

April 2021

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### Repository Citation

Tatsiana Ziniakova, *Gender-Based Violence in International Human Rights Law: Evolution Towards a Binding Post-Binary Framework*, 27 Wm. & Mary J. Women & L. 709 (2021), <https://scholarship.law.wm.edu/wmjowl/vol27/iss3/4>

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GENDER-BASED VIOLENCE IN INTERNATIONAL HUMAN  
RIGHTS LAW: EVOLUTION TOWARDS A BINDING  
POST-BINARY FRAMEWORK

TATSIANA ZINIAKOVA\*

ABSTRACT

The present Article seeks to analyze the notion of gender-based violence, in light of the evolving gender discourse, and identify the problems associated with effectively addressing it in international human rights law. It analyzes the definitions of gender, enshrined in various human rights documents, and suggests using performative theory of gender to form a comprehensive view on gender-based violence. It also critically addresses three aspects of regulating gender-based violence: inclusivity, patriarchy, and normativity. It concludes that, in the long term, the commitment to eradicate gender-based violence should be strengthened by framing it as a binding treaty obligation on the universal human rights level, while in the short term it can continue to be strengthened through a developing body of jurisprudence and authoritative interpretations of standing instruments.

INTRODUCTION: THE NOTION OF GENDER-BASED VIOLENCE IN  
INTERNATIONAL HUMAN RIGHTS LAW

- I. GENDER AS A SOCIAL CONSTRUCT
- II. PROBLEMS AND PERSPECTIVES OF REGULATING GENDER-BASED  
VIOLENCE IN INTERNATIONAL HUMAN RIGHTS LAW
  - A. *Inclusivity*
  - B. *Patriarchy*
  - C. *Normativity*

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The Article was written in the turbulent year of 2020, marked not only by a devastating COVID-19 pandemic, but by the bravery and determination of Belarusians—the author's compatriots—in their pursuit of freedom. The author stands in solidarity with all who daily fight for their right to be treated as humans and citizens, wherever we may fall on the gender spectrum.

1. *Regional Instruments*
2. *Universal Instruments*

## CONCLUSION

- A. *Amending Existing Instruments*
- B. *Adopting New Instruments*
- C. *Interpreting Existing Instruments Revolutionarily*

## INTRODUCTION: THE NOTION OF GENDER-BASED VIOLENCE IN INTERNATIONAL HUMAN RIGHTS LAW

In the words of the United Nations Secretary-General, “there is simply no way that the world can achieve the 17 Sustainable Development Goals without also achieving gender equality.”<sup>1</sup> There are still some years left before it is time to assess the progress made on 2030 Agenda, but the declared ambition to eliminate discrimination and violence<sup>2</sup> has proven hard to fulfill. Gender-based violence is a major factor undermining gender equality worldwide.<sup>3</sup> Violence is practiced by intimate partners, colleagues, strangers, family members, enemy’s soldiers, soldiers of one’s own state, peacekeepers,<sup>4</sup> police officers.<sup>5</sup> It can be sexual, physical, psychological, or economic.<sup>6</sup> It can occur in peacetime and wartime, online,<sup>7</sup> and offline.<sup>8</sup> Its

1. U.N. Secretary-General, *Rep. of the Secretary-General on SDG Progress 2019*, Sp. Ed., U.N. Doc. E/2019/68, at ii (May 8, 2019).

2. G.A. Res., 70/1, 2030 Sustainable Development Goals, ¶ 20 (Sept. 25, 2015).

3. *Id.*

4. Sophie Genovese, *Prosecuting U.N. Peacekeepers for Sexual and Gender-Based Violence in the Central African Republic*, BROOKLYN J. INT’L. L. 609, 611 (2018); Skye Wheeler, *UN Peacekeeping has a Sexual Abuse Problem*, HUM. RTS. WATCH (Jan. 2020), <https://www.hrw.org/news/2020/01/11/un-peacekeeping-has-sexual-abuse-problem>.

5. Payal Seth, *As COVID-19 Raged, the Shadow Pandemic of Domestic Violence Swept Across the Globe*, THE WIRE (Jan. 23, 2021), <https://thewire.in/women/covid-19-domestic-violence-hdr-2020> [<https://perma.cc/5DG2-RQKC>]; Ignacio Torres, *A Silent “Colleague”: Violence Against Women in the Workplace*, DIANOVA (Apr. 2017), <https://www.dianova.org/news/a-silent-colleague-violence-against-women-in-the-workplace> [<https://perma.cc/99EV-R2CA>]; Ella Torres, *Military Sexual Assault Victims Say The System Is Broken*, ABC NEWS (Aug. 28, 2020), <https://abcnews.go.com/US/military-sexual-assault-victims-system-broken/story?id=72499053> [<https://perma.cc/YQ6R-CGSV>]; Alexander Heal, *Nowhere to Turn: Women Say Domestic Abuse by Police Officers Goes Unpunished*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 5, 2019), <https://www.thebureauinvestigates.com/stories/2019-05-01/police-perpetrators-domestic-violence> [<https://perma.cc/6TXN-XF2U>]; Genovese, *supra* note 4, at 611; Wheeler, *supra* note 4.

6. *Forms of Violence*, EURO. INST. FOR GENDER EQUAL., <https://eige.europa.eu/gender-based-violence/forms-of-violence> [<https://perma.cc/G4GP-KV6W>].

7. UNHRC, *Online Violence Against Women And Girls*, U.N. Doc. A/HRC/38/47 (June 14, 2018); ANASTASIA POWELL & NICOLA HENRY, *SEXUAL VIOLENCE IN A DIGITAL AGE 1–2* (2017).

8. Wheeler, *supra* note 4; Muhammad Lila & Martha Raddatz, *U.S. Soldier Accused of Killing 16 Afghans Including Women and Children*, ABC NEWS (Mar. 11, 2012), <https://abcnews.go.com/International/us-soldier-accused-killing-16-afghans-including-women>

survivors are found on every side of the gender spectrum.<sup>9</sup> In a world, where patriarchal gender stereotypes continue to fuel abuse and aggression, the progress in achieving gender equality can only be marginal.<sup>10</sup> However, if the international community is to adhere to its equality commitments, it is crucial to analyze whether international law has developed a proper gender lens to effectively address gender-based violence.

*Prima facie* the concept of equality between sexes seems to have been historically integrated in the fabric of modern international law. References to equal rights of men and women appear in the texts of fundamental instruments of public international law, human rights law, international humanitarian law, and international criminal law.

The United Nations Charter reflects the intention “to reaffirm faith . . . in the equal rights of men and women”<sup>11</sup> and the commitment to “place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality” in any of the United Nations bodies.<sup>12</sup> The creation of the Commission on the Status of Women a year after the establishment of the United Nations supported the declared pursuit of equality.<sup>13</sup>

The Universal Declaration of Human Rights reiterates the wording of the United Nations Charter in its preamble.<sup>14</sup> Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights contain binding obligations to “ensure the equal right of men and women” to the enjoyment of all rights thereunder.<sup>15</sup> Nondiscrimination on the basis of sex is also enshrined in regional human rights instruments.<sup>16</sup>

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/story?id=15897098 [https://perma.cc/ZC9Q-5XM5]; UNHRC, *supra* note 7; POWELL & HENRY, *supra* note 7, at 1–2.

9. U.N. Charter, pmbl.; CEDAW, Dec. 18, 1979, 1249 U.N.T.S. 13; U.N., Rome Statute of the Int’l Criminal Court art. 7(1)(h) July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter U.N. Rome Statute]; C. Nadine Wathen, *True or False? Men and Women Face Violence in Their Relationships Equally*, THE CONVERSATION (Jan. 20, 2018), <https://theconversation.com/true-or-false-men-and-women-face-violence-in-their-relationships-equally-121540> [https://perma.cc/9FLA-NU4S].

10. Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 UNIV. OF CHI. LEGAL F. 21, 22 (1999).

11. U.N. Charter, pmbl.

12. U.N. Charter, art. 8.

13. Economic and Social Council Res., U.N. Doc. 1946/29, 525–26 (July 13, 1946); *see also* Economic and Social Council Rep. on the Comm’n of Women, U.N. Doc. E/2013/27 (Mar. 15, 2013).

14. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948).

15. Int’l Covenant on Civil and Political Rights arts. 3, 26, Dec. 16, 1966, 99 U.N.T.S. 171 [hereinafter ICCPR]; Int’l Cov. on Economic, Social and Cultural Rights (ICESCR) art. 3, Dec. 16, 1966, 99 U.N.T.S. 3 [hereinafter ICESCR].

16. Eur. Conv. on Human Rights (ECHR) art. 14, Sept. 21, 1970, 213 U.N.T.S. 222;

In the field of international humanitarian law, the four Geneva Conventions, as well as Additional Protocols I and II prohibit discrimination on the basis of sex.<sup>17</sup> All of these fundamental instruments also contain specific provisions dedicated to the treatment of women during armed conflict.<sup>18</sup>

In the domain of international criminal law, the Rome Statute recognizes “persecution against any identifiable group or collectivity on . . . gender . . . grounds” as a crime against humanity if certain qualifying criteria are met.<sup>19</sup>

Several treaties have been adopted to specifically combat gender discrimination and violence, such as the Convention on the Elimination of All Forms of Discrimination Against Women, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women [hereinafter Convention of Belém do Pará], the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa [hereinafter Maputo Protocol], and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence [hereinafter Istanbul

Amer. Conv. on Human Rights, art. 1, Aug. 27, 1979, 1144 U.N.T.S. 123; African Charter on Human and Peoples’ Rights, art. 3 ¶ 20, June 27, 1981 1520 U.N.T.S. 217; League of Arab States, Arab Charter on Human Rights art. 3, Mar. 15, 2008. Note, however, that Art. 3(3) of the Arab Charter on Human Rights also enshrines “positive discrimination of women,” stating that:

Men and women are equal in respect of human dignity, rights and obligations *within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments*. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.

League of Arab States, Arab Charter on Human Rights art. 3(3), Mar. 15, 2008 (emphasis added).

17. Geneva Conv. for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3(1), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Conv. I]; Geneva Conv. for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Conv. II]; Geneva Conv. Relative to the Treatment of Prisoners of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Conv. III]; Geneva Conv. Relative to the Protection of Civilian Persons in Time of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 75 U.N.T.S. 287 [hereinafter Geneva Conv. IV]; Protocol Additions to the Geneva Conv. of 12 August 1949, and Relating to the Protection of Victims of Int’l Armed Conflicts, art. 9(1), 75(1) 1125 U.N.T.S. [hereinafter Additional Protocol I]; Protocol II Additions to the Geneva Conv. of 12 August 1949 and Relating to the Protection of Victims of Non-Int’l Armed Conflicts, art. 2 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

18. Geneva Conv. I, *supra* note 17, art. 12; Geneva Conv. II, *supra* note 17, art. 12; Geneva Conv. III, *supra* note 17, art. 14, 25, 29, 97, 108; Geneva Conv. IV, *supra* note 17, art. 27, 38, 76, 85, 124; Additional Protocol I, *supra* note 17, art. 76; Additional Protocol II, *supra* note 17, art. 5(2)(a).

19. U.N. Rome Statute, *supra* note 9, art. 7(1)(h).

Convention].<sup>20</sup> Moreover, gender-based violence has been addressed in the jurisprudence of universal<sup>21</sup> and regional<sup>22</sup> human rights bodies.

20. Conv. on the Elimination of all Forms of Discrimination Against Women, pmbl., Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Inter-Am. Convention on the Prevention, Punishment, and Eradication of Violence against Women, pmbl., Mar. 5, 1995, 33 I.L.M. 1534 (1994) [hereinafter Conv. of Belém do Pará]; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, pmbl., Sept. 13, 2000, CAB/LEG/66.6 [hereinafter Maputo Protocol]; Council of Europe Conv. on Preventing and Combating Violence against Women and Domestic Violence, pmbl., Apr. 7, 2011, C.E.T.S. No. 210 [hereinafter Istanbul Conv.].

21. *See, e.g.*, Natalia Ciobanu v. Republic of Moldova, Communication No. 104/2016, U.N. Doc. CEDAW/C/75/D/107/2016 (Nov. 4, 2016); Zhen Zhen Zheng v. The Netherlands, Communication No. 15/2007, U.N. Doc. CEDAW/C/42/D/15/2007 (Nov. 14, 2008); Karen Tayag Vertido v. The Philippines, Communication No. 18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (Sept. 1, 2010); Kell v. Canada, Communication No. 19/2008, U.N. Doc. CEDAW/C/51/19/2008 (Aug. 28, 2008); V.K. v. Bulgaria, Communication No. CEDAW/C/49/D/20/2008 (July 25, 2011); Inga Abramova v. Belarus, Communication No. 23/2009, U.N. Doc. CEDAW/C/49/D/23/2009 (Sept. 27, 2011); X and Y v. Georgia, Communication No. 24/2009, U.N. Doc. CEDAW/C/55/D/24/2009 (Oct. 29, 2009); R.K.B. v. Turkey, Communication No. 28/2010, U.N. Doc. CEDAW/C/51/D/28/2010 (Apr. 13, 2012); Isatou Jallow v. Bulgaria, Communication No. 31/2011 U.N. Doc. CEDAW/C/53/D/31/2011 (Nov. 24, 2012); R.P.B. v. The Philippines, Communication No. 34/2011, U.N. Doc. CEDAW/C/57/D/34/2011 (Mar. 12, 2014); Angela González Carreño v. Spain, Communication No. 47/2012, U.N. Doc. CEDAW/C/58/D/47/2012 (July 16, 2014); Goekce v. Austria, Communication No. 5/2005, U.N. Doc. CEDAW/C/39/D/5/2005 (Aug. 6, 2007); Fatma Yildirim v. Austria, Communication No. 6/2005, U.N. Doc. CEDAW/C/39/D/6/2005 (Oct. 1, 2007); S.T. v. Russian Federation, Communication No. 100/2016, U.N. Doc., CEDAW/C/73/D/100/2016 (Aug. 9, 2019); X. v. Timor-Leste, Communication No. 88/2015, U.N. Doc. CEDAW/C/69/D/88/2015 (Apr. 25, 2018); S.L. v. Bulgaria, Communication No. 99/2016, U.N. Doc. CEDAW/C/73/D/99/2016 (Sept. 10, 2019); A.T. v. Hungary, Communication No. 2/2003, U.N. Doc. CEDAW/C/36/D/2003 (Jan. 26, 2005).

22. *See, e.g.*, APDF and IHRDA v. Mali, Communication No. 046/2016, African Commission on Human and Peoples' Rights (May 11, 2018); A. v. Croatia, App. No. 55164/08 (Oct. 14, 2010), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-101152%22%7D> [https://perma.cc/279B-M37Y]; B.V. v. Belgium, App. No. 61030/08 (Feb. 5, 2017), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-173480%22%7D> [https://perma.cc/WX9G-LDHY]; Bălsan v. Romania, App. No. 49645/09 (May 23, 2017), <http://hudoc.echr.coe.int/eng?i=001-173619> [https://perma.cc/7EYD-YTRU]; Bevacqua v. Bulgaria, App. No. 71127/01, Eur. Ct. H.R. (June 12, 2008); Tomašić v. Croatia, App. No. 21753/02, Eur. Ct. H.R. (Oct. 19, 2006); Đorđević v. Croatia, App. No. 41526/10, Eur. Ct. H.R. (July 24, 2012); Eremia v. The Republic of Moldova, App. No. 3564/11, Eur. Ct. H.R. (May 28, 2013); Hajduová v. Slovakia, App. No. 2660.03, Eur. Ct. H.R. (Nov. 30, 2010); Irina Smirnova v. Ukraine, App. No. 1870/05 (Oct. 13, 2016), <http://hudoc.echr.coe.int/eng?i=001-167118> [https://perma.cc/9D4C-BTR5]; Kaluczka v. Hungary, App. No. 57693/10 (Apr. 24, 2012); Kontrová v. Slovakia, App. No. 7510/04, Eur. Ct. H.R. (May 31, 2007); M.C. v. Bulgaria, App. No. 39272/98, Eur. Ct. H.R. (Dec. 4, 2003); O'Keeffe v. Ireland, App. No. 35810/09, Eur. Ct. H.R. (June 16, 2009); Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. (June 9, 2009); Rumor v. Italy, App. No. 72964/10, Eur. Ct. H.R. (May 27, 2014); Siliadin v. France, App. No. 73316/01, Eur. Ct. H.R. (July 26, 2005); Talpis v. Italy, App. No. 41237/14 (Mar. 21, 2017), <http://hudoc.echr.coe.int/eng?i=001-171994> [https://perma.cc/P3X8-A5KE]; V.C. v. Slovakia, App. No. 18968/07, Eur. Ct. H.R. (Nov. 11, 2011); Valiulienė v. Lithuania, App. No. 33234/07, Eur. Ct. H.R. (Mar. 26, 2013); Volodina v. Russia, App. No. 41261/17 (July 9, 2019), <http://hudoc.echr.coe.int/eng?i=001-194321> [https://perma.cc/K2D3-CL8R]; Y. v. Slovenia, App. No. 41107/10 (May 28, 2015), <http://hudoc.echr.coe.int/eng?i=001-154728> [https://perma.cc/BQB4-L9M8]; Gonzalez et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R.

There are quasi-legal commitments to address gender-based violence in parts of the world that do not have standalone regional human rights bodies, such as the Declaration of the Advancement of Women in the Association of Southeast Asian Nations Region,<sup>23</sup> the Declaration on the Elimination of Violence Against Women in the Association of Southeast Asian Nations Region,<sup>24</sup> and the Arab Strategy for Combating Violence Against Women.<sup>25</sup>

Nonbinding yet influential instruments have been developed, such as the Vienna Declaration and Programme of Action,<sup>26</sup> the Declaration on the Elimination of Violence against Women,<sup>27</sup> the Beijing Declaration and Platform for Action,<sup>28</sup> the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, as well as the Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles.<sup>29</sup>

The United Nations Human Rights Council has consistently used tools at its disposal to address gender-based violence.<sup>30</sup> The United

(ser. C) No. 205 (Nov. 16, 2009); “Las Dos Erres” Massacre v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 211 (Nov. 24, 2009); Miguel Castro-Castro Prison v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25, 2006); Veliz Franco et al. v. Guatemala, Prelim. Obj., Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 277 (May 19, 2014); Vicky Hernández and Family, Honduras, Case 13.051, Inter-Am. Comm’n H.R., Rep. No. 157/18, OEA/Ser.L/V/II.170, doc. 179 (2018); Maria Da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am. Comm’n H.R., Rep. No. 54/01, OEA/Ser.L/V/II.111, doc. 20 (2000); Jessica Lenahan (Gonzales) et al., United States, Case 12.626, Inter-Am. Comm’n H.R., Rep. No. 80/11 (2011); Indravani Pamela Ramjattan, Trinidad and Tobago, Case 11.837, Inter-Am. Comm’n H.R., Rep. No. 31/14, OEA/Ser.L/V/II.150, doc. 35 (2014).

