**RESPONSE TO CALL FOR PROPOSALS ON GAP IN INCORPORATING & IMPLEMENTING INTERNATIONAL & REGIONAL STANDARDS ON VIOLENCE AGAINST WOMEN. COMPILED BY ADA TCHOUKOU JULIE YNES, NEKURA RUTH & MUBAIWA PRETTY**

1. **Introduction**

Violence against women is an issue that has generally been recognised in international law as a violation of human rights. Within the past two decades, a number of international treaties and declarations have regarded this form of violence as a violation of basic rights such as the right to life, freedom and security of the person, violation of the right to equality and a violation of the prohibition against torture. However, despite this worldwide recognition and the existence of numerous internationally agreed norms and standards regulating this issue, an analysis of the current regional and international framework reveals a huge gap in both implementation and regulation of VAW.

Drawing on a number of theories, documents and studies, this proposal seeks to address specific questions and provide a critical analysis of the current strategies used within the international human rights framework to address the incidence of violence against women. It will show that the current strategies adopted by international and regional bodies merely codifies and reinforces the unequal position of women in international human rights law. This discussion on the adequacy of the international legal framework on VAW will be centered around the current incorporation and implementation gap, the array of instruments echoing a significant fragmentation of policies, and also the international bodies failure to address VAW as violence in and of itself.

1. **Fragmentation of Policies Addressing Gender-based Violence and Incorporation gaps of international or regional human rights norms and standards**

At the global level several instruments contain certain provisions that address, or could be read to address gender-based violence. However, most of these instruments either fail to speak to GBV and VAW directly or are not binding. While CEDAW articulates comprehensive state obligations to address all forms of discrimination, it does not contain specific obligations with respect to violence against women. To address this gap, the CEDAW Committee developed general recommendations 12 and 19. We see the first evidence of fragmentation in these two non-binding recommendations which speak to the exact same thing – violence against women.

The Declaration on the Elimination of Violence against Women, (DEVAW) enshrines the states obligation to condemn, prevent and refrain from all forms of violence against women, however it is not a binding instrument. The Convention on the Rights of the Child (CRC) creates obligations on state parties to protect children from all abuse including sexual exploitation and assist in the recovery of child victims of abuse. These provisions are relevant for gender-based violence against children. The Convention on the Elimination of Racial Discrimination (CERD) generally notes the right to be free from violence- and thus has been interpreted by the CERD Committee to include GBV.[[1]](#footnote-1) A number of instruments also address sexual and gender-based violence perpetrated in situations of armed conflict. These include the Geneva Conventions of 1949 and their additional protocols.[[2]](#footnote-2) The UN Security Council resolution 1325 of 2000 and more recently resolution 2106 which was unanimously adopted in 2013 to call on all parties in an armed conflict to take special measures to protect women from violence including assistance for refugee women. The Vienna Declaration and Programme of Action, the 1995 Beijing Platform for Action and the 1994 International Conference on Population and Development(ICPD) policy documents and processes, have alsohighlighted actions for states to take in addressing violence against women. The 2013 Commission on the Status of Women (CSW) consensus document is also a critical instrument showing global consensus on the need to address violence against women. This array of instruments demonstrates significant fragmentation of laws and policies on violence against women.

On the issue of incorporation, the language and substance of certain international norms and standards have largely influenced the content of regional instruments. The Council of Europe Convention on preventing and Combating Violence Against Women and Domestic Violence which obliges states to refrain from any act of violence against women adopts the language of General Recommendation 19.[[3]](#footnote-3) The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, borrows heavily from DEVAW’s provisions.[[4]](#footnote-4) The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa draws heavily on the international set standards, and incorporates both positive and negative obligations with respect to violence against women in public or private spheres.[[5]](#footnote-5) However, despite this incorporation of standards to the regional frameworks there is a significant lack of discrepancy in the way violence against women is particularly conceptualised. While these regional instruments conceptualise violence against women as a direct violation of human rights, international norms, deriving from CEDAW, conceptualise violence as a form of discrimination against women. Perhaps this presents an opportunity for reciprocity where these regional norms can be incorporated to develop the recognition of violence against women as a human rights violation at the international level.

