



**GENDER-BASED VIOLENCE AGAINST WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW: OPTIONS FOR STRENGTHENING THE INTERNATIONAL FRAMEWORK**

**DISCUSSION PAPER**

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# **GENDER-BASED VIOLENCE AGAINST WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW: OPTIONS FOR STRENGTHENING THE INTERNATIONAL FRAMEWORK**

## **DISCUSSION PAPER**

### **A. INTRODUCTION**

1. The issue of gender-based violence against women (GBVAW) and the obligations of States under international law to take steps to prevent such violence, to punish perpetrators and to provide support for the survivors have been consistent topics for discussion and action at the international level over the last 30 years. During that period the issue has moved from a relatively little-discussed matter to a regular topic on international agendas, and the widespread and varied nature of violence against women has been increasingly documented.

2. Despite the many legal, policy and other measures adopted at the international and national levels and the advances that have been made, gender-based violence against women continue to be widespread and present in all regions and countries, in familiar and new forms. Not only have new forms of violence emerged such as cyberviolence (including cyberstalking, online threats of violence, and revenge porn), but longstanding forms of violence persists and legal and practical failures to address violence are ubiquitous. Many countries still have laws and cultural, customary or religious laws, practices and attitudes which are conducive to or legitimate violence against women. There are many examples of laws making it extremely difficult or effectively almost impossible to prove criminal cases of sexual violence (for example, restrictive evidentiary rules); impunity for acts of GBVAW committed by both State and non-State actors is commonplace.

3. As a result, there have been calls to strengthen the existing international legal and accountability framework addressing GBVAW, in particular by the elaboration of a new United Nations convention on gender-based violence against women but also in other ways. While recognising that the elimination of GBVAW will be possible only through a multifaceted approach, advocates of a new convention see international law and a new convention as important components of any strategy to stimulate further action at the international and national levels to address the causes and consequences of such violence.

4. The adoption of a number of regional conventions that deal explicitly with violence against women and the obligations of States to combat it has provided impetus for these calls. These conventions include the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994

(Convention of Belém do Pará), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (Maputo Protocol), and the Council of Europe Convention on preventing and combating violence against women and domestic violence 2011 (Istanbul Convention). The call for a new UN convention has been based in part on the argument that there is a 'normative gap' at the international level, and that the adoption of a treaty similar to these regional treaties would eliminate that gap.

5. The question of whether a new UN convention on GBVAW would be an appropriate and effective way of contributing significantly to the struggle against GBVAW, is an important one, and an examination of the issue once again is timely.<sup>1</sup> There are of course many other measures that need to be taken, whether or not such a convention is adopted. This paper takes up the question of what international and national (legal) measures might be taken to render more effective efforts to eliminate GBVAW. It provides an overview of the role that international law and practice has played in advancing these efforts, and engages in particular with the question of whether a new convention is desirable, and what other measures might be adopted independently of or in conjunction with elaboration of a new instrument.

6. This paper argues that in seeking to strengthen existing frameworks, it is important to recognise that existing international human rights law already imposes extensive and detailed obligations on States to address GBVAW, and that proposals for a new normative instrument and other measures should not undermine but rather complement existing protections. It argues that greater efforts need to be devoted to the invocation and implementation of the existing standards, whatever position is adopted on the question of the desirability of a new treaty.

7. The paper first provides a brief description of current status of international human rights law relating to violence against women, followed by a sketch of the major developments in the international response to the problem of violence against women since the early 1990s. It then describes the nature and legal significance of the work of the CEDAW Committee under the Convention and the responses of States parties. It then sets out and evaluates one of the principal arguments made to support

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<sup>1</sup> The issue was the subject of considerable discussion in the early 1990s, in response to a Canadian proposal that a new convention on the subject be adopted. The matter was considered at an expert group meeting held in Vienna in 1991: E/CN.4/1992/4 (1991). At that time concerns similar to those expressed in relation to the latest proposals were raised. These included in particular the already binding coverage of CEDAW obligations with respect to violence against women, the need not to undermine the work of the CEDAW Committee in developing the interpretation of the Convention and monitoring its implementation in relation to VAW, and the need to strengthen implementation mechanisms. These discussions were part of the process that led to the adoption of *General recommendation 19*, the Declaration on the Elimination of Violence against Women (DEVAW), the Optional Protocol to CEDAW Convention and the establishment of the mandate of the Special Rapporteur on violence against women.

the elaboration of a new convention, namely the claim that there is a 'normative gap' in international law that should be remedied by a new convention that explicitly addresses violence against women. It outlines the principal questions that should be addressed as part of deliberations over the desirability of a new convention, and outlines possible advantages and potential drawbacks of a new convention might be. It then The paper concludes by noting other options for strengthening the current international law framework and its implementation and sets out a number of principles that should be observed in future effort to improve the international legal framework relating to GBVAW.

## **B. THE CURRENT STATE OF INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE IN RELATION TO VIOLENCE AGAINST WOMEN**

8. The obligations of States under international human rights treaties have been interpreted by courts and other expert bodies as requiring States parties not only to ensure that State officials do not themselves engage in gender-based violence against women, but also that they take appropriate measures to prevent the infliction of violence by private actors, to investigate and punish such actions, and to provide protection and support for the survivors of violence. At the UN level, the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) has articulated the obligations of States parties to the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) to eliminate violence against women, in particular in its *General recommendation 19* (1992). Other UN human rights treaty bodies, such as the Human Rights Committee and the Committee against Torture, have also made clear that States parties' obligations under the International Covenant on Civil and Political Rights 1966 (ICCPR) and the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) include eliminating public and private violence against women; regional human rights bodies have reached similar conclusions under their general human rights conventions.

9. In the case of the UN human rights treaties bodies, the application of the treaties to GBVAW has been articulated by the supervisory bodies in their general comments and recommendations, decisions under individual complaints procedures or in reports on inquiries, concluding observations on the reports of States parties, and in other formal statements. The legal status and practical relevance of these interpretive statements and decisions ('pronouncements') are discussed below, where the argument is made that, in light of their acceptance by States parties, these can be accepted for the most part as authoritative interpretations of the relevant treaty obligations. Quite apart from their formal legal status, these outputs of the UN human rights treaty bodies have in practice been important and influential interpretations for governments, courts and tribunals and advocates seeking to give effect to the relevant treaties, and their impact should not be underestimated through focusing only on their formal legal status.

