



## **Saar Blueprints**

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Effectiveness of International Human Rights  
Law in Protecting Women against Domestic  
Violence – Comparison of Global and  
Regional Mechanisms



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## **Preface**

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## Abbreviations

<b>ACHR</b>	American Convention on Human Rights
<b>African Charter</b>	African Charter on Human and People Rights
<b>African Commission</b>	African Commission on Human and People's Rights
<b>AU</b>	African Union
<b>African Court</b>	African Court on Human and Peoples' Rights
<b>Belém do Pará Convention</b>	Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women
<b>CAHVIO</b>	Ad Hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>CEDAW Committee</b>	Committee on the Elimination of Discrimination Against Women
<b>CIM</b>	Inter-American Commission of Women
<b>CoE</b>	Council of Europe
<b>CSW</b>	Commission on the Status of Women
<b>DEVAW</b>	Declaration on the Elimination of Violence against Women
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>EDVAW Platform</b>	Platform of Independent Expert Mechanisms on Discrimination and Violence against Women
<b>EU</b>	Europe Union
<b>GR19</b>	CEDAW Committee General Recommendation 19: Violence against women of 1992
<b>GR 35</b>	CEDAW Committee General Recommendation 35: Gender-Based Violence against Women, Updating General Recommendation No. 19 of 26/07/2017
<b>GREVIO</b>	Group of Experts on Action against Women and Domestic Violence
<b>IACHR</b>	Inter-American Commission on Human Rights
<b>IACtHR</b>	Inter-American Court on Human Rights
<b>IHRL</b>	International Human Rights Law
<b>IPV</b>	Intimate Partner Violence

<b>Istanbul Convention</b>	Convention on preventing and combating violence against women and domestic violence
<b>Maputo Protocol</b>	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
<b>MESECVI</b>	Mechanism to Follow-Up on Implementation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women
<b>NGOs</b>	Non-governmental organizations
<b>OAS</b>	Organization of American States
<b>OAU</b>	Organisation of African Union
<b>OP-CEDAW</b>	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women
<b>UN</b>	United Nations
<b>UNGA</b>	United Nations General Assembly
<b>UN SRVAW</b>	United Nations Special Rapporteur on violence against women, its causes and consequences
<b>UDHR</b>	Universal Declaration of Human Rights
<b>VAW</b>	Violence Against Women
<b>WHO</b>	World Health Organization

## A. Introduction

Throughout history women have been deprived of their rights and submitted to violence in their public and private life. This gendered violence has its roots in the structural discrimination suffered by women on the basis of sex. Today, gender-based violence – in all its manifestations - remains a grave problem that threatens women’s human rights daily and very often systematically, both in times of war and peace.<sup>1</sup>

The private environment is also the scene of many abuses against women that often are perpetuated in the name of privacy and the family’s autonomy. Significantly, domestic violence is widespread worldwide and in an overwhelming number of cases the victims are women. This is a direct consequence of the patriarchy that often uses violence to perpetuate power relations as a mechanism of social control over women. Moreover, domestic violence is a major public health issue that may result in serious physical or psychological harm, being one of the main reasons why women lose healthy life years.<sup>2</sup>

Furthermore, although in some countries domestic violence is seen in a more brutal manner and despite the fact that different factors may trigger it, the issue affects women throughout the world, regardless of social class, race or religion. According to the World Health Organization, globally around 30% “*of all women who have been in a relationship have experienced physical and/or sexual violence by their intimate partner*”<sup>3</sup>. In addition, in times of crises these figures are even higher. For instance, since the beginning of the current COVID-19 global pandemic, in which more than half of the global population were submitted to confinement conditions, the number of domestic violence cases reported has significantly increased in many countries.<sup>4</sup> Notably, the data available on gender-based violence is only partially reliable, since for different reasons the issue is highly underreported.

Violence against women (“VAW”) has had different legal treatments over time, both on the domestic as well as at the international level, following the logic of distinct sociocultural contexts. The recognition of domestic violence as a human rights issue was not a simple process and only emerged in the early 1990s resulting from the pressure of the feminist movement. Since then, the international legal protection for gender-based violence has been improving and much has been achieved. Nevertheless, despite all the achievements, violence

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<sup>1</sup> *Peters/Wolper*, Introduction, in: Peters/Wolper (eds.), *Women’s Rights, Human Rights: International Feminist Perspectives*, 2018, p. 1.

<sup>2</sup> *Helweg-Larsen*, *Violence Against Women in Europe: Magnitude and the Mental Health Consequences Described by Different Data Sources*, VAWMH 2013, p. 54.

<sup>3</sup> [https://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625\\_eng.pdf?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625_eng.pdf?sequence=1) (02/11/2020).

<sup>4</sup> <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf?la=en&vs=5006> (02/11/2020).

against women still “*remains pervasive in all countries of the world, with high levels of impunity*”<sup>5</sup>.

Therefore, this thesis aims to analyse the effectiveness of international human rights law (“IHRL”) in protecting women against violence, especially the domestic violence committed by men against women. For that reason, the subject is assessed through a comparative approach of different international human rights systems around the world - considering their mechanisms and jurisprudence.

Section B describes a brief background of women’s human rights protection within the international community, and how gender-based violence became recognized as a human rights violation. It also explains the different terminologies used and the different facets by which domestic violence can be manifested. Finally, it discusses the challenges faced by the issue, in particular the relation of the public-private dichotomy theory with the topic and some of the reasons why these abuses are underreported.

Sections C and D are dedicated to the analyses of the different human rights systems. First, Section C considers the United Nations and its Convention on the Elimination of Discrimination Against Women. Then, in D the issue will be tackled in the light of regional human rights mechanisms: Organization of American States (Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women), Council of Europe (Istanbul Convention) and African Union (Maputo Protocol). Although there are other regional organizations tackling VAW, such as the League of Arab States and the Association of Southeast Asian Nations, the regional human rights systems here analysed were chosen for being more developed.

In addition, Section E exposes the convergences and divergences between these legal systems, assessing how they can learn from and reinforce each other. Despite the particularities of each region, human rights are universal rights, which justifies the comparison of different international and regional legal jurisdictions, seeking a better interpretation and application of values.<sup>6</sup>

Finally, Section F discusses the thesis’ conclusions, analysing as to whether IHRL has been effective in combating domestic violence.

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<sup>5</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 35: Gender-Based Violence against Women, Updating General Recommendation No. 19* of 26/07/2017, UN Doc. CEDAW/C/GC/35.

<sup>6</sup> *Fredman, Comparative Human Rights Law*, 2018, p. 6.

## B. International Protection of Women's Human Rights and Violence Against Women

### I. International Legal Framework Chronology

Women's struggle to make their rights recognized and to achieve gender equality has always been present in world history. At the international level, legal instruments representing this battle started to become more frequent with the establishment of the United Nations ("UN"). Since its constitutive Charter<sup>7</sup> in 1945, the organization has already indicated its concern with gender discrimination and its aim to promote equality.<sup>8</sup> In particular, the UN Charter encourages the respect, promotion, observance and realization of human rights and fundamental freedoms to everyone "*without distinction as to [...] sex*" (article 1 (3), article 13 (2), article 55 (c) and article 76 (c)). Shortly after, in 1946, the UN Economic and Social Council established the Commission on the Status of Women ("CSW") as a global intergovernmental body to be responsible for "*promoting women's rights in political, economic, social, and educational fields*"<sup>9</sup>. Consequently, the effects of CSW's contributions can already be observed in the Universal Declaration of Human Rights<sup>10</sup> ("UDHR") that was adopted in 1948,<sup>11</sup> in which the Commission achieved a broader and more inclusive vocabulary for the document's text, changing the initial genders mentioned from solely 'men' to 'human being' or ensuring the use of both 'men' and 'women'.<sup>12</sup> In addition, in article 2 the UDHR reinforced the gender discrimination concerns already expressed in the UN Charter and stated that the rights and freedoms present in the declaration are inherent to everyone, without any distinction, "*such as [...] sex*".

However, both above-mentioned instruments, even though important and significant, did not sufficiently address women's rights.<sup>13</sup> Later, in the 1960s and 1970s other important milestones for the empowerment of women were achieved. Firstly, in 1966 two UN treaties came into being intending to better specify States' human rights obligations: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>14</sup> Both legal documents stated precisely in their article 3 that State signatories must "*ensure equal right of men and women to the enjoyment*"<sup>15</sup> of the rights protected in the

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<sup>7</sup> United Nations, Charter of the United Nations, 24/10/1945, 1 UNTS XVI.

<sup>8</sup> Hellum/Aasen, Introduction, in: Hellum/Aasen (eds.), Women's Human Rights - CEDAW in International, Regional and National Law, 2013, p. 1.

<sup>9</sup> ECOSOC, *Commission on the Status of Women*, of 21.06.1946, Res. 11(II).

<sup>10</sup> UNGA Res. 217 A (III) *Universal Declaration of Human Rights* of 10/12/1948, UN Doc. A/RES/3/217A.

<sup>11</sup> Edwards, *Violence Against Women under International Human Rights Law*, 2011, p. 76.

<sup>12</sup> Adami, *Women and the Universal Declaration of Human Rights*, 2018, p. 7.

<sup>13</sup> Miller, *Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, HHR 2004, p. 20.

<sup>14</sup> Hellum/Aasen, (fn. 8), p. 2.

