Routledge
Taylor & Francis Group

Nordic Journal of Human Rights

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/rnhr20

A Critical Engagement with the Conceptualization of Sexual Harassment in International Human Rights Law

Yulia Dergacheva

To cite this article: Yulia Dergacheva (09 Sep 2024): A Critical Engagement with the Conceptualization of Sexual Harassment in International Human Rights Law, Nordic Journal of Human Rights, DOI: 10.1080/18918131.2024.2378646

To link to this article: https://doi.org/10.1080/18918131.2024.2378646

Published online: 09 Sep 2024.

NORDIC JOURNAL OF HUMAN RIGHTS
https://doi.org/10.1080/18918131.2024.2378646

Routledge
Taylor & Francis Group

A Critical Engagement with the Conceptualization of Sexual Harassment in International Human Rights Law

Yulia Dergacheva

Faculty of Law, University of Turku, Turku, Finland

ABSTRACT

This article discussess the concept of sexual harassment in international human rights law (IHRL). After analysing how sexual harassment emerges in two different legal traditions, I investigate the transformations the concept has undergone. I create an outline of sexual harassment as a concept and of certain contexts in which it is conceptualized in international human rights law. The research is grounded in critical feminist studies and intersectionality theory. I investigated an extensive number of legal texts, including various IHRL treaties, soft law, and interpretations by treaty bodies, with a focus on the concept of a hypothetical 'victim' within the sexual harassment narrative. This was done by delving into the linguistic choices present in legal documents that deal with sexual harassment. I conclude that sexual harassment in IHRL is largely constructed around the 'universal subject' of the white cisgender middle-class women, with other identities perceived as exceptions. This leads to the exclusion of subjects who are different from the imaginary victim, thus creating people, spaces, and settings in which sexual harassment is neglected by the law.

KEYWORDS

sexual harassment; marginalized subject; international human rights law; gender-based violence; intersectionality; victim subject

1. Introduction

In international human rights law (IHRL), sexual harassment has received relatively little attention despite the #metoo campaign which gained prominence in 2017 and subsequent discussions highlighting the pervasiveness of sexual harassment in society. Sexual harassment has been a subject of IHRL,[1] but researchers have long noted its marginalized position[2] and the unaddressed structural issues surrounding it.[3] Alice Edwards argues that the IHRL principle of 'violence against women as sex discrimination' was first

CONTACT Yulia Dergacheva yuderg@utu.fi, tel. +358449191306, Caloniankuja, 3, Turku, Finland, 20540

[1]Sexual harassment in IHRL was brought up in the framework of the Convention on the Elimination of all Forms of Discrimination against Women 1979 [UN Treaty Series vol 1249, p. 13] (CEDAW) by several CEDAW Committee General Recommendations (GR), General Recommendation N 12, Violence Against Women (1989), UN Doc. A/44/38, para 1, and the CEDAW Committee General Recommendation N 19, Violence against women (1992), UN Doc. A/47/38, para 17.

[2]Beverley H Earle and Gerald A Madek, 'An International Perspective on Sexual Harassment Law' (1994) 12 Minnesota Journal of Law & Inequality 43.

[3]Ibid; Elizabeth Anderson, 'Recent Thinking about Sexual Harassment: A Review Essay' (2006) 34 284; Minni Leskinen, 'The Istanbul Convention on Sexual Offences A Duty to Reform the Wording of National Law or the Way We Think?' in

developed by US-American legal scholar Catherine McKinnon in 1979,[4] and may be well-placed to address the 'structural causes of inequality and violence'.[5] Recent research has primarily focused on the 2011 Istanbul Convention,[6] in which the discourses of discrimination and sexual violence intertwine, creating a complex and multilayered concept of sexual harassment.[7] The absence of a supranational obligation to criminalize sexual harassment further undermines its perceived seriousness on the national level.[8] Yet no unfragmented and comprehensive study of sexual harassment in contemporary IHRL has been undertaken, and existing analyses fail to provide a complete picture of what sexual harassment currently entails within IHRL.

To help address this knowledge gap, this study aims to answer the following research questions: How is sexual harassment conceptualized in IHRL? What specific human rights violations does the concept of sexual harassment in IHRL focus on? What spatial dimensions are expressed in the conceptualization of sexual harassment in IHRL? I uphold the idea that the concept of sexual harassment in IHRL largely emerged after the second wave of feminism, which occurred from the early 1960s to the early 1980s in North America and various European countries, and it had a primary focus on sexual harassment as an obstacle to women's participation in the labour market. Framed around a fictitious white heterosexual cisgender woman, sexual harassment in IHRL neglects the intersectional discrimination faced by women 'othered' by that framing and insufficiently challenges the power imbalances inherent in sexual harassment.

To understand the reasons behind the repeated failures of the justice system in addressing sexual harassment, it is crucial to explore the legal meaning of sexual harassment and whether the concept adequately addresses marginalized groups. This is because societal and legal conceptualizations of issues like violence against women have practical consequences.[9] Legally speaking, the concepts established in IHRL have significant repercussions because the sources and instruments of IHRL are at least partly legally binding, depending on the instrument. Furthermore, they wield considerable discursive power: discussions surrounding the #metoo movement were often 'deeply rooted in law'.[10] For example, in the public discourse about sexual harassment in the US, there has been extensive use of legal terminology, legal concepts, and framing.[11] Moreover, examining the conceptualization of sexual harassment and analysing the broader contexts of IHRL surrounding this concept reveals structural issues in IHRL, including

Johanna Niemi, Lourdes Peroni and Vladislava Stoyanova (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention* (Routledge 2020).

[4]Alice Edwards argues that it was first developed by Catherine MacKinnon in her fundamental work on sexual harassment: Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press 2011); Catharine A MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press 1979).

[5]Edwards (n 4).

[6]Council of Europe Convention on preventing and combatting violence against women and domestic violence 2001 [European Treaty Series 210].

[7]Leskinen (n 3).

[8]Ibid; Johanna Niemi and Amalia Verdu Sanmartin, 'The Concepts of Gender and Violence in the Istanbul Convention' in Johanna Niemi, Lourdes Peroni and Amalia Verdu Sanmartin (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention* (1st edn, Routledge 2020).

[9]Niemi and Verdu Sanmartin (n 8) 78.

[10]Lesley Wexler, 'MeToo and Law Talk' (2019), The University of Chicago legal forum 343, 343-344.

[11]Ibid, 347.

discrimination. If sexual harassment is constructed in IHRL in a way which maintains or creates inequalities and power disbalances, the failure to effectively address sexual harassment in national law is unsurprising.

First, in the second section of this article, I focus on the materials and methods I engage with to provide my analysis. In the third section I present a historical outline of the conceptualization of sexual harassment in the law to trace how sexual harassment discourses were formed in law and how they influenced the development of the concept. I also explore this conceptualization in relation to the structural inequalities present in IHRL. Section four focuses on the early developments of the concept of sexual harassment in IHRL within the UN framework. In section five, I explore how the Istanbul Convention and its treaty body developed the concept of sexual harassment, as well as the lack of intersectional perspectives in the Convention. In section six, I briefly explore treaties that focus on economic and social rights: the ICESCR[12] and the ESC (Revised).[13] My findings are summarized in the Conclusion.