### C. THE EMERGENCE OF VIOLENCE AGAINST WOMEN AS AN INTERNATIONAL ISSUE: A BRIEF REVIEW<sup>2</sup>

10. At the time of the elaboration of the CEDAW Convention during the 1970s, violence against women, particularly in the private sphere, was largely considered to be a 'private' matter -- not an international concern, nor a human rights concern. Accordingly, although there was a late proposal introduced by Belgium to include 'attacks upon the integrity of women' in the draft Convention,<sup>3</sup> the treaty does not include an explicit provision on violence against women, other than in article 6 which addresses trafficking and the exploitation of the prostitution of women.

11. Interest in the issue of violence against women coincided with growing emphasis on human rights and the blurring of the boundary of the responsibility of the State for public and private spheres of life and was manifested in the work of the United Nations congresses on the prevention of crime and the treatment of offenders,<sup>4</sup> the world conferences on women convened in Copenhagen in 1980<sup>5</sup> and in Nairobi in 1985,<sup>6</sup> and other events such as the World Assembly on Ageing. Discussions during the elaboration of the Convention on the Rights of the Child (CRC) highlighted the abuse which children, including girls, experienced, and accordingly article 19 of that Convention was the first human rights treaty to oblige States parties to take all appropriate legislative, administrative, social and educational measures to protect all forms of physical or mental violence, injury or abuse, neglect or negligent

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<sup>2</sup> See also the review of developments of the last two decades in the *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo [SRVAW 2014 report]*, UN Human Rights Council, 26<sup>th</sup> session, paras 6-42, UN Doc A/HRC/26/38 (2014).

<sup>3</sup> UN Doc E/CN.6/591/Add. 1 (1976), 4; Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1993) 91; Kate Rose-Sender, 'Emerging from the Shadows: Violence against Women and the Women's Convention' in Ingrid Westendorp (ed) *The Women's Convention Turned 30: Achievements, Setbacks and Prospects* (Intersentia, 2012) 453, 455-458. This echoed language in the outcome document of the 1975 Mexico World Conference on Women (Report of the World Conference of the International Women's Year', Mexico City, UN Doc. E/CONF.66/34, para 51, 1975).

<sup>4</sup> See, eg, Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, 25 August - 5 September 1980, Ch I, Section B, UN Doc A/CONF.87/14/Rev.1 (1981)

<sup>5</sup> *Report of the World Conference of the United Nations Decade for Women, Copenhagen, 14-30 July 1980* (United Nations, 1980), UN Doc A/CONF.94/35, resolution 5.

<sup>6</sup> *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985* (United Nations, 1986), UN Doc A/CONF.116/28/Rev.1, paras 76, 258 and 288.

treatment, maltreatment or exploitation, including sexual abuse.<sup>7</sup> Other forms of exploitation are addressed in articles 35 and 36 of the CRC.<sup>8</sup>

12. The United Nations General Assembly took up the issue of domestic violence in 1985 and in its first resolution on violence against women requested the Eighth United Nations Congress on the Prevention of Crime and Criminal Justice to give the issue special attention.<sup>9</sup> Other intergovernmental bodies followed suit. Beginning in 1986 the UN Economic and Social Council convened a number of meetings and produced publications on the subject. In 1987 the Commission on the Status of Women (CSW) identified violence against women within the family and society as falling within the Nairobi Forward-looking Strategies priority theme of peace.

13. In the following years ECOSOC called for consolidated efforts by intergovernmental and non-governmental organizations to eradicate VAW,<sup>10</sup> and requested further research on the subject to be undertaken.<sup>11</sup> In its resolution on the first review and appraisal of the Nairobi Forward-looking Strategies, ECOSOC called for urgent and effective steps to eliminate the pervasive violence against women in the family and society,<sup>12</sup> while in the same year it recognized that domestic violence may cause physical and psychological harm to members of the family and requested the Secretary-General to convene a further expert group meeting to draw up guidelines on domestic violence.<sup>13</sup>

14. The Commission on the Status of Women also began to dedicate greater attention to the issue and convened an expert group meeting in 1991 to consider options to strengthen the international legal framework to strengthen the international legal framework. While one of the proposals before the meeting was the adoption of a specific convention on VAW, this meeting concluded that a declaration would be an appropriate instrument in this context, as it would further emphasize the pervasive and egregious nature of violence against women and would also address States which had not ratified the CEDAW Convention. The meeting also recommended other incremental approaches: the elaboration and promotion by the CEDAW Committee of a general recommendation on violence against women; the creation and appointment of a special rapporteur on violence against women; strengthening of

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<sup>7</sup> Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* (United Nations 2007), vol II, 512-521.

<sup>8</sup> Id at 723-737.

<sup>9</sup> GA resolution 40/36 (1985).

<sup>10</sup> ECOSOC resolution 1988/2.

<sup>11</sup> ECOSOC resolution 1989/67.

<sup>12</sup> ECOSOC resolution 1990/19.

<sup>13</sup> General Assembly resolution 45/114 (1990).

the communications procedure of CSW<sup>14</sup> and, in the event these mechanisms proved ineffective, consideration of a substantive Optional Protocol to the Convention on violence against women.<sup>15</sup> Subsequent years saw the adoption of an important general recommendation on the theme by CEDAW (1992), the adoption by the UN General Assembly of the Declaration on the Elimination of Violence against Women (1993), the establishment of a special rapporteur on the subject by the UN Commission on Human Rights (1994), and the adoption of the procedural Optional Protocol to the CEDAW Convention in 1999.

15. Parallel to these developments was the work of the Committee on the Elimination of Discrimination against Women, which had commenced its work under the CEDAW Convention in 1982. The Committee became conscious of the systemic nature of violence against women through its consideration of States parties' reports and information provided by non-governmental organizations during its first decade. In response, the CEDAW Committee adopted *General recommendation 12* on violence against women in 1989, in which it identified articles of the Convention which imposed obligations on States parties to address violence against women, identified sites of such violence as the family, the workplace and other areas of social life, and recommended that States parties report on legislation and other measures adopted to protect women against violence and provide support services, as well as compiling statistical data on the incidence of violence. The Committee built on this in *General recommendation 14* (1990) on female circumcision, identifying this as a traditional practice harmful to women's health and making recommendations for its eradication.

