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SEXUAL HARASSMENT IN THE WORKPLACE AND THE MEXICAN LABOUR REFORM: AN ANALYSIS UNDER THE INTERNATIONAL LABOUR ORGANIZATION CONVENTION CONCERNING THE ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK AND THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS.

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DISSERTATION

Sexual Harassment in the Workplace and the Mexican Labour Reform: an analysis under the International Labour Organization Convention concerning the Elimination of Violence and Harassment in the World of Work and the UN Guiding Principles on Business and Human Rights.

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I dedicate this dissertation to the women of my life:

To my mother and my grandmother Chata, who pushed into believing I could change anything that I put my efforts into. Thank you both for leading my way into womanhood; your love and strength shaped me into the happy woman that I am today.

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And to my pá, that in his own way, taught me to stand up in my nonconformity for the things I believe in, and to be most subversive being that I could be.

ACRONYMS

CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
IACtHR	Interamerican Court of Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
NOM-035	Norm NOM-035-STPS-2018
OSH	occupational safety and health
SHWP	sexual harassment in the workplace
UNGPs	United Nations Guiding Principles on Business and Human Rights
VHWP	violence and harassment in the workplace

1. Introduction

The emergence of the #MeToo movement, has brought an extraordinary cultural moment of resistance against sexual harassment in the workplace (“SHWP”) in several countries, one that it has been believed can galvanize real change.¹ In Mexico, a country where sexual violence is normalized and institutionally allowed, the #MeToo movement had its momentum. The social media movement in Mexico began in the creative and media industries, as journalists, academics, writers and filmmakers turned to social media to share incidents of SHWP.² The Mexican #MeToo movement opened the discussion about what SHWP constitutes, and the lack of avenues that victims have access to seek redress. Some Mexican feminist scholars even argued that the Mexican #MeToo movement is a radical movement that leads to unjust practices and violates the legal principle of due process.³ Nonetheless, one thing is sure: the Mexican #MeToo movement proves that the Mexican legislation is deficient and lacks appropriate legal avenues for redressing SHWP.

Until recently, with the International Labour Organisation’s Convention concerning the Elimination of Violence and Harassment in the World of Work (“190 Convention”), no other international human rights legal instrument had defined gendered-based violence and harassment in the workplace (“VHWP”), nor established the necessary steps and measures that States need to take to prevent and redress said VHWP. The international human rights instrument involves businesses as employers, who according to the 190 Convention, should be obliged to take measures to prevent SHWP.

Mexico is a State member of the International Labour Organization (“ILO”), and participated in the draft process of the 190 Convention. In this sense, if Mexico were to ratify the international legal instrument, the Mexican legislation will have to be reformed in order for the State to comply with the convention’s legal provisions. However, even if the Mexican State does not address SHWP accordingly, businesses can also go further by preventing and redressing such conducts accordingly

¹ Vicki Shultz, ‘Reconceptualizing Sexual Harassment, Again’ (2018) Yale L.J.F 22, 22 -24

² The Guardian, ‘#MeToo reaches Mexico: majority of women in media report harassment at work’ Nina Lakhani (2019)

³ Nexos, ‘Acoso: Duncia o victimización’ Marta Lamas (2018)

by applying the United Nations Guiding Principles on Business and Human Rights (“UNGPs”). Nevertheless, there are problematics when it comes to redressing human rights violations that arise from gendered-based VHWP.

This essay is a qualitative and a critical analysis of the 190 Convention and its Text of the Recommendation Concerning the Elimination of Violence and Harassment in the World of Work (“Recommendation”), the UNGPs, and the Mexican labour legislation that intends to prevent and redress SHWP. However, this essay focuses on remedies, specifically on State-based non-judicial mechanisms, as mechanisms to redress SHWP, and the matter in which such mechanisms may be assessed to ensure their effectiveness. Consequently, this essay will overview the conciliation mechanism established in the Mexican Labour Law to determine if it complies with the required elements to provide adequate and effective redress in cases that involve SHWP.

2. What is sexual harassment in the workplace?

SHWP takes various forms of behaviours and conducts that constitute gender-based VHWP, and a reflection of structural gender inequality in the workplace. It is necessary to comprehend the various definitions of SHWP, and the matter in which SHWP violates human rights. This section focuses on the different definitions of SHWP, and how such behaviours translate to human rights violations. Moreover, this section will briefly describe the theoretical context in which SHWP is violated, focusing on patriarchal oppression of women in the workplace, by means of enforcing gender-based roles in the workplace, and the organizational factors that allow such enforcement to persist.

Now, SHWP began to be recognised as an issue affecting women during the 1970s.⁴ The discussion of SHWP led to international human rights instruments recognising that SHWP is a form of sex

⁴ Paula McDonald, ‘*Workplace Sexual Harassment 30 Years on: A Review of the Literature*’ (2012 *International Journal of Management Reviews*) 14:1, 1-1.

discrimination⁵, gender-based violence against women⁶ and a violation to the right to just and favourable conditions of work⁷. Nevertheless, the 190 Convention and its Recommendation are the first international legal instruments that define gender-based VHWP, and includes SHWP.

2.1. The categorisation of SHWP: quid pro quo and hostile environmental harassment.

The Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”) is the treaty body with the authority to implement and monitor the Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”)⁸. The latter, while recognising that SHWP is a form of gendered-based violence, exemplifies that SHWP includes, unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Moreover, the CEDAW Committee recognises that SHWP is discriminatory when a woman has reasonable ground to believe that her rejection to sexual favours or remarks will be a disadvantage in her employment, including in processes of recruitment or promotion, or when it creates a hostile working environment.⁹

However, the SHWP definitions that the CEDAW Committee provides, should not be limited to those mentioned, but they must be understood as an exemplification of both quid pro quo and hostile environment harassment.

a. Quid pro quo harassment.

⁵ Convention on the Elimination of All Forms of Discrimination against Women (Adopted 18 December 1979) UNTS 1249 ('CEDAW')

⁶ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Published 9 June 1994, Entered into Force 5 March 1995) ('Belem do Para') Article 2 (b); UN Declaration on the Elimination of Violence against Women 20 December 1993 ('A/RES/48/104') Article 2 (b)

⁷ International Covenant on Economic, Social and Cultural Rights (Adopted 2 January 1976) UNTS 993 ('ICESCR') Article 7

⁸ CEDAW Article 17.1

⁹ CEDAW '*General Recommendation No 19: Violence against women*' 1992 ('General Recommendation No. 19') Article 11 [17-18]

Quid pro quo harassment is the legal term that some jurisdictions have used to define for sexual coercion.¹⁰ In this type of SHWP, the individual must comply with an unwelcome sexual advance, requests for sexual favours, or/and other verbal or physical conducts of sexual nature that might lead to certain employment decisions.¹¹ The employment decisions might include but not be limited to promotions, favourable work conditions, assistance, good performance evaluations¹²; and/or withdrawal of financial or other entitlements, reductions in work hours, dismissal or other threats of that affects an employee's everyday life.¹³ In quid pro quo harassment, one thing is clear: women that do not comply with the unwanted sexual advance might face retaliation¹⁴, and will inevitably face an obstacle in their professional growth.

b. Hostile work environment harassment

Hostile work environment harassment is defined as behaviours that focus on the sexuality of another person or a group of persons in the work environment.¹⁵ Such form of SHWP is carried out indistinctively by supervisors, colleagues, or any external individual that interacts in the work atmosphere, it is unwelcomed, and it creates an environment that makes an individual feel intimidated or uncomfortable or an environment that interferes with work performance and productivity.¹⁶

Some examples of hostile work environment harassment include, but are not limited to; unwanted sexual attention, touching, and advances that might involve suggestive or positive and negative comments about a person's physique, leering, catcalling, spreading sexual rumours about a person, grabbing, pinching and groping.¹⁷

¹⁰ Shawn Meghan Burn, 'The Psychology of Sexual Harassment' (2019 Teaching of Psychology) 46:1, 96-97

¹¹ Susan Gluck Mezey, *Elusive Equality: Women's Rights, Public Policy, and the Law* (2003 edn, L Rienner Publishers) 136

¹² Burn (n 10) 97

¹³ McDonald (n 2) 4

¹⁴ Catharine A. MacKinnon, 'The Logic of Experience: Reflections on the Development of Sexual Harassment Law' (2002 GEO. L.J) 90, 813-823.

¹⁵ Martha E Reeves, 'Women in Business: Theory, Case Studies, and Legal Challenges' (2010 Routledge) 161

¹⁶ *ibid*; Christopher Uggen and Amy Blackstone, 'Sexual Harassment as a Gendered Expression of Power' (2004 American Sociological Review) 69:1, 64-65

¹⁷ Burn (n 10) 97

Hostile environment harassment can also take other forms of conducts that have as a purpose undermining a women's job, and competence.¹⁸ These treatments may subject her to a differentiated treatment, including delegating tasks that are outside her job description, such as cleaning or serving coffee, or denying them necessary privileges for them to succeed professionally.¹⁹ This form of SHWP must not be limited to explicit sexual conducts and comments, but conducts that have the effect of creating an uncomfortable work atmosphere for employees.

2.2. SHWP: The 190 Convention and CEDAW's definition.

Prior to the 190 Convention, legal approaches on the definition of gender-based VHWP, such as SHWP differed in each jurisdiction. However, the definitions shared similar elements; the conduct has to be unwanted or unwelcomed, and its primary purpose or effect is to intimidate, degrade, humiliate or offend a person²⁰. It is crucial to review the 190 Convention definition of gendered-based VHWP since this definition will set an essential parameter for victims. Victims need to comprehend if the conduct that has been directed towards them constitutes gendered-based VHWP in order for them to go forward and claim that their rights have been violated.

The 190 Convention, which is now open to ratification for the ILO State members, provides for the first time a standardised definition of gendered-based VHWP.²¹ Article 1 (a) of the 190 Convention establishes the following: '*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*'. Article 1 (b) of the Violence and Harassment Convention specifies that: '*gendered-based violence and harassment*' means violence and

¹⁸ Vicki Shultz, 'Reconceptualizing Sexual Harassment' (1998 YALE L.J.) 107:6, 1683-1765

¹⁹ *ibid*

²⁰ McDonald (n 4) 6

²¹ International Labour Conference, 'Report V (I) 2018 Ending Violence and Harassment against Women and Men in the World of Work' ('Report V (I) 2018') [10 and 11]

harassment directed at persons because of their sex or gender, of affecting persons of a particular sex or gender disproportionately, and includes SHWP.

The definition of gendered-based VHWP in the 190 Convention does not focus merely on SHWP, nor does it refer to specific sexual conducts or behaviours. However, a broad definition of gendered-based VHWP as the one defined in the 190 Convention is protective in many ways. First, by emphasising on the effect of the conduct and not on the conduct *per se*. Second, the definition acknowledges that there are other forms of gendered-based VHWP which might not be embedded in sexual conducts. Third, it clarifies that the behaviours and practices, or threats, can be of a single occurrence or repeated, and does not specify if there must be a specific relationship between the perpetrator and the victim.

However, the 190 Convention determines that gendered-based VHWP can take the form of a range of '*unacceptable*' behaviours and practices or threats, but does not mention if the conduct must be '*unwelcomed*'. SHWP is generally understood as an unwanted sexual advance, an unwanted request for sexual behaviours, or other unwanted conducts of sexual nature which makes a person feel offended. Hence, SHWP combines both subjective and objective elements. The subjective element is the response of the person affected, and the objective element, is based on the reasonableness of that response.²² Therefore, the term '*unacceptable*' behaviours or practices, is problematic; it eliminates the subjective element of gendered-based VHWP. The person that is affected by the behaviour or practice does not have agency in rejecting or accepting said behaviours. Therefore, the 190 Convention definition leaves SHWP to be interpreted by third parties other than victims, who might not consider the effect on a victim but a biased perception on what constitutes '*unacceptable*' behaviour.

2.3. The causes and effects of SHWP.

²² Alex Newton, *The Business of Human Rights: Best Practice and the UN Guiding Principles* (Routledge 2019) 84.

Now, gender-based violence, and forms of structural inequalities arise from a patriarchal system of oppression that has shaped legal, and social systems, including the manner in which the workplace is organized. As Celina Romany argues: *'Through the workings of male supremacy, women lie at the bottom of the economic and social ladder, a position that attains legitimacy in concrete ways that cultural and social attitudes characterize gender differences.'*²³ SHWP is a manifestation of such male supremacy in the workplace; it seeks to perpetuate gender stratification, and differences in economic and social spheres.

The 190 Convention acknowledges that gender-based SHWP affects disproportionately girls and women and that a gendered-responsive approach is needed to tackle its causes and risk factors in order for such conducts to end.²⁴ However, as Vicki Shultz argues: *'Those who seek to use the law for social change must develop a more nuanced historical and sociological account of how the law interacts with other social forces.'*²⁵

Only by understanding the root causes of SHWP, can it be possible to address them holistically as human rights violations. The following section will overview the theoretical context that explains why SHWP takes place, focusing mainly on organizational issues within the workplace, and the effects it has on both victims and businesses.

a. The causes of SHWP.

Feminist theory explains SHWP as an expression of workplace sexism, not sexuality or sexual desire.²⁶ SHWP has nothing to do with sexuality nor sexual gratification but with gender²⁷. Recent theorization rejects sexual desire or desire for sexual domination as the best explanation for this form of gender-based violence.²⁸ Instead, it is believed to be about putting women and those who do not

²³ Celina Romany, *'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law'* in Rebecca J. Cook (ed), *Human Rights of Women* (University of Pennsylvania Press), 108

- ²⁴ International Labour Organization, *International Labour Organisation's Convention concerning the Elimination of Violence and Harassment in the World of Work*, (Adopted June 21 2019) ('190 Convention'), Preamble

²⁵ Vicki Schultz, *'The Sanitized Workplace'* (2003 YALE L.J.) Vol. 112, 2061-2192

²⁶ Shultz, (n 1) 24

²⁷ *ibid* 47

²⁸ Shultz (n 18) 1692

conform to the existing traditional gender order in their place.²⁹ Amongst the leading causes of SHWP that feminist scholars have discussed are gender sex-roll spillover, organizational power and culture in the workplace. Such factors that allow SHWP to arise in the workplace are rooted in the way businesses operate institutionally.

i. Sex roles and Sex-roll spillover in the workplace.

