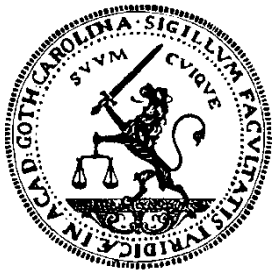

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Violence and harassment at the work in the light of the new ILO Convention No. 190

A study on the application of ILO Convention No. 190 in the Swedish framework

JAMM07 Master Thesis

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Summary

Violence and harassment in the world of work is a complex issue that has numerous manifestations. This thesis provides an overview of the international law around violence and harassment at the workplace, both taking into the account the new ILO Convention on the Violence and Harassment (C 190; the Convention) and the previous legal instruments that had touched on this issue. In so doing, it assesses the potential value as well as the risks to international law protection that are brought on by the adoption of the Convention.

Additionally, this thesis provides a comparison of the scope and content of the protection against violence and harassment at the workplace from the international and regional levels, and further analysis on the question of whether and how the new Convention takes a human rights approach and how it can strengthen such protection.

Furthermore, this thesis reviews national regulations of Sweden covering violence and harassment, which are limited to non-discrimination and occupational safety and health provisions. It also addresses if the protection of individuals against violence and harassment at work will be extended in Sweden if C 190 would be ratified.

Overall, this thesis showed that the reviewed international and regional instruments whilst providing the protection against some manifestations of violence harassment at work, do so in a rather fragmented manner, either by omitting some of the possible manifestations of violence and harassment from a subject-matter scope or by having a limited personal protection scope. Furthermore, it showed that Sweden can benefit from ratifying the Convention, as it would give stronger protection of individuals' freedom against violence and harassment in the world of work, as currently excising gaps in this protection can be solved by implementing C 190's provisions.

Preface

I would like to take this opportunity to acknowledge and thank those without whom this thesis would not have been possible.

I am grateful for Constance Thomas and Lee Swepston, whose courses in International Labour Law sparked my interest and gave me new perspectives on human rights. My special gratitude goes to Constance in particular, as my supervisor, whose encouragement, guidance and insightful comments motivated me to continue and develop my research for this thesis.

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Especially, I am grateful for my partner, Viktor. For all the love, encouragement and never-ending discussions throughout this process and for being always there to support me.

Finally, my appreciation goes to the Lund University Faculty of Law and the Swedish Institute for giving me the amazing opportunity to study at the International Human Rights LLM Program.

Abbreviations

UN	United Nations
ILO	International Labour Organisation
OSH	Occupational safety and health
WHO	World Health Organisation
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CRPD	Convention on the Rights of Persons with Disabilities
ICRMW	International Convention of the Rights of All Migrants Workers and Their Families
ICESCR	International Covenant on Economic, Social and Cultural Rights
CERD	International Convention of the Elimination of All Forms of Racial Discrimination
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CoE	Council of Europe
EU	European Union
ECSR	European Committee of Social Rights
Istanbul Convention	Convention on preventing and combating violence against women and domestic violence
ECJ/CJEU	Court of Justice of European Union
The Recast Directive	EU Directive 2006/54/EC
CST	European Union Civil Service Tribunal
VCLT	Vienna Convention of the Law of Treaties
LGBTI	Lesbian, gay, bisexual, trans and intersex persons
DO	Equality Ombudsman (Diskrimineringsombudsmannen)
AD	Swedish Labour Court (Arbetsdomstolen)
SFS	Swedish Code of Statutes (*Svensk författningssamling*)
Prop.	Government Bill (*Proposition*)
SOU	Swedish Government Official Reports (*Statens offentliga utredningar*)
AMV	The Swedish Work Environment Authority (*Arbetsmiljöverket*)
AFS	The Swedish Work Authority's Statute Book (*Arbetsmiljöverkets författningssamling*)

1 Introduction

This Chapter provides an overview of the importance of specific regulations that address the issue of violence and harassment at work and the potential implications of addressing this issue not fully. It particularly focuses on what is included in the scope of this issue. Additionally, the background, context and effect of harassment and violence at work are presented. It also presents the purpose of the research undertaken and the specific research question addressed in this thesis, including its delimitations and methodology used.

1.1 Background and context

International Labour Organisation, has stressed numerous times that violence cannot coexist with decent work, nor can it be considered as part of anyone's job.[1] However, when the question of violence and harassment at work is discussed, the real extent of how frequent it happens or how widespread it is gets overlooked due to a lack of statistical data, as well as the overall normalisation of such conduct. The additional reason in the lack of clear picture over this issue is so-called silence culture, which implies that individuals subjected to violence and harassment do not report because of a range of reasons, whether it is due to victims' stigmatisation, fear of reprisals or lack of reporting mechanisms.

The severity of the impact of violence and harassment on the affected individuals, enterprises and economy in general is discussed below. However, it is important to stress that this issue has a potential to affect anyone: workers, employers and communities in general.[2] Furthermore, this issue can have both vertical and horizontal manifestations, and perpetrators can be co-workers, managers and third parties.

Some of the already existing international human rights instruments are addressing a few manifestations of violence and harassment at work. Partly, it gets addressed in the non-discriminatory provisions as part of gender discrimination, or as part of discrimination based on other grounds such as race, migration status or having a disability etc. Other provisions have established the protection of individuals from the right to favourable and just working conditions that take into the account the occupational safety and health (OSH) perspective and

[1] International Labour Office. Governmental Body. Fifth Supplementary Report: Outcome of the Meeting of Experts on Violence against Women and Men in the World of Work. 328th Session, Geneva, 25 October 2016 GB.328/INS/17/5, paras 4–5.
[2] Ibid. para 6.

aim to eliminate risks for individuals' physical and mental health that can occur from violence at work. However, it only became the main issue of an international treaty with the adoption of the ILO Violence and Harassment Convention (C 190; the Convention) in 2019.

The issue of violence and harassment at work has a very close relation to the gender-based violence and discrimination against women, and to the intersection with other vulnerable groups such as migrant workers; domestic workers; workers in the informal sector of the economy; workers with disabilities and those who are employed either part-time or in any other form of employment that distinct from permanent full-time employment. As those groups of individuals have higher risk to be subjected to violence and harassment at work.

The issue of sexual harassment was dealt with from the position of discrimination based on sex as a human rights issue by the ILO Committee of Experts.[3] In 1989, the International Labour Conference has adopted a resolution on equal opportunities and equal treatment for men and women in employment. And in this resolution, sexual harassment at the workplace was deemed as detrimental to employees working conditions and employment and promotion prospects.

Sexual harassment has been dealt before as a manifestation of a violation of gender equality. Additionally, harassment based on outlined discriminatory grounds has been dealt from the position of an issue of the occupational safety and health. This dichotomy is in a sense protecting different rights. As the OSH is addressing the consequences of the harassment on health of the individual, which can be assessed by physical or mental or emotional harm.

1.2 The scope of the issue of violence and harassment at work

Violence and harassment in the world of work is a complex issue that has numerous manifestations. Both parts of it, violence and harassment, have different implications in different jurisdiction as there is no conventional definition to violence at work nor harassment. That said the issue of violence and harassment shall be defined as wide as possible to include all manifestations. There are definitions of both quid pro quo and working environment that were strictly set in some jurisdictions as it shows in the chapters bellow, but there is no universal definition which results into gaps in protection.

[3] ABC of women workers' rights and gender equality. ILO. Second Edition. 2007, p 166.

Physical violence is defined as "the use of physical force against another person or group, that results in physical, sexual or psychological harm".[4] This type of violence being the most visible is however at least two times less commonly reported as the others type of violence.[5] This type of violence is most commonly reported in occupations that deal directly with public, such as education, health care, social work, public administration and food services.[6] Statistically, men are more prompt to risk being subjected to physical violence than women.[7]

Psychological violence could also be referred as emotional violence, bullying, or mobbing, is defined as the "intentional use of power" which harms the "physical, mental, spiritual, moral or social states or development" of an individual. Additionally, it can manifest in following ways: such as manipulating a person's reputation, isolating the person, withholding information, assigning tasks that do not match capabilities or giving impossible goals and deadlines.[8] One of the new expression of psychological violence is bullying through electronic technology, so-called cyberbullying that manifests as sending offensive or threatening emails, posting sexually explicit information and spreading rumours on social networking sites.[9] Psychological violence is the most reported type of violence in Europe, with countries reporting from 8 to 15 percent of affected workers.[10] When it comes to cyberbullying, different studies report from 8 to 20 percent of affected individuals in the world of work. [11]

Sexual violence is getting defined by WHO as "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work".[12] In the world of work sexual violence combines physical and psychological violence and can manifest in such behaviours, as unwanted comments, 'jokes', brief physical contact and sexual assault.[13] One of the most common manifestation of sexual violence is sexual harassment and it can manifest in two

[4] Meeting of Experts on Violence against Women and Men in the World of Work; Background paper for discussion at the Meeting of Experts on Violence against Women and Men in the World of Work (Geneva, 3–6 October 2016), Conditions of Work and Equality Department, International Labour Office, Geneva, 2016, para 9.
[5] European Foundation for the Improvement of Living and Working Conditions (Eurofound), 2013, p 8.
[6] Supra note 4, para 48.
[7] Ibid.
[8] Supra note 4, para 11, citing Leymann, 1990; Milczarek, 2010, p 22; Forastieri, 2012, p 114.
[9] Supra note 4, para 54.
[10] Supra note 4, para 50, citing Eurofound, 2015, p 16.
[11] Supra note 4; See University of Sheffield, 2012; Eurofound, 2015, p 59.
[12] Supra note 4, para 13, citing Krug et al., 2002, p 149.
[13] Supra note 4, p 13, citing McCann, 2005, p 2.

different ways.[14] The first one being 'quid pro quo' and it occurs when the victim's job benefit such as a pay raise, promotion or continuation of employment depends on participation in a conduct of a sexual nature. Second one is 'hostile working environment', which covers conduct that creates an unwelcoming, offensive working environment. For example, hostile environment can be created by sex-based comments, disparaging remarks about the sex of the victim, innuendos and the display of sexually suggestive or explicit material.[15] Several statistical studies have reported an incredibly high numbers of affected workers, mostly female, who have been subjected to sexual violence. Thus, the European study have found that approximately one out of every two to three women, and one out of ten man had experienced some form of sexual harassment or sexually unwanted behaviour.[16]

At the same time, all physical, psychological and sexual violence can be a manifestation of a gender-based violence if it occurs from unequal power relationships between man and woman.[17] Generally, the occurrence of gender-based violence is linked to patriarchy, defined as 'a system for maintaining class, gender, racial, and heterosexual privilege and the status quo of power' and can be targeted against people who do not confirm to socially accepted gender roles, which is affecting both sexes and especially individuals with perceived or real sexual orientation that differs from heterosexuality.[18] That being said, women are statistically more affected by such manifestations of the gender-based violence as sexual harassment, bullying, intimate partner violence, with statistically most perpetrators being men.[19]

Overall, the numbers presented create an idea of a seriousness of an issue of violence and harassment at work with a significant number of workers being affected and women being disproportionately affected. However, the real amount of cases, and therefore the real percentages of affected individuals, is rather hard to estimate due to several reasons. One is being underreporting, as not all countries have appropriate legislation in place, or mechanisms of its enforcement, which does not give victims opportunities to claim their rights being violated. The other big obstacle for reporting is normalization of violence, which could come from overall societal structures, and getting re-enforced by working cultures and the frequency of its occurrence.

[14] Committee of Experts on the Application of Conventions and Recommendations. General Observation on the Convention on discrimination (Employment and Occupation), 1958 (No. 111), 91st ILC session (2003).
[15] Supra note 4, para 14, citing Zweighaft, 1997.
[16] Ibid. Citing: European Commission, 1999, p 14.
[17] Ibid. para 15, citing WHO, 2009, p 3.
[18] Asian Pacific Institute on Gender-Based Violence, n.d.
[19] United Nations Population Fund, 2009, p 7; European Institute for Gender Equality, n.d.

1.3 Effects of violence and harassment

Overall the impact that the issue of violence and harassment could be seen for individuals affected, for business and for economy in general.

The issue of violence and harassment is negatively impacting workers mental well-being as it can lead to the development of such conditions as depression disorder, post-traumatic stress disorder, burnout, social withdrawal, suicidal thoughts etc.[20] Furthermore, sexual harassment at work "undermines the long-term earning capacity of women workers and contributes to the gender wage gap".[21] Experiencing violence for workers may result in leaving the job or workforce altogether, which generally can contribute to high staff turnover.[22] Co-workers who are witnessing workplace violence can experience resentment towards the company, powerlessness, increased stress, denial and self-blame, decreased workplace morale and fear for their own safety. Friends and family members of individuals affected by violence can experience certain complications, such as: fear of future threats and injury to the worker; loss of family income; stress within the family; disruption in activities of daily leaving and changing in relationship with the worker and other family members. [23]

It reduces the participation of vulnerable groups in the job market, disproportionally affecting women, precludes them from entering the labour market, especially in male-dominated sectors and jobs, and from remaining therein.[24]

Enterprises experience direct financial costs due to the impact of violence at the workplace as it provokes absenteeism (which increases sick pay if there is any), turnover, recruitment, litigation and compensation. Indirect costs can include 'reduced productivity, and "knock on" effects which can harm the enterprise's reputation, image and competitiveness'.[25]

Although there has not been a study that would calculate these overall costs for the worldwide economy, some local and sectorial studies have shown significant loses for businesses and general economy. The UK based study showed that around the equivalent of 100 million days productivity were lost as a result of bullying, related to absenteeism; in the United States there has been multimillion-dollar lawsuits by workers alleging bullying and sexual harassment has been adding to the overall costs of violence at work.[26]

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[20] Eurofound, 2013; Caponecchia and Wyatt, 2011.
[21] Equal Rights Advocates, 2014, p 7
[22] Supra note 4. para 65. See Eurofound, 2015, p 36.
[23] Ibid.
[24] Supra note 1, para 1.
[25] Ibid, citing Rayner et al., 2001.
[26] Ibid, citing Giga et al., 2008, p 3; Sattler and Otenti, 2015, p 5.

1.4 Purpose of the thesis

Firstly, the purpose of this thesis is to conduct an overview of the international law around violence and harassment at the workplace, both taking into the account C 190 and the Recommendation on the Violence and Harassment at Work (R 206) and the previous legal instruments that had touched on this issue. In so doing, it assesses the potential value as well as the risks to international law protection that are brought on by the adoption of the new Convention and Recommendation.

Secondly, the thesis reviews national regulation of Sweden covering violence and harassment, that is including non-discrimination and occupational safety and health (OSH) provisions. This country was chosen because it has well developed and long-standing national framework that address these issues from both the gender equality and labour law perspective. Furthermore, Sweden was one of the first countries to release national OSH regulations that were explicitly dealing with harassment, including sexual harassment, physical violence and bullying, at work from the perspective of such treatments having consequences in violating workers physical and mental health and therefore creating the risk of absenteeism. [27] Additionally, Sweden had actively participated in negotiations during drafting committee sessions of the C 190.[28]

Thirdly, the thesis will compare the scope and content of the protection against violence and harassment at the workplace from the international and national levels, with further analysis on the question of whether and how the Convention takes a human rights approach and how it can strengthen such protection. It will also address if the protection of individuals against violence and harassment at work will be extended in Sweden if C 190 would be ratified.

The thesis analyses and aims to conclude the most effective ways to combat violence and harassment at the workplace by both analysing the cases of such issue and researching the best examples of practical experience form international and nation legal regulations.

1.5 Research questions

This thesis has on two main research questions:

[27] AFS 1993:17 Kränkande Särbehandling I Arbetslivet (Not In Force, As It Was Repealed By AFS 2015:4 Arbetsmiljöverkets Föreskrifter Och Allmänna Råd Om Organisatorisk Och Social Arbetsmiljö).
[28] Sweden was represented by the Hotel and Restaurant Workers' Union, see International Labour Office. Director-General. Ending violence and harassment in the world of work: International Labour Conference, 107th Session, 2018. Report V(2). Geneva, 2018.

Whether the scope and content of the new C 190 effectively changes the protection of individuals from violence and harassment at the workplace in comparison with already-existing international law instruments.

Whether national regulations on violence and harassment at the workplace of Sweden could benefit from ratifying the C 190.

1.6 Method

This thesis consists of two general parts, one of which is descriptive and the other one is analytical. For the methodology, two general methods would be used: the legal doctrinal method and the comparative method.

The use of the first method would aim to summaries the source of the law of the topic of violence and harassment at the workplace and with further use of legal interpretation principles, those sources of law would be analysed.

The second method is used to compare national regime of Sweden and perhaps, eventually concluding the possibility of improving its protection of individuals against violence and harassment by implementing international standards from C 190.

1.7 Limitations

This thesis is limited only to the outlined research and based on the international legal framework. This is not a general overview of Swedish domestic legal systems but is limited specifically to outlined issues. Additionally, both C 190 and R 206 have been adopted only in 2019 and there are no comments or informal interpretation by supervisory bodies on their application to individual countries or the meaning of its contents; there are also no official ratifications to either of them so far, that would be discussed further but makes questions of interpretation more complicated. Further limitations will be outlined in following chapters.

2 International human rights instruments

2.1 Introductory remarks

This Chapter provides an overview of international instruments that deal with issues of violence and harassment at work. Due to this topic being complex, its manifestation could be found in various regulations both general and work-relations specific, including but not limited to legislation on anti-discrimination, protection of minority groups of workers, occupational safety and health, forced labour and workers in transition to formal economy. Previously, the issue of violence and harassment was linked to the regulations on non-discrimination and equality and violence at work was dealt from the perspective of forced labour and occupational safety and health.

While conducting this review of international instruments, the main attention is drawn to those relevant UN instruments, and especially, the ILO initiatives. International human rights instruments usually set out minimum standards of protection of individuals against their rights to be violated. Those standards are addressing the most serious issues that can interfere with human rights and holding governments accountable for them to protect, respect and fulfil outlined rights. However, while dealing with an issue of violence and harassment the international legal framework has a number of gaps in protection of individuals, by either not including the violence and harassment in the scope of the protection, or by non-addressing it in full scope, not defining this issue and not providing with guidance on how to deal with in.[29] Hence, this kind of fragmented protection on the international level could be leading to the wide gaps that exist in the protection at the domestic level.

2.2 The UN

International Human Rights instruments are in general binding on those Countries who have signed and ratified the instrument, and had therefore consented to be bounded by the treaty's provisions.[30] Depending on the provisions in the instruments, the binding power also includes mandating the supervisory bodies to review a situation in the ratifying country specifically. In some cases, the instrument has a binding character due to it being a customary law, which

[29] International Labour Office. Director-General. Ending violence and harassment in the world of work: International Labour Conference, 107th Session, 2018. Report V(1). Geneva, 2018, paras 371–374.
[30] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, Article 2 (b).

implies the obligations provided in the instrument to be universally binding. Furthermore, in case country has signed but have not ratified the international instrument, implies the binding character only of the object and purpose of the said instrument.[31] Being legally bound by an international instrument meant that the State is obligated to be in compliance with the provisions of a said instrument, which can be including in negative obligations; positive obligations; and procedural obligations. The manifestations of the issue the violence and harassment at the world of work is not specifically regulated in most of the UN instruments, however, they do regulate broader topics that are inevitably connected to work, such as gender-based violence, non-discrimination and the right to just and favourable work environment. However, some of UN instruments that touch on those aspects of protection against discrimination violence harassment at the workplace do not cover all employees, as they specifically target certain defined groups: persons with disabilities, migrant workers and their families and women.[32] There are however, some general non-discriminatory provisions that cover all individuals when it comes to them being treated differently based on outlined discriminatory grounds.

This subchapter provides an overview of the main UN instruments that somehow have touched on manifestations of violence and harassment, either in provisions of conventions or by the virtue of the interpretation of the supervisory body. General States' obligations would be considered, as well as the recommendation of the ways to implement the international instruments provisions and the ways to effectively fulfil obligations under conventions.