16. In the lead-up to the 1993 Vienna World Conference on Human Rights, the Committee allocated part of its 1992 session to a discussion of violence against women which would reflect on Convention articles which related particularly to the issue. The outcome of this was the Committee's *General recommendation 19* (1992). The Committee has also addressed the issue in a number of its other *General recommendations*, many of its decisions and its inquiry reports under the Optional Protocol, and regularly comments on the issue in its concluding observations on the reports of States parties. States parties have regularly reported under the Convention on violence against women in response to the Committee's requests.

17. The legal status and impact of the practice of the CEDAW Committee is addressed below. The practice of the CEDAW Committee, in particular *General recommendation 19*, has had a significant influence in many countries on the actions of government, the approach of courts, tribunals and national human rights institutions, and has been an important reference point for advocates.

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<sup>14</sup> The CSW conducted a review of its communications procedure earlier in 1991 (see E/CN.6/1991/10), but did not adopt any major modifications to the existing procedure.

<sup>15</sup> E/CN.6/1992/4 (1991).

#### **D. CALLS FOR A NEW CONVENTION –THE JUSTIFICATIONS OFFERED**

18. The persistence and emergence of new forms of GBVAW has led to calls for the bolstering of the existing international framework by the adoption of a new convention which explicitly addresses gender-based violence against women, along the lines of the regional conventions on the subject mentioned above. These calls reflect the view that international law standards and procedures can make a difference and that a new binding instrument.

19. Various arguments have been put forward in support of a new convention. The first is that there is ‘normative gap’ in international law because

- (a) there is no explicitly binding UN human rights treaty addressing GBVAW, which needs to be recognised as ‘a human rights violation in and of itself’; and
- (b) the many standards and the jurisprudence that has developed on the topic are all ‘soft law’ and not binding under international treaty law or customary international law.

20. A related argument is that there is a pressing need to provide more coherent and detailed guidance to States as to the steps they should take in order to address GBVAW, especially in relation to ‘obligations of due diligence’. It has also been argued that a specific, focused treaty will help to bring about the transformative changes that are needed to eliminate violence. Further, the adoption of the regional treaties on the subject demonstrate that there is a widely held view among States and civil society organisations that such treaties are normatively and practically useful. The following sections elaborate in more detail some of potential advantages and possible drawbacks of a new convention.

#### **E. EVALUATION OF THE ‘NORMATIVE GAP’ ARGUMENT**

##### **1. *The ‘normative gap’ argument***

21. One of the central arguments made in support of the development of a new convention is the argument that there exists a ‘normative gap’ on the subject of GBVAW international human rights law. A leading proponent of a new convention and the existence of a ‘normative gap’ has been the former Special Rapporteur on violence against women, Professor Rashida Manjoo. She has argued that there is a ‘normative gap’ in international law in relation to violence against women because there is no ‘legally binding specific instrument on violence against women’ and that none of the more detailed prescriptions in non-binding instruments have become part of customary international law. In Professor Manjoo’s view:

[t]he lack of a legally binding instrument on violence against women precludes the articulation of the issue as a human rights violation in and of itself, comprehensively addressing all forms



of violence against women and clearly stating the obligations of States to act with due diligence to eliminate violence against women.<sup>16</sup>

22. While Professor Manjoo acknowledges that there has been much development in the elaboration of international standards relating to violence against women (including under the CEDAW Convention), nonetheless

The current norms and standards within the United Nations system emanate from soft law developments and are of persuasive value, but are not legally binding. 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.<sup>17</sup>

23. The 'normative gap' argument thus places considerable emphasis on the international legal status of the international norms and standards that address violence against women. Professor Manjoo notes that the legally binding CEDAW Convention does not address the issue explicitly and systematically. She emphasises that, while the *General recommendations* and other output of the CEDAW Committee do address violence against women, as do the more detailed UN Declaration on the Elimination of Violence against Women and other programmatic and policy documents, none of these are in themselves legally binding as a matter of international law:

There are many 'soft law' documents that address the issue, including the Vienna Declaration and Programme of Action, the Declaration on the Elimination of Violence against Women, the Beijing Declaration and Platform for Action, and general comments and recommendations of treaty bodies. **However, although soft laws may be influential in developing norms, their non-binding nature effectively means that States cannot be held responsible for violations.**<sup>18</sup>

24. Accordingly, there is a 'normative gap' that is not adequately remedied by the range of non-binding instruments nor through treaty body practice.<sup>19</sup> Professor Manjoo argues that it is important to the struggle against violence against women that there be explicit, binding and detailed prescriptions of the steps that States must take to combat such violence -- and that these should be contained in a new treaty on the subject. Professor Manjoo places particular importance on the need to elaborate the

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<sup>16</sup> SRVAW 2014 report, above n 2, para 68.

<sup>17</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo [SRVAW 2015 report], UN Human Rights Council, 29<sup>th</sup> session, para 63, UN Doc A/HRC/29/27 (2015).

<sup>18</sup> SRVAW 2014 report, above n 2, para 68 (emphasis added).

<sup>19</sup> Professor Manjoo has also argued that explicit and detailed obligations in relation to violence against women have not become part of customary international law. Ibid. Professor Manjoo may have been too quick to dismiss the possibility that there is a customary international law norm relating to the prevention and punishment of violence against women. While the existence of a customary international law rule can be difficult to prove, this may be one case where there is a general obligation, even if there is not agreement as to every detail.

content of the 'due diligence' obligation of States in relation to such violence. She sees the adoption of legally binding treaties at the regional level and the practice under those treaties as positive support for the potential effectiveness of a similar convention at the universal level.

25. Professor Manjoo argues that:

[I]t is time to consider the development and adoption of a United Nations binding international instrument on violence against women and girls, with its own dedicated monitoring body. Such an instrument should ensure that States are held accountable to standards that are legally binding, it should provide a clear normative framework for the protection of women and girls globally and should have a specific monitoring body to substantively provide in-depth analysis of both general and country-level developments. With a legally binding instrument, a protective, preventive and educative framework could be established to reaffirm the commitment of the international community to its articulation that women's rights are human rights, and that violence against women is a human rights violation, in and of itself.<sup>20</sup>

## 2. ***Evaluation of the 'normative gap' argument***

26. While the rhetorical and strategic advantages of an argument based on the existence of a 'normative gap' argument are clear, the assertion of the existence of such a gap bears further examination. Whether the claim is correct depends not only on how one defines the concept, but also on a detailed analysis of the text of the Convention in light of its object and purpose and in light of the practice of States parties to the Convention. This paper argues that the claimed existence of a 'normative gap' is not persuasive as a matter of international treaty law, and that pressing for a new treaty on the ground that there is such a gap is a potentially counter-productive strategy.