<sup>15</sup> UNGA, *International Covenant on Civil and Political Rights*, 16/12/1966, UNTS 999, p. 171, article 3; UNGA *International Covenant on Economic, Social and Cultural Rights*, 16/12/1966, UNTS 993, p. 3, article 3.



treaties. Then, in 1967 the Declaration on the Elimination of Discrimination Against Women was adopted by the United Nations General Assembly (“UNGA”), demanding the States to take “*all appropriate measures [...] towards the eradication of prejudice and the abolition of customary and all other practices which are based on the idea of the inferiority of women*”<sup>16</sup>. Additionally, between 1975 and 1985 the UN declared it to be the decade of women and during this time the organization held the first three ‘World Conference on Women’, international meetings to discuss women’s human rights issues.<sup>17</sup>

Nevertheless, there was still an absence of an international treaty that addressed human rights from a woman’s point of view, tackling the inequalities and violence experienced by women “*by reason only of their being women*”<sup>18</sup>. In that context, in 1979 the Convention on the Elimination of All Forms of Discrimination Against Women<sup>19</sup> (“CEDAW”) redefined IHRL through a female perspective and it is considered to be the “*international bill of rights for women*”<sup>20</sup>. Notably, the convention was initially silent in regard to VAW and has made no express mention to the issue in the instrument,<sup>21</sup> despite later attempts to correct this gap, mainly through the General Recommendation 19 issued by the convention Committee.<sup>22</sup>

Whereas violence against women was already a major concern within the international community, as it was observed in the Third World Conference of Women in 1985 that recognized the issue as such, the theme was still diminished as a ‘women issue’, yet being necessary to remedy the lack of international legal provision addressing it.<sup>23</sup> Thus, in 1993 the UN held in Vienna the World Conference of Human Rights, in which women’s rights had a special voice and VAW was finally recognized as a human rights violation.<sup>24</sup> Consequently, in the same year the UNGA issued the resolution 48/104 named ‘Declaration on the Elimination of Violence against Women’<sup>25</sup> (“DEVAW”), under some criticisms and concerns that a non-

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<sup>16</sup> UNGA Res. 2263 (XXII) *Declaration on the Elimination of Discrimination against Women* of 07/11/1967, UN Doc. A/RES/22/2263, article 3.

<sup>17</sup> *De Tilio*, Marcos legais internacionais e nacionais para o enfrentamento à violência contra as mulheres: Um percurso histórico, RGPP 2012, p. 74.

<sup>18</sup> *Cook*, Women’s International Human Rights Law: The Way Forward, in: Cook (ed.), *Human Rights of Women: National and International Perspectives*, 1994, p.3.

<sup>19</sup> UNGA, Convention on the Elimination of All Forms of Discrimination against Women of 18/12/1979, UNTS 1249, p. 13.

<sup>20</sup> *Da Silva et al.*, A Interface entre Gênero e Direito – Entrevista com Alda Facio, CDG 2018, p. 188 et seqq.

<sup>21</sup> *Byrnes/Bath*, Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women - Recent Developments, HRLR 2008, p. 518.

<sup>22</sup> See Section C, p. 11.

<sup>23</sup> *Miller*, Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection, HHR 2004, p. 20 et seqq.

<sup>24</sup> *Marks*, Nightmare and Noble Dream: the 1993 World Conference on Human Rights, CLJ 1994, p. 59; *Boyle*, Stocktaking on Human Rights: The World Conference on Human Rights, Vienna 1993, PS 1995, p. 91.

<sup>25</sup> UNGA Res. 48/104 *Declaration on the Elimination of Violence against Women* of 20/12/1993, UN Doc. A/RES/48/104.

binding instrument could be used as an excuse by CEDAW States parties to claim that under the convention combating VAW is not a binding obligation.<sup>26</sup>

Overall, the DEVAW was the first international document that explicitly recognized VAW as human rights and fundamental freedom violation,<sup>27</sup> linking the cause and permanency of the systematic violence suffered by the female sex to the gender inequalities and women's historical subservient position to men.<sup>28</sup> Furthermore, the declaration established an agenda for action and gave a clear definition of the different ways the violation can happen.

## II. Definitions and Terminologies

According to the DEVAW (article 1), violence against women means: “*any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life*”<sup>29</sup>. Based on that, we highlight some points of this definition: first, the DEVAW considers multiple levels of violence, not limiting the scope to physical violence but also including sexual and psychological; it also defines that VAW not only happens when a harm effectively occurs, a ‘threat’ is enough to configure the violation; and finally, it expressly covers acts that take place in private life.<sup>30</sup>

The above-mentioned definition represents the international general understanding for VAW and the UN has reproduced it ever since.<sup>31</sup> For instance, in 1995 the organization held the Fourth World Conference on Women, an occasion that was adopted as the ‘Beijing Declaration and Platform for Action’<sup>32</sup>. The instrument flagged VAW as one of its twelve critical areas of concern and replicated the same definition of VAW brought by the DEVAW. Likewise, in 2012 the UNGA again used this interpretation in its Resolution 67/144 on the ‘Intensification of efforts to eliminate all forms of violence against women’<sup>33</sup>.

Moreover, the international definition of VAW also elucidates that the violation can occur in, but is not limited to, three different spheres: within the family, the general community or by the States (DEVAW, article 2). When the abuse happens in the family it is commonly called “domestic violence”. In particular, the UN explains, “*domestic violence is violence that occurs within the private sphere, generally between individuals who are related through blood*

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<sup>26</sup> *Bymes/Bath*, (fn. 21), p. 518.

<sup>27</sup> *Goldsheid*, Declaration on the Elimination of Violence Against Women, in: Smith (ed.), *The Oxford Encyclopedia of Women in World History - Vol. 2*, 2008, p.18.

<sup>28</sup> *Ertürk/Purkayastha*, Linking research, policy and action: A look at the work of the special rapporteur on violence against women, CS 2012, p. 144.

<sup>29</sup> DEVAW, (fn. 25), article 1.

<sup>30</sup> *Russo*, Violence against women: A global health issue, in Jing et al. (eds.), *Progress in Psychological Science Around the World, Vol. 2 Social and Applied Issues*, 2018, p. 242.

<sup>31</sup> *Russo*, (fn. 30), p. 242; *Edwards*, (fn. 11), p. 21.

<sup>32</sup> UNCONF. 177/20, *Beijing Declaration and Platform for Action* of 15/09/1995, UN Doc. A/CONF.177/20

<sup>33</sup> UNGA Res. 67/144, *Intensification of efforts to eliminate all forms of violence against women* of 20/12/2012, UN Doc. A/RES/67/144.

or intimacy”<sup>34</sup>. Further, domestic violence not only encompasses an intimate partner relationship, but the abuse can also be directed against children or elderly people.

Among the distinct facets of domestic violence, we draw attention to the abuses committed by a male partner or former partner against a woman; a clear and severe consequence of patriarchy. The World Health Organization (“WHO”) defines that Intimate Partner Violence (“IPV”) “refers to a behaviour by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviours”<sup>35</sup>. Although IPV is not restricted to women as victims and men as perpetrators, which means the violation per se is gender neutral, the overwhelming number of cases demonstrates an abuse committed by a male intimate partner or ex-partner against a woman.<sup>36</sup> The UN recognizes the matter as “one of the most common and least visible forms of violence against women”<sup>37</sup> that still is wrongly considered a private matter by some countries.<sup>38</sup>

In addition, IPV is a worldwide issue that occurs in all societies, indifferent of social class, religion, race or economic system, many resulting in several health and psychological consequences in women’s life, notably harsher than when men suffer the same abuse.<sup>39 40</sup> Statistics of the WHO demonstrate the gravity of the problem: 38% of all women’s murders across the world are perpetrated by male intimate partner.<sup>41</sup>

Thus, for the purpose of this paper we are going to use the terms IPV and Domestic Violence as interchangeable, but always in regard to an abusive behaviour committed by men towards women in an intimate relationship.

### III. Types of abuses

As mentioned before, IPV can take many forms and does not happen exclusively through physical assaults, but the abuser can also use different forms to establish his domination, either by sexual, economic or psychological abuses, as well as any combination of these.<sup>42</sup>

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<sup>34</sup> UNGA Res. 58/147, *Elimination of Domestic Violence Against Women* of 22/12/2003, UN Doc. A/RES/58/147, para. 1 (a)

<sup>35</sup> *Garcia-Moreno et al.*, Understanding and addressing violence against women – Intimate Partner Violence, [https://apps.who.int/iris/bitstream/handle/10665/77432/WHO\\_RHR\\_12.36\\_eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf) (02/11/2020).

<sup>36</sup> *Ibid.*

<sup>37</sup> UNGA Res. 58/147, (fn. 34), para. 1 (b).

<sup>38</sup> UNGA Res. 58/147, (fn. 34), 4 (b).

<sup>39</sup> *Jansen et al.*, Prevalence of intimate partner violence: findings from the WHO multi-country study on women’s health and domestic violence, TL 2006, p. 1267.

<sup>40</sup> *Krantz/Garcia-Moreno*, Violence against women, JECH 2005, p. 820.

<sup>41</sup> WHO, (fn. 3).

<sup>42</sup> *Lockton/Ward*, Domestic Violence, 2016, p. 7.

## 1. Physical Violence

Domestic violence very often threatens women's physical integrity. The definition of physical violence in our context involves any intentional act of force or power against women's physical integrity that results, or has the potential of resulting in physical injury, death or another harm, such as hitting, slapping, beating, burning, kicking or any other act attempted against a woman's body.<sup>43</sup> Notably, a study from the WHO shows that women that have been physically or sexually assaulted by an intimate partner have higher rates of some severe health issues.<sup>44</sup>

## 2. Psychological/Emotional Violence

Emotional abuses can be manifested in several ways, "*such as, belittling, constant humiliation, intimidation (e.g. destroying things), threats of harm, threats to take away children*"<sup>45</sup>. In these instances, women are constantly depreciated through a controlling male behaviour, involving verbal offenses and/or restrictions. As a result of emotional violence, women's self-esteem, confidence and independence are directly affected, helping to maintain the male dominance in the relationship and also interfering in the victims' decision to leave the abusive relationship.<sup>46</sup>

Psychological violence is usually more difficult to identify than physical or sexual violence,<sup>47</sup> since the abuse often starts in a subtle way and gradually becomes more serious. Nevertheless, emotional abuse is considered to be present in almost all the cases of domestic violence,<sup>48</sup> and it may have equal damaging effects for the victims, being in some situations even more harmful with long-term consequences, such as mental illness or a negative economic impact.<sup>49</sup>

## 3. Sexual Violence

Intimate-partner sexual violence happens when a man forces a woman to have sexual intercourse or any other sexual persuasion, with him or someone else, without her consent. At national levels, these violations sometimes are not completely or properly criminalized, as a result of cultural tolerance and imposition that women should be submissive to men, sex being

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<sup>43</sup> *Krantz et al.*, Intimate partner violence: forms, consequences and preparedness to act as perceived by healthcare staff and district and community leaders in a rural district in northern Vietnam, PH 2005, p. 1051.