2.2.1 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

CEDAW considers violence at work through a perspective of gender-specific discrimination, as well as through an occupational safety and health perspective and it is addressing this issue mainly in its Article 11.[33]

Article 11 deals with the elimination of discrimination against women in employment and occupation, which are viewed as key to sustainable development and the human dignity and

[31] Ibid. Article 18.
[32] Supra note 29, paras 158–163.
[33] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at https://www.refworld.org/docid/3ae6b3970.html [accessed 28 May 2020]

personality of the individual.[34] This Article in its first paragraph poses an array of obligations, including: the elimination of discrimination against women in the field of employment and occupation; the equality in the right to work, employment opportunities, employment conditions, remuneration, social security, and health and safety.[35] Special attention is given to the provision on prevention of the discrimination against women on the grounds of marriage or maternity and on the obligation to ensure their right to work which is regulated by the second paragraph of Article.[36] Additionally, this Article provides the framework for formal and substantive equality and the elimination of structural discrimination in employment and occupation.[37]

The Committee adopted General Recommendation No. 19 to address specifically the violence against women and its implications. Overall the Committee had stressed that violence against women constitutes violations of human rights and fundamental rights and is manifesting as gender-based violence and the discrimination against women. It has also reminded to the State Parties that they could be found responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for not providing compensation.[38] In Article 11, the Committee had been specifically dealing with the issue equality in employment and , therefore, with gender-specific violence that the women can be subjected in the workplace, such as sexual harassment.[39] Most importantly, the Committee had elaborated on what sexual harassment includes, defining it as the following: 'unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions'.

Additionally, being subjected to sexual harassment could seriously impair equality in employment for women and can constitute a health and safety problem.[40] The Committee has also stated that sexual harassment is a phenomenon of discrimination 'when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment'.

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[34] Freeman, M. A., Rudolf, B., Chinkin, C., Kroworsch, S., & Sherrier, A. (Eds.). (2012). The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary. Oxford University Press, p 281.
[35] Ibid.
[36] Ibid; CEDAW Article 11 (2).
[37] Ibid; p 281.
[38] Committee on the Elimination of Discrimination Against Women, General comment on Article 11 of General Recommendation No. 19 (11th Session, 1992), para 9.
[39] Ibid; paras 17–18.
[40] Ibid; para 18.

The Committee had included the range of actions, that are required form State Parties, such as: undertaking of all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including sexual harassment other forms of violence of coercion at the workplace; and the reporting of the information on sexual harassment.

The Committee has also stated that the issue of sexual harassment contributes to the widespread discrimination against women.[41] One of the types of this discrimination occurs when certain occupations or types of labour, such as night time work, are refusing entry for female employees due to the potential increase in the risk of sexual violence directed at them. Yet to comply with the obligations following from Article 11, States must meet the risk of sexual violence by eliminating the violence and maintaining a safe environment at the workplace instead or simply restricting women's freedom of choice and the right to work.[42]

The Committee, in several of its Concluding Observations, had brought up the attention to the need of adopting national legislation that would define and prohibit sexual harassment in the workplace and record statistics on reported cases of sexual harassment, investigations, prosecutions and sentences imposed on perpetrators.[43] Additionally, the Committee was concerned with the implementation of the provisions penalising sexual harassment at the workplace, and had recommended to the Government to establish mechanisms to investigate complaints, adequately punish such acts and provide redress to victims.[44]

The Committee had raised concerns on the discrimination in employment and sexual harassment in the workplace that get exacerbated by persistent gender stereotypes and had released a recommendation to raise women's awareness of the remedy mechanisms and to encourage them to make use of it, as part of the recommendation to the government.[45] As part of the aim to eliminate discriminatory stereotypes concerning roles and responsibilities of

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[41] Supra note 34, p 290, citing CO Samoa, A/60/38, 33rd Session (2005) paras 54–55; CO Argentina, A/59/38, 30th Session (2004) paras 121, 122, & 162; CO New Zealand, A/58/38, 28th Session (2003) paras 166–167; CO South Africa, A/53/38/Rev.1, 19th Session (1998) para 104.

[42] Ibid. p 298.

[43] See for example: UN Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding observations on the combined fifth and sixth periodic reports of Armenia, 18 November 2016, CEDAW/C/ARM/CO/5-6, paras 74–75; UN Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding Observations on the Initial Report of the State of Palestine, 25 July 2018, CEDAW/C/PSE/CO/1, paras 36–37.

[44] UN Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding observations on the combined fifth and sixth periodic reports of Estonia CEDAW/C/EST/CO/5-6. 18 November 2016, paras 28–29; UN Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding observations on the combined third to fifth periodic reports of Mozambique, 30 July 2019, CEDAW/C/MOZ/CO/3-5, paras. 33–34.

[45] UN Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding observations on the fifth periodic report of Kazakhstan. CEDAW/C/KAZ/CO/5. 12 November 2019, paras 37–38.

women and men in the family and the society, the Committee had raised a particular attention to the adoption of effective measures for the protection of women politicians, journalists, human rights defenders and women's non-governmental organisations to enable them to freely undertake their important work without fear or threat of violence and harassment.[46]

In its other Concluding Observations, the Committee had brought up the attention to the lack of effective measures to deal with harassment, especially the one represented by the discriminatory attitudes in the male dominated sectors and at the senior management level.[47] That kind of discriminatory harassment shall be dealt with by ensuring the effective mechanisms and remedies and encourage employers to conduct regular reviews of company culture to prevent such harassment.

The Committee had dealt with the definition of harassment in general terms and have not yet defined in in particular, however, both sexual harassment and the harassment as discriminatory attitudes have been mentioned.

2.2.2 Convention on the Rights of Persons with Disabilities (CRPD)

CRPD provides the protection against harassment in the world of work, not defining, however, what this term is implying.[48] In its Article 27 (1) (b), the Convention requires State Parties to promote the right to work of persons with disabilities by providing them with favourable, safe and healthy working conditions, including protection from harassment.[49]

The Committee has not dealt with a substantive case under Article 27 that would deal with a harassment yet, nor has it released any commentary on the provision.[50] However, in its Concluding Observations on Canada, the Committee had brought up the recommendation to develop strategies aimed at providing decent job opportunities for women and young persons

[46] UN Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding observations on the sixth periodic report of Bosnia and Herzegovina. 8 November 2019. CEDAW/C/BIH/CO/6, para 23.
[47] UN Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding observations on the combined fourth and fifth periodic reports of Switzerland. CEDAW/C/CHE/4-5. 2 November 2016, paras 36–37.
[48] UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at https://www.refworld.org/docid/45f973632.html [accessed 28 May 2020].
[49] Supra note 29, para 158.
[50] Communication of 2013/ No.10 of the case against Brazil had Article 27 as one of the claims, yet it had dealt with an issue of equal treatment and was considered to be inadmissible due to non-exhaustion of domestic remedies first. CRPD/C/12/D/10/2013.

with disabilities, including measures to prevent harassment and other forms of discrimination at the workplace, as part of the realization of the State's obligations under Article 27.[51]

2.2.3 International Convention of the Rights of All Migrants Workers and Their Families (ICRMW)

ICRMW requires State Parties to effectively protect migrant workers and members of their family against violence, physical injury, threats and intimidation, whether perpetrated by public officials, private individuals, groups or institutions.[52]

Article 7 of the Convention explicitly includes nationality as one of the prohibited grounds for discrimination. Following by this provision, the Committee concludes that any different treatment based on nationality or migration status amounts to discrimination unless the reasons for such discriminations are prescribed by law, pursue the legitimate aim under the Convention, are necessary in the specific circumstances, and proportionate to the legitimate aim perused.[53] Furthermore, it prohibits both direct and indirect discrimination against migrant workers, and later is defined by occurrence when the law, policy or practice appears neutral at face value but has a disproportionately impact of their rights.[54]

As a general rule, migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of the employment in respect of renumeration and other terms and conditions of work.[55] The Committee in its first commentary deals with the protection of migrant domestic workers, among other things against the abusive working conditions. It has included in the list of such conditions psychological, physical and sexual abuse and harassment from their employers as well as from recruitment agents or intermediaries.[56] Furthermore, the Committee reaffirms the position of women migrants being different from male migrants, it also proceeds with recognizing that most domestic workers are women and girls. The Committee therefore recommends to State Parties to implement gender perspective in efforts

[51] Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report of Canada. 8 May 2017. CRPD/C/CAN/CO/1, para 48.
[52] UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158, available at https://www.refworld.org/docid/3ae6b3980.html [accessed 28 May 2020] Article 16 (2); Supra note 29, para 159.
[53] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families. 28 August 2013. CMW/C/GC/2, paras 18–19.
[54] Ibid. para 20.
[55] ICRMW, Article 25.
[56] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General comment no. 1 on migrant domestic workers. 23 February 2011. CMW/C/GC/1, para 13 (g).

to understand specific problems and develop remedies to the gender-based discrimination, especially while dealing with sex-specific bans and discriminatory restrictions.[57]

2.2.4 International Covenant on Economic, Social and Cultural Rights (ICESCR)

ICESCR obliges State Parties to recognise the right of everyone to the enjoyment of just and favourable conditions of work, which are including safe conditions and healthy working conditions and equal opportunity for everyone to be promoted in *his* employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.[58] The Committee on Economic, Social and Cultural Rights has interpreted the right to favourable and just working conditions to implicitly include the freedom from physical and mental harassment, including sexual harassment.[59] Moreover, the Committee had pronounced the recommendation to States to define harassment broadly while regulating it in national legislation, with an explicit reference to sexual and other forms of harassment, such as on the basis of sex, disability, race, sexual orientation, gender identity and intersex status.[60] Additionally, it is recommended to specifically define the sexual harassment in the workplace and legislate its criminalization or otherwise imposed punishment.

The Committee had also underlined the general obligation of State Parties to identify indicators and benchmarks to monitor the implementation of the right to just and favourable conditions at work, which includes addressing the number of complaints of harassment received and resolved.[61]

The underlined core obligations for State Parties address the need to ensure the satisfaction of minimum essential levels of the right to just and favourable conditions at work. The Committee specifically requires the States to define and prohibit harassment, including sexual harassment, at work through law and ensure appropriate complaint procedures and mechanisms and establish criminal sanctions for sexual harassment.[62] The obligation to effectively

[57] Ibid. paras 60–61.
[58] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at https://www.refworld.org/docid/3ae6b36c0.html [accessed 28 May 2020] Article 7 (b) and (c).
[59] Supra note 29, para 161, citing UN Economic and Social Council, general comment No. 23 (2016) on the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23.
[60] UN Economic and Social Council, general comment No. 23 (2016) on the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, para 48.
[61] Ibid. para 55.
[62] Ibid. para 65 (e).

investigate, prosecute and sanction individuals for acts of sexual harassment had also been reaffirmed in the Committee's concluding observations.[63]

2.2.5 International Convention of the Elimination of All Forms of Racial Discrimination (CERD)

The Convention prohibits racial discrimination, and defines it as 'any distinction, exclusion, restriction or preference based of race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[64] Individuals are entitled to the enjoyment of the right to work and to just and favourable treatment, and the State has a corresponding obligation to prohibit and eliminate in all its forms and to guarantee the right of everyone, without any distinction as to race, colour, or national or ethnic origin.[65]

Although the Convention does not directly deal with an issue of violence and harassment at work, the Committee has dealt with those issues following general provisions of the Convention. In its General Recommendation on decent, the Committee stresses obligation of State Parties to develop or refine legislation and practice specifically prohibiting all discriminatory practices based on descent in employment and the labour market.[66] For example, while dealing with racial discrimination based on cast and the following form harassing treatment, the Committee has found the government in violation of the right to work.[67] Additionally, it is important to mention that the Committee has considered gender-related dimensions of racial discrimination. It has stated that certain forms of racial discrimination may be directed towards women specifically because of their gender, such as abuse of women workers in the informal sector or domestic workers employed abroad by their employers. This way the Committee had specifically outlined the vulnerability of women in the face of abusive treatment at work. [68]

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[63] Ibid; paras. 27–28.
[64] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at https://www.refworld.org/docid/3ae6b3940.html [accessed 28 May 2020] Article 1(1).
[65] CERD, Article 5 (e)(i).
[66] UN Committee on the Elimination of Racial Discrimination, CERD General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), 1 November 2002, para 7 (kk).
[67] UN Committee on the Elimination of Racial Discrimination, Concluding Observations on United Kingdom. Concerns and recommendations. CERD/C/SR.2115. 1/09/2011, para 30.
[68] UN Committee on the Elimination of Racial Discrimination, General recommendation XXV on gender-related dimensions of racial discrimination, 20 March 2000, para 2.

2.3 Soft law initiatives

There are a number of soft law initiatives, including awareness-raising campaigns and advocacy actions. Soft law is not legally defined but generally it includes all non-binding internationals initiatives, that could be in a form of declarations, resolutions or guidelines.[69] It could also be so that the initial soft law instrument becomes a foundation for the creation of the hard law instrument, especially when there is no agreement on certain issues within states in the beginning. Therefore, these instruments are acting in the capacity of soft law and can be used by states as an inspiration for adopting further legally-binding treaties, and more so to use as an interpretation tool to already existing obligations under international law.

However, while these initiatives address some manifestations of the violence and harassment in the world of work, most of them do so through a lens of protection of a certain vulnerable group: would that be women or LGBTI people, a list of which does not cover every group that needs to be addressed and protected which is arguably every group of working individuals. Furthermore, while those instruments show the importance and urgency to address this issue, they are not able to come up with binding provision due to their nature.

2.3.1 The United Nations General Assembly

In 1993 the UN General Assembly adopted the Declaration on the Elimination of Violence against Women.[70] Article 2 of this declaration includes in the gender-based violence concepts of 'sexual harassment and intimidation at work' and 'physical, sexual and psychological violence occurring in the family'.

2.3.2 The UN Human Rights Council

The *UN Special Rapporteur on Violence against Women, its Causes and Consequences* has a mandate to the collection of information, including individual complaints, on violence against women and the adoptions of recommendations on how to eliminate it.[71] Article 2 of the Declaration that establishes the mandate of Special Rapporteur defines the concept of work as

[69] Gammeltoft-Hansen, Thomas, Stephanie Lagoutte, and John Cerone. "Introduction: Tracing the Roles of Soft in Human Rights." (2016).
[70] UN, General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, available at: https://www.refworld.org/docid/3b00f25d2c.html [accessed 28 May 2020].
[71] UN, Commission on Human Rights, Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women, 4 March 1994, E/CN.4/RES/1994/45, available at https://www.refworld.org/docid/3b00f47f4.html [accessed 28 May 2020].

encompassing both sexual harassment and the intimidation at work and physical, sexual and psychological violence occurring in the family. As part of the realisation of this mandate, there have been conducted visits to countries for the monitoring of the situation and the following conclusion and recommendations to governments released. The Special Rapporteur had brought to the attention of the Government to sexual harassment being largely underreported due to the fear among victims of reprisals or counter-accusations of having provoked the perpetrator's advances, which leads to further victimisation, and additionally, due to the challenges posed by the lack of protection for victims and witnesses of sexual harassment, particularly in criminal cases.[72] In another report, the Special Rapporteur recommended the government to address the root causes of violence against women and included the prosecution and punishment of perpetrators of violence against women as a required action.[73] These required measures explicitly included the pursuing of zero tolerance of gender-based violence and sexual harassment, particularly in law enforcement.

In 2013, the *UN Commission on the Status of Women on the elimination and prevention of all forms of violence against women and girls* has released the concluding report with the recommendation of the need to respond to, prevent and eliminate all forms of discrimination and violence, including sexual harassment at work.[74]

The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity was appointed in 2016 and given the mandate to deal with violence and discrimination based on sexual orientation and gender identity.[75] The Independent Expert has a mandate to raise awareness and identify and address the causes of violence and discrimination, and support national efforts to combat them. In realisation of the mandate of the Independent Expert, the Human Right Council called for the cooperation from the private sector. In its Report on the visit to Georgia, the Independent Expert had to conclude that violence and discrimination based on sexual orientation and gender identity are pervasive in the country, including normalization of harassment and bullying, among other manifestations and as a conclusion a legislative amendment have been recommended.[76]

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[72] UN, General Assembly. Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo. Mission to Algeria. 19 May 2011. A/HRC/17/26/Add.3, paras 18–19.
[73] UN, General Assembly. Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk. A/HRC/4/34/Add.3. 6 February 2007, para 71 (a) (ii).
[74] UN, Commission on the Status of Women agreed on conclusions on the elimination and prevention of all forms of violence against women and girls, E/2013/27-E/CN.6/2013/11 (2013).
[75] Supra note 29, para 162; Supra note 4, para 113.
[76] UN, General Assembly. Human Right Counsel. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. 15 May 2019. A/HRC/41/45/Add.1, para 31.

In 2013 the *UN Commission on the Status of Women on the elimination and prevention of all forms of violence against women and girls* mentioned the need to respond to, prevent and eliminate all forms of discrimination and violence that included sexual harassment at the workplace.[77]

UN Women and the United Nations Global Compact have developed Women's Empowerment Principles for businesses that provide with guidance on how to empower women at the workplace, marketplace and the community. Third Principle on Employee Health, Well-being and Safety address employer's role in preserving and promoting the physical and emotional health, safety and well-being of their employees.[78] Furthermore, it states that sexual harassment and violence signify high costs to women in terms of lost earnings, missed promotions and overall well-being. Companies are also impacted in the form of employee absenteeism and productivity loss. Suggested actions include measures from zero-tolerance policy against all forms of violence and harassment to addressing safety and security issues, including travelling to and from work and business trips, and train security staff and managers to recognize signs of violence against women, human trafficking, labour and sexual exploitation. Currently, almost 3000 companies have signed up to this initiative, 7 of which are from Sweden.[79]

The campaign *UNiTE to End Violence against Women* was launched in 2008 with an objective to raise public awareness and to increase political will to prevent and eliminate all forms of violence against women.[80] UNiTE has a specific focus on violence against women as a human rights violation and deals with such issues as intimate partner violence, discrimination and sexual harassment.

2.4 ILO

This subchapter describes international labour law instruments adopted by ILO and the role that violence and harassment plays in them.

ILO standards on worker's rights include basic principles and rights at work in a form of Conventions which are legally-binding and Recommendations which are of advisory

[77] UN, Commission on the Status of Women Agreed conclusions on the elimination and prevention of all forms of violence against women and girls, E/2013/27-E/CN.6/2013/11 (2013).
[78] Women's Empowerment Principles, Employee Health, Well-Being and Safety, available at https://www.weps.org/principle/employee-health-well-being-and-safety [accessed 28 May 2020].
[79] Women's Empowerment Principles, WEPs Signatories, available at https://www.weps.org/companies [accessed 28 May 2020].
[80] Supra note 29, para 167; Supra note 4, para 114.

character.[81] Certain ILO Conventions were proclaim to be of fundamental importance and they lay out key principles: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.[82]

As it was stated several times during the C 190 preparatory works, there is a number of existing international law instruments that provide protection to some groups of workers against some forms of workplace violence and harassment.[83] None of them defined violence and harassment in the world of work, nor did they provide with an integrated approach on how to address various forms of violence and harassment effectively. Despite that, some instruments provide essential elements of regulatory framework even without mentioning violence and harassment explicitly and they regulate some of the manifestations of violence and harassment in the world of work. Much of the interpretation and further development of the concept to include some forms of violence and harassment at work is made by Committee of Experts on the Application of Conventions and Recommendations (CEACR) through its General Observations.

