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Written submission prepared by the

International Human Rights Clinic
at Santa Clara University School of Law

in response to the call for submissions issued by the

UN SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN

regarding

THE NEED FOR A SEPARATE LEGALLY BINDING U.N. TREATY ON VIOLENCE AGAINST WOMEN WITH ITS SEPARATE MONITORING BODY

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UN Special Rapporteur on Violence Against Women
Office of the High Commissioner for Human Rights
Special Rapporteur, Ms. Dubravka Šimonović
Geneva, Switzerland

Submitted via email to: vaw@ohchr.org

Dear Special Rapporteur Šimonović:

In response to the call for submissions soliciting information about the adequacy of the current international legal framework on violence against women and girls ("VAW") and the gap in incorporating and implementing the international and regional standards related to violence against women, the International Human Rights Clinic at Santa Clara University School of Law (the Clinic) welcomes the opportunity to provide information on the need for a new normative framework and monitoring mechanism to adequately address issues of VAW.

This submission focuses on providing answers to questions 1 and 5 of the call for submissions. In responding to question 5, we interpreted the question as asking for specific suggestions on the content of a new VAW treaty, including specific measures necessary for its effective implementation.

In our submission, we have highlighted several reasons why a new normative framework focusing exclusively on VAW is needed. Particularly, the report highlights the need for a new treaty that actually incorporates words such as "violence," "assault," or "rape" in the text and that a new treaty body would be the best method to ensure the issue of VAW receives adequate attention and resources. We also address the need for a robust individual communications mechanism within a new treaty body, as well as highlight the importance of developing strong domestic implementation obligations.

Additionally, we have attached the Clinic's 2015 Report entitled *The Inter-American Human Rights System and Violence Against Women*: *Norms, Compliance Mechanisms, Jurisprudence, Implementation, Lessons Learned, and Recommendations*, which provides more details on the existing normative and implementation gap of the international legal framework on VAW.

We hope this submission will be helpful to the Special Rapporteur as you move forward with a strategy in favor of the adoption of a new treaty on violence against women and girls.

Respectfully Submitted,

International Human Rights Clinic
Santa Clara University, School of Law

Response to Question 1: Do you consider that there is a need for a separate legally binding treaty on violence against women with its separate monitoring body?

I. *Yes, there is a need for a separate legally binding treaty on VAW.*

A. A new treaty on VAW would help address the normative gap

A new global treaty that focuses solely on VAW would help address the normative gap that exists in U.N. human rights treaty law to protect women and girls from acts of violence. There is no legally binding treaty at the U.N. level that unequivocally recognizes that perpetuating violence against women based on gender, whether done privately or publicly, is a human rights violation. The Convention on the Elimination of Discrimination Against Women ("CEDAW") does not specifically address VAW. CEDAW does not mention the words "rape," "assault," or even "violence," and therefore provides an inadequate legal framework to protect, defend, and guarantee women and girls the right to a life free from gender-based violence. While there is a General Comment on VAW that was issued by the CEDAW Committee,[1] the binding nature of such soft-laws is often questioned by states. And although there are treaties that address VAW for certain regions of the world,[2] there is no overarching U.N. treaty that focuses specifically on VAW. Thus there is a need for a separate legally binding treaty on VAW to fill this normative gap at the global level.

B. A legal framework that requires relying on creative interpretations of more general human rights law is inadequate to address VAW

When U.N. treaty bodies address VAW, they employ creative forms of legal interpretation to fit VAW within the more general human rights treaties. For example, the CEDAW Committee has read into CEDAW a general prohibition on acts of VAW by characterizing such acts as a form of discrimination against women, and therefore within the purview of CEDAW.[3] In order to make this assertion, General Comment 19 relies on multiple articles of CEDAW that prohibit "discrimination in all forms" and that tangentially address some aspects of the more complex issues involved in VAW. Conflating violence against women and discrimination against women results in an inadequate or incomplete description of the legal concept of violence against women as its own human rights violation. Just like torture is better addressed in CAT than in the ICCPR,

[1] General Recommendations Adopted By the Committee on the Elimination of Discrimination Against Women. Eleventh Session 1992. General Recommendations No. 19: Violence Against Women.