Sex-role spillover is the carryover of gender-based roles into the workplace.³⁰ This theory proposes that SHWP is a behaviour that results from gender roles in which men are sexual agents and women are sexual objects.³¹ According to this theoretical model, SHWP takes place in both female and male-dominated workplaces. In workplaces where women hold traditional jobs, the job becomes feminized, and women cannot complain about SHWP because it is seen as part of the job.³²

SHWP is also predominant in male-dominated workplaces where there is a disproportionate sex-ratio.³³ On the one hand, male-dominated workplaces place a high value on male gender roles. For instance, the idea that men must be empowered, dominant, aggressive and competitive workers. On the other hand, in such environments, women's social gender roles, as feminine roles, are not equated to the workplace.³⁴ On the contrary, women begin to compete with men over their status of workers, and thus, challenge their social gender stereotype that enforces the idea that women are subordinate to men. In these scenarios, SHWP becomes a tool for dominant groups to control those others that question the workplace gender hierarchy, especially when they are threatened by their equal presence in the occupational status.³⁵

ii. Organizational factors.

²⁹ Shultz (n 1) 45.

³⁰ Barbara A. Gutek and Aaron Groff Cohen, 'Sex Ratios, Sex Role Spillover, and Sex at Work: A Comparison of Men's and Women's Experiences.' (1987 Academic Journal Human Relations) 40:2, 97-97.

³¹ Sandy Welsh, 'Gender and Sexual Harassment' (1999 Annual Review of Sociology) Vol. 25, 169-178.

³² Harriet Samuels, 'Sexual Harassment in the Workplace: A Feminist Analysis of Recent Developments in the UK' (2003 Women's Studies International Forum) 26:5, 467-471.

³³ Gutek (n 30) 98.

³⁴ McDonald (n 4) 6.

³⁵ Shultz (n 1) 24.

Feminist scholars have explained that organizational factors fuel SHWP. There is sex segregation of work that occurs when men hold the most powerful and prized jobs, while women hold lower subordinate positions.³⁶ Sex segregation enforces gender roles; women belong in subordinate positions where their central role is to serve the men.³⁷ Consequently, those who hold positions of power seek to do whatever it is necessary to preserve their higher status and their privileged place in the organizational hierarchy.³⁸

Therefore, SHWP becomes a means to situate women in 'their place' when they challenge workplace gender hierarchy³⁹. The goal becomes to enforce women's stereotypes and forces them into a subordinate social and economic position.⁴⁰ Harassers view their targets as a threat to their own power: in both the workplace and in broader society.⁴¹ It comes as no surprise that in predominantly male organizational hierarchies, women tend to be denigrated and assaulted by SHWP.

Now, subjective and unconstrained authority lead to sex segregation in the workplace.⁴² For instance, employment systems overlook that subjective and unconstrained authority is a consequence of power in day to day activities, including employee hiring, assessment, promoting, paying, firing and evaluating people. Subjective and unconstrained authority in organizational processes allow people to exercise their power to engage on stereotyping, and foster SHWP. ⁴³

Finally, it must not be overlooked that the main cause that explains why SHWP takes place, is the fact that it is tolerated by society and by the same organizations. ⁴⁴ Therefore, it comes as no surprise that SHWP is a normalized form of gender-violence.

³⁶ *ibid* 48.

³⁷ Julie Berebitsky, *'Sex and the Office: A History of Gender, Power, and Desire'* (Yale University Press 2012) 220.

³⁸ Burn (n 10) 98.

³⁹ Heather McLaughlin, Christopher Uggen and Amy Blackstone, *'Sexual Harassment, Workplace Authority, and the Paradox of Power'* (2012 *American Sociological Review*) 77:4, 625-627.

⁴⁰ Shultz (n 18) 1758.

⁴¹ McLaughlin (n 39) 627.

⁴² Vicki Shultz (n 1) 50.

⁴³ *Ibid* 50.

⁴⁴ Sandy Welsh (n 31) 180; McDonald (n 4) 6.

Even if SHWP is caused by several socio-cultural factors, such as a societal patriarchal structure⁴⁵, and the gender stereotypes embedded in society, States through their international human rights obligation can also address the issue by obliging organizations to tackle organizational causes.

b. The effects of SHWP: victims and businesses.

SHWP as gender-based violence evidently has detrimental effects on victims. However, it has been showed that it also has negative impacts on businesses as organizations. The 190 Convention acknowledges that VHWP affects both the victim and businesses.⁴⁶ It is important to note that such findings could be incentives for organizations such as businesses to address SHWP efficiently.

a. *Impact on workers.*

Victims of SHWP and workers, are affected in their psychological, physical and sexual health, dignity, family and social environment.⁴⁷ SHWP produces emotional and physical stress, anxiety, depression, headaches and sleep disorders, and at times post-traumatic stress disorders.⁴⁸ All of these effects interfere with a victims' job performance⁴⁹, and in other realms of their lives. In economic terms, SHWP becomes a barrier for women entering and remaining in the workplace, and therefore undermines the long-term earning capacity of women workers and contributes to the gender wage gap.⁵⁰

Third parties who observe SHWP of co-workers, may develop bystander stress and team conflict, leading to a declining in financial performance and occupational stress.⁵¹

⁴⁵ Reeves (n 15) 164-165.

⁴⁶ 190 Convention Preamble.

⁴⁷ Ibid Preamble.

⁴⁸ Burn (n 10) 96.

⁴⁹ Ibid 96.

⁵⁰ Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women.' (2017 Gender & Society) 31:3, 333-335.

⁵¹ McDonald (n 4) 4.

b. Impact on businesses

SHWP is incompatible with the promotion of sustainable enterprises, and impacts negatively on the organization of work, workplace relations, worker engagement, enterprise reputation and productivity.⁵² Consequently, companies have negative direct financial losses, due to absenteeism turnover, litigation and compensation. Additionally, some costs result in a the decrease of productivity, which can harm the business' reputation, image and competitiveness.⁵³

In that vein, SHWP harms everyone involved: the victim's health and their economic and professional growth, co-workers, and businesses. Therefore, SHWP needs to be approached from the human rights perspective; States are obliged to respect and protect all those human rights that are violated when SHWP take place. In cases where SHWP has taken place, States and businesses should seek effective redress that includes organizational changes in the matter in which businesses operate. States and businesses, need to address the issue as a priority, not only since it violates human rights under international human rights law, but also since it affects the productivity of their operations and their organisations.

2.4.SHWP: a series of human rights violations.

The 190 Convention recognises the right of everyone to a world of work free from gendered-based VHWP. The international legal instrument establishes that the violation of said right, constitutes a human rights violation or abuse, by threatening equal opportunities and being incompatible with decent work.⁵⁴ Other international human rights instruments determine that SHWP results in the violation of a series of human rights, including: the right to equality and non-discrimination, the right to be free from violence and the right to just and favourable conditions of work. Therefore, it is

⁵² 190 Convention Preamble.

⁵³ McDonald (n 4).

⁵⁴ 190 Convention.

necessary to comprehend that SHWP violates not only the right to a world of work free from violence and harassment, but a range of other human rights⁵⁵. Therefore, States have the international legal obligation to protect victims from such violations.

2.4.1. The right to equality and non-discrimination.

The right to equality and non-discrimination is one of the most declared norms embedded in international human rights.⁵⁶ CEDAW defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁵⁷ The legal instrument obliges States to take appropriate measures to eliminate discrimination against women in the field of employment to ensure, on the basis of equality of men and women, the right to work as an inalienable human right.⁵⁸

CEDAW does not refer explicitly to SHWP as a form of discrimination against women. Nonetheless, the CEDAW Committee recognises that equality in employment can be impaired when women are subjected to gender-specific violence such as SHWP.⁵⁹

2.4.2. The right to be free from gender-based violence.

International human rights law recognises that SHWP is gender-based violence and violates women's right to be free from violence. CEDAW does not mention nor defines gendered-based violence. However, as mentioned previously, the CEDAW Committee, in its General Recommendation 19 has

⁵⁵ Ibid preamble.

⁵⁶ Anne F. Bayefsky, '*The Principle of Equality or Non-Discrimination in International Law*' in Stephanie Fariior (eds) *Equality and non-discrimination under the law* (Abigdon Routledge 2016) 71.

⁵⁷ CEDAW.

⁵⁸ CEDAW Article 11.

⁵⁹ General Recommendation No. 19 [17].

defined gendered-based violence as “*violence that is directed against women because she is a woman or that affects women disproportionately.*”⁶⁰

The UN Declaration on the Elimination of Violence against Women⁶¹ and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (“Belém do Para Convention”)⁶², both define violence against women, as any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, and includes explicitly SHWP as violence against women.⁶³

2.4.3. The right to just and favourable conditions of work

Moreover, the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) recognises that everyone has the right to just and favourable conditions of work.⁶⁴ The Committee on Economic, Social and Cultural Rights (“CESCR”), created to monitor States compliance to the ICESCR, provides an authoritative interpretation of the right to just and favourable conditions of work through its General Comment 23 on the right to just and favourable conditions of work.⁶⁵ The latter, recognises that all workers, should be free from physical and mental harassment, including free from SHWP.⁶⁶ General Comment 23 establishes a series of core obligations for States to ensure the satisfaction, at the very least minimum, of the right to just and favourable conditions of work. Amongst said core obligations, States must define and prohibit SHWP, ensure appropriate complaints procedures and mechanisms, and establish criminal sanctions for SHWP.⁶⁷

⁶⁰ *ibid* [6].

⁶¹ A/RES/48/104 Article 1.

⁶² Belem do Para Article 1.

⁶³ A/RES/48/104 Article 2(b); Belem do Para Article 2(b).

⁶⁴ ICESCR Article 8.

⁶⁵ CESCR, ‘*General Comment No. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*’ 2016 E/C.12/GC/23 (‘General Comment No 23’).

⁶⁶ *ibid* [48].

⁶⁷ *ibid* [65 (e)].

Multiple international human rights treaties and treaty bodies, even before the adoption of the 190 Convention had already established that SHWP as gendered-based violence leads to a series of other human rights violations. Such treaties recognised States' obligations have to take adequate measures to ensure such rights. However, said international human rights treaties do not specify specific measures that States need to take in order to respect, protect and full to ensure the mentioned human rights. The 190 Convention and its Recommendation, which will be analysed in the following section, intends to encompass all State obligations in order to ensure the right to be free from VHWP, including the right to access appropriate and effective remedies.

3. The International Labour Organization Convention Concerning the Elimination of Violence and Harassment in the World of Work

Ending VHWP became a top international objective. In 2016 participant experts at the ILO Meeting of Experts on Violence against Women and Men in the World of Word recognised that international labour standards failed to define 'violence and harassment', and agreed for an integrated approach to address VHWP. Consequently, experts agreed on the need for a new instrument or instruments that could address different socio-economic realities, enterprises, forms of violence and contexts.⁶⁸ Consequently, State members of the ILO, workers representatives and employer's organizations negotiated the texts and adopted the 190 Convention and its Recommendation ⁶⁹, which main objective is to supplement the former.⁷⁰

The 190 Convention and its Recommendation, are the first international legal instruments that define gendered-based VHWP and establish State obligations to ensure and protect the right to be free from

⁶⁸ Report V (I) 2018 [8-11].

⁶⁹ Constitution of the International Labour Organisation (Published 1 April 1919, Entered into force 29 June 1919) Article 19.6 (a).

⁷⁰ International Labour Organization, '*Recommendation concerning the elimination of violence and harassment in the world of work*' (Adopted June 21 2019) ('Recommendation 190 Convention') Preamble.

gendered-based VHWP. As mentioned in the previous section, the legal instrument reaffirms the international protections against VHWP to which workers were already entitled to⁷¹.

The adoption and ratification of the 190 Convention and its Recommendation by the ILO State members is necessary. First, to recognise that gender-based VHWP, including SHWP, is problematic that needs to be addressed globally. Secondly, the 190 Convention and its Recommendation are innovative international legal instruments as they recognise States obligations in a clear, concise matter, and it is based on extensive research on the necessary measures that are needed to prevent and redress SHWP. The legal instruments provide protection for the most basic issues that involve SHWP, but still gaps can be found.

To explain further the 190 Convention content, the following section will overview: i) the legal instrument scope, ii) the States' obligations to protect against employers and, iii) it will focus primarily on the provisions regarding remedies, with the purpose to identify some of its gaps and challenges.

3.1. The Scope of the 190 Convention.

The 190 Convention protects workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons of working irrespective of their contractual status⁷². Article 2 (1) of the mentioned instrument, sets forth a catalogue of those who are protected: interns, apprentices, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer. By establishing the latter, the 190 Convention fails to address that there may be other individuals that might be affected by gender-based VHWP, who might not be employees or contracted individuals. Work culture must be based on mutual respect and dignity of being⁷³. Hence, the protection against gendered-based VHWP should not be limited, and

⁷¹ Report V (I) 2018 [393].

⁷² 190 Convention Article 2.1.

⁷³ *ibid* Preamble.

must be provided to everyone who comes in contact with the workplace.⁷⁴ The legal instrument does not mention that it applies solely to women, but refers to both and men, since men who challenge gender-stereotypes have been subject to gendered-based violence, including SHWP.⁷⁵

The mentioned instrument applies to VHWP and gendered-based VHWP, occurring in the world of work, in the course of, linked or arising out of work, and provides a catalogue of spaces and moments in which VHWP may arise. Including: public and private spaces, through work-related communications, when commuting to and from work⁷⁶, and all of the areas where employers have an influence in avoiding and addressing sexual harassment⁷⁷, such as cyber sexual harassment.