It further proceeds with the overview of ILO instruments that touch on the issue of violence and harassment at the workplace: first, there is an overview of fundamental international labour law regulations that are relevant due to their subject-matter, and afterwards, it reviews regulations that are protecting certain groups of people that are vulnerable due to the type of work or their characteristics and therefore at higher risk to be subjected to violence and harassment at work.

[81] Rules of the game: An introduction to the standards-related work of the International Labour Organisation. International Labour Office, Geneva, 2019.
[82] There are eight of those Conventions: The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol); the Abolition of Forced Labour Convention, 1957 (No. 105); the Minimum Age Convention, 1973 (No. 138); the Worst Forms of Child Labour Convention, 1999 (No. 182); the Equal Remuneration Convention, 1951 (No. 100); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).
[83] Supra note 1, para 9; Supra note 4, paras 92–93; Supra note 29, paras 125–127.

2.4.1 Fundamental Labour Rights

2.4.1.1 Forced labour

The Forced labour Convention of 1930 (No. 29) in conjunction with its Protocol of 2014 and the Abolition of Forced Labour Convention, 1957 (No. 105) provide freedom from forced labour to all workers regardless of sector or on nature of their work.

Convention No. 29 in its Article 2 (1) defines forced or compulsory labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". The Convention also states that the use of physical violence and psychological coercion as a means of compelling a worker to engage in labour indicates a situation amounting to focused labour.[84] One form of the psychological coercion is the use of a position of vulnerability and it is often used to involve workers in forced labour.[85] Additionally, when assessing the threat that is used to compel labour, the analysis is made from the perspective of the worker, taking into consideration their characteristics and situation.[86]

2.4.1.2 Child labour

Minimum Age Convention 1973 (C 138) in Article 3(1) prohibits the use of children for hazardous work. The prohibition of physical, psychological and sexual abuse of children with respect to the use of children in armed conflict and for illicit activities and of work that has potential damage to child's physical and psychological health is explicitly stated the in Worst Forms of Child Labour Convention 1999 (C 182) in its Article 3.[87] Furthermore, the worst forms of child labour inherently include physical and psychological violence and harassment.[88]

The Worst Forms of Child Labour Recommendation of 1999 (R 190) defines hazardous work as labour that exposes children to physical, psychological or sexual abuse.[89] The Recommendation also contains a provision on the special attention that needs to be given to the girl child, and to the problem of hidden work situations, in which girls are at special risk.[90]

[84] Supra note 4, para 94.
[85] Supra note 29, para 131, citing ILO, 2012a, paras 270–271 & 293–297.
[86] Supra note 29, para 131.
[87] Supra note 4, para 95.
[88] Supra note 29, para 132, citing 2012 General Survey, paras 951 & 953.
[89] R190, para 3.
[90] R190, paras 2 (c) (ii) & (iii).

2.4.1.3 Discrimination

Discrimination (Employment and Occupation) Convention 1958 (C 111) provides the State Parties with an obligation to declare and pursue a national equality policy to eliminate any discrimination in employment and occupation based on race, colour, sex, religion, political opinion, national extraction or social origin.[91] Furthermore, sexual harassment is considered to be the serious manifestation of sex discrimination and therefore as falling within the scope of C 111.[92] CEACR has also commonly addressed gender-based harassment and violence against women as a form of the discrimination in the context of discrimination certain measures, or lack thereof.[93] For example, in the of the Democratic Republic of the Congo, the CEACR has urged the Government to take the necessary measures to address the inferior position of women in society, which is reflected in sexual violence committed against them and in discriminatory legislation. The Committee has considered it as having a serious impact on the application of the principles of the Convention.[94]

The CEACR in its General Observation has found that the Convention's requirement to prohibit sex discrimination and adopt policies to promote equality of opportunity and treatment, include the protection against sexual harassment. Hence governments need to ensure the full protection against sexual harassment, as a form of sex discrimination. It was defined through two different manifestations which are quid pro quo and hostile work environment:

(1) (quid pro quo): any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable, and offensive to the recipient; and a person's rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job; or

(2) (hostile work environment): conduct that creates an intimidating, hostile or humiliating working environment for the recipient.[95]

The Committee urged governments to take effective measures to prevent and prohibit sexual harassment in employment and occupation due to its gravity and serious repercussions. One of the required measures, proposed by the Committee, was a request to the governments to report

[91] C 111, Articles 1(1)(a) & 2.
[92] Supra note 29, para 134; Supra note 4, para 95, citing ILO, 2012, paragraph 789.
[93] Supra note 29, para 138, citing Burundi – Convention No. 111, observation, 2016; Cambodia – Convention No. 111, observation, 2016; Central African Republic – Convention No. 111, observation, 2016; United Arab Emirates – Convention No. 111, direct request, 2016.
[94] Ibid; Democratic Republic of the Congo – Convention No. 111, observation, 2016.
[95] Supra note 4, para 96, citing CEACR, general observation, Convention No. 111, 2003, p 463.

on the existent legislation on sexual harassment, its definition, the scope of the protection, the scope of the liability for employers, supervisors and co-workers, enforcement mechanisms etc.[96]

Additionally, the harassment based on race, colour, religion, political opinion, national extraction or social origin, was also addressed by the CEACR under Article 1(1) of the Convention.[97] For example, CEACR has addressed violence against migrant workers, certain ethnic and religious groups.[98]

In the most recent comments and General Observation on C 111, the Committee pronounced the need for countries to impose comprehensive regulations that would explicitly contain provisions on the prohibition defining and prohibiting all forms of the discrimination in order for them to be in compliance with the Convention.[99] The Committee followed with list of definitions that needs to be regulated: direct and indirect discrimination, discrimination-based harassment as a serious form of discrimination, in particular racial harassment. Racial harassment was defined to occur where a person is subjected to physical, verbal or non-verbal conduct or other conduct based on race which undermines their dignity or which creates an intimidating, hostile or humiliating working environment for the recipient. Additionally, the Committee had brought up a question of the intersectionality aspect of discriminatory grounds that tends to increase the risk of the harassment occurrence whilst they overlap. This concerns those factors such as race, religion, gender and disability, and particularly effects young women from an ethnic or racial minority.

2.4.1.4 Freedom of association

The main ILO instruments on freedom of expression are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (C 87) and the Right to Organise and Collective Bargaining Convention, 1949 (C 98). And although they do not include explicitly the prohibition of violence against members and activists of trade unions, the concept of such

[96] Committee of Experts on the Application of Conventions and Recommendations. General Observation on the Convention on discrimination (Employment and Occupation), 1958 (No. 111), 91st ILC session (2003).
[97] Supra note 29, para 135, citing Bosnia and Herzegovina – Convention No. 111, observation, 2013; Montenegro – Convention No. 111, direct request, 2014; Slovenia – Convention No. 111, direct request, 2015; Nicaragua – Convention No. 111, direct request, 2010; Canada – Convention No. 111, direct request, 2014; Angola – Convention No. 111, direct request, 2013.
[98] Ibid; Greece – observation, 2015; and Papua New Guinea – observation, 2015.
[99] Committee of Experts on the Application of Conventions and Recommendations. General Observation on the Convention on discrimination (Employment and Occupation), 1958 (No. 111), 108th ILC session (2019).

protection has been considered an inherent part of the freedom of association.[100] CEACR has stressed the importance for trade unions to operate in a climate free from violence, pressure and threats of any kind and the importance of the right to life, security and physical and moral integrity.[101] Additionally, while Article 1(1) of C 98 prohibits anti-union discrimination of workers, it was stated that this provision also protects against anti-union harassment.[102]

2.4.2 Labour standards-based regulations

2.4.2.1 Indigenous and tribal people

The Indigenous and Tribal People Convention of 1989 (C 169) is the first ILO convention that explicitly mentions sexual harassment in its Article 20 (3). This article provides the obligation for governments to adopt measures to ensure that indigenous peoples are not subjected to working conditions hazardous to their health and that they enjoy protection against sexual harassment.[103] CEACR has dealt with several cases of use of violence and harassment against indigenous peoples' communities, some of them were concerning the removal of indigenous communities form the land that they traditionally occupy.[104]

2.4.2.2 Workers living with HIV

The HIV and AIDS Recommendation of 2010 (C 200) in its Paragraph 14(c) mentions the measures that shall be taken for 'ensuring actions to prevent and prohibit violence and harassment in the workplace' as one of the ways to reduce the transmission and alleviate the impact of HIV.[105]

2.4.2.3 Domestic workers

The Domestic Workers Convention of 2011 (C 189) requires the State Parties to impose measures that would ensure effective protection of domestic workers against all forms of abuse, harassment and violence in its Article 5. The Domestic Workers Recommendation of 2011 (R 201) elaborates further on this provision and proposes governments to establish some mechanisms to protect domestic workers from abuse, harassment and violence, such as accessible complaint mechanisms to report cases; ensuring that all complaints are investigated

[100] Supra note 4, para 98; Supra note 29, para 133.
[101] Supra note 4, para 98, citing ILO, 2012a, para 59.
[102] Supra note 4, See CEACR, Serbia, C 98, observation, 2010.
[103] Supra note 4, para 100.
[104] Supra note 29, para 137, citing Argentina – C 169, observation, 2012; Brazil – C 169, observation, 2012.
[105] Supra note 4, para 101; Supra note 29, para 140.

and prosecuted; and establishing programmes for the relocation and rehabilitation, including the provision of temporary accommodation and health care, of domestic workers who have been subjected to abuse, harassment and violence.[106] There is also a specific mention of migrant domestic workers in Paragraph 21(a), where governments are advised to establish a hotline for them and to raise the employer's awareness of their obligations by providing information on good practises.[107]

2.4.2.4 Seafarers

The Maritime Labour Convention of 2016 has specifically referred to the protection of seafarers against harassment and bullying.[108] Those manifestations of harassment and violence at the workplace were addressed in its Guideline B4.3.1 and required the competent authority to ensure and take into account the implication of harassment and bullying for health and safety. Furthermore, the Guideline B4.3.6 elaborates on investigations and that the needed consideration to including problems arising from violence and bullying in them.

2.4.2.5 Transition to the formal economy

The Transition from the Informal to the Formal Economy Recommendation, 2015 (R 204) proposes an integrated policy framework that would address the elimination of all forms of discrimination and violence, including gender-based violence at the workplace in its Paragraphs 10 and 11(f).[109] Additionally, there is a general recommendation to address concerns of unhealthy and unsafe working conditions that are often present in the informal economy and to promote and extend occupational safety and health protection to employers and workers in the informal economy in its Paragraphs 17(a) and (b).

2.4.2.6 Occupational safety and health

OSH instruments, in general, have an aim to protect workers safety and health, therefore, harassment and violence while not being mentioned by those instruments is still covered in its manifestations that lead to both mental and physical health implications.[110] Furthermore, OSH instruments can be helpful when dealing with the prevention and management of violence and

[106] Supra note 29, para 138.
[107] Supra note 4, para 102.
[108] Supra note 4, para 103; Supra note 29, para 139.
[109] Supra note 4, para 104; Supra note 29, para 141.
[110] Supra note 4, paras 128–129, 145–146.

harassment at the workplace, although the recommendations and guidelines are general and not specified to deal with violence and harassment, as well as to address gender-based violence.

The Occupational Safety and Health Convention, 1981 (C 155) imposes an obligation on the State Parties to adopt national OSH policy that would include training, an adaptation of work to the physical and mental capacities of workers, and protection from reprisals against complaints.[111] In Sweden, the implementation of this provision has led to the adoption of initiatives regarding psychological problems in the workplace.[112] In Article 3(e) of the C 155, the term 'health' is defined through the perspective of work and includes physical and mental elements affecting health which are directly related to safety and hygiene at work.[113] In addition to that, there is a possibility for workers to remove themselves from the work situation in which the worker has a reasonable justification to believe presents an imminent and serious danger to their life or health under Article 13 of the C 155. In this regard, there have been cases when burnout, work-related stress in the public sector and others have been considered to be a violent situation.[114]

Occupational Safety and Health Recommendation, 1981 (R 164) calls for measures for the prevention of harmful physical or mental stress due to conditions of work on the national level of OSH regulation.[115] The Occupational Health Services Convention, 1985 (C 161) has a provision on the establishment and maintaining a safe and healthy working environment which will facilitate optimal physical and mental health in relation to work in its Article 1(a)(i). In addition to this, State Parties have to identify and assess the risks from health hazards in the workplace and factors in the working environment and practises that may affect workers' health.[116]

The list of occupational diseases in the List of Occupational Diseases Recommendation, 2002 (R 194) was updated to include mental and behavioural disorders, including post-traumatic stress disorder, with the establishment of a direct link between the exposure to risk factors at the workplace and mental disorders as a reason.[117]

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[111] C 155, Articles 4–5.
[112] Committee of Experts on the Application of Conventions and Recommendations. Observation on Sweden, the Occupational Safety and Health Convention, 1981 (No. 155). 104th ILC session (2015).
[113] C 155, Article 3(e).
[114] Supra note 4, para 105, citing CEACR, Finland, Convention No. 155, observation 2010. CEACR, Republic of Korea, Convention No. 155, direct request, 2014. Sweden, Convention No. 155, observation, 2014.
[115] R 164, para 3 (e).
[116] C 161, Article 5.
[117] Supra note 4, para 105.

OSH regulations also include working during night hours and a potential hazard and are protecting the health, safety and well-being of night workers in Night Work Convention, 1990 (C 171) and in Night Work Recommendation, 1990 (R 178).[118] C 171 provides the State Parties with the obligation to set up appropriate social services for night workers that would meet the specific conditions of their work and their special needs.[119] The said social services can include but is not limited to collective transport arrangements and suitably equipped resting facilities.[120] Paragraph 12 of the R 178 also specifies that employers should maintain the same level of protection against occupational hazards at night as during the day, and specifically to avoid the isolation of workers as far as possible.

2.4.2.7 Social security

Social security instruments provide for medical care for work-related incidents and damages and for periodical payment in case of loss of earning capacity connected to sickness.[121] Consequences of occupational accidents and diseases triggering the application of provisions of the Social Security (Minimum Standards) Convention, 1952 (C 102), and Employment Benefits Convection No. 121, 1964 (C 121), which provide benefits for employees. The list of occupational diseases shall be regulated and defined by State Parties based on C 121. This list does not include potential diseases caused by violence and harassment at work but since it is a minimal requirement and created more like a starting point for ratifying states it can still be implemented differently in national legislations depending on the country in question. Additionally, CEACR has not addressed any diseases caused by violence at work.[122] The list of occupational accidents in is open for the interpretation, and as such could be interpreted by having/not having regulated accidents that can arise from violence and harassment and similar countries are free to take higher standards of protection on the national level while being in compliance with minimum standards set out by C 102 in Article 12 and Article 1(1)(a).

2.4.2.8 Peace and Resilience

In the Recommendation on Employment and Decent Work for Peace and Resilience No. 205 of 2017 (R 205), it was once again reaffirmed that crises affect women and men differently.[123]

[118] Ibid, para 106
[119] C 171, Article 9.
[120] R 178, Paras 13–18.
[121] Part VI of the Social Security (Minimum Standards) Convention, 1952 (No. 102), the Employment Injury Benefits Convention, 1964 [Schedule I, as amended in 1980] (No. 121), the Employment Injury Benefits Recommendation, 1964 (No. 121) and Recommendation, No. 194.
[122] Supra note 29, paras 150–151; Supra note 4, paras 107–108.
[123] R 205, preamble.

Therefore, it needs to be recognized that gender equality and the empowerment of women and girls in promoting peace, preventing crises, enabling recovery and building resilience are of critical importance. In response to discrimination that is arising from or exacerbated by conflicts or disasters, the recommendation contains the special provision on prevention and punishing all forms of gender-based violence, including rape, sexual exploitation and harassment.[124] State Parties should also protect and support victims of gender-based violence when taking measures for promoting peace, preventing crises, and enabling recovery and building resilience.

2.5 Summary

Overall, it could be seen that the UN instruments whilst providing the protection against harassment at work, do so in a rather fragmented manner, either by omitting some manifestations of violence and harassment from a subject-matter scope, or by having a limited personal protection scope.

Similar outcome can be drawn by going through the ILO instruments, as one can conclude that they do indeed impose some obligations on States for the protection of worker against violence and harassment at the workplace. This protection is however rather fragmented and is applicable either based on the subject matter, depending on certain manifestations of violence and harassment at the workplace, or on the particular protected group, or criteria of non-discrimination. Additionally, those instruments while mentioning the protection against some manifestations of violence and harassment, do not address it as a primary aim and do not define the conduct, and neither of them provide detailed guidance on how to address the problem.[125]

Overall, it could be argued that the new C 190, that is discussed below, is long overdue and needs to be taken in full seriousness as it should combat those above-mentioned gaps in protection against violence and harassment in the world of work.

[124] R 205, para 15 (e).
[125] Supra note 29, para 371.

3 Violence and Harassment Convention (C 190) and the Recommendation on the Violence and Harassment at work (R 206)

This chapter will provide the main developments in the understanding and defining aspects of violence and harassment that were conducted with the adoption of the C 190 and R 206, and their legal implications for States, as well as for employers. It will also cover the most important provisions that develop the scope of the protection against violence and harassment at work, individuals that are covered by this protection and especially vulnerable groups, and pre-existing hazards in the world of work that may lead to a higher risk of violence and harassment incidents. The importance of those ILO instruments is mainly consisting of the most comprehensive approach so far in dealing with various issues arising from violence and harassment at the workplace. It is also very inclusive in its definitions what to be considered violence and harassment, what forms it could take and what implications are arising from those situations. This issue has numerous implications for direct victims, other employees, general work environment and employers.

Additionally, this Convention reinforces previous ILO instruments on fundamental principles and rights at work, those on freedom of association and the effective recognition of the right of the collective bargaining, the elimination of all forms of forced and compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation, as well on promoting decent work.[126]

3.1 Scope and core principles

In the preamble, the Convention recalls several rights, such as the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment; and recognises that human rights and harassment in the world of work can constitute a human rights violation or abuse, and that violence and harassment is a threat to equal opportunities and is unacceptable and incompatible with decent work, and recall that the State Parties have an important responsibility to promote a general environment of zero tolerance to violence and harassment.

[126] C 190, Article 5.

Additionally, it was stated that violence and harassment in the world of work affect a person's psychological, physical and sexual health, dignity, and family and social environments. It was further stated that the violence and harassment affect the quality of public and private survives and may prevent persons, women in particular, from accessing and retaining and advancing in the labour market.

Violence and harassment at the workplace also have economic development implications, such as they are incompatible with the promotion of sustainable enterprises and impact negatively the organisation of work, workplace relations, worker engagement, enterprise reputation, and productivity.

It was also specifically acknowledged that violence and harassment disproportionately affect women and girls, and the inclusive, integrated and gender-responsive approach, that tackles underlining causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relationships, is essential to ending the violence and harassment in the world of work.

The possibility of domestic violence effect on the employment, productivity and health and safety was pronounced, and the corresponding action plan of governments, employers' and labour markets institutions for helping as part of the other measures to recognise, respond and address the impacts of domestic violence was recognised.

In Article 1 the Convention defines 'violence and harassment' as one term and the 'gender-based violence and harassment' as the other, as follows:

(a) the term "violence and harassment" in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment;

(b) the term "gender-based violence and harassment" means violence and harassment directed at persons because of their sex or gender or affecting persons of a particular sex or gender disproportionately and includes sexual harassment.

The scope of the Convention seems like it was purposefully made rather wide and is deemed to include all the possible occasions that had not been regulated previously and or covered by the previous international instruments. Article 2 lists the protected persons including workers and other persons in the world of work, such as employees as defined by national law and practice, working persons irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, job

seekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer.