2. Materials and Methods

To analyse structural legal issues which may not be explicitly present, I draw on certain strands of feminist and critical scholarship. I engage with the theory of intersectionality to determine how discrimination on several grounds qualitatively creates new forms of discrimination.[14] In this context, as 'a theoretical framework for understanding power and inequality by examining the systemic operation of marginalization along axes of multiple identities',[15] intersectionality theory is a powerful instrument. Postcolonial feminist studies likewise enables an exploration of the complex interaction between power, gender, and race dynamics, and the resulting unequal treatment of women.[16]

Drawing on critical and intersectional feminist scholarship also provides an analysis of neoliberalism that commodifies women as a workforce. As Ratna Kapur points out, states now understand violence against women 'as being a barrier to women's participation in the market, including as a cheap exploitable labour resource'.[17] This framework allows sexual harassment to be situated within the IHRL-constructed differentiation between gender violence in the Global South and gender violence the Global North; in the former, certain types of violence are labelled as 'harmful practices'[18] or the outcome of 'patriarchy'[19] while the label differs for the Global North, as Sally Engle Merry puts it: 'Yet in the United States, domestic violence, rape in wartime, and stalking are not

[12]International Covenant on Economic, Social and Cultural Rights 1966 [UN Treaty Series vol 993 p. 3].
[13]European Social Charter (Revised) 1996 [European Treaty Series 163].
[14]Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) Article 8 University of Chicago Legal Forum; Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241. Intersectionality theory was originally created by Crenshaw as an instrument to analyse gender-based violence as discrimination against women of colour.
[15]Saru Matambanadzo, 'Gender, Expulsion, and Law Under Racial Capitalism' (2022) 2 Journal of Law and Political Economy 205 <https://escholarship.org/uc/item/4j55b8nx> accessed 2 October 2023.
[16]Ratna Kapur, 'Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India' (2013) 14 Melbourne Journal of International Law 317, 325-329.
[17]Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Pub, Inc 2018) 98.
[18]Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Nachdr, University of Chicago Press 2007) 28.
[19]Merry (n 18).

labeled as harmful cultural practices nor are forms of violence against women's bodies such as cosmetic surgery, dieting and the wearing of high heels'.[20] This division within IHRL constructs the 'victim subject'[21] as a non-white woman (from the Global South) who needs to be 'saved'[22] from 'uncivilised' and 'dangerous' non-white men and 'cultural practices'.[23] Simultaneously, queer theory, for the purpose of this article, provides an analysis of how gendered power relations, as constructed in IHRL treaties, only acknowledge two genders and two sexes, with men being portrayed as superior to women.[24] As a result, gender-based violence (GBV) in IHRL is essentially viewed as violence against women, with no other gender seen as being a victim of GBV, and the sexual harassment of 'trans- and gender-variant subjects'[25] is often invisible or non-existent in the IHRL discourse.

To conduct this inquiry on sexual harassment conceptualization, I studied an extensive number of legal texts[26], including various IHRL treaties, soft law, and interpretations by treaty bodies. I analysed the content and language[27] of these texts using the method of discourse analysis[28] to trace the development of the concept of sexual harassment and uncover the insights provided by the language of sexual harassment law. I examined the language used to frame sexual harassment and the content of the legal provisions, as well as the contexts surrounding the legal texts on harassment.

My primary sources were international human rights law instruments: two treaties addressing women's rights—the United Nations' CEDAW[29] and the Council of Europe's Istanbul Convention[30]—and two treaties on economic and social rights—the UN's ICESCR[31] and the European Social Charter (ESC).[32] In addition, I used soft-law instruments such as treaty body interpretations and recommendations to member states. My secondary sources included scholarly articles. Due to the limited space and scope of this article, I did not include an analysis of the development of EU law,[33] the

[20]Ibid 28.
[21]Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 Harvard Human Rights Journal 1.
[22]Kapur acknowledges the importance of the gender-based violence framework to women rights but still notes the backlash of the 'victim's narrative'. Kapur, 'Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India' (n 16) 4.
[23]Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (n 21).
[24]Niemi and Verdu Sanmartin (n 8).
[25]Sandra Duffy, 'Contested Subjects of Human Rights: Trans- and Gender-variant Subjects of International Human Rights Law' (2021) 84 The Modern Law Review 1041.
[26]I open up which legal texts I analysed together with the criteria and justification of such selection in the beginning of the each section.
[27]Johanna Niemi-Kiesiläinen, Päivi Honkatukia and Minna Ruuskanen, 'Legal Texts as Discourses' in Åsa Gunnarsson, Eva-Maria Svensson and Margaret Davies (eds), *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (Ashgate 2007).
[28]Ibid; Johanna Niemi, 'Excluding Power from a Narrative: Sexual Harassment in a Criminal Law Reform' in Ulrika Andersson and others (eds), *Rape Narratives in Motion* (Springer International Publishing 2019).
[29](n 1).
[30]Council of Europe Convention on preventing and combatting violence against women and domestic violence 2001 [European Treaty Series 210].
[31]International Covenant on Economic, Social and Cultural Rights 1966 [UN Treaty Series vol 993 p. 3].
[32]European Social Charter (Revised) 1996 [European Treaty Series 163].
[33]The main Directive addressing sexual harassment is the 'Equality Directive': Directive 2002/73/EC of the European Parliament and of the Council of 23.09.2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. [Official Journal L 269].

International Labour Organization Convention 190,[34] or treaties concerning the Organization of American States and the African Union.

3. The History of Sexual Harassment Concepts: Pragmatic Responses

As suggested above, the concept of sexual harassment as discrimination based on sex in the workplace originated in the work of Catharine MacKinnon,[35] based on the US courts'[36] anti-discrimination jurisprudence. It was a solution to address a phenomenon that had existed long before it was named sexual harassment; as MacKinnon put it, 'sexual harassment … has been legally unthinkable'.[37] MacKinnon's work is both a product of and the contribution to the second-wave feminist struggle that was predominantly white-centred, overlooked the activism of women of colour,[38] and viewed sexism as the primary oppression while centred around US issues. It omitted class and race analysis, aiming for equality with men, and promoted individual rights rather than a response to systemic oppression.[39]

Angela P. Harris has argued that MacKinnon's legal theory relies on gender essentialism.[40] Sexual harassment in MacKinnon's work is not an exception, it is a common experience of *all* women, whereby the experience of gender is seen as monolithic inherent to all women and is 'described independently of race, class, orientation, and other realities of experience'.[41] In *Sexual Harassment of Working Women* (1979), MacKinnon states that 'Sexual harassment of working women is argued to be employment discrimination based on gender where gender is defined as the social meaning of sexual biology. Women are sexually harassed by men because they are women, that is, because of the social meaning of female sexuality, here, in the employment context.',[42] and this is the fundamental point of MacKinnon's analysis. Gender essentialism leads to the 'universal subject' problem: the unique challenges faced by marginalized women based on their class, race, religion, ethnicity, or sexual orientation are disregarded and the victim subject becomes a universal subject, 'a subject that resembles the uncomplicated subject of liberal discourse. It is a subject that cannot accommodate a multi-layered experience'.[43]

The anti-discrimination law of the time was rooted in the Civil Rights Movement, as MacKinnon acknowledged: 'The primary point of reference for antidiscrimination law has not been the social situation and experience of women, but that of black Americans, or at least black men'.[44] MacKinnon's classic work has multiple historical references to the sexual harassment of Black women[45] and analyses many related court

[34]International Labour Organisation Convention (No. 190) concerning the elimination of violence and harassment in the world of work 2019.
[35]MacKinnon (n 4).
[36]Niemi (n 28).
[37]MacKinnon (n 4) 9.
[38]bell hooks, Ain't I a Woman: Black Women and Feminism (Nachdr, Pluto Press 2001).
[39]Becky Thompson, 'Multiracial Feminism: Recasting the Chronology of Second Wave Feminism' (2002) 28 Feminist Studies 336, 337.
[40]Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford Law Review 581.
[41]Ibid 585.
[42]MacKinnon (n 4) 174.
[43]Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (n 21) 6.
[44]MacKinnon (n 4) 127.
[45]Ibid 53.