3.2. State obligations under the 190 Convention.

State members of the ILO that ratify the 190 Convention and its Recommendation are required to adopt, in accordance to national law and circumstances, an inclusive, integrated and gender-responsive approach to prevent VHWP.⁷⁸ The approach includes taking on numerous actions, including; i) enacting national laws that define and prohibit VHWP, ii) ensuring relevant policies to address VHWP, iii) adopting a comprehensive strategy to implement measures to prevent and combat VHWP, iv) ensuring access to remedies and support for victims⁷⁹.

Amongst the legislation that States must adopt, are regulations requiring employers to take appropriate steps to commensurate with their degree of control to prevent gender-based violence and harassment in the workplace.⁸⁰ The following subsections will focus on States' obligations and measures that employers need to adopt in order to enforce the legal instruments, prevent gendered-

⁷⁴ For instance, there has been the case of women who were not employees in the workplace but they suffered sexual violence by security personnel in such workplaces. For more see: Human Right Council, '*Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo Mission to Papua New Guinea*' (2013) A/HRC/23/49/Add. 2 [50]

⁷⁵ Burn (n 10) 97.

⁷⁶ 190 Convention Article 3.

⁷⁷ International Labour Conference, '*Report V (2) 2018 Ending Violence and harassment against women and men in the world of work*' ('Report V (2) 2018') 27.

⁷⁸ 190 Convention Article 4.2.

⁷⁹ *ibid* Article 4.

⁸⁰ *ibid* Article 9.

based VHWP, and provide remediation for victims when such violation cannot be effectively prevented.

a. Employer's obligations.

The 190 Convention obliges ILO State members to adopt laws and regulations, requiring employers to take appropriate steps commensurate with their degree of control to prevent gender-based VHWP.⁸¹ The legal instrument requires that particular steps are taken, but limits them to be reasonably practical to apply.⁸² In that sense, it seems as the 190 Convention provides States with the possibility to not comply with the obligation to adopts laws that require employers to prevent VHWP, by allowing them to argue that according to national domestic laws or policies, it is not reasonably practical to take such steps.

First, the 190 Convention establishes that States should adopt laws requiring employers to adopt and implement, in consultation with workers and their representatives, a workplace policy on VHWP⁸³. The Recommendation specifies that policies should include the following: i) that VHWP will not be tolerated; ii) VHWP prevention programmes with, if appropriate, measurable objectives; iii) the specification of the rights and responsibilities of workers and the employers; iv) information on complaint and investigation procedures; v) provisions that establish that all internal and external communications related to incidents of VHWP will be duly considered, and acted upon as appropriate; vi) specifications on the right to privacy of individuals and confidentiality, while balancing the right of workers to be aware of all hazards; vii) measures to protect complainants.⁸⁴

In that vein, the 190 Convention obliges State members to regulate and prevent gendered-based VHWP through employers and their implementation of policies. Nevertheless, the 190 Convention

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ *ibid* Article 9 (a).

⁸⁴ Recommendation 190 Convention Section II [7].

and its Recommendation, fail to address some basic requirements that workplace policies should consider, including the definition of gendered-based VHWP, the identification of the groups and individual the policy aims to protect⁸⁵, and its spatial scope. Without the clarification of such information, the adequate implementation of policies would be impossible: workers and employers must have a basic comprehension of the prohibited conducts, and the cases in which the policy would be applied to them.

Moreover, the Recommendation fails to address other substantial issues that academics have discussed are needed to elaborate an effective policy. For instance, the establishment of an effective redress mechanism⁸⁶, and not a mere complaint and investigation procedure, but an integral mechanism that will provide the victim with adequate reparations. Furthermore, there is the need for more than one complaint avenue should have been considered in the Recommendation to assure that employers are not required to complain to a person who may have engaged in the conduct.⁸⁷ Although the Recommendation include words such as “including” to introduce non-exhaustive list of considerations⁸⁸, the Recommendation purpose is to supplement the 190 Convention⁸⁹. Hence, it should have mentioned other essential issues that have been raised in connection with the effective implementation of policies.

Now, Article 9 of the 190 Convention establishes further obligations that States must consider when legislating and regulating employers within their territories. According to the legal instrument, employers must consider gendered-based VHWP and associated psychological risks in the management of occupational safety and health (“OSH”)⁹⁰. In OSH, employers must identify hazards and assess the risks of VHWP, with the participation of workers and their representatives, and take measures to prevent and control them⁹¹. In connection with workplace risk assessments, the

⁸⁵ Michael B. Reuben, and Isaac M. Zucker, *‘Remedying Sexual Harassment: A Primer’* (1995 LITG) 21:2, 43-43.

⁸⁶ Arjun P. Aggarwa, *‘Dispute Resolution Processes for Sexual Harassment Complaints’* (1995 CANADIAN LAB. & EMP. L.J.) 3, 61-67.

⁸⁷ Lisa L. Fowler, *‘Sexual Harassment Policies: An Employer’s Burden or Advantage’* (1996 BYU J. PUB. L) 10, 71-73.

⁸⁸ Report V (2) 2018, 4.

⁸⁹ Recommendation 190 Convention, Preamble.

⁹⁰ 190 Convention, Article 9 (b).

⁹¹ *ibid* Article 9 (c).

Recommendation establishes that the assessments must take into account factors that increase the likelihood of violence, including psychological hazards and risks.⁹² Amongst some of the hazards and risks that employers should pay particular attention are those that arise from working conditions and arrangements, work organizations, human resource management⁹³, discrimination, abuse of power relations, and gender, cultural and social norms that support violence and harassment.⁹⁴

However, there are two identifiable problematics with the OHS strategy to prevent gendered-based VHWP. First, the legal instrument provides a list of the particular situations that must be taken into consideration, but it does not emphasize nor evidences that measures to prevent and control VHWP rely on those particular factors. In short: once employers undertake the assessment, specific measures should be taken regarding hazard and risks that need particular attention. For instance, organizational work changes such as dissolving subjective authority or monitoring discriminative practices within the organization.

Second, the legal instruments fail to consider that employers should measure OSH performances over time to review if there is a continuous improvement in eliminating gendered-based VHWP, and the need for keeping records with information that include all incidents regarding gendered-based VHWP.⁹⁵ Only by monitoring the OSH performance it is possible to determine if gendered-based VHWP is being adequately controlled and prevented in the first place.

Finally, employers must provide workers and other persons concerned, information and training. Information and training on the identified hazards and risks of gendered-based VHWP should be accessible in formats as appropriate. Moreover, the formats should mention the associated prevention and protection measures, including on the rights and responsibilities of workers and other persons.⁹⁶

⁹² Recommendation 190 Convention [8].

⁹³ *ibid* [8 (a)].

⁹⁴ *ibid* [8 (c)].

⁹⁵ Benjamin O. Alli, '*Fundamental Principles of Occupational Health and Safety*' (2 edn, International Labour Office 2008) 55.

⁹⁶ 190 Convention Article 9 (d).

The 190 Convention and its Recommendation set forth that States have an obligation to adopt laws and regulation requiring employers to take appropriate steps commensurate to their degree of control to prevent gendered-based VHWP, and establish four means of control and protection. However, this section evidences that said means are not enough to prevent and control gendered-based VHWP. Therefore, the obligations that employers should comply with according to the legal instruments are barely the minimum. Particularly, when the 190 Convention establishes that such steps should be applied 'so far as are they are reasonably practicable', providing the opportunity to not even comply at all.

b. Remedies.

Now, for those cases in which gender-based VHWP, including SHWP is not prevented, and takes place, the 190 Convention and its Recommendation recognise that member States have an obligation to ensure victims easy access to appropriate and effective remedies, and safe, fair and effective reporting and dispute resolution mechanisms and procedures.⁹⁷ Victims of gendered-based VHWP should have effective access to gender-responsive, safe and effective and dispute mechanisms, support, services and remedies.⁹⁸

It comes to no surprise that the 190 Convention and its Recommendation oblige States to provide victims of gendered-based VHWP with appropriate and effective remedies. However, to determine if the international legal instruments foresee easy, appropriate and effective redress, it is necessary to first comprehend the dual meaning of remedies. Remedies contain two different concepts: procedure and substantive. The former, are the processes by which human rights violations are heard and decided by courts, administrative agencies, or other competent bodies. The later, refers to the outcome of the proceedings, the relief or reparation afforded to the victim, also known as reparations.

⁹⁷ *ibid* Article 10 (b).

⁹⁸ *ibid* Article 10 (e).

⁹⁹ In that vein, the 190 Convention and its Recommendation foresee both procedural and substantive remedies. The following subsections will overview such remedies, and if they are in fact appropriate and effective to repair human rights violations that arise from gender-based VHWP.

i. Procedural remedies.

The 190 Convention establishes that States must take appropriate measures to ensure easy access to safe, fair and effective reporting and dispute resolution mechanisms and procedures in cases of gendered-based VHWP.¹⁰⁰ The international legal provides a catalogue of redress mechanisms, such as: complaint and investigation procedures and dispute resolution mechanisms at the workplace level; dispute resolution mechanisms external to the workplace; and courts or tribunals.¹⁰¹ Exemplifying the diverse avenues that can be provided to victims to redress human rights violations that arise from gender-based VHWP is not sufficient. It is crucial that victims of gendered-based VHWP have access to a range of appropriate avenues to seek redress for the caused damage. For instance, gaps in coverage of redress occurs in the event that labour law does not include a safe and accessible complaint mechanisms, and the only recourse for victims is to resign and seek compensation through the courts based on tort or civil law, which leave little opportunity for restorative or transformative processes for enterprises. ¹⁰²

Even if the procedural avenues in the 190 Convention seem limited, the legal instrument does sets forth a series of measures that need to be taken during SHWP dispute mechanisms and procedures. Such measures include, protection against victimization of retaliation against complainants, victims, witnesses, and whistle-blowers.¹⁰³ By focusing on protection of victims and complainants against retaliation the legal instrument addresses one of the most needed measures to provide an effective

⁹⁹ Dinah Shelton, *Remedies in International Human Rights Law* (3 edn, OUP 2015) 16.

¹⁰⁰ 190 Convention Article 10 (b).

¹⁰¹ *ibid* Article 10 (b) i-iii.

¹⁰² Report V (I) 2018 [386].

¹⁰³ 190 Convention Article 10 (b) (iv).

remedy: fear of retaliation is the main reason why SHWP is not reported in the first place.¹⁰⁴ In that vein, even if there are several reporting avenues, without protection of retaliation, victims of SHWP may never come forward and use the provided mechanisms and procedures, which would makes them ineffective .

Moreover, the 190 Convention and its Recommendation recognise that State members shall ensure legal, social, medical and administrative support measures for complainants and victims of gendered-based VHWP,¹⁰⁵ as well as legal advice and assistance for complainants.¹⁰⁶ Nevertheless, the legal instruments fail to specify that such legal advice and assistance should be free of any charge for victims. Legislations should ensure that complainants of gendered-based VHWP have the right to free legal aid in all legal proceedings. Otherwise, access to justice and avoiding secondary victimization is not ensured.¹⁰⁷

Furthermore, according to the Recommendation, amongst the measures that complaint and dispute mechanisms for gendered-based VHWP should include is shifting of the burden of proof, as appropriate, in proceedings other than criminal proceedings.¹⁰⁸ The latter, is a crucial measure since it has been proven that even when legislation on workplace harassment exists, its implementation may not be effective since the burden of proof is a significant obstacle. Shifting the burden of proof from the alleged victim to the employer has been considered to be a useful means of correcting a situation that could otherwise result in inequality.¹⁰⁹

Finally, the 190 Convention foresees interim measures that States should consider implementing in dispute resolution mechanisms and procedures.¹¹⁰ However, the only interim measure is that State

¹⁰⁴ Bruce Haller, 'Sexual Harassment in the Workplace: Legal Attempts to Resolve a Cultural Problem' (2018 Northeast Business and Economics Association), 118-121.

¹⁰⁵ 190 Convention Article 10 (b) (v).

¹⁰⁶ Recommendation 190 Convention [16 (c)].

¹⁰⁷ Jane Aeberhard-Hodges and Ludo McFerran, 'An International Labour Organization Instrument on Violence against Women and Men at Work: The Australian Influence' (2017 Journal of Industrial Relations) 2-5.

¹⁰⁸ Recommendation 190 Convention [16].

¹⁰⁹ International Labour Organization, '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' (2016) 42.

¹¹⁰ 190 Convention Article 10 (g).

members shall ensure that workers have the right to remove themselves from a work situation which they have reasonable justification to believe presents an imminent and serious danger to life, health or safety due to violence and harassment, without suffering retaliation or other undue consequences.¹¹¹ In that vein, it is insufficient that the 190 Convention mentions merely one interim measure, and does not exemplify further in its Recommendation. Interim orders are important measures to redress SHWP, including reinstating a discharged employee pending the corresponding hearings, or transferring the harasser away from the complainant.¹¹² The 190 Convention, even if it does recognise one interim measure, such interim measure leaves the victim with the only option of abandoning the workplace which can cause an additional detriment to their personal and professional growth, as it leaves them with no other alternatives to avoid the perpetrator.

Consequently, it is noted that the 190 Convention and its Recommendation, in a general matter intend to provide victims of gendered-based VHWP with appropriate and effective procedural remedies. However, the legal instruments fail to ensure that all avenues are provided to victims. Additionally, even if the 190 Convention and its Recommendation cover some essential measures that need to be considered in such procedures, they still fail to provide a wider protection to victims of SHWP, such as: the provision of free legal aid, and additional protective interim measures that do not affect the victim's work performance.

ii. Substantive remedies and reparations

Adequate, effective and prompt reparation is intended to promote justice by redressing violations of international human rights law by mending the injury.¹¹³ In accordance with domestic law and international law, victims of international human rights violations, as appropriate and proportional to the gravity of the violation and the circumstances of each case, should be provided with full and

¹¹¹ *ibid.*

¹¹² Mary Cornish and Suzanne Lopez, 'Changing the Workplace Culture through Effective Harassment Remedies' (1994-1995 CANADIAN LAB. & EMP. L.J.) 3, 95-126.