<sup>44</sup> *Garcia-Moreno et al.*, Understanding and addressing violence against women – Intimate Partner Violence, [https://apps.who.int/iris/bitstream/handle/10665/77432/WHO\\_RHR\\_12.36\\_eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf) (02/11/2020).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Lockton/Ward*, Domestic Violence, 2016, p.10.

<sup>47</sup> *Estefan et al.*, Depression in Women Who Have Left Violent Relationships: The Unique Impact of Frequent Emotional Abuse, VAW 2016, p. 1409.

<sup>48</sup> *Krantz et al.*, (fn. 43), p. 1052.

<sup>49</sup> *Estefan et al.*, (fn. 47), p. 1399/1409.

one of their duties in a relationship, especially in a marriage.<sup>50</sup> Moreover, research indicates that intimate partners are the perpetrators in about one third of sexual abuse cases and the issue still remains in some countries not properly legally addressed as rape.<sup>51</sup> Therefore, feminist movements have been fighting for a worldwide marital rape criminalization, a fundamental step towards female independence and bodily integrity.<sup>52</sup>

#### 4. Economic Violence

IPV can also be characterized by economic abuses. Another characteristic of the patriarchal society is male dominance in the economic sphere, leading to women's financial dependence in a direct or indirect way. This dependence results in a serious barrier for women to leave an abusive relationship, which can also lead to physical or psychological health harm.<sup>53</sup>

In this context, economic violence occurs when financial sources or goods are used as a form of control in a relationship, restricting or subordinating the woman to do something.<sup>54</sup> The abuses can happen either through financial control, financial exploitation or sabotage of women's efforts to study or work.<sup>55</sup>

### IV. Challenges

#### 1. Public/Private dichotomy

The public/private dichotomy was for a long time a barrier for human rights law and remains a controversial issue. International law is based on the idea of liberal States that are independent, free and should be the primary subjects of law in this area.<sup>56</sup> Likewise, international human rights law was founded following the liberal model and therefore only States or someone representing them could be considered as a human rights violator.<sup>57</sup> At first glance these premises lead to the idea that all the acts happening within the private sphere are exempted from State control and therefore not binding at international level. However,

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<sup>50</sup> *Venkatehsh/Randall*, Normative and International Human Rights Law Imperatives for Criminalising Intimate Partner Sexual Violence: The Marital Rape Impunity in Comparative and Historical Perspective in: Randall et al. (eds.), *The Right to Say No – Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi*, p. 46 et seqq.

<sup>51</sup> *Bagwell-Gray et al.*, *Intimate Partner Sexual Violence: A Review of Terms, Definitions, and Prevalence*, TVA 2015, p. 317.

<sup>52</sup> *Venkatehsh/ Randall*, (fn. 50), p. 42 ff.

<sup>53</sup> *Adams et al.*, *Development of the Scale of Economic Abuse*, VAW 2008, p. 568.

<sup>54</sup> Sanders, *Economic abuse in the lives of women abused by an intimate partner: a qualitative study*, VAW 2015, p. 4.

<sup>55</sup> *Anitha*, *Intersectional Lens: Financial Abuse, Control, and Exploitation of Women's Productive and Reproductive Labor*, VAW 2019, p. 1855 et seqq.

<sup>56</sup> *McQuigg*, *International Human Rights Law and Domestic Violence: The Effectiveness of international human rights law*, 2011, p. 5.

<sup>57</sup> *Libal/Parekh*, *Reframing Violence Against Women as a Human Rights Violation: Evan Stark's Coercive Control*, VAW 2009, p. 1480.

IHRL, as an exception, opposed this rule of horizontal application “*and introduced a quasi-vertical system of state responsibility for individual rights*”<sup>58</sup>.

Nevertheless, this dichotomy is especially problematic in the context of domestic violence that for a long time was seen as an intimate life problem, in which the States should not intervene. Since the subject in some countries is still characterized strictly as a private issue, recognizing them as a human rights violation may be a challenge. Indeed, the initial interpretation of IHRL that does not consider private actors as human rights’ violators leaves domestic violence out of the scope of protection of this area.<sup>59</sup> However, the poor background of assistance States have given to women in the private sphere and the way families are structured, has over time reverberated in the inequalities observed in public relations,<sup>60</sup> which means that hierarchical gender inequalities in private relations jeopardizes women’s participation in public life.

In this sense, patriarchy is still a social system largely present in families around the world and gender stereotypes are rooted in many cultures and traditions, leading us to believe that women are naturally domestic and therefore responsible for home activities and offspring,<sup>61</sup> while men are natural family leaders. As a consequence, the position of woman in society “*is still viewed as inevitable or natural rather than as a politically constructed reality maintained by patriarchal interests, ideology, and institutions*”<sup>62</sup>. Notably, even though women nowadays have a much stronger and more active participation in public life, they still deal with stigmas, prejudices and unequal life conditions e.g. lower salaries. Hence, these family/private relations should not be analysed separately from a political nature.

Therefore, how can domestic violence be addressed under international human rights law? Firstly, although States are not directly liable for private citizen’s acts, they can be held responsible for domestic violence when systematically failing to protect women, by either not creating appropriate laws for that or not effectively applying them.<sup>63</sup> Secondly, it is also argued, although hard to measure, that States are accountable for the traditions, beliefs and customs that permeate a given society;<sup>64</sup> in other words, the structural reasons that are both the cause and consequence of domestic violence. Finally, the reframing of domestic violence as a human

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<sup>58</sup> *Edwards*, (fn. 11), p. 65.

<sup>59</sup> *Libal/Parekh*, (fn. 57), p. 1480.

<sup>60</sup> *Bunch*, Transforming Human Rights from a Feminist Perspective, in: Peters/Wolper (eds.), *Women’s Rights, Human Rights: International Feminist Perspectives*, 2018, p. 14.

<sup>61</sup> *Biroli/ Miguel*, *Feminismo e Política – Uma introdução*, 2014 p. 16.

<sup>62</sup> *Bunch*, (fn. 60), p. 14 et seqq.

<sup>63</sup> *Friedman*, *Women’s Human Rights: The Emergence of a Movement*, in: Peters/ Wolper (eds.), *Women’s Rights, Human Rights: International Feminist Perspectives*, 2018, p. 21; *Libal/ Parekh*, (fn. 57), p. 1482.

<sup>64</sup> *Libal/Parekh*, (fn. 57), p. 1483.

rights issue happened due to the feminist struggle to broaden the interpretation of State's due diligence and the characterization of the issue as a political act, like any other act of violence.<sup>65</sup>

Furthermore, there are some important precedents that reinforce the above-mentioned arguments and the UN has already in some cases expressed their concern about the issue. For instance, the CEDAW's General Recommendation 19 recognized States' responsibilities for private acts "*if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation*"<sup>66</sup>. Likewise, the DEVAW established that in order to eliminate VAW States should "*exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons*"<sup>67</sup>. In addition, the Inter-American Court of Human Rights in *Velasquez-Rodriguez v. Honduras*<sup>68</sup>, a case of forced disappearance, recognized the State responsibility for a human rights violation committed by a private actor,<sup>69</sup> "*not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it*"<sup>70</sup>.

Overall, despite these remarkable recognitions there is still a strong resistance from the States to recognize their responsibilities for actions that happened in the private sphere, since their acceptance of this would significantly increase their duties. Additionally, it is argued that human rights law, whereas not completely excluding violations against women occurring in the private sphere from its competence, rather, it focuses its aim almost strictly to cases in which a State is the direct party, using the public/private dichotomy in a timely manner to abstain from women's issue when opportune.<sup>71</sup>

## 2. Unreported cases

Another challenge related to ending domestic violence is the fact that the issue remains highly underreported to authorities and the number of victims seeking help from health professionals is significantly low.<sup>72</sup> According to the UN, only 40% of women victims of violence seek help, and only 10% seek police assistance.<sup>73</sup> There are several different and complex factors that account for that and here we mention some of them. Firstly, since these violations

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<sup>65</sup> Morgaine, "You Can't Bite the Hand..." Domestic Violence and Human Rights, AJWSW 2009, p. 32; García-Del Morala/ Dersnah, A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship, CS 2014, p. 661 et seqq.

<sup>66</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence against women* of 1992, UN Doc. A/47/38, para. 19.

<sup>67</sup> DEVAW, (fn. 25), art. 4 (c).

<sup>68</sup> Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, (Ser. C) No. 4, 29/07/1988.

<sup>69</sup> Morgaine, (fn. 65), p. 32.

<sup>70</sup> Inter-American Court of Human Rights, (fn. 68), para. 172.

<sup>71</sup> Edwards, (fn. 11), 69.

<sup>72</sup> Yamawaki *et al.*, Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship With Her Abuser, and the Decision to Return to Her Abuser, JIV 2012, p. 3206.

<sup>73</sup> <https://unstats.un.org/unsd/gender/worldswomen.html> (02/11/2020).

take place within a domestic environment, many women who pass through it believe this is normal, an intrinsic part of their lives, which means many times they do not even realize they are in a situation of IPV and therefore do not seek help, believing that nothing can be done on their behalf.<sup>74</sup> This lack of knowledge is due to cultural traditions, norms and social beliefs that perpetuate women's subordination to men, thereby helping to maintain violence against women. Secondly, the victim of domestic violence is very often considered guilty for causing the perpetrator's violent act. As a consequence, fearing to be criticized or blamed, many victims do not report the abuses and this also reinforces a self-blaming feeling, making it more difficult to overcome what happened.<sup>75</sup> In addition, other reasons for the victim's silence may also include concerns with child safety, economic dependence and fear of the abuser being even more violent.<sup>76</sup>

To sum up, victims of domestic violence face many barriers to leave the abusive relationship and seek help. Therefore, it is important to diminish the social intolerance and prejudices that permeate the issue through public policies that educate society as well as to raise awareness of the legal remedies and health assistance available.<sup>77</sup>

## **C. Global Mechanism – United Nations and The Convention on the Elimination of All Forms of Discrimination Against Women (1979)**

### **I. CEDAW Overview**

As previously mentioned,<sup>78</sup> the Convention on the Elimination of All Forms of Discrimination Against Women is the first binding international treaty that condemns discrimination against women, both in public and private. The convention promotes women's rights by seeking gender equality, while it represses all kind of discrimination against women that may occur in the States parties.<sup>79</sup> Therefore, the CEDAW is a landmark instrument of women empowerment throughout the world and it is considered to be the women's *Magna Carta*.<sup>80</sup>

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<sup>74</sup> *Hegarty et al.*, Effect of Type and Severity of Intimate Partner Violence on Women's Health and Service Use: Findings From a Primary Care Trial of Women Afraid of Their Partners, *JIV* 2013, p. 286.