cases.[46] She pointed out that 'some black women have been able to grasp the essence of the situation, and with it the necessity of opposition, earlier and more firmly than other more advantaged women', but she attributed this to their extra vulnerability: 'they are most vulnerable to sexual harassment, both because of the image of black women as the most sexually accessible and because they are the most economically at risk'. She also wrote that Black women have greater capability to risk struggling against sexual harassment, despite the fact that 'they have the most to lose by protest, which targets them as dissidents', because their situation is already so desperate: 'Since they cannot afford any economic risks, once they are subjected to even a threat of loss of means, they cannot afford not to risk everything to prevent it. […] Thus, since black women stand to lose the most from sexual harassment, by comparison they may see themselves as having the least to lose by a struggle against it'.[47] MacKinnon also attributed Black women's leadership in the discourse to harassment practices during slavery: 'Their heritage of systematic sexual harassment under slavery may make them less tolerant of this monetized form of the same thing'.[48] By insisting on the special vulnerability and the traditions of resistance of Black women, MacKinnon constructs them as the classical 'Other', a deviant version of the sexual harassment subject.[49]

Another important axis of intersectional discrimination missing from the second-wave feminist concept of sexual harassment is class. MacKinnon speaks of women of all classes suffering from sexual harassment at work, including factory workers, waitresses, seamstresses, personal secretaries, typewriters, teachers, nurses, care workers, and domestic helpers.[50] However, in the analysed court cases,[51] which is the main part of MacKinnon's legal analysis from which her conceptualization of sexual harassment emerges, almost all the plaintiffs are office workers (this is either stated directly or may be easily understood from the context of each case).[52] Thus, most categories of working-class women whose experiences MacKinnon ostensibly values are missing from the legal conceptualization of harassment, making it the problem of women in office settings, that is, predominantly middle-class women.

The social harm done by premising feminism—and by extension sexual harassment in the legal discourse—on white middle-class women's experience, disregarding the axes of race and class, was outlined by Kimberlé Crenshaw in her revolutionary work from the late 1980s and early 1990s introducing intersectional theory.[53] Responses to violence against a woman based on the experiences of women who do not share the same class

[46]Ibid 60–74.
[47]Ibid 53.
[48]Ibid 54.
[49]Compare MacKinnon's image of Black women with how Kimberlé Crenshaw, 13 years later, addressed sexual harassment of Black women. The latter attributed the disproportionately high amount of Black women among the plaintiffs in such cases to the fact that the racialization of sexual harassment meant Black women are more likely to be subjected to sexual harassment. Crenshaw's foregrounding of structural inequalities and intersectionality avoided the creation of an imaginary Other. Kimberlé Crenshaw, 'Race, Gender, and Sexual Harassment' (1992) 65 Southern California Law Review 1467, 1469-1471.
[50]MacKinnon (n 4) 10–23.
[51]Ibid 57–82.
[52]This may of course be attributed to the issue of the access to justice – middle-class women supposedly may have better possibilities of such. But this is a separate study which is outside of the scope of this article for which it was important to demonstrate how sexual harassment conceptualisation was focused on the office workers.
[53]Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (n 14); Crenshaw, 'Mapping the Margins' (n 14); Crenshaw, 'Race, Gender, and Sexual Harassment' (n 49).

or race with the victim will be insufficient.[54] Several scholars have made a critique of the gender essentialism, non-intersectionality, and the universal subject problem in MacKinnon's early scholarship.[55] It is important to note, however, that Kimberlé Crenshaw opposed the critique of MacKinnon essentialism, noting among other things, that:

> In practice, MacKinnon's theorizing about women closely parallels similar analytic moves that have historically mobilized African Americans as a group to contest the terms of racial subordination. The parallel tends to be underappreciated in the discourses surrounding the commensurability of feminist and antiracist mobilizations. Moreover, the premises upon which intra-racial solidarity and empathy are grounded are not fully explained by actual antiracist practice.[56]

Through feminist discourse, the conceptualization of sexual harassment in the workplace as discrimination based on sex became US legal practice and then found its way into international human rights law. For example, the UN's CEDAW framework conceptualized not only sexual harassment but violence against women in general as sex discrimination. As Edwards shows, 'In much the same way as MacKinnon's work on sexual harassment in the USA, in which she argued that sexual harassment is sex discrimination in order to locate a legal cause of action before US courts, the approach of the Women's Committee is a pragmatic response to a gap in the law.'[57] Within the discrimination framework, sexual harassment primarily endangers the fundamental human right to equality and the principle of non-discrimination, especially in professional environments and situations related to employment. Thus, as I discuss further in my analysis of the CEDAW, when violence against women was incorporated into IHRL, the concept of sexual harassment retained its roots in second-wave feminism.

By definition, sexual harassment in MacKinnon's framework—as an 'unwanted imposition of sexual requirements in the context of a relationship of unequal power'[58]—is not limited to work or work-related scenarios, such as hiring processes. A relationship of unequal power can occur in any setting in which there is power relations, such as educational institutions (teacher-student), medical institutions (doctor-patient), sports institutions (coaches, officials, doctors, and athletes), and closed institutions such as care homes, psychiatric wards, prisons, and military organizations. Unequal power settings also tend to be present in families, while street harassment manifests wider gendered power imbalances. However, I believe that MacKinnon's focus in *Sexual Harassment of Working Women* on cases of sexual harassment of working middle-class women with office jobs, disregarding the axis of racial discrimination, has impacted the advancement of laws and research related to sexual harassment, including IHLR, in the realm of employment in particular.

As several scholars have shown, the current US political and legal culture around sexual harassment was largely built on the US Civil Rights Movement and Civil Rights

[54]Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (n 14) 1252.
[55]Carol Smart, *Feminism and the Power of Law* (Routledge 2003) 76; Marlee Kline, 'Race, Racism, and Feminist Legal Theory' (1989) 12 Harvard Women's Law Journal 115; Harris (n 40); Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (n 21).
[56]Kimberlé Crenshaw, 'Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality' (2013) 46 Tulsa Law Review 151, 182.
[57]Edwards (n 4) 183-184.
[58]MacKinnon (n 4) 1.

Act of 1964,[59] with equality and discrimination as its founding legal concepts—as in MacKinnon's work.[60] In European law, however, due to developments during the period of post-Holocaust trauma, especially in the context of Germany, human dignity[61] was implemented as the founding legal concept in dealing with sexual harassment.[62] The European approach grew from recognizing sexual harassment at large not as a violation of human dignity in the sense of the post-1945 human rights system but as a violation of 'sexual dignity'.[63] For example, in France, through a lengthy legislative process between 1991–92 which led to the adoption of the law on sexual harassment, French legislators found it most suitable to classify sexual harassment as a minor sexual offence conducted through the abuse of power.[64] Because the 'dignity' concept in sexual violence law is often rooted in the understanding of dignity as 'honor' in its patriarchal sense,[65] this approach led to seeing sexual harassment as sexual violence.[66] More specifically, a woman's modesty[67] is seen as a component of dignity.[68] Thus, only women seen as good and modest can truly be victims of sexual violence, including harassment. Women perceived as bad and promiscuous are 'bad victims' of the offence against dignity because their dignity is seen as already impaired.