¹¹³ Shelton (n 99) 18.

effective reparation.¹¹⁴ Reparations should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition¹¹⁵.

In that vein, to provide adequate, effective, and prompt reparation, the 190 Convention and its Recommendation should include the mentioned means of reparations. The 190 Convention recognises that support, services and remedies should be provided to victims of gendered-based VHWP.¹¹⁶ Moreover, satisfaction, as judicial and administrative sanctions is the only form of reparation that is recognised in the binding convention.¹¹⁷

However, the non-binding Recommendation supplements the 190 Convention in regards with forms of reparations that can be provided when there is gendered-based VHWP. First, the Recommendation establishes that remedies referred to article 10 (b) of the Convention should 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 or that policies or practices are changed, and the provision of legal fees, and costs according to national law and practice.¹¹⁸ However, these forms of reparations are non-limitative. Hence, the provision of the Recommendation, even if not binding does imply that organizational changes can be ordered to prevent further practices that lead to gendered-based VHWP.

Finally, the Recommendation focuses on rehabilitation remedies by establishing that support, services and remedies for victims of gender-based VHWP. Said measures are: support to help victims re-enter the labour market, counselling and information services, 24-hour hotlines; emergency services; medical care, treatment and psychological support, crisis centres, and specialized police units or specially trained officers to support victims.¹¹⁹

¹¹⁴ UN General Assembly, '*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*' 2006 UN DOC A/RES/60/147 ('A/RES/60/147') [18].

¹¹⁵ *ibid.*

¹¹⁶ 190 Convention Article 10 (e).

¹¹⁷ *ibid* Article 10 (d); A/RES/60/147 [22 (f)]

¹¹⁸ Recommendation 190 Convention [14].

¹¹⁹ *ibid* [17].

Consequently, the 190 Convention and its Recommendation seek that State members ensure access to appropriate, effective and gender-responsive, safe and effective complaint and dispute resolution mechanisms and remedies. The 190 Convention and its Recommendation do cover necessary measures to address gendered-based VHWP, including measures to avoid retaliation against victims or claimants, interim measures, and exemplify on the mechanisms that States can implement to provide victims of gendered-based VHWP with adequate redress. Nevertheless, even if the legal instruments address all forms reparations in international human rights law; the reparations are all contained in the non-binding instrument and focus mainly on individual reparations, that do not focus on the necessary organizational changes that need to be done in order to eradicate gendered-based VHWP, including SHWP.

The adoption and implementation of the 190 Convention and its Recommendation by the ILO State members is crucial to commence to address gendered-based VHWP, including SHWP. The ratification of the legal instruments is an explicit recognition that gendered-based VHWP is an issue that needs to be solved, and that it is the States' obligation to implement all the necessary measures to eradicate this means of violence.

It must be noted that the international legal instruments, even if they do set forth a series of necessary measures that need to be taken, as shown in this section, such measures present a series of gaps that do not fully address gendered-based VHWP. In connection with the mechanisms of redress outside the world of work, such as dispute resolution mechanisms including, mediation, arbitration and conciliation in the cases of SHWP the legal instruments do not address some of the problematics and particularities of such mechanisms, nor are they mentioned specifically.

However, the UNGPs set forth a series of standards in order for States to provide effective and proper remedies through State-based non-judicial mechanisms. The following section, will provide a brief overview of the UNGP's first and second pillars, and will focus on the third pillar, specifically on State-

based non-judicial mechanisms. The later, to determine if the UNGPs are an effective instrument that can supplement the Violence and Harassment Convention and its Recommendation and provide the parameters for an effective and proper mechanism that can redress human rights violations arising from SHWP.

4. The United Nation's Guiding Principles on Business and Human Rights.

a. An introduction to the UNGPs

The relationship between businesses operations and human rights impacts have been a recurrent international discussion since the earlies 2000's to this day. In the early 2000's there was a recognition that corporations even if they contribute to the enjoyment of human rights¹²⁰, businesses may pose human rights challenges when they become offenders.¹²¹

Moreover, the Commission on Human Rights recommended the Secretary-General the appointment of an independent expert to identify and clarify businesses' corporate responsibility of human rights.¹²² Consequently, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises ("Special Representative of the Secretary-General"), elaborated a series of reports for the Human Rights Council, including the "*Protect, Respect and Remedy*" framework. The framework comprised three core principles: (i) the State duty

¹²⁰ UN Commission on Human Rights, '*Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises*' 2005 UN DOC.E/CN.4/RES/2005/69 ('Resolution 2005/69').

¹²¹ UN Human Rights Council, '*Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Business and human rights: mapping international standards of responsibility and accountability for corporate acts*' 2007 UN DOC A/HRC/4/35 ('A/HRC/4/35') [2-3].

¹²² Resolution 2005/69 (n 120) .

to protect human rights abuses by third parties, including businesses; (ii) the corporate responsibility to respect human rights; (iii) and the need for more effective access to remedies.¹²³

As a result, the Special Representative of the Secretary-General developed the UNGPs on the issue of human rights and transnational corporations and other businesses, which were endorsed by the Human Rights Council on 16 June 2016.¹²⁴ The UNGPs are grounded in: i) the recognition of States' existing obligations to respect, protect and fulfil human rights obligations¹²⁵, ii) the role of businesses enterprises as specialized organs of society performing specialized functions¹²⁶, required to comply with all applicable laws and respect human rights, iii) and the need for rights and obligations to be matched to appropriate and effective remedies when breached.¹²⁷ The division of these three sections constitute the UNGPs framework's pillars: the state duty to protect (Guiding Principles 1-10), the corporate responsibility to respect (Guiding Principles 11-21), and access to remedies (Guiding Principles 22-31)

The UNGPs are not a replacement of the international human right's legal framework, but a set of standards for businesses to comply with applicable laws and respect human rights.¹²⁸ Meaning, the UNGPs do not constitute nor create new human rights obligations for businesses nor States, but they constitute 'soft law' which can influence in a positive matter for both States and businesses.¹²⁹ Additionally, the UNGPs have a notable mandatory/voluntary divide: they can be mandatory if States entrench them through domestic law or a multilateral treaty, or otherwise they are directed at corporations as social norms rather than legal norms.¹³⁰ It is important to understand the nature of

¹²³ UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: *Protect, Respect and Remedy: a Framework for Business and Human Right*' 2008, UN DOC A/HRC/8/5 ('A/HRC/8/5').

¹²⁴ United National Human Rights Office of the High Commissioner 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' 2011, UN DOC HR/PUB/1104 (UN Guiding Principles) iv.

¹²⁵ *ibid* General Guiding Principle (a).

¹²⁶ *ibid* General Guiding Principle (b).

¹²⁷ *ibid* General Guiding Principle (c).

¹²⁸ *ibid* General Principles.

¹²⁹ Mihaela Maria Barnes, 'The United Nations Guiding Principles on Business and Human Rights, the State Duty to Protect Human Rights and the State-Business Nexus' (2018 BRAZ J INT'L) 15:2, 40-44.

¹³⁰ Penelope Simons and Melisa Handl, 'Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction' (2019 CAN. J. WOMEN & L) 31:1, 113-146.

the UNGPs, to comprehend how they can be applied by businesses even if States do not entrench them through domestic law.

a. *The Gender dimensions of the UNGPs*

The UNGPs recognise the importance of applying its content with a gender perspective in several of its principles. For instance, the commentary text of Guiding Principle 3 provides that States should provide guidance to businesses on how to consider effectively issues of gender, vulnerability and marginalization, recognizing the specific challenges that may be face by women.¹³¹ However, the UNGPs have received a series of feminist critiques on the fact that the international standards only raise the issue of sexual violence in relation to business activities in conflict zones, and ignore that sexual violence may occur outside of conflict-affected areas.¹³² In that vein, from a feminist perspective, the UNGPs have a narrow focus that relies on the idea that gender violence occurs solely during conflict, and it ignores the daily manifestations of the systematic discrimination and socio-economic marginalization of women.¹³³

The Working Group on the issue of human rights and transnational corporations and other business (“Working Group”), has a mandate to integrate a gender perspective throughout its work and to give special attention to persons living in vulnerable situations¹³⁴. The Working Group elaborated further on the need to embed gender as a cross-cutting issue in the business and human rights field in its country visit reports¹³⁵. As a consequence, it developed the ‘*Gender dimensions of the Guiding Principles on Business and Human Rights*’ report (“UNGPs Gender Dimensions”), a gender framework for the UNGPs and gender guidance to each of the 31 principles¹³⁶. In said document, the

¹³¹ UN Guiding Principles, Guiding Principle 3 Commentary Text.

¹³² Simons (n 130) 129.

¹³³ *ibid* 130.

¹³⁴ Human Rights Council, ‘*Human Rights and transnational corporations and other business enterprises*’ 2011 UN DOC A/HRC/RES/17/4 (‘A/HRC/RES/17/4’) 6 (f).

¹³⁵ Human Rights Council, ‘*Visit to Thailand: Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*’ 2019 UN DOC A/HRC/41/43/Add.1 (‘A/HRC/41/43/Add.1’) [67-68].

¹³⁶ Human Rights Council ‘*Gender dimensions of the Guiding Principles on Business and Human Rights: Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*’ 2019 UN DOC A/HRC/41/43 (‘UNGPs Gender Dimensions’).

Working Group acknowledges gender issues that arise from businesses operations, including that SHWP is a common form of violence, pervasive at the workplace, and needs to be addressed.¹³⁷ Furthermore, the primary objective of the UNGPs Gender Dimensions is to provide guidance to States and businesses on the integration of a gender perspective in implementing the UNGPs.¹³⁸

This following section will provide an overview of the UNGPs 'Protect, Respect and Remedy' framework, in conjunction with the developments of the Working Group and the UNGPs Gender Dimensions. However, the following section will not review each principle in detail but will focus mainly on the Foundational Principles of each pillar, particularly those in the Third Pillar and the effectiveness of State-Based Non-Judicial Grievance Mechanisms.

4.1. The State Duty to Protect Human Rights

The international human rights framework has established that States should respect and ensure rights of all individuals.¹³⁹ However, the UN human rights bodies have adopted the tripartite system clarifying the matter in which human rights obligations should be secured: States have the obligation to respect, protect and fulfil.¹⁴⁰

When it comes to the duty to protect human rights, States have a customary international legal obligation to protect against actions within their territory, including those by nonstate actors such as businesses that violate human rights, including those that violate women's human rights.¹⁴¹ This obligation requires States to take appropriate steps to prevent, investigate, punish and redress human rights abuses through effective policies, legislation, regulations and adjudication¹⁴². For instance,

¹³⁷ *ibid* [14].

¹³⁸ *ibid* [5].

¹³⁹ UN General Assembly, 'International Covenant on Civil and Political Rights' (Published 16 December 1966, Entered into force 23 March 1976) UNTS 999 ("ICCPR") Article 2.

¹⁴⁰ Frederic Megret 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah, Sandeh Sivakumaran (eds) *International Human Rights Law*, 97

¹⁴¹ Robert McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights' in Lara Blecher, Nancy Kaymar Stafford and Gretchen C. Bellamy (eds) *Corporate responsibility for human rights impacts: new expectations and paradigms* (American Bar Association 2014) 53; UN Guiding Principles, Guiding Principle 1; UNGPs Gender Dimensions Annex Guiding Principle 1.

¹⁴² *ibid*, Guiding Principle 1.

States should revise existing legislation that directly or indirectly discriminate against women and take effective measures to eliminate SHWP, so that women can have access to opportunities on an equal basis as men.¹⁴³ Therefore, according to the UNGPS, it is States' obligation to: prohibit such conducts in its legislation and policies, investigate if SHWP arises, and punish and redresses victims of such gendered-based violence and discrimination.

The UNGPs first pillar includes other operational principles such as the General State Regulatory and Policy Functions, which establish that States should enforce laws that aim at, or have the effect of requiring businesses to respect human rights, and periodically assess the adequacy of such laws and address any gaps¹⁴⁴. Therefore, States must enact, and enforce laws that requires businesses to prevent SHWP and redress victims when they fail to prevent such conducts. The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice.¹⁴⁵ Hence, States must not only legislate the prohibition of SHWP but should regulate businesses to oblige them to take the necessary measures to prevent, and redress SHWP within their enterprise organizations.

4.2. Corporations duty to respect human rights

- a. *Foundational Principles: Businesses obligations to respect human rights and avoid causing and contributing to human rights impacts.*

The UNGPs second pillar sets forth a series of foundational and operational principles regarding businesses' responsibility to respect human rights. According to the UNGPs foundational principles, businesses should respect human rights, by avoiding infringing on the human rights of others and should address adverse human impacts in which they are involved.¹⁴⁶ The responsibility to respect

¹⁴³ UNGPs Gender Dimensions Annex Guiding Principle 1 [2 (b)].

¹⁴⁴ UN Guiding Principles, Guiding Principle 3 (a).

¹⁴⁵ *ibid*, Guiding Principle 3 Commentary Text.