Article 6 adds to the list of protected persons and mentions 'other persons belonging to one or more vulnerable groups or groups in situations of vulnerability that are disproportionately affected by violence and harassment in the world of work.'[127] Furthermore, the R 206 mentions that the provision of Article 6 on vulnerable groups should be interpreted in accordance with applicable international labour standards and international instruments on human rights.[128] However, there is one group that is still specifically mentioned in the R 206 in conjunction with States' obligation to protect individuals from violence and harassment at work, which is migrant workers, particularly women migrants workers, regardless of migrant status, and in origin, transit and destination countries.[129]

Vulnerable groups are not explicitly defined in the C 190 nor by R 206 yet can be drawn from the preparatory works of those documents. Preparatory works indicating that some groups of people are more frequently targeted for violence and harassment at work, based on perceived or real differences in gender, ethnicity, sexual orientation or ability, and use such differences as a justification of violence.[130] Among others, the following groups are at higher level of risk not always due to perceived difference but because they lack social power: pregnant women and working mothers experience 'maternity harassment', psychological violence and humiliating treatment; young women and men due to their oftentimes subordinate position are more likely to be exposed to harassment, and especially young female workers to sexual harassment; persons with disabilities are significantly more likely to report violence at work being less represented in the labour market; migrant workers due to their lower chances to pursue formal employment and lower rates to seek help because of possible arrest and deportation, are more likely to experience violence at work, exploitive working conditions, coercion and exploitation; indigenous people are at higher rate of workplace violence, especially disproportionately experiencing bullying and lateral violence; LGBTI persons being an estimated minority (although real numbers are difficult to estimate), report several times higher rates of workplace violence, specifically bullying, mobbing and sexual and physical assault; people living with HIV are experiencing higher risks of physical violence and there is also a correlation between HIV transmission and discriminatory practices that impose barriers

[127] C 190, Article 6.
[128] R 206, para 13.
[129] R 206, para 10.
[130] Supra note 4, para 83.

to some vulnerable groups to obtain formal employment that push them to pursue dangerous forms of sex work.[131] Taking this into consideration does not undermine the previously discussed protection that was specifically afforded under more general human rights instruments covered earlier in this chapter, particularly through non-discrimination and safety and health provisions.

Additionally, the Convention is applicable in all sectors, public or private, both in the formal and informal economy, in rural or urban areas. The recommendation elaborated further on this issue and provides Members with a provision on facilitating the transition from the informal to the formal economy, in accordance to which Members should provide recourses and assistance for informal economy workers, employers and their associations to prevent and address violence and harassment in the informal economy.[132]

Applicability of the Convention that is based on the place is also wide, as it is applicable in situations of 'violence and harassment in the world of work occurring in the course of, linked with or arising out of work:

(a) in the workplace, including public and private spaces where they are a place of work;

(b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities;

(c) during work-related trips, travel, training, events or social activities;

(d) through work-related communications, including those enabled by information and communication technologies;

(e) in employer-provided accommodation; and

(f) when commuting to and from work.'[133]

3.2 States' obligations

The core principles of the Convention include an array of obligations to the Member States, as they ought to respect, promote and realize the right of everyone to a world of work free from violence and harassment.[134]

The State Parties shall adopt an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work, that should take into the account violence and harassment involving third parties. This obligation includes

[131] Supra note 4, paras 85–91.
[132] R 206, para 11.
[133] C 190, Article 3.
[134] C 190, Article 4, para 1.

several different provisions: (a) prohibiting in law violence and harassment; (b) ensuring that relevant policies address violence and harassment; (c) adopting a comprehensive strategy in order to implement measures to prevent and combat violence and harassment; (d) establishing or strengthening enforcement and monitoring mechanisms; (e) ensuring access to remedies and support for victims; (f) providing for sanctions; (g) developing tools, guidance, education and training, and raising awareness, in accessible formats as appropriate; and (h) ensuring effective means of inspection and investigation of cases of violence and harassment, including through labour inspectorates or other competent bodies. [135]

3.3 Protection and prevention

Article 7 calls for the adoption of laws and regulations to define and prohibit violence and harassment in the world of work, including gender-based violence and harassment, in a consistent manner with Article 1. Then Convention follows with two provisions, Article 8 is on the prevention of violence and harassment by the States, and Article 9 is on preventing measures that shall be adopted by the employers respectfully.

In Article 8 there is an obligation for the States to recognize the important role of public authorities in the case of informal economy workers; to identify sectors or occupations, work arrangements, in which workers and other persons are more exposed to violence and harassment; and to take measure to effectively protect those persons.

In Article 9 the Convention calls Member State to adopt laws and regulations that would require employers to take appropriate steps proportionate to their level of control to prevent violence and harassment in the world of work, including gender-based violence and harassment, 'so far as it is reasonably practicable'. The R 206 elaborates in detail what those laws and regulations shall impose over employers to improve workers and their representatives' participation in adoption workplace policies and to identify hazards and risks at the workplace.[136]

Provision from Article 9(a) concerning the adoption and implementation a workplace policy on violence and harassment in consultation with workers and their representatives are supplemented by the paragraph 7 of R 206, on what that policy should have. It should state that harassment and violence will not be tolerated; establish prevention programs with measurable objectives; specify the rights and responsibilities of the workers and the employer; contain the

[135] C 190, Article 4, para 2.
[136] R 206, paras 7–8.

complaint and investigation procedures; provide appropriate action and due consideration of communications related to incidents of violence and harassment. The right to confidentiality and privacy of individuals involved shall be specified and protected to the extent possible, especially in case of protection of complainants, victims, witnesses and whistle-blowers against victimization or retaliation.[137]

Article 9 (c) obliges States to identify hazards and to assess the risk of violence and harassment, with the participation of workers and their representatives, and to take measure to prevent and control them. In the realisation of this obligation, the R 206 points to certain hazards and risks that shall be given particular attention: those that are arising from the working conditions and arrangements, work organisation and human resource management; those that involve third parties such as clients, customers, service providers, users, patients and members of public; and those that arise from the discrimination, abuse of power relationships, and gender cultural and social norms that support violence and harassment.[138] These provision are following an OSH approach and therefore puts much attention on prevention of the incident that can be resulting in ill-health of the worker.

R 206 specifically mentions those sectors, occupations and work arrangements in which exposure to violence and harassment can be more likely and States, therefore, should adopt appropriate measures: night work, work in isolation, work in health, hospitality, social services, domestic work, transport, education and entertainment.[139] Preparatory works mention also public emergency services, i.e. police officers, medical staff and firefighters that are at higher risk to violence due to 'frequent contact with members of public and people in distress', which manifests in the risk of occurring physical violence and also in the potential to develop work-related mental health disorders, such as PTSD. Additionally, in the preparatory works, there is an outlined increased risk for the workers in agriculture and the rural economy, as well as for workers in the garment sector, both having a significantly higher percentage of female workers, for sexual and psychological violence.[140]

Other risk factors are based on fundamental and structural problems in societies. For example, the culture of impunity for violence and harassment and perpetrators and the absence of effective and accessible dispute resolution mechanisms.[141] Furthermore, the widespread idea

[137] C 190, Article 10 (c); R260, paras 7(f) & (g).
[138] R 206, para 8.
[139] R 206, para 9; Supra note 4, paras 74–82.
[140] Supra note 4, paras 81–82.
[141] Supra note 1, paras 12 & 15.

of harassment and violence being 'part of the job', as in the case of teachers, health and transport workers.[142]

3.4 Enforcement and remedies

Article 10 imposes an obligation on States to take appropriate measures to monitor and enforce national laws and regulations regarding violence and harassment at work.

One of the main obligations for States that is dedicated to protection is to ensure the right of workers to remove themselves from a work situation which they have reasonable justification to believe present an imminent and serious danger to life, health and safety due to violence and harassment, without suffering retaliation or other undue consequences, and the duty to inform management.[143] As a complementing provision, there is also an obligation of States to ensure that labour representatives (or any alternative to the national authority), are empowered to deal with violence and harassment in the world of work and therefore are able to issue an order to requiring measures with immediate executory force, and an order to stop work in cases of imminent danger to life, health and safety.[144]

Provision on the States' obligation to ensure easy access to appropriate and effective remedies and safe, fair and effective reporting and dispute resolution mechanisms and procedures includes the protection against victimisation of complainants or retaliation against them, victims, witnesses and whistle-blowers, and legal, social medical and administrative support for complainants and victims.[145] The remedies were further explained in R 206, and they could include the right to resign with compensation, reinstatement, appropriate compensation for damages, orders requiring measures with immediate executory force to be taken to ensure that certain conduct is stopped and the legal fees and costs according to the national law and practice.[146]

Furthermore, victims of violence and harassment in the world of work should have access to compensation in cases of psychological, physical or any other type of injury or illness which results in an incapacity to work.[147]

The Convention also imposes a specific obligation to provide victims of gender-based violence and harassment with effective access to gender-responsive, safe and effective

[142] Ibid, para 11.
[143] C 190, Article 10 (g).
[144] C 190, Article 10 (h).
[145] C 190, Article 10(b).
[146] R 206, para 14.
[147] R 206, para 15.

complaint and dispute resolution mechanisms, support, services and remedies.[148] In provisions of R 206, those measures should include the following: (a) support to help victims re-enter the labour market; (b) counselling and information services, in an accessible manner as appropriate; (c) 24-hour hotlines; (d) emergency services; (e) medical care and treatment and psychological support; (f) crisis centres, including shelters; and (g) specialized police units or specially trained officers to support victims.[149]

Domestic violence and its effect and impact in the world of work has to be recognized and, so far as is reasonably practicable, mitigated by potentially imposing leave for victims of domestic violence, flexible work arrangements, temporary protection against dismissal for victims, by having domestic violence included in workplace risk assessments, by a referral system to public mitigation measures for domestic violence and by raising awareness about the effects of domestic violence.[150]

The recommendation also has a provision concerning perpetrators of violence and harassment, as they should be held accountable and provided with counselling or other measures where appropriate, to prevent the reoccurrence of violence and harassment and facilitate their reintegration into work.[151]

Article 11 provides States with an obligation to ensure that violence and harassment are addressed in relevant national policies, such as occupational health and safety, equality and non-discrimination, and migration; that employers and workers and their organisation, and relevant authorities are provided with tools on violence and harassment in accessible formats; and that awareness-raising campaigns are undertaken.

3.5 Summary

The main breakthrough of the C 190 is how it extends the scope of the protection of individuals against violence and harassment. This extension applies to the personal scope, which defines who is covered by the protection, and also to when and where they are covered, and the subject-matter of the protection. This protection level has arguably the highest level in comparison to all international instruments that were legislated beforehand and introduces a concept of universal freedom of individuals from violence and harassment in the world of work, regardless of their status and personal characteristics.

[148] C 190, Article 10 (e).
[149] R 206, para 17
[150] C 190, Article 10 (f), R206, para 18.
[151] R 206, para 19.

This universal protection, that covers all the potential conduct within the manifestation of violence and harassment and individuals that can be affected, has a potential to help overcoming the stereotypes about perpetrators and victims. [152]

[152] Supra note 29, para 377.

4 Regional human right treaties

This chapter provides an overview of regional regulations that would mostly include instruments from the Council of Europe and the European Union. This European focus was chosen due to its effect on Sweden, as all the following instruments have been signed, ratified and implemented accordingly by Sweden. Those instruments include both specific provisions that target the protection of workers against violence and harassment and the regulation of a more general character that deal with gender-based violence and can, therefore, be relevant for the world of work although not regulating it specifically.

4.1 Council of Europe

4.1.1 Revised Social Charter

Revised European Social Charter of 1996 by the European Committee of Social Rights is the main instrument within the Council of Europe on violence in the world of work, it was ratified by a majority of 47 member States, including Sweden.[153] Article 26 of the Revised Social Charter imposes obligations on State Parties in consultation with employers and workers' representatives, to promote awareness, information and prevention of sexual and moral harassments in the workplace.[154] Article 26 (2) of the Revised Chapter imposes an obligation to State Parties 'to take all necessary preventive and reparatory measures to protect individual workers against recurrent reprehensible or distinctly negative and offensive actions directed against them in the workplace or relation to their work since these actions constitute a humiliating behaviour'.[155] It also establishes a right to the protection of human dignity against harassment creating a hostile working environment related to a specific characteristic of a person.[156]

The European Committee of Social Rights (ECSR) has stated, that sexual harassment is not 'necessarily form a form of discrimination based on gender but always qualifies as a breach of

[153] Sweden ratified the Revised European Social Charter on 29th of May 1998, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804928a3 [Accessed 28 May 2020].
[154] Sweden had ratified both paragraphs of Article 26 of the Convention. Declaration contained in the instrument of ratification deposited on 29 May 1998 - Or. Engl.
[155] European Committee of Social Rights, Conclusions on Sweden on Article 26 (1) and (2) of the the European Social Charter. 2003 def/SWE/26/2/EN; 2003/def/SWE/26/1/EN.
[156] Liddell, R. and O'Flaherty, M. "Handbook on European non-discrimination law." Luxembourg: Publications Office of the European Union, 2018, p 69.

equal treatment 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'.[157]

The other important amendment made by the Revised European Social Charter is the procedural implication of effective protection of employees. This implication has shifted the burden of proof. This shift has been made in favour of the victims of discrimination, and now, the complainant remains to have a burden of proof but only to a lower level of probability standard. In the case of the prima facie evidence that points to a discrimination case (including harassment cases), the burden of proof can be further moved on the employer, who then needs to rebut this evidence or produce contrary evidence.[158]

Those provisions are based on the fact, that employer has an advantageous position and in possession of all the documents or other relevant evidence that would allow them to prove the need of any different treatment if needed. In the case of the shifting burden of proof, the victim of discrimination has higher chances to win a case and this, therefore, contributes to combating unequal treatment at the workplace.[159]

As for the scope of this provision, the ECSR has stated that there must be a possibility for employers to be held liable when harassment occurs in relation to work, or the premises under their responsibility, regardless of the defendant or a victim is a third person in a sense of not being employed by a said employer, i.e. an independent contractor, self-employed workers, visitors, clients, etc.[160]

4.1.2 Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention)

The Istanbul Convention was adopted by the Council of Europe in 2011.[161] State Parties and Sweden, being one of them, are obliged to prohibit, prevent, prosecute and eliminate violence against women, including sexual harassment, and all forms of domestic violence, including economic violence. The Convention specifically outlines detailed obligations for the States to criminalize certain parts of gender-based violence and domestic violence that include detailed

[157] Supra note 155.
[158] Ibid.
[159] ABC of women workers' rights and gender equality. ILO. Second Edition. 2007, pp 24–25.
[160] Supra note 156.
[161] Sweden has signed it on 11 May 2011, and ratified on 1 July 2014, and therefore entered for it into force on 1st of November 2014, available at https://www.coe.int/en/web/istanbul-convention/sweden [Accessed 28 May 2020].

remedies and sanctions, and to legislate in other branches of law the remaining offences.[162] This Convention is also providing Members with a comprehensive framework, policies and measures for the protection of, and the provisions of assistance to, all victims of violence against women and domestic violence in its Chapter IV.

In its Article 40, the Convention requires State Parties to take 'the necessary legislative or other measures to ensure that 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 creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction'. Furthermore, there are articles that set standards on psychological, physical and sexual violence, which are applicable in the prevention of violence against women at the workplace.[163]

4.2 European Union

Violence and harassment at work is prohibited and its occurrence shall be prevented from the provisions of the occupational safety and health instruments and equal treatment within the EU.[164] The following instruments that are going to be used in this Chapter are all having a legal status of an EU Directive.

Directives are binding legal instruments upon all of the EU Member States.[165] However, their binding character is applicable to the result that have to be achieved, and national authorities have to decide which type of form and methods they will utilize to achieve that result.[166] Directives are used when the aim is to harmonize national laws or to introduce complex legislative change, as State Parties are left to decide on how to implement the Directive provisions.[167] Additionally, the ECJ has increased the force of directives by pronouncing that they have direct effect, which allows individuals to use them as a foundation of an action against

[162] Council of Europe, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, November 2014, ISBN 978-92-871-7990-6, available at https://www.refworld.org/docid/548165c94.html [accessed 28 May 2020] Chapter V.
[163] Articles 33, 35 & 36 of the Istanbul Convention respectively; Joint statement "Violence and harassment against women and girls in the world of work is a human rights violation", on 31 May 2019, available at www.ohchr.org/Documents/Issues/Women/SR/StatementILO_31May2019.pdf [Accessed 28 May 2020].
[164] Supra note 4, para 115.
[165] European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at https://www.refworld.org/docid/4b17a07e2.html [accessed 28 May 2020]; Article 288.
[166] Ibid.
[167] Craig, Paul, and Gráinne De Búrca. EU law: text, cases, and materials. Oxford university press, 2015, p 108.

the State, and that the Member State can be found liable for damages for non-implementation of a directive.[168]

4.2.1 Subject matter of protection

Harassment was firstly treated as a case of direct discrimination, then as a particularly harmful form of discriminatory treatment.[169] Harassment can be deemed as discrimination if following criteria are fulfilled: there is a presence of unwanted conduct related to a protected ground; this conduct has a purpose or effect of violating the dignity of a person; and/or, it creates an intimidating, hostile, degrading, humiliating or offensive environment.[170]

According to the definition of harassment, there is no need for a comparator to prove it, as it is wrong in itself due to the forms of its manifestation: 'verbal, non-verbal, or physical'; or the potential effect it might have: as a violation of human dignity.[171]

There is a two-fold approach towards harassment in the EU: a combination of objective and subjective approach. Firstly, the perception of the victim of the treatment is used to determine if harassment had occurred. Secondly, even if the victim does not feel the effect of harassment, the finding of the harassment case can still be made if the complaint is in the target of the conduct in question.[172]

4.2.2 Main binding instruments

Directive 89/391/EEC requires employers to ensure the health and safety of workers at work in its Article 5(1), which, according to the European Agency for Safety and Health at Work (EU-OSHA), includes protection against external violence and bullying (EU-OSHA, 2002).

Directive 2010/41/EU of European Parliament and of the Council of 7 July 2010 regulates matters of equal treatment of men and women engaged in the activity in a self-employed capacity.

EU non-discrimination law protects individuals based on grounds such as sex, sexual orientation, race or ethnic origin, religion or belief, age or disability, and has special regulations regarding discrimination within employment as well as within market of goods and services.

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[168] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECLI:EU:C:1991:428.
[169] Supra note 156, pp 64–67.
[170] Racial Equality Directive Article 2 (3); Employment Equality Directive 2000/78/EC of 27 November 2000 Article 2 (3); Gender Goods and Services Directive Article 2 (c); Gender Equality Directive (recast), Article 2 (1) (c).
[171] Supra note 156, p 66.
[172] Supra note 156, p 64.

Council Directive 2000/78/EC of 27 November 2000 (Employment Equality Directive) establishes a general framework for equal treatment in employment and occupation.[173] Council Directive 2000/43/EC of 29 June 2000 is implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.[174] Those directives jointly prohibit harassment based on the grounds of racial or ethnic origin, religion, belief, disability, age or sexual orientation, as a form of discrimination in employment and occupation.

Directive 2006/54/EC of European Parliament and of the Council of 5 July 2006 is implementing the principles of equal opportunities and equal treatment for men and women in matters of employment and occupation. It has been called 'a Recast Directive' as it had clarified and brought together in one instrument all the main provisions regarding access to employment, including promotion, vocational training, and working conditions that were previously regulated by three other directives.[175] This directive has provisions that are prohibiting both harassment and sexual harassment as forms of sex discrimination.

In Article 2(1)(c) the occurrence of harassment is established 'where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment'.[176] Therefore, two following requirements are cumulative and need to be fulfilled in order to consider the conduct as harassment: the conduct has to have a purpose or the effect of violating the 'dignity' of an individual, and it has to create an environment falling into the definition of intimidating etc.[177] Sexual harassment is occurring 'where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or the effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment'. The discrimination in the cases of sexual harassment is driven from its impact on the person and the effect of following victimization, such as effect on one's wages, promotions, or dismissal (in case of quid pro quo harassment); in the absence of direct economic measures – it creates the hostile environment which may lead to a person not being able to fulfil one's professional potential at the workplace.[178]

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[173] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. EU non-discrimination law in the Courts. 2017, pp 1–5.
[174] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
[175] Burri, S. EU gender equality law. European Union, 2008, p 14.
[176] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
[177] Ibid, p 17.
[178] Directive 2006/54/EC, para 6; Article 2(2)(a).