Furthermore, scholars argue that the critical engagement with dignity in sexual offences,[69] including sexual harassment, mainstreams only a certain type of 'normal' dignity, which disregards the othered subject.[70] An intersectional perspective is therefore lacking in the dignity approach. The search for the 'good victim' of a sexual crime persists in contemporary discourse on sexual harassment.[71] Black women are often seen as manifesting a dangerous and immoral sexuality,[72] for example, and bisexual women are seen as 'promiscuous'.[73] Like the equality approach, the dignity approach to sexual harassment is thus best fitted to protect the 'respectable woman'—who is presumably white, heterosexual, cisgender, and middle-class. As Elizabeth Anderson puts it, dignity theory, 'insofar as it views modesty as a component

[59]Abigail C Saguy, 'Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law' (2000) 34 Law & Society Review 1091, 1100-1104.
[60]Susanne Baer, 'Dignity or Equality?' in Catharine A MacKinnon and Reva B Siegel (eds), *Directions in Sexual Harassment Law* (Yale University Press 2003) 588.
[61]Ibid.
[62]Saguy (n 59).
[63]L Camille Hebert, 'Dignity and Discrimination in Sexual Harassment Law: A French Case Study' (2019) 25 Washington and Lee Journal of Civil Rights and Social Justice 7-8.
[64]Saguy (n 59) 1111-1118.
[65]Anna High, 'Sexual Dignity in Rape Law' (2021) Yale Journal of Law & Feminism 10.
[66]Ibid 1.
[67]Elizabeth Anderson, 'Recent Thinking about Sexual Harassment: A Review Essay' (2006) 34 Philosophy & Public Affairs 3, 284-311.
[68]High (n 65) 11.
[69]Libby Adler, 'The Dignity of Sex' (2008) 17 UCLA Women's Law Journal.
[70]High (n 65) 31.
[71]Heather Berg, 'Left of #MeToo' (2020) 46 Feminist Studies 259; Miranda Pilipchuk, 'Good Survivor, Bad Survivor: #MeToo and the Moralization of Survivorship' (2019) 19 American Philosophical Association Newsletter on Feminism and Philosophy 5.
[72]Joel R Anderson and others, 'Revisiting the Jezebel Stereotype: The Impact of Target Race on Sexual Objectification' (2018) 42 Psychology of Women Quarterly 461; Iyiola Solanke, 'Putting Race and Gender Together: A New Approach To Intersectionality' (2009) 72 Modern Law Review 723, 732; Abigail C Saguy and Mallory E Rees, 'Gender, Power, and Harassment: Sociology in the #MeToo Era' (2021) 47 Review of Sociology 417, 422–424.
[73]Christina Dyar, Brian A Feinstein and RaeAnn E Anderson, 'An Experimental Investigation of Victim Blaming in Sexual Assault: The Roles of Victim Sexual Orientation, Coercion Type, and Stereotypes About Bisexual Women' (2021) 36 Journal of Interpersonal Violence 10793.

of dignity, also supports strong regulation of sexuality at work and school' and might threaten non-hetero gender identities.[74] Another problem with dignity-centred approach to sexual harassment is that it often perceived offences as individual acts of dignity violation rather than as systemic expressions of gender inequality and gender-related power imbalances in society.[75] Constructing sexual harassment as violating a person's psychological or physical integrity fails to recognize the systemic power imbalances entangled with sexual harassment and depoliticizes the phenomenon.[76]

To summarize, the scholarship suggests that the equality-led US approach is historically connected to second-wave feminism, which largely disregarded racial and other axes of oppression and addressed mostly office-working women, while the dignity approach fails to recognize the structural character of violence and incorporates women's 'sexual modesty' into dignity, leaving out divergent or marginalized subjects.

4. The CEDAW and The Early UN Framework: Introducing Sexual Harassment into International Human Rights Law

In this section, I address the central documents that introduced sexual harassment into IHRL: the UN's Beijing Declaration and Platform for Action[77] (1995) and the CEDAW. As the CEDAW does not address the issue specifically, I analyse the CEDAW Committee's interpretations. Taken together, the CEDAW interpretations and non-binding instruments represent the earliest IHRL discourse on sexual harassment. To trace evolution over time, I took both the CEDAW general recommendations (GR) addressing harassment and concluding observations (COs) on states' periodic reports. I selected several years of such reports, each separated by a six- to nine-year period: 1986 (overall, eight periodic reports analysed), 1993 (nine), 2004 (16), 2010 (23), 2017 (28), and 2021–22 (27). In each period, I analysed all COs issued. I chose these years in order to track the changes and progress made in the CEDAW COs over time from the 'pre-harassment' discourse to the most recent developments. An analysis of the contexts and the language which the aforementioned IHRL instruments use to frame sexual harassment provides a means to identify underlying assumptions and power dynamics, as well as the structural discrimination and the legal subject addressed by the IHRL instruments.

As early as 1989, the CEDAW Committee mentioned sexual harassment in the workplace as a part of violence in everyday life,[78] and in 1992, in its GR N 19, it stated that sexual harassment constitutes violence against women.[79] In the same GR N 19, the Committee also interpreted GBV as discrimination covered by the CEDAW (Article 1).[80] According to the CEDAW Committee, 'sexual harassment includes such unwelcome

[74]Anderson (n 3) 291.
[75]Baer (n 60) 587.
[76]High (n 65) 13; Kathryn Abrams, 'New Jurisprudence of Sexual Harassment' (1998) 83 Cornell Law Review 1169, 1176.
[77]United Nations, Beijing Declaration and Platform of Action [1995], adopted at the Fourth World Conference on Women.
[78]GR N 12 (n 1).
[79]GR n 19 (n 1), para 17.
[80]Ibid, para 6. According to the Committee, 'the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately'.

sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions'.[81] It limited sexual harassment to the workplace: 'Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.'[82]

Interestingly, the CEDAW framework takes the pragmatic approach that MacKinnon took, in that it does not explicitly address violence against women (VAW) but uses the concept of discrimination based on sex (SD). The CEDAW Committee preferred to address sexual harassment as a form of violence against women which in turn constitutes SD. This VAW = SD formula, as Edwards calls it,[83] is a practical response to the gap in the CEDAW, just as framing sexual harassment as discrimination was a way to address the gap in the US justice system.[84]

With regard to sexual harassment, GR N 19 also states that 'such conduct can be humiliating and may constitute a health and safety problem', and that it is 'discriminatory when the woman has reasonable grounds to believe that her objection would *disadvantage her in connection with her employment, including recruitment or promotion,*[85] or when it creates a hostile working environment'.[86] Changing discourse around the conceptualization of violence against women is reflected in the COs made by the CEDAW Committee. For example, out of all 1989 concluding observations,[87] violence against women is mentioned once[88] (sexual harassment is not mentioned), while in 1993 the concept of violence against women prevails[89] and sexual harassment as a form of VAW is addressed in four of eight COs.[90] In the decades following the GR N 19, sexual harassment was mainly conceptualized as a *form of violence against women in the workplace*. In 2004, the COs[91] either state directly that sexual harassment constitutes VAW or list sexual harassment together with other forms of VAW, such as domestic violence.[92] Sexual harassment as a form of VAW is mentioned 14 times, and as employment discrimination it is mentioned three times.[93]

Tracing conceptualization through time is reflected in Table 1.