¹⁴⁶ *ibid*, Guiding Principle 11.

human rights exists independently of State's abilities to fulfil their own human rights obligations, and such responsibility exists over and above compliance with national laws and regulations protecting human rights.¹⁴⁷ Hence, on the contrary to States, to this day businesses do not have direct international human rights legal obligations.¹⁴⁸ However, on the bright side, in many jurisdictions, legislation is now being enacted to address aspects of corporation's responsibility to respect human rights¹⁴⁹. Moreover, international human rights courts, such as the Interamerican Court of Human Rights ("IACtHR"), are advancing the implementation of the UNGPs to recognise enterprises' human rights obligations.¹⁵⁰

In connection with women's human rights, the Working Group establishes that businesses enterprises have the responsibility to avoid infringing women's rights, and to address adverse human rights impacts with which they may be involved.¹⁵¹ To discharge this responsibility, businesses should contribute to achieving substantive gender equality and avoid exacerbating or reproducing existing discrimination against women throughout their operations.¹⁵² As an illustrative example, the Working Group specifies that businesses should create an enabling environment for women to have access to all opportunities, and take into account certain situations such as SHWP that might discourage women from taking job opportunities and remaining in employment¹⁵³, and to take effective measures to ensure women are not harassed in cyberspace.¹⁵⁴

Now, according to the UNGPs, the responsibility of businesses to respect human rights refers to internationally recognised human rights, understood at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour's Organization's Declaration on Fundamental Principles and Rights at Work.¹⁵⁵

¹⁴⁷ *ibid*, Guiding Principle 11 Commentary Text.

¹⁴⁸ McCorquodale (n 141) 64.

¹⁴⁹ Alex Newton (n 22) 57.

¹⁵⁰ Inter-American Court of Human Rights, '*Case of the Kaliña and Lokono Peoples V Suriname (Merits, Reparations and Costs)*' Judgement of November 25 2015, [224-226].

¹⁵¹ UNGPs Gender Dimensions Annex Guiding Principle 11 [21].

¹⁵² *ibid*, Guiding Principle 11 [22].

¹⁵³ *ibid*, Guiding Principle 11 [22 (a)].

¹⁵⁴ *ibid* Guiding Principle 11 [22 (h)].

¹⁵⁵ UN Guiding Principles, Guiding Principle 12.

The UNGPs establish a list of authoritative international instruments, including the International Covenant on Civil and Political Rights, the ICESCR, and the ILO's Core Convention as set out in the Declaration on Fundamental Principles and Rights at Work.¹⁵⁶ Additionally, the UNGPs determine that depending on the circumstances, businesses enterprises may need to consider additional standards, that take into account specific groups that require special attention, including women.¹⁵⁷

It is clear that the UNGPs hierarchize applicable human rights to businesses into two categories: in first place, the authoritative international instruments, and in second place, the additional standards applicable to the rights of marginalized groups, including women's rights¹⁵⁸. The UNGPs do not only hierarchize applicable human rights, but they limit the application of international human rights legal instruments by mentioning that enterprises should respect standards which the United Nations instruments have elaborated further.¹⁵⁹ A strict interpretation of the latter, might limit the application of new instruments, and other instruments which have not been elaborated by the United Nations, such as 190 Convention and its Recommendation. Hence, a strict application by businesses of the UNGPs allows corporations to apply the minimum standards, ignore those standards that apply to women specifically, and limit the application of new legal instruments.

Now, the responsibility to respect human rights requires that businesses enterprises avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur.¹⁶⁰ The enterprises' activities that cause or contribute to human rights impacts include both actions and omissions.¹⁶¹ Thus, the omission to prevent SHWP, causes and contributes to human rights impacts, by allowing SHWP to occur within the organization, and enabling violence and discrimination against women.

b. Operational Principles: Policy Commitment, Human Rights Due Diligence and Remediation.

¹⁵⁶ *ibid* Guiding Principle 12 Commentary Text.

¹⁵⁷ *ibid*.

¹⁵⁸ Simons (n 130) 140.

¹⁵⁹ UN Guiding Principles, Guiding Principle 12 Commentary Text.

¹⁶⁰ *ibid*, Guiding Principle 13 (a).

¹⁶¹ *ibid*, Guiding Principle 13 Commentary Text.

The UNGPs establish that in order for enterprises to respect their human rights, businesses should have in place policies and processes appropriate to their size and circumstances. Including: a policy commitment to meet their responsibility to respect human rights; a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on their human rights; and processes to enable the remediation of any adverse human rights impacts they cause to which they contribute.¹⁶² In connection to the prevention of SHWP, the mentioned policies and processes that are further described in the operational principles 16 to 24, may serve as additional processes to the measures considered in the 190 Convention and its Recommendation in order for businesses to address SHWP in an efficient matter.

Guiding Principle 16 sets forth the necessary characteristics that enterprises should implement in their policy commitments, characteristics that the 190 Convention and its Recommendation fail to mention. According to the UNGPs, policy statements should be approved at the most senior level of the businesses enterprise; informed by relevant internal and or external expertise; stipulated the enterprises expectations of personnel, business partners, and other relevant parties; be publicly available and communicated; and should be reflected in operational policies and procedures necessary to embed it throughout the business enterprise.¹⁶³

These requirements are crucial for businesses' SHWP policies. For instance, it is essential that policy statements are approved and endorsed by the most senior level of the businesses enterprise to underline that senior management will not tolerate nor endorse SHWP.¹⁶⁴ Unless high management follows the policy, and has a proactive attitude towards its implementation, businesses' policies will fail.¹⁶⁵ Moreover, in cases of gendered-based SHWP external expertise from organizations that advise on women's issues might provide a gender lens to the policies and identify certain gaps. However, even if businesses' do comply with such requirements, policy statements should be

¹⁶² *ibid*, Guiding Principle 15.

¹⁶³ *ibid*, Guiding Principle 16 (a-e).

¹⁶⁴ Sara Charlesworth, '*Risky Business - Managing Sexual Harassment at Work*' (2002) Griffith L Rev 11:2, 353-363.

¹⁶⁵ Fowler (n 87) 91.

implemented in practice and not be left as a mere tokenism to present the business as human rights compliant.

Secondly, according to UNGPs to identify, prevent mitigate and account for how businesses address their adverse human rights impacts, they should carry out human rights diligence¹⁶⁶. Human Rights diligence includes assessing actual and potential human rights impacts, integrating and acting upon the finding, tracking responses, and communicating how impacts are addressed.¹⁶⁷ Businesses should explicitly integrate a gender perspective in carrying out all steps of human rights due diligence, covering both actual and potential and adverse impacts on women's human rights.¹⁶⁸ For instance, if a business need to identify priority areas where risks of adverse impacts are most significant, the process should be done with the participation of potentially affected communities, including women and women's organizations.¹⁶⁹

In connection with SHWP, the process of human rights due diligence does not only include the identification of hazards and assessment of risks of gendered-based VHWP and the implementation of measures to prevent and control such hazards and risks. The UNGPs find it necessary to track responses, using sex-disaggregated data and communicating how such impacts are addressed.¹⁷⁰

In that vein, the UNGPs also supplement the 190 Convention and its Recommendation, by tracking the effectiveness of human right impact responses. This, through appropriate qualitative and quantitative indicators, and to draw feedback from internal and external sources, including affected stakeholders. However, tracking the effectiveness of human rights impact responses, including those to prevent SHWP, throughout sex-disaggregated data, and drawing feedback from affected stakeholders may be impossible without establishing certain measures such as those that protection participants from retaliation. Without such measures, the outcome of such disaggregated data and

¹⁶⁶ UN Guiding Principles, Guiding Principle 17.

¹⁶⁷ *ibid.*

¹⁶⁸ UNGPs Gender Dimensions Annex Guiding Principle 17 [33].

¹⁶⁹ *ibid.*, Guiding Principle 17 [34 (c)].

¹⁷⁰ UN Guiding Principles, Guiding Principle 20 (b); *Ibid.*, Guiding Principle 20 [39].

feedback by those affected may not reflect the reality of the effectiveness of human rights impact responses.

Finally, where businesses identify that they have caused or contributed to adverse impacts, they should provide for, or cooperate in their remediation, including in gender-transformative remediation, through legitimate processes.¹⁷¹ Now, in cases of SHWP and human rights violations that concern gendered-based violence, remedies should be responsive to women's experiences, and should be aimed to bringing about systematic changes in discriminatory power structures.¹⁷² For instance, the Working Group has recognised the importance to address cases of SHWP in factories, where women complaints are usually not taken seriously owing to underrepresentation of women in managerial positions.¹⁷³

This section evidences, that businesses in the first place, need to respect women's human rights and avoid infringing or causing human rights impacts through their operations, including SHWP. Secondly, businesses should take appropriate steps and implement procedures to avoid human right impacts. Finally, in cases in which their operations do have an impact on women's rights, enterprises should provide adequate remediation. Now that this section has outlined businesses obligation to respect human rights, and redress those violations in which they are involved, the following section will scrutinize on the access to remedy; in particular if Non-Judicial State-Based mechanisms are an effective and appropriate mechanism to address SHWP.

4.3. The Third Pillar: Remediation

The third pillar of the UNGPs framework focuses on the need for remedy in cases of human rights violations, and the States' obligation to take appropriate steps to ensure an effective remedy, as part

¹⁷¹ Ibid, Guiding Principle 22; UNGPs Gender Dimensions, Guiding Principle 22 [43].

¹⁷² UNGPs Gender Dimensions, Guiding Principle 22 (b) and (c).

¹⁷³ *ibid.*

of their duty to protect against business-related human rights abuses.¹⁷⁴ When abuses occur within States' territories or jurisdictions, States should take appropriate steps to provide effective remedies should be through judicial, administrative, legislative and other appropriate means¹⁷⁵.

According to the UNGPs, access to remedy has both procedural and substantive aspects. The international standards provide a range of procedural remedies including State-based or non-State-based grievance mechanisms, judicial or non-judicial processes through which grievances concerning business-related human rights abuse can be raised, and remedy can be sought.¹⁷⁶ Moreover, the UNGPs establish that there are a range of substantive forms which aim to counteract or make good any human rights harms that have occurred, including apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions, as well as prevention of harm through injunctions or guarantees of non-repetition.¹⁷⁷

This section will scrutinize on State-based non-judicial grievance mechanisms, and their effective criteria, in conjunction with the Working Group's UNGPs Gender Dimensions, and the United Nations High Commissioner's for Human Rights Report on Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms ("Remedy Report"). The latter, sets forth a series of recommendations to improve the implementation of State-based non-judicial, as well as requirements that are crucial for their effectiveness.¹⁷⁸

However, this section will focus on mediation and conciliation State-based mechanisms, as means to redress SHWP. Moreover, this section will overview various scholars' standpoints on the strengths and weaknesses of such mechanisms. The objective of this section, is to determine if in fact the UNGPs effective criteria for State-based non-judicial grievance mechanisms, could address some of

¹⁷⁴ UN Guiding Principles, Guiding Principle 25.

¹⁷⁵ *ibid*, Guiding Principle 25 Commentary Text.

¹⁷⁶ *ibid*.

¹⁷⁷ *ibid*.

¹⁷⁸ Human Rights Council, *Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms: Report of the United Nations High Commissioner for Human Rights* 2018 UN DOC A/HRC/38/20 ('Remedy Report'), [17].

the issues that have been raised in SHWP mediation and conciliation mechanisms, such as the Mexican conciliation grievance mechanism.

4.3.1. State-based non-judicial grievance mechanisms.

Amongst the range of procedural remedies that States should provide victims of business-related human rights violations, along with judicial mechanisms, are effective and appropriate State-based non-judicial mechanisms.¹⁷⁹ These mechanisms play an essential role in complementing and supplementing judicial mechanisms, since judicial remedies are not always required nor are they always the favoured approach for all claimants.¹⁸⁰ Hence, these mechanisms should supplement and complement judicial mechanisms. State-based non-judicial mechanisms by no means should be considered as a way to substitute the former, nor should they be imposed as the only means to access remedies for business-related human rights violations.

State-based non-judicial grievance mechanisms, may be mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes.¹⁸¹ Some of the mechanisms may have self-executing powers, whereas others rely on the cooperation of the parties involved.¹⁸² State-based non-judicial mechanisms can be broken down into five broad categories: complaint mechanisms, inspectorates, ombudsman services, mediation or conciliation bodies, arbitration and specialized tribunals.¹⁸³ Mediation and conciliation-based mechanisms have been implemented as alternative dispute mechanisms to redress SHWP, and they have been extensively discussed to determine if they are effective means to address such gendered-based violence.¹⁸⁴

¹⁷⁹ UN Guiding Principles, Guiding Principle 26.

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*, Guiding Principle 27 Commentary Text.

¹⁸² Remedy Report [9].

¹⁸³ *ibid.* [10].

¹⁸⁴ Mori Irvine, '*Mediation: Is It Appropriate for Sexual Harassment Grievances*' (1993) OHIO ST. J. ON DISP. RESOL.9:1, 27-27; Nicole Duke, '*Expose Your Pig: The Procedural Failures of Sexual Harassment Mediation and Danger to Abuse Victims*' (2018 AM. J. MEDIATION11), 37-37.

a. *Mediation and conciliation mechanisms to redress SHWP.*

Mediation can be described as a facilitated form of negotiation, and it can be applied in cases of conflict that are comprehensive, multidimensional and entangled.¹⁸⁵ Conciliation, the main alternative dispute resolution mechanism used in anti-discrimination jurisdictions, is used on bringing the parties of a conflict together with an agreed outcome which fully and effectively resolves the dispute between them.¹⁸⁶ Mediation and conciliation bodies even if they have their differences they aim at finding a mutual acceptable outcome rather the appointment of blame.¹⁸⁷ For instance mediators, as third parties to the conflict, provide support and guidance to catalyse the dispute setting process toward an appropriate solution for the participants in the mechanism.¹⁸⁸ Now, when it comes to addressing SHWP, mediation and conciliation has both positive outcomes and negative ones.

On the one hand, conciliation and mediation-based mechanisms in SHWP cases have characteristics that may favour victims, and which judicial mechanisms do not satisfy. For example, they provide further confidentiality and flexibility, a variety of remedies and holistic solutions, avoiding costs, delays and exposures that are often associated with litigation.¹⁸⁹ Alternative solutions that are not focused on monetary settlements have also been provided, including transfers, retraining, counselling, separation of offender and victims, as well as formal apologies.¹⁹⁰ Also, mediation and conciliation based-mechanisms allow for respectful communication, and because solution and remedies are voluntarily and include both parties outlooks, it makes both parties responsible and accountable and empowers victims of SHWP.¹⁹¹

¹⁸⁵ Maximilian J.L. Schormair and Lara M Gerlach, 'Corporate Remediation of Human Rights Violations: A Restorative Justice Framework' (2019 Journal of Business Ethics), 1-3.