<sup>75</sup> *Yamawaki et al.*, (fn. 72), 3206 ff.

<sup>76</sup> *Bibi et al.*, Prevalence instigating factors and help seeking behaviour of physical domestic violence among married women of Hyderabad Sindh, *PJMS* 2014, p. 124.

<sup>77</sup> *Gracia*, Unreported cases of domestic violence against women: towards an epidemiology of social silence, tolerance, and inhibition, *JECH* 2004, p. 537.

<sup>78</sup> See section B, I, p. 4.

<sup>79</sup> *Pimentel*, Convencção Sobre a Eliminação de Todas as Formas de Discriminação Contra a Mulher – CEDAW 1979, in: Frossard (ed.), *Instrumentos Internacionais de Direitos das Mulheres*, 2006, p. 14.

<sup>80</sup> *Silva et al.*, A Interface entre Gênero e Direito – Entrevista com Alda Facio, *CDG* 2018, p. 188 et seqq.



The CEDAW currently has one hundred and eighty-nine States Parties and ninety-nine signatories.<sup>81</sup> Sadly, while being a highly ratified convention, the CEDAW has received, in contrast, a great number of reservations, regularly to its core provisions, such as article 16 that addresses equality within the family relations and marriage. Additionally, these reservations are often vague and difficult to interpret, which seems to be an attempt by some States to abstain from important obligations present in the Convention.<sup>82</sup> The CEDAW Committee has already declared that some reservations are impermissible under CEDAW's article 28 (2), and the body is constantly requiring States to withdraw these reservations, both through General Recommendations, as well as while dialoguing with States Parties during the examination of their States Reports. Notwithstanding, the excessive number of reservations to the CEDAW remains a major obstacle to the enforcement of the Convention in some countries.

The preamble of the convention points out that the modification of the traditional role of men and women "*in society and in the family is needed to achieve full equality*"<sup>83</sup>, since gender stereotypes strongly impact inequalities. This is of particular importance considering that many forms of VAW that undermine women's integrity are justified by religion, traditions, customs or values. Further, convention is divided into six parts with a total of thirty articles. Part I has more generic provisions, with definitions and an agenda of obligations; Part II is dedicated to civil and political rights; Part III focuses on social, cultural and economic equality; Part IV discusses legal equality; Part V is related to the monitoring Committee; and Part VI has the final provisions.<sup>84</sup>

Despite the undoubted value of the CEDAW, the convention's original text does not categorically consider gender violence as a form of discrimination against women, with no express mention of it in the whole convention. Thus, it is clear the initial focus of the instrument was to tackle discrimination in public life, with little attention to women's private sphere.<sup>85</sup> This neglect considerably limits the protection guaranteed by the treaty, since at first it leaves out of its regulation one of the most serious structural discriminations suffered by women worldwide.

Nevertheless, this absence can be explained if we consider the general understanding of VAW within the international community by the time the CEDAW was established – when the issue was not yet fully recognized as a human rights violation. Moreover, it is argued that international actions aiming to combat VAW would only be possible after women's equality has

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<sup>81</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (02/11/2020).

<sup>82</sup> Keller, *The Impact of States Parties' Reservations to the Convention on the Elimination of All Forms of Discriminations Against Women*, MSLR 2014, p. 316.

<sup>83</sup> CEDAW, (fn. 19), preamble.

<sup>84</sup> Chinkin/Freeman, Introduction, in: Freeman et al. (eds.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women – A Commentary*, 2012, p. 8.

<sup>85</sup> Qureshi, *The Recognition of Violence against Women as a Violation of Human Rights in the United Nations System*, SAS 2013, p. 191.

been internationally accepted and formally recognized as a human right, thus being used as benchmark to access gender-based violence.<sup>86</sup>

Later there have been some attempts to amend this gap by the CEDAW Committee, mainly by issuing General Recommendations that extended the Convention's scope.<sup>87</sup> The decision to address VAW through a broader interpretation of the CEDAW seemed to be more appropriate than drafting a new treaty specifically for the issue, which could face resistance by member States.<sup>88</sup> Notwithstanding the above, this position is arguable and some scholars criticize the lack of normative strength of general recommendations, claiming the necessity of a new treaty with legally binding obligations addressing violence against women.<sup>89</sup>

In this sense, in 2016 the current 'Special Rapporteur on violence against women, its causes and consequences' ("UN SRVAW"), Dubravka Šimonović, called upon submissions from civil society "*on the adequacy of the international legal framework on violence against women*"<sup>90</sup>, in order to inquire whether a new UN treaty specifically for VAW is necessary. After analysing divergent responses, in her report submitted to the UNGA the UN SRVAW concluded that "*a separate treaty would expose the existing legal framework under the Convention on violence against women to the risk of isolating provisions aimed at addressing gender-based violence against women from the structural causes of discrimination against women*"<sup>91</sup>. She also pointed out that a global implementation plan on VAW and a new optional protocol to the CEDAW could be possible responses to adapt the legal framework in question.<sup>92</sup> Hence, in 2018 the UN SRVAW created the Platform of Independent Expert Mechanisms on Discrimination and Violence against Women ("EDVAW Platform") gathering seven independent mechanisms<sup>93</sup> focused on VAW and discrimination against women, both from the UN and regional level, with the aim of joining efforts to "*[...] establish deep links between them, in order to improve implementation of the existing international legal and policy framework on violence and discrimination against women and to reinforce each mechanism's recommendations relating to observed gaps in implementation*"<sup>94</sup>. Since its creation, the EDVAW Platform's members have been meeting regularly and taking actions towards the promotion of women's human rights and the combat of VAW. Most recently, on 14 July 2020,

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<sup>86</sup> *Tomaševski*, Los derechos de las mujeres: de la prohibición a la eliminación, AA 2004, p. 5.

<sup>87</sup> See section C, II, 2., p. 15-16.

<sup>88</sup> *Qureshi*, (fn. 85), p. 192.

<sup>89</sup> *Ibid*, p. 192 et seqq.

<sup>90</sup> UNGA Res. 71/170, *Adequacy of the international legal framework on violence against women of 19/07/2017*, UN Doc. A/72/134.

<sup>91</sup> *Ibid*, para. 91.

<sup>92</sup> *Ibid*, para. 85/ para. 93.

<sup>93</sup> The seven independent experts mechanisms are: UN SRVAW; CEDAW Committee; UN Working Group on the issue of discrimination against women and girls; MESECVI; GREVIO; African Commission on Human and Peoples' Rights Special Rapporteur on the Rights of Women in Africa; and the IACHR Rapporteur on the rights of women.

<sup>94</sup> <https://www.ohchr.org/Documents/Issues/Women/SR/CooperationbetweenGlobalRegionalMechanisms.pdf> (02/11/2020).

the EDVAW Platform issued a statement on “*Covid-19 and the increase in violence and discrimination against women*”<sup>95</sup>, requesting the States to adopt urgent measures in response to the recent pandemic crisis and the dramatic increase in domestic violence cases worldwide.

All in all, the CEDAW is an important instrument in combating VAW and the work of its Committee resulted in a strong jurisprudence in gender-based violence, thus showing the living nature of the convention.

## II. Mechanisms of Control

The Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”) is the body designated for ensuring the CEDAW’s implementation and it is composed of twenty-three experts elected by member States (CEDAW, article 17, 1.). The CEDAW Committee has mainly four duties. The first two are established by the CEDAW: the Committee analyses reports periodically submitted by State parties (CEDAW, article 18) and issues General Recommendations (CEDAW article 21, 1.). In addition, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women<sup>96</sup> (“OP-CEDAW”) is a procedural addendum that strengthened and complemented the CEDAW,<sup>97</sup> broadening the Committee’s duties through the establishment of two other mechanisms of control in the combating of discrimination against women: Individual Complaints (OP-CEDAW, article 2) and an Inquiry Procedure (OP-CEDAW, article 8).

The OP-CEDAW was adopted on 6 October 1999 and came into force on 22 December 2000, and it has currently one hundred and fourteen States Parties and eleven signatories.<sup>98</sup> The protocol is an international treaty that State parties must ratify separately from the CEDAW to be bound by its provisions. After its establishment, the CEDAW became more aligned with the other UN treaties’ monitoring systems.

### 1. States Report

The primary CEDAW monitoring mechanism is the examination of the State Reports,<sup>99</sup> in which State parties are obliged to update the Committee through regular reports concerning measures adopted regarding the implementation of the convention, achievements and challenges faced (CEDAW, article 18). Therefore, after having this overview about what has been done by the States, the Committee is able to elaborate observations and

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<sup>95</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26083&LangID=E> (02/11/2020).

<sup>96</sup> UNGA, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* of 15/10/1999, UNTS 2131, p. 83.

<sup>97</sup> Freeman, *The Convention on the Elimination of All Forms of Discrimination Against Women*, in: Reilly, (ed.), *International Women Rights of Women*, 2019, p. 101.

<sup>98</sup> <https://indicators.ohchr.org/> (02/11/2020).

<sup>99</sup> Freeman, (fn. 97), p. 99.

recommendations that may help the States to improve compliance with the Convention.<sup>100</sup>

In general, criticisms about the State Reports procedure involve allegations that the reports may be biased, since they are drafted by States that may hide important information when convenient. In addition, whilst it is argued that the procedure is too bureaucratic with a great lack of States' compliance and frequent delays in submission, there are also delays by the Committee in analysing the reports, which results in a considerable time gap between the reports' submission and their consideration, thus compromising the credibility of the procedure.<sup>101</sup>

## 2. General Recommendations

The CEDAW Committee is also entitled to make general comments to clarify substantial or procedural provisions, thus giving a deeper interpretation of the Convention on a given subject that later may help State parties to improve their reports.<sup>102</sup> The Convention provides that the Committee “*may make suggestions and general recommendations*”<sup>103</sup> based on the State Reports or other information received by the States.