23. 1988 Decl. of the Advancement of Women in the Assoc. of Southeast Asian Nations Region, July 5, 1988, 35 I.L.M. (1996).

24. ASEAN 2012—Declaration of the Advancement of Women in the Association of Southeast Asian Nations Region (Oct. 12, 2012).

25. Haifa Abu Ghazaleh, *Arab Strategy for Combating Violence Against Women*, ARAB WOMEN ORG. (2011), <http://www.arabwomenorg.org/content/publications/vaweng.pdf> [<https://perma.cc/4ZR5-B983>].

26. World Conf. on Human Rights, *Vienna Decl. and Programme of Action*, U.N. Doc. A/CONF. 157/23 (June 25, 1993).

27. G.A. Res. 48/104, Decl. on the Elimination of Violence Against Women (DEVAW), art. 4(f), U.N. Doc. A/RES/48/104 (Dec. 20, 1993) [hereinafter U.N. DEVAW].

28. INT’L COMM’N OF JURISTS (ICJ), *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (Mar. 2007) [hereinafter *The Yogyakarta Principles*].

29. INT’L COMM’N OF JURISTS (ICJ), *The Yogyakarta Principles Plus 10—Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (Nov. 10, 2017) [hereinafter *The Yogyakarta Principles Plus 10*].

30. See U.N. Women, *Work of the Human Rights Council (2006–present) and the*

Nations Fact-Finding Mission on Myanmar and the Independent International Commission of Inquiry on the Syrian Arab Republic have issued separate reports on sexual and gender-based violence in the respective countries.<sup>31</sup> Similarly, the mandates of the Group of Eminent International and Regional Experts on Yemen<sup>32</sup> and the Commission on Human Rights in South Sudan<sup>33</sup> provide for a gender dimension. Gender-based violence also falls within the mandate of the Special Rapporteur on violence against women, its causes and consequences, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, and the Working Group on discrimination against women and girls.<sup>34</sup> However, twenty-five years into the existence of the first mandate, the most recent report of the Special Rapporteur on violence against women concludes that “gender-based violence against women and girls continues to be tolerated and has become normalized in many societies.”<sup>35</sup> The Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity continues to highlight a “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.”<sup>36</sup>

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*Commission on Human Rights (until 2006)*, U.N., <https://www.un.org/womenwatch/daw/vaw/v-hrc.htm> [<https://perma.cc/5Y2N-CS2R>].

31. H.R.C., *Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of Its Ethnic Conflicts*, U.N. Doc. A/HRC/42/CRP.4, pmb. (Aug. 22, 2019) [hereinafter H.R.C., *Sexual and Gender-Based Violence in Myanmar*]; H.R.C., “I Lost My Dignity”: *Sexual and Gender-Based Violence in the Syrian Arab Republic*, U.N. Doc. A/HRC/37/CRP.3, pmb. (Mar. 8, 2018) [hereinafter H.R.C., “I Lost My Dignity”].

32. H.R.C., *Human Rights, Technical Assistance and Capacity-Building in Yemen*, U.N. Doc. A/HRC/RES/39/21, ¶ 11 (Oct. 8, 2018).

33. H.R.C., *Situation of Human Rights in South Sudan*, U.N. Doc. A/HRC/43/56, 2 (Jan. 31, 2020).

34. See H.R.C., *Violence Against Women, Its Causes And Consequences*, U.N. Doc. A/HRC/41/42, ¶ 44 (June 20, 2019) stating:

Furthermore, *the Special Rapporteur in the field of cultural rights* considered the impact of fundamentalism and extremism on the cultural rights of women (A/72/155), and, in 2017, *the Special Rapporteur on the rights of persons with disabilities* examined the challenges experienced by girls and young women with disabilities in relation to their sexual and reproductive health and rights (A/72/133). *The Special Rapporteur on extrajudicial, summary or arbitrary executions* considered key elements of a gender-sensitive perspective to the mandate (A/HRC/35/23), while *the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* included a section on women, the right to health and confinement in his report (A/HRC/38/36) (emphasis added).

35. *Id.* ¶ 95.

36. H.R.C. Res. 17/1, U.N. Doc. A/HRC/17/1 (June 15, 2011); H.R.C., *Rep. of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/38.43 (May 11, 2018); H.R.C. Res.



On the face of it, international law, albeit often adopting a binary view of gender, does not seem to be completely gender blind.<sup>37</sup> Binding and nonbinding documents have been adopted to ensure equality.<sup>38</sup> Platforms, organizations, and mandates have been created to achieve the same end.<sup>39</sup> However, pervasive gender problems remain invisible and unaddressed up to the present day.<sup>40</sup> The instances of gender-based violence in Myanmar,<sup>41</sup> Iraq,<sup>42</sup> Syria,<sup>43</sup> DRC,<sup>44</sup> Haiti,<sup>45</sup> Mexico,<sup>46</sup> and India<sup>47</sup> have received attention from the international community in recent years, but they are far from being the only ones.<sup>48</sup> Gender-based violence continues to affect communities in developed and developing countries, in peacetime and wartime, and irrespective of whether survivors identify within or beyond the “traditional” gender binary.<sup>49</sup>

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32/2, U.N. Doc. A/HRC/RES/32/2 (July 15, 2016) [hereinafter H.R.C., Rep. of the Independent Expert].

37. Economic and Social Council Res., 1946/29 (July 13, 1946).

38. World Conf. on Human Rights, *supra* note 26; ICESCR, *supra* note 15, art. 3.

39. *DRC: Women and Girls’ Bodies Are Not Battlegrounds*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (May 13, 2019), <https://www.unocha.org/story/drc-%E2%80%9Cwomen-and-girls%E2%80%99-bodies-are-not-battlegrounds%E2%80%9D> [<https://perma.cc/F2KC-QZUY>].

40. See Dubravka Šimonović (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Rep. on Violence Against Women, Its Causes and Consequences*, U.N. Doc. A/HRC/41/42 (June 20, 2019) [hereinafter Šimonović, *Rep. on Violence Against Women*]; *U.N. Women, Work of the Human Rights Council (2006–present) and the Commission on Human Rights (until 2006)*, *supra* note 30.

41. See *The Gambia v. Myanmar*, Order on Provisional Measures, 2020 I.C.J. ¶ 73 (Jan. 23); *The Gambia v. Myanmar*, Verbatim Record 2019 I.C.J. (Dec. 12); H.R.C., *Sexual and Gender-Based Violence in Myanmar*, *supra* note 31.

42. See Nadia Murad, *My People Were Massacred Five Years Ago. The Genocide Continues*, WASH. POST (July 31, 2019), [https://www.washingtonpost.com/opinions/global-opinions/my-people-were-massacred-five-years-ago-the-genocide-continues/2019/07/31/b4ee1352-b24f-11e9-8f6c-7828e68cb15f\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/my-people-were-massacred-five-years-ago-the-genocide-continues/2019/07/31/b4ee1352-b24f-11e9-8f6c-7828e68cb15f_story.html) [<https://perma.cc/2JP9-4AXC>].

43. See H.R.C., “I Lost My Dignity,” *supra* note 31.

44. See *DRC: Women and Girls’ Bodies Are Not Battlegrounds*, *supra* note 39.

45. See Wheeler, *supra* note 4.

46. See Paulina Villegas, *In Mexico, Women Go on Strike Nationwide to Protest Violence*, N.Y. TIMES (Mar. 9, 2020), <https://www.nytimes.com/2020/03/09/world/americas/mexico-women-strike-protest.html?> [<https://perma.cc/KZ5D-K8CT>]; Inquiry Rep. on Mexico, U.N. Doc. CEDAW/C/2005/OP.8/MEXICO (Jan. 27, 2005).

47. See Neeta Lal, *Addressing Rape in India*, THE DIPLOMAT (Jan. 21, 2020), <https://thediplomat.com/2020/01/addressing-rape-in-india> [<https://perma.cc/AE4N-5Z79>]; NALINI NATARAJAN, *THE UNSAFE SEX: THE FEMALE BINARY AND PUBLIC VIOLENCE AGAINST WOMEN* ix (2016).

48. See Rep. of the Inquiry Concerning Canada, U.N. Doc. CEDAW/C/OP.8/CAN/1 (Mar. 30, 2015); Summary of the Inquiry Concerning the Philippines, U.N. Doc. CEDAW/C/OP.8/PHL/1 (Apr. 22, 2015); Rep. of the Inquiry Concerning the U.K., U.N. Doc. CEDAW/C/OP.8/GBR/1 (Feb. 23, 2018).

49. WHO, *GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL*

Armed conflicts often, if not always, notoriously result in “turning women’s bodies into battlefields.”<sup>50</sup> Gender-based violence as a tactic of war has recently been addressed at the 8514th Meeting of the United Nations Security Council, which adopted Resolution 2467 (2019) on conflict-related sexual violence.<sup>51</sup> It reiterated the “demand for the complete cessation . . . of all acts of sexual violence”<sup>52</sup> and recognized that the situation of armed conflict “exacerbates the frequency and brutality . . . of gender-based violence.”<sup>53</sup>

Survivors of violence often feel no safer in their own home than they do in the battlefield. Domestic violence all too often goes invisible, unreported, and unpunished.<sup>54</sup> For many home is a place of pain and humiliation.<sup>55</sup> According to the World Health Organization, almost one third of all women who have been in a relationship have experienced physical and/or sexual violence by their intimate partner.<sup>56</sup> The non-physical forms of violence, such as economic<sup>57</sup> or psychological violence are no less harmful.<sup>58</sup> Despite the unsettling statistics, legislation addressing gender-based violence often remains nonexistent, inadequate, or poorly implemented.<sup>59</sup>

Violence in armed conflict and domestic violence are but two of the forms that gender-based violence may take. Human trafficking, genital mutilation, forced marriages, and sexual harassment in the workplace also fall within the ambit of gender-based violence.<sup>60</sup>

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VIOLENCE (Oct. 20, 2013) [hereinafter WHO, GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN]; Wathen, *supra* note 9.

50. *DRC: Women and Girls’ Bodies Are Not Battlegrounds*, *supra* note 39; SUSAN DEWEY, CONFLICT-RELATED SEXUAL VIOLENCE: INTERNATIONAL LAW, LOCAL RESPONSES 1–2 (Tonia St. Germain & Susan Dewey eds., 2012); SARA SHARRATT, GENDER, SHAME AND SEXUAL VIOLENCE: THE VOICES OF WITNESSES AND COURT MEMBERS AT WAR CRIMES TRIBUNALS ix (2011).

51. S.C. Res. 2467 (Apr. 23, 2019); *see also* S.C. Res. 1325 (Oct. 31, 2000).

52. S.C. Res. 2467, ¶ 1 (Apr. 23, 2019).

53. *Id.* ¶ 2.

54. Enrique Gracia, *Unreported Cases of Domestic Violence Against Women: Towards an Epidemiology of Social Silence Tolerance and Inhibition*, J. EPIDEMIOLOGY & CMTY. HEALTH 536, 536, 537 (2004).

55. WHO, MULTI-COUNTRY STUDY ON WOMEN’S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN, at viii (2005).

56. WHO, GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN, *supra* note 49, at 1.

57. Olufunmilayo Fawole, *Economic Violence to Women and Girls*, TRAUMA, VIOLENCE, AND ABUSE 1, 2 (2008).

58. WHO, GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN, *supra* note 49, at 7.

59. U.N., Gen. Rec. No. 35, ¶ 7, U.N. Doc. CEDAW/C/GC/35 (July 14, 2017) [hereinafter U.N. CEDAW, Gen. Rec. No. 35].

60. *Infographic: Violence Against Women*, U.N. WOMEN, <https://www.unwomen.org/en/digital-library/multimedia/2015/11/infographic-violence-against-women> [<https://perma.cc/K3UM-8WEV>].

Despite the variety of legal instruments and procedures designed to combat gender-based violence, the *status quo* seems to suggest that the international community is far from succeeding. It begs several questions on the effectiveness of the existing international legal framework. Is international law failing if patterns of gender-based violence repeat in all major armed conflicts and persist in the peacetime? Is continued gender-based violence a consequence of ineffective implementation of international law by states? Is international law generally ill-fitted to meaningfully address gender-based violence? Does the fact that international law is shaped by states and, therefore, mostly by men who rule the states, have any bearing on effectively combating gender-based violence? All these questions are relevant to comprehensively addressing gender-based violence.

It must be understood that gender-based violence will never be “solved” by strictly legal means. It is deeply rooted in long-standing patriarchal gender stereotypes and its prevention would require “major social changes in communities, families, and nations.”<sup>61</sup> In the words of American anthropologist Sally Engle Merry, “for human rights ideas to have an impact, they need to become part of consciousness of ordinary people around the world.”<sup>62</sup> Indeed, a major mindset shift is a *sine qua non* of overcoming gender-based violence. The evolution of international human rights law can inspire such shift and help change the paradigm.

While the problem of gender-based violence is addressed by various fields of international law, including notably international humanitarian law and international criminal law, this Article will primarily focus on gender-based violence within the realm of international human rights law. However, there may be intersections with other fields of international law, for instance, to the extent that international humanitarian law and human rights law can simultaneously or complementarily apply in situations of armed conflict.<sup>63</sup>

The present Article seeks to analyze the notion of gender-based violence in light of the evolving gender discourse and identify the problems associated with effectively addressing gender-based violence in international human rights law.

Part I of the Article is dedicated to the category of gender, which is central to the discussion of gender-based violence. It analyzes the definitions of gender, enshrined in various human rights documents,

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61. SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 2 (2006).

62. *Id.* at 3.

63. ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Op., 2004 I.C.J. 131 at 105 (July 9).

and suggests using performative theory of gender to form a comprehensive view on gender-based violence.

Part II of the Article critically addresses three aspects of regulating gender-based violence: inclusivity, patriarchy, and normativity. *First*, the Article analyzes the inclusivity of existing human rights instruments tackling gender-based violence and their potential in addressing violence committed against persons within and beyond the gender binary. *Second*, the Article draws attention to patriarchy as one of the major causes of gender-based violence. It notes the interconnectedness of patriarchy and heteronormativity, suggesting that violence against women and violence against sexual minorities are often motivated by the same patriarchal beliefs. It also cautions against stereotypical perception of cultures as more or less prone to gender-based violence and encourages to focus on patriarchy within cultures instead. *Third*, the Article analyzes the normative value of the prohibition of gender-based violence in international human rights law. It concludes that, in the long term, the commitment to eradicate gender-based violence should be strengthened by framing it as a binding treaty obligation on the universal human rights level, while in the short term it can continue to be strengthened through a developing body of jurisprudence and authoritative interpretations of standing instruments.

### I. GENDER AS A SOCIAL CONSTRUCT

Gender-based violence has been on the agenda of governments, international organizations, judicial bodies, and academia for decades. Undeniably, having more and more voices speak about it helps raise awareness about the problem. Yet when discussing gender-based violence, it is important to avoid contradictory and exclusionary language. Analyzing the concept of gender (without necessarily picking the ultimate “correct” definition thereof) is a necessary first step towards coherent understanding of the matter.

One of the difficulties in regulating gender-based violence is the lack of consensus as to what “gender” means. International legal instruments often omit the word “gender,” adhering to the binary categories of men and women. For instance, the Convention on the Elimination of All Forms of Discrimination Against Women [hereinafter CEDAW] did not initially reference gender in its text. The word first appeared in the Committee on the Elimination of Discrimination Against Women [hereinafter CEDAW Committee] General Recommendation No. 9 in 1989, ten years after the adoption of CEDAW,

but remained undefined.<sup>64</sup> Twenty-one years after the term's first appearance, it was defined in General Recommendation No. 28 in 2010 as "socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women" and expressly distinguished from a biological category of "sex."<sup>65</sup> This CEDAW Committee's definition embodied a progressive understanding of gender, reflecting its constructed nature. Making the gender/sex distinction was an important milestone in the CEDAW framework, even though it did not automatically extend the application of CEDAW beyond the gender binary.

A number of instruments reference gender without defining it, such as the Declaration on the Elimination of Violence against Women<sup>66</sup> and the Inter-American Convention on the Prevention, Punishment, and the Convention of Belém do Pará.<sup>67</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa does not define gender either, but notably defines "women" as persons of "female gender"<sup>68</sup>—a definition somewhat controversial in current gender discourse.

In the realm of international labor law, in the text of the Violence and Harassment Convention, signed under the auspices of International Labor Organization and pending entry into force in 2021, the terms "sex" and "gender" are not defined but expressly distinguished.<sup>69</sup>

Some instruments both incorporate the term and purport to define it. In the domain of international criminal law, the Rome Statute of the International Criminal Court recognizes "persecution against any identifiable group or collectivity on . . . gender . . . grounds" as a crime against humanity,<sup>70</sup> but proceeds to define gender in strictly binary terms, as "the two sexes, male and female, within the context of society."<sup>71</sup>

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64. U.N. CEDAW, Gen. Rec. No. 9, *Statistical Data Concerning the Situation of Women*, Preamble, CEDAW, U.N. Doc. A/44/38 (1989).

65. U.N. CEDAW, Gen. Rec. No. 28, *Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of all Forms of Discrimination Against Women*, ¶ 2, CEDAW, U.N. Doc. C/GC/28 (Dec. 16, 2010).

66. U.N. DEVAW, *supra* note 27, art. 4(f).

67. Conv. of Belém do Pará, *supra* note 20, art. 1.

68. Maputo Protocol, *supra* note 20, art. 1(k).

69. Int'l Labor Org., Conv. Concerning the Elimination of Violence and Harassment in the World of Work, June 21, 2019, 58 I.L.M. 1170.

70. U.N. Rome Statute, *supra* note 9, art. 7(1)(h).

71. *Id.* art. 7(3).