[81]Ibid, para 18.
[82]Ibid, para 17.
[83]Edwards (n 4) 183–185.
[84]Niemi (n 28) 18; Baer (n 60) 593–594.
[85]Emphasis added.
[86]GR N 19 (n 1) para 18.
[87]UN Committee on the Elimination of Discrimination against Women (5th sess. : 1986: New York): Report of the Committee on the Elimination of Discrimination against Women. General Assembly. Official Records. Supplement. A/41/45 UNA(01)/R3, 57 p., on Denmark, Mongolia, Portugal, Czechoslovakia, Viet Nam, Ecuador, Venezuela, El Salvador.
[88]Ibid, para 48. Another mention is read as 'violence against female'.
[89]UN Committee on the Elimination of Discrimination against Women (11th sess. : 1992: New York): Report of the Committee on the Elimination of Discrimination against Women General Assembly. Official Records. Supplement. A/47/38, 135 p., on Barbados, Ghana, Sri Lanka, Venezuela, China, Czechoslovakia, El Salvador, Spain, Honduras.
[90]Ibid. With regard to Sri Lanka, Honduras, China, Spain.
[91]UN Committee on the Elimination of Discrimination against Women (30th and 31st sess. :2004: New York). Report of the Committee on the Elimination of Discrimination against Women. General Assembly. Official Records. Supplement. A/59/38, A(01)/R3, 268 p. on Kuwait, Bhutan, Kyrgyzstan, Nepal, Ethiopia, Nigeria, Belarus, Germany, Latvia, Malta, Angola, Equatorial Guinea, Bangladesh, Dominican Republic, Spain, Argentina.
[92]Ibid: see concluding observations with regard to Nigeria, Belarus, Germany, Malta, Bhutan, Kyrgyzstan, Bangladesh, Dominican Republic, and Argentina.
[93]Ibid.

Table 1 Conceptualisation of sexual harassment in the CEDAW concluding observations

	Sexual harassment as VAW / GBV (Nr of mentions)	Sexual harassment [as employment discrimination (Nr of mentions)	Sexual harassment is not mentioned
1986	0	0	8 / 8
1993	5	2	4 / 9
2004	14	3	7 / 16
2010	7	27	4 / 23
2017	16	28	3 / 28
2021	10	17	0 / 11
2022	11	26	1 / 16

Surprisingly, the CEDAW Committee GR N 35 (2017),[94] on gender-based violence against women, updating GR N 19, hardly mentions sexual harassment; it states that GBV takes multiple forms including harassment. The shift to citing sexual harassment as GBV in GR N 35 can be explained by the changing conceptualization of sexual harassment. In 1993 and 2004, as discussed earlier, the VAW conceptualization was prevalent but later shifted towards the discrimination framing. For example, in 2010, in the CEDAW Committee COs concerning Argentina[95] and Australia,[96] sexual harassment was raised as an employment issue among other forms of employment discrimination while the COs with regard to Albania[97] mentioned sexual harassment both as a VAW issue[98] in the context of rape and stalking and as SD[99] in the workplace.[100]

As of 2017, sexual harassment in the COs was primarily mentioned in the context of employment, not GBV, so tackling sexual harassment is presented alongside other anti-discriminatory measures. For example, in the COs on the eighth periodic report on Ukraine, sexual harassment is categorized under the 'employment' section,[101] not under the 'gender-based violence' section.[102] The COs on the combined 7th and 8th periodic reports of Germany follow a similar structure.[103] Although they do not directly refer to sexual harassment as discrimination, they place other anti-discriminatory measures (such as equal pay or providing kindergartens) alongside sexual harassment, suggesting the shift towards conceptualizing sexual harassment as workplace discrimination rather than GBV.

In the US, sexual harassment discourse initially as developed by Catherine Mackinnon on the basis of gender essentialism was centred only around sex discrimination disregarding other forms of oppression and power imbalance between certain groups (for instance, racial, and religious):

> Her central concern is women as objectified victims of this male process: law, which is produced by men, objectifies women. Class, cultural, religious, and racial differences between

[94]CEDAW Committee, General recommendation N 35 on gender-based violence against women, updating general recommendation No. 19 (2013), UN Doc. CEDAW/C/GC/35.
[95]Argentina, CEDAW/C/ARG/CO/6, 16 August 2010, para 32-33.
[96]Australia, CEDAW/C/AUL/CO/7, 30 July 2010, para 32-33.
[97]Albania, CEDAW/C/ALB/CO/3, 16 September 2010, paras 25, 32, 33 and 14.
[98]Ibid, para 26.
[99]Ibid., para 14.
[100]Similarly, with regard to Egypt, CEDAW/C/EGY/CO/7, 03 February, 2010.
[101]Ukraine, CEDAW/C/UKR/CO/8, 9 March 2017, para 35-36.
[102]Ibid, para 25.
[103]Germany, CEDAW/C/DEU/CO/7-8, 9 March 2017, para 35-36 on employment, para 25 on GBV. Similarly, Rwanda, CEDAW/C/RWA/CO/7-9, 9 March 2017, Micronesia, CEDAW/C/FSM/CO/1-3, 9 March 2017, Kenya, CEDAW/C/KEN/CO/8, 22 November 2017.

> women are all collapsed under the category of gender through women's common experience of sexual violence and objectification by men.[104]

The CEDAW Committee also rarely directly frames sexual harassment as an issue of intersectional discrimination. GR N 35, however, attempts to add an intersectional dimension to GBV in general, if not explicitly to sexual harassment, by stating that discrimination against women is linked to 'other factors that affected their lives'.[105] It does not state these factors to be the grounds of discrimination per se; rather, they are linked with discrimination. This may because the CEDAW does not mean intersectional discrimination as such but instead perceives race as a factor that may influence discrimination against women; in my view, this is precisely the 'additive' approach that Crenshaw, writing in the US context, warned against.[106] Putting subaltern identities into lists,[107] which is often done in treaties, highlights how IHRL is designed for a specific narrow universal subject.

While these clauses are a big step forward in recognizing intersectional discrimination, they are not enough to fully address intersecting factors of oppression and marginalization. Firstly, the additive approach to intersection leads to the 'whitening' of intersectionality, that is, positioning race and other factors such as disability or being transgender as less significant additions to gender discrimination.[108] Secondly, even these intersectional clauses, as demonstrated in Table 2, are applied by the CEDAW Committee inconsistently.[109] The CEDAW COs have rarely mentioned sexual harassment as intersecting with other forms of discrimination; such mentions have increased in recent years but are nevertheless still not significant, as demonstrated in Table 2.

Table 2. Addressing sexual harassment in conjunction with other forms of discrimination in the CEDAW concluding observations

	Young women	Women street vendors	Women in prostitution	Women with disabilities	Women domestic workers	National or religious minority	Migrant women	Women with HIV / AIDS	LGBTI + women
1986	0	0	0	0	0	0	0	0	0
1993	0	0	0	0	0	0	0	0	0
2004	0	0	0	0	0	0	0	0	0
2010	0	0	1	0	0	0	0	0	2
2017	0	1	1	0	1	1	2	0	3
2021	0	0	1	1	0	1	1	0	1
2022	2	0	1	2	0	1	1	1	4

[104]Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (n 21) 9.

[105]These are: women's ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital status, maternity, parental status, age, urban or rural location, health status, disability, property ownership, being lesbian, bisexual, transgender, or intersex, illiteracy, seeking asylum, being a refugee, internally displaced or stateless, widowhood, migration status, heading households, living with HIV/AIDS, being deprived of liberty, and being in prostitution, as well as trafficking women, situations of armed conflict, geographical remoteness and the stigmatisation of women who fight for their rights, including human rights defenders. GR N 35 (n 94) para 12.

[106]Crenshaw, 'Mapping the Margins' (n 14).

[107]These lists vary from treaty to treaty. Unsurprisingly, the later the text was adopted, the longer the 'list of subalterns'. See: The CESCR GC N 23 (n 144), para 28, the Istanbul Convention Article 4(3), The CEDAW GR N 35 (n 94) para 12.

[108]Ashlee Christoffersen and Akwugo Emejulu, '"Diversity Within": The Problems with "Intersectional" White Feminism in Practice' (2023) 30 Social Politics: International Studies in Gender, State & Society 630.