Less favourable treatment that is based on an individual's rejection of the harassing treatment or a submission of thereof is also considered to be sex discrimination, and therefore falls within the protection of the directive. [179] This provision essentially prohibits against reprisals against the individual that reported an incident of violence and harassment.

These directives are the main instruments within the EU to combat discrimination in the employment, which they do by among other things prohibit direct and indirect discrimination; harassment and allow positive measures to be taken in order to support underrepresented groups within society. Gender Equality Directive deems sexual harassment as a special type of discrimination, where unwanted 'verbal, non-verbal, or physical' conduct is of sexual nature. Statistics on gender-based violence against women within the EU shows that 75 per cent of women in qualified professions or top management have been subjected to sexual harassment as victims, and 10 per cent of women have experienced stalking or sexual harassment trough new technologies.[180]

In its Explanatory Memorandum, attached to the Commission's proposal for the Employment Equality Directive and Racial Equality Directive, the European Commission stated that harassment may take different forms: 'from spoken words and gestures to the production, display and circulation of written words, pictures or other materials, as long it is serious'. [181]

4.2.3 Personal scope of the protection

As for the personal scope of the protection, the list of the protected individuals is rather wide, and includes 'members of working population', self-employed individuals, those on the maternity leave, those who are seeking employment, and those who have been previously employed.[182]

[179] Article 2(2) of the Recast Directive.
[180] Supra note 156, p 66, citing FRA (2014), Violence against women: an EU-wide survey. Main results report, Luxemburg, Publications Office of European Union, pp 96 & 104.
[181] Supra note 156, p 65, citing Proposal of a Council Directive implementing the principle of equal treatment between persons.
[182] Directive 2006/54/EC, Article 6.

4.2.4 Obligations of States

Additionally, 'the instruction to discriminate' also constitutes the discrimination, according to all of the non-discrimination directives.[183] Although there is no definition of such conduct, that can be potentially helpful to combat mandatory instructions of discriminatory nature, as well as situations where there is an expressed preference or an encouragement to threat individuals less favourably due to one of the protected grounds.[184]

EU State Parties shall encourage employers, collective agreements or practice, to prevent all forms of discrimination on the grounds of sex, in particular harassment and sexual harassment at the workplace, in access to employment, vocational training and promotion.[185] The Recast Directive further reaffirms that those forms of discrimination should be prohibited and should be subjected to effective, proportionate and dissuasive penalties.[186]

In terms of the protected groups of persons, the Court of Justice of European Union (CJEU) held that the prohibition of harassment is not limited to a person holding certain characteristics and therefore, a mother of a disabled child was also protected.[187] Questions of facts whether the conduct amounts to harassment are getting determined in national jurisdictions before cases are getting referred to the CJEU.[188]

As for the interpretation of the 'harassment' as a notion, it was concluded by the European Union Civil Service Tribunal (CST), that the conduct can be considered harassment if it is perceived as excessive and open to criticism for a reasonable observer of normal sensitivity and in the same situation.[189] Part of the definition of harassment that was given in the Employment Equality Directive concerning 'the purpose or effect of violating the dignity of a person', the CST has noted that this criterion allows harasser not to have the direct intent to discredit the victim or deliberately impair their working conditions, and it is sufficient enough this intentional conduct led to such consequences.[190]

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[183] Racial Equality Directive Article 2 (4); Employment Equality Directive 2000/78/EC of 27 November 2000 Article 2 (4); Gender Goods and Services Directive Article 4 (1); Gender Equality Directive (recast), Article 2 (2) (b).
[184] Supra note 156, p 67.
[185] Directive 2006/54/EC, Article 26.
[186] Directive 2006/54/EC, paras 6–7.
[187] CJEU, C-303/06 *S. Coleman v. Attidge Law and Steve Law* (GC), 17 July 2008, ECLI:EU:C:2008:415.
[188] Supra note 156, p 66.
[189] European Union Civil Service Tribunal (CST), F-42/10 *Carina Skareby v. European Commission*, 16 May 2012, ECLI:EU:F:2012:64, para 65.
[190] CST, F-52/05 *Q v. Commission of the European Communities*, 9 December 2008, ECLI:EU:F:2008:161, para 135.

The CST has also had several cases, that marked the lines on what cannot constitute harassment, such as a critical appraisal of the performance of an official made by the supervisor.[191] For example, negative comments addressed to a member of staff do not undermine their personality, dignity or integrity where they are formulated in measured terms and are not based on allegations that they are unfair and lacking any connections with objective facts.[192] Similarly, the refusal of annual leave with the justification of the need to ensure the proper functioning of the service is not considered to be a manifestation of psychological harassment.[193]

4.3 Summary

Overall, the European framework is reflecting the overall international trend as the protection against violence and harassment based on non-discrimination provision, therefore on the outlined discrimination grounds. The protection against sexual harassment is viewed as a gender-based violence issue and directed to the vulnerable group based on female gender.

The EU protection has a holistic approach and covers the prohibition of the harassment based on discriminatory grounds. However, through judicial cases, the requirement for a presence of a personal characteristics that constitute grounds for discrimination is removed as concerns sexual harassment, instruction to discriminate and reprisals. Furthermore, the protection covers individuals not only in the position of an employee but also those who are self-employed, former employees and those on a leave. The other very important regulation is the objective test that helps to establish whether the incident of harassment occurred. In this regard it is enough that the treatment that falls under the definition of harassment due to its manifestation. At the same time, the subjective approach is also used, as harassment could be established if it violates the dignity of the person.

These European instruments are also relevant to be considered for this thesis due to the effect they are having on the Swedish national legislation. Since by being in the EU, and having ratified other instruments, Sweden is bound to fully transpose and apply the above-mentioned provisions.

[191] Supra note 156, p 65.
[192] CST, F-12/13 *CQ v. European Parliament*, 17 September 2014, ECLI:EU:F:2014:214, para 87.
[193] Ibid, para 110.

5 Swedish national regulations

5.1 Introductory remarks

This chapter examines Swedish national legislation on manifestations of violence and harassment in the world of work. It firstly gives an overview on the legal systems to a degree that it concerns the understanding of employment regulations. Then it covers the role of the international law in Sweden and the status of the instruments and their implementation.

Furthermore, it covers the relevant branches of the national law that regulate violence and harassment at work. The national legislation of Sweden covers manifestations of violence and harassment at work from three different perspectives: from the position of the occupational safety and health in the work environment provisions; from a position of anti-discriminatory and gender equality regulations.

This Chapter will not cover Swedish criminal law, that generally criminalises some manifestations of violence and harassment, for example assault or battery due to main focus lying within labour specific regulations. Additionally, the collective agreements, as well as the awareness-raising companies are covered shortly and in no way are meant to be a comprehensive description.

5.2 General overview of the labour regulations and sources of law

Generally, labour relations are regulated under the private law in Sweden, and therefore, parties of this contractual relationships, which are employees and employers together with trade unions set up the conditions of the labour relations in individual and collective agreements.[194] The Swedish model of regulating labour relations implies fewer mandatory provisions legislated by the government, as the State does not intervene in labour relations often and most of the provisions are negotiated by the parties.

There is, however, a part of labour law that that deals mainly with relations between the government and employer, and additionally between the government and employees and or trade unions, which is called the public labour law. Those provisions, being part of the public part of law, cannot be contractually amended by the parties through negotiations and therefore

[194] Adlercreutz, A. & Nyström B. Labour law in Sweden. Kluwer, 2015.

are mandatory to follow. They are applicable to everyone regardless of the nationality or the provisions of individual or collective agreements, the only limitation is the territory of Sweden.[195]

The relevant regulations regarding the protection of individuals against violence and harassment at the workplace are exactly the part of public labour law: the working environment law and the equal treatment and anti-discriminatory regulations.[196]

5.3 Legal Framework

The main sources of labour law are in line with the main Swedish trend to regulate labour relations, as they include both law, that includes non-codified principles of law and court decisions, and the collective and individual agreements.[197]

When it comes for the international instruments as a source of law, they are only binding if have been integrated into the Swedish law by either transformation of existing laws or through incorporation i.e. through legislation of new laws.[198] It is also possible to integrate international instruments by corresponding the general practice observers in collective bargaining, as it was done with several ILO conventions.[199]

Additionally, since Sweden has entered into the EU, the law of EU became an important source of law. Following by the provisions directives of the European Union is mandatory and State Parties are obliged to implement the provision from those directives in their national legislation as they are not directly applicable. Although the form of incorporation of the Directives provisions into the national law of State Parties is up to their choice, they are obliged to ensure the effectiveness of the EU law and by the time limit that is given by each directive for the incorporation. [200]

5.4 The working environment regulations

The working environment provisions are parts of Swedish labour law that deal with occupational safety and health regulations. In general, the purpose of work environment

[195] Ibid, pp 75–76.
[196] Ibid, pp 59–60.
[197] Ibid, p 61.
[198] SFS 1976:633 Lag (1976:633) om kungörande av lagar och andra författningar. Stockholm: Justitiedepartementet, (t.o.m. SFS 2018:99)
[199] Supra note 194, p 61.
[200] Supra note 194.

legislation is to prevent ill-health of workers and accidents at work, hence there is no regulation on the right of individuals to compensation or the investigations of guilt of the employer.[201]

Work Environment Act (Arbetsmiljölagen SFS 1977:1166) is the main instrument that deals prevention of occupational illnesses and accidents and to otherwise imposes a notion of maintenance of a good working environment.[202] This Act is a so-called framework legal instrument which implies that it sets up general principles and calls for the further actions for their realization.[203] The following from the Act Ordinances (Föreskrifter) that were adopted by the Swedish Work Environment Authority, impose more detailed obligation on labour relations parties and specify the provisions of Work Environment Act .

5.4.1 The scope of the protection

In its Section 3 of Chapter 1, the Act in the list of protected individuals equates with employees those persons who are undergoing education or training, persons who are assigned to perform work in institutional care and persons who perform duties within the scope of the National Total Defence Service Act (SFS 1994:1809).[204]

5.4.2 The obligations on the employer

Work Environment Act imposes the main obligations regarding the maintenance of good working environment and the prevention of occupational accidents in its Chapter 3.

Section 2 of this Chapter regulates the responsibility of the employer to take all the steps necessary to prevent employees from being subject to ill-health or accidents. It follows with the requirement of the elimination of all risk factors that can lead to ill-health or accidents. It is specifically mentioned, that employees that are carrying out work alone shall enjoy special protection based on risks that may be associated with this.

Section 2a imposes an obligation on the employer for systematic planning, directing and monitoring the activities in a way that is leading to the maintenance of a good working environment. That obligation includes the mandatory investigation of work-related injuries, continuous investigation of risks involved in the activities and taking the measures required as a result of those investigations. Additionally, it calls for the documentation of the work environment, undertaking measures and the following of actions plan.

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[201] Supra note 194, p 15.
[202] SFS 1977:1166 Arbetsmiljölagen Svensk Författningssamling, 1977, No. 1166 (INFORM)
Section 1. Work Environment Act (1977:1160) Amendments: up to and including SFS 2019:614.
[203] Blyme H. Kommentar till arbetsmiljölag (1977:1160), Karnov Online, Note 18.
[204] Ibid, Notes 10–13.

The Act therefore holds that the main responsibility for the good working environment rests within the employer is established in the Work Environment Act.[205] That being said, there is an emphasis on mutual responsibility of the employer and employees to develop a good working environment.[206]

5.4.3 The delegation of legislative power regarding working environment

Furthermore, the Work Environment Act includes the authorisation for the Government or the authority, designated by the Government, to issue regulations, concerning, among others, any further regulations on the state of the working environment and general obligations in respect of the working environment that are needed to prevent illnesses and accidents at work.[207] This provision gives general authorization to issue additional regulations on the nature and obligations of working environment.[208] Following this provision, the Government had issued the Work Environment Ordinance (Arbetsmiljöförordning SFS 1977:1166), following by which the Swedish Work Environment Authority gained a mandate to release its Ordinances on issues connected to the working environment that are not mentioned in the Chapter 4 of the Work Environment Act.[209]

5.4.4 Responsibility for the violation

Although Ordinances released by the Swedish Work Environment Authority can impose a number of obligations for the employers, having this power does not directly trigger the same level of responsibility as in the case of the direct violation of the Work Environment Act.[210] On the contrary, the violations of the following Ordinances do not directly trigger penalties.[211] The way they have a potential to get enforced is through the decision of the Swedish Work Environment Authority that could be issued in the case against the employer. It can issue an order to comply with obligation or prohibition on certain actions with the conditional financial penalty in case the order would not be followed.[212] The imposed penalty has a nature of fine

[205] Ibid. Note 15.
[206] Ibid. Note 14.
[207] Work Environment Act(SFS 1977:1160), Chapter 4, Section 10.
[208] Proposition 1990/91:140 Arbetsmiljö och rehabilitering, pp 78–81 & 145.
[209] Work Environment Ordinance (1977:1166), Section 18 (6).
[210] Blyme, H. Kommentarer till AML, 4 kap. 10§ n 56.
[211] Malmberg, J. & Källström K. Anställningsförhållandet: inledning till den individuella arbetsrätten. Iustus, 5:e upplagan 2019, p 281.
[212] Work Environment Act (SFS 1977:1160), Chapter 7, Section 7.

and ought to be paid to the Swedish Work Environment Authority, and there are no further provisions allowing damages for the individual, as was stated before.

5.4.4.1 Ordinance of the Swedish National Board of Occupational Safety and Health on measures for the prevention of violence and menaces in the working environment, AFS 1993:2

This Ordinance was adopted on 14th January, 1993 by the Swedish National Board of Occupational Safety and Health pursuant to Section 18 of the Work Environment Act.[213] It was first of its kind in the world and had an important value of holistic approach to the prevention of the violence and threats of violence in the working environment, since it has addressed both prevention strategies the deal with violence in the context of environmental and organizational issues and the mitigation of the individuals' risks.[214] This Ordinance was aimed to impose an overall goal to arrange working environment as free from violence or the threat of violence as far as possible.[215]

Obligations of the employer

As part of the realization of the prevention of violence and menaces in the working environment, the Ordinance imposes several obligations for employers.

Firstly, the employer shall investigate the risks of violence or a threat of violence which may exist at work and take measures to mitigate those risks that have been identified by the investigation.

Secondly, the employer shall also have special routines for observing, reporting and following up all incidents and occurrences involving elements of violence and threats of violence. Thus, in cases of serious incidents or injuries the employer is obliged to report to the police, the social insurance officer and the Labour Inspectorate.[216]

Thirdly, if work entails risks of violence, special security routines shall be in place and those employees that are affected by risk have to be informed of its existence and have sufficient training and information to be able to perform their work safely and with adequate security. In case if the employee was subjected to violence or to the risk of violence, they shall be provided with prompt assistance and support for the prevention or the alleviation of both physical and

[213] Swedish National Board of Occupational Safety and Health, Statute Book of the Swedish National Board of Occupational Safety and Health containing Provisions on Measures against Victimization at Work Ordinance (AFS 1993:2) on Victimization at Work, 21 Sep. Stockholm (official English translation).
[214] Chappell, D.; Di Martino, V. Violence at work. Third edition. Geneva, International Labour Office, 2006, p 155.
[215] AFS 1993:2, Sections 1 & 3.
[216] AFS 1993:2, Section 10.

mental injury. All the incidents of violence and threats of violence shall be recorded and followed up on.

Recommendations on the implementation

In addition to the Ordinance, the Recommendations were also adopted that were further elaborating on the implementation of the provisions on measures for the prevention of violence and menaces in the working environment.[217]

Those Recommendations provided the list of high-risk occupational categories that were most liable to be subjected to violence and to the threat of violence at the workplace, for example: nurses and other health personnel, social welfare officers, teachers, security personnel, police officers, ticket inspectors, and public transport drivers. They have also stressed the employers liability to the danger of violence or threats of violence to employees in particular groups: those who are working with valuables, goods or money; those who occupy a position of power or authority; those whose work involves a risk of confrontation with provocative or aggressive persons.

5.4.4.2 Provisions of the Swedish Work Environment Authority on Systematic Work Environment Management, AFS 2001:1.

These Provisions were adopted on 15th February, 2001 by the Swedish Work Environment Authority in realization of the Section 18 of the Work Environment Ordinance.[218] Provisions were adopted to incorporate parts of the European Commission Directive on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC) on stipulations concerning work environment policy and written risk assessments. Together with the Provisions, the General Recommendations of the Swedish Work Environment Authority on the implementation of the Provisions on Systematic Work Environment Management were adopted. Although they have a non-binding legal nature, they provide recommendations on the implementation of the provision and give examples on the fulfilment of the legally binding requirements. The main regulatory meaning of those Provisions is to impose and define the obligation of the employer to perform systematic work environment management. [219]

[217] General Recommendations of the Swedish National Board of Occupational Safety and Health on the implementation of the provisions on measures for the prevention of violence and menaces in the working environment.
[218] These Provisions enter into force on 1 July 2001. They include readjustments implemented by AFS 2003:4 and AFS 2008:15.
[219] General Recommendations of the Swedish Work Environment Authority on the implementation of the Provisions on Systematic Work Environment Management. AFS 2001:1. Guidance on Section 1.

The Systematic work environment management as the obligation of employers

Overall, the employer is obliged to provide employees with systematic work environment management, that includes rules concerning work environment policy and knowledge requirements, regular risk assessments and investigations, corrective measures and follow-ups that would be able to prevent and mitigate the for ill-health and accidents of workers. This obligation is applicable to all employers and equated to them persons.[220] This provision includes to natural and legal persons who are employing individuals, and those persons renting manpower, and for some provisions to persons who rent out manpower.[221]

The systematic work environment management is defined as a 'work done by the employer to investigate, carry out and follow up activities is such a way that ill-health and accidents at work are prevented and a satisfactory working environment achieved'.[222] Ill-health is defined as both illness by objective medial criteria and the physical and mental functional disturbances of various kinds which could not be objectively considered an illnesses but can lead to an illness; accidents mean physical or mental injury resulting from a sudden event, that can lead to an injury and fatality.[223] As for the obligation to ensure the satisfactory working environment, it is not enough to prevent an ill-health and accidents for employees, but there is a need for the contribution towards the good health and means, such as the possibility to influence and freedom of action and development.[224]

The employer shall give employees and safety delegates the possibility of participating in the systematic work environment management. The realization of this obligation calls for the existence of a work environment policy in written form that describes how the working conditions in the employers' activity shall be in order for ill-health and accidents at work to be prevented and a satisfactory working environment to be achieved, as well as the routines on how it shall be processed. Furthermore, it reinforces the employers' obligation to provide their employees with enough information on risks which the work entails for ill-health and accidents to be prevented and for a satisfactory working environment to be achieved.

The employer shall regularly investigate working conditions and assess risks of any person being affected by ill-health or accidents at work. Such risk assessment shall be done in written

[220] AFS 2001:1, Section 1.
[221] General Recommendations of the Swedish Work Environment Authority on the implementation of the Provisions on Systematic Work Environment Management. AFS 2001:1. Guidance on Section 1.
[222] AFS 2001:1, Section 2.
[223] General Recommendations of the Swedish Work Environment Authority on the implementation of the Provisions on Systematic Work Environment Management. AFS 2001:1. Guidance on Section 2.
[224] General Recommendations of the Swedish Work Environment Authority on the implementation of the Provisions on Systematic Work Environment Management. AFS 2001:1. Guidance on Section 3.

form and indicate the seriousness of each indicated risk. Cases when the risk is of serious nature, the employer is supposed to include it in the written instructions for work. In cases when the employee faces ill-health or accident at work, the employer shall investigate the cases and risks that caused them.