So far, the Committee has developed thirty-seven General Recommendations which became an important part of the Committee's work on the CEDAW's implementation.<sup>104</sup> Despite not being a treaty, the CEDAW Committee considers General Recommendations to be authoritative statements and it is constantly ruling and referring to them.<sup>105</sup> This is a controversial issue since the General Recommendations are not treaties and were not ratified, therefore, they are not strictly binding.<sup>106</sup>

Nevertheless, it was initially through the instrument of General Recommendation that the Committee tried to redress the lack of provisions related to VAW in the CEDAW. Firstly, the General Recommendation 12<sup>107</sup> (1989) required the States to include information regarding VAW in their periodic reports to be submitted to the Committee. However, the document was limited and did not explain how VAW was part of the CEDAW's scope.<sup>108</sup> Later, the General Recommendation 19 (“GR 19”) addressed the issue more widely, adopting a new

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<sup>100</sup> *Byrnes*, The Committee on the Elimination of Discrimination Against Women, in: Hellun/Aasen (eds.), *Women's Human Rights - CEDAW in International, Regional and National Law*, 2013, p. 32.

<sup>101</sup> *Edwards*, (fn. 11), p. 111.

<sup>102</sup> *Rodley*, The Role and Impact of Treaty Bodies, in: Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, 2015, p. 631; *Mechlem*, Treaty Bodies and the Interpretation of Human Rights, *VJTL* 2009, p. 927.

<sup>103</sup> CEDAW, (fn. 19), article 21, 1.

<sup>104</sup> <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx> (02/11/2020).

<sup>105</sup> *Campbell*, *Women, Poverty, Equality – The Role of CEDAW*, 2018, p. 210.

<sup>106</sup> *Bhattacharya*, Can International Law Secure Women's Health? An Examination of CEDAW and its Optional Protocol, *PAAM* 2009, p. 473.

<sup>107</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 12: Violence against women* of 1989, U.N. Doc. A/44/38.

<sup>108</sup> *McQuigg*, The CEDAW Committee and Gender-Based Violence Against Women - General Recommendation No. 35, *IHRLR* 2017, p. 264.

approach to the CEDAW in a way that some articles of the Convention started to be interpreted as encompassing VAW.<sup>109</sup>

In addition, the GR 19 recognizes that “*Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes*”<sup>110</sup>. Further, the GR19 recommends that States “*should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures that have been taken*”<sup>111</sup>.

Therefore, the GR 19 enlarges the definition of discrimination against women and became the basis of the Committee’s work in gender-based violence, being the most cited general recommendation on the subject, both in the Committee’s concluding observations towards State Reports, as well as within its views regarding individual complaints.<sup>112</sup> Moreover, the relevance of the document can also be observed in the case law from different judicial systems - national and regional - mentioning the GR19.<sup>113</sup>

Furthermore, twenty-five years after its adoption, in 2017 the UN updated the GR 19 with the General Recommendation 35 (“GR 35”). The rationale for this review was to provide a further guide to States parties, considering that despite all the work that had been done to combat it, gender based violence “*remains pervasive in all countries, with high levels of impunity*”<sup>114</sup>. In particular, the GR 35 acknowledges the structural roots of gender-based violence (para. 10 and 19) and has a strong intersectional approach for tackling the issue, recognizing “*that gender-based violence may affect some women to different degrees, or in different ways, meaning that appropriate legal and policy responses are needed*”<sup>115</sup>. In regard to the acts committed by private citizens, the GR 35 is much more assertive than the GR 19, specifying States’ due diligence obligations in more detail.<sup>116</sup>

### 3. Individual Complaints

The OP-CEDAW enables individual women or groups of women to access international justice by submitting communications to the CEDAW’s Committee, by means of alleging violations by the State parties against her/their rights protected by the CEDAW. The

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<sup>109</sup> Ibid, p. 265.

<sup>110</sup> CEDAW Committee, *General Recommendation No. 19*, (fn. 66), para. 23.

<sup>111</sup> Ibid, para. 24, s.

<sup>112</sup> *McQuigg*, (fn. 108), p. 266; Qureshi, (fn. 85), p.187, 191.

<sup>113</sup> See for instance: Indian Supreme Court, *Vishakha & Ors. v. State of Rajasthan*, Air 1997 Sc 3011, 13 August 1997/ African Commission on Human and People’s Rights, *Egyptian Initiative for Personal Rights & Interights v. Egypt*, Communication no. 323/2006, 16 December 2011.

<sup>114</sup> CEDAW Committee, *General Recommendation No. 35*, (fn. 5), para. 6.

<sup>115</sup> Ibid, para 12.

<sup>116</sup> *McQuigg*, (fn. 108), p. 266.

communications may be submitted also “*on behalf of individuals or groups of individuals*”<sup>117</sup>, with due consent, which allows non-governmental organizations (“NGOs”) to represent the victims. In addition, the individual complaints’ admissibility criteria require that before the submission of a communication to the Committee, all available domestic remedies have to be exhausted, unless the State’s lack of effective remedies is proved (OP-CEDAW, article 4).

Notably, most of the Communications analysed by the CEDAW Committee involve gender-based violence.<sup>118</sup> *A.T. v. Hungary*<sup>119</sup> was the first Communication the Committee ruled on the issue and which became a key case, very often referred to in future decisions. In its view, the CEDAW Committee mentioned the GR 19, reiterating that gender-based violence is encompassed by the CEDAW’s definition of discrimination and that “*States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation*”<sup>120</sup>. The committee has found that the absence of specific legislation in Hungary regarding domestic violence and sexual harassment constitutes a violation of the victims’ “*human rights and fundamental freedoms, particularly her right to security of person*”<sup>121</sup>. Therefore, it was considered that Hungary had not fulfilled its obligations under the CEDAW and had violated the complainant’s rights recognized under articles 2 (a), (b) and (e), along with articles 5 and 16.

In addition, the case *Angela González Carreño vs. Spain*<sup>122</sup> is a well-illustrated case of domestic violence against women and girls. The victim separated from her husband (F.R.C.) in 1999 after years of suffering physical and psychological abuse. In the following years, the violations persisted and F.R.C. also started to practice parental alienation with the daughter Andrea. The victim sought help from the Spanish authorities, which ultimately failed to protect the mother and her daughter’s rights, resulting in F.R.C. murdering the child and committing suicide. The Committee ruled that the State violated the mother and her (deceased) child’s rights under CEDAW articles 1, article 2 (a)-(f), article 5 (a) and article 16, 1. (d), along with the Committee’s GR 19.

On the whole, the CEDAW Committee has been developing concise jurisprudence through the individual complaints and contributing to the development of women’s human rights, especially clarifying how the CEDAW is applicable to domestic violence cases and the extent of States’ due diligence in these cases.<sup>123</sup>

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<sup>117</sup> OP-CEDAW, (fn. 96), article 2.

<sup>118</sup> *Hodson*, Women’s Rights and the Periphery: CEDAW’s Optional Protocol, EJIL 2014, p. 567.

<sup>119</sup> Committee on the Elimination of Discrimination against Women, *A.T. v Hungary*, Communication No: 2/2003, 26/01/2005, CEDAW/C/32/D/2/2003.

<sup>120</sup> *Ibid*, para. 9.2.

<sup>121</sup> *Ibid*, para 9.3.

<sup>122</sup> Committee on the Elimination of Discrimination against Women, *González Carreño vs. Spain*, Communication No. 47/2012, 16/07/2014, CEDAW/C/58/D/47/2012.

<sup>123</sup> *Nguyen*, Through the Eyes of Women? The Jurisprudence of the CEDAW Committee, OFAW 2014, p. 2 ff.

#### 4. Inquiry Procedure

The second mechanism that the OP-CEDAW came up with is the inquiry procedure. This procedure grants the Committee wide powers to initiate confidential investigations when it has reliable information of serious or systematic violations of women's human rights committed by a State that ratified the protocol (OP-CEDAW, article 8, 1.). After the relevant information is received, the Committee may instruct one or more of its experts to directly carry out an investigation and, if justified and always with the due consent of the affected State, the investigation may include an on-site visit (OP-CEDAW, article 8, 2.). Then, after the Committee considers the investigation's findings, it will submit a final report with comments and recommendations to be sent to the investigated State, which will then have six months to present its own observations (OP-CEDAW, article 8, 3.). The Committee may also ask the State to include in its next periodic report the measures adopted in regard of the investigation (OP-CEDAW, article 9, 1.).

Furthermore, while the OP-CEDAW does not allow States to make reservations (OP-CEDAW, article 17), it is possible to opt out of the inquiry procedure (OP-CEDAW, article 10). Therefore, State parties can express that they do not recognize the Committee's competence to conduct these inquiries by making a declaration under the afore-mentioned article at the time of ratification of the Protocol.<sup>124</sup> This paper argues that this clause adds a weakness to the OP-CEDAW, limiting its effectiveness to combat women rights' violations, since any country, at its own will, can avoid the application of an important procedure of control. Yet, this was the price to pay for inducing more States to ratify the OP-CEDAW.

So far the Committee has concluded only five inquiries - Kyrgyzstan, Mexico, Philippines, the United Kingdom and Northern Ireland and Canada - all of which were triggered by NGOs requests. In Kyrgyzstan's inquiry procedure, the CEDAW Committee received information in 2013 that the country had committed grave and systematic violations when failing to prevent and protect victims of bride kidnapping. Despite the case not being directly about domestic violence, in the Committee's report of the inquiry presented in 2018, it is pointed out that "*domestic violence is disproportionately prevalent in forced marriages*"<sup>125</sup>. Significantly, the Committee considered that the violations indeed are grave and systematic (para. 86 and 87) and found the State had violated the CEDAW under "*the right to live free from gender-based violence; the right to freely choose a spouse, equal rights within marriage and upon its dissolution and prohibition of child and/or forced marriages; and the right to access to justice and victim support*"<sup>126</sup>. In its observations, Kyrgyzstan elucidated that since

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<sup>124</sup> Byrnes, (fn. 100), p. 28.