1. **The Lack of Implementation of International and Regional Legislation into Domestic Law**

In her 2003 report the former SRVAW Rhadhika Coomaraswamy echoed that the Convention Against Torture offered more protection to women as compared to the protection CEDAW could offer with regards to violence.[[6]](#footnote-6) In 2016, the current Special Rapporteur Simonovich, holding the same position, states that despite unimaginable strides at the international, regional and local levels, women are still vulnerable to experiencing violence.[[7]](#footnote-7) One of the reasons is the absence of a cohesive implementation of international and regional instruments at the municipal level. This implementation gap has negatively impacted women because even though they enjoy rights in the global sense, their lived reality is far from the universality that these frameworks present.

According to Eleanor Roosevelt, human rights cannot have meaning unless they impact the smallest of people in the smallest of places. As such, it becomes the responsibility of the state to make sure that every individual at the grassroots level experiences these rights, and only then can the assumption of the universality of rights be true. There is currently a lack of domestication of international and regional legislation concerning women’s rights in general and because there is no legally binding framework internationally addressing VAW, it thus remains in the state’s purview to implement regional provisions into their domestic law. However, most states have the prerogative to decide on whether or not they wish to domesticate international obligations. This situation prevalent in dualist settings forms one of the gaps affecting the fight to end VAW.

A quick browsing of the reports by the SRVAW since the inception of the mandate shows that states are taking a lax approach towards implementing international and regional instruments. The more recent reports from the former SRVAW Rashida Manjoo show that there is indeed an implementing gap at national levels. In her visit to the UK in 2014, the special rapporteur, Rashida Manjoo noted that even though the legal regime in UK was advanced and offered numerous protections for women against violence, she noted that there was still a large number of cases of VAW not being reported such as gender-based bullying, forced and/or early marriages, female genital mutilation and honour related violence.[[8]](#footnote-8) She noted with concern that because of the non-alignment of some legislation with international standards, some women ended up experiencing violence and discrimination based on their race, sexuality, ethnicity, class and immigration status.[[9]](#footnote-9)

In Honduras, the Special Rapporteur noted that a lack of effective implementation of legislation and gender discrimination in the justice system left women in the country more vulnerable to experiencing violence. According to Articles 2 and 24 of CEDAW, the state is obligated to enact policies of non-discrimination and to adopt all necessary measures at national level to ensure the realisation of the rights contained in the convention respectively. These provisions set out the obligation of the state to domesticate the spirit of the convention in their jurisdictions. In Afghanistan, the SRVAW noted the same problems because even though legislation existed, there was a failure to implement this legislation as women faced problems with accessing justice.[[10]](#footnote-10) There was also a failure on the part of the state to investigate and prosecute crimes of VAW, and this reinforced the climate of impunity.[[11]](#footnote-11)

In her state visit to USA, the SRVAW found that there were also internal restrictions on women’s access to justice. For example, she noted that incarcerated women had trouble accessing justice after experiencing violence in prison despite the provision of the Prison Litigation Reform Act of 1995. This Act required that women exhaust all internal systems before seeking redress from a court,[[12]](#footnote-12) which only serves to lengthen the process and frustrate women who are seeking justice, especially if the perpetrator is in a position of power and within the chain of command in the prison. Similarly, women in Kyrgyzstan suffered multiple forms of violence in detention centres which included beatings, burns and other forms of physical assault.[[13]](#footnote-13) This makes it difficult for women to access justice because the same people who are responsible for providing this access are the perpetrators of violence as well. In El Salvador, the special rapporteur in 2011 reported that prosecution of domestic violence and other crimes of violence remained low as police officers encouraged (internal) family resolutions than arresting perpetrators and pursuing state legislative measures. The state has due diligence obligations under CEDAW to prevent, investigate, prosecute and punish for acts of VAW and this is not the case at the domestic levels since women are still experiencing problems to accessing justice. In Zimbabwe, women still experience multiple and intersecting forms of discrimination because the state has not implemented its international and regional obligations according to CEDAW and the Maputo Protocol. For example, the Constitution of Zimbabwe Amendment Act No. 20 of 2013 completely neglects LGBTQIA+ rights. This leaves these women completely vulnerable to violence as they are afraid to report any cases of violence against them and the state perpetuates this violence by arresting and detaining them. According to Article 1 of CEDAW, one of the basis of discrimination the state should eliminate is discrimination based on sexual orientation. For as long as states continue to neglect fundamental rights such as the right to sexual orientation, women will continue to be vulnerable to such violence.