[2] *See* Council of Europe Convention on Preventing and Combating Violence Against Women Domestic Violence "Istanbul Convention" (2014) (treaty addressing violence against women and domestic violence in Europe); the Maputo Protocol, and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women "Convention of Belem do Para" (CBP) (1995) (treaty addressing violence against women in the Organization of American States).

[3] General Recommendations Adopted By the Committee on the Elimination of Discrimination Against Women. Eleventh Session 1992. General Recommendations No. 19: Violence Against Women.

VAW would be better addressed in a separate treaty than in CEDAW. A new treaty that has clearly established norms within the text of the treaty itself would help avoid relying on similar generic definitions that are the result of an inadequate normative framework.

C. Regional treaties on VAW have been successful in minimizing the normative gap, but those regional standards do not apply globally.

As the Clinic explains in more detail in its 2015 report, before the adoption of the Belém do Pará Convention ("BDP")[4] in the Inter-American Human Rights System more than twenty years ago, the Inter-American Commission and Inter-American Court of Human Rights also had to come up with creative interpretations of the more general human rights treaties to address cases involving VAW. The resulting jurisprudence was inconsistent and did not address VAW adequately. For example, these organs relied on the following human rights that are recognized in other OAS human rights treaties: the rights to life, personal integrity, family, privacy, non-discrimination, equal treatment, personal liberty, personal dignity, and access to justice, among others. While such rights are certainly relevant in the context of VAW, they are broad in nature and were not specifically drafted to address the distinct context of VAW. General human rights treaties simply do not address with sufficient specificity the particular complexities and nuances that arise in cases of violence against women.

With the adoption of BDP, that normative gap was narrowed. BDP provides a definitional foundation for VAW,[5] and its widespread ratification amongst OAS states is promising (all but the United States and Canada have ratified this convention). Consequently, the Inter-American Commission and Court have now developed a stronger jurisprudence that more adequately addresses VAW as a human rights violation separate and distinct from the general prohibition of discrimination on the basis of gender. A new U.N. treaty would similarly help provide more normative specificity.

Finally, the regional treaties on VAW apply only to those regions - the Americas, Europe, and African states. They do not apply to other states throughout Asia, the Middle East, and other parts of the world. A global U.N. treaty on VAW would not only help bridge this geographic gap, but would also complement the existing regional legal framework by providing a more universal definition of VAW that would be applicable to all State parties within the U.N. system.

[4] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women "Convention of Belem do Para" (CBP) (1995)

[5] BDP defines violence against women as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere." *See* OAS, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* "*Convention of Belém do Pará,"* Article 1, available at http://www.oas.org/juridico/english/treaties/a- 61.html. This definition of VAW is more comprehensive than anything else found on the other OAS human rights treaties, and includes physical, sexual, and psychological violence, as well as domestic violence. *See Id,* Article 2.

II. *Yes, there is a need for separate monitoring body.*

A. The CEDAW Committee is already overburdened.

The CEDAW Committee does not have the resources to address its current backlog[6]. Adding a mandate to monitor a new VAW treaty would increase this backlog because states would have to submit even more information about respecting, protecting, and guaranteeing the right to be free from gender-based violence, in addition to their current reporting obligations. To effectively monitor a new treaty on VAW, the CEDAW Committee would have to receive a substantial increase in resources. However, even an increase in resources would not be an ideal solution, considering the Committee's existing backlog. Under this scenario, issues of VAW would be diluted within the broader mandate of the CEDAW Committee. Rather than augment the resources of a committee with expertise on the broad topic of discrimination against women, the resources would be allocated much more efficiently if given to a treaty body that specializes in the issues surrounding VAW.

B. A separate monitoring body could more effectively address individual communications

The CEDAW Committee's backlog would also affect its ability to hear individual communications alleging violations of the rights set forth in the VAW treaty by State Parties. A separate monitoring body that is authorized to receive individual communications is a better option for women and girls who often do not have access to justice mechanisms to address their violations. An independent body of experts on gender-based violence would be better suited to address those cases than would a body with expertise on more general issues of discrimination. Additionally, victims of acts of VAW should be able to present their cases before a single body covering all aspects of VAW, rather than being forced to do forum shopping for the least irrelevant treaty body. In sum, a new treaty body will ensure that the individuals interpreting the norms of the VAW treaty and monitoring state compliance are experts in the field of VAW.