### *The legal status of CEDAW's practice in relation to VAW: General recommendations and other practice*

27. As noted earlier, the CEDAW Committee has set out its views on the scope of States parties' obligations under the Convention to eliminate public and private violence against women in a number of general recommendations (in particular *General recommendation 19*), as well as in its concluding observations, decisions on individual communications, and reports of inquiries relating to individual States parties. It is well-accepted that such pronouncements of the United Nations human rights treaty bodies are not in themselves formally binding as a matter of international law. This is case with CEDAW's pronouncements – they are not as such formally binding interpretations of the Convention.

28. Leaving the matter there, though, as the 'normative gap' argument does, involves an inadequate analysis of the meaning of the CEDAW Convention, because it

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<sup>20</sup> SRVAW 2015 report, above n 17, para 64.

fails to apply the accepted international law approach to the interpretation of treaties to the Convention. The fact that the CEDAW Committee may not have the legal power to issue formally binding interpretations of the Convention, does not mean that its interpretations are not an accurate statement of the scope of States parties' binding obligations under the treaty. The question is whether the Convention, properly interpreted, imposes such obligations on States parties, not the formal legal status of CEDAW's views.

29. This section first briefly analyses the Convention's coverage of GBVAW in the light of the standard rules of treaty interpretation. It argues that CEDAW's interpretation of the Convention as including GBVAW is a correct interpretation of the Convention construed in accordance with those rules. It further argues that the responses of States parties to CEDAW's interpretation of the Convention as imposing obligations in relation to GBVAW can be viewed as subsequent State practice that establishes the agreement of States parties as to the interpretation of the treaty.

### **3. *Interpreting the CEDAW Convention***

30. The starting-point for the interpretation of an international treaty is the ordinary meaning' of the terms of the treaty in their context and in the light of [the treaty's] object and purpose'.<sup>21</sup> Also to be taken into account in the interpretation of a treaty are other agreements adopted at the same time as the treaty, and subsequent practice of the States parties that establishes their agreement as to the meaning of the treaty.<sup>22</sup> The drafting history of the treaty may also be taken into account in certain circumstances as a subsidiary means of interpretation.

31. In the case of the CEDAW Convention, States parties assume wide-ranging obligations across all fields of social life. Those obligations are, broadly speaking, to eliminate all forms of discrimination against women in those areas and to ensure that women enjoy human rights and fundamental freedoms generally and in a number of specific areas, on the basis of equality with men. In addition, article 5 of the Convention requires States parties to take all appropriate measures to modify social and cultural patterns of behaviour in order to eliminate prejudices customary and other practices which are based on the idea of the superiority of either sex or on stereotyped roles for men and women.

32. The Convention requires States parties to ensure that State actions do not involve discrimination and in particular that public officials do not engage in discriminatory acts. Equally importantly, the Convention explicitly obliges States

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<sup>21</sup> Vienna Convention on the Law of Treaties, art 31(1). While the Vienna Convention would not apply directly to the interpretation of the CEDAW Convention because although the Vienna Convention entered into force after the conclusion of the CEDAW Convention, its provisions on interpretation are generally accepted as forming part of customary international law.

<sup>22</sup> *Id.*, art 31(3).

parties to take all appropriate measures to eliminate discrimination by private persons ('any person, organization or enterprise', article 2(e)), to modify existing laws, regulations, customs and practices which constitute discrimination (article 2(f)), and to ensure that there is effective legal protection of women against any act of discrimination.

33. The obligations of States parties with respect to non-State actors are what has been traditionally described as the obligation of 'due diligence', a concept derived from classical international law in relation to State responsibility for injuries to aliens but one which has been taken up and extensively developed in modern human rights law.

34. Article 2(e) of the Convention plainly obliges States parties to take all appropriate measures to ensure that women are protected against discrimination by non-State actors. It supplements the obligations of a State party in relation to actions of the State itself, in relation to which a State party is obliged to ensure that public authorities and institutions act in conformity with the obligation to refrain from engaging in any discrimination against women. Other provisions of the Convention also require States parties to take action in relation to various forms of discrimination by private persons in specific areas (for example, articles 2(f), 5, 6, 7, 11, 13 and 16), but the general 'due diligence' obligations apply across all the areas specified in the Convention and, because of the broad definition in article 1 of 'discrimination against women', to all other human rights and fundamental freedoms as well.

35. The obligations of the State in relation to its own officials and actions appear to impose a more demanding standard ('undertake... (d) to refrain from engaging in ... discrimination and to ensure that public authorities and institutions shall act in conformity with this obligation') than is imposed in relation to non-State actors ('undertake ... to take all appropriate measures to eliminate discrimination').

*Violence against women as a form of 'discrimination against women'<sup>23</sup>*

36. The next issue is whether violence against women in its many forms falls within the concept of 'discrimination against women' as defined in article 1 of the CEDAW Convention, or is covered by other provisions of the Convention that do not use the language of discrimination (for example, articles 5 and 6). The CEDAW Committee has argued and it appears consistent with the ordinary meaning of the treaty language that as gender-based violence against women is gendered in its forms and incidence, it can be understood as a form of discrimination against women. Thus, such violence involves discrimination against women in the equal enjoyment of their rights, both those rights explicitly mentioned in the Convention as well as those incorporated by reference in the definition of 'discrimination against women' in article 1 – including

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<sup>23</sup> See Christine Chinkin, 'Violence against Women' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford: Oxford University Press, 2012) 443-474.

the right to life, right to integrity of the person, the right to be free from torture and cruel, inhuman or degrading treatment, the right to health, and other rights, the enjoyment of which is limited by violence.

37. This reading is also consonant with the object and purpose of the Convention – the elimination of all forms of discrimination against women -- something which must be understood as comprehensive in scope as well as dynamic in operation, to be applied to newly emerging forms of discrimination or existing forms of discrimination that are named as such.