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, akin to CEDAW Committee General Recommendation No. 28, progressively defines gender as “socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.”<sup>72</sup>

A similar view on gender is taken by the Special Rapporteur on extrajudicial, summary, or arbitrary executions Agnes Callamard, who defined gender as “social attributes and opportunities associated with being male and female, an evolving social and ideological construct that justifies inequality and a way of categorizing, ordering and symbolizing power relations.”<sup>73</sup> She proceeded by stating that gender “is not synonymous with or equivalent to sex.”<sup>74</sup>

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity [hereinafter Yogyakarta Principles 2007], a nonbinding document claiming to reflect “binding international legal standards,”<sup>75</sup> takes a different approach. It does not define gender *per se* but provides elaborate definitions of gender identity and sexual orientation.<sup>76</sup> Gender identity is defined as:

Each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>77</sup>

Sexual orientation is understood to refer to “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”<sup>78</sup>

The Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles [hereinafter

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72. The Conv. on Preventing and Combating Violence Against Women and Domestic Violence, art. 3(c) Nov. 5, 2011, C.E.T.S. No. 210.

73. Agnes Callamard (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Report on a Gender-Sensitive Approach to Arbitrary Killings*, U.N. Doc. A/HRC/35/23, ¶ 16 (June 6, 2017).

74. *Id.* ¶ 17.

75. *The Yogyakarta Principles*, *supra* note 28, pmb1.

76. *Id.*

77. *Id.* ¶ 2.

78. *Id.* ¶ 1.

Yogyakarta Principles 2017] extended the scope of the document to include gender expression<sup>79</sup> and sex characteristics.<sup>80</sup> This approach is effective because, instead of running the risk of defining gender in essentialist terms, the drafters concentrate on manifestations of gender—*inter alia*, sex characteristics, gender identity, and gender expression.<sup>81</sup>

None of the abovementioned instruments has a monopoly on defining gender. Gender is not merely a legal, but a societal and philosophical category. Defining gender is an ambitious endeavor that can be subject to a lengthy philosophical debate. Even though the attempt to formulate the ultimate definition may be futile, harmonizing the understanding of gender across human rights systems is essential. Different legal instruments, built upon different understandings of gender, create a risk of potential *fragmentation* of international human rights law. Fragmentation can mean that people, notably transgender and nonbinary persons,<sup>82</sup> subjected to violence on the same gendered grounds as cisgender women, would have to seek remedies for human rights violations under different instruments, because they were never contemplated to be the beneficiaries of certain human rights regimes. To avoid this outcome, a postmodern gender discourse, which increasingly dominates the way sex and gender are discussed in the twenty-first century, could be integrated into human rights frameworks.

The famous assertion of French philosopher Simone de Beauvoir that “one is not born, but rather becomes, a woman”<sup>83</sup> paved way for discussion of gender in the twentieth century. Something previously seen as indisputable was brought into question. Indeed, if the expectations of womanhood (such as women’s primary role as caregivers, submissiveness, lack of political will, etc.) are constructed by the society to benefit the privileged groups, how could one still claim that womanhood as an objective given?

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79. Defined as “each person’s presentation of the person’s gender through physical appearance—including dress, hairstyles, accessories, cosmetics—and mannerisms, speech, behavioural patterns, names and personal references.” *The Yogyakarta Principles Plus 10*, *supra* note 29, ¶ 1.

80. Defined as “each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.” *Id.* pmbl.

81. *Id.*

82. Transgender people may or may not identify as nonbinary, hence the distinction. See NAT’L CTR. FOR TRANSGENDER EQUAL., *Understanding Non-Binary People: How to Be Respectful and Supportive* (Oct. 5, 2018), <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive> [https://perma.cc/6SC3-4E9Z].

83. SIMONE DE BEAUVOIR, *THE SECOND SEX* 283 (2010).

Beauvoir's argument is not well taken by many. It is not uncommon to argue that even though some aspects of womanhood and manhood may be acquired, it is a medically established fact that a person is born either a man or a woman.<sup>84</sup> While it is true that people are typically assigned sex at birth, even the seemingly indisputable duality of "biological sex" may be brought into question by the very existence of intersex people.<sup>85</sup> Clearly, if even the biological difference between the "two sexes" can get blurred, defining gender in binary terms would be still more controversial and excluding.

French feminist Monique Wittig challenged the notion of sex as an "immediate given . . . belonging to a natural order," stating that it is more of a "mythic construction . . . which reinterprets physical features (in themselves as neutral as others, but marked by a social system), through the network of relationships in which they are perceived."<sup>86</sup> Along the same lines, French philosopher Michel Foucault described sex as a unique signifier, that made it possible for people to group together, in an "artificial unity."<sup>87</sup> These viewpoints on the socially constructed categories of sex and gender were analyzed and put into perspective by American philosopher Judith Butler in her renowned work *Gender Trouble*.<sup>88</sup>

Instead of characterizing gender as fictitious, artificial, or non-real, Butler famously described it as *performative*.<sup>89</sup> The corollary of her work states that "there is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results."<sup>90</sup> In a way, it is a postmodern elaboration on Beauvoir's idea of "becoming a woman." If womanhood or manhood is acquired and reaffirmed by continually

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84. AM. COLLEGE OF PEDIATRICIANS, *Gender Ideology Harms Children* (Sept. 2017), <https://www.medicinaepersona.ch/wp-content/uploads/2017/03/1.30.17b-Gender-Ideology-Harms-Children-updated.pdf> [<https://perma.cc/6BWQ-2MWV>]; see also *American College of Pediatricians*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/american-college-pediatricians> [<https://perma.cc/7388-G9H3>] (displaying that the Southern Poverty Law Center designates the American College of Pediatricians as a fringe hate group against LGBTQ individuals).

85. *Genetic Components of Sex and Gender*, WHO, <https://www.who.int/genomics/gender/en> [<https://perma.cc/54WA-YUJE>]; SHARON PREVES, INTERSEX AND IDENTITY: THE CONTESTED SELF 2–4 (2003); BRUCE HENDERSON, QUEER STUDIES: BEYOND BINARIES 105–06 (2019); DAVID A RUBIN, INTERSEX MATTERS: BIOMEDICAL EMBODIMENT, GENDER REGULATION, AND TRANSNATIONAL ACTIVISM 51 (2017).

86. MONIQUE WITTIG, THE STRAIGHT MIND AND OTHER ESSAYS 11–12 (1992); JUDITH P. BUTLER, GENDER TROUBLE: FEMINISM AND SUBVERSION OF IDENTITY 114 (1st ed. 1990).

87. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION 154 (1978); BUTLER, *supra* note 86, at 92.

88. BUTLER, *supra* note 86, at 92, 114.

89. *Id.* at 24.

90. *Id.* at 25.



practicing manly and womanly behaviors (manners, choice of clothes, choice of profession, division of household chores, etc.), then what is gender if not the constant process of performing these behaviors? Butler concludes that “because there is neither an ‘essence’ that gender expresses or externalizes nor an objective ideal to which gender aspires, and because gender is not a fact, *the various acts of gender create an idea of gender*, and without those acts, there would be no gender at all.”<sup>91</sup> In Butler’s view, this absence of objective characteristics of gender, makes it “a construction that regularly conceals its genesis.”<sup>92</sup> This view remains prevalent in contemporary feminist scholarship.<sup>93</sup>

So, what is gender? Performativity of gender implies that there is no exhaustive answer to that question. Gender is what one does, not what one is.<sup>94</sup> It is helpful to think about it as a package<sup>95</sup> or a spectrum,<sup>96</sup> that includes, but is not limited to, one’s sex characteristics (*inter alia*, assigned sex, bodily traits, hormone levels), gender identity (internal sense of self-identification), and gender expression (behaviors and attributes of self-expression, e.g., clothing, makeup, hairstyle).<sup>97</sup>

Performative theory of gender is instrumental in changing the human rights law approach to gender-based violence. Thinking beyond the binary helps realize that gender equality is not merely equality between the two sexes. International legal instruments have long sought to afford special protection to women and girls, because they have historically been primary targets of gender-based violence.<sup>98</sup> While it is not empirically untrue, gender-based violence is directed at not just cisgender women, but those practicing femininity, or generally ill-fitting into a binary gender role.<sup>99</sup> Violence is often seen as punishment for failure of people to conform to gender behaviors that they are expected to practice.<sup>100</sup> Transgender and gender nonconforming

91. *Id.* at 140 (emphasis added).

92. *Id.*

93. See THE BLOOMSBURY HANDBOOK OF 21ST-CENTURY FEMINIST THEORY (Robin Truth Goodman ed., 2019).

94. *Id.* at 43–44.

95. Nancy Felipe Russo & Angela Pirlott, *Gender Based Violence. Concepts, Methods, and Findings*, 1087 ANNALS N.Y. ACAD. SCI. 178, 180 (2006).

96. Surya Monro, *Beyond Male and Female: Poststructuralism and the Spectrum of Gender*, 8 INT’L J. TRANSGENDERISM 3, 7 (2005).

97. NICHOLAS M. TEICH, TRANSGENDER 101: A SIMPLE GUIDE TO A COMPLEX ISSUE 6–10 (2012).

98. ANCA-RUXANDRA PANDEA ET AL., GENDER MATTERS: A MANUAL ON ADDRESSING GENDER-BASED VIOLENCE AFFECTING YOUNG PEOPLE 17 (2019).

99. *Id.*

100. Vicky Hernández and Family, Honduras, Case 13.051, Inter-Am. Comm’n H.R., Rep. No. 157/18, OEA/Ser.L/V/II.170, doc. 179 ¶ 61 (2018). “[A] considerable proportion of the incidents of torture carried out against [LGBT persons] suggests that they are often subjected to violence of a sexual nature, such as rape or sexual assault, in order to

people are targeted for “masquerading” as the “wrong” gender.<sup>101</sup> Violence against men and boys often includes emasculating practices sought to symbolically undermine their masculinity.<sup>102</sup> Violence against women and girls often relates to the idea of coercing them into a “traditional” role of submitting to men’s will.

Embracing the idea of gender as a performance, rather than a trait, has a promising potential of extending explicit human rights guarantees to vulnerable groups. Yet it is not immune to criticism. Some are skeptical about a postmodernist approach to gender for the lack of attention it provides to “the lived experience of the body”<sup>103</sup> and for the “lack of political awareness.”<sup>104</sup> Some feminists state that referring to women as a group may be necessary “to make representational claims in their behalf”<sup>105</sup> in current political realities. Some claim that the obsession with attacking the “falsely hegemonic categories” of women and men “has put feminism in a bind”<sup>106</sup> or “trapped feminist thinking in an echo chamber.”<sup>107</sup> Instead of “answering the call of the Symbolic to decide once and for all what a woman is or what ‘woman’ does” feminist scholars encourage a focus on “the politics of saying and acting.”<sup>108</sup> There are also valid concerns about neutralizing gender and downplaying the importance of women’s rights, “hard-won” in the world of “male privilege and women’s oppression.”<sup>109</sup> But is performative understanding of gender really a threat to conventional models of political representation or human rights advocacy?

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*‘punish’ them for transgressing gender barriers or for challenging predominant conceptions of gender roles.*” U.N. Gen. Assembly (Special Rapporteur of The Commission on Human Rights) *Interim Report on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. No. A/56/156, at 7–8 (July 3, 2001) (emphasis added).

101. Emilia L. Lombardi, Rikki Anne Wilchins, Dana Priesing & Diana Malouf, *Gender Violence, Transgender Experiences with Violence and Discrimination*, 42 J. HOMOSEXUALITY 89, 100 (2008).

102. H.R.C., *Sexual and Gender-Based Violence in Myanmar*, *supra* note 31, ¶ 156; H.R.C., “I Lost My Dignity,” *supra* note 31, at 11.

103. Monro, *supra* note 96, at 3.

104. *Id.*

105. BUTLER, *supra* note 86, at 142.

106. THE BLOOMSBURY HANDBOOK OF 21ST-CENTURY FEMINIST THEORY, *supra* note 93, at 4.

107. *Id.*

108. *Id.*

109. Jeanne Ward, *It’s Not About the Gender Binary, It’s about the Gender Hierarchy: a Reply to “Letting Go of the Gender Binary,”* 98 INT’L REV. RED CROSS 275, 282 (2016), in response to Chris Dolan, *Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence*, 96 INT’L REV. RED CROSS 485 (2014); see also Dolan’s response in Chris Dolan, *Inclusive Gender: Why Tackling Gender Hierarchies Cannot Be at the Expense of Human Rights and the Humanitarian Imperative*, 98 INT’L REV. RED CROSS 625, 626–34 (2016).

First, performative gender theory is not an arbitrary imposition of how people must *feel* about their sex or gender. On a subjective, individual level, people can have a perception of their gender as an essence, not a performance.<sup>110</sup> Yet on a societal level, deconstructing the idea of gender can be beneficial to vulnerable stakeholders, who remain invisible and unprotected in the strict binary system.

Second, a performative understanding of gender, fortunately or unfortunately, does not lead to a complete transformation of political systems. It does not take away the possibility of people, as participants of democracy, to unite around more “traditional” gender identities to achieve a specific political goal. It may, in fact, be more effective under the *status quo* to advocate for policy change under a well-established political label. In the author’s view, the trend of moving to a “post-binary”<sup>111</sup> society can coexist with current representation models, at least in the transition period. While Butler’s scenario, whereby “a new configuration of politics would surely emerge from the ruins of the old,”<sup>112</sup> is possible and even desirable, universal acceptance of gender beyond the binary remains an aspiration. However, it is natural for “terminology that constitutes feminist politics [to constantly overturn and reorganize] what counts as a feminist subject.”<sup>113</sup> Embracing the post-binary should not be seen as a threat to feminist and human rights discourse, but be integrated as part of their constantly evolving agenda.<sup>114</sup>

110. Mere Abrams, *Gender Essentialism Is Flawed—Here’s Why*, HEALTHLINE (Jan. 27, 2020), <https://www.healthline.com/health/gender-essentialism#definition> [https://perma.cc/R2WC-3V44]. This perception will never be true for all.

111. KERRY O’HALLORAN, SEXUAL ORIENTATION, GENDER IDENTITY AND INTERNATIONAL HUMAN RIGHTS LAW: COMMON LAW PERSPECTIVES 18 (2020).

112. BUTLER, *supra* note 86, at 149.

113. THE BLOOMSBURY HANDBOOK OF 21ST-CENTURY FEMINIST THEORY, *supra* note 93, at 4; *see also* ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 186 (1988) (“I am not saying that we ought never to think about or refer to women ‘as women’ and men ‘as men’ I am only insisting that whenever we do, that we remember which women and which men we are thinking about.”).

114. Note that whenever violence and discrimination on the basis of gender are discussed in feminist or human rights discourse it is important to follow an *intersectional approach*. Discrimination based on gender overlaps with discrimination based on religion, race, class, ethnicity, migrant status, age, disability, sexual orientation, etc. People associate themselves with multiple social signifiers simultaneously—some immutable and some acquired—and it is often the combination of those signifiers that makes them targets of discrimination and violence.

The term “*intersectionality*” was coined by American legal scholar Kimberlé Crenshaw to address the legal system’s failure to address the overlapping discrimination of Black women based on both their race and gender. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHIC. LEGAL F. 139, 140 (1989). Butler later reflected on the idea that “gender intersects with racial, class, ethnic, sexual, and regional modalities of discursively constituted identities.” BUTLER, *supra* note 86, at 3.

## II. PROBLEMS AND PERSPECTIVES OF REGULATING GENDER-BASED VIOLENCE IN INTERNATIONAL HUMAN RIGHTS LAW

### A. Inclusivity

There is no single universally accepted definition of gender-based violence in international human rights law. It is not imperative that an exhaustive definition is even given, in order to accommodate for the term's potential evolution. However, it is in the interests of the international community that there is at least a coherent understanding of what constitutes gender-based violence and who may fall victim to it. In the absence of such understanding, states are left with a dangerously wide discretion in choosing what to include and exclude from the notion of gender-based violence. This risk may manifest in excluding<sup>115</sup> certain gender identities (notably transgender and nonbinary people) from the benefits of human rights protection.

While CEDAW is known for pioneering the values of gender equality in international law, the word "violence" does not once appear in the Convention. The plain language of the Convention concentrates on a broader category of discrimination. To remedy that *lacunae*, the CEDAW Committee in its General Recommendation No. 19 clarified that discrimination in the meaning of the Convention also covers gender-based violence, defined as "violence that is directed against a woman because she is a woman or that affects women disproportionately."<sup>116</sup> The logical fallacy of that definition is that it equates gender-based violence with violence against women, even though the former is a wider category applicable to more than one gender.

Later attempts to make the prohibition of gender-based violence a binding obligation, by developing a separate additional protocol to CEDAW or drafting a subject-specific treaty were unsuccessful.<sup>117</sup>

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More recent scholarship of American academic Mary Romero likewise embodies the idea that "without considering age, class, race, ableness, and sexual orientation as social identities, gender exists as an empty signifier." MARY ROMERO, INTRODUCING INTERSECTIONALITY 98 (2017); *see also* Rashida Manjoo (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Sixty-Sixth Session on Multiple and Intersecting forms of Discrimination and Violence against Women*, U.N. Doc. No. A/HRC/17/26, ¶ 3 (Oct. 10, 2011).

115. At least, making it unclear whether they can expect the same degree of protection, if confronted with violence.

116. U.N., Gen. Rec. No. 19, *Violence Against Women*, CEDAW, U.N. Doc. A/47/38, at 1 (Jan. 29, 1992) [hereinafter U.N. CEDAW, Gen. Rec. No. 19].

117. *See* Rashida Manjoo (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Twenty Years of Developments to Combat Violence Against Women*, ¶ 10 (May 28, 2014).

The compromise was achieved in the Declaration on the Elimination of Violence against Women [hereinafter DEVAW].<sup>118</sup> Article 1 of the Declaration states that “violence against women” means “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>119</sup> While the Declaration remains a nonbinding instrument, it has been instrumental in bringing gender-based violence against women into the spotlight.<sup>120</sup> Notably, it paved the way to the Beijing Declaration and Platform for Action, which referenced the DEVAW definition of violence against women and extended it to include violence committed in armed conflict.<sup>121</sup> DEVAW and Beijing forged a definition of violence against women somewhat more inclusively, suggesting that violence against women is one of the forms of gender-based violence, but not the only one.<sup>122</sup>

Twenty-five years after the adoption of General Recommendation No. 19, the CEDAW Committee once again addressed the notion of gender-based violence in its General Recommendation No. 35.<sup>123</sup> In this recommendation, the Committee chose to use the more precise<sup>124</sup> phrase “gender-based violence against women” to highlight the gendered causes and impacts of such violence.<sup>125</sup> Importantly, the Committee mentioned that women face “varying and intersecting

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It has been argued that an optional protocol or a new convention on violence against women should be viewed as long-term measures to be implemented if the General Recommendations of CEDAW, the Declaration and the Special Rapporteur proved ineffective. Others have argued that the Declaration, as opposed to a convention on the elimination of violence against women, was adopted because of *fears of confusion between the scope of the CEDAW and a new binding treaty on violence against women; fears that a new binding instrument might run the risk of limited ratification; and also because of concerns about the expense of implementing a new binding instrument.*

*Id.* (emphasis added).