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[6] *UN Secretary General Reports Treaty Bodies More Effective and Efficient*, International Justice Resource Center (August 22, 2016) (In response to efforts to strengthen UN treaty body system, a capacity building program was implemented. Most treaty bodies have experienced a reduction in backlog of 15 to 50 percent. CEDAW's backlog, however, has actually increased despite these measures). http://www.ijrcenter.org/2016/08/22/un-secretary-general-reports-treaty-bodies-more-effective-and-efficient/

Response to Question 5: Could you also provide your views on measures needed to address this normative and implementation gap and to accelerate prevention and elimination of violence against women?

I. *A new treaty should ensure that VAW is recognized as a grave and complex human rights violation*

The starting point of a new treaty on VAW is to declare that acts of gender-based violence constitute a complex violation of multiple and interrelated human rights. For example, the rights to honor and dignity should be recognized as distinct and cognizable rights that are part of this complex human rights violation. The treaty should enumerate acts that constitute a violation of the right to live free from gender-based violence, and it should define the different types of violence (e.g. domestic/family, sexual, state-sponsored, human trafficking, etc.), as well as the different groups of women and girls who are affected.

In establishing these definitions, regional treaties such as the Istanbul Convention, the Maputo Protocol, and the Convention of Belem do Para may prove informative, although not definitive. Additionally, the UN Declaration on the Elimination of Violence Against Women, particularly Articles 1-3, also provides a good starting point.[7] Ultimately, the treaty must define VAW in a way that recognizes that cultural approaches to VAW is very disparate, and the framework must seek to have a universal definition that will be adopted and ratified by states of various regions.

The treaty must also declare that VAW can entail state responsibility, and that it is not merely a private matter that states cannot or need not address. The treaty must recognize that States will incur liability for failing to guarantee, protect, and respect the right to be free from gender-based violence, even when the acts of violence occur in a private setting. That is, it should provide that a State can be held internationally responsible not only for its failure to respect freedom from VAW (a negative obligation), but also for its failure to prevent VAW committed by private individuals and for its failure to exercise due diligence in investigating and prosecuting such acts (a positive obligation). General Comment 19 of the CEDAW Committee states that while CEDAW applies to violent acts perpetrated by public authorities, discrimination is not restricted to an action directly or indirectly attributed to the state, and in certain cases states may be responsible for private acts.[8] A new VAW treaty would explicitly mandate state accountability for these private acts and specify when a state's failure to prosecute against private acts of gender-based violence would result in its international responsibility.

[7] United Nation Declaration on the Elimination of Violence Against Women, General Assembly 85th Plenary Meeting, (December 23, 1993) http://www.un.org/documents/ga/res/48/a48r104.htm

[8] General Recommendations Adopted By the Committee on the Elimination of Discrimination Against Women. Eleventh Session 1992. General Recommendations No. 19: Violence Against Women.

II. *A new treaty on VAW should define femicide or feminicide.*

As the Clinic describes in its 2015 Report, "[an] international treaty should consider including and defining femicide or feminicide as a particularly grave form of violence against women. The Convention of Belém do Pará does not include this term, which has resulted in varying definitions. [S]ome experts differentiate these terms by stating that a feminicide involves the killing of women on the basis of their gender specifically in a context of impunity due to a State's failure to protect, prevent, investigate and punish VAW. Further research should be done on the disparate definitions that currently exist depending on the cultural context, to ensure that a new VAW treaty incorporates and recognizes the debate about this terminology. In any case, this definition should highlight femicide/feminicide as a particularly grave human rights violation."

III. *A new treaty should require education and training on gender-based violence*

Although international human rights treaties and bodies often require states to provide education and training to prevent several human rights violations - like torture,[9] those treaties and bodies often do not specifically require education and training through a gender-perspective.[10] Education and training of military and police officials on gender-based violence would serve to prevent acts of VAW, as well as to ensure that acts of VAW are adequately addressed. For example, comprehensive training of the judiciary and officials tasked with investigating these instances of violence must ensure that the entire process is done with a gender focus. Relying on the language of the Istanbul Convention may prove helpful.[11]