38. This approach to interpreting the Convention is essentially the one adopted by CEDAW in its *General recommendation 19* and which it has reaffirmed consistently in its practice since that time. The CEDAW Committee's view of the meaning of the Convention as regards violence against women and the resulting obligations thus appears to lead to the same result that follows from the application of the ordinary rules of treaty interpretation. Furthermore, to the extent that there may be any doubt about this as the proper interpretation of the treaty, we can look to State parties' practice under the treaty: this appears to confirm that States have accepted that the Committee's interpretation of their obligations under the Convention in relation to violence as the correct interpretation of the treaty.

*The practice of States parties and its relevance to the interpretation of the Convention*<sup>24</sup>

39. The importance of States parties' responses to the CEDAW Committee's pronouncements in its formally non-binding *General recommendations*, concluding observations, Optional Protocol cases and inquiries is that they constitute 'State practice' that may be relevant to the interpretation of the treaty. Article 31(3)(b) of the VCLT provides that in interpreting a treaty:

3. There shall be taken into account, together with the context:

...

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation ...<sup>25</sup>

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<sup>24</sup> This issue has recently been considered in depth by the International Law Commission. See International Law Commission, 'Conclusion 13[12]: Pronouncements of expert treaty bodies', *Report of the International Law Commission*, sixty-eighth session, 2 May-10 June and 4 July-12-August 2016), advance version (18 August 2016) [ILC 2016 Report], UN Doc A/71/10, 247-258 (2016) and International Law Commission, *Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur [Nolte Fourth Report]*, Sixty-eighth session, UN Doc A/CN.4/694 (2016).

<sup>25</sup> The pronouncements of treaty bodies may also be relevant under article 32 of the VCLT as 'other practice' that 'may' be taken into account as a supplementary means of interpretation, though that has not finally been resolved. See *ILC 2016 Report*, above n 24, at 255-257, paras 20-27.

40. The practice referred to in article 31(3)(b) is the practice of *States parties*, not that of the CEDAW Committee. However, it is clear that the responses of States parties to the pronouncements of a treaty body may constitute relevant State practice in this context.<sup>26</sup> The practice must be of *all* of the States parties and it must establish the *agreement* of those parties; relying on subsequent State practice to elucidate the terms of the treaty is thus not an easy hurdle to overcome.<sup>27</sup> As the Appellate Body of the World Trade Organisation has commented, for ‘practice’ to fall under article 31(3)(b), there must be

a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation.<sup>28</sup>

41. Express endorsement of a particular interpretation may not be required. However, the International Law Commission has cautioned that mere silence or the absence of objections cannot assumed to be consent or acquiescence. Nonetheless, where a State party is aware of other parties’ or the expert treaty body’s interpretation in circumstances in which a reaction would be expected, and remains silent, this may constitute agreement:<sup>29</sup> The concluding observations on individual State party reports

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<sup>26</sup> See International Law Commission, ‘Conclusion 13[12](3)’, *ILC 2016 Report*, above n 24, at 247 and *Nolte Fourth Report*, above n 24, at 19, para 43. For earlier discussions see International Law Association Committee on International Human Rights Law and Practice, *Final report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals, Report of the Seventy-first Conference, Berlin (2004)* 621, paras 19-27; International Law Commission, *Subsequent Agreement and Subsequent Practice in relation to the interpretation of treaties*, ‘Draft Conclusion 5: Commentary’, para 13, *Report of the International Law Commission on its Sixty-fifth session (6 May–7 June and 8 July–9 August 2013)*, UN Doc A/68/10, 45 (2013) (‘Statements or conduct of other actors, such as international organizations or non-State actors, can reflect, or initiate, relevant subsequent practice of the parties to a treaty’).

<sup>27</sup> *ILC 2016 Report*, above n 24, at 252, para 12 (‘this result is not easily achieved in practice’); and *Nolte Fourth Report*, above n 24, at 19, para 44.

<sup>28</sup> WTO Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:I, 97, at 106 (footnote omitted). See also *Assange v The Swedish Prosecution Authority (Rev 1)* [2012] UKSC 22, [2012] 2 AC 471, in which a number of members of the UK Supreme Court cited with approval a passage from Villiger’s leading text on the Vienna Convention relating to article 31(3)(b) (Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, 2009)):

...it requires active practice of some parties to the treaty. The active practice should be consistent rather than haphazard and it should have occurred with a certain frequency. However, the subsequent practice must establish the agreement of the parties regarding its interpretation. Thus, it will have been acquiesced in by the other parties; and no other party will have raised an objection.

<sup>29</sup> See the discussion of the relevance of silence in International Law Commission, *ILC 2016 Report*, above n 24, at 254-255, paras 18-19 (referring to ‘Draft Conclusion 10[9] (2): ‘Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction’). See also International Law Commission, *Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, by Georg Nolte,

and the adoption by the Committee of views or reports under the communications procedures, would clearly give rise to circumstances in which States parties would be expected to express an objection to the Committee's interpretations if they disagreed with them.

42. The issue is thus whether States parties' responses to CEDAW's pronouncements on the existence and scope of obligations under the Convention in relation to violence against women establishes the agreement of States parties as to the interpretation of the CEDAW Convention in this regard.

43. A definitive answer to this question would require a comprehensive examination of State responses to CEDAW's pronouncements in their reports, their responses to lists of issues and concluding observations, and the positions they take in individual communications and inquiries and in response to the outcomes of those procedures, are all relevant sources, as are statements made in other contexts about the Convention.<sup>30</sup> The approach taken in this paper is to examine a sample of State responses in recent years to assess State practice against article 31(3)(b) and, in particular to try to identify instances in which State parties have objected to the legal interpretation of the Convention (as opposed to its application to the facts of a particular case).<sup>31</sup>

44. CEDAW's practice provides States parties with many opportunities to respond to its interpretations of the CEDAW Convention and to take exception to them if the State party considers the Committee's interpretation of the treaty to be incorrect. CEDAW's General recommendations are circulated and are freely available to States parties and States parties are asked to report on violence and in accordance with *General recommendation 19* on a regular basis, and this is reflected in CEDAW's concluding observations.<sup>32</sup>

45. States have indicated their acceptance of the Convention's coverage of violence generally and of *General recommendation 19* in particular in a number of ways, both

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*Special Rapporteur*, UN Doc A/CN.4/671, paras 58-70 (2014) and *Nolte Fourth Report*, above n 24, at 20-21, paras 47-48.