118. U.N. DEVAW, *supra* note 27, art. 1.

119. *Id.*

120. *Global norms and standards: Ending violence against women*, UN WOMEN, <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards> [<https://perma.cc/3VVZ-NFZU>].

121. Beijing Decl. & Platform for Action, Rep. of the Fourth World Conf. on Women, U.N. Doc. A/C.177/20, ¶¶ 113(a)–(c), 114 (1995).

122. See U.N. DEVAW, *supra* note 27, art. 1; Beijing Decl. & Platform for Action, *supra* note 121, ¶¶ 113(a)–(c), 114.

123. U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 9.

124. The author considers it more precise because, while choosing to concentrate on the category of women, it does not preclude the interpretation of gender-based violence as a broader concept, affecting more than one gender.

125. U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 9.

forms of discrimination,” which can be enhanced by other factors—*inter alia*, by being lesbian, bisexual, transgender, or intersex.<sup>126</sup>

Lesbian, bisexual, transgender, and intersex persons were mentioned by the CEDAW Committee again in General Recommendation No. 36 on the right of girls and women to education, in line with the initiative of the International Gay and Lesbian Human Rights Commission.<sup>127</sup> The Committee specifically called upon states parties to “address discrimination against [lesbian, bisexual, transgender, and intersex] girls and women by ensuring policies are in place to address the obstacles that impede their access to education.”<sup>128</sup> The Recommendation also identified limited education and cultural taboos as factors that increase the vulnerability of lesbian, bisexual, transgender, and intersex students to violence.<sup>129</sup> Although the Recommendation was dedicated to questions of education and not violence *per se*, it made an important nexus between the two. By expressly stating that gender-based violence happens to people of diverse genders and sexual orientations, it took a crucial step towards making the CEDAW framework more inclusive.<sup>130</sup>

Another example of understanding gender-based violence inclusively is the Violence and Harassment Convention signed under the auspices of the International Labor Organization.<sup>131</sup> It explicitly decouples “sex” and “gender” categories, defining “gender-based violence and harassment” as “violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately.”<sup>132</sup> In the preamble, it also notes the disproportionate impact gender-based violence and harassment have on women and girls, and recognizes that “an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations” is essential to ending violence.<sup>133</sup> The Convention

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126. *Id.* ¶ 12.

127. *Id.* ¶ 45; INT’L GAY AND LESBIAN HUMAN RIGHTS COMM’N, WHY SEXUAL ORIENTATION AND GENDER IDENTITY MUST BE SPECIFICALLY REFERENCED IN THE FORTHCOMING CEDAW GENERAL RECOMMENDATION ON GIRLS’ AND WOMEN’S ACCESS TO EDUCATION 8 (2014), <https://www.ohchr.org/Documents/HRBodies/CEDAW/WomensRightEducation/IGLHRCContribution.pdf> [<https://perma.cc/XL5P-9R9D>].

128. U.N., Gen. Rec. No. 36, On the Right of Girls and Women to Education, U.N. Doc. CEDAW/C/GC/36, ¶ 46(I) (Nov. 16, 2017) [hereinafter U.N. CEDAW, Gen. Rec. No. 36].

129. *Id.* ¶ 45.

130. *See id.* ¶¶ 65–66, 69(a)–(I).

131. Conv. Concerning the Elimination of Violence and Harassment in the World of Work, adopted by the International Labor Organization June 21, 2019, 58 I.L.M. 1170 pmb1.

132. *Id.* art. 1(1)(b).

133. *Id.* pmb1.

adopting a gender-inclusive approach to the problems of workplace violence and harassment has so far been ratified by only two states—Fiji and Uruguay—making it sufficient to formally enter into force,<sup>134</sup> but hardly impactful enough to reflect wide state consensus.

Regional human rights instruments largely use binary language when addressing violence.<sup>135</sup> For example, the Convention of Belém do Pará and the Maputo Protocol use the term “violence against women” in their operative clauses.<sup>136</sup>

However, the Istanbul Convention, while concentrating on women’s rights, does not equate all gender-based violence to violence against women as a definitional matter.<sup>137</sup> Similarly to General Recommendation No. 35 of the CEDAW Committee, it uses the phrase “gender-based violence against women,”<sup>138</sup> and explains the document’s chosen focus on women in the preamble, stating that “women and girls are exposed to a higher risk of gender-based violence than men.”<sup>139</sup> Moreover, Article 4, paragraph 3 of the Istanbul Convention requests state parties to implement all measures in the Convention without discrimination on grounds of sexual orientation or gender identity.<sup>140</sup> This provision is interpreted in the Explanatory Report to the Istanbul Convention to mean that “groups of persons that do not correspond to what society has established as belonging to ‘male’ or ‘female’ categories” are covered by the nondiscrimination clause.<sup>141</sup> This clarification is crucial. It arguably makes the Istanbul Convention the most inclusive instrument designed to combat gender-based violence.

However, the language of the Explanatory Report allows states parties significant discretion in affording protection to gender-diverse persons under the Istanbul Convention.<sup>142</sup> Namely, it states that “when ensuring that a gender-sensitive interpretation is given to each of the convention grounds, Parties *may if they wish*, extend

134. *Id.* art. 14(2).

135. *See, e.g.*, Conv. of Belém do Pará, *supra* note 20, pmb.; Maputo Protocol, *supra* note 20.

136. Conv. of Belém do Pará, *supra* note 20, pmb.; Maputo Protocol, *supra* note 20.

137. Istanbul Conv., *supra* note 20, art. 3(d).

138. *Id.*

139. *Id.* pmb.; *see also* RONAGH, J. A. MCQUIGG, THE ISTANBUL CONVENTION, DOMESTIC VIOLENCE AND HUMAN RIGHTS 52, 56 (2017) (highlighting the considerations of the European Committee on Crime Problems feasibility study regarding a convention on domestic violence, preceding the adoption of the Istanbul Convention) (“Even though the majority of victims are women, a convention would preferably use gender-neutral terminology. That would not preclude a gender-based analysis of the underlying problem, nor a gender-sensitive implementation of the convention.”).

140. Istanbul Conv., *supra* note 20, art. 4(3).

141. Explanatory Rep. to the Istanbul Conv., ¶ 53, C.E.T.S. No. 210 (Nov. 5, 2011).

142. *Id.* ¶¶ 85, 162, 214, 278.

the interpretation to individuals who are gay, lesbian, bisexual or transgender, who may also face particular forms of gender-related persecution and violence.”<sup>143</sup> The access of gender-diverse persons to the Istanbul Convention’s guarantees through the nondiscrimination clause may be the best mechanism developed so far, but it is not ideal.

Although the understanding of gender has evolved,<sup>144</sup> gender-based violence is mostly addressed by women-specific human rights instruments.<sup>145</sup> The prevalent approach of such instruments is to focus on the category of women, while acknowledging the potentially wider interpretation of gender-based violence.<sup>146</sup> This is a thoughtful strategy that can accommodate for future developments of international human rights law, while still concentrating on a particularly affected group.

While the chosen focus on women is lawful and fully justified by historic oppression, it does not prevent human rights instruments from confronting *gender dilemmas* in the future. These documents will sooner or later be challenged to address issues that were not initially part of their “comfort zone” and they will need to respond. For instance, can a transgender woman<sup>147</sup> seek protection under CEDAW or regional instruments? Can every transgender woman seek such protection or is this right limited to transgender women who have surgically transitioned and acquired documents indicating their sex as female? How about male-to-female transgender persons who are in the process of transition? How about those who do not ever wish to undergo surgical or medical transition? How about transgender men who retain female physical features and are attacked because the aggressors perceive them as women?

In 1993 Tyra Hunter, a transgender woman from Washington, D.C., died of injuries she suffered in a car accident after emergency personnel refused to treat her when they discovered that she was anatomically male.<sup>148</sup> In 1999 Brandon Teena, a transgender man from Nebraska, who had not undergone male-to-female surgery, was raped and murdered by his acquaintances who found out that he was anatomically female.<sup>149</sup> Whether or not similarly situated

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143. *Id.* ¶ 313 (emphasis added).

144. See discussion *supra* Part I.

145. See, e.g., U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶¶ 9–10.

146. See, e.g., Ward, *supra* note 109, at 278.

147. Note that the term “transgender woman” is used here for the purposes of distinguishing it from the term “cisgender woman.” Persons who technically “qualify” as “transgender women” can, in fact, identify as just “women” and may not use the word “trans” when referring to themselves.

148. TEICH, *supra* note 97, at 100.

149. *Id.*



persons could count on CEDAW or regional instruments' protection remains an open question.

More recently, in the summer of 2020 the transfemicides of Tony McDade, Nina Pop, Dominique Fells, and Riah Milton may have been a less visible, yet a crucial part of Black Lives Matter protests.<sup>150</sup> The trans-exclusionary approach to feminism recently exhibited by famous writer Joanne Rowling in her work and on her social media platforms was severely criticized by the trans community and its allies.<sup>151</sup> The *Bostock v. Clayton County* case of the Supreme Court of the United States decided in 2020 has brought attention to the problems of gender-based discrimination in the workplace.<sup>152</sup> The need to address gender-based violence against gender-variant individuals is evident and the cases reaching national and international judicial and quasi-judicial platforms will only increase.

In 2018, the case of transgender activist Vicky Hernández was heard before the Inter-American Commission of Human Rights and presented to the Inter-American Court of Human Rights, pending judgement.<sup>153</sup> The Commission's report involves analysis on the application of the Convention of Belém do Pará to transgender persons.<sup>154</sup> It states that the Commission "has already taken into account considerations made at the international level that violence against LGBT<sup>155</sup> persons 'constitute[s] a form of gender-based violence, driven by a desire to punish those seen as defying gender norms.'"<sup>156</sup> The Commission ultimately concluded that there had been a violation of Article 7 of the Convention of Belém do Pará,<sup>157</sup> effectively extending the protection from violence to transgender women. This pronouncement remains nonbinding, but if the Inter-American Court of Human Rights adopts the Commission's approach, this interpretation would be given more authoritative weight.

150. Isabella Grullón Paz & Maggie Astor, *Black Trans Women Seek More Space in the Movement They Helped Start*, N.Y. TIMES (June 28, 2020), <https://www.nytimes.com/2020/06/27/us/politics/black-trans-lives-matter.html> [<https://perma.cc/627W-D45C>]; Elliott Kozuch, *HRC Mourns Nina Pop, Black Trans Woman Killed in Missouri*, HUM. RTS. CAMPAIGN (May 5, 2020), <https://www.hrc.org/news/hrc-mourns-nina-pop-black-transgender-woman-killed-in-missouri> [<https://perma.cc/E2GB-ZSJH>].

151. Lianne Kolirin, *JK Rowling's New Book Sparks Fresh Transgender Rights Row*, CNN (Sept. 15, 2020), <https://www.cnn.com/2020/09/15/entertainment/jk-rowling-troubled-blood-book-trans-gbr-scli-intl/index.html> [<https://perma.cc/7MSQ-VCK7>].

152. 590 U.S. 1731, 1737 (2020).

153. Vicky Hernández and Family, Honduras, Case 13.051, Inter-Am. Comm'n H.R., Rep. No. 157/18, OEA/Ser.L/V/II.170, doc. 179 (2018).

154. *Id.* ¶¶ 46–88.

155. Unless used as part of quoted direct speech, throughout the Article the terms "LGBTQ+" or "LGBTQIA+" will be used.

156. Vicky Hernández and Family, Honduras, Case 13.051, ¶ 60 (emphasis added).

157. *Id.* ¶ 101.

The United Nations Fact-Finding Mission on Myanmar, extensively cited by the parties in *The Gambia v. Myanmar* case before the International Court of Justice to illustrate claims of genocide, uniquely addresses transgender violence (alongside violence against women and girls and men and boys) in its report.<sup>158</sup> Rape and gang rape, genital mutilation, forced nudity, and other forms of sexual violence, sometimes leading to death, were used to humiliate women,<sup>159</sup> publicly emasculate men,<sup>160</sup> and cause double victimization of transgender persons.<sup>161</sup> The Independent International Commission of Inquiry on the Syrian Arab Republic does not tackle violence against transgender persons, but concludes that ISIL violence against women, girls and “sexual minorities” violates international humanitarian and human rights law.<sup>162</sup> It also describes violence perpetrated against men and boys.<sup>163</sup> The documented atrocities in Myanmar and Syria were exacerbated by militarized settings and the intersections of gender, sexual identity, ethnicity, and religion of victims.<sup>164</sup>

A useful critique of the binary approach was provided by legal scholar Darren Rosenblum in his article *Unsex CEDAW*.<sup>165</sup> He argues that CEDAW’s focus on women “serves to reinforce the very binary that must be dismantled to achieve change.”<sup>166</sup> He criticizes CEDAW for using an identitarian term as a universal descriptor.<sup>167</sup> Acknowledging that the “biologically driven clarity” of the term “women” must have been appealing for CEDAW drafters because it could be accepted by a wide range of states,<sup>168</sup> he observes that such framing left transgender and intersex persons<sup>169</sup> “in the difficult position of questionable international law subjectivity,”<sup>170</sup> while further entrenching the idea of womanhood as victimhood.<sup>171</sup>

While Rosenblum’s concerns are relevant, there are possible ways to address the inclusivity critique without rewriting CEDAW.

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158. H.R.C., Sexual and Gender-Based Violence in Myanmar, *supra* note 31. Note that the Inter-American Court of Human Rights merely made a *recommendation* based off of the Commission’s findings, with no indication that it was adopting the Commission’s approach.

159. *Id.* ¶ 118.

160. *Id.* ¶¶ 154, 171.

161. *Id.* ¶ 180.

162. H.R.C., “I Lost My Dignity,” *supra* note 31, ¶¶ 103–13 (emphasis added).

163. *Id.* ¶¶ 43–50.

164. *Id.* ¶¶ 43–50.

165. Darren Rosenblum, *Unsex CEDAW, or What’s Wrong With Women’s Rights*, 20 COLUM. J. GENDER & L. 98, 103–05 (2011).

166. *Id.* at 104.

167. *Id.* at 134.

168. *Id.* at 106.

169. The critique is equally applicable to nonbinary/gender nonconforming persons.

170. Rosenblum, *supra* note 165, at 175.

171. *Id.* at 167–68.

For instance, one could argue, based on the evolutionary interpretation of treaties, that the notion of “women” in women-specific instruments has grown to include transgender women and/or transgender men.<sup>172</sup> It is also possible to claim that, even though transgender and nonbinary people may not be direct beneficiaries of women’s rights protection regimes, they may seek protection against violence in nondiscrimination clauses of the two human rights covenants,<sup>173</sup> or in specialized instruments—*inter alia*, the Yogyakarta Principles 2007 and 2017, which are themselves nonbinding, but profess to “affirm binding international legal standards with which all states must comply.”<sup>174</sup>

The Yogyakarta Principles 2017 address four grounds for discrimination: gender identity, gender expression, sex characteristics, and sexual orientation.<sup>175</sup> The first three of these grounds refer to the elements of gender,<sup>176</sup> and the fourth deals with sexual orientation, i.e., “one’s romantic and sexual attraction to others.”<sup>177</sup> While sexual orientation and gender identity remain two distinct notions,<sup>178</sup> the concept of addressing them jointly (but separately from women’s rights) perhaps stems from the way the underpinning rights have been politically advocated.<sup>179</sup> Women’s rights have been spearheaded

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172. See Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, Inter-Am. Comm’n H.R., OAS/Ser.L/V/II.rev.1, Doc. 36 ¶ 52 (2015).

IACHR notes that sexual orientation and gender identity are not expressly included in the Convention of Belém do Pará. However, the IACHR is of the view that the Convention of Belém do Pará is a ‘*living instrument*.’ Thus, the Commission considers that when Article 9 of the Convention of Belém do Pará speaks of the state obligation to take special account of factors of special vulnerability to violence, listing certain examples ‘among others,’ these other factors would necessarily include sexual orientation and gender identity.

*Id.*

173. ICCPR, *supra* note 15; ICESCR, *supra* note 15.

174. *The Yogyakarta Principles*, *supra* note 28, pmbl.

175. *The Yogyakarta Principles Plus 10*, *supra* note 29, pmbl.

176. See discussion *supra* Part I.

177. TEICH, *supra* note 97, at 14.

178. See H.R.C., Rep. of the Independent Expert, *supra* note 36, ¶ 2 (“Sexual orientation has an *external* dimension—it indicates a person’s sexual inclination and feelings towards others. Gender identity has an *internal* dimension—the term refers to how a person self-identifies in regard to his or her own gender, which may be different from the gender assigned at birth.”).

179. See O’HALLORAN, *supra* note 111, at 13.

An identity is the particular aggregate of constituents, or their configuration, that distinguishes an entity from all others. Once identified, an entity then becomes amenable to classification, which in turn means it can be ascribed a status or be rank-ordered relative to other entities. In effect, *identification leads to determining the significance of an entity and its worth*; this establishes its value or perhaps power in relation to its context. *Not until it acquires or is ascribed an identity can an entity be recognized in law and*

by the feminist movement(s), often conventionally centered around the “women/men” dialectic.<sup>180</sup> While LGBTQIA+ is perceived by some as a form of political unity,<sup>181</sup> akin to the feminist movement,<sup>182</sup> the dialectic of its struggle is a lot less clear. At the very least, it combines the “gay/straight” dialectic of L, G, B; the “transgender/cisgender” of T; the “biologically concordant/non-concordant” of I; the “sexual/nonsexual” of A; and the “normative/non-normative” of Q.<sup>183</sup> Certainly, all of these groups are attacked for similar patriarchal “reasons” and it is practical to address the intersections holistically. Yet women are also attacked because of patriarchy.<sup>184</sup> While LGBTQIA+ unites both gender and sexual orientation signifiers under the same umbrella, resulting in documents like the Yogyakarta Principles, women’s rights occupy a distinct political platform and are typically addressed in women-specific instruments.<sup>185</sup> In fact, when criticizing the CEDAW binary language, Rosenblum commended a more inclusive framework of the Yogyakarta Principles.<sup>186</sup>

Having noted the peculiarities of the Yogyakarta Principles’ inclusive “design,” their substantive provisions on gender-based violence must be analyzed. Without giving gender-based violence a definition *per se*, the Yogyakarta Principles recognize the existence of violence based on sexual orientation, gender identity, gender expression, and sex characteristics<sup>187</sup> and refer to the obligation to

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then deemed to be vested with a ‘legal personality’ with rights and duties that can be the subject of legal proceedings.