IV. *A new treaty should prohibit the use of military jurisdiction to address cases of VAW*

The treaty should explicitly recognize that cases involving VAW must be heard in civil or criminal courts and not in military courts. An act of VAW does not become a military crime simply because it is perpetrated by a member of the military.[12] In the case *Rosendo Cantú et al. v. Mexico*, the Inter-American Court of Human Rights held "the rape of a person by military personnel bears no relation, in any case, to military discipline or mission."[13] As the Clinic mentioned in its 2015 Report, "[a]n explicit prohibition on the use of military courts to adjudicate cases involving rape and sexual violence will provide clear guidelines to States Parties

[9] *See, e.g.,* Inter-American Convention to Prevent and Punish Torture (CPPT) (1987).

[10] *The Inter-American Human RIghts System and Violence Against Women Report*, prepared by the International Human Rights Clinic at Santa Clara University School of Law, p.7 (2015).

[11] Istanbul Convention, Chapter I, Article 6 reads: "Parties shall undertake to include a gender perspective in the implementation and evaluation of the impact of the provisions of this Convention and to promote and effectively implement policies of equality between women and men and the empowerment of women."

[12] *The Inter-American Human RIghts System and Violence Against Women Report*, prepared by the International Human Rights Clinic at Santa Clara University School of Law, pp 72-75, 86-89 (2015).

[13] IACtHR, *Rosendo Cantú et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2010, Series C No. 216, para. 161.

and would require them to modify their domestic legislation accordingly. Preventing the use of military courts for such crimes of non-military nature would assist in guaranteeing women victims of violence their right to access justice."

V. *A new treaty on VAW should require strong and effective domestic and international mechanisms of implementation.*

The treaty must recognize that the right of women and girls to be free from violence is a justiciable right, and therefore a key aspect of the treaty needs to focus on access to justice for these victims. Access to justice should be understood broadly to encompass both domestic and international justice mechanisms.

Domestically, the treaty should explicitly require States parties to allocate adequate resources to develop strong domestic implementation, enforcement, and monitoring mechanisms and action plans. As the Clinic's 2015 Report states, "[a]n international treaty should require states to establish or empower a domestic body to implement and ensure compliance with the treaty. […] By requiring States Parties to establish or empower a domestic body to ensure compliance, the treaty would promote its effective implementation. These bodies would be responsible for carrying out recommendations and reporting to the treaty's compliance mechanism. The treaty could even go so far as to require States to empower these bodies to hear complaints of violations of the treaty. This would further lighten the load of the treaty's mechanism, making it more efficient while also allowing complaints to be resolved closer to home."

Furthermore, given the way local, regional, and federal systems often interact, the new VAW treaty should incorporate a clear federalism clause that provides guidance on how federal states should comply with their treaty obligations. In federal states, the ultimate implementation of a treaty is often carried out at the local level. This can lead to problems, as is seen in the Jessica Lenahan case in the U.S., when local governments refuse to implement the treaty and the federal government claims that it lacks the authority to step in and implement the treaty.

Internationally, women and girls should also be able to have their "day in court" and allege before an independent body of experts that States parties are responsible for violations of the rights recognized in the VAW treaty. Failure to include such a complaints mechanism may suggest that the treaty body would have no "teeth" to enforce the norms in the new treaty. While reports submitted to and observations written by the treaty body are valuable "naming and shaming" tools, they are not designed to provide a remedy for specific victims of violence. Additionally, information about specific cases, especially those involving private actors in private settings, is often left out of state-prepared reports, even when supplemented by shadow report submissions. Having a robust individual complaint system, with the resources necessary to ensure the system can handle the caseload effectively, is key to ensuring that women and girls can have their voices heard and be able to seek redress for acts of VAW.

This individual communications mechanism before a new treaty body should be integrated into the text of the new treaty, as opposed to being contained in an optional protocol. Additionally, the individual complaint mechanism must be more robust to give victims a *meaningful* opportunity to have their case be adjudicated by the VAW treaty body. Furthermore, States should have to "opt out" (rather than "opt in") to this individual communications mechanism. Finally, the individual communications mechanism should allow non-governmental organizations to make such complaints on behalf of individuals and groups.

Conclusion

All of the above suggests that the current international legal framework to address VAW is inadequate, and that a new global treaty on VAW with its own separate monitoring body is required.