<sup>30</sup> See *ILC 2016 Report*, above n 24, at 252-253, paras 13-15 (referring to the relevance of stances taken by States in the adoption of resolutions in political bodies): *Nolte Fourth Report*, above n 24, at 19, paras 45-46 (same).

<sup>31</sup> This summary is based on primary research carried out in 2015 by Erin O'Connor Jardine, at the time a student associate of the Australian Human Rights Centre, Faculty of Law, University of New South Wales, Sydney, Australia ([www.ahrcentre.org](http://www.ahrcentre.org)). It was prepared for a workshop organised by IWRAP Asia Pacific in 2015 to explore the issues arising from suggestions that a new convention on violence against women be adopted.

<sup>32</sup> For example, the 152 sets of concluding observations adopted by the CEDAW Committee from January 2009 to March 2015 included 92 specific references to GR 19, with all concluding observations contained a section headed 'violence against women'.

tacit and explicit. For example, in the 109 State party reports submitted under the Convention between January 2010 and March 2015, there were explicit endorsements of *General recommendation 19* by 29 States parties. There were also eleven general endorsements of CEDAW's *General recommendations*. All States parties reported on violence against women in their periodic reports, in pursuance of their obligation under article 18 of the Convention to report on 'the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect'.

46. Acceptance by States parties, whether by conduct or explicit endorsement, can also be seen in a number of individual communications considered under the Optional Protocol to CEDAW. Of the 40 cases concluded in the period under review, 24 cases involved complaints in relation to violence against women. In 20 of those cases States parties recognised or explicitly endorsed *General recommendation 19*, even in cases in which they argued that there had been no failure to carry out the relevant obligations. No State dissented from the general gist of *General recommendation 19*; the only aspect of substantive interpretive disagreement was over the applicability to refoulement decisions of the Convention's obligations in relation to violence.<sup>33</sup>

47. Overall, then, this material indicates broad support amongst States parties for an interpretation of the Convention that imposes binding obligations in relation to violence, the general features of which can be seen in *General recommendation 19*. Equally importantly, there appears to have been no objection to the substance of *General recommendation 19* in any of the materials studied for the 2010-2015 period, whether in the reporting, communications or other procedures.<sup>34</sup> (This probably reflects the longer-term position as well, pre-2010.)

48. A review of this sample of the responses of States parties to the Convention over the last five years suggests that there is a strong argument that the subsequent practice of States parties shows that they have endorsed the interpretation of the Committee taken in its *General recommendation 19* and that as a result this General recommendation can be viewed as a statement of the binding effect of the Convention in relation to violence against women. In other words, States parties are bound under the Convention to carry out the types of actions set out in *General recommendation 19*.

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<sup>33</sup> For example, Denmark argued that its obligations extended only to 'individuals under its jurisdiction and cannot be held responsible for discrimination in another country.' *M E N v Denmark*, Communication No 35/2011, 26 July 2013, para 4.9). The Committee held the communication inadmissible, but nonetheless went on to affirm that the Convention barred States parties from returning women to other countries in certain circumstances (*id* at para 8.4).

<sup>34</sup> States have formally objected to general comments proposed or adopted by other treaty bodies: see the examples in Andrew Byrnes, 'The Meanings of International Law: Government Monopoly, Expert Precinct or Peoples' Law?' (2014) 32 *Australian Yearbook of International Law* 11-32.



49. While a definitive conclusion to that effect would require a comprehensive survey of the responses of States, it is striking that no State party appears to have taken exception to the Committee's interpretation of the Convention as applying to violence against women by public and private actors. As noted above, silence in the face of Committee pronouncements may not in itself be enough to establish the agreement of the States parties. However, *General recommendation 19* as an appropriate interpretation of the Convention, the acceptance of the *General recommendation 19* as the appropriate standard for argument in Optional Protocol cases, and the consistently positive responses to CEDAW requests to report on violence against women, strongly support the conclusion that the practice of States parties would therefore satisfy the criteria for recognition as State practice which establishes the agreement of States parties as to the meaning of the treaty under article 31(3) (b) of the Vienna Convention on the Law of Treaties. In other words, there are binding international legal obligations to eliminate public and private violence against women, and no normative gap.

50. However, a further question might arise, however, in relation to the details of the obligations in relation to violence that can be established in this way. The content of CEDAW's *General recommendation 19* sets out in some detail the steps that States parties should take, but it does not purport to be exhaustive or the mandates that every State party take all the individual steps that it might list. It is true that the CEDAW Committee practice does not have the detail of the Istanbul Convention, for example, but that does not mean that the general and specific obligations set out in the *General recommendation 19* are not binding. It goes rather to the level of detailed specification that is appropriate or desirable in an international normative regime.

*Conclusion on the existence of a normative gap and the dangers of asserting that there is one*

51. In light of the above analysis, while it may be accurate to say that there is no UN convention that explicitly and systematically addresses violence against women, the claim that there is a 'normative gap' disregards the results reached by the ordinary processes of treaty interpretation involving interpretation of the language of the Convention in light of its object and purpose is confirmed by what appears to be consistent practice by States parties. Thus, the CEDAW Convention properly interpreted requires States parties to take action to prevent and punish both State and private violence against women.<sup>35</sup>

52. In short, there is no 'normative gap'. To suggest otherwise may have the unfortunate effect of providing ammunition for those who wish to resist the

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<sup>35</sup> This paper has not addressed in detail the obligations in relation to violence against women that exist under other UN human rights treaties and which have been explicated by other human rights treaty bodies. There is a similar argument to be made about the practice under a number of those treaties about the existence and scope of obligations in relation to violence against women.

application of the Convention to GBVAW to argue that CEDAW's general recommendations on the subject represent no more than exhortation rather than an accurate statement of States parties' legal obligations. That would be an unfortunate outcome of an endeavour to improve the situation in relation to the elimination of violence against women through the use of international legal norms.