Additionally, employers shall introduce measures to prevent ill-health or accidents from reoccurrence and to achieve a satisfactory working condition. While deciding the measures, it shall be clear who is responsible for them being carried out and that they have a determent timespan.

Finally, the employer shall have an annual follow-up on systematic work environment management which shall be documented in writing and include areas that need to be improved if there are any.

Overall the systematic working environment management is supposed to prevent and accordingly deal with those manifestations of violence and harassment, which have risks that lead to ill-health of workers.

5.4.4.3 Provisions of the Swedish Work Environment Authority on Organisational and Social Work Environment, AFS 2015:4

The Swedish Work Environment Authority issued the following provisions pursuant to Section 18 of the Work Environment Ordinance with the purpose to promote a good working environment and prevent risks of ill-health due to organisational and social conditions in the work environment.

Scope of the protection

The Provisions define harassment as actions in an abusive manner at one or more employees, which may lead to ill-health or to the exclusion from the workplace community.

The list of obligations that are imposed by these Provisions are applicable to the employer and persons that are equated to the employer i.e. those who hire a workforce, are bearing the responsibility for the insurance that these provisions are followed.

Obligations of the employer

Firstly, the employer is obliged to impose zero-tolerance at work for the harassment. Hence, there is a requirement to have procedures to handle harassment that indicate: the responsible individual that receives information on the victimisation occurrence; how this information is treated and how the victim can assess help in a timely manner. Those procedures must be known to all employees.

Secondly, the employer is obliged to take measures to eliminate conditions in the work environment that could give rise to harassment. General recommendations point out towards special responsibility to prevent, notice and deal with harassment. [225] Additionally, they clarify that those risks can include to conflicts, workloads, allocation of work, conditions for collaboration and restriction to change.

Thirdly, employers are obliged to prevent the unhealthy workloads that arise due to assigned authority and tasks.[226] The unhealthy workload is defined as job with requirements that exceed recourses on more than a temporary basis, creating an unhealthy imbalance that is prolonged and with inadequate recovery opportunities. Regarding this provision, the General Recommendations advise the employer to consider the signs and signals of unhealthy workload when assigning tasks and that the employers' obligation to prevent it covers managers, supervisors and other employees.[227]

These Provisions also reaffirm the obligation for the employer to ensure that managers and supervisors have the knowledge on how to prevent and manage harassment and unhealthy workloads, and that this knowledge can be practically applicable. General recommendations on this provision advise having trainings preferably to managers, supervisors and safety representatives together, as it is important for them to have equal knowledge.[228]

Overall, these provisions guarantee the protection of the working environment against a harassment, a term that is broadly defined and can potentially include among other manifestations psychological, physical and sexual harassment, which application is not conditioned on the individuals characteristics i.e. no need to establish the connection with one of the discriminatory ground. Additionally, they guarantee a protection against other risk factors that can contribute to the unhealthy working environment.

[225] AFS 2015: 4. "Organisational and social work environment." The Swedish Work Environment Authority provisions on organisational and social work environment, with general recommendations on application thereof (2016), p 13.
[226] The Swedish Work Environment Authority's Regulations and General Guidelines on the Organisational and Social Work Environment – adopted 22 September 2015. AFS 2015: 4. Section 9.
[227] AFS 2015: 4. "Organisational and social work environment." The Swedish Work Environment Authority provisions on organisational and social work environment, with general recommendations on application thereof (2016), p 10.
[228]"Organisational and social work environment." The Swedish Work Environment Authority provisions on organisational and social work environment, with general recommendations on application thereof (2016), p 8.

5.5 The anti-discriminatory regulations

5.5.1 Introductory remarks

There are some researchers who argue that pieces of national legislation that deal with discrimination and gender equality were drafted as realization of the obligation toward the implementation the directives of the EU.[229] However, general prohibition of the discriminatory treatment on the basis of race, colour, ethnic origin, association membership and sex is in the Swedish Constitution.[230]

In general, Swedish legislators view discrimination from the position of the treatment that constitutes a violation of fundamental human rights.[231] This idea was pronounced in the Equal Opportunity Act defined sexual harassment as an unwanted conduct based on sex or sexual nature and imposed an obligation for employers to fight gender-based discrimination.[232] It viewed sexual harassment from a two-fold approach: as an act of harassment at work and as an act of gender-based discrimination and/or criminal offence.

5.5.2 The Discrimination Act

The Discrimination Act of 2008 became a codifying document that included rules and provisions on non-discrimination from already excising regulatory acts.[233] Thus, by entering into force it repealed the following laws: the Equal Opportunities Act (SFS 1991:433), the Act on Measures against Discrimination in Working Life on Grounds of Ethnic Origin, Religion or Other Religious Faith (SFS 1999:130), the Prohibition of Discrimination in Working Life on Grounds of Disability Act (SFS 1999:132), the Prohibition of Discrimination in Working Life on Grounds of Sexual Orientation Act (SFS 1999:133), the Equal Treatment of Students at Universities Act (SFS 2001:1286), the Prohibition of Discrimination Act (SFS 2003:307), the Act Prohibiting Discriminatory and Other Degrading Treatment of Children and School Students (SFS 2006:67).

The Discrimination Act has a purpose of combating discrimination and in other ways promoting equal rights and opportunities regardless of sex, transgender identity or expression,

[229] Supra note 194, pp 52, 60, 137.
[230] Supra note 156.
[231] SOU 2006:22, p 46.
[232] Jämställdhetslag (SFS 1991:433), Section 16 (a). This act was repealed by the Discrimination Act SFS 2008:567.
[233] Entered into force from 1 January 2009. Amendments incorporated up to and including SFS 2014:958; Supra note 194. 137–142.

ethnicity, religion or other belief, disability, sexual orientation and age.[234] This Act is binding and none of the contractual provisions can undermine its legal implications.[235] In cases when individual or collective agreements include provision that contain prohibited by the Discrimination Act treatment, those provisions must be modified or declared invalid.[236] The Discrimination Act sets up few obligations of the employers.[237]

5.5.3 Subject-matter of the protection

The Discrimination Act prohibits the following treatments: direct discrimination; indirect discrimination; inadequate accessibility; harassment that is associated with one of the discriminatory grounds as sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age; sexual harassment and instructions to discriminate.[238] The Discrimination Act defines it as sexual harassment a "conduct of a sexual nature that violates someone's dignity" and defines the harassment based on certain grounds as "conduct that violates a person's dignity and that is associated with one of the grounds of discrimination sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age".[239] Additionally, the prohibition of the instruction to discrimination includes harassment based on underlined grounds and sexual harassment.[240]

It is worth mentioning that the intention or the purpose to violate someone's dignity is not needed, instead the offender is required to know that their actions are unwanted and therefore potentially offensive. Some actions are deemed to be offensive in character, whereas for other actions the burden is on the victim to clearly indicate that the conduct is unwanted.[241] For example, in the case of a labour court AD 2011 No. 13, the part on the ethnic harassment included calling an employee by their country of origin, rather than their actual name was deemed a harassment based on ethnicity due to the fact that victims had stated that causes an offence. As for the part on sexual harassment, the exposure to a certain image of a sexual nature was considered to be offensive only when the victim specifically had told the offender that and when it was directed at the victim, in that case through an email. The Court had cited a

[234] Discrimination Act (2008:567) Chapter 1. Section 1.
[235] Discrimination Act (2008:567) Chapter 1. Section 3.
[236] Supra note 194, para 431.
[237] Discrimination Act (2008:567) Chapter 2, Section 3.
[238] Discrimination Act (2008:567) Chapter 1, Section 4.
[239] Discrimination Act (2008:567) Chapter 1. Section 4, paras 4–5; Harassment related to Sex and Sexual Harassment Law in 33 European Countries – 2012.
[240] Göransson, H. & Garpe B. Arbetsrätten: en introduktion. Wolters Kluwer, 2016, p 44; Discrimination Act (2008:567) Chapter 1. Section 4, para 6.
[241] Harassment related to Sex and Sexual Harassment Law in 33 European Countries, p 266.

preparatory work on the legislative act that was later on included in to the Discrimination Act, which stated that in order for the harassment to occur the behaviour of the alleged perpetrator have to be undesirable.[242] This interpretation implies that the requirement of behaviour to be undesirable is part of the definition of harassment. Thus, the assessment shall therefore not be made following the general perception on which behaviours are deemed to violate someone's dignity. Furthermore, the alleged offender is required to have an understanding of the fact that their behaviour offends the victim because of one of the protected grounds of discrimination. In this case, the victim needs to make it clear to the offender that their behaviour is perceived as offensive.[243]

The prohibition of discrimination, and therefore of harassment on underlined grounds and sexual harassment is applicable to all the situations that are arising or have connection to working relations.[244] That means that the protection not only covers incidents that are happening at the workplace but also those that are happening during work-related travels and celebrations organized by the employer.[245]

5.5.4 Personal scope of the protection

The Discrimination Act addresses the prohibition of harassment based on discriminatory grounds and sexual harassment by the employer or someone who has a right to take decisions on the employer's behalf. Additionally, there is a protection against harassment or sexual harassment by someone performing work or carrying out a traineeship at the employer's establishment.[246] Thus, this protection does not cover individuals against harassment based on discriminatory grounds and sexual harassment conducted by third parties, such as clients or customers.[247]

The Act also is prohibiting employers to subject their employees to reprisals in connection with these employees, among other things, having participated in the investigation under the Act, or rejected or given in to harassment or sexual harassment on the part of the employer.[248]

[242] Lagrådets yttrande i prop. 1997/98:177, p 99.
[243] AD 2011 nr 13.
[244] Prop. 2007/08:07 s.498, s. 138 f.
[245] AD 45 nr 17.
[246] Discrimination Act (2008:567) Chapter 2. Section 3.
[247] Discrimination Act (2008:567) Chapter 2. Section 1; Harassment related to Sex and Sexual Harassment Law in 33 European Countries – 2012.
[248] Discrimination Act (2008:567) Chapter 2. Section 18.

This prohibition of reprisals covers a wide range of individuals, among others: job and internship seekers and outsourced employees.[249]

As for the protected persons in working life, they include employee, persons enquiring about or applying for work; persons applying or carrying out a traineeship; persons who are available to perform work or is performing work as temporary or borrowed labour (so-called outsourced workers).[250]

5.5.5 Obligation to investigate the incident of alleged harassment

If the employer becomes aware that the employee considers that they have been subjected in connection with work to harassment or sexual harassment by someone performing work or carrying out a traineeship at the employer's establishment, the employer is obliged to investigate the circumstances surrounding the alleged harassment.[251] However, the knowledge criteria have been interpreted in a very specific way. As a rule, an employer can gain knowledge by witnessing an incident themselves, or by being told by one of the alleged victim's co-worker or a trade union representative.[252] Yet the obligation to conduct the investigation only then arises when the alleged victim has confirmed the offensiveness of the treatment themselves.[253] That is to say that the obligation to investigate exists as the employer has to find out the circumstances of the incidents without delay as soon as they have gained the knowledge, the employer however is not obliged to proceed with the investigation if the alleged victim opposes it or refuses allegations.[254]

5.5.6 Obligation to conduct active measures to prevent harassment

As part of the active measures chapter, the Act provides employers with an obligation to take measures to prevent and hinder any employee being subjected to harassment or reprisals associated with sex, ethnicity, religion or other belief, or to sexual harassment.[255] The measures can vary depending on the circumstances, such as the size of the workplace.[256] For example, if

[249] Gabinus Göransson, H. et al. "Diskrimineringslagen, tredje upplagan." Stockholm: Norstedts Juridik AB (2013), p 94–95.
[250] Discrimination Act (2008:567) Chapter 2. Section 1; ECSR, Conclusions on Sweden on Article 26 (1) and (2) of the European Social Charter.
[251] This obligation also applies with respect to a person carrying out a traineeship or performing work as temporary or borrowed labour.
[252] Supra note 240, p 44.
[253] Supra note 249, p 92; AD 2002 nr 102; AD 2005 nr 22; AD 2009 nr 4 & AD 2012 nr 27.
[254] Persson Härneskog, G. Kommentarer till Diskrimineringslagen. Kapitel 2 § 3. Note 48. Karnov.
[255] Discrimination Act (2008:567) Chapter 3. Section 6.
[256] Persson Härneskog, G. Kommentarer till Diskrimineringslagen. Kapitel 2 §3. Note 49. Karnov.

there is an employee that subjects other to harassment the employer can at first try to urge and order them to stop the offensive treatment. However, if that does not have an effect, the employer could proceed with warning and placing the employee on a different position, and as the most ultimate measure the dismissal can be considered.

Additionally, the employer is obliged, where appropriate, to take reasonable measures to prevent harassment in the future by analysing the incident and continuous monitoring and evaluation. The Discrimination Act requires that everyone has to have access to clear procedures for the prevention and handling of harassment cases if they were to arise at the workplace. Those procedures must be available in writing and have to state the following: the responsible individual for investigating incidents or allegation; to whom the victim is to turn to get help quickly; what the employer must do when they receive information that sexual harassment is happening at the workplace and what the employer does with this information.[257] Additionally, for those procedures to be effective, everyone at the workplace shall be aware of their existence and have an understanding on what they are implying.[258]

5.5.7 Remedies

Supervision on the employers' compliance with the provisions of Discrimination Act is conducted by the Equality Ombudsman.[259] At first, the Equality Ombudsman has to try to make the non-compliant party comply voluntarily. It is important to mention however, that decisions of the Equality Ombudsman are not binding. The Equality Ombudsman is mandated to bring a court action on behalf of an individual. Although the Equality Ombudsman can bring cases before the Labour Court in principle, it is comparatively rare due to hardship in proving that there was a sufficiently clear link between the harassment and the grounds of discrimination. It was reported that this problem in collecting enough evidence results cases being mainly settled on the Equality Ombudsman level or get closed with the lack of evidence.[260] Additionally, as regards moral harassment, no cases have been brought so far.[261]

Victims of sexual harassment are entitled to seek reparatory damages that include their financial losses, moral and/or physical harm suffered. The amount is not determined in advance but depends on the injustice suffered and the circumstances of the case. Remedies in case of

[257] Supra note 249, p 102; AD 2005 nr 22.
[258] Prevent Sexual Harassment, available at https://www.av.se/en/health-and-safety/mental-ill-health-stress-threats-and-violence/bullying/prevent-sexual-harassment/ [Accessed 28 May 2020].
[259] Discrimination Act (2008:567) Chapter 4. Section 1.
[260] Harassment related to Sex and Sexual Harassment Law in 33 European Countries, p 269.
[261] ECSR, Conclusions on Sweden on Article 26 (1) and (2) of the European Social Charter.

violation of employers' obligations are provided by three main instances.[262] The Equality Ombudsman has a right to request the information, the access to the workplace and other premises and the discussion with a natural or legal person who is subject to the prohibitions of discrimination and reprisals, the obligation to investigate and take measures against harassment or the provisions on active measures following from the Discrimination Act. In case of non-compliance with those requests of Equality Ombudsman, natural or legal persons can be subjected to a financial penalty.

In cases where individual or legal person is not fulfilling its obligations under the Discrimination Act, the Equality Ombudsmen can apply to the Board against Discrimination to deal with the question of subjecting them to financial penalty. The Board against Discrimination is mandated to deal with cases of discriminatory treatment. The main function of it is to examine applications for financial penalties for those cases that were referred by the Equality Ombudsman and appeals against decisions concerning orders for financial penalties made by the Equality Ombudsmen.[263] In these cases, the employer who was found of non-fulfilment of their obligations is obliged to pay compensation to the offended person. This compensation is an unusual differentiation from regular damages in Swedish law and was introduced only by the Discrimination Act. Compensation is supposed to have larger sums than damages, which is showing the importance of the anti-discrimination legislation.[264]

According to Chapter 5, Section 1 of the Discrimination Act, when deciding the amount of the compensation, attention shall be given to the "purpose of discouraging such infringements of the Act". According to the report, the amounts granted during the reference period in the context of judgements and settlements before the Equality Ombudsman ranged from 50 000 SEK to 125 000 SEK (€5 234 – 13 086 at the rate of 31/12/2016).[265] The report also specifies that it is possible to reinstate in their former positions, persons who have been unfairly dismissed in the case when the court orders the invalidity of the notice of termination of work relations, upon the condition that the employer has to accept to reinstate the employee in their former position.

[262] Discrimination Act (2008:567) Chapter 4. Section 2.
[263] Discrimination Act (2008:567) Chapter 4. Section 16, No appeal may be made against a decision of the Board against Discrimination under this Act.
[264] Supra note 194, p 143.
[265] ECSR, Conclusions on Sweden on Article 26 (1) and (2) of the European Social Charter.

5.5.8 Burden of proof

The EU Directive (97/80/EC) on the burden of proof had found full implementation in the Discrimination Act. Thus, if a person who considers that he or she has been discriminated against or subjected to reprisals demonstrates circumstances that give reason to presume that he or she has been discriminated against or subjected to reprisals, the defendant is required to show that discrimination or reprisals have not occurred.[266]

5.6 Trade unions

As it was stated before, anti-discriminatory laws, as well as those regulating OSH in Sweden are obligatory for all the parties i.e. employers and employees cannot negotiate on those provisions or chose not to apply them in the individual agreements and or collective agreements.

Thus, the questions of equality and non-discrimination are not particularly covered by the collective agreement that are getting negotiated by the trade unions. Furthermore, there are long-standing issues with including a gender perspective into trade unions activities and discrimination within the structures of trade unions, which leads to them being less inclined to provide works with better protection against harassment and violence at work. Despite this, there are initiatives that propose to include certain provisions into the collective agreements that may then lead to prevention or the minimisation of violence and harassment at the workplace. For example, there are initiatives to include in the collective agreement a provision on mandatory having changing rooms based on sex to preclude potential complications arising from all workers using the same changing room or a provision on the prohibition of using sexist slurs.[267] Those are surely fragmented measures, which can implicate the illumination of only a few factors that can provoke the violence and harassment incidents at work. However, this initiative generally shows the capacity of collective agreements in protecting works more thoroughly. It could be argued that those kinds of issues are quite inadequate to regulate on the governmental level, especially taking into the consideration the Swedish model with limited State involvement in labour relations. Yet trade unions are better placed to negotiate with employers' potential measures that can eliminate risks of violence and harassment at the workplace.

[266] Discrimination Act (2008:567) Chapter 6. Section 3.
[267] Andersson, J. Använd kollektivavtalen för att stärka jämställdheten. Från ord till (för)handling, 2019, p 18.

6 Analysis

6.1 Introductory remarks

This analytical chapter addresses the main research questions of this thesis. It reviews the new additions of C 190 to the international regulatory standards and the scope of the protection against violence and harassment at work. It also assesses the potential value and risks that are presented by the adoption of C 190, from the position of international and regional standards. Furthermore, this analysis has a focus on the human rights-based approach. Secondly, the comparison is made between the scope and content of C 190 and the protection against violence and harassment at the workplace following from the Swedish national regulation.

The analysis focuses mainly on covering the detailed obligations of State Parties and the scope of the protection itself, and it is limited to drawing a general conclusion by providing a few main points and examples rather than going into a detailed overview of each provision of C 190. The implications of the chosen method include paying specific attention on, among others, the universality of the protection of individuals, the incorporation of the gender perspective, and the co-participation of protected individuals.

6.2 The new provisions of C 190 regarding obligations of States and the extended scope of protection

While providing with an overview of the main new provision on the scope of the Convention, this subchapter also touches on the critical aspects of those provisions. The following subchapter provides a comparison of the C 190 outlined regulations and regulations previously adopted on the international and regional (European) level. This comparison is made in general terms and is not exhaustive on all the legal regulations that exist on this matter, rather it aims to show the main trends in regulations and how they differ from the provisions of C 190.