<sup>125</sup> Committee on the Elimination of Discrimination against Women, *Inquiry concerning Kyrgyzstan under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women - Report of the Committee*, 21/09/2018, CEDAW/C/OP.8/KGZ/1, para. 4.2.

<sup>126</sup> *Ibid*, para. 60-84.

the investigation procedure started it had taken measures to modify its law.<sup>127</sup> Among other measures, in 2017 the country adopted a new 'Act of Kyrgyzstan on protection against domestic violence' to amend the gaps of the previous law (para 4).

Overall, the inquiry procedure is a good alternative for the CEDAW Committee's monitoring system that has resulted in strong jurisprudence and a guide for the application of CEDAW provisions.<sup>128</sup> However, it is argued the procedure is still underutilized and slow - with many steps and very often demanding the States parties' permission to continue the investigation, which results in long intervals. As a consequence, this slowness can be a threat to the effectiveness of the inquiry procedure, since the procedure targets 'grave' violations.<sup>129</sup>

## **D. Regional Mechanisms**

### **I. Organization of American States – Belém do Pará Convention (1994)**

#### **1. Background**

In order to understand the situation of women within the Americas, it is necessary to briefly mention the peculiarities and social-cultural context of the region. In particular, Latin America is well known for inequalities and social exclusions, as well as for fragile democracies, some of them still in development. In this sense, the unequal wealth concentration present in this area contributed to political instability, oppressions and many human rights violations.<sup>130</sup> Significantly, the history of Latin America is marred by authoritarian dictatorship regimes; periods in which the most basic human rights were violated, with overwhelming cases of arbitrary imprisonment, torture and people who disappeared.<sup>131</sup> As a consequence, the culture of violence and impunity is widespread in the continent and the threats to these young democracies are still a reality, as we can observe in the recent wave of protests trying to avoid democratic backsliding in different countries in South America.

In this context, the Organization of American States ("OAS") was established by its Charter<sup>132</sup> on April 30, 1948, with the purpose to promote solidarity and cooperation among the American States, thus building a healthy relationship environment in the continent. At the same time, the American Declaration of the Rights and Duties of Man was also adopted, and later, the American Convention on Human Rights (1969) and the Inter-American Convention

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<sup>127</sup> Committee on the Elimination of Discrimination against Women, *Inquiry concerning Kyrgyzstan under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women - Observations of Kyrgyzstan*, 14/11/2018, CEDAW/C/OP.8/KGZ/2.

<sup>128</sup> *Freeman*, (fn. 97), p. 101.

<sup>129</sup> *Edwards*, (fn. 11), p. 136; Sullivan, *The Inquiry Procedure*, in: Langford et al. (eds.), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, 2016, p. 82.

<sup>130</sup> *Pasqualucci*, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2014, p. 4.

<sup>131</sup> *Gonçalves*, *Direitos Humanos das Mulheres e a Comissão Interamericana de Direitos Humanos*, 2013, p. 183.

<sup>132</sup> OAS, *Charter of the Organization of the American States*, 30/04/1948, A-41.



to Prevent and Punish Torture (1985). Together, all these instruments became the normative basis of the regional human rights system in the Americas,<sup>133</sup> and also recognized core provisions related to VAW,<sup>134</sup> progressively succumbing to more space for feminist demands within public policies.

Hence, the OAS, through the work of the Inter-American Commission of Women, adopted on June 09, 1994 the 'Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women'<sup>135</sup> ("Belém do Pará Convention"). Remarkably, the instrument came into force on 05 March 1995 and was the first international binding treaty in the world that ever recognized violence against woman as a human rights violation, specifying that "*every women has the right to be free of violence in both the public and private spheres*"<sup>136</sup>. Therefore, the Belém do Pará Convention is considered to be a historic trailblazer in terms of a legal instrument that has given guidelines to States for adopting laws and political strategic frameworks on the prevention, eradication and punishment of VAW. In addition, the convention has been well ratified by thirty-two States, with only two OAS members not ratifying it (the United States and Canada, which both have also not ratified the ACHR).<sup>137</sup>

## 2. Belém do Pará Convention Overview

The efficiency of the convention revolves around four important points highlighted in its preamble that stand as a basis for the interpretation of the instrument: i. VAW is a violation of women's rights and their fundamental freedoms; ii. VAW is "*an offense against human dignity and a manifestation of the historically unequal power relations between women and men*"<sup>138</sup>; iii. VAW transcends all social classes; and iv. the eradication of VAW is a condition for women's social and individual development.<sup>139</sup>

Moreover, the Belém do Pará Convention defines violence against women as: "*any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere*"<sup>140</sup>. Thus, the convention adopted a new paradigm for international human rights law, establishing that the private sphere is also the responsibility of States and, consequently, it is the States' responsibility to eradicate

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<sup>133</sup> *Villalba*, Imprisonment and Human Rights in Latin America: An Introduction, TPJ 2018, p. 19.

<sup>134</sup> *Bettinger-López*, Violence against Women Normative Developments in the Inter- American Human Rights System, in: Manjoo/Jones (eds.), *The Legal Protection of Women from Violence - Normative Gaps in International Law*, 2018, p. 166.

<sup>135</sup> OAS, *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, "Belém do Pará Convention"*, 09/11/1994, A61.

<sup>136</sup> *Ibid*, article 3.

<sup>137</sup> Cuba also did not ratify the convention. However, the country was suspended from the OAS during the period between 1962 and 2009. To the date, Cuba refuses to re-join the OAS, so that its future relationship with the organization is still uncertain; <https://www.oas.org/juridico/english/sigs/a-61.html> (02/11/2020).

<sup>138</sup> Belém do Pará Convention, (fn. 135), preamble.

<sup>139</sup> *Bandeira/ De Almeida*, Twenty Years of the Convention of Belém do Pará and of the Law Maria da Penha, REF 2015, p. 507.

<sup>140</sup> Belém do Pará Convention, (fn. 135), article 1.

and punish VAW.<sup>141</sup> Although the convention does not explicitly mention domestic violence, the instrument clarifies that VAW shall encompass any act: “*that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse*”<sup>142</sup>. In addition, article 2 also determines that VAW may involve acts occurring in the community (para. b), in which the perpetrator may be any person, and acts committed by the State or its agents (para. c.).

Furthermore, the Convention is composed of 25 articles and its structure is the following: Chapter I - Definition and Scope of Application; Chapter II – Rights Protected, recognizing the vulnerable position of women and thus guaranteeing a significant list of rights to be protected; Chapter III - Duties of the States, which differentiates the measures States must immediately take (article 7), from measures to be taken progressively (article 8); Chapter IV – Inter-American Mechanisms of Protection; and Chapter V – General Provisions.

Moreover, the Convention does not specifically criminalize any form of violence, but rather provides a set of rights to be protected by States in order to guarantee all women a life free of violence, expressly including the following rights: the right to life; to freedom and security; to physical, mental and moral integrity; to dignity; to equality; and to justice (article 3).

Finally, the Convention reflects ideas of the ‘intersectionality’ theory, pointing out that gender-based violence intersects with other forms of discrimination faced by women,<sup>143</sup> and therefore States are required to give special attention to vulnerable women related to race, ethnic origin, immigrant, social-economic situation or other reasons (article 9). This is an important development considering the already mentioned high number of inequalities and the vast number of different ethnic groups present in the geographic area covered by the Convention.

### **3. Mechanisms of Control**

The Inter-American human rights system has an extensive number of mechanisms of control that allowed the Belém do Pará Convention to establish its compliance mechanisms through four pillars: the Inter-American Commission of Women; Inter-American Commission on Human Rights; the Inter-American Court of Human Rights; and the Mechanism to Follow-Up on Implementation of the Inter American Convention on the Prevention, Punishment, and Eradication of Violence Against Women.

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<sup>141</sup> *Bandeira/De Almeida*, (fn. 139), p. 506.

<sup>142</sup> Belém do Pará Convention, (fn. 135), article 2, a.

<sup>143</sup> *Bettinger-López*, (fn 134), p. 171.

### **a) Inter-American Commission of Women**

The Inter-American Commission of Women (“CIM”) was the first international body established to safeguard “*women’s human rights and gender equity and equality*”<sup>144</sup> and it is the main OAS body on the issue.<sup>145</sup> Moreover, the CIM is composed of one representative of each OAS Member State that will act as political delegates, meeting once every two years. Within the Belém do Pará Convention the CIM has competence under article 10 to receive national reports submitted by States “*on measures adopted to prevent and prohibit violence against women*”<sup>146</sup>, as well as the challenges faced during this process. In addition, under article 11 the CIM is also entitled to request advisory opinions from the Inter-American Court of Human Rights regarding the clarification of any matter related to the convention.

### **b) Inter-American Commission on Human Rights**

The Inter-American Commission on Human Rights (“IACHR”) is the main OAS body, with jurisdiction over all the organization’s countries and responsible for promotional and contentious duties, being a quasi-judicial body.<sup>147</sup> The IACHR is based in Washington, D.C., U.S.A. and it is composed of seven experts who must be elected by the OAS States based on their profound knowledge of human rights and therefore, they do not represent their home country.<sup>148</sup>

Significantly, the IACHR has wide duties related to the promotion and protection of human rights in the continent and here we briefly mention some of them, relevant in our context. Firstly, the IACHR has established Thematic Rapporteurships to dedicate work to specific areas of human rights concern involving vulnerable groups;<sup>149</sup> with a Rapporteurship on the Rights of Women being created in 1994 to analyse the laws and practices related to women’s human rights within the OAS member States. Secondly, the IACHR frequently publishes Thematic Reports and holds Public Hearings on women’s human rights, especially on VAW – both mechanisms often reflecting subjects addressed in individual cases brought before the Commission. Thirdly, the IACHR’s experts are also entitled to conduct country visits to inquire about States’ compliance with human rights conditions, which are to be followed by a report published by the Commission considering the situation, and also public hearings.<sup>150</sup> Finally, the Commission may, by its own initiative or a request of the party involved, when there is evidence of imminent threat, demand that the State adopt precautionary measures in serious

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<sup>144</sup> <https://www.oas.org/en/cim/docs/CIMStatute-2016-EN.pdf> (02/11/2020).

<sup>145</sup> *Bandeira/De Almeida*, (fn. 139), p. 504.

<sup>146</sup> Belém do Pará Convention, (fn. 135), article 10.