#### **F. THE POTENTIAL ADVANTAGES AND POSSIBLE DRAWBACKS OF A NEW CONVENTION**

53. However, the fact that there may be no normative gap is not determinative of whether a new convention is necessary or desirable. The fundamental question is whether a new convention would contribute to the elimination of violence against women. The process of elaborating a new convention might involve the specification of obligations or rights that are 'new' -- at least in their focus or perspective or level of detail-- even if they can be said to be derived from more general statements of 'universal' rights and obligations. The establishment of a separate monitoring mechanism might also help to spur government and community activity and advocacy around specific themes and in this ways contribute to effective practical change. At the same time one must also weigh the putative benefits of a new convention against its possible drawbacks, including that it might undermine existing norms and procedures. Advocates of a new convention have not carried out an assessment of the potential drawbacks of such an instrument, and how this might affect the arguments for a new treaty, its form or content.

##### *Some possible advantages of a new convention*

54. A number of advantages of a new convention may be identified. First, a new convention might offer the opportunity to clarify the detail of various aspects of States' obligations, and bring them together in a more concise instrument that is clearly a binding normative instrument addressed directly to States. At the moment the argument that there are binding obligations in relation to GBVAW (as set out above) might be seen as complex; an instrument directly and explicitly setting out obligations might be more persuasive to public officials and easier for them to use. The drafting of a new treaty might provide the opportunity to define terms such as 'gender-based violence against women' and to give more detailed content to obligations of due diligence.

55. Secondly, the drafting and existence of a new convention is likely to provide a focus for activism and to provide advocates with a new tool that can be invoked in various contexts to help drive social and legal change. Thirdly, it may provide governments and policymakers with an updated and coherent framework for developing or strengthening laws, policies and programs to address GBVAW. There may be further arguments to be made in addition to these.

##### *Possible drawbacks*

56. While a new convention would add to the current body of legal norms; however, the fundamental question is whether the adoption of a convention would be an overall positive contribution to the struggle against violence against women, and whether there are any drawbacks that should temper enthusiasm for a new binding instrument. Possible drawbacks include:

57. *Danger of undermining the CEDAW Convention:* It is not clear from proposals for a new convention exactly what relationship is envisaged between convention and existing norms and practices (especially those of CEDAW). There is a danger of undermining the advances achieved under the CEDAW Convention (especially if advocates continue to assert the existence of a 'normative gap' argument continues to be used or providing a pretext for States to suggest CEDAW does not cover GBVAW (or, at least, does not impose binding obligations).

58. *Need for a holistic analysis and recognition of context:* A specific convention on violence may detract from a holistic analysis of the broader discriminatory context in which GBVAW arises, and lead to a focus on symptoms to the neglect of the underlying systemic causes of violence. This may involve 'definitional creep' whereby most forms of discrimination become 'violence', eg 'structural violence' and 'economic violence'.

59. *Different normative and institutional contexts:* The UN human rights treaty system is different to the regional systems which have adopted a specific violence convention. Neither the Council of Europe nor the Organisation of American States had a CEDAW-equivalent convention at the time they adopted their violence conventions; there was thus only a very limited body of jurisprudence on international human rights law and violence against women and the conventions significantly supplemented the existing norms and procedures available under those systems in relation to GBVAW. In the case of the African Union, the Maputo Protocol is the region's CEDAW-equivalent and contains general obligations and those specific to VAW. Thus, arguing for a UN convention on the basis that the regional systems have adopted them fails to take full account of the different coverage of sex discrimination issues in the various systems.

60. *Less flexibility:* While a treaty is a binding instrument, once the text of a treaty has been negotiated it can be difficult to amend it, as times and circumstances change and new forms of violence against women emerge. This may be contrasted with an instrument such as a declaration, or the interpretive practice of a treaty body – each of these is a very flexible method of adapting to changing circumstances without going through the lengthy and arduous intergovernmental process to negotiate an updated amendment to a treaty.

61. *Dangers of the political process:* The political process of drafting a new convention runs the risk of States trying to limit what is understood as violence by excluding certain practices from any definition (whether in the text of a convention or

in reservations to a new convention), or to open up disagreement with and challenges to the CEDAW approach in General recommendation 19 or its Update.

62. *Possibility of excessive duplication of bodies and procedures:* If a new treaty were to establish a new monitoring mechanism, this might be – and would be seen by States as – excessive duplication, given the existence of CEDAW Committee, the Special Rapporteur on Violence against Women, and the Working Group on Discrimination against Women in Law and Practice (as well as the other UN human rights mechanisms that address GBVAW as part of non-gender-specific mandates, quite apart from any regional mechanisms). One way to minimise concerns on this account would be to link any new convention closely to the CEDAW Convention normatively and any new procedure to the CEDAW Committee institutionally.

63. *Transaction costs and diversion of resources:* The elaboration of a new convention would involve a lengthy and resource-intensive campaign to persuade States to draft a convention, and to participate in what could be a drawn-out and contentious process. If that were successful, then a further political campaign would be required to persuade States to ratify it; it would be some time before any convention reached the current 189 States parties to the CEDAW Convention.<sup>36</sup> Both these processes may draw energy and resources away from implementation efforts based on existing obligations (though one might also expect some synergy between both efforts).

## **G. SOME GUIDING PRINCIPLES**

64. Against the background of this overview of the possible advantages and drawbacks of a new convention, this section suggests a number of guiding principles that should be adopted in the consideration of whether or not to pursue the development of a new convention on GBVAW and, if such a goal is adopted, how this might be appropriately pursued. These are:

- (a) *Recognition that we are not starting with a blank sheet:* The starting-point of any discussions and conceptualisation of a new convention or other measures should be that such an effort will not be drawing on a blank sheet at the UN level, nor will it be adding a gender-specific treaty to a human rights system that does not have a general women's human rights treaty. This means that care needs to be taken to recognise the importance and impact of existing norms and practice, and to build on them, not undermine them or give States any pretext for contesting or watering down existing standards.

Any new measures should recognise the role that existing international obligations and standards have played in supporting government action, institutional change and women's human rights advocacy at the domestic level, and explore ways to consolidate and build on those achievements – including

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<sup>36</sup> There are 107 States parties to the Optional Protocol to the Convention.

through drawing the significant jurisprudential work that has been undertaken to explicate the content of the obligations of States both positive and negative in relation to violence perpetrated by both State and non-State actors (including work on the nature of 'due diligence' and 'due diligence obligations').