Thus even though certain international and regional frameworks exist for the protection of women’s, an implementation gap exists at the state level. There is a failure to align international and regional state obligations with municipal law. This gap continuously leaves women vulnerable to experiencing violence.

1. **Is There a Need for a Separate Legally Binding Treaty on Violence against Women with its Separate Monitoring Body?**

The preceding sections highlighted the fragmentation, implementation and regulatory problems existing within the international and regional human rights system. However, despite the above mentioned problems with the general framework of the human rights system, more specific to the issue of violence is the current strategies used within the international human rights framework to address the incidence of violence against women.

An overview of international human rights jurisprudence reflects that, in order to accommodate VAW within the framework of various treaties, certain ‘jurisdictional gymnastics’ have to be done. Two plausible strategies have been adopted by international human rights bodies to include VAW within the human rights framework. These include, the conceptualisation of VAW as a form of sex discrimination and the expanded reinterpretation of existing human rights provisions so that they be applied to women. Although these strategies have been symbolic and necessary, they however signify some sort of rhetoric inclusion, one that continuously reinforces the unequal position of women within the human rights discourse.[[14]](#footnote-14)

Like Conley, we are of the view that the silence and language of law is an instrument of power.[[15]](#footnote-15) There is always more at stake in the relationship between questions of gender and language, than just a question of literary style.[[16]](#footnote-16) Silence and language not only has legal and moral implications but can also serve to construct and strengthen gendered systems.[[17]](#footnote-17) Therefore, in order to ensure an appropriate response to the issue of VAW, it becomes essential to label an act appropriately. There is something counter-intuitive about describing violent conduct as discrimination rather than violence itself. For example, classifying rape as discrimination tends to diminish the harm and rights at issue, in the eyes of the victim and also in respect of the states responsibility for it.[[18]](#footnote-18) Compare this to a language of violence, which generally carries an intentional, and usually criminal behaviour and sanction. This difference in language has a significant impact on the types of remedies that will be available for victims.

Using sex discrimination in the context of violence requires one to move across different legal and moral regimes. This is not to say that inequality is not a root cause of VAW, yet, it is important to note that a violent act has been committed and inequality and discrimination are merely causes and consequences of such violence. The language of discrimination goes on to reflect a significant disparity in the alleged universality of IHRL. It creates problems of implementation in practice. This is so judging from the steps of inquiry a court will need to take in order to determine whether a specific act amounts to discrimination and then amounting to violence.[[19]](#footnote-19) Not only will a woman who has suffered violence need to establish that she has, for example been raped, she also needs to prove that the rape was discriminatory. The same holds true for cases where human rights provisions, such as the right to life and freedom from torture, need to be expanded and reinterpreted so that they be applied to women. Accommodating VAW within these criteria subjects’ victims to an added layer of analysis. For example, they must first substantiate that they have been raped and then that the rape amounts to torture. This added layer of analysis required to prove violence is not applied to men in relation to violence that disproportionately affects them.[[20]](#footnote-20) The indirect protection afforded to women creates even greater challenges in instances where such violence occurred privately. In this case, the woman will have to establish first that such violence suffered was discriminatory, and not violence per se, and second that the state is responsible for that violence owing to its failure in due diligence, which may or may not be discrimination.[[21]](#footnote-21) This additional link places a disproportionate onerous burden on women.