¹⁸⁶ Anthea Worley, Sara Charlesworth and Paula McDonald, 'Sexual Harassment and Conciliation: Which Complaints Settle, and Which Don't' (2013 Alternative L.J) 38, 96-96.

¹⁸⁷ Remedy Report [10].

¹⁸⁸ Schormair (n 185) 3.

¹⁸⁹ Linda Stamato, 'Sexual Harassment in the Workplace: Is Mediation an Appropriate Forum' (1992 MEDIATION.Q) 10:2, 167-168; Duke (n 184) 38.

¹⁹⁰ Duke (n 184) 38.

¹⁹¹ Stamato (n 189) 169.

However, the appropriateness of mediation or conciliation-based mechanisms should depend on a screening process, as it is done in family mediation mechanisms: the mediator determines the appropriateness of a case for the mediation and identifies potentially dangerous situations before the mediation.¹⁹² Nevertheless, these mechanisms, as options to redress SHWP, should always be voluntary¹⁹³. Some have even compared forced mediation to rape.¹⁹⁴

On the other hand, legal commenters have concluded that mediation and conciliation-based mechanisms are inappropriate in cases of SHWP. Amongst some of the reasons, there is the fact that such mechanisms might risk trivializing the seriousness of SHWP.¹⁹⁵ Moreover, mediators and conciliators cannot guarantee that SHWP victim will not be victimized again.¹⁹⁶

Other issues that mediation and conciliation-type mechanisms present: authorities have limited formal investigative powers, and must only rely on the cooperation of the businesses concerned¹⁹⁷. In cases in which State-based non-judicial mechanisms entail investigatory processes, they also involve reaching findings, conclusions and recommendations.¹⁹⁸ Hence, investigatory powers to determine if there has been SHWP could provide mediators with the possibility to provide a range of adequate reparations. Otherwise, the parties to the grievance mechanism will negotiate the reparations, which can have as an outcome an imbalance of power.

Another pivotal issue, is the need for these mechanisms outcomes to be enforceable; without the enforcement of legally binding remedial outcomes, there cannot be an effective and appropriate redress mechanism.¹⁹⁹ In that vein, if the mediation or conciliation mechanisms are not supplemented by the enforcement of the conciliation settlement by means of a judicial resolution, the mechanism fails to redress the gender-violence violation.

¹⁹² Duke (n 184) 52.

¹⁹³ Stamato (n 189) 170.

¹⁹⁴ Duke (n 184) 39.

¹⁹⁵ Irvine (n 184) 28.

¹⁹⁶ Duke (n 184) 52.

¹⁹⁷ Remedy Report [24].

¹⁹⁸ Martijn Scheltem, 'Assessing the Effectiveness of Remedy Outcomes of Non-Judicial Grievance Mechanisms' (2013 DQ) 2013:4, 190-192.

¹⁹⁹ Remedy Report [24].

b. Gender imbalances in non-judicial state-based mechanisms.

Now, the UNGPs determine that as with judicial mechanisms, States should consider ways to address any imbalances, including gender imbalances, between parties to business-related human rights claims.²⁰⁰ States should also consider any additional barriers to access such mechanisms faced by individuals from groups or populations at heightened risk of vulnerability or marginalization.²⁰¹

Now the imbalances that can arise between parties makes it impossible to resolve a dispute fairly, since the weaker party cannot negotiate on an equal basis. Nevertheless, in SHWP some approaches have been taken to deal with gender-imbalances, such as the mediators or conciliators rebalancing the power during sessions, terminating the meetings²⁰², and keeping the parties in separate caucuses so that the victims may not be forced to face their abuser.²⁰³ Hence, mediators need to be sensitive to the presence of gender imbalances, that might be rooted in abusive relationships.²⁰⁴ However, an issue with the latter, is that the power and gender imbalances might also derive from basic societal difference between men and women. Meaning, it is rooted on a patriarchal society characterized by gender inequality that has an institutionalised ideology that justifies male domination.²⁰⁵ Therefore, societal factors that normalise male domination and gender imbalance might also influence mediators in not identifying such power structures.²⁰⁶

c. Gender-transformative remedies.

The Working Group has established that States should grant State-based non-judicial grievance mechanisms the necessary powers to provide effective, and transformative remedies in cases of

²⁰⁰ UN Guiding Principles, Guiding Principle 27; UNGPs Gender Dimensions Annex Guiding Principle 27 [54 (b)].

²⁰¹ *ibid*, Guiding Principle 27.

²⁰² Irvine (n 184) 36.

²⁰³ Duke (n 184) 47.

²⁰⁴ Irvine (n 184) 47.

²⁰⁵ *ibid* 38.

²⁰⁶ For example, in cases of arbitration mechanisms, it has been argued that in arbitral decisions and remedial orders arbitrators have not grasped the reality of SHWP and its systematic nature. See more in: Mary Cornish and Suzanne Lopez (n 112).

SHWP.²⁰⁷ The IACtHR first elaborated on the notion of gender-sensitive and transformative reparations in a decision against Mexico. The IACtHR recognised that acts of violence against women are part of a larger system of a gender hierarchy that can only be fully grasped in the broader structural context.²⁰⁸ Reparations, when it comes to gender-based violence, including SHWP, must not be limited to individual forms of reparations, but they should strive to have transformative potential.²⁰⁹ Amongst other forms of reparations, guarantees of non-repetition offer the greatest potential for transforming gender relations and structural inequality.²¹⁰

An issue with mediation and conciliation-based mechanisms, and gender-transformative reparations, is that reparations are determined by the parties. Therefore, collective or structural remedies may be ignored and not even considered. Particularly, if the mediator does not have investigative powers, nor the adequate authority to provide recommendations on the forms of adequate measures for reparation that challenge the status quo in the workplace, including subjective authority and gender segregation policies and practices. SHWP is violence against women as a result of a structural inequality based on power relationships between men and women in the workplace.²¹¹ Thus, reparations to address SHWP must be unlinked to compensation, and should be developed at the individual, institutional and structural levels.²¹²

4.3.2. The effectiveness criteria for non-judicial grievance mechanisms.

In order to ensure the effectiveness of State-based non-judicial mechanisms, such as mediation and conciliation in cases of SHWP, the UNGPs set forth that such mechanisms should be:

²⁰⁷ UNGPs Gender Dimensions Annex Guiding Principle 27 [54 (a)].

²⁰⁸ Human Rights Council, 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' 2010 UN DOC A/HRC/14/22 ('A/HRC/14/22') [27 and 78].

²⁰⁹ *ibid* [31].

²¹⁰ *ibid*.

²¹¹ Samuels (n 32) 477.

²¹² Rashida Manjoo, 'Introduction: Reflections on the Concept and Implementation of Transformative Reparations' (2017 *International Journal of Human Rights*) 21:9, 1193-1196.

- a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognised human rights.
- g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;²¹³

The commentary text of Guiding Principle 31 establishes that these criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective

²¹³ UN Guiding Principles, Guiding Principle 31.

in practice²¹⁴. Additionally, the Working Group in the UNGPs Gender Dimensions adds that the non-judicial mechanisms should take additional targeted measures to: i) ensure their accessibility to potential affected women and enjoy their trust, and ii) address the imbalance of power, information, financial resources and legal expertise faced by affected women.²¹⁵

Nevertheless, the effectiveness criteria for non-judicial grievance mechanisms should not only encompass the process of the non-judicial mechanism but the outcomes that might be achieved through them.²¹⁶ For instance, if every human rights violation is addressed through compensation, this may not result in meaningful change in the conduct of the company or address of the underlying issues.²¹⁷ Finally, by having access to the outcomes of mediation and conciliation mechanisms in cases of SHWP, can it be possible to determine if said mechanisms are effective.

The following section will revise and assess the Mexican SHWP legal framework, focusing on the 2019 Federal Labour Law Reform and its conciliation-based mechanism as a form for victims of SHWP to seek redress. The assessment will briefly review in the Mexican legislation complies with the 190 Convention and its Recommendation, as well as the third pillars of the UNGPs. However, the analysis will focus on the development and design of the new conciliation-based mechanism (“Labour Conciliation Mechanism”), an available avenue for victims of SHWP to seek redress.

5. SHWP in the Mexican legislation and its conciliation mechanism.

In September 2016, the Working Group visited Mexico at the invitation of the Mexican government. The purpose of the visit was to assess the efforts made to prevent and address adverse human rights impacts of business-related activities, in line with UNGPs framework ²¹⁸. After its visit to Mexico, the

²¹⁴ *ibid*, Guiding Principle 31 Commentary Text.

²¹⁵ UNGPs Gender Dimensions Annex Guiding Principle 31 [62 (a) i-ii)].

²¹⁶ Scheltem (n 198) 190.

²¹⁷ *ibid* 196.

²¹⁸ Human Rights Council, ‘*Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Mexico*’ 2017 UN DOC A/HRC/35/32/Add.2 (‘A/HRC/35/32/Add.2’) [1].

Working group issued a series of recommendations relating to the State's need to step up efforts to address gendered- based discrimination and SHWP, through improved forms of grievance mechanisms.²¹⁹

In May of 2019, the Mexican Congress reformed the Federal Labour Law ("Labour Law") in which, amongst other structural reforms, the Mexican State took legislative steps and established measures to prevent and redress SHWP through a State-based non-judicial mechanism ²²⁰.

This section will overview the Mexican State's efforts to address SHWP, including the enactment of national laws, and non-binding norms that define and seek to prevent SHWP. However, the main purpose of this section is to assess the Labour Conciliation Mechanism, and determine if it complies with the effectiveness requirements and criteria set forth in the 190 Convention and its Recommendation, and those established in the UNGPs. However, the Labour Conciliation Mechanism even if it is recognised in the Labour Law, has not yet been implemented. The mechanism will start to operate until May 2022 once the Local Conciliation Institutes in charge of its implementation begin their mandates²²¹.

Therefore, it is impossible to assess the outcomes of the grievance mechanism, since there are no cases that have been solved through it. Hence, the assessment will focus on a qualitative analysis of Labour Law's content that concerns measures established in the 190 Convention and its Recommendation as well as the UNGPs. The latter, to identify the issues that needed to be addressed during its design process, and the gaps that could still be addressed with secondary legislation that has not yet been issued.

5.1. SHWP in the Mexican Constitution and National Law.

²¹⁹ *ibid* [108 (m)].

²²⁰ Congress of the Union, Federal Labour Law (Enacted 1971, Reformed 2019) ('Labour Law').

²²¹ *ibid*, Fifth Transitory Article.

Mexico has a solid legal framework for the protection of human rights. In 2011, Mexico had a historical constitutional reform regarding the guarantee of recognised international human rights. First, Article 1 of the Federal Constitution establishes that all persons shall enjoy the human rights recognised in the Constitution, as well as those in international treaties that Mexico has ratified. Second, Article 133 sets forth that the supreme law of the Union is the National Constitution, the laws of the Congress of Union and all international treaties celebrated by the State. Therefore, the Federal Constitution of Mexico, with said reform, integrates all those international human rights treaties the Mexican domestic law. The latter, is relevant to this essay, since Mexico is a State party to CEDAW, the Convention of Belem do Para, and the ICESCR, treaties that guarantee women the right to equality and non-discrimination, the right to be free from violence, and the right just and favourable conditions of work. Thus, Mexico has ratified treaties that obliges the Mexican government to address and take steps to prevent SHWP.

Additionally, Mexico is a member State of the ILO, and did participate in the discussion and elaboration of the 190 Convention and its Recommendation. Hence, even if the Mexican State has not yet ratified said international instruments to this date, if the Mexican State proceeds to its ratification, it will be obliged to adopt the measures that have been described and analysed in chapter 3 of this essay. Nevertheless, before reviewing if the Mexican legislation complies with said international instrument as well as the UNGPs, it is crucial to scrutinize what the State has adopted to this date in its legislation to address SHWP.

In accordance to the international human rights legal instruments that Mexico has ratified, the State enacted the General Law of Access for Women to a Life Free of Violence (“Women’s General Law”). The mentioned law, the Labour Law and the Criminal Penal Code recognise that SHWP constitutes a form of gender-violence in the workplace²²², define two forms of SHWP, and determine measures to prevent and redress SHWP. However, it is important to first comprehend and review the SHWP

²²² Congress of the Union , 'General Law of Access for Women to a Life Free of Violence', 2017 ('Women's General Law') Article 12.

definitions in the Mexican legislation in order to determine if they comply, as a basic standard, with the definition of gendered-based VHWP in the 190 Convention.

5.2. Defining SHWP in the Mexican legislation.

On one hand, the Women's General Law establishes a form of quid pro quo type of SHWP. In this quid pro quo SHWP there is an exercise of power, due to a relationship of subordination between the aggressor and the victim, and the exercise of power is expressed verbally, physically or both, and with a sexual lascivious connotation.²²³ The perpetrator of this form of SHWP can be found criminally liable. However, the Federal Penal Code requires the additional requirement that the behaviour needs to take place in several occasions²²⁴. The Labour Law when defining this form of SHWP, contemplates all elements of the Women's General Law but it does not require that the conduct must have a sexual lascivious connotation²²⁵

On the other hand, there is the form of SHWP that constitutes hostile environment harassment. In this form of SHWP, there is no relationship of subordination between the aggressor and the victim, but there is an abusive exercise of power that leads the victim to a state of defencelessness and of risk, independently if it takes place on one or several events.²²⁶

However, even if the definition of SHWP in the Mexican legislation does not constitute an essential issue in the analysis of this essay, said definitions are limited in their protection, they are not coherent, and they do not comply with the definition of gendered-based VHWP established in the 190 Convention. The definitions are limited in their content by focusing on elements such as: the relationship between the perpetrator and the victim, the number of incidents, the effects the conduct has on the victim, and worryingly, if the conduct is sexually lascivious.