*Id.* (emphasis added).

180. See, e.g., Quinn Crossley, *Uplifting Diverse Genders: Beyond “Women and Non-Binary,”* MEDIUM (Mar. 2, 2019), <https://medium.com/@quinnrossley/uplifting-diverse-genders-beyond-women-and-non-binary-916c890f2185> [<https://perma.cc/LQ49-RWDS>].

181. O’HALLORAN, *supra* note 111, at 15 (“[The term ‘LGBT community’] is admittedly inadequate but has come to be accepted as a form of shorthand to identify those perceived to fall outside rigid binary sex and gender norms.”).

182. Perception of feminism as a single and homogeneous political movement is, likewise, questionable. It is not uncommon to refer to “feminisms” to reflect the variety of feminist philosophies and movements.

183. Gender-queerness can be experienced differently, but it generally opposes the need for self-labeling in matters of gender and sexual orientation. See O’HALLORAN, *supra* note 111, at 20 (citing DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY, 62 (1997)) (“Queer is by definition whatever is at odds with the normal, the legitimate, the dominant. There is nothing in particular to which it necessarily refers. It is an identity without an essence. ‘Queer’ then, demarcates not a positivity but a positionality vis-à-vis the normative.”).

184. H.R.C., “The Time to Act Is Now”—UN Experts Urge Men and Boys to Become Women’s Rights Defenders 1, 2 (2020).

185. See, e.g., U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶¶ 9–10.

186. Rosenblum, *supra* note 165, at 106, 162, 166. Rosenblum also argues that both the Yogyakarta Principles and CERD are more inclusive because of their right-based character, as contrasted with CEDAW identity-centered approach. *Id.* at 166.

187. *The Yogyakarta Principles*, *supra* note 28, pmb1.

combat violence multiple times.<sup>188</sup> This framing helps expand the understanding of gender-based violence to account for the experiences of gender-diverse people.

Inclusivity is important. Representatives of different gender identities should not feel like they have a lesser claim to human rights protection from violence, than those whose identity is more “conventional” (and, therefore, perceived as more real or more valid). According to the data of Transrespect versus Transphobia Worldwide, 2300 transgender persons are known to have been killed in the last decade in dozens of countries.<sup>189</sup> According to the Human Rights Campaign Foundation, forty-seven percent of transgender people have been sexually assaulted, while often being “left out of conversations surrounding intimate partner violence and sexual assault.”<sup>190</sup>

The focus on women reflected in CEDAW, DEVAW, and regional human rights instruments is understandable, well-meant, and hard-won.<sup>191</sup> The author does not wish to disregard the painstaking struggle against historic male oppression that lies at the heart of these documents. Nor does she wish to dispute the fact that a large number of gender-based violence survivors are indeed cisgender women attacked by cisgender men. While these experiences are not to be neglected, they should not justify trans-exclusionary approaches<sup>192</sup> to gender-based violence.

Standing definitions of gender-based violence are not hopelessly exclusionary and there is some leeway for an “evolutionary interpretation” argument.<sup>193</sup> However, most human rights instruments dealing

188. *Id.* principles 33(F), 36, 37(A), 9(H), 17(J), 23(E), 24(H), 25(D).

189. HUM. RTS. CAMPAIGN FOUND., *DISMANTLING A CULTURE OF VIOLENCE: UNDERSTANDING ANTI-TRANSGENDER VIOLENCE AND ENDING THE CRISIS*, 1, 14 (2018).

190. *Id.*

191. Similar logic is applicable in the humanitarian context. *See* Ward, *supra* note 109, at 282.

192. On the notion of trans-exclusionary radical feminism (TERF), *see* THE BLOOMSBURY HANDBOOK OF 21ST-CENTURY FEMINIST THEORY, *supra* note 93, at 149; *see also* Robin Dembroff, *Trans Women Are Victims of Misogyny, Too—and All Feminists Must Recognize This*, THE GUARDIAN (May 19, 2019), <https://www.theguardian.com/commentisfree/2019/may/19/valerie-jackson-trans-women-misogyny-feminism> [<https://perma.cc/J4VQ-D5Y7>]; Emi Koyama, *The Transfeminist Manifesto*, in *CATCHING A WAVE: RECLAIMING FEMINISM FOR THE TWENTY-FIRST CENTURY* 245, 248 (Rory Dicker & Alison Piepmeier eds., 2003).

193. For an optimistic view on potentially extending existing definitions, *see*:

While the UN definitions both refer specifically to women, they also *allow for a wider definition of gender* which could be extended to vulnerable males, even though the majority of, or a disproportionate number of victims are indeed still female. This approach takes into account *social constructions of masculinity and femininity* and allows for examination of broader issues of sexuality, including protection of rights in relation to freedom of sexual orientation, which are still highly under-developed in international human

with gender-based violence default to the binary.<sup>194</sup> This illustrates an identity divide between “traditional” and “nontraditional.” Women whose sex, gender identity, and expression are a perfect cisgender fit are welcome to seek protection as women. Women who are less gender concordant are encouraged to seek protection as LGBTQIA+, not as women. This approach, especially *in the absence of binding LGBTQIA+ specific instruments* to counterbalance women-specific ones, fragments and weakens international human rights responses to gender-based violence, which strikes without acknowledging the peculiarities of legal frameworks.

Developing strategic jurisprudence (*Vicky Hernández and Family v. Honduras*), adopting inclusive interpretations of gender-based violence (CEDAW Committee General Recommendation No. 36), and using nondiscrimination clauses of women-specific instruments are the crucial first steps of extending human rights guarantees beyond the binary, but more remains to be done. In the fight against gender-based violence, there needs to be solidarity across genders and orientations. Whether it is achieved through more inclusive interpretations of existing texts or through negotiating new, more inclusive ones, it is desirable that international human rights law promotes solidarity, not otherness.

### B. Patriarchy

On International Women’s Day 2020, a group of 77 United Nations experts made a joint statement urging states and private actors to “ensure systematic changes to *patriarchal* power structures, social norms, gender stereotypes and hostile environments.”<sup>195</sup> The call to dismantle patriarchy can only be acted upon once its overarching nature, the ways it is ingrained in cultural practices, and the ways it manifests in gender-based violence are understood.<sup>196</sup>

When womanhood and manhood are socially constructed, they are constructed based on certain rules.<sup>197</sup> There is an unspoken script

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rights law. The terminology around gender-based violence, as opposed to that of violence against women or sex discrimination, highlights the relevance of *multiple power hierarchies* which can victimize both men and women in a variety of contexts.

Ilias Bantekas & Lutz Oette, *The Human Rights of Women*, in INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 534–35 (3d ed. 2020) (emphasis added).

194. See, e.g., Explanatory Rep. to the Istanbul Conv., *supra* note 141, ¶¶ 1, 45.

195. Off. of High Comm’ner, U.N. Human Rights, International Women’s Day Statement from United Nations Human Rights Experts (Mar. 6, 2020) [hereinafter International Women’s Day Statement].

196. *Id.*

197. See REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 1 (2010).

in a play of womanhood and manhood, in which the leading actor is a man and the supporting actress is a woman.<sup>198</sup> The way people are supposed to perform these two (and only two) gender roles is determined by patriarchy.<sup>199</sup>

Feminist scholar bell hooks<sup>200</sup> describes patriarchy as “the dynamic between those qualities deemed ‘masculine’ and ‘feminine’ in which half of our human traits are exalted while the other half is devalued.”<sup>201</sup> She calls patriarchy a “tortured value system,” in which both men and women participate.<sup>202</sup> Historian Merry Wiesner-Hanks defines patriarchy as a “social system in which men have more power and access to resources than women of the same group, and in which men are privileged over other men.”<sup>203</sup>

In their book *Why Does Patriarchy Persist?*, Carol Gilligan and Naomi Snider define patriarchy as a culture based on a *gender binary* and hierarchy, a framework or lens that (1) leads us to see human capacities as either “masculine” or “feminine” and to privilege the masculine, (2) elevates some men over other men and all men over women, (3) forces a split between the self and relationships so that in effect men have selves, whereas women ideally are selfless, and women have relationships, which surreptitiously serve men’s needs.<sup>204</sup> In their view, “gender binary and hierarchy” are key elements of maintaining patriarchal order.<sup>205</sup>

Patriarchy is a crucial force in constructing socially acceptable gender roles.<sup>206</sup> An extension of this power to define manhood and womanhood is the power to dictate who men and women are supposed to be attracted to. *Heteronormativity* is as important part of patriarchy as male superiority.<sup>207</sup> Not only does patriarchy negatively affect women as an “inferior” gender, it affects everyone who is gender- or sexually “mismatched.”<sup>208</sup> When a cisgender woman demands equal

198. *See id.*

199. *See* BELL HOOKS, *THE WILL TO CHANGE: MEN, MASCULINITY, AND LOVE* 19–20 (2004).

200. Lowercase intended.

201. *See* HOOKS, *supra* note 199, at 32–33; *see also* CLEMENTINE FORD, *BOYS WILL BE BOYS: POWER, PATRIARCHY AND TOXIC MASCULINITY* 8–9 (2019).

202. HOOKS, *supra* note 199, at 33.

203. MERRY E. WIESNER-HANKS, *WOMEN AND GENDER IN EARLY MODERN EUROPE* 325 (4th ed. 2019).

204. CAROL GILLIGAN & NAOMI SNIDER, *WHY DOES PATRIARCHY PERSIST?* 6 (2018).

205. *Id.* at 135–36.

206. HOOKS, *supra* note 199, at 19–20.

207. *See* Radhika Coomaraswamy (Special Rapporteur on violence against women, its causes and consequences) on its Fifty-eighth session, *Cultural practices in the family that constitute violence towards women*, ¶ 29, U.N. Doc. E/CN.4/83 (Jan. 31, 2002) (“[N]on-heterosexual orientations are also punished severely. . . . [I]n Zimbabwe, a young lesbian woman was locked up by her family and forced to submit to rape by an older man to ‘correct’ her orientation. She was raped until she became pregnant.”) (emphasis added).

208. *See* COOK & CUSACK, *supra* note 197, at 33.

division of household chores—she is mismatched, because women are supposed to be housekeepers.<sup>209</sup> When a cisgender woman is attracted to women—she is mismatched, because she is supposed to like men. When a cisgender man earns less than his wife—he is mismatched, because men are supposed to be breadwinners.<sup>210</sup> When a cisgender man is attracted to men—he is mismatched, because he is supposed to like women. Transgender people are a mismatch by default. This immediate intersection of gender and sexual orientation is at the heart of patriarchy.<sup>211</sup>

Patriarchy is a necessary ideological foundation of a gender-unequal society. It legitimizes the superiority of men over women. It manifests in laws, policies, family relations, cultural practices, and media representations. It disapproves of and sanctions nonconformity. It provides a moral, essentialist justification to harmful practices. When women and gender-diverse persons are underrepresented in governmental institutions, patriarchy provides a rationale for it—there is just something inexplicably but fundamentally manly about a political career. When rape culture<sup>212</sup> persists, it rests on a patriarchal belief that rape can be “provoked”<sup>213</sup> by inappropriate behaviors. Such prejudices generate disrespect and devaluation of “gender inferior” persons in all sectors of society.<sup>214</sup> Failure to recognize and eliminate patriarchal prejudices and stereotypes exacerbates a climate of impunity with respect to violations of human rights.<sup>215</sup>

A patriarchal definition of “masculinity” often “involves a tolerance of violence.”<sup>216</sup> Gender-based violence is an embodiment of patriarchy, a manifestation of full power some men have over women

209. *See id.* at 22, 33.

210. *See id.* at 22, 33, 52.

211. Note that this intersection is important for ensuring a more inclusive human rights approach to gender-based violence. Dismantling patriarchy is equally necessary in eliminating violence against different persons of different genders (women, transgender, nonbinary, etc.) and sexual orientations (gay, lesbian, bisexual, etc.).

212. Rape culture is understood as a set of patriarchal beliefs that justify the actions of rapists based on a stereotype that rape can be provoked by “inappropriate” behavior of victims. *See* Anastasia Powell & Nicola Henry, *Framing Sexual Violence Prevention, in* PREVENTING SEXUAL VIOLENCE: INTERDISCIPLINARY APPROACHES TO OVERCOMING A RAPE CULTURE 2 (Nicola Henry & Anastasia Powell eds., 2004); ALONA HAGAY-FREY, SEX AND GENDER CRIMES IN THE NEW INTERNATIONAL LAW: PAST, PRESENT, FUTURE 33–36 (2011); SHARRATT, *supra* note 50, at 35–38.

213. *S.T. v. Russian Federation*, Communication No. 100/2016, U.N. Doc., CEDAW/C/73/D/100/2016 ¶¶ 2.22, 5, 7.2, 9.7, 5 (Aug. 9, 2019); *Karen Tayag Vertido v. The Philippines*, Communication No. 18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 ¶¶ 3.5, 8.5, 8.6 (Sept. 1, 2010); *R.P.B. v. The Philippines*, Communication No. 34/2011, U.N. Doc. CEDAW/C/57/D/34/2011 ¶¶ 8.9, 8.10 (Mar. 12, 2014).

214. COOK & CUSACK, *supra* note 197, at 1.

215. *Id.*

216. Coomaraswamy, *supra* note 207, ¶ 105.



as a group, over “weaker” men, and over “queers” who do not fit into a predetermined binary gender role.<sup>217</sup>

Human rights instruments identify a patriarchal value system as one of the causes of gender-based violence.<sup>218</sup> CEDAW General Recommendation No. 35 calls upon states parties to “[a]dopt and implement effective legislative and other appropriate preventive measures to address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes.”<sup>219</sup> The Recommendation refers to an “erosion of legal and policy frameworks to eliminate gender-based discrimination or violence, often justified in the name of tradition, culture, religion or fundamentalist ideologies” as a factor weakening state response to violence.<sup>220</sup> Article 5(a) of CEDAW itself calls upon states,

to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>221</sup>

The Convention of Belém do Pará recognizes that “violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men” and includes an obligation equivalent to one contained in Article 5(a) of CEDAW.<sup>222</sup>

The Maputo Protocol similarly requires its states parties,

to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.<sup>223</sup>

The Istanbul Convention recognizes violence against women as a “manifestation of historically unequal power relations between

217. See COOK & CUSACK, *supra* note 197, at 1.

218. See, e.g., U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 34.

219. *Id.*

220. *Id.* ¶ 7.

221. CEDAW, *supra* note 20, art. 5(a).

222. Conv. of Belém do Pará, *supra* note 20, pmb., art. 8(b); U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, art. 5(a).

223. Maputo Protocol, *supra* note 20, art. 2.

women and men, which have led to domination over, and discrimination against, women by men” and as “crucial social mechanisms by which women are forced into a subordinate position compared with men.”<sup>224</sup> It obliges states parties to

take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men<sup>225</sup>

and to “ensure that culture, custom, religion, tradition or so-called ‘honour’ shall not be considered as justification for any acts of violence covered by the scope of [this] Convention.”<sup>226</sup>

As is evident from the provisions of international human rights instruments, gender-based violence is often discussed in the context of culture.<sup>227</sup> It is true that violence is often normalized or tolerated due to patriarchal cultural patterns. However, we must resist the urge of labeling some (usually non-Western) cultures as more barbaric than others when it comes to gender-based violence.<sup>228</sup> In the Preliminary Report of the first Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy pointed out that “*there are patterns of patriarchal domination which are universal, though this domination takes a number of different forms as a result of particular and different historical experiences.*”<sup>229</sup> This should serve an important reminder that patriarchy is deeply rooted in universal power structures and is not merely a local phenomenon.<sup>230</sup> It is not cultures *per se* that should be a human rights subject, but patriarchy within cultures.

American scholar Traci West in her book *Solidarity and Defiant Spirituality: Africana Lessons on Religion, Racism and Ending Gender Violence* identifies the double standard in treating gender-based

224. Istanbul Conv., *supra* note 20, pmbl.

225. *Id.* art. 12(1).

226. *Id.* art. 12(5).

227. See MERRY, *supra* note 61, at 11; U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 7; Beijing Decl. & Platform for Action, *supra* note 121, ¶ 118.

228. See Yakin Ertürk (Special Rapporteur on violence against women, its causes and consequences), *Rep. on the Intersections Between Culture and Violence Against Women*, ¶ 20, U.N. Doc. A/HRC/4/34 (Jan. 17, 2007) (“[T]here has also been a tendency on the part of some to essentialize traditional cultures of the Global South as inherently harmful to women.” (emphasis added)).

229. Radhika Coomaraswamy (Special Rapporteur on violence against women, its causes and consequences), *Prelim. Rep.*, ¶ 50 (Nov. 22, 1994) (emphasis added).

230. *Id.*

violence in developed and developing countries.<sup>231</sup> She notes how “prohibitions on gender violence among European Christians (intra-racial violence) coexisted with the seeming cultural normalcy of their acts of interracial sexual assault.”<sup>232</sup> She discusses how a “boastful identification of U.S. culture as global symbol of progress”<sup>233</sup> contradicts the fact that “routine intimate violence against African and Native women was seamlessly woven into the history of early American religious and moral habits,”<sup>234</sup> allowing a discourse of “gendered historical amnesia.”<sup>235</sup>

The risk of portraying some cultures as inherently more harmful than others was voiced when the problem of female genital mutilation was addressed by the United Nations in the context of harmful traditional practices.<sup>236</sup> Some argued that the harmful traditional practices agenda “unfortunately reinforced the notion that metropolitan centers of the West contain no ‘tradition’ or ‘culture’ harmful to women”<sup>237</sup> and that “culture is only seen as . . . a relevant factor in violence against women in non-Western contexts, despite the existence of high rates of sexual and domestic violence in Western states, as well as other harmful practices such as cosmetic surgery or media portrayals of women as sexual objects.”<sup>238</sup>

Anthropologist Sally Engle Merry cautioned against homogenizing and essentializing cultures<sup>239</sup> in ways that allow some cultures to be associated with civilization and some with savagery.<sup>240</sup> She maintained that the complex and dynamic nature of culture is ignored when a group’s failure to abide by human rights principles is blamed on its “traditional culture.”<sup>241</sup> She stated that human rights regimes are better off critiquing “particular practices or gender stereotypes”<sup>242</sup> instead of cultures at large. In Merry’s view, this tactic is “less likely to evoke nationalist defenses and justifications and more likely to build on local movements of resistance and contestation.”<sup>243</sup>

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231. See TRACI C. WEST, *SOLIDARITY AND DEFIANT SPIRITUALITY: AFRICANA LESSONS ON RELIGION, RACISM AND ENDING GENDER VIOLENCE* 5–6 (Anthony B. Pinn & Stacey M. Floyd-Thomas eds., 2019).