Turning to the language through which the CEDAW Committee has conceptualized sexual harassment, there are discursive signs of the neoliberal framing of the sexual harassment subject that aims to mobilize women to participate in the labour market, familiar from the US context. Kapur has identified the following with regard to gender-based violence in India:

> The image of an aspiring Indian woman creating a valid, hard-earned place for herself within a sexist national order—which is now also linked to a global economic order—marked a significant moment in the inscription of a new generation within the neoliberal schema of gender, and the foregrounding of the *femme economicus*.[110]

Sexual harassment seems to be regarded as a distinct form of oppression among other forms of GBV by the CEDAW. For example, in CEDAW GR N 19, the language on sexual harassment stands out from other paragraphs. With regard to other forms of GBV, the Committee states that 'traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles'[111] lead to such forms of VAW as: 'family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision'.[112] Furthermore, it labels 'dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation' as 'traditional practices'. It also notes that 'the subordinate role of women persists in many rural communities'.[113]

Yet the Committee does not frame sexual harassment as connected to the subordinate role of women, or to harmful stereotypes and traditional practices inherent to patriarchy. The Committee's wording in the case of sexual harassment can be described as empowering rather than victimising: 'equality in employment can be seriously impaired when women are subjected to [..] sexual harassment in the workplace'.[114] Moreover, sexual harassment may 'disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment'.[115] In my view, both recruitment and promotion are closely associated with white-collar professions and a modern office setting. In framing sexual harassment as a phenomenon located in the labour market, the CEDAW does not frame it as an outcome of patriarchy. Notions of patriarchy in IHRL seem to be largely linked to the Global South, as Cassandra Mudgway demonstrates.[116] As such, the CEDAW treats sexual harassment discursively as not a 'traditional harmful practice', but a practice of discrimination against a *femme economicus* in the workplace.[117]

The Beijing Declaration, a program document that addresses the concept of GBV, contains similar language that suggests a focus on empowered women experiencing

[109]Meghan Campbell comes to similar conclusion on inconsistency of the intersectional approach of the CEDAW analysing different CEDAW Committee materials. Meghan Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination' (2015) 11 Revista Direito GV 479.
[110]Kapur, *Gender, Alterity and Human Rights* (n 17) 87.
[111]GR N 19 (n 1), para 11.
[112]Ibid.
[113]Ibid.
[114]Ibid, para 17.
[115]Ibid, para 18.
[116]Cassandra Mudgway, 'Can International Human Rights Law Smash the Patriarchy? A Review of "Patriarchy" According to United Nations Treaty Bodies and Special Procedures' (2021) 29 Feminist Legal Studies 67.
[117]Kapur, *Gender, Alterity and Human Rights* (n 17) 87.

sexual harassment. The phrasing includes: 'achieving', 'potential', 'promoted further', 'abilities', 'making a contribution' and 'achieving full potential'[118]:

> For those women in paid work, many experience obstacles that prevent them from achieving their potential. While some are increasingly found in lower levels of management, attitudinal discrimination often prevents them from being promoted further. The experience of sexual harassment is an affront to a worker's dignity and prevents women from making a contribution commensurate with their abilities. The lack of a family-friendly work environment, including a lack of appropriate and affordable child care, and inflexible working hours further prevent women from achieving their full potential.

This passage reflects the neoliberal discourse of work as a commodity, of women's participation in the job 'market' and orientation to the culture of productivity, and the 'lean-in'[119] type of white liberal feminism.[120] Thus, women who are not considered high achievers or who do not or cannot choose a career in a workplace that offers promotions or align with the professional-managerial class and career-building culture are overlooked when it comes to addressing sexual harassment. Such women include those who work in agriculture, the domestic garment sector, or street vending. In contrast, for other types of GBV the language of the Beijing Declaration mostly envisions an imaginary subject of an oppressed victim in a setting of 'traditionalism' and 'patriarchy'.[121]

The abovementioned approach to sexual harassment leads to its conceptualization as an issue in certain workplaces and implies less focus on sexual harassment in other social situations. The CEDAW Committee rarely speaks of street harassment, for example. While women are overrepresented in the informal economy,[122] as well as in unpaid caregiving labour in households, the workplace described by the CEDAW Committee does not suggest an agricultural field or a home with several children. Again, it seems to be the office, a predominantly a middle-class working space, where sexual harassment occurs. Promotions and achieving one's full potential are unlikely to apply to agricultural workers or sex workers, for example. In Table 3, I demonstrate the spatial dimension of sexual harassment.

Thus, the CEDAW framework analysis provides an understanding of sexual harassment mostly as workplace discrimination of an emancipated woman.

[118]Beijing Declaration (n 77), para 161.

[119]Sheryl Sandberg, Lean in: Women, Work, and the Will to Lead (First edition, Alfred A Knopf 2013).

[120]As bell hooks states, criticizing Sheryl Sandberg's feminism (n 119): 'From this perspective, the structures of imperialist white supremacist capitalist patriarchy need not be challenged. And she makes it seem that privileged white men will eagerly choose to extend the benefits of corporate capitalism to white women who have the courage to 'lean in'. bell hooks, 'Dig Deep: Beyond Lean In' The Feminist Wire (28 October 2013) <https://thefeministwire.com/2013/10/17973/>. See also: Susan Faludi, 'Facebook Feminism, Like It or Not' The Baffler (August 2013) <https://thebaffler.com/salvos/facebook-feminism-like-it-or-not>.

[121]For example, compared with the language para 117 of the Beijing Declaration (n 77): "Acts or threats of violence, whether occurring within the home or in the community, or perpetrated or condoned by the State, instil fear and insecurity in women's lives and are obstacles to the achievement of equality and for development and peace. The fear of violence, including harassment, is a permanent constraint on the mobility of women and limits their access to resources and basic activities.' In para 118: "Violence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices and all acts of extremism linked to race, sex, language or religion that perpetuate the lower status accorded to women in the family, the workplace, the community and society.'

[122]According to the ILO, for example, https://www.unwomen.org/en/news/in-focus/csw61/women-in-informal-economy

Table 3. Settings where sexual harassment occur in in the CEDAW concluding observations

	Public spaces	Detention	Online	Education	Army	Employment
1986	0	0	0	0	0	0
1993	0	0	0	0	0	2
2004	0	0	0	0	0	3
2010	0	0	0	5	0	27
2017	2	3	0	13	2	28
2021	1	0	3	23	0	17
2022	3	0	1	8	0	26

5. The Istanbul Convention Development of The Sexual Harassment Discourse

To analyse the discourse of sexual harassment within the Istanbul Convention framework, I took its explanatory report,[123] and the country reports of 2017–18 and 2021–22 from the GREVIO, the Council of Europe body that monitors the implementation of the Istanbul Convention.[124] I used these to analyse the conceptualization of sexual harassment by the Istanbul Convention treaty body in a similar way to the CEDAW Committee GCs and COs. The Istanbul Convention provides a complete and precise definition of sexual harassment in Article 40: it is 'any form of unwanted verbal, non-verbal, or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular, when this creates an intimidating, hostile, degrading, humiliating, or offensive environment'.[125] The Istanbul Convention does not limit sexual harassment to the workplace or to the right to work. Sexual harassment qualifies as a form of GBV and thus as discrimination, while its purpose or effect is defined as a violation of dignity.[126]

In its recommendations to member states, the GREVIO coherently urges them to conceptualize sexual harassment in line with the Istanbul Convention. For example, the GREVIO criticizes the definition of sexual harassment as having as its purpose or effect 'degrading the victim's living conditions entailing a deterioration in his or her health'.[127] It insists that the definition should include respect for the victim's dignity, which allows the inclusion of acts of harassment that do not impair the victim's health.[128] Further, the GREVIO underlines that 'sexual harassment is not limited to the workplace and can occur in multiple contexts. Accordingly, the context or setting does not constitute an element of the offence defined in the Convention'.[129]

Remarkably, the GREVIO does not frame sexual harassment as an issue of workplace discrimination, preferring the dignity approach. Although the explanatory report[130] states that any form of GBV 'seriously violates and impairs or nullifies the enjoyment by women of their human rights, in particular their fundamental rights to life, security,

[123]Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence [2011] ETS 210.
[124]GREVIO (Group of Experts on Action against Violence against Women and Domestic Violence).
[125]The Istanbul Convention, Article 40.
[126]Leskinen (n 3) 152–156.
[127]Monaco, Round Baseline Evaluation Round GREVIO/Inf(2017)3, Publication date: 27/09/2017. Sexual harassment (Article 40), para 120.
[128]Ibid.
[129]Albania, Round Baseline Evaluation Round GREVIO/Inf(2017)13, Publication date: 24/11/2017 V. B. 8. Sexual harassment (Article 40), para 153.
[130]Explanatory Report (n 123), para 26.

freedom, dignity and physical and emotional integrity',[131] dignity and the violation of dignity are mentioned as a qualifying element only in relation to sexual harassment. Yet with regard to domestic violence, sexual violence, or other forms of GBV, the 'dignity discourse' is missing.