- (b) *Affirmation of CEDAW and other existing obligations*: Any new treaty should affirm the existing binding obligations under the CEDAW Convention to take all appropriate measures to eliminate all forms of gender-based violence against women committed or tolerated by State or non-State actors; and indicate that it is providing further detail as to how States can more effectively fulfil those obligations.
- (c) *Recognition of need for better implementation*: Any new measures should recognise that there is a significant failure of implementation at the national level and that significant efforts and resources needed to be devoted to implementation, in particular by supporting legal and other forms of action at the domestic level. In addition to exploring ways to enhance follow-up to CEDAW concluding observations (which now all contain a separate section explicitly dealing with violence against women). This should include encouragement of and support for the adoption of laws recognising and addressing GBVAW (including marital rape), the adoption of national policies on violence against women and the designation or establishment of national mechanisms for monitoring the implementation and effectiveness of the relevant laws and policies, and prioritising GBVAW- initiatives in legislative and budgetary actions.
- (d) *Adoption of a holistic and contextual approach to GBVAW*: Any new international measures, including a treaty, should adopt a holistic analysis of GBVAW that reflects the indivisibility of rights and an understanding of GBVAW as rooted in broader patterns of the denial of women's right to equality and the enjoyment of all rights (as is reflected in the CEDAW Convention).
- (e) *No retrogression*: Any new treaty should not permit the erosion or roll-back of any existing obligations or standards.
- (f) *Expansive and flexible definition of violence*: Any new treaty should adopt a definition of violence that is expansive, flexible and dynamic. However, it should not adopt a definition that is so broad that most forms of discrimination against women are brought under the rubric of 'violence against women'.

- (g) *Need for clarity relating to due diligence obligations:* Any new treaty should embody conceptual clarity in relation to the concept of 'due diligence', in particular distinguishing between 'obligations of due diligence' as a type of obligation (steps the State should take in relation to non-State actors), and 'due diligence' as a standard of conduct or fault.
- (h) *Linking monitoring procedures to existing mechanisms:* Any new international monitoring procedures should be linked to existing procedures. If a treaty were to be considered –
- (i) it should be a further optional protocol to the CEDAW Convention
  - (ii) it should focus on ways in which such a treaty might further strengthen existing procedures for enhancing implementation and ensuring accountability and thus be a procedural rather than a substantive convention (perhaps along the lines of the Optional Protocol to the Convention against Torture)
  - (iii) it should assign any monitoring role to the CEDAW Committee (among the largest of the UN human rights treaty bodies); and
  - (iv) if substantive provisions are included, they should reaffirm that the Convention covers all forms of GBVAW and should in no respect fall below the existing standards articulated under the Convention by the CEDAW Committee.
- (i) *Avoidance of duplication or overlap:* Any new treaty should avoid duplicating procedures that already apply to GBVAW. For example, there would appear to be little justification for establishing a new treaty with its own individual communications or inquiry procedure when CEDAW already has that role, and it is open to States parties to the Convention to adhere to those procedures. If they have not already done so, they should be encouraged to do so. However, consideration might be given to whether a preventive and educative visits function similar to that established by the Optional Protocol to the Convention against Torture might be adopted.
- (j) *Specification of role for national institutions:* Any new treaty should include provision that specifically address the role of different national institutions in addressing violence against women, including national human rights institutions and other public bodies with a relevant mandate. These might draw on the provisions in OP-CAT and the Convention on the Rights of Persons with Disabilities.
- (k) *Limitation on reservations:* Any new treaty, especially one that contains any substantive provisions, should prohibit reservations.

## H. ADOPTION OF A MULTI-PATH STRATEGY

65. Whatever may occur with regard to the development of a new convention, its adoption and entry into force would be years off, and there is a need to focus on improving implementation of existing standards now. There is a range of options that could be undertaken in parallel with or instead of the elaboration of a new convention. These include:

- a. Building on CEDAW's jurisprudence and practice in relation to GBVAW;
- b. Drawing on and strengthening the jurisprudence of other UN human rights treaty bodies and mechanisms;
- c. Using regional conventions and procedures where available (and developing further procedures, for example in Asia Pacific or its sub-regions); and
- d. Continuing to draw on international law standards to influence domestic level decision-making.

66. Another option is the renewal by CEDAW of *General recommendation 19*, a process which is well underway, with the CEDAW Committee releasing a draft update to *General recommendation 19* for comment on its website in late July/early August 2016.<sup>37</sup> This 'complements and updates the guidance to States parties set out in General Recommendation No. 19, and provides further clarification of their obligations to all women within their territories.'<sup>38</sup>

67. The adoption of a supplementary *General recommendation* by the CEDAW Committee has the advantage of speed and will produce useable results more rapidly than a treaty drafting process. *General recommendations*, with their ability to be updated and supplemented, are flexible tools that can ensure that the Convention is kept up to date; amending treaties is a much harder prospect. Whether all of the content of the new (or updated or supplementary) *General recommendation* would represent binding interpretations of the Convention will depend on the specific content and also on how States parties react. In any case, the content of the draft supplementary *General recommendation* is a summary or digest of the past practice of CEDAW that has been accepted by States parties over the last 25 years. Of course, a new or updated *General recommendation* does not preclude parallel advocacy for a convention.

## H. CONCLUSION

68. IRAW Asia Pacific recognise that the CEDAW Convention is a creature of its time and that, if one were drafting such a convention today, violence against women would be explicitly addressed and probably in some detail. It also recognises CEDAW's *General recommendation 19* is itself almost a quarter of a century old, though the

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<sup>37</sup> See 'Draft General Recommendation No. 19 (1992): accelerating elimination of gender-based violence against women', CEDAW/C/GC/19/Add.1 (28 July 2016), available through [www.ohchr.org/EN/HRBodies/CEDAW/Pages/DraftUpdateGR19.aspx](http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/DraftUpdateGR19.aspx) (4 August 2016).

<sup>38</sup> Id para 6.

Committee has in its other *General recommendations* and in its practice been able to develop its understanding of the obligations.

69. IRAW Asia Pacific also acknowledges that much needs to be done to eliminate the scourge of GBVAW and that strengthened international (legal) measures can contribute significantly to that struggle. The question of the form that any new measures take should be approached boldly but also carefully, and the critical issue is how best to ensure implementation of the standards of the Convention and other equality guarantees at the national level. IRAW Asia Pacific suggests that any discussion of a new convention needs to recognise what has been achieved, carefully weigh the potential positive and negative consequences of pushing for a new convention, and to take into account the concerns and guidelines set out in this paper.

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