The main breakthrough of the C 190 is that it extended the scope of the protection of individuals against violence and harassment. This extension applies to the personal scope, which defines who is covered by the protection, and also to when and where they are covered, and the subject-matter protection. This protection level has arguably the highest level in comparison to all international instruments that were legislated beforehand and introduces a concept of universal freedom of individuals from violence and harassment in the world of work,

regardless of their status and personal characteristics. The protection granted is also rather wide regarding the subject matter regulations i.e. in what it includes the freedom from.

This universal protection, that covers all the potential conduct within the manifestation of violence and harassment and individuals that can be affected, has a potential to help in overcoming the stereotypes about perpetrators and victims. [268]

6.2.1 Personal scope

Personal scope of the new Convention can be considered to be a universal protection as there are no personal characteristics that are needed in order for the C 190 to be applicable. Despite that, the Convention still reaffirms and explicitly stresses that there are some groups of individuals that are more vulnerable to manifestations to violence and harassment than others, for example, women and girls are specifically mentioned in the Preamble. Hence the Convention is truly innovative, as the **protection is not conditioned on the belonging to the said vulnerable group**, which not only extends the protection to all the individuals, but also makes the implementation of the provisions much more effective as the individual would not have a need to prove this belonging to a vulnerable group i.e. on potential ground of discrimination.

In the cases of previous ILO instruments, that impose of protection against violence and harassment based on individual belonging to a certain group is highly problematic and fragmented. First of all, it is a given that in having this type of regulation, not all the workers are protected against violence and harassment at work, which inherently causes unequal treatment of individuals who are not protected. It is, of course, true that certain groups are more vulnerable and have a higher risk to be subjected to those harmful treatments. However, the list of protected groups or protected criteria under discrimination law is not developing on the same pace as those groups appear or start to identify themselves as such. As it is happening now with the issue of gender and widely understood sexual orientation, while some states are progressive and accept the protection of all genders and include nonbinary people, others could be less inclined to accept those regulations. Therefore, it is very important to have universal protection against violence and harassment, so it would not depend on the group to which an individual is associated with but due to the mistreatment that they have been subjected to.

Furthermore, reliance on protected criteria creates a situation where different vulnerable groups are protected in a different manner which defeats the purpose of special regulations

[268] Supra note 29, para 377.

addressed to those vulnerable groups in order to make their level of protection ultimately higher. Most importantly though is to come to the understanding that violence and harassment is not an issue that affects only some groups or some professions, it is something that everyone in the world of work can experience and therefore, the protection against it can only be effective is it would apply to everyone.

As for the international human rights instruments, they follow the same trend to protect individuals based on the discriminatory grounds, or on the vulnerability of the group. For example, the **CRPD** and **CERD** deal with the general non-discriminatory provisions of individuals that belong to either group of persons with disabilities, and to the individuals in racial or national minority respectively. **CEDAW** provides protection of women, whereas the **ICRMW** includes the protection of migrants and members of their family. The personal scope in **ICESCR** is limited in general by those outlined discriminatory grounds based on sex, disability, race, sexual orientation, gender identity and intersex status.

Secondly, being that the Convention is solely dedicated to the regulation of an issue of violence and harassment at work, it elaborates on personal scope regarding **the position of the individual** that is covered by the protection. There is a wide range in that matter, that includes essentially anyone who can have a connection to labour relations, or had it in the past: workers including interns and apprentices, previously employed, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties and responsibility of an employer. Therefore, it does not limit protection to a person depending on their status as an employee, as all the individuals are protected. Additionally, C 190 puts a special attention towards the protection against actions of **third persons** which can be considered to be violence and harassment, and which are often omitted from the scope of the protection in previous international and national regulations. Third person violence is a phenomenon of high occurrence and in some professions it is more common than violence and harassment from colleagues or managers, such as in some sectors that are more client-oriented, such as educational, hospitality and retail, and medical and health survives.[269] Therefore, if this violence and harassment falls outside the protection coverage, a significant amount of individuals could be left without an effective remedies.

In the framework of the Council of Europe, **the Revised Social Charter** has a broad scope of the protection of individuals, that could be compared with the C 190. For example, personal scope is covering employees, and third person such as an independent contractor, self-employed

[269] Ibid, para 75.

worker, visitor or client. This protection is rather broad, however, it is unclear whether former workers, interns and job seekers are also covered.

Furthermore, in the **EU framework** the protection covers individuals not only in the position of an employee but also those who are self-employed, former employees and those on a leave, although the coverage against the actions of third parties does not seem to be included.

6.2.2 Subject matter-scope

Subject matter is similarly more descriptive in C 190, as it includes the general definition of manifestations of violence and harassment at the workplace based on its effect or implied effect and not a list of actions that can be considered to be falling within the definition.

That being said, the subject-matter of the Convention raises concerns due to being non-descriptive, as it can have a potential to complicate the application of this provision to national laws since it would require the implementation with national authorities deciding the definition. That, in itself, could be potentially helpful for the Governments to adopt definitions depending on their national legal systems, however, it also bears the danger in different interpretations of the issue due to different cultural and legal background of countries, which can complicate the universality of the protection of individuals.

However, a few possible complications arising from the rather wide scope of C 190 shall be considered.

Firstly, the protection given by the Convention is on such a wide spectrum it can end up being watered down with the implementation of its provisions. Whilst the scope of the Convention seems to be pretty clear, the subject matter can be argued to be too vague as it was not defined in clear terms saying what is included. This can create a problem of different countries defining on what counts as violence and harassment in different ways. Special complications can arise if a said country does not have a background in regulation of violence and harassment at work previously, and therefore can require more guidance from the C 190 and R 206 as international instruments.

Secondly, some long-standing stereotypes on people's roles in the society can be potentially affecting the definition of violence and harassment the governments would come up with during ratification. Thus, the ILO Committee of Experts may have to address this vagueness through the development of its supervision on the fulfilment of obligations under the Convention. This could perhaps be accomplished through its adoption of a General Observation containing general recommendations for countries on would be required to meet the obligations of C 190.

Firstly, the Convention has a **specific provision regulating gender-based violence and harassment** which implies protection against the treatment that disproportionately affects individual because of their sex or gender, such as sexual harassment. However, the accent on gender, and also not dedicating it only to women, makes the protection more universal and includes the cases of individuals that would previously fall out of scope of the protection, ex. male in female-dominated industry or in subordinate position; LGBTI person in a superior position at work etc.

Although the research shows that violence and harassment at work can occur as a consequence of disbalance of power, it is not linear and not only depends on the position of individual.[270] For example, there could be an imbalance in power within the society based on gender race and class, rather than at the particular workplace. The individual in the superior position can still be harassed due to their ethnical minority or being LGBTI. Those particular cases show to be less common, however, societal structures are complex and change through times, thus the universal protection would always be more effective as the legislating new provisions cannot be deemed to be an effective and adequate protection.

International human rights instruments also impose the protection against sexual harassment at work. Such as **CEDAW** which views sexual harassment as being part of the gender-based violence. This instrument, in the interpretation of the Committee, had defined what sexual harassment entails, and also had elaborated on the potential for it to constitute a health a safety problem. That being said the said definition does not explicitly include a harassment based on gender of non-sexually determined behaviour, which could, for example, manifest in bullying by using sexist slurs, although the Committee has mentioned it in few of its General Observations.

In the same time, the **ICRMW** deals with harassment and violence from the OSH perspective, viewing it as one of the 'abusive working conditions'. The Committee had recognised gender-sensitive perspective and stressed that women and girls get impacted more than others as the domestic workers, despite having initial focus on general group of migrants and their families.

Secondly, **the provision on 'general' violence and harassment** has quite an open definition that includes (1) actions and threats of actions, (2) single occurrence or repeated, (3) that aim at, result in, or aim to result in (4) physical, sexual or economic harm. All of those variables are incredibly important to include in the scope of the protection. Yet one of them is of vital

[270] Ibid, paras 88–90.

importance, the one that allows the conduct to have an outcome that is not originally covered by the perpetrator's intent, since the conduct of the perpetrator qualifies as a manifestation of violence and harassment based on its result. This way the C 190 grants protection to individuals in situations when an individual gets subjected to a behaviour with no direct intent to harm from the perpetrators side, but has potential to create harm due to the mere unexpectable character of these behaviours and practices, which would include the creation of hostile environment. That also potentially removes the need for a subjective experience of those harmful results, as different people can have different appreciation of certain treatments, and instead, it includes more objective test of potential harm being inflicted. Furthermore, there is also no need to face yet another implementation obstacle when a victim or the alleged perpetrator has to prove the existence or non-existence of intent to cause harm in order to establish the fact that violence and harassment has occurred. Occurred or potential harm-based protection is therefore beneficial not only for the effective protection of an individual but also for the practical enforcement of those provisions.

In the UN instruments, the protection against violence and harassment is not explicitly mentioned in the provisions but can be drawn from the general rights. Furthermore, this protection is usually dedicated to the protected group of the respected instrument. The protection against violence and harassment is not explicitly stated but can be drawn from a right of the protected group to work with favourable and just working conditions. The protection can still be drawn in cases, when harassing treatment is based on discriminatory ground of being part of the protected group i.e. person with disability and person of racial minor.

In comparison with other UN instruments, the **ICESCR** has a wider protection of realisation of the right to just and favourable conditions at work, as it prohibits all manifestations of harassment at work, covering all mental, physical and sexual. This instrument operates within the terms of OSH and uses the 'just and favourable conditions of work', paying specific attention to include in it safe and healthy working conditions.

In cases of the ILO instruments, the protection is granted based on the subject matter, it could be seen that not all of the possible manifestations of violence and harassment at the workplace get to be regulated and this scope of coverage can also vary depending on the Member State national regulations of the issue, whereas the ILO instruments' provisions set out a so-called minimum standard of protection for governments to follow. An additional problem arises when certain instruments, while prohibiting some types of harmful behaviours do not call for the comprehensive regulation of those issues, and can omit such important parts of it, as the effective and accessible remedy mechanisms, or a right for the victim to leave the dangerous

situation at work without the notification to their supervisor. Violence and harassment are still highly stigmatised and normalised and are affected by the silence culture, so by not regulating the procedural and prevention aspects, the purely material prohibition of certain outlined behaviours would have a hard time to be enforced in the world of work.

Thirdly**, spill outs of domestic violence have been mentioned** by the C 190. The issue of domestic violence is a complex problem that has multiple consequences over the societal structures, and not just limited to the family matters in question.[271] With regards to the world of work, it has been shown that domestic violence has an overall negative impact on workers' lives and the productivity of enterprises.[272] In particular the financial impact on businesses has been shown to be substantive. One of the reasons being the labour relations has a primary effect of absenteeism within workers who are victims of domestic violence due to injuries or ill-health.[273] Absenteeism is a phenomenon that disproportionately effects women and therefore keeps them out of the workforce precluding financial independence which is having yet more severe complications for victims of domestic violence.

Although the C 190 in interpretation with R 206 is raising an array of possible measures that shall be conducted jointly by the State and the employer, that does seem like a promising mechanism for prevention and intervention in the issue of domestic violence.

Additionally, being the first convention that is directly dedicated to the protection against violence and harassment at the workplace, C 190 implements the specifics of labour relations to the protection and allows its application in wider range of **situations that could potentially** occur around it. That can be seen in the scope of the protected economic sectors, which includes both private and public, formal and informal, and urban and rural. Whilst the application to different sectors and industries is non-arguable on the national level as labour law is usually having a jurisdiction over all recognized labour relations, in informal economy individual would have a much harder time proving a non-official arrangement to be a labour relation. Hence an applicability of those provisions would be questioned and, therefore, the protection of the individual would not be accessible and effective. With the obligation that the C 190 puts on States to ensure rights of individuals, even in the **informal sector**, the persistent issue of the vulnerability to violence and harassment of workers in informal economy can be resolved.[274]

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[271] Supra note 4, para 21
[272] Supra note 4, para 23, citing Walby, S. 2009. The Cost of Domestic Violence: Update 2009 (UNESCO and Lancaster University), p 2.
[273] Supra note 29, paras 108–110.
[274] See more on the lack of protection for the workers in informal economy in: Transitioning from the informal to the formal economy. International Labour Conference, 103rd Session, 2014. Report V(1), paras 25–27, 29.

Furthermore, C 190 includes an extensive provision elaborating on **circumstances during which incidents of violence and harassment could occur**. This list is going far beyond the 'classical protection' on the workplace itself. The provision includes such places, as: where the worker gets paid, or takes rests breaks of a meal, work-related trips, employer-provided accommodation, the commute to and from work and those enabled by information and communication technologies. This extensive protection is truly a breakthrough considering its coverage of next to all situations connected to the labour relations. This specificity of regulations gives more protection to individuals again due to them not having to deal with limitations of formal provisions, for example, that had a potential to cover only workplace before, and therefore, have not been applicable to the time after work. Additionally, it puts employers in charge on a significantly higher level, than previously, with the provision of them being responsible for situations when they do have control. However, the ability of the employer to exercise control under a few of the named circumstances, such as during commute to and from work, is controversial in its character, since this provision does not refer to an employer-provided means of commuting. Therefore, it could be argued as a disproportionate overburdening of the employer. Despite that it could be clearly said that in such situations the employer is better placed to provide the protection to the individuals, and to prevent the potential incidents from happening.

6.2.3 Obligations of States

C 190 has a holistic, human rights-based approach towards dealing with violence and harassment at work and it imposes three-part obligations to respect, promote and realize the right of everyone to a world of work free from violence and harassment. The Convention obliges State Parties to first of all adopt the approach for the prevention, elimination and combating violence and harassment in the world of work, that take into the account third parties' involvement into violence and harassment. The importance of the inclusive, integrated and gender-responsive contest is also stressed and therefore contributes towards the main trend of an overall universal protection of individuals against violence and harassment at work.

The Convention is also widely operating within **the joint responsibility** of the State Parties and employers to protect individuals and prevent the violence and harassment. This approach also includes the consultation with workers or their representatives on questions of identifying general risks, such as sectors, occupations and working arrangements in which individuals are more exposed to violence and harassment. Additionally, there is an attention dedicated to **awareness-raising and educational measures**, as it is a part of States' obligations to ensure

that all involved parties, especially employer and workers and their representatives, are informed about their responsibilities and roles in preventing and combating violence and harassment. The State, along with the adoption the legislative framework, also have to **identify hazards and assess risks** of violence and harassment and to take measures to prevent and control them.

When it comes to the employers' responsibilities, they shall be imposed on them by their governments and complied with '**so far as it is reasonably practicable'**. In fact, there are obligations the are directed specifically to employers and enforced through the State. Employers are expected to be obligated by national law to take appropriate measures proportionate to their level of control to prevent violence and harassment at work. This provision is unique as it covers a gap in prevention and OSH management measures at the workplace. Since before this provision, employer might have had the general duty to protect health and safety of workers, the protection against violence and harassment was not always explicitly included.[275] Most important outcome when dealing with violence and harassment at work in for such treatments to stop. Hence the primary attention shall be directed to the establishment of **zero-tolerance policies** and onto educating and empowering employers. Since it lays on the employers' shoulders the aim of the government is to establish the needed legal framework within OSH and non-discriminatory regulations, in other words the State shall accommodate employers with knowledge and assistance to prevent from the occurrence of violence and harassment cases. In the same time, there shall be transparency and effectiveness in enforcement of provisions and the remedies for the incidents that will occur.

As part of enforcement provisions of C 190, the governments have to provide workers with **opportunity to remove themselves** from a work situation which they have reasonable justification to believe presents an imminent and serious danger to life, health and safety due to violence and harassment without suffering retaliation or other undue consequences and the duty to inform management. This provision is of most importance due to the direct protection of individuals by providing them with an opportunity not to suffer from dangerous treatment, especially since they would be more inclined to use it if there would be no risk of retaliation involved.

Dispute resolution mechanisms that the Convention asks for from the States have two innovative main points: effective and gender-responsive, and anonymous reporting and dispute resolution mechanisms **and the prohibition of reprisals** against those who report including

[275] Supra note 29, para 380.

third persons i.e. not an alleged victim. The Convention deals with health consequences of work-related violence and harassment as an occupational health and safety issue; therefore, it falls as a compensable issue. In those cases, where remedies include a possibility of compensation for victim of harm to their physical and mental health, individuals are better protected as they would not need to deal with those consequences on their own budget.

Due to the specifics of the manifestations of violence and harassment at the workplace, it is of most importance not to re-enforce stigmatisation of victims and perpetrators and stereotypes on gender roles within the society. In case of such re-enforcement the purposed protection of international instruments could be not as effective, as it could be having a universal protection of individuals. These provisions help to prevent such issues as the victimization of the individual that has reported an incident of violence and harassment whether that was an alleged victim or a whistle-blower.

At the same time, the Convention also provides the obligation **to consider the effects of domestic violence and as far reasonably practicable**, mitigate its impact at the world of work. Hence, the main aim of the protection is to protect and support the victim of the domestic violence, as the employer does not have a responsibility for the occurred domestic violence cases outside of their control, i.e. outside of the work and its premises.[276]

The Convention is also paying attention to the need of informing on gender-based violence and of trainings of relevant authorities, including labour inspectors and judges, on identifying risks of violence and harassment, as well as giving them a power to stop work.

These obligations of the States are detailed and have no analogue in other international human rights instruments. As they usually have been quite fragmented obligations, that do not imply further obligations to the employers.

In general, one can conclude that the explicit right to be free from violence and harassment at work has not been pronounced in previous human instruments. It was drawn in part from other rights, namely general prohibition of discriminatory treatment has included the prohibitions of sexual harassment, and the prohibition of the harassment that was based as one of the discriminatory grounds. In those cases, the protection is overreaching towards the society in general, and therefore, does not capture specific measures that could be directed at the world of work.

One of the examples of such general obligations in this regard can be shown by analysing State obligations on the UN human rights instruments. **CEDAW** imposes two main obligations

[276] Supra note 29, para 383.

for state-parties, which are: to undertake of all legal and other measures that are necessary to eliminate discrimination against women in the field of employment, and to secure the equality in the right to work. Similarly, both **CRPD** and **CERD** that deal with the general non-discriminatory provisions of individuals that belong to either group of persons with disabilities, and to the individuals in racial or national minority respectively, and allow for the claim on a right of the protected group to work with favourable and just working conditions. And although the right does not explicitly mention violence and harassment at work, the protection can still be drawn in cases, when harassing treatment is based on discriminatory ground of being part of the protected group i.e. person with disability and person of racial minor.

That is, however, does not provide a systematic action plan to prevent violence and harassment at the workplace, including the detailed employers' responsibilities and annual reporting.

The **European Union framework**, while protecting individuals against discrimination in employment additionally does it by implementing the employer's perspective. As EU State Parties shall encourage employers, collective agreements or practice, to prevent all forms of discrimination on the grounds of sex, in particular harassment and sexual harassment at the workplace, in access to employment, vocational training and promotion.[277] The Recast Directive further reaffirms that those forms of discrimination should be prohibited and should be subjected to effective, proportionate and dissuasive penalties.[278]

The similar provisions could be found in **Revised European Social Charter** where the employer has more responsibility for the protection of individuals against violence and harassment. For examples, the employer is bearing the burden of proof in harassment cases. Additionally, State Parties are obliged in consultation with employers and workers' representatives, to promote awareness, information and prevention of sexual and moral harassments in the workplace.

Alternatively, other instruments are prohibiting some manifestation of violence and harassment due to their effect of health and safety of the worker, so such protection is drawn from the individual's right for just and safe working conditions, or from the similar rights but in different formulation. Hence this not a direct regulation of the right to be free from violence and harassment at work, as obligations of the States are equality fragmented or vague, which

[277] Directive 2006/54/EC, Article 26.
[278] Directive 2006/54/EC, paras 6–7.

does not allow them to cover specifically needed measures to prevent and eliminate violence and harassment at work.