However, the Istanbul Convention framework uses the concept of dignity in conjunction with the GBV = SD approach, alongside an extended spatial dimension of the sexual harassment context—meaning the shift from the workplace to multiple settings. This moves the sexual harassment discourse away from the office-setting workplace discrimination of the CEDAW, the CESCR, the ESC (Revised) and the ILO C190 framework. The GREVIO includes, for example, domestic settings in the scope of sexual harassment and underlines that the contexts can vary:

> Sexual harassment is neither limited to the workplace nor to the family and can occur in multiple contexts. Accordingly, the context or setting in which it occurs does not constitute an element of the offence as defined in the convention.[132]

The Istanbul Convention treaty body recognizes the usual power imbalance in sexual harassment, which presents a huge departure from with the dignity approach that had emerged earlier in the law of European countries and in the ESC (Revised).[133] The Explanatory report states that:

> Typically, the above acts are carried out in a context of abuse of power, the promise of reward or threat of reprisal. In most cases, the victim and perpetrator know each other, and their relationship is often characterised by differences in hierarchy and power.[134]

The mixed discourse of the Istanbul Convention thus widened the contexts and spaces of sexual harassment to unequal settings beyond the workplace, shifting the discourse away from its focus on discrimination against (some) working women. Researchers have also noted that the Istanbul Convention avoids framing women from the Global South as victims: 'the text stays clear of the "harmful cultural practices" frame'.[135] These developments taken together demonstrate that the Istanbul Convention drafters and the treaty body embraced at least some postcolonial and intersectional feminist critique on IHRL as a system deeply rooted in colonization and the exclusion of marginalized groups.[136] This is arguably not nearly enough, however.[137]

The Istanbul Convention has been criticized as often lacking intersectional perspectives, instead drawing on 'the idea of women as a constant and homogenous category, promoted by mainstream European feminism, […] soon criticised for promoting issues that affected "white heterosexual middle-class women" almost

[131]Ibid.
[132]Türkiye, Round Baseline Evaluation Round GREVIO/Inf(2018)6. Publication date: 15/10/2018
[133]The ESC (Revised) addresses sexual harassment in Article 26 on the right to 'dignity at work': 'With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations: to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct'.
[134]Explanatory report (n 123), para 29.
[135]Lourdes Peroni, 'Violence Against Migrant Women: The Istanbul Convention Through a Postcolonial Feminist Lens' (2016) 24 Feminist Legal Studies 49, 11.
[136]Ibid.
[137]Emily Jones, *Feminist Theory and International Law: Posthuman Perspectives* (Routledge 2023) 163.

exclusively.'[138] The Convention also lists forms of discrimination and its definition of gender-based violence in the preamble refers only to violence against women, excluding other gender identities.[139] Article 4 (3) states that the Convention shall be implemented without discrimination, but there is no recognition of racialized gender-based violence or gender-based racial violence.

6. Discursive Inputs of Other Treaties Addressing Sexual Harassment

6.1. The European Social Charter (Revised): dignity at work.

The ESC (Revised), often referred to as the social constitution of Europe, addresses sexual harassment as a violation of the right to dignity at work. I examined the ESC Committee Conclusions on country reports in the ESC monitoring procedure starting in 2003, because before 2003 Article 26(1) was not referred to. Although preceded by the CEDAW Committee GR N 19 (1992), which framed sexual harassment as VAW and workplace discrimination, the 1996 ESC (Revised) represents an early attempt to deal with harassment on the European level without using a VAW or employment discrimination framework. Article 26(1) of the ESC (Revised) is titled 'The right to dignity at work':

> With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations (1) to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.

In using the phrase 'all workers', the language is gender neutral. However, the European Committee of Social Rights (the ESC Committee) interprets Article 26(1) as indicating discrimination: in its conclusions on country reports in the ESC monitoring procedure (starting in 2003), the Committee states that sexual harassment is not always gender-based discrimination but always constitutes a breach of equal treatment.[140] This approach broadens the narrow 'dignity' definition of the ESC and brings the discourse forward to discrimination in the workplace.

Furthermore, in 2003 the ESC Committee defined sexual harassment as 'determined by an insistent preferential or retaliatory attitude directed towards one or more persons, or by an insistent attitude of other nature which may harm their dignity or their career'[141] which is a vague definition of sexual harassment for 2003. Apart from unclear 'attitudes', it implies that sexual harassment must be 'insistent'.[142] Harm to a worker's career is yet again the demonstration of extending sexual

[138]Lorena Sosa, 'The Istanbul Convention in the Context of Feminist Claims' in Johanna Niemi, Vladislava Stoyanova and Lourdes Peroni (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention* (Routledge 2020) 29.

[139]Daniela Alaattinoğlu, 'Forced Sterilisation in the Istanbul Convention: Remedies, Intersectional Discrimination and Cis-Exclusiveness' in Johanna Niemi, Lourdes Peroni and Vladislava Stoyanova (eds), International Law and Violence Against Women: Europe and the Istanbul Convention (Routledge 2020) 185–188.

[140]European Committee on Social Rights. Conclusions on Sweden of 30.06.2003 Article 26-1 of the ESC, https://hudoc.esc.coe.int/eng?i=2003/def/SWE/26/1/EN

[141]Ibid.

[142]The same definition was used by the European Committee on Social Rights in the Conclusions on Bulgaria (2003), Italy (2003), https://hudoc.esc.coe.int/eng?i=2003/def/ITA/26/1/EN, Slovenia (2003) https://hudoc.esc.coe.int/eng?i=2003/def/SVN/26/1/EN, France (2003) https://hudoc.esc.coe.int/eng?i=2003/def/FRA/26/1/FR,

harassment from merely an act against dignity to discrimination. In 2005, the ESC Committee acknowledged the sexual character of harassment: 'Sexual harassment qualifies as a breach of equal treatment manifested mainly by an insistent preferential or retaliatory conduct of a sexual nature, directed towards one or more persons which may harm their dignity or their career'.[143]

6.2. The International Covenant on the Economic, Social and Cultural Rights: Freedom from Sexual Harassment for All Workers.