<sup>147</sup> *De Schutter*, *International Human Rights Law – Cases, Materials, Commentary*, 2019, p. 1020.

<sup>148</sup> *Cavallaro et al.*, *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System*, 2019, p. 34.

<sup>149</sup> *Ibid*, p. 199.

<sup>150</sup> *Pinto*, *The Role of the Inter-American Commission and Court of Human Rights in the Protection of Human Rights: Achievements and Contemporary Challenges*, HRB 2013, p. 34.

and urgent cases with a risk of irreparable harm, thus protecting against on-going human rights violations. However, this decision shall not be understood as a prejudgment.<sup>151</sup>

On the other hand, the IACHR through its adjudicatory role processes complaints of human rights violations under the scope of the OAS human rights instruments. After analysing the admissibility of the case, the IACHR attempts to establish an amicable solution between the parties, and if that is not possible, it will then analyse the merits of the case.<sup>152</sup> Further, when the denunciation turns out to be true, the IACHR holds the State responsible for the violations attributed to it and issues recommendations for remedies. Afterwards, if the recommendations are not complied with by the State, the Commission may report the case to the Inter-American Court on Human Rights.

Moreover, the jurisdiction of the IACHR under the Belém do Pará Convention is enabled by article 12, which allows any person, group of person or NGO to address petitions denouncing violations under article 7 of the Convention. It is relevant to mention that article 12 of Belém do Pará Convention while allowing Individual Complaints to be lodged, which is a triumph, also limits these complaints to violations of the obligations established by article 7, which involves the measures States agreed to take immediately in order to eradicate VAW. Therefore, it is beyond the scope of both the Commission and the Court to examine individual complaints based on the measures that States agreed to progressively adopt (article 8), as well as the intersectional obligations for vulnerable women (article 9).<sup>153</sup> Remarkably, article 8 encompasses important obligations related to the prevention of VAW, such as to adopt measures “to promote awareness and observance of the right of women to be free from violence [...]”<sup>154</sup> and “to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs [...]”<sup>155</sup>. Notably, the IACHR has already ruled on the matter in the case *Gonzales et al. (“Cotton Field”) v. Mexico*, in which it was decided that the Court: “does not have contentious jurisdiction *rationae materiae* to examine alleged violations of Articles 8 and 9 of that international instrument.”<sup>156</sup> Particularly, this paper shares the opinion of some scholars who argue that this limitation of competence is a drawback since article 7 cannot be fully understood or enforced without being analysed in sync with article 8.<sup>157</sup>

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<sup>151</sup> *Rodríguez-Pinzón*, Precautionary Measures of the Inter-American Commission on Human Rights: Legal Status and Importance, HRB 2013, p. 13.

<sup>152</sup> *De Schutter*, (fn. 147), p. 1026.

<sup>153</sup> *Bettinger-López*, (fn. 134), p. 175.

<sup>154</sup> Belém do Pará Convention, (fn. 135), article 8, a.

<sup>155</sup> Belém do Pará Convention, (fn. 135), article 8, b.

<sup>156</sup> IACHR, *Gonzales, Monreal and Monarrez (“Cotton Field”) v. Mexico*, 16/11/2019, para. 602.

<sup>157</sup> *O’Connell*, *Women’s Rights and the Inter-American System*, in Reilley (ed.), *International Women Rights of Women*, 2019, p. 143.

Nevertheless, the IACHR has already in a number of cases ruled on inter-partner violence, and recognized the States' due diligence obligation with regard to these violations.<sup>158</sup> Thus, the first major case brought to the IACHR on the topic was *Maria da Penha Maia Fernandes v. Brazil*, which was also the first case decided under the Belém do Pará Convention. This was a case of extreme tolerance from Brazil with the domestic violence committed against Maria da Penha by her ex-husband in 1983, which resulted in two murder attempts and the victim being left paraplegic. Maria da Penha sought the State's protection, but Brazil systematically failed to give the case a final decision and punish the perpetrator - who was only convicted in 2002, nineteen years after the facts occurred, and only after the international pressure due to the petition lodged by the victim in the IACHR.<sup>159</sup> Within the Inter-American system, the Commission in 2001 found that Brazil's negligence and omission led to violations of the victim's rights under the American Declaration on the Rights and Duties of Man (article 2 - Right to equal protection under the law without discrimination; and article 8 - Right to Justice), the American Convention on Human Rights (article 1 - Obligation to Respect Rights; article 8 - Right to a Fair Trial; and article 25 - Right to Judicial Protection), and the Belém do Pará Convention (article 7 - States' obligation to prevent, punish and eradicate VAW).<sup>160</sup> Furthermore, the Commission's recommendations on the case resulted in Brazil adopting a landmark domestic violence law, popularly known as the Maria da Penha Law, which was later considered to be one of the most advanced pieces of legislation on domestic violence in the world by the United Nations Development Funds for Women.<sup>161</sup> Therefore, this case demonstrates the positive effect of the Belém do Pará Convention, especially in the law and change of policy.

In addition, another landmark case on domestic violence brought to the Commission is *Jessica Lenahan Gonzales et al. v. United States of America*<sup>162</sup>. Here the victim claimed, along with her three daughters, to be victims of domestic violence perpetrated by her ex-husband and father. Although the U.S. has not ratified neither the ACHR, nor the Belém do Pará Convention, the IACHR did not refrain from citing the two instruments, and found violations under a wide range of provisions of the American Declaration on the Rights and Duties of Man - which was interpreted as a binding instrument and through a gendered perspective -

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<sup>158</sup> *Obreja*, Expanding Due Diligence: Human Rights Risk Assessments and Limits to State Interventions Aimed at Preventing Domestic Violence, GJIL 2020, p. 184.

<sup>159</sup> *Espíndola*, Dos Direitos Humanos das Mulheres à Efetividade da Lei Maria da Penha, 2018, p. 43.

<sup>160</sup> IACHR, *Maria da Penha v. Brazil*, Case 12.051, 16/04/2001, para. 60.

<sup>161</sup> *Goety et al.*, Progress of the World's Women 2008/2009: Who Answers to Women?, <https://www.unwomen.org/-/media/headquarters/media/publications/unifem/poww08reportfulltext.pdf?la=en&vs=1016> (02/11/2020).

<sup>162</sup> IACHR, *Jessica Lenahan (Gonzales) et al. v. United States of America* Report, Case no. 12.626, 21/07/2011.

concluding that the U.S. failed to act with due diligence to protect Jessica and the children.<sup>163</sup> Therefore, this decision demonstrated that within the Inter-American system, States have a due diligence obligation to protect, prevent, investigate and punish domestic violence, regardless of the ratification of the Belém do Pará Convention.

### c) Inter-American Court of Human Rights

The Inter-American Court on Human Rights (“IACtHR”) is the judicial body that together with the IACHR is responsible to safeguard human rights within the Inter-American system. The Court was established in 1979 with its headquarters in San José, Costa Rica, and is composed of seven judges. Further, the IACtHR is in charge of interpreting and enforcing the American Convention on Human Rights (“ACHR”) and the other regional specific human rights conventions,<sup>164</sup> including the Belém do Pará Convention. Like the Commission, the Court also has advisory and contentious roles, however here both competences are exclusively judicial.<sup>165</sup>

Thus the IACtHR, at the request of the OAS bodies or any Member State, can issue advisory opinions to clarify the interpretation of the ACHR or any other human rights instrument that are part of the Inter-American system.<sup>166</sup> Thereby, under the Belém do Pará Convention, States Parties and the CIM are entitled to request a legal advisory opinion from the court regarding the interpretation of the convention (Article 11).

Furthermore, the adjudicatory role of the IACtHR is more restricted than within the Commission, because here the Court only has competence over cases involving States that not only ratified the ACHR, but also expressly accepted the IACtHR’s jurisdiction (ACHR, Art. 62). Moreover, these cases must be previously processed by the Commission, which also decreases the number of cases reaching the Court. Therefore, when the Commission addresses a case to the Court, the case will be heard and ruled by the judicial body, which later will follow the State’s compliance with its judgments.<sup>167</sup> In addition, the IACtHR decisions are binding, mandatory and have unappealable legal force (ACHR, articles 67 and 68). Furthermore, like the Commission, the IACtHR may, when deemed necessary, adopt provisional measures for grave and urgent situations that may cause irreparable damage to the victims (ACHR, article 63). Finally, although the Belém do Pará Convention has no express mention of the IACtHR jurisdiction, the Court has already ruled affirming its competence with regard to violations to the Convention in the case *Cotton Field*.<sup>168</sup>

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<sup>163</sup> Klein/Klein, *Abetting Batters: What Police, Prosecutors, and Courts Aren't Doing to Protect America's Women*, 2020, p. 58.

<sup>164</sup> Bettinger-López, (fn. 134), p. 182.

<sup>165</sup> Cavallaro *et al.*, (fn. 148) p. 43.

<sup>166</sup> *Ibid.*

<sup>167</sup> Bettinger-López, (fn. 134), p. 171.

<sup>168</sup> IACtHR, (fn. 156), para. 76-80.

**d) Mechanism to Follow-Up on Implementation of the Inter American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (MESECVI)**

In order to evaluate the States' compliance with the Belém do Pará Convention, the 'Mechanism to Follow-Up on Implementation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women' ("MESECVI") was created in 2004, developed by the States Parties as a multilateral, systematic and permanent evaluation process. The MESECVI was formed to work together with the IACHR and the IACtHR, but so far there has been little interaction between the three bodies.<sup>169</sup> In addition, MESECVI is composed of two bodies: the Committee of Experts, a technical body responsible for the evaluation of implementation of the convention, with members indicated by the member States; and the Conference of States Parties, a political body composed of State representatives that together shall discuss the fulfilment of the convention and issue recommendations to the Committee of Experts.<sup>170</sup>

Furthermore, the MESECVI consists of a State report procedure with two phases: i. a multilateral evaluation, in which the State's implementation of the Convention is individually examined, followed by the draft of a Hemispheric Report on the regional progress on VAW, containing the results and recommendations of the procedure; and ii. a follow-up round to track the State's compliance with progress indicators.<sup>171</sup>

## **II. African Union – Maputo Protocol (2003)**

### **1. Background**

The situation of women in Africa is a very sensitive issue and women's rights in the continent have been threatened by poverty, armed conflicts, customs, traditions, harmful practices, religion, a high prevalence of HIV, difficulties to access education and gender-based violence. Consequently, the prevalence of domestic violence in the continent is significantly high, while some African countries still do not have laws prohibiting this violation. Research conducted by the United Nations Office on Drugs and Crimes demonstrates that in 2017 Africa presented the highest level in the world of female homicides committed by intimate partners, and these crimes also represented more than two thirds (69%) of all the intentional homicides of female victims in the continent.<sup>172</sup>

Whereas the pressure of the international community has led to some African countries adopting gender-sensitive national laws, and also ratifying international and regional

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<sup>169</sup> O'Connel, (fn. 157), p. 144.