²²³ *ibid*, Article 13.

²²⁴ Congress of the Union, 'Federal Criminal Penal Code', (Enacted 1931, Reformed 2019), Article 259 Bis. It is important to note that SHWP is penalised as a local crime in each of the 32 federal entities. However, the local legislation is beyond the scope of this essay, which focuses on the federal legislation.

²²⁵ Labour Law, Article 3 bis (a).

²²⁶ Women's General Law, Article 13; Labour Law, Article 3 bis (b).

The 190 Convention establishes that certain elements, including the relationship between the victim and the perpetrator, and the number of occurrences are irrelevant. Whereas the Mexican legislation quid pro quo form of SHWP, emphasizes on both of these elements.

Additionally, the international legal instrument recognises that the range of conducts considered gendered-based VHWP, aim, result in, or are likely to result in physical, psychological, sexual or economic harm. The quid pro quo SHWP definition in the Mexican legislation, ignores any effects on the victim. The hostile environment harassment only foresees that the conduct leaves the victim in a state of defencelessness and of risk. Meaning, the effect of SHWP must be the worst-case scenario: the victim must already be defenceless and at risk. The Mexican law does not contemplate any conducts that might lead to such risk, nor that the conduct still constitutes gendered-based violence as it may also result in psychological, or economic harm even if the victim is not yet in a state of risk.

The definition of quid pro quo SHWP in the Women's General Law, requires that the conduct must have a sexual lascivious connotation. Therefore, the Mexican legislators suppose that SHWP is based on sexual desire. The Mexican State, with such legislation ignores that SHWP is based on gender, and directed at persons because of their sex and gender.

The Mexican legislation does define and criminalize SHWP. Nevertheless, it does not comply with the definition of gendered-based VHWP set forth in the 190 Convention. It is impossible for the State to address, prevent, and redress SHWP, when such gendered-based violence is so narrowly defined, and includes elements which represent obstacles for victims to seek redress.

5.3. The Mexican State's obligations to prevent and redress SHWP.

The Mexican legislation establishes numerous obligations for governmental entities to prevent SHW. These obligations are the most crucial measures to avoid human rights violations arising from

gendered-based VHWP. The General Women's Law establishes that the executive, legislative and judicial powers must establish mechanisms in the workplace and businesses that favour the eradication of SHWP²²⁷, and create administrative procedures in the workplace to sanction and prevent SHWP²²⁸.

Furthermore, the mentioned law recognises that confidentiality measures are necessary, and refers to the prohibition to publicize the claimant's name to avoid revictimization and pressure that will lead to the victim's job²²⁹. The General Women's Law also includes necessary measures to redress SHWP. These measures include the provision of specialized and free psychological support and legal aid to victims and SHWP²³⁰, and administrative sanctions to supervisor that ignored the SHWP claims²³¹. However, there is not a specific administrative grievance mechanism in the mention law, nor does the law stipulate the matter in which victims of SHWP can submit a claim.

Additionally, the General Law on Equality between Women and Men, acknowledges that to guarantee the right to substantive equality between men and women in the work force, including in businesses, the authorities shall promote work conditions and actions to prevent SHWP²³². However, it does not mention any specific conditions or actions that need to be considered.

5.3.1. Employers obligations to prevent SHWP

The Labour Law prohibits SHWP committed by employers, and/or that employers allow others to sexually harass in the workplace.²³³ There are economic sanctions in those cases in which employers do not comply with such negative obligations²³⁴.

²²⁷ Women's General Law Article 15 II.

²²⁸ *ibid*, Article 15 III.

²²⁹ *ibid*, Article 15 IV.

²³⁰ *ibid* Article 15 VI.

²³¹ *ibid*.

²³² Congress of the Union, General Law on Equality between Women and Men 2006, Article 31 XII.

²³³ Labour Law, Article 133 XIII.

²³⁴ *ibid*, Article 994 VI.

Now, with the 2019 Labour Law Reform, the Mexican legislation obliges employers to implement, with the participation of workers, a protocol to prevent gender-discrimination, violence and SHWP²³⁵. The legal instrument does not provide a catalogue with the minimum requirements that the protocol must contain, nor have the authorities to this date, issued a guideline on the design of said protocols²³⁶. The Mexican legislation, and the authorities leave the design of SHWP and discrimination policies and protocols to employers, including businesses. Such omission from the State to provide a basic guideline regarding the content of protocols and policies, may lead to their weak instrumentalization, deficient measures, or even to the development of documents that will be considered as tokenisms. Additionally, such legislative and administrative omissions, allow employers to not even comply with the minimum standards set forth in the 190 Convention and its Recommendation, which as this essay has demonstrated are essential to prevent SHWP.

Moreover, the Mexican government took additional steps to prevent SHWP by issuing the non-binding Norm NMX-R-025-SCFI-2015 for Labour Equality and Non-Discrimination. The norm's main purpose is to set forth a series of requirements so employers in general, including businesses, can obtain a certificate that proves that they have implemented non-discrimination policies and practices in the workplace.²³⁷ The certification consists of a due diligence process in which employers prove they have developed policies, and have taken certain measures to prevent discriminatory practices in the workplace²³⁸. The process depends on a scoring system; the employer receives a score that relies on the compliance of compulsory requirements and other non-compulsory requirements. If the employer receives a passing score they can obtain the certification²³⁹. However, SHWP policies and protocols are not amongst those compulsory requirements. Hence, the employer can still obtain the certification without taking the necessary measures to prevent SHWP.

²³⁵ *ibid*, Article 132 XXXI.

²³⁶ The Ministry of Interior with the National Women's Institute issued a Protocol for the prevention, attention and sanctions in cases of SHWP. However, such instrument is only applicable to the national governmental entities. For more see: Ministry of Interior, Protocol for the prevention, attention, and sanctions in cases of SHWP 2016.

²³⁷ Ministry of Economy, 'Norm NMX-R-025-SCFI-2015 for Labour Equality and Non-Discrimination' (2015).

²³⁸ *ibid*.

²³⁹ *ibid*.

Additionally, the Ministry of Labour and Social Welfare issued the Norm NOM-035-STPS-2018 for the identification, analysis and prevention of psychosocial risk factors at work and promotion of positive organizational environment in the workplace²⁴⁰ (“NOM-035” for its acronym in Spanish). The later, obliges employers to identify, analyse, adopt and record measures to prevent psychosocial risk factors, identify employees who are have been subject to severe traumatic events due to their functions, and to adopt measures to prevent VHWP²⁴¹. The NOM-035 seems as a ground-breaking instrument that advances worker’s rights, and the right be free from VHWP, including gendered-based VHWP. Nevertheless, when defining VHWP, the NOM-035 explicitly establishes that for the purposes of the norm, SHWP is not to be considered.

The Mexican legislation recognises that it is the employers’ obligation, including businesses, to prevent gendered-based VHWP. Furthermore, the Labour Law takes further steps to prevent SHWP, by obliging employers to implement protocols to prevent discrimination and gendered-based VHWP including SHWP. However, the fact that the NOM-035 does not consider SHWP as violence in the workplace, and does not recognise that SHWP can lead to traumatic events or psychosocial risks, would not only violate the 190 Convention and its Recommendation if Mexico where to ratify the international legal instrument, but also demonstrates that the Mexican State is reluctant to acknowledge that SHWP is an issue that needs to be addressed at every level and in every opportunity.

The lack of regulation and guidelines that should provide employers with the minimum criteria that protocols must comply with, and the establishment of a voluntarily certification that does even requires that employers prevent SHWP, demonstrates that the Mexican State does not intend to prevent SHWP. Let alone does it demonstrate, that the State recognises that SHWP constitutes structural violence against women, and needs urgent transformative changes. On the contrary, measures such

²⁴⁰ Ministry of Labour and Social Welfare, ‘NOM-035-STPS-2018 Norm for the identification, analysis and prevention of psychosocial risk factors at work and promotion of positive organizational environment in the workplace’ (2018).

²⁴¹ *ibid* [5].

as the NOM-035, seem to leave SHWP as a secondary issue that businesses should address themselves voluntarily, and according to their own discretion.

Preventing SHWP might be interpreted by businesses as a mere social responsibility, and not as a legal obligation, and in worst cases, as a mere tokenism to appear as businesses that consider gender issues in their operations.

5.3.2. The Labour Conciliation Mechanism

The Labour Conciliation Mechanism is a mandatory prejudicial conciliation procedure that employees and employers must exhaust before going to the labour judicial instance.²⁴² However, in cases of SHWP, discrimination on the basis of sex, sexual orientation, religion, ethnical origin, social condition, the Labour Law recognises that the grievance mechanism is optional, and victims can choose to present their claims directly before labour tribunals.²⁴³

In that vein, the Mexican legislation establishes a State-based non-judicial mechanism, which can be considered within the procedural remedies in both 190 and its Recommendation, and the UNGPs. Nevertheless, the grievance mechanism must comply with a series of criteria to be adequate and effective. Thus, this section will assess the Labour Conciliation Mechanism according to the UNGPs effectiveness criteria, gender-imbalances, the possibility of gender-transformative remedies, and it will include the specific measures established in the Violence and Harassment Convention and its Recommendation.

- a. The application of the UNGPs effectiveness criteria.

- i. *Legitimate*

²⁴² Labour Law, Article 684-B.

²⁴³ *ibid*, Article 685 Ter.

With the 2019 Labour Law reform, the Mexican State created the Local Conciliation Centres. These Centres are the authorities in charge of substantiating the conciliation claims submitted by victims of SHWP.²⁴⁴ Each Local Conciliation Centre is a decentralized public entity, with its own legal personality and patrimony, as well as with technical, operative, budgetary, decisional autonomy.²⁴⁵ According to the Labour Law, each centre will function according to the principles of certainty, legality, impartiality, equality, efficiency, objectivity, professionalism and transparency.²⁴⁶ In that vein, the Labour Law sets forth a series of criteria to ensure that the State-based non-judicial mechanism complies with a degree of operational autonomy from government functions .

Now, each Local Conciliation Centre will have a governing body that will be integrated by authorities from distinct public organisms and entities.²⁴⁷ These governing bodies will have the responsibility to preserve the Local Conciliation Centre's technical, operative, budgetary and decisional autonomy²⁴⁸. Governing bodies have specific responsibilities: to approve job vacancies for possible conciliators, as well as the development of guidelines for the selection of the conciliators²⁴⁹, and the designation of conciliators.²⁵⁰ However, governing bodies, will not be entities in charge of overseeing the Local Conciliation Centres' operation, nor will they revise if the centres operate according to their principles.

In connection with possible conflicts of interest that might arise in the Labour Conciliation Mechanism, the Labour Law only requires conciliators to abstain from testifying or to legally represent those who participated in a conciliation procedure in further judicial procedures.²⁵¹ Unlike judges in judicial labour procedures, there are not legal impediments that limit conciliators to participate in procedures in which they might have a conflict of interest.

²⁴⁴ *ibid.*, Article 684-B.

²⁴⁵ *ibid.*, Article 590-F.

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

²⁴⁸ *ibid.*

²⁴⁹ *ibid.*, Article 684-S I-III.

²⁵⁰ *ibid.*, Article 684-U.

²⁵¹ *ibid.*, Article 684-H V.

The Labour Law does refer to the autonomous and independent mandate of the local Conciliation Centres. Nevertheless, the legislation does not mention certain requirements that are needed for the mechanism to be considered legitimate. Local Conciliation Centres should have a revising body, such as the governing bodies, that have specific mandates to receive complaints about the matter in which the mechanism discharges its functions²⁵². Governing bodies should also review cases of possible conflict of interests between the parties in the conciliation procedure²⁵³, and they should be allowed to issue periodic reviews, to provide the Local Conciliation Centres advice on how they can improve their performance.²⁵⁴ Otherwise, the Labour Conciliation Mechanism will have a weak implementation; it will not enable trust from stake holders, and with no revising body, the mechanism cannot be accountable for a fair conduct.

ii. Accessible

As mentioned previously, the Labour Conciliation Mechanisms to this day has not been implemented. Hence, certain requirements to assess its accessibility are beyond the scope of this essay. For instance, it is not possible to review if the State has raised awareness amongst right holders about the existence of the mechanism, nor information regarding their physical accessibility.

The Labour Law does refer to financial assistance for victims that go before the Labour Conciliation Mechanism. Firstly, the Local Conciliation Centres have the obligation to provide free legal aid, and information about the period of limitations about the available avenues, to those who wish to submit a conciliation claim.²⁵⁵ Secondly, the Labour Defence Attorney, the authority in charge of the legal representation of workers, has amongst its duties, to assist the Conciliation Centres in providing workers with free²⁵⁶ information and orientation regarding the Labour Conciliation Mechanism²⁵⁷. In

²⁵² Remedy Report Annex Part II 6.2.

²⁵³ *ibid* 6.6.

²⁵⁴ *ibid* 6.5.

²⁵⁵ Labour Law, Article 684-E.

²⁵⁶ *ibid*, Article 534.

²⁵⁷ *ibid*, Article 530 V.

that vein, the mechanism provides for victims that go before the Labour Conciliation Mechanism with free legal aid to elaborate their claim and substantiate the mechanism.

However, the Labour Law is limited in enabling claimants with a process that is designed to be user-friendly, or that enables them to access the mechanism in a matter that is most convenient to them.

²⁵⁸ The victims that choose to go before the Labour Conciliation Mechanism can attend personally to submit their claims²⁵⁹ or submit them electronically²⁶⁰. It is compulsory that claimants assist the conciliation hearing personally.²⁶¹ However, the claimant is not allowed to attend the hearing by means of a legal representative, whereas the employer might be given the choice to attend personally or by means of their legal representative²⁶². Now, in cases in which the claimant does not attend the conciliation hearing personally, the matter will be filed, giving the claimant the opportunity to present a new claim.²⁶³ In that vein, it is clear that the Labour Conciliation Mechanism is not user friendly, nor does it enable claimants to participate in the process in the matter in which is most convenient to the. The Labour Conciliation Mechanism could establish that the claimants can substantiate the hearing by means of their legal representatives, by telephone, instead of obliging the employer to attend the conciliation centres facilities.