232. *Id.* at 6.

233. *Id.* at 5.

234. *Id.* at 8.

235. *Id.* at 5.

236. Bronwyn Winter, Denise Thompson & Sheila Jeffreys, *The UN Approach to Harmful Traditional Practices*, *INT’L FEMINIST J. OF POL.* 72, 72–94 (2002).

237. Ertürk, *supra* note 228, ¶ 33 (citing Winter et al., *supra* note 236).

238. Bantekas & Oette, *supra* note 193, at 533–34.

239. See MERRY, *supra* note 61, at 8.

240. *Id.* at 13.

241. *Id.* at 15.

242. *Id.* at 100.

243. *Id.*

However, the second Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk was critical of “culture versus cultural practices distinction,” stating that “compartmentalizing violence against women and neatly partitioning it into ‘practices’ may at times also be counterproductive, if commonalities and shared root causes of such practices are not identified and integrated into a holistic strategy.”<sup>244</sup>

Merry and Ertürk, however, both reject essentializing cultures<sup>245</sup> and share a common perspective that the potential to combat gender-based violence can be found within cultures themselves.<sup>246</sup> Merry states that for universal standards “to find resonance in very diverse societies”<sup>247</sup> they should be “translated into local . . . contexts.”<sup>248</sup> Ertürk maintains that the human rights discourse needs to be complemented by “cultural negotiation” as a process of drawing on positive elements within culture, demonstrating that culture is not an immutable and homogenous entity.<sup>249</sup>

Every culture is “infected” with patriarchy in one way or another.<sup>250</sup> However, the aspirations to be treated equally are also “indigenous to every culture.”<sup>251</sup> The challenge is to combat patriarchy without marginalizing cultures, never sliding into the language of “superiority” and “inferiority,” “civilization,” and “barbarism.” Human rights regimes should avoid essentializing cultures by stating, explicitly or implicitly, that certain cultures are wired to promote or tolerate gender-based violence more than others. Treating cultures as homogenous, static, or apolitical<sup>252</sup> is a fatal mistake. Even the vulnerable gender groups that are sought to be protected from

244. Ertürk, *supra* note 228, ¶ 34.

245. MERRY, *supra* note 61, at 8; Ertürk, *supra* note 228, ¶ 68.

246. MERRY, *supra* note 61, at 11; Ertürk, *supra* note 228, ¶ 85.

247. Coomaraswamy, *supra* note 207, ¶ 10.

248. Vijaya Nagarajan & Archana Parashar, *Gender Equality in International Law and Constitutions: Mediating Universal Norms and Local Differences*, in *THE PUBLIC LAW OF GENDER: FROM THE LOCAL TO THE GLOBAL* 187 (Kim Rubenstein & Katharine G. Young eds., 2016); *see also* MERRY, *supra* note 61, at 220; TONIA ST. GERMAIN & SUSAN DEWEY, *CONFLICT RELATED SEXUAL VIOLENCE: INTERNATIONAL LAW, LOCAL RESPONSES* 84–86 (2012).

249. Ertürk, *supra* note 228, ¶ 52; Yakin Ertürk (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women* ¶ 85, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

250. *See* Coomaraswamy, *supra* note 207, at 3 (“All cultures have certain practices that deny women their rights and dignity.”).

251. Alexandra Oprea, *Re-Envisioning Social Justice From the Ground Up*, 2004 *ESSEX HUM. RTS. REV.* 29, 31 (July 2004) (citing UMA NARYAN, *DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD WORLD FEMINISM* 22 (1997)).

252. Ertürk, *supra* note 228, ¶¶ 58, 60, 62.

their “inherently harmful” cultures are likely to identify with their cultures and reject such blatant negative characterizations (especially if such characterizations are exclusively reserved for the Global South).<sup>253</sup>

Universal human rights should not be a force of “disciplining and punishing” local cultures for not adhering to universal standards. For universal standards “to find resonance in . . . diverse societies”<sup>254</sup> they should be “translated into local contexts.”<sup>255</sup> Translation does not mean transformation<sup>256</sup> and does not require radical reformulations of human rights instruments. It is merely an invitation for human rights bodies to be sensitive to and informed about local contexts, when monitoring compliance or issuing recommendations regarding gender-based violence. In Merry’s words, when “human rights ideas are packaged in culturally resonant wrappings, the interior remains a *radical challenge to patriarchy*.”<sup>257</sup>

Abstaining from essentializing cultures does not mean reframing gender-based violence as a mixture of sporadic and disconnected practices, instead of a pattern. It means that there are commonalities in gender oppression that “go beyond specific cultural boundaries.”<sup>258</sup> The effort to combat gender-based violence is most effective when the focus is shifted from cultures to patriarchy within cultures.<sup>259</sup>

The notion of patriarchy is not limited to specific cultural practices but embedded into power structures around the globe. Electing women as heads of states is still largely viewed as triumphant, but unusual. There are states that have never had a woman or a gender-diverse person as a leader. The United Nations has never once had

253. See Coomaraswamy, *supra* note 207, ¶ 5:

Despite these international norms and standards, the tension between universal human rights and cultural relativism is played out in the everyday lives of millions of women throughout the globe. The situation is made more complex by the fact that *women also identify with their culture and are offended by the arrogant gaze of outsiders who criticize their way of doing things.*

See *id.* ¶ 112 (“It is often argued that the human rights approach, with its emphasis on law and punishment, may not be very productive in fighting violence against women on the ground.”) (emphasis added).

254. *Id.* ¶ 10.

255. MERRY, *supra* note 61, at 220.

256. *Id.*

257. *Id.* at 221 (emphasis added).

258. Ertürk, *supra* note 228, ¶ 72(a)(iii).

259. See Oprea, *supra* note 251, at 30–31 (stating in respect of essentializing Romani culture that the “portrayal of culture as an unchanging monolith” has led to a situation when “[p]atriarchy within Romani communities is either ignored or deemed ‘Romani culture.’ . . . [M]any fall into the trap of ‘turning a blind eye’ to patriarchal practices, excusing them as the others’ ‘culture.’”).

a woman or a gender-diverse person as its Secretary-General. All these facts mean that, in the mindset of many, manhood is still synonymous with power. Changes constantly happen to this power dynamic, but, even when they are welcomed, they are often perceived as revolutionary, scandalous, radical, and unprecedented.

Gender-based violence is a product of patriarchal power relations where men and “the masculine” is privileged over women and “the feminine.” It is not just women who fall victim to this narrative. Because of its heteronormative character, it immediately intersects with sexual orientation and other signifiers. The patriarchal power dynamic is *universally* prevalent. Even though international human rights law should not cease tackling violent practices that attach to certain localities, the struggle of dismantling patriarchy should not ever be substituted by the struggle to fix particularly dangerous cultures.

### *C. Normativity*

The prohibition of gender-based violence was first enshrined in nonbinding sources. CEDAW Committee General Recommendations Nos. 19 and 35, DEVAW, and the Beijing Platform have succeeded in gaining momentum and drawing states’ attention to the problem. Whether a universal prohibition has emerged as a binding rule of treaty or customary international law is still debatable.

#### *1. Regional Instruments*

While the normative value of the prohibition of gender-based violence may still be disputed on the level of universal human rights, no such dispute exists for countries that have ratified regional human rights instruments, establishing said prohibition. Forty-two African states that have ratified the Maputo Protocol, thirty-two American states that have ratified the Convention of Belém do Pará, thirty-three European states that have ratified the Istanbul Convention, are bound by the obligations thereunder. All of these documents have been revolutionary in acknowledging and responding to gender-based violence against women.<sup>260</sup>

The Convention of Belém do Pará has significantly advanced the interpretation of violence against women as a violation of human rights, highlighting “the deeply held patriarchal attitudes and stereotypes relating to the social roles and responsibilities of women

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260. All of the mentioned instruments, based on their ordinary textual interpretation, are aimed at women specifically.

and men.”<sup>261</sup> It provides for two types of obligations: first, measures to prevent, punish and eradicate violence against women that need to be undertaken by all appropriate means and without delay, and, second, measures that are to be undertaken progressively.<sup>262</sup> The former includes, *inter alia*, refraining from violence;<sup>263</sup> exercising due diligence in preventing, investigating, and imposing penalties for violence;<sup>264</sup> amending domestic legislation;<sup>265</sup> modifying cultural practices that sustain tolerance of violence;<sup>266</sup> introducing protective measures for women affected.<sup>267</sup> The latter includes, *inter alia*, developing educational programs to counteract gender bias;<sup>268</sup> providing shelters;<sup>269</sup> introducing readjustment and training programs.<sup>270</sup>

The Maputo Protocol establishes the connection between the right to dignity and freedom from violence<sup>271</sup> and obliges states parties, *inter alia*, to take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women;<sup>272</sup> identify the causes and consequences of violence;<sup>273</sup> punish the perpetrators;<sup>274</sup> establish information, rehabilitation, and reparation services;<sup>275</sup> condemn and prohibit all forms of female genital mutilation and other harmful practices.<sup>276</sup> In the spirit of intersectionality, it recognizes especially affected groups of women who are subject to intersecting forms of discrimination, such as widows,<sup>277</sup> elderly women,<sup>278</sup> women with disabilities,<sup>279</sup> women in distress,<sup>280</sup> and women in situations of armed conflict.<sup>281</sup> As indicated by the Special Rapporteur on violence against women, many gains have been achieved since

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261. DUBRAVKA ŠIMONVIĆ (SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN), 25 YEARS IN REVIEW OF THE BEIJING PLATFORM FOR ACTION 23 (2020), [https://www.ohchr.org/Documents/Issues/Women/SR/Booklet\\_BPA.pdf](https://www.ohchr.org/Documents/Issues/Women/SR/Booklet_BPA.pdf) [<https://perma.cc/VER7-ZNZJ>].

262. *Id.* at 22–23.

263. Conv. of Belém do Pará, *supra* note 20, art. 7(a).

264. *Id.* art. 7(b).

265. *Id.* art. 7(c).

266. *Id.* art. 7(e).

267. *Id.* art. 7(f).

268. *Id.* art. 8(b).

269. Conv. of Belém do Pará, *supra* note 20, art. 8(d).

270. *Id.* art. 8(f).

271. See Maputo Protocol, *supra* note 20, art. 3(4).

272. *Id.* art. 4(2)(a).

273. *Id.* art. 4(2)(c).

274. *Id.* art. 4(2)(e).

275. *Id.*

276. *Id.* art. 5.

277. See Maputo Protocol, *supra* note 20, art. 20.

278. *Id.* art. 22.

279. *Id.* art. 23.

280. *Id.* art. 24.

281. *Id.* art. 11.

the adoption of the Maputo Protocol at the national level.<sup>282</sup> The positive changes include, *inter alia*, adopting and amending legislation in the areas of violence against women, female genital mutilation, child marriage, sexual and reproductive health rights.<sup>283</sup>

The Istanbul Convention is the first legally binding treaty in Europe addressing gender-based violence.<sup>284</sup> The Istanbul Convention is renowned for the unmatched comprehensiveness of its framework.<sup>285</sup> It provides for different types of obligations: prevention;<sup>286</sup> protection and support;<sup>287</sup> changes in substantive law;<sup>288</sup> investigation, prosecution, procedural law and protective measures;<sup>289</sup> measures related to protection and asylum;<sup>290</sup> measures of international cooperation;<sup>291</sup> and data collection.<sup>292</sup> The Istanbul Convention has been a major force keeping gender-based violence as a priority on the political agenda of the Council of Europe.<sup>293</sup> Moreover, the steps taken by the European Union to accede to the Istanbul Convention have put violence against women on the agenda of the European Parliament, the European Council, and other bodies, calling for increased action to end violence against women.<sup>294</sup> “At national level, the ratification of the Istanbul Convention has in many instances prompted legislative and policy changes, sometimes leading to widespread parliamentary and public debate.”<sup>295</sup>

“It is generally recognized that the effectiveness of international instruments can be[,]” *inter alia*, “measured by the effectiveness of their monitoring mechanism.”<sup>296</sup> All three regions introduced special institutions or mandates designed to oversee the implementation of the instruments—the Committee of Experts of the Follow-up

282. See ŠIMONVIĆ, *supra* note 261, at 37.

283. *Id.*

284. Council of Eur. Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV), *Final Activity Report*, Strasbourg 21 (Sept. 2008); *Background to Project ‘Preventing and combating violence against women and domestic violence in Ukraine,’* COUNCIL OF EUR. (Sept. 2013), <https://www.coe.int/en/web/stop-violence-against-women-ukraine/about-project/background> [<https://perma.cc/XF79-J29P>].

285. “*Challenging the Istanbul Convention is a serious setback for women’s rights*”: Jelena Drenjanin, COUNCIL OF EUR. (July 31, 2020), <https://www.coe.int/en/web/portal/-/challenging-the-istanbul-convention-is-a-serious-setback-for-women-s-rights-jelena-drenjanin> [<https://perma.cc/6PD9-ZA7Y>].

286. See Istanbul Conv., *supra* note 20, arts. 12–17.

287. *Id.* arts. 18–28.

288. *Id.* arts. 29–48.

289. *Id.* arts. 49–58.

290. *Id.* arts. 59–61.

291. *Id.* arts. 62–65.

292. See Istanbul Conv., *supra* note 20, art. 2.

293. See ŠIMONVIĆ, *supra* note 261, at 30–31.

294. *Id.*

295. *Id.* at 31.

296. MCQUIGG, *supra* note 139, at 48.



Mechanism to the Convention of Belém do Pará; the Group of Experts on action against violence against Women and Domestic Violence and the Committee of the Parties to the Istanbul Convention; the African Commission on Human and Peoples' Rights' Special Rapporteur on the rights of women in Africa.<sup>297</sup>

While the three regional human rights instruments prohibiting gender-based violence are all binding upon the respective state parties, the modalities of their practical application are different. For instance, the Maputo Protocol and the Convention of Belém do Pará are directly actionable before the African Court on Human and Peoples' Rights<sup>298</sup> and the Inter-American Court of Human Rights, respectively.<sup>299</sup> The violations of the Istanbul Convention may not be directly addressed before the European Court of Human Rights, the jurisdiction of which is limited to claims under the European Convention on Human Rights and its Protocols.<sup>300</sup> However, the Istanbul Convention can be and is, in fact, cited by the European Court of Human Rights to substantiate its analysis.<sup>301</sup> It is also not uncommon for the CEDAW Committee, following its communication procedure,<sup>302</sup> to recommend that states ratify the Istanbul Convention.<sup>303</sup>

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297. *International Day on the Elimination of Violence against Women—25 November*, U.N. HUM. RTS OFF. OF THE HIGH COMM'N, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20911> [<https://perma.cc/43AW-FTTC>].

298. The cases before the court may be brought by either the African Commission on Human and Peoples' Rights, nongovernmental organizations, or individuals (the two latter categories can only gain access to the court if declarations to that effect were made by states parties to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights).

299. The cases before and the Inter-American Court of Human Rights are brought by the Inter-American Commission on Human Rights if the state in question failed to adhere to the recommendations of the Commission.

300. Conv. for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and No. 14, art. 32, Apr. 11, 1950, ETS No. 005.

301. *See* *Talpis v. Italy*, App. No. 41237/14 ¶¶ 58, 129 (Mar. 21, 2017), <http://hudoc.echr.coe.int/eng?i=001-171994> [<https://perma.cc/P3X8-A5KE>]; *Volodina v. Russia*, App. No. 41261/17 ¶ 60 (July 9, 2019), <http://hudoc.echr.coe.int/eng?i=001-194321> [<https://perma.cc/K2D3-CL8R>]; *Y. v. Slovenia*, App. No. 41107/10 ¶ 72 (May 28, 2015), <http://hudoc.echr.coe.int/eng?i=001-154728> [<https://perma.cc/BQB4-L9M8>]; *see also* Sarah Murphy, *Domestic Violence as Sex Discrimination: Ten Years since the Seminal European Court of Human Rights Decision in Opuz v. Turkey*, 51 N.Y.U. J. INT'L L. & POL'Y 1347, 1357 (2019) ("The ECtHR makes reference to the Istanbul Convention to confirm that domestic violence can constitute sex discrimination, but it rarely goes further than that.").

302. G.A., Optional Protocol to the Conv. on the Elimination of All Forms of Discrimination against Women, art. 1, Oct. 15, 1999, A/RES/54/4 [hereinafter CEDAW Optional Protocol].

303. *S.L. v. Bulgaria*, Communication No. 99/2016, U.N. Doc. CEDAW/C/73/D/99/2016 ¶ 7.15(b)(iii) (Sept. 10, 2019); *S.T. v. Russian Federation*, Communication No. 100/2016, U.N. Doc., CEDAW/C/73/D/100/2016 ¶ 11(b)(vi) (Aug. 9, 2019). Note that the Istanbul Convention is also open for signature and ratification by nonmembers of the Council of Europe.

The actionability of the Maputo Protocol has not significantly increased the volume of gender-based violence cases before the African Court on Human and Peoples' Rights.<sup>304</sup> So far, the court has only decided one case in which it found a violation of the Maputo Protocol—*APDF and IHRDA v. Mali*, which concerned discriminatory child marriage and inheritance clauses of Malian family code.<sup>305</sup>

The Convention of Belém do Pará has been successfully invoked before both the Inter-American Commission on Human Rights<sup>306</sup> and the Inter-American Court of Human Rights<sup>307</sup> several times. The violations of the Convention of Belém do Pará often entailed very detailed state obligations, such as erecting a “monument in memory of the women victims of gender-based murders[,]”<sup>308</sup> creating a “web page with the necessary personal information on all the women and girls who have disappeared . . . and who remain missing[,]”<sup>309</sup> providing “appropriate and effective medical, psychological or psychiatric treatment, immediately and free of charge.”<sup>310</sup>

Even though the implementation of the three regional treaties may differ in effectiveness, the treaties are not thereby stripped of their normative value. However, the varying modalities of their application illustrate that even a violation of a binding treaty obligation can be difficult to remedy in practice.

304. Alice Banens, *African Court issues its first judgment on women's rights*, INTLAW-GRRLS (Sept. 13, 2018), <https://ilg2.org/2018/09/13/african-court-issues-its-first-judgment-on-womens-rights> [https://perma.cc/2YJ9-2F9M].

305. ACTHPR, *APDF and IHRDA v. Mali*, App. No. 046/2016, African Commission on Human and Peoples' Rights, 28–29 (May 11, 2018).