To analyse the ICESCR discourse, I examined both the Committee on Economic Social and Cultural Rights (CESCR) general comments (GC) and concluding observations on state periodic reports for the years 1986, 1993, 2004, 2010, 2017, and 2021–22, similar to the CEDAW Committee COs. In the ICESCR sexual harassment discourse is initially not present; it appears in 2016 in the CESCR interpretation[144] as a violation of the right to just and favourable conditions[145] of work (Article 7) and as a violation of the right to health (Article 12).[146] In Article 7, sexual harassment is seen as one form of 'mental and physical harassment'.[147] The CESCR does not provide a definition, calling on states to define harassment broadly. Further, GC N 23 states that sexual harassment is a form of discrimination and should be prohibited by law.[148]

The CESCR addressed sexual harassment in a separate section rather than incorporating it into the section on discrimination of women at work, therefore emphasizing gender inclusivity as mentioned above it pointed to the 'glass ceiling', the 'sticky floor', and the wage gap, stating the freedom from harassment for 'all workers', using gender-inclusive language. In the GC N 23, para 49(a), the CESCR demands 'explicit coverage of harassment by and against any worker' while in the draft proposal, para 49(a), the authors use the words 'men and women'.[149] Thus, the CESCR brings sexual harassment out of the 'discrimination against women' and VAW discourses. Sexual harassment is rather conceptualized as 'workplace discrimination', which coexists with other forms of harassment impairing the rights of CESCR Article 7: 'harassment on the basis of sex, disability, race, sexual orientation, gender identity, and intersex status'. Anti-discrimination laws are cited among the appropriate legislation addressing harassment.

In its COs, the CESCR holds that sexual harassment is the most common form of discrimination in the workplace.[150] It had already started regularly addressing sexual

[143]European Committee on Social Rights Conclusions Moldova (2005), https://hudoc.esc.coe.int/eng?i=2005/def/MDA/26/1/EN, Lithuania (2005) https://hudoc.esc.coe.int/eng?i=2005/def/LTU/26/1/EN

[144]CESCR General comment N 23 (2016) on the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/23.

[145]Earlier the approach to sexual harassment as jeopardizing conditions of work was, for example, framed in the Beijing Declaration (n 77).

[146]CESCR General comment N 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/2 ge2.

[147]GC N 23 (n 144), para 48.

[148]Ibid.

[149]Right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights). Draft prepared by Virginia Bras Gomes and Renato Ribeiro Leão, Rapporteurs.

[150]Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (First edition, Oxford University Press 2014) 385. The authors mention the following

harassment before the adoption of GC N 23. While in 2004 none of the CESCR COs referred to sexual harassment, in 2010 three of 11 COs cited it as an issue of workplace discrimination. Starting in 2016, mentions of sexual harassment within the COs relating to Article 7 became increasingly common. In 2017, it was reported in three out of 10 instances, and in 2021–22 the number rose to four out of 18. Yet the previously observed gender-neutral language is rarely used in the CESCR COs, which conceptualize sexual harassment as discrimination against women in the workplace. For example, in the case of Bolivia, 'the lack of effective measures to protect women from harassment and discrimination in the workplace',[151] or in the case of Bulgaria: 'prevalence of harassment, including sexual harassment, in the workplace, particularly in the garment sector where the majority of workers are women belonging to marginalised groups'.[152] More rarely, the CESCR positions sexual harassment as an issue of VAW. For example, with regard to Sri Lanka:

> The Committee is concerned that many women-headed households, in particular those in the north and east, are vulnerable to poverty, face food insecurity and lack livelihood opportunities, which increase their vulnerability to exploitation, sexual harassment and violence.[153]

In the GC N 22, the CESCR links freedom from sexual harassment with the right to health (Article 12), the right to work (Article 6), the right to just and favourable conditions of work (Article 7), and the right to non-discrimination.[154] In the COs, however, it usually links sexual harassment with Article 7 and the right to non-discrimination.

While listing the grounds for possible discrimination, the CESCR remains blind to intersectionality and power dynamics. Iyiola Solanke distinguishes the 'additive' approach to discrimination from the intersectional approach: sexual harassment on the basis of race *and* sex is qualitatively different from the simple sum of the two forms of discrimination.[155] As observed in the case of the CEDAW Committee, mentioning sexual harassment in conjunction with other forms of discrimination is rare: in 2017, there is one mention of LGBTI persons, one of internally displaced persons, one of women heads of households, one of children; in 2021–22, there are two mentions of LGBTI persons. Further, like the CEDAW Committee, the CESCR rarely speaks of sexual harassment in any context other than the workplace. For example, in relation to education, sexual harassment is only mentioned twice in 2017, 2021, and 2022 (twice in each year); in 2017, the CESCR addressed sexual harassment at home as a part of a domestic violence issue. Compared to the CEDAW Committee's approach,

concluding observations on the issue. CESCR, Concluding Observations: Georgia, E/C.12/1/Add.42 (17 May 2000); Macedonia, E/C.12/MKD/CO/1 (15 January 2008); Hungary, E/C.12/HUN/CO/3 (16 January 2008); Latvia, E/C.12/LVA/CO/1 (7 January 2008); Morocco, E/C. 12/MAR/ CO/3 (4 September 2008); Poland, E/C.12/1/Add.82 (19 December 2002).

[151]Bolivia, E/C.12/BOL/CO/3 (5 November 2021), para 30.

[152]Bulgaria, E/C.12/BGR/6 (29 March 2019), para 23.

[153]Sri Lanka, E/C.12/LKA/CO/5 (4 August 2017).

[154]GC N 22 (n 146).

[155]Solanke (n 72), quoting C. Jones and K. Shorter Gooden: 'The myth from slavery of the over-sexed, carefree, immoral black woman was felt to persist, making black women specifically more susceptible to direct sexual harassment than white women: "because of their gender, the black women were in a way that black men are not, and because of their race, they were sexually harassed differently from many white women".'

the issue of sexual harassment in the CESCR seems to be mostly an issue of middle-class office workspaces.

Conclusion

This article has shown how two concepts of sexual harassment, which emerged from two different types of discourse around national law yet are both being pragmatic constructions, have entered international law and continued developing. Both constructions exist in a (neo)liberal discourse involving, for instance, the abolition of obstacles to women's access to the 'free labour market' or the individual sexual freedom of an emancipated woman. As the discrimination approach emerged from second-wave feminist concerns in the US and neoliberal 'market needs' for equal participation of women in the job market, the concept of sexual harassment in IHRL remains largely focused on white, middle-class, cisgender women. The lack of an intersectional perspective means that sexual harassment of other women and sexual harassment occurring in spaces other than offices remain marginalized in IHRL discourse. Conceiving of a sexual harassment victim as a white, middle-class, cisgender woman may mean that other victims of sexual harassment, such as non-cisgender and/or non-white individuals, as well as those working in the informal economy, are excluded and marginalized, not only in supranational and national laws but in society more broadly. Too often, as Eileen Boris writes, sexual harassment is seen 'as a Western problem rather than a proper subject for universal standard making in a world of uneven and unequal economic development.'[156] There has been extensive criticism of the #metoo movement as being colonized[157] or constructed around the 'perfect victim', thereby excluding marginalized subjects from the scope of sexual harassment discourse.[158] My legal inquiry is thus consistent with sociological findings on sexual harassment in the #metoo context. Indeed, we cannot separate one from another: if society excludes othered subjects, such as Black women, transgender women and men, and sex workers, from #metoo, then so does the law and vice versa.

Funding

This work is a part of the Mobile Futures – Diversity, Trust and Two-Way Integration research project and is funded by the Strategic Research Council (SRC) established within the Academy of Finland (grant decisions number 345154 and 345405); the Faculty of Law at the University of Turku; TOP-Säätiö (grant decision number 20220259).

ORCID

Yulia Dergacheva http://orcid.org/0000-0003-3795-6842

[156]Eileen Boris, 'From Sexual Harassment to Gender Violence at Work: The ILO's Road to Convention #190' (2022) 19 Labor 109.
[157]Ritty Lukose, 'Decolonizing Feminism in the #MeToo Era' (2018) 36 The Cambridge Journal of Anthropology 34.
[158]Pilipchuk (n 71).