The Labour Law establishes that victims of SHWP have a month as a period of limitation to present their conciliation claims.²⁶⁴ In that vein, the Mexican legislation does not set a period of limitations in accordance to the nature and severity of the human rights violation, as well as the remoteness and particular situations of the victims.²⁶⁵

Finally, the Labour Law establishes that the information that is to be presented by the parties in the Labour Conciliation Mechanism cannot be provided to any third party or any other authority that is

²⁵⁸ Remedy Report Annex, Part II 7.4-7.5.

²⁵⁹ Labour Law, Article 684-E I.

²⁶⁰ *ibid*, Article 684-E II.

²⁶¹ *ibid*, Article 684-E VII.

²⁶² *ibid*.

²⁶³ *ibid*.

²⁶⁴ *ibid*, Article 517.

²⁶⁵ Remedy Report Annex, Part II 7.8.

not party to the procedure.²⁶⁶ Moreover, the Labour Law protects the identity and personal information of those participating in the process by establishing that such information shall be protected in the term of by the Law on the Protection of Personal Data and the Federal Law of Transparency and Access to Public Government Information²⁶⁷. In that vein, the Labour Law protects the confidentiality of the private information by the domestic law regimes on privacy, that establish the protection of sensitive data. However, it does not establish any other measures to protect victims of SHWP from further violence and harassment. The Labour Law should be interpreted and applied in conjunction with the Women's General Law that establishes that the name of the victim by no means should be made public, to avoid revictimization.²⁶⁸

iii. Predictable

The Labour Law does set a clear procedure, indicative of time frames and the available outcomes. First, the Labour Law establishes the precise elements that the claim must comply with.²⁶⁹ Secondly, the Mexican legislation sets forth that the procedure might not exceed of forty-five calendar days, and that the conciliators should take appropriate measures to resolve within such a term.²⁷⁰ However, the legislation does not establish what exactly proceeds in those cases in which there is no conciliation, or in which the necessary stages of the procedure have not taken place within the forty-five day timeframe. Thirdly, the Labour Law establishes two possible outcomes of the conciliation procedure; i) there is no settlement, and thus, the conciliator will end the conciliation instance²⁷¹, and ii) if there is an agreement, there is no need to ratify the agreements and the parties may demand for its execution before the labour tribunals.²⁷²

iv. Equitable

²⁶⁶ Labour Law, Article 684-C.

²⁶⁷ *ibid.*

²⁶⁸ Women's General Law, Article 15 IV.

²⁶⁹ Labour Law, Article 684-C.

²⁷⁰ *ibid.*, Article 684-D.

²⁷¹ *ibid.*, Article 684-E VIII.

²⁷² *ibid.*, XIII.

The Labour Conciliation Mechanism, even if it seeks that employees have access to sources of information, advice and expertise through conciliators and the Labour Defence Attorney, the Labour Law does not provide an equitable participation of employers and employees. As mentioned previously, claimants are not allowed to attend the hearing by means of a legal representative, whereas the employer might be given the choice to attend personally or by means of their legal representative²⁷³. In cases of SHWP, where there is an imminent risk of revictimization, the conciliator may establish certain measures in order to avoid a meeting with the victim and the harasser. In such cases, the conciliation procedure shall take place with a representative of the harasser, avoiding the victim and the alleged perpetrator to meet.²⁷⁴ Hence, both of the parties to the procedure are not in equitable circumstances. The employer is given certain advantage when the law provides them with the opportunity to attend personally, while employees who may be victims of gendered-based VHWP are obliged to assist hearings that may lead to revictimization.

Now, once the claim is presented by the employee, the employer must present a preliminary conciliation agreement, providing several just solutions.²⁷⁵ However, the Labour Law does not establish if the employee, including victims of gendered-based VHWP, have the opportunity to comment on such points and present their adjustments. Thus, it seems as if the employer has the final decision on the points that the conciliation agreement contains, leaving the victim with the only option to decline or accept their terms and conditions.

v. *Transparent*

The Labour Law establishes that once a Local Conciliation Centres receives the conciliation claim, it assigns an identification number, and an electronic mailbox. Through such system, the claimant and the other party will have access to all the communications concerning the Labour Conciliation

²⁷³ *ibid.*

²⁷⁴ *ibid.*

²⁷⁵ *ibid.*, VIII.

Mechanism.²⁷⁶ Thus, in the Labour Conciliation Mechanism, the authority keeps parties to the grievance informed about its progress in an accessible matter.

Nevertheless, the Labour Law does not provide any mechanism that provides sufficient information about the mechanism's performance. These sorts of mechanism are necessary to build confidence in its effectiveness, and to meet public interest. Therefore, to meet the transparency criteria, it is not enough that parties to the grievance mechanism have access to their file electronically, but the Mexican State should take steps to disseminate periodic reports on the mechanism's activities and performance, with the type of complaints it receives, the percentage of cases successfully resolved, and common challenges.²⁷⁷

vi. Rights-compatible.

The Mexican labour legislation, and specifically the Labour Conciliation Mechanism does not ensure outcomes and remedies according with internationally recognized human rights when it comes to redressing SHWP. In order for State-based non-judicial mechanisms to be rights-compatible, they should exercise their mandates and functions, in a matter that promotes equal and effective access to justice, provides adequate effective and prompt reparation for the harm suffered; as well as access to information concerning violations and reparation mechanisms²⁷⁸.

In that vein, in cases of gendered-based VHWP, State-based non-judicial mechanisms should comply, at the minimum, with the measures and forms of reparations established in the 190 Convention and its Recommendation. Meaning, for the Labour Conciliation Mechanism to be rights-compatible in cases of SHWP, it should establish measures to protect against retaliation, the provision of medical and administrative support, and it should consider interim measures, such as the right of victims to remove themselves from the work situation in which they have the justification to believe

²⁷⁶ *ibid*, V and VIII.

²⁷⁷ Remedy Report Annex, Part II 10.3.

²⁷⁸ *ibid* Part II 11.2.

presents a risk. Now, the Women's General Law establishes that in cases of SHWP, the judiciary should provide free psychological support to victims.²⁷⁹ In that sense, the conciliators even if they are not a judicial body *per se*, they should still apply the Women's General Law to provide victims with all the necessary legal and medical support they require.

The Labour Law or any other Mexican law, do not mention those crucial measures that need to be considered to provide victims of SHWP with a proper and effective procedural remedy, nor do they establish any forms of reparation that are not economic sanctions for employers. As reviewed in previous sections, reparations in cases of SHWP should include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Mexican legislation does not consider any other forms of substantive reparations. Thus, a State-based non-judicial mechanism by no means can be rights-compatible, if it does not even set forth all the forms of reparations that victims may seek in order to redress human rights violations.

Moreover, according to the Labour Law, conciliators must have acquired knowledge in subjects regarding human rights law and a gender perspective.²⁸⁰ However, such requirement does not ensure that conciliators will not trivialize conflicts that involve gendered-based VHWP, and does not provide conciliators with possibility to conduct their mandate with a gender perspective by establishing special measures that are not recognised in the Labour law. For instance, the Labour Law does not authorise conciliators to undertake an assessment to determine if the grievance mechanism is appropriate for particular cases of gendered-based VHWP, nor to determine certain interim measures that are needed to avoid revictimization.

Moreover, conciliators may evaluate the parties proposed conciliation agreements, and provide a range of options on the matter in which the conflict may be resolved, but they cannot impose such

²⁷⁹ General Women's Law.

²⁸⁰ Labour Law, Article 684-G.

options on the parties.²⁸¹ However, there is no assurance that the conciliator will suggest all forms of reparations if they are not even mentioned in the Labour Law.

Now, the Labour Law establishes that the Labour Conciliation Mechanism is an optional avenue for victims of SHWP to obtain redress. Nevertheless, said law overlooks the establishment of necessary, or even the minimum standards that are needed to address gender imbalances in the procedure, as well as to provide gender-transformative reparations.

In connection with gender imbalances, the provision in the labour legal instrument that foresees the possibility to implement measures to avoid that the victim and the alleged perpetrator to meet, cannot be considered as a means to address gender imbalances. This measure does not even provide the victim with the possibility to access the mechanism through a representative to avoid revictimization. On the contrary, it obliges the victim to go through the procedure with almost no protective measures. As if the latter were not enough, the procedure privileges the perpetrator may be excluded from the conciliation as if they were exempted from any responsibilities. The Mexican labour legislation, with such a provision may seem as it were seeking to address gender imbalances that might arise in the procedure. However, such provision is limited and overlooks that there is a range of measures that can be taken to address gender-imbalances.

Furthermore, conciliators may have knowledge in subjects that concern human rights and gender issues. However, a general knowledge on the subjects does not disregard the power and gender indifference that might derive from basic societal differences men and women. Thus, there is no guarantee that a conciliator may be biased to suggest effective and necessary forms of reparations, when it comes to gendered-based VHWP.

Furthermore, the Labour Law does not even mention means of individual substantive reparation, let alone does it leave opportunity for gender-transformative remedies, such as guarantees of non-

²⁸¹ *ibid.*

repetition. Such guarantees of non-repetition should be considered to change the condition within an organization that allows SHWP and gendered-based discrimination. Without gender-transformative remedies SHWP will not be fully addressed, prevented nor repaired.

vii. A source of continuous learning.

Finally, it is impossible to assess if the Labour Conciliation Mechanism is a source of continuous learning, drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms. The Labour Conciliation Mechanism has not yet been implemented, but as mentioned previously, the Labour Law does not establish any mechanisms or governing bodies that monitor and evidence the flaws of such grievance mechanism.

b. The effectiveness of the Labour Conciliation Mechanism.

In that vein, it is possible to conclude that the Labour Conciliation Mechanism does not comply with none of the UNGPs' effectiveness criteria in their totality, nor with the remedies established in the I190 Convention and its Recommendation. However, this essay has showed that even if a State-based non-judicial mechanism does comply with certain requirements, if the mechanism overlooks certain criteria, the mechanism is ineffective in overall. For instance, even if a mechanism where rights-compatible, if it is not accessible the mechanism will be ineffective. There is no purpose on a mechanism that provides substantive reparations, if victims cannot access them.

However, the Labour Conciliation Mechanism has showed that most importantly that a State-based non-judicial mechanism that pretends to remedy cases of SHWP must be first and foremost: rights-compatible. Firstly, the Labour Conciliation Mechanism is not effective, since it does not consider the most crucial and basic measures that are needed to remedy gendered-based VHWP, as those set forth in the 190 Convention and its Recommendation. The Mexican legislation when it comes to reparations, merely focuses on economic sanctions for employers, and not even on individual forms

of reparation for victims of SHWP. The Labour Law does not consider that victims of gendered-based VHWP need special support and protection to go forward with their claims, and seek redress.

Secondly, the labour grievance mechanism, which intends to remedy gendered-based VHWP, does not consider gender-imbalances but in a very subtle way trivializes SHWP. The Mexican legislation sets forth only one measure which is poorly designed, as it leaves the conciliator to decide whether the harasser should participate directly in the process, and leaves out the victim in any decision-making in whether or not this measure is viable in the case.

Finally, the Labour Conciliation Mechanism, leaves no space for gender-transformative reparations. To redress gendered-based VHWP, a human rights violation that arises from structural gender inequalities based on power relationships, it is imperative to provide gender-transformative reparations. It is necessary to seek structural changes to these inequalities within organizations: the implementation of policies to prevent gendered-based VHWP, measures to avoid subjective authority and gender segregation practices. However, it must be acknowledged organizational and societal intolerance towards SHWP is the first and foremost gender-transformative form of reparation.

6. Conclusion.

This essay has examined that the 190 Convention and its Recommendation are necessary international legal instruments that need to be ratified and implemented by the ILO State members. Gendered-based VHWP is a cross-cutting issue that involves both States and employers, including businesses, and action must be taken to prevent and redress such conducts that lead to several human rights violations. Nevertheless, several gaps can still be found in the content of the 190 Convention and its Recommendation, especially those that involve organizational changes to avoid perpetrating SHWP. Additionally, this essay demonstrates that gendered-based VHWP, including SHWP has a detrimental effect on businesses and victims. Hence, businesses have the possibility to adopt and integrate the UNGPs to their operations to avoid human rights impacts. Therefore,

businesses can apply the UNGPs, especially those that seek to prevent impacts through in place policies and processes appropriate to their size and circumstances. Moreover, when SHWP takes place, it is crucial that victims have access to a range of avenues to seek redress. However, said avenues have to comply with certain criteria to be considered as effective means of redress.

Now, the Mexican legislation that seeks to address SHWP is a weak, in both content and its implementation. First of all, its definition is narrow, and developed in a matter that leaves almost no opportunity for victims to access remedies. Second, the measures to prevent SHWP are limited, and proves that the Mexican State is reluctant to address SHWP as a cross-cutting issue that needs the implementation of exhaustive measures for its prevention. Third, the Labour Law evidences that State-based non-judicial mechanisms need to comply with an extensive set of criteria to be effective. The Mexican law does not in a way comply with the 190 Convention and its Recommendation. Particularly, by applying the UNGPs' effective criteria, and assessing the Labour Conciliation Mechanism with such criteria, this essay has proved that said mechanism by no means complies with either the 190 Convention and its Recommendation, nor with the UNGPs.

However, once thing is evident: SHWP needs to be redressed through gender-transformative remedies. Gender-transformative remedies should challenge the structural gender inequality in the workplace, and the matter in which organizations perpetrate such inequalities through their way of operating. State-based non-judicial mechanisms, including the Labour Conciliation mechanism merely, or not even at, leave any opportunity for such form of redress.

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