ICRMW, while having non-discriminatory provisions, imposes the obligations on States regarding the protection of migrants and members of their family against violence, physical injury, threats and intimidation, based on the protection that is meant to prevent 'abusive working conditions' for individuals.

Those obligations are however not necessarily defined and do not include enough clarity on whether it includes some preventive actions, possibly with the cooperation of employers.

On the contrarily, **ICESCR,** while still operating within the terms of OSH and uses the 'just and favourable conditions of work' and paying specific attention to include in it safe and healthy working conditions, provides the protection of individuals. This instrument includes the obligation to identify indicators and perform benchmarks to monitor the realisation of the right, that includes the statistics on complaints of harassment received and resolved. The Committee further recommends to define subject matter of harassment at national legislation broadly, so it would include both sexual harassment and harassment based on sex, disability, race, sexual orientation, gender identity and intersex status. Furthermore, the Committee has explicitly mentioned that sexual harassment at the workplace shall be a punishable act under the national legislation, as part of the States' obligation to define and prohibit harassment and ensure appropriate complain procedures. Similarly to these legislative obligations, **the Istanbul Convention** requires State Parties to take 'the necessary legislative or other measures to ensure that 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 creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction'.

Although it imposes a range of obligations to the States, they are essentially directed towards the dealing with the violence and harassment that has already occurred. Hence, the State shall have the complaint procedures and the law prohibiting harassment, however, the focus on preventing is lacking. The lack of attention to the employers' role in prevention and protection also gives rise to concerns on how systematic this protection is. It therefore can be concluded, that in comparison with C 190, the protection is not as wide and systematic, hence not as effective.

6.3 The comparative analysis of C 190 and the Swedish national regulations on violence and harassment at work

This subchapter provides an analysis of the national legislation of Sweden, in the scope, it was presented in the previous chapter and the C 190. The main question behind this analysis is whether the protection of individuals against violence and harassment at work can be increased in case Sweden were to ratify C 190. Following from this question the analysis is divided into two main parts: those provisions of law that could be concluded to comply with the C 190 already now, and those provisions that shall be amended to be in compliance with the C 190. Hence, the following analysis does not go into the detailed review of national legislation regarding each provision of the Convention that could be seen in compliance with the outlined scope of C 190 but rather addresses key aspects regarding the scope of the protection and the obligations respectful obligations of the State and employers.

6.3.1 Compliance

Considering the high level of development of the protection of individuals in the world of work in the scope of the working environment regulations and the anti-discriminatory regulations, there are a lot of provisions from C 190 that can be considered to be complied with by Sweden even without ratification. Following paragraphs address a few of these.

Firstly, the personal scope of protection is rather wide and includes almost all of the actors named in Article 2 of the Convention. It protects a wide range of individuals, not making a distinction on nationality or other grounds, as those provisions are applicable on the territory of Sweden and therefore relevant to each and every worker or persons equated with workers for the purposes of protection. Thus, the Discrimination Act protects individuals who are in the position of the employee, trainee, job seekers, and outsourced workers. The working environment regulatory instructions include the protection towards employees, students, trainees and those undertaking military service. Other cases when the scope of personal protection on the contrary is limited, will be discussed in the next section of this subchapter.

Furthermore, the scope of the protection regarding territory is quite similar in Sweden, as in Article 3 of C 190. As individuals are covered in any circumstances that are happening in connection with the working arrangements, including work-related trips and office celebrations, under the provision of the Discrimination Act.

Secondly, the protection of individuals based on subject matter, is rather wide including the general protection of the working environment against harassment that may lead to ill-health, or to victimisation of the employee in the working environment regulations. This scope of protection is correlating towards the definition of violence and harassment in Article 1 of the Convention. Additionally, the Discrimination Act covers the protection against sexual harassment and against the harassment based on the outlined discriminatory grounds, which are of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age. These provisions of Discrimination Act are also prohibiting reprisals against victims or those who report on the case of sexual harassment or the harassment based on the outlined discriminatory grounds. Hence, this provision allows to conclude the compliance with Article 10(b)(iv), that obligations to take appropriate measures ensure safe, fair and effective reporting dispute resolutions mechanisms, in the form of protecting involved individuals against victimisation or the retaliation.

Thirdly, both C 190 and the relevant Swedish legislation impose a systematic approach to the prevention and elimination of the violence and harassment at the workplace, which directly corresponds to the core principles of the Convention that obliges State Parties to respect, promote and realize the right of everyone to a world of work free from violence and harassment in its Article 4. In the Provisions of Swedish Working Environment Authority on organizational and social work environment, the key role of promoting a good working environment and prevent risks of ill-health due to organisational and social conditions is on the employer. These obligations include the establishment of zero-tolerance to harassment, and to take measures to eliminate conditions in the work environment that could give rise to harassment. Whereas in the Discrimination Act the employer bears the main responsibility to investigate the incident of the alleged harassment, as soon as they gain knowledge about it; and additionally, they bear the responsibility to conduct active measures to prevent harassment. Following these provisions, it could be concluded that Sweden complies with provisions of Articles 9 and 11 of the Convention.

6.3.2 Points of divergence

Swedish labour law regulations are very extensive both in the field of the OSH and in the field of the anti-discrimination regulations, as it has been summarised in the respective chapters. That being said, there are some complications that arise from the enforcement of those provisions. On top of that, laws arguably do not effectively protect individuals from all the

manifestations that can arise from violence and harassment at work, which leads to the complications of the protection based on scope of the regulations.

6.3.2.1 The scope of subject-matter protection

Firstly, Article 1 of the Convention operates within the term 'violence and harassment', that essentially is not limited to the discriminatory grounds on its application but instead, is basing a protection against behaviours, practices that aim at, result in or likely to result in physical, psychological, sexual or economic harm. Considering this provision on the scope of the definition of the harassment and violence at work, national legislation shall provide the additional provisions that would be prohibiting the act of violence and harassment not based, as it is currently regulated now but having a result-based protection. Currently, there are few potential hindrances in the implementation of this provision.

The idea of establishing the case of harassment based on a probable harm occurred is impossible, as there is a need of a victim to testify that the treatment had caused a certain harm.

The question on when the harassment case occurs has also been met with some complications regarding the victim's assessment of what has happened. In Swedish law, which is interpreted by the preparatory works to the non-discrimination provisions of the national legislation, there are two cases when the harassment can occur.

Considering that the general rule of qualification of certain behaviour as sexual harassment is in the eyes of the victim according to the Discrimination Act, it then requests the need of the victim to inform alleged offender that their actions are either unacceptable or unwanted. These actions shall cause a disadvantage in the form of injury or discomfort and therefore a violation of one's dignity. Therefore, only with the existence of the knowledge that certain behaviour is undesirable or unwanted and therefore offensive for the victim and that, an individual can conduct harassment. The question whether there is a need for the verbal notification of the victim that the action causes offence is debatable, as in one case it was enough for the victim to show this with body language.[279]

There are however other cases, where certain actions of a sexual nature are offensive by their nature, these are not strictly defined but examples can be found in the preparatory works to the Discrimination Act, which include 'unwelcomed suggestions or pressure into sexual activity, unwanted physical contact in the form of touching, petting or pinching'.[280] In the few Judgements of the Labour Court, the knowledge requirement on the part of the alleged offender

[279] AD 2016 nr 38.
[280] Diskrimineringslagen (prop. 2007/08:95), pp 493 f.

can be relaxed, and the victim is not supposed to show that they find this behaviour offensive on the grounds that it was unwanted or undesirable.[281]

Overall, the compliance with the provision of Article 1 of the Convention is arguably not fully achieved. Since the relevant law does not always account for actions that are likely to result in harm but have not been experienced by an individual as harmful as the raise to a harassment case.

6.3.2.2 The scope of personal protection

Secondly, Article 2 of the Convention outlines the scope of personal protection in the list of individuals that shall be covered by the Convention with the protection against violence and harassment, which includes along with employees also workers whose employment has been terminated, volunteers, job seekers and job applicants. These groups are however not covered by the obligation of the employer to protect against harassment under the Discrimination Act, as job seekers and those who seek internship in connection to their studies (yrkespraktik), as well as former employees are lacking protection from the Discrimination Act is. In cases of alleged harassment on the underlined grounds or sexual harassment regarding those individuals, the employer does not have an obligation to investigate the case or to conduct systematic measures in preventing the occurrence of incidents.[282] Therefore, to comply with the provisions of C 190, Sweden needs to consider the extension of the list of protected groups of individuals to include former employees, volunteers, job seekers and job applicants.

Additionally, the provisions of the Convention to extend the protection to the individuals involved in the informal economy in Article 2(2) and Article 8(a) can face serious resistance from the national provisions that at first glance do not protect those individuals who are not registered in the employment relations, as it is the key pre-requisite for the protection to apply. The concern in the effectiveness of such provisions stated in the Convention is also present, due to in many countries work in the informal sector can be penalized, such as in Sweden in case one works and does not pay taxes that can be qualified as a crime of tax evasion. Therefore, even if the protection for individuals in the informal sector would be legislated, the enforcement will have certain complications. As individuals can be hesitant to report that they have been subjected to violence and harassment at work if they would be risking this way to face criminal prosecution on the tax crime. Furthermore, the same reasoning can be brought up to those individuals that are working in the informal sector and do not have legal permission to do so or

[281] For example, AD 2016 nr 38, AD 2011 nr 13; However, these cases have not dealt with the named 'offensive sexual behavior by nature' per se, they have just mentioned their existence.
[282] Supra note 240, p 44; Supra note 249, p 92.

to even be present on the territory of the country they are working. Arguably, an individual that is faced with the risk of deportation will not report the alleged case of violence and harassment at work that they have experienced. Therefore, the protection of workers in the informal sector is a complex aim and by imposing the general obligation on the State to exercise such protection, important legal complication can occur. This situation is, of course, even more complicated considering the fact that individuals involved in informal work have higher risks to be subjected to violence and harassment at work, and therefore very much need this protection.

6.3.2.3 Lack of effective protection against third party's harassment

Article 4 of the Convention obliges Stated to take into account violence and harassment involving third parties, as part of the obligation to prevent and eliminate manifestations of violence and harassment.

However, the Discrimination Act does not cover harassment on the underlined grounds and sexual harassment against workers that can arise from third parties, i.e. clients or patients.[283] In principle the employer has an obligation of not to harass employees and to investigate the incidents that happen between employees, however, when it comes to other potential perpetrators, those obligations do not apply. While the statistics shows that on average, employees get subjected by sexual harassment more often by third parties, than by their collages or superiors, some of the branches, such as hospitality, health and other forms of care and commerce show that there could be a double difference with 16 against 8 percent respectively.[284]

In those circumstances the working environment provisions apply as part of the realisation of the employer's obligation to conduct a systematic work on work environment that includes the prevention of harassment incidents. Those instruments, however, are harder to enforce in practice.[285] One of the reasons is the lack of direct remedies in the Ordinances in case the employer would not comply with their obligations. That is not to say that remedy is lacking, but the way it gets triggered is two-fold. The employer first have to fail to comply with their obligations, then there shall be an investigation of the Swedish Work Environment Authority open, then they have to find the violation and order to comply with obligations to the employer, and only then if employer does not fulfil their obligations the Authority can issue a form of financial penalty. The question of the remedy for the individual whose integrity has been

[283] AD 2017 nr 61.
[284] Sexuella Trakasserier I Arbetslivet – Situationen För Lo-Förbundens Medlemmar, pp 5 f.
[285] See for example Supra note 267, p 16.

violated is unclear. In these setups, one may conclude that the protection against violence and harassment is not fully effective. As the statistic goes, there is quite a difference in recorded data of harassment cases against workers in healthcare with 2 percent when the perpetrator is a co-worker or in managerial position against 16 percent when the perpetrator is a third party which includes patient or a client.[286] One of the cases that shows the relevance of such concern is a case AD 2017/61. In that case, a claimant worked as a personal assistant at the house of their client that lived with their partner. The claimant alleged sexual harassment and harassment on the basis of ethnical background from the cohabiting partner of their client. However, since this cohabiting partner was not an employee, the Court held that the employer does not have an obligation to investigate such incidents.[287] Having said that, the Court also stated that such case falls within the protection of work environment regulations and thus raises corresponding obligations of the employer to maintain good working environment at the workplace, i.e. in the house of the client at this case. Yet due to the work environment regulations have not been brought as part of the claim, the Court was not able to rule on a potential breach of the employer's obligation to maintain good working environment at the workplace.

Therefore, it could be potentially argued that the current standard is not in compliance with the obligations stetted out by the Convention on the prevention and elimination of violence and harassment.

Additionally, the current Swedish legislation does not allow the victim to claim damages in case of harassment from a third party, so on those cases regulated by the Work Environment Act and following from its ordinances. Whereas it was mentioned in the Convention that victims should be entitled to remedies and support general, the Recommendation has specified this provision and mentioned the redress to victims as suitable form of damages. Therefore, it would be arguably needed to change national law so it would include such a possibility.

6.3.2.4 Lack of knowledge in employers on their obligations

Furthermore, there is a concern regarding the possibility to enforce non-discrimination provisions due to the lack of knowledge within the employers on their obligations in accordance with the provisions of Discrimination Act. The Equality Ombudsman had recently released results of an overview regarding general awareness among the employer on their obligations, and it shows that a number of them have not been able to respond on this issue. Furthermore, in these statistics there have been an overall compliance of the employers with their obligations

[286] Arbetsmiljöverket (2018), Arbetsmiljön 2017, rapport 2018:2. Tabellbilaga.
[287] AD 2017 nr 61.

in accordance with the Discrimination Act. In the hospitality industry, almost 80 percent of reviewed hotels and restaurants, were found not to be in compliance, fully or partly, with their obligations in accordance with the Discrimination Act.[288] Whereas within the construction industry, 90 percent of reviewed employers were not in compliance.[289] The same study regarding the IT industry, showed that 80 percent were not in compliance.[290] Private businesses within culture, media and law had 85 percent of employers that have been not in compliance with their obligations.[291] Furthermore, 90 present of employers within municipalities and country council had been found not in compliance with their obligations.[292]

This is deeply concerning due to the employer holding the main burden of creating policies and assessing risks in order to prevent and mitigate violence and harassment at work. Thus, if judged by the enforcement rather than the legal framework, Sweden is not in full compliance with Article 9 of the Convention that establishes the employer's obligations.

[288] DO's article "Hotell- och restaurangbranschen: rutiner och riktlinjer mot trakasserier, sexuella trakasserier och repressalier", 12 July 2019, available at https://www.do.se/lag-och-ratt/stallningstaganden/rutiner-och-riktlinjer-mot-trakasserier-sexuella-trakasserier-och-repressalier-bygg-hotell-restaurang/ [Accessed 28 May 2020].
[289] DO's article"Bygg och anläggningsbranschen: rutiner och riktlinjer mot trakasserier, sexuella trakasserier och repressalier", 11 July 2019, available at https://www.do.se/lag-och-ratt/stallningstaganden/rutiner-och-riktlinjer-mot-trakasserier-sexuella-trakasserier-och-repressalier-bygg-branschen2/ [Accessed 28 May 2020].
[290] DO's article"IT-branschen: rutiner och riktlinjer mot trakasserier, sexuella trakasserier och repressalier ", 11 July 2019, available at https://www.do.se/lag-och-ratt/stallningstaganden/rutiner-och-riktlinjer-mot-trakasserier-sexuella-trakasserier-och-repressalier-i-it-branschen/ [Accessed 28 May 2020].
[291] DO's article"Kultur, media och juridik: rutiner och riktlinjer mot trakasserier, sexuella trakasserier och repressalier", 17 August 2018, available at https://www.do.se/lag-och-ratt/stallningstaganden/rutiner-och-riktlinjer-mot-trakasserier-sexuella-trakasserier-och-repressalier-media-kultur-juridik/ [Accessed 28 May 2020].
[292] DO's article"Kommuner och landsting: rutiner och riktlinjer mot trakasserier, sexuella trakasserier och repressalier hos kommuner och landsting", 15 Augusut 2018, available at https://www.do.se/lag-och-ratt/stallningstaganden/arbetsgivares-rutiner-och-riktlinjer-mot-trakasserier/ [Accessed 28 May 2020].

7 Conclusion

Overall, it can be seen that the UN instruments whilst providing the protection against harassment at work, do so in a rather fragmented manner, either by omitting some manifestations of violence and harassment from a subject-matter scope, or by having a limited personal protection scope. One other point that could be brought up is a lack of provisions that would account for special protection in working relations, such as provisions stating that individuals are covered in different forms of employment, and potentially regardless of their position. This would allow for less potential speculations on whether the victimised individual even falls under the protection of instruments. By going through the ILO instruments, one can conclude that they do indeed impose some obligations on States for the protection of worker against violence and harassment at the workplace. This protection is however rather fragmented and is applicable either based on the subject matter, depending on certain manifestations of violence and harassment at the workplace, or on the particular protected group, or criteria of non-discrimination. Additionally, those instruments while mentioning the protection against some manifestations of violence and harassment, do not address it as a primary aim, do not define the conduct, and neither of them provide detailed guidance on how to address the problem.[293] The European framework is reflecting the overall international trend as the protection against violence and harassment based on non-discrimination provision, therefore on the outlined discrimination grounds. The protection against sexual harassment is viewed as a gender-based violence issue and directed to the vulnerable group based on female gender.

Overall, it could be argued that the new C 190 was long overdue and needs to be taken in full seriousness and readiness to ratification and implementation campaigns as it should combat those above-mentioned gaps in protection against violence and harassment in the world of work. As it was shown in the previous chapters, the scope of the protection of individuals against violence and harassment at the world of work with the adoption of C 190, has become broader and, as could be argued, universal. The Convention has effectively regulated the extended personal scope of protection and the subject-matter that includes all the manifestations of violence and harassment. Furthermore, C 190 promotes a holistic approach in prevention, protection, enforcement and remedies of cases of violence of harassment and imposes corresponding obligations on States and employers. Although the protection is not based on personal characteristics, the Convention still outlines potential vulnerable groups, working

[293] Supra note 29, para 371.

arrangements and industries that are more at risk of incidents occurrence, while in the same time implementing gender-responsive approach. The Convention is imposing the human rights approach regarding general obligations of the State Parties, as it accounts for a wider cooperation between governments, employers and civil society actors for preventing and eliminating harassment and violence at work. Additionally, the enforcement of the Conventional can be concluded to be beneficial to the extension of the protection of individuals in both International and European frameworks.

Based on the Convention's innovative approach and wide scope of protection it can be concluded that the Convention can be wildly promoted for universal ratification. Not only does it set a foundation of the actions and divides the roles between the government and the employer so the protection would be most effective, it also takes into the account vulnerable groups in the labour market; the issue of gender-based violence; and outlines particular labour market sectors and working conditions that are likely to have higher risks of occurrence of the incidents of violence and harassment. This attention to detailed measures combined with a universal coverage shall be of most use for both preventing and eliminating violence and harassment in the world of work. The application of C 190 will be also supplemented with the Supervisory Body concluding observations and commentaries. These might be able to resolve some concerns regarding the scope and governmental obligations that were mentioned above with the help of preparatory documents and studies.

Sweden can benefit by ratifying the Convention, as it would give stronger protection of individuals' freedom against violence and harassment in the world of work. Several currently pressing issues can be solved with the implementation of C 190's provisions. First of all, the protection against third-parties violence can be strengthened by incorporating the provision of compensation of individuals' harm that have occurred during the incident. Additionally, the protection against violence and harassment for job and internship seekers and the informal economy would be considered on the same level as the already protected workers and those equated with them by law.

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