<sup>170</sup> McAleese, Strengthening the OAS's Women Human Rights and Gender Equality Regime, in: Davies/True, The Oxford Handbook of Women, Peace, and Security, 2019, p. 417.

<sup>171</sup> <https://www.oas.org/en/mesecvi/docs/MESECVI-CEVI-doc.228.eng.XIIReunion.ReglamentoModificado.pdf> (02/11/2020).

<sup>172</sup> [https://www.unodc.org/documents/data-and-analysis/gsh/Booklet\\_5.pdf](https://www.unodc.org/documents/data-and-analysis/gsh/Booklet_5.pdf) (02/11/2020).

instruments of women's human rights protection, it is argued the major problem in protecting women in Africa from domestic violence is the fact that these laws and treaties even when already ratified are not properly enforced, resulting in mere formalities.<sup>173</sup> This lack of law enforcement happens largely as a consequence of the conflict of multiple legal systems present in the continent, in which religious and customary law often prevail, tolerating violations of women's rights and helping to perpetuate domestic violence.<sup>174</sup>

In this context, the African human rights system had its roots back in 1963, when the Organisation of African Union ("OAU") was established by thirty-two African states to promote solidarity and unity, and to face the colonialism and neo-colonialism present on the continent.<sup>175</sup> Initially, the organization's constitutional charter had no mention of a human rights system, which was only officially established in 1981 with the adoption of the 'African Charter on Human and People's Rights'<sup>176</sup> ("African Charter"). In 2002 the OAU was replaced by the African Union ("AU") that today is composed by fifty-five member states.

The African Charter is a very progressive instrument that encompasses a range of civil, political, economic, social and cultural rights, while it also brings the notion of 'peoples' rights'.<sup>177</sup> However, the instrument has a lack of gender specific provisions, with only one direct mention to women's rights (African Charter, article 18, 3.), and a provision prohibiting discrimination based, among others, on sex (African Charter, article 2).

Therefore, in order to complement the African Charter's limited women's human rights scope, the 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa'<sup>178</sup> ("Maputo Protocol") was created by the African Union in 2003 and came into force in 2005 as a binding instrument.<sup>179</sup> So far the Protocol has been signed by forty-nine States, of which forty-two have already ratified it.<sup>180</sup>

All in all, despite the Maputo Protocol being a landmark progressive instrument for African women, the treatment States give to women's human rights is still precarious. The Protocol has some drawbacks that threaten its effectiveness and its usage is still limited. Firstly, despite being widely ratified, countries' domestication of the protocol is still in progress

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<sup>173</sup> Okereke, Africa: Domestic Violence and Law, in: Jacksons, Encyclopedia of Domestic Violence, 2008, p. 4 et seqq.

<sup>174</sup> Ibid.

<sup>175</sup> Vijoer, International Human Rights Law in Africa, 2012, p. 157.

<sup>176</sup> Organization of African Union, *African Charter on Human and Peoples' Rights*, 27/06/1981, OAU Doc. CAB/LEG/67/3.

<sup>177</sup> Ayeni, Introduction, in: Ayeni (ed.), *The impact of the African Charter and the Maputo Protocol in selected African States*, 2016, p. 1, 6.

<sup>178</sup> African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11/07/2003, OAU Doc. CAB/LEG/66/6.

<sup>179</sup> Mohamed, 11 Years of the African Women's Rights Protocol: Progress and challenges, DJ 2014, p. 71.

<sup>180</sup> <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (02/11/2020).



and it is necessary to raise a broader public awareness of the instrument.<sup>181</sup> Secondly, it is argued that the rights protected in the Maputo Protocol are based on a western idea of women's human rights, while the instrument brings no mention of how its provisions should be implemented when in conflict with domestic statutory or customary law.<sup>182</sup> Finally, the AU's mechanisms of control still need to be more developed under the scope of the Protocol.

## 2. Maputo Protocol Overview

The Maputo Protocol recognizes a wide set of rights and determines that "*all forms of discrimination against women*"<sup>183</sup> shall be eliminated, thus perceiving the interconnected nature of women's human rights.<sup>184</sup> In regard to violence against women, the issue is addressed in some provisions of the Protocol, with no direct mention of domestic violence. According to the instrument, and following the international understanding of the topic, VAW means: "*all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war*"<sup>185</sup>.

Moreover, the Maputo Protocol correlates the protection against gender-based violence with the guarantee of women's dignity (article 3), their right to life, integrity and security (article 4), elimination of harmful practices (article 5) and protection in armed conflicts (article 11), comprehensively applying all the necessary elements that contribute to combat VAW - prohibition, prevention, sanction and protection - in any of the areas in which it occurs, public or private.

Furthermore, the instrument became the first international instrument that expressly regulated and legally banned female genital mutilation,<sup>186</sup> requiring the States to take all legislative measures to prohibit and punish this violation (article 5, b.). This recognition in an international legal binding instrument is a significant achievement considering the continent is highly affected by this practice.<sup>187</sup>

Despite the lack of express mention of domestic violence in the Protocol, the African Union has already demonstrated the organization's understanding that VAW encompasses domestic violence. For instance, in a guide drafted in 2011 by one of the African Commission's

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<sup>181</sup> Ayeni, (fn. 177), p. 15.

<sup>182</sup> Kristin, The Emperor Is Still Naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination, VJTL 2009, p. 963 ff.

<sup>183</sup> Maputo Protocol, (fn. 178), preamble.

<sup>184</sup> Abdulmelik/Belay, Advancing Women's Political Rights in Africa: The Promise and Potential of ACDE, AS 2019, p. 152.

<sup>185</sup> Maputo Protocol, (fn. 178), article 1, j.

<sup>186</sup> McCauley/Broek, Challenges in the eradication of female genital mutilation/cutting, IH 2019, p. 2.

<sup>187</sup> Nabaneh/ Muula, Female genital mutilation/cutting in Africa: A complex legal and ethical landscape, IJGO 2019, p. 254.

special groups to help member States better implement the African Charter's provisions,<sup>188</sup> under the 'Right to Health' (African Charter, article 16), it is specified that the minimum obligation of the provision, among other measures, is to take measures to prevent VAW, precisely including domestic violence (para. 67, ii, 1./7.).<sup>189</sup> Likewise, the 'General Comment No. 4 on the African Charter' elucidates that sexual and gender based violence encompass physical and psychological acts perpetrated against women, such as domestic violence (para. 58).<sup>190</sup>

In addition, the Maputo Protocol is ground-breaking for women's reproductive and sexual rights provisions,<sup>191</sup> expressly demanding States to adopt measures authorizing abortion in cases of sexual abuse, rape, incest, and when the continuation of pregnancy endangers the mother's mental and physical health or the life of the foetus (Maputo Protocol, article 14, 2.).

On the whole, other provisions in the protocol include child marriage (article 6, b), polygamy (article 6, c), inheritance (article 21), economic empowerment (article 13), participation of women in the political process (article 9) and right to education (article 12). Notably, the Maputo Protocol recognizes that certain women experience multiple forms of discrimination and, consequently, it gives special protection for vulnerable groups: elderly women (article 22), women with disabilities (article 23) and women in distress (article 24).

### **3. Mechanisms of Control**

As mentioned before, the Maputo Protocol is intended to supplement the African Charter. Therefore, the institutions established to oversee the State's compliance with the African Charter are also monitoring the Maputo Protocol's implementation.<sup>192</sup>

#### **a) African Commission**

The primary monitoring mechanism in the African human rights system is attributed to the African Commission on Human and People's Rights ("African Commission"), an executive body mainly responsible for promoting and protecting the human and people's rights within the organization (African Charter, article 30), and also to interpret the African Charter's provisions (African Charter, article 45, 3./4.). The commission's duties include receiving and evaluating States' reports, examining communications and other promotional roles.

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<sup>188</sup> <https://archives.au.int/handle/123456789/2063> (02/11/2020).

<sup>189</sup> Murray, *The African Charter on Human and Peoples' Rights: A Commentary*, 2019, p. 424.

<sup>190</sup> African Commission on Human and Peoples' Rights, *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, 04/03/2007.

<sup>191</sup> Mohamed, (fn. 179), p. 71.

<sup>192</sup> Budoo, *African Women's Protocol at the level of the African Union*, AHRJ 2018, p. 61.

Firstly, the African Charter demands that all State parties must submit to the Commission “every two years [...] a report on the legislative or other measures”<sup>193</sup> on the implementation of the instrument. Likewise, this procedure is explicitly provided for in the Maputo Protocol, which demands in article 26 (1) that States shall submit the status of the implementation of the protocol, simultaneously with the periodic report foreseen in the African Charter, both in a single report.<sup>194</sup>

Secondly, the African Commission has a protective mandate, in which it is responsible for considering individual communications alleging violations of the African Charter, and after the assessment of the complaint it shall elaborate recommendations to the Assembly of Heads of States and Government of the AU.<sup>195</sup> The Maputo Protocol is not clear in regard to individual complaints, with no provision extending the Commission’s scope to receive communications under the protocol. Nevertheless, it is considered that while lacking a specific provision excluding the Commissions’ protective mandate, the body is entitled to analyse individual complaints also under the women’s Protocol, by necessary implication due to the complementary relation between the two instruments.<sup>196</sup>

The African Commission has so far ruled in two cases involving women’s human rights: first in 2011, a case of sexual harassment during a public protest (*Egyptian Initiative for Personal Rights & Interights v. Egypt*)<sup>197</sup> and then in 2