306. See Vicky Hernández and Family, Honduras, Case 13.051, Inter-Am. Comm'n H.R., Rep. No. 157/18, OEA/Ser.L/V/II.170, doc. 179 ¶¶ 80, 98 (2018); Maria Da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Rep. No. 54/01, OEA/Ser.L/V/II.111, doc. 20 ¶ 4 (2000); Jessica Lenahan (Gonzales) et al., United States, Merits, Case 12.626, Inter-Am. Comm'n H.R., Rep. No. 80/11 ¶ 124 (2011); Indravani Pamela Ramjattan, Trinidad and Tobago, Case 11.837, Inter-Am. Comm'n H.R., Rep. No. 31/14, OEA/Ser.L/V/II.150, doc. 35 ¶¶ 3–4 (2014).

307. Gonzalez et al. (“Cotton Field”) v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 205 ¶¶ 6, 31, 58, 64, 394, 400–02, 542 (Nov. 16, 2009); see also “Las Dos Erres” Massacre v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 211 ¶¶ 54, 140–41 (Nov. 24, 2009); Miguel Castro-Castro Prison v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 160 ¶¶ 12, 31 (Nov. 25, 2006).

308. *Cotton Field*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 17; “Las Dos Erres” Massacre, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 15; *Miguel Castro-Castro Prison*, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 16.

309. *Cotton Field*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 20; “Las Dos Erres” Massacre, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 17.

310. *Cotton Field*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 24; “Las Dos Erres” Massacre, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 16; *Miguel Castro-Castro Prison*, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 13.4.

## 2. *Universal Instruments*

The existence of three binding regional instruments prohibiting gender-based violence does not discharge one from the duty to analyze whether the same prohibition exists on a universal level. One of the possible scenarios is that the prohibition of gender-based violence has emerged as a rule of *treaty law*—in the process of interpreting CEDAW through DEVAW and CEDAW Committee’s recommendations. Another scenario is one where the prohibition of gender-based violence has emerged as a rule of *customary law*—in the process of forming state practice and *opinio juris*.

CEDAW Committee General Recommendation No. 19, which arguably incorporated the prohibition of gender-based violence to CEDAW, did not clearly situate gender-based violence as a legal rule within the Convention’s framework.<sup>311</sup> The Committee stated that “[g]ender-based violence may breach specific provisions of the Convention regardless of whether those provisions expressly mention violence.”<sup>312</sup> The Committee, therefore, suggested that gender-based violence was a “means” of violating existing CEDAW provisions without formulating a distinct right to be free from gender-based violence.<sup>313</sup>

DEVAW, adopted a year after the General Recommendation No. 19, preserves the Committee’s logic that gender-based violence can serve as a means of depriving women of other substantive human rights.<sup>314</sup> CEDAW Committee General Recommendation No. 35 deals with the prohibition of gender-based violence in more detail, stating that there is a “[w]omen’s *right to a life free from gender-based*

311. See U.N. CEDAW, Gen. Rec. No. 19, *supra* note 116, ¶¶ 6–7. It is important to note that these developments do not explicitly articulate violence against women as a human rights violation in and of itself.

312. *Id.* ¶ 6. Note that there is not a single provision in CEDAW that expressly mentions violence.

313. See Manjoo, *supra* note 117, ¶ 23:

In general recommendation No. 19, the Committee establishes that gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention and links gender-based violence to the different rights and substantive areas covered by the Convention . . . . The adoption of the Optional Protocol to the Convention, in 1999, and the subsequent jurisprudence thereunder further reinforce the Committee’s position that violence against women equates to discrimination based on sex, which disproportionately affects women. It is important to note that these developments *do not explicitly articulate violence against women as a human rights violation in and of itself*.

(Emphasis added).

314. U.N. DEVAW, *supra* note 27, art. 3.

*violence*” that “is indivisible from and interdependent with other human rights.”<sup>315</sup>

It could be argued that DEVAW, as well as CEDAW Committee’s general<sup>316</sup> and case-specific<sup>317</sup> recommendations, can serve as tools of interpreting CEDAW under Article 31 of the Vienna Convention on the Law of Treaties.<sup>318</sup>

DEVAW, adopted without vote by the United Nations General Assembly,<sup>319</sup> directly references CEDAW<sup>320</sup> and may be considered an “instrument which was made by one or more parties in connection with the conclusion of [CEDAW] and accepted by the other parties as an instrument related to [CEDAW]”<sup>321</sup> or a “subsequent agreement between the parties regarding the interpretation of [CEDAW] or the application of [CEDAW] provisions.”<sup>322</sup> The practice of states complying with CEDAW Committee’s recommendations may be considered “subsequent practice in the application of [CEDAW] which establishes the agreement of the parties regarding [CEDAW] interpretation.”<sup>323</sup>

There is promise in stating that nonbinding sources, such as DEVAW and CEDAW Committee’s recommendations, may be used as essential elements of CEDAW interpretation. However, these interpretative tools do not clearly attest to the existence of a binding treaty obligation to eliminate gender-based violence.

For instance, Article 6 of DEVAW states that “[n]othing in the present Declaration shall affect any provision that is more conducive to the elimination of violence against women that may be contained in the *legislation of a State* or in any international convention, treaty or other instrument in force in a State.”<sup>324</sup> This cautious phrasing

315. U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 15.

316. *See id.*; U.N. CEDAW Gen. Rec. 19, *supra* note 116.

317. Adopted following individual complaints procedure under OP-CEDAW A/RES/54/4. *See, e.g.*, A.T. v. Hungary, Communication No. 2/2003, U.N. Doc. CEDAW/C/36/D/2003 ¶¶ 8.4–8.6 (Jan. 26, 2005); Goekce v. Austria Communication No. 5/2005, U.N. Doc. CEDAW/C39/D/5/2005 ¶¶ 12.1.6–12.3 (Aug. 6, 2007); V.K. v. Bulgaria, Communication No. CEDAW/C/49/D/20/2008 ¶¶ 9.16–9.17 (July 25, 2011); Inga Abramova v. Belarus, Communication No. 23/2009, U.N. Doc. CEDAW/C/49/D/23/2009 ¶¶ 7.9–7.10 (Sept. 27, 2011); X and Y v. Georgia, Communication No. 24/2009, U.N. Doc. CEDAW/C/55/D/24/2009 ¶¶ 11–12 (Oct. 29, 2009); Karen Tayag Vertido v. The Philippines, Communication No. 18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 ¶ 8.9 (Sept. 1, 2010); Kell v. Canada, Communication No. 19/2008, U.N. Doc. CEDAW/C/51/19/2008 ¶¶ 10.2–12 (Aug. 28, 2008).

318. Vienna Conv. on the Law of Treaties, art. 31(2)–(3), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Conv.].

319. U.N. DEVAW, *supra* note 27, at 217, annex IV, 411; U.N. GAOR, 48th Sess., 85th plen. mtg. at 3, U.N. Doc. A/48/PV.85 (Dec. 20, 1993).

320. *See* U.N. DEVAW, *supra* note 27, pmb., art. 4(a).

321. *See* Vienna Conv., *supra* note 318, art. 31(2)(b).

322. *Id.* art. 31(3)(a).

323. *Id.* art. 31(3)(b).

324. *See* U.N. DEVAW, *supra* note 27, art. 6.

allows states to resort to their domestic law in regulating gender-based violence if such law is deemed “more conducive” to the elimination of violence.<sup>325</sup> There are hardly any objective criteria to assess what is “more conducive” to ending violence. Making such an assessment seems to be left within state discretion.<sup>326</sup> DEVAW language, therefore, provides a “safety net” of resorting to national standards, making it less clear whether the universal prohibition of gender-based violence is, in fact, an integral part of CEDAW.

CEDAW Committee’s general and case-specific pronouncements remain of recommendatory character and may not reflect the “agreement of [state] parties regarding [CEDAW] interpretation.”<sup>327</sup> Given the unprecedented amount of reservations to even the original (and carefully negotiated) language of CEDAW,<sup>328</sup> it is doubtful that all states parties fully subscribe to the CEDAW Committee’s conclusions. The interpretative value of documents produced by this expert body is significant, but not indisputable.

In the author’s view, the “safe” discretionary language of DEVAW and the recommendatory character of CEDAW Committee’s statements make it more difficult to interpret CEDAW as an instrument that contains (or has come to contain) a universal treaty rule on prohibiting gender-based violence.

However, CEDAW Committee General Recommendation No. 35 has recently stated that “the prohibition of gender-based violence against women has evolved into a principle of customary international law.”<sup>329</sup> This conclusion stems from the Committee’s assessment of actual state practice and *opinio juris*, based on the input of states

325. *See id.*

326. *See id.*

327. *Id.*

328. *See* Jennifer L. Ulrich, *Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic within Reach*, 7 *IND. J. GLOBAL LEGAL STUD.* 629, 645–46 (2000):

[CEDAW] has been subject to an unusually high number of reservations, making it *one of the most reserved human rights treaties in history*. This high number of reservations is due in part to flexible language, as Article 28(2) permits all reservations that do not thwart the general purpose of the Convention. Although allowing liberal reservations may have increased the willingness of nations to adopt the Convention, this proliferation of reservations will ultimately dilute the treaty’s strength. Unfortunately, as a result: “[CEDAW] may face the paradox of maximizing its universal application at the cost of compromising its integrity.”

(emphasis added); *see also* Bantekas & Oette, *supra* note 193, at 497; Kate Nash, *Women’s Rights Are Human Rights*, in *THE POLITICAL SOCIOLOGY OF HUMAN RIGHTS* 120 (John Scott ed., 2015).

329. U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 2; *see also* Dubravka Šimonović (Special Rapporteur on Violence Against Women), Adequacy of the International Legal Framework on Violence Against Women, ¶ 79, U.N. Doc. A/72/134 (July 19, 2017) [hereinafter Šimonović, Adequacy of the International Legal Framework].

themselves, civil society organizations, academia, United Nations entities, and “other stakeholders.”<sup>330</sup> One may still take an optimistic or a pessimistic view on whether the prohibition has indeed acquired a customary, and therefore binding, status.

An optimistic approach would be to cite CEDAW Committee General Recommendations Nos. 19 and 35, stating that the prohibition of gender-based violence has evolved into a principle of customary international law<sup>331</sup> and is, therefore, directly binding upon states can be confirmed by the findings of the International Courts. The authoritative character of CEDAW Committee’s pronouncement of Justice in *Diallo*, when the statements of another treaty body—the Human Rights Committee—were ascribed great weight.<sup>332</sup> The existence of a customary rule can further be supported by the involvement of states in drafting DEVAW and its subsequent adoption without vote.<sup>333</sup> Moreover, state practice and *opinio juris* can be demonstrated through numerous ratifications of regional human rights instruments.<sup>334</sup> Even the ASEAN region, which does not have a binding instrument to address gender-based violence, has developed the Declaration on the Elimination of Violence Against Women in the ASEAN Region, which references CEDAW and DEVAW in its Preamble.<sup>335</sup>

Under this optimistic scenario, all 189 states parties to CEDAW would agree with the CEDAW Committee’s characterization of their obligations to eliminate gender-based violence as customary and would challenge neither the existence nor the scope of this binding obligation, should any dispute arise.

There is also a more pessimistic view. The authority of the CEDAW Committee may be brought into question, similarly to the scenario when the United States rejected the Human Rights Committee’s conclusion that the International Covenant on Civil and Political Rights [hereinafter the ICCPR] could apply extraterritorially.<sup>336</sup>

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330. U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, pmb1.

331. *Id.* ¶¶ 2, 9.

332. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Merits, Judgment, 210 I.C.J. 639, 664 ¶ 66 (Nov. 30, 2010).

333. U.N. DEVAW, *supra* note 27, pmb1.; U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, pmb1.

334. Note that the Maputo Protocol references CEDAW and Beijing in its Preamble; and the Istanbul Convention references CEDAW and CEDAW Committee General Recommendation No. 19 in its Preamble.

335. ASEAN Doc. Series 2004—Declaration on the Elimination of Violence against Women in the ASEAN Region (June 30, 2004), <https://www.asean.org/wp-content/uploads/images/archive/ADS-2004.pdf> [<https://perma.cc/MFE2-28DB>].

336. H.R.C., Gen. Comm. No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, ¶ 10 (May 26, 2004); Jon Kevin Heller, *Does the ICCPR Apply Extraterritorially?*, OPINIOJURIS (July 18, 2006), <http://opiniojuris.org/2006/07/18/does-the-iccpr-apply-extraterritorially> [<https://perma.cc/VF7L-ZKZ2>].

Just as the United States rejected the interpretation of ICCPR (with no reference to extraterritoriality),<sup>337</sup> it is not implausible for states parties to claim that the plain language of CEDAW (with no reference to violence) should prevail over any emanations therefrom. A long list of reservations to even the original language of CEDAW<sup>338</sup> indicates the reluctance of some states to subject domestic gender policies to international scrutiny. Recognizing a customary rule on prohibition of gender-based violence by states would also mean recognizing their due diligence obligations to prevent, investigate, and punish violence committed by private actors<sup>339</sup>—an inference not easily accepted by states.

Under the pessimistic scenario, states may choose to ignore the Committee's findings, stick to the textual interpretation of CEDAW, and treat DEVAW, Beijing, and CEDAW Committee's recommendations as aspirational statements.<sup>340</sup>

Perhaps, the truth is somewhere in the middle. It is hardly possible that all states would consider themselves bound by the prohibition of gender-based violence, as defined by the CEDAW Committee or DEVAW. It is also an exaggeration to expect an overwhelming rejection of this rule, especially from states that are already parties to regional agreements prohibiting gender-based violence.

American legal scholar Bonita Meyersfeld, in her work *Domestic Violence and International Law* of 2010 maintained that “clarity, authority and precision are . . . still sorely required”<sup>341</sup> to confirm the status of gender-based violence prohibition as a binding rule. A year after this publication, the world saw the adoption of the Istanbul Convention of 2011—the third regional agreement to declare the prohibition of gender-based violence as a binding treaty rule. In 2017 CEDAW Committee General Recommendation No. 35 was issued, potentially putting an end to “the amorphous process of norm-crystallization through custom”<sup>342</sup> by announcing a fully formed customary rule.

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337. ICCPR, *supra* note 15, art. 2(1).

338. See Ulrich, *supra* note 328, at 645–46.

339. U.N. DEVAW, *supra* note 27, art. 4(c); Ertürk, *supra* note 228, ¶ 25.

340. The pronouncement 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” has already been made by the Special Rapporteur on violence against women, its causes and consequences in 2006 long before the CEDAW Committee General Recommendation No. 35. Ertürk, *supra* note 228, ¶ 29; see also Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. art. 2 (June 9, 2009). Yet it was the adoption of the Istanbul Convention and development of jurisprudence that truly strengthened the anti-violence framework and not the identification of a customary rule *per se*.

341. BONITA MEYERSFELD, DOMESTIC VIOLENCE AND INTERNATIONAL LAW 107 (2010).

342. *Id.*

So, are we there yet? Is there a black letter rule of international human rights law prohibiting gender-based violence? The bare facts are as follows. First, there are three binding regional treaties prohibiting gender-based violence against women.<sup>343</sup> Second, CEDAW does not contain the word “violence” and has never been amended to include it.<sup>344</sup> Third, according to the assessment of the CEDAW Committee (expressed in a nonbinding recommendation), there is a universally binding customary rule prohibiting gender-based violence against women.<sup>345</sup>

From a public international law perspective, customs are not less binding than treaties.<sup>346</sup> As long as the customary rule of international law prohibiting gender-based violence exists, there is no need to go through a hustle of amending or supplementing CEDAW to explicitly include violence.<sup>347</sup> Moreover, nonbinding sources, such as DEVAW and the CEDAW Committee’s general and case-specific recommendations, may be used as essential elements of interpreting CEDAW.<sup>348</sup>

However, there is a practical and symbolic value in having human rights explicitly recognized in a binding instrument, as opposed to inferring rules from a body of subsequent nonbinding interpretations.<sup>349</sup> When Rashida Manjoo, a former Special Rapporteur on violence against women, its causes and consequences, was advocating the adoption of a binding legal instrument on violence against women, she stated that “the 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.”<sup>350</sup> She characterized the situation, where the gender-based violence was reflected only in nonbinding instruments, as “normativity, without legality.”<sup>351</sup>

The call for a binding legal instrument addressing gender-based violence, subsided in the works of the next Special Rapporteur,

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343. See Maputo Protocol, *supra* note 20; Conv. of Belém do Pará, *supra* note 20; Istanbul Conv., *supra* note 20.

344. See U.N. CEDAW, Gen. Rec. No. 19, *supra* note 116, ¶ 4.

345. See U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 21.

346. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), 2009 I.C.J. 213, 237 (July 13).

347. U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 2.

348. Vienna Conv., *supra* note 318, art. 31.

349. G.A., Violence Against Women, Its Causes and Consequences, Note by the Secretary-General ¶ 59 U.N. Doc. A/69/368 (Sept. 1, 2014) [hereinafter G.A., Violence Against Women, Its Causes and Consequences].

350. *Id.*

351. Rashida Manjoo (Special Rapporteur on Violence Against Women, Its Causes and Consequences) *Rep. on Violence Against Women, Its Causes and Consequences*, U.N. Doc. A/HRC/26/38, ¶ 76 (May 28, 2014).



Dubravka Šimonović.<sup>352</sup> She assessed the existing normative framework as adequate, shifting the focus from the normative gap to “incorporation and implementation gaps.”<sup>353</sup> However, while the Rapporteur was skeptical about the idea of a new standalone instrument on gender-based violence, the possibility of adopting an optional protocol to CEDAW, expressly regulating gender-based violence, was not put off the table.<sup>354</sup> Her report of 2017 called upon states to “strengthen the implementation of general recommendation No. 35 and, by that means, test the need for a substantive optional protocol on violence against women or a mere procedural protocol along the lines of the Optional Protocol to the Convention against Torture.”<sup>355</sup> Furthermore, the report of 2019 explicitly recommended the CEDAW Committee to “adopt an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women based on general recommendation No. 35.”<sup>356</sup> Therefore, the question of enhancing the normative value of the prohibition of gender-based violence through its incorporation in a binding optional protocol to CEDAW remains relevant.<sup>357</sup>

If customary international rule on prohibition of gender-based violence has indeed crystallized, as the CEDAW Committee maintains,<sup>358</sup> simply reflecting this rule in a binding supplement to an existing treaty should not be that burdensome of an endeavor. If, however, the process of codifying this customary rule faces state rejection, it could serve as a “litmus test,” showing the lack of genuine state commitment to gender equality goals and mobilizing critical response from civil society.