In light of the above, we are of the view that a legally binding document addressing VAW as violence needs to be enacted. This document could take the form of a separate treaty, an optional protocol to CEDAW or an amendment of DEVAW to include VAW as violence in itself. We are specific to DEVAW and not to CEDAW, because the title of both conventions are fundamentally different. It is impossible to reflect VAW as violence where CEDAW’s title considers violence as discrimination and not violence in itself. It should be noted that in terms of a legal strategy, all three options entail the same process but in terms of a political strategy states are more likely to subscribe to an amendment or expansion of an existing framework, rather than the creation of an entirely new one. This is so because, member states are more likely to ratify documents they are already familiar with.

On the issue of creating a separate monitoring body, it becomes important to ascertain whether the current Committee can effectively monitor two conventions, in the case where a separate treaty is enacted. The problem with the current international legal framework on VAW does not lie in the monitoring body’s capacity to address issues relating to VAW. The problem lies in the fact that, in the committee’s attempts at holding states liable for its failure to address violence within their domestic framework, the basis on which these decisions are made are somewhat dispersed. The committee in its efforts at addressing issues of violence effectively makes reference to its general comments, which are non-binding, and other human rights documents to substantiate its decisions. General comments are relied on in addressing these cases because they reflect a certain measure of specificity as to what constitutes violence, a specificity that is currently absent within CEDAW. The Committee has been commended for its attempts at making CEDAW a ‘living’ instrument, continuously growing, developing and adapting through the work of the Committee. However, we are of the view that the existence of an internationally binding document substantially addressing the issue of violence will facilitate the mandate of the current committee. As such, we do not think that the creation of a separate monitoring body is necessary to address VAW.

1. UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195 art 5(b) and (e). [↑](#footnote-ref-1)
2. International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. [↑](#footnote-ref-2)
3. Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011 art. 1 to 5. [↑](#footnote-ref-3)
4. Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, 9 June 1994. See art. 7 and 8. [↑](#footnote-ref-4)
5. African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11July 2003, art 2. [↑](#footnote-ref-5)
6. Rhadhika Coomaraswamy ‘Integration of the human rights of women and the gender perspective violence against women: International, regional and national developments in the area of violence against women 1994-2003’ Report of the Special Rapporteur on violence against women, its cause and consequences, submitted in accordance with Commission on Human Rights Resolution 2002/52 Addendum (E/CN/42003/75/Add.1) [↑](#footnote-ref-6)
7. Dubravka Simonovic Report to General Assembly 70th Session in New York (October 2015) [↑](#footnote-ref-7)
8. Statement by the Special Rapporteur on violence against women, its causes and consequences to the Human Rights Council’s Twenty-ninth session 16th June 2015 (A/HRC/29/27/Add.2) at 6 [↑](#footnote-ref-8)
9. Ibid at 7 [↑](#footnote-ref-9)
10. Ibid at 9. [↑](#footnote-ref-10)
11. Ibid. [↑](#footnote-ref-11)
12. (A/HRC/17/26/Add.5) [↑](#footnote-ref-12)
13. (A/66/215) [↑](#footnote-ref-13)
14. Alice Edwards, *Violence Against Women under International Human Rights Law* (United Kingdom: Cambridge University Press, 2011) xiii. [↑](#footnote-ref-14)
15. John Conley & William O’Barr, *Just Words: Law, Language and Power* (Chicago: University of Chicago Press, 2005). [↑](#footnote-ref-15)
16. Ibid. [↑](#footnote-ref-16)
17. Edwards, *supra* note 14 at 193. [↑](#footnote-ref-17)
18. Ibid at 262. [↑](#footnote-ref-18)
19. Refer for example, the case of *Prosecutor v Kunarac and Vukovic*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T (22nd February 2001), para 816. [↑](#footnote-ref-19)
20. Edwards, *supra* note 3 at 197 [↑](#footnote-ref-20)
21. Ibid at 197. [↑](#footnote-ref-21)