If the treaty codification of the prohibition of gender-based violence is to happen, it must account for the inclusivity critique.<sup>359</sup> Gender-based violence (against persons of diverse genders<sup>360</sup>) is

352. Šimonović, Adequacy of the International Legal Framework, *supra* note 329, ¶ 12.

353. *Id.*

354. *Id.* ¶ 13.

355. *Id.* ¶ 99.

356. Šimonović, *Rep. on Violence Against Women*, *supra* note 40, ¶ 98.

357. *Id.*

358. U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 2; *see also* Šimonović, *Rep. on Violence Against Women*, *supra* note 40, ¶ 79.

359. *See* discussion *supra* Section II.A.

360. Note that the idea behind broader protections is not to downplay the disproportionate burden of gender-based violence that is borne by women and switch focus to men, like some men’s organizations suggest (an issue analyzed, *inter alia*, in Manjoo, *supra* note 117, ¶¶ 70–71). The idea is rather to challenge the binary, showing that patriarchy, manifested in gender-based violence, affects gender-diverse people (whose struggles remain invisible in strictly binary frameworks) and backfires at men and boys. It does not change the fact that empirically it is cisgender men who form the vast majority of perpetrators of gender-based violence against women, men and gender-diverse persons.

simply too important an issue to be read between the lines. It deserves to be articulated in binding (and more inclusive) instrument(s), within or outside the CEDAW framework. Some of the possible options include:

1. Adopting a standalone treaty on gender-based violence that would explicitly extend protection against gender-based violence to gender-diverse persons.
2. Adopting an optional protocol to CEDAW on gender-based violence that would explicitly extend protection against gender-based violence to gender-diverse persons.
3. Adopting an optional protocol to CEDAW on gender-based violence against women and adopting the Yogyakarta Principles in the form of a binding treaty, in order to counterbalance and complement women-specific treaties with a LGBTQ+ specific one.

The process of expressly codifying the prohibition of gender-based violence, especially in post-binary terms, may be challenging. A lot of arguments for a more gender inclusive and binding human rights instruments are arguments *de lege ferenda*.<sup>361</sup> However, even in the absence of a binding normative framework, the prohibition of gender-based violence can be strengthened through a growing body of human rights jurisprudence and inclusive interpretations of existing instruments.<sup>362</sup>

## CONCLUSION

Antonio Cassese's *Realizing Utopia*—a series of essays discussing the future of international law—starts with the following statement:

We know that the international society will never be free from violence, poverty, and injustice. We do not dream of peaceful international society based on comity, friendship, and cooperation. We simply intend to suggest in utopian terms new avenues for improving the major deficiencies of the current society of states.<sup>363</sup>

Similarly, a human rights framework that fully embraces the post-binary, completely abstains from cultural essentialism, and definitively codifies the prohibition of gender-based violence may

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361. See Šimonović, *Rep. on Violence Against Women*, *supra* note 40, ¶¶ 83–85.

362. G.A., *Violence Against Women, Its Causes and Consequences*, *supra* note 349, ¶ 59.

363. ANTONIO CASSESE, *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* xxi (2012).

seem utopian.<sup>364</sup> However, universal and regional human rights systems are made of “living instrument[s],”<sup>365</sup> sensitive to the change in public discourse.

The present Article has sought to identify three aspects of regulating gender-based violence that could be improved to make the human rights response to gender-based violence more effective and up to date with evolving realities.

The *first* avenue for potential improvement is *inclusivity*. The developing understanding of gender as a spectrum, rather than a binary, directly affects the way human rights systems address gender-based violence.<sup>366</sup> In the spirit of trans-inclusive<sup>367</sup> and intersectional feminism, it is important to acknowledge that survivors of gender-based violence are found on different sides of a gender spectrum.<sup>368</sup> While most human rights instruments, addressing gender-based violence, do so in the context of violence against women, gender-diverse persons’ right to live a life free from violence also deserves recognition.<sup>369</sup>

There is a variety of ways for human rights instruments to encompass a more inclusive understanding of gender-based violence. They can generally be divided into three categories:

#### A. Amending Existing Instruments

Officially amending universal and regional treaties to recognize gender-based violence as a notion transcending the binary is certainly a very straightforward way to go. Once adopted, amendments are directly binding on states, expressly obliging them to eradicate violence against gender-diverse individuals.<sup>370</sup> However, accumulating political will of states to make changes to CEDAW, the Convention of Belém

364. *See id.*

365. The term has crystallized in the practice of the European Court of Human Rights to refer to the Convention for the Protection of Human Rights and Fundamental Freedoms as “a living instrument which . . . must be interpreted in the light of present-day conditions.” *See, e.g.,* Tyrer v. The United Kingdom, No. 5856/72 Eur. Ct. H.R. 12 (1978); Soering v. The United Kingdom, No. 14038/88 Eur. Ct. H.R. 33 (1989); Selmouni v. France, No. 25803/94 Eur. Ct. H.R. 31 (1999). However, interpretation of the American Convention on Human Rights and the Convention of Belém do Pará as “living instrument(s)” has also been supported by the Inter-American Commission on Human Rights. *See* Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, *supra* note 172, ¶¶ 39, 52. CEDAW was also called a “dynamic, living instrument” by the Special Rapporteur on violence against women, its causes and consequences. *See* Šimonović, Adequacy of the International Legal Framework, *supra* note 329, ¶ 84.

366. Monro, *supra* note 96, at 7.

367. *See, e.g.,* Koyama, *supra* note 192, at 244.

368. Wathen, *supra* note 9.

369. Manjoo, *supra* note 117, ¶¶ 70.

370. CEDAW Optional Protocol, *supra* note 302, art. 18(3).

do Pará, the Maputo Protocol, and the Istanbul Convention may be extremely challenging, if not completely unrealistic. The example of multiple states making reservations to the original language of CEDAW shows that even addressing gender equality in binary terms can be treated less than enthusiastically.<sup>371</sup>

### *B. Adopting New Instruments*

There is some potential in codifying the prohibition of gender-based violence in LGBTQ+ specific human rights instruments. Negotiating a separate treaty on the right of LGBTQ+ people to be free from violence, built upon nonbinding documents, like the Yogyakarta Principles 2007 and Yogyakarta Principles 2017, could be a possibility.<sup>372</sup> However, the lack of political will of states could remain a problem under this scenario.

### *C. Interpreting Existing Instruments Revolutionarily*

Interpretative, judicial, and quasi-judicial bodies, created to oversee the observance of human rights treaties, undoubtedly, have a role to play in progressively understanding the notions of gender and gender-based violence.<sup>373</sup> Steps are already being taken in this direction.<sup>374</sup> In the recent case of *Vicky Hernández and Family v. Honduras*, the Inter-American Commission on Human Rights recognized the applicability of the Convention of Belém do Pará to transfemicide.<sup>375</sup> CEDAW Committee General Recommendation No. 36 recognized the particular vulnerability of lesbian, bisexual, transgender, and intersex students to violence.<sup>376</sup> The Explanatory Report to the Istanbul Convention clarified that “groups of persons that do not correspond to what society has established as belonging to ‘male’ or ‘female’ categories” are covered by the nondiscrimination clause of the document.<sup>377</sup> Evolutionary interpretation of human rights treaties, consistent with progressive understanding of gender, has a potential of positively impacting human rights frameworks. Although not all interpretations are binding *per se*, they are authoritative enough to

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371. Ulrich, *supra* note 328, at 645–46.

372. *The Yogyakarta Principles*, *supra* note 28, pmb1.

373. G.A. Res. 447 (IX), art. 19(d), Statute of the Inter-American Commission on Human Rights (Oct. 1979).

374. See *Vicky Hernández and Family, Honduras*, Case 13.051, Inter-Am. Comm’n H.R., Rep. No. 157/18, OEA/Ser.L/V/II.170, doc. 179 ¶ 98 (2018).

375. *Id.*

376. U.N. CEDAW, Gen. Rec. No. 36, *supra* note 128, ¶ 46.

377. Explanatory Rep. to the Istanbul Conv., *supra* note 141, ¶ 53.

foster change in the long term.<sup>378</sup> For that gradual change to happen, the body of such interpretations, enshrined in recommendations, judicial decisions, commentaries, and analytics should continue to develop.

The *second* avenue for potential improvement is related to understanding *patriarchy*. Conceptualizing patriarchy as an ideological basis of gender-based violence can help those making and applying human rights law form a comprehensive picture of whom patriarchy affects and on what scale.<sup>379</sup> Patriarchy as a value system is largely dependent on the immutable gender binary and the predetermined hierarchy between the two (and only two) sexes.<sup>380</sup>

This Article makes two key observations about patriarchy that are relevant in human rights framework:

1. Patriarchy is characterized by both the idea of women's inferiority to men and the idea of heteronormativity, leading to an immediate intersection between women's and LGBTQ+ rights.

Patriarchy is based on the presumption that there are two genders—men (the superior gender) and women (the inferior gender).<sup>381</sup> Each gender is expected to follow accepted “womanly” or “manly” behaviors.<sup>382</sup> Under patriarchy, women are only attracted to men and men are only attracted to women.<sup>383</sup> The binary and heteronormative character of patriarchy entails that it not only legitimizes oppression of women, but also oppression of transgender persons and sexual minorities.<sup>384</sup> It is important to observe this feature of patriarchy to boost inclusivity and intersectionality of human rights instruments. Patriarchy is oftentimes the shared underlying cause of violence against women and violence against LGBTQ+ persons.<sup>385</sup> It is, therefore, important for human rights mechanisms to reflect this interconnectedness and note the impact patriarchal beliefs have on all vulnerable groups.

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378. Šimonović, *Adequacy of the International Legal Framework*, *supra* note 329, ¶ 43.

379. U.N. ESCOR, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, including the Question of the Programme and Methods of Work of the Commission*, ¶ 50, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994) [hereinafter U.N. ESCOR, *Further Promotion*].

380. *See* U.N. Rome Statute, *supra* note 9, art. 7(3).

381. *See id.*

382. BUTLER, *supra* note 86, at 24.

383. *Id.* at 17.

384. Coomaraswamy, *supra* note 207, ¶ 102.

385. *Id.*

## 2. Patriarchy within cultures must not be equated with cultures themselves.

Another observation in addressing patriarchy as the cause of gender-based violence is its overarching and universal nature.<sup>386</sup> The Article shares the concerns of scholars about associating gender-based violence with only certain (usually non-Western) cultures and cautions against such approach.<sup>387</sup> Not only can such a lens cause backlash from countries, the cultures of which are explicitly or implicitly labeled as violent, it also fails to account for the true scale of patriarchy as a universal phenomenon that still dominates power structures all across the globe.<sup>388</sup> An approach, which criticizes patriarchal patterns within cultures, without marginalizing cultures, is the most effective in addressing the roots of gender-based violence.

The *third* avenue for potential improvement is *normativity*. The prohibition of gender-based violence (even in its narrower understanding as violence against women) has been codified in regional, but not in universal human rights instruments.<sup>389</sup> While there is a significant body of CEDAW Committee's interpretations of gender-based violence as discrimination, enshrined both in its general and case-specific recommendations, the normative status of the prohibition of gender-based violence can still be brought into question.<sup>390</sup> There have been claims made by both the CEDAW Committee and the Special Rapporteur on violence against women, its causes and consequences that the prohibition of gender-based violence against women has crystallized into a binding customary rule of international human rights law.<sup>391</sup> However, these views are disputable.<sup>392</sup>

There are several ways of increasing the normative value and effectiveness of existing frameworks regulating gender-based violence:

## 3. Adopting a standalone treaty on gender-based violence.

A proposition of adopting a binding treaty on gender-based violence (against women) was championed by the third Special Rapporteur on Violence Against Women, Its Causes and Consequences, Rashida Manjoo.<sup>393</sup> Having identified a normative gap in

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386. See U.N. ESCOR, *Further Promotion*, *supra* note 379, ¶ 50.

387. See Ertürk, *supra* note 228, ¶ 20.

388. *Id.*

389. MCQUIGG, *supra* note 139, at 3.

390. Šimonović, *Rep. on Violence Against Women*, *supra* note 40, ¶ 84.

391. U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 2; Šimonović, *Rep. on Violence Against Women*, *supra* note 40, ¶ 79.

392. Šimonović, *Rep. on Violence Against Women*, *supra* note 40, ¶ 43.

393. G.A., *Violence Against Women, Its Causes and Consequences*, *supra* note 349.

international human rights law,<sup>394</sup> she continually suggested that “it is essential that the United Nations system adopts a legally binding framework on violence against women and girls.”<sup>395</sup>

This position was criticized by subsequent Special Rapporteur Dubravka Šimonović, who stated that “the option of creating a separate treaty would expose the existing legal framework under the Convention on violence against women to the risk of isolating provisions aimed at addressing gender-based violence against women from the structural causes of discrimination against women.”<sup>396</sup> She focused on implementation gaps, rather than the normative gap in existing human rights framework.<sup>397</sup> Even though the vast majority of civil society organizations asked to assess the need for a new treaty actually supported it,<sup>398</sup> the critique of adopting a brand new instrument is also understandable. Indeed, there may be “a considerable political risk in seeking to negotiate a new treaty, which might encompass lower standards than those already widely accepted”<sup>399</sup> or a “risk in diverting meaningful energy from implementation of existing norms.”<sup>400</sup>

While the idea of adopting a new treaty on gender-based violence may seem overambitious and hard to implement in the current political climate, expressly codifying the prohibition of gender-based violence has a potential of sending a powerful message. If the claims on the customary nature of such a prohibition are indeed true, reflecting the already formed rule in a binding instrument does not appear disproportionately burdensome.<sup>401</sup> If, however, the codification process faces state rejection, the act of rejection itself could reveal the lack of genuine state commitment to gender equality goals, mobilizing response and condemnation from civil society.

#### 4. Adopting an optional protocol to CEDAW.

Adopting an optional protocol to CEDAW, explicitly codifying the prohibition of gender-based violence (ideally—against persons

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394. Rashida Manjoo (Special Rapporteur on Violence Against Women, Its Causes and Consequences) *Report on Violence Against Women, Its Causes and Consequences*, U.N. Doc. A/HRC/29/27, ¶ 65 (June 10, 2015).

395. *Id.*; see also Manjoo, *supra* note 117, ¶ 76.

396. Šimonović, Adequacy of the International Legal Framework, *supra* note 329, ¶ 91.

397. *Id.* ¶¶ 69, 94.

398. *Id.* ¶ 41.

399. *Id.* ¶ 25.

400. *Id.* ¶ 60.

401. U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 2; Šimonović, *Rep. on Violence Against Women*, *supra* note 40, ¶ 79.

of any gender, else—against women, subject to evolutionary inclusive interpretation), is a perfect compromise between adopting a new treaty and leaving gender-based violence in the realm of nonbinding instruments and interpretations.

In the current Special Rapporteur's opinion, "an optional protocol to the Convention is . . . a long-term solution . . . which could aid implementation."<sup>402</sup> The prospect of supplementing the CEDAW framework with a binding optional protocol is promising. Given the significant body of jurisprudence on gender-based violence developed by the CEDAW Committee, as well as its General Recommendations Nos. 19 and 35, there are reasons to hope for state support on the matter.<sup>403</sup> The risks associated with this process are similar to the ones associated with negotiating a new treaty. Likewise, the lack of state engagement in adopting a protocol can have reputational risks for states who would choose to ignore the gender-based violence agenda.<sup>404</sup>

##### 5. Adopting the Yogyakarta Principles in the form of a binding treaty.

Gender-based violence is referenced in women-specific instruments and interpretations thereof.<sup>405</sup> Balancing the *status quo* to ensure protection of gender-diverse individuals can be done not only through amending women-specific instruments, but through encouraging the adoption of LGBTQ+ specific ones.<sup>406</sup> While the Yogyakarta Principles have not yet acquired universal state support, there is promise in drawing the attention of states and international organizations to the side of gender-based violence that affects gender-diverse persons and sexual minorities. While the normative value of gender-based violence prohibition would be highest if the rules enshrined in the Yogyakarta Principles are recognized in a binding treaty, their normative value can also be strengthened over time through authoritative progressive interpretation.

The eradication of gender-based violence is only partially dependent on perfecting human rights frameworks and instruments.<sup>407</sup> Gender-based violence is not merely a matter of positivist discussion on how masterfully legal documents are drafted.<sup>408</sup> Even the most inclusive and binding documents could lack *de facto* effectiveness if

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402. *Id.* ¶ 93.

403. U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶ 2.

404. Manjoo, *supra* note 394, ¶¶ 63, 65.

405. Manjoo, *supra* note 117, ¶ 70.

406. *See* Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, *supra* note 172, ¶¶ 39.

407. International Women's Day Statement, *supra* note 195.

408. U.N. ESCOR, *Further Promotion*, *supra* note 379, ¶ 50.



patriarchy is not dismantled on individual, family, and societal levels.<sup>409</sup> Both legal and political commitments are often ignored in practice, allowing gender-based violence to continue.<sup>410</sup> An interdisciplinary approach is key in addressing gender-based violence. Alongside with improving the effectiveness of legal frameworks, efforts should be made to spread human rights education, support local communities, fund civil society organizations, and provide support and resources to survivors of violence.

Although the discussion about gender-based violence goes well beyond the framework of CEDAW and regional human rights treaties, it starts with a fundamental human right to live a life free from violence. Embracing inclusivity helps realize the true scale of gender-based violence. Understanding patriarchy, deeply embedded in global power structures, helps identify the causes of gender-based violence. Strengthening the normative basis helps frame gender-based violence as a central and not collateral matter in the human rights discourse.

In a constantly evolving world, the effectiveness of human rights systems is measured by their ability to embrace new developments and combat emerging challenges.<sup>411</sup> It is only natural to demand comprehensive protections against gender-based violence from human rights instruments. The effectiveness of existing frameworks can be enhanced in a variety of ways—better texts, better interpretations, better implementation. The cooperation between mechanisms and mandates, the partnerships of grassroots organizations and global platforms, the solidarity of all actors in their struggle to achieve gender equality helps spearhead the progressive agenda. Even though legal frameworks regulating gender-based violence are unlikely to ever produce a perfect utopia, the will to evolve and develop brings us closer to a world free from violence.<sup>412</sup>

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409. International Women's Day Statement, *supra* note 195.

410. Manjoo, *supra* note 394, ¶¶ 63, 65.

411. U.N. CEDAW, Gen. Rec. No. 35, *supra* note 59, ¶¶ 48–49.

412. CASSESE, *supra* note 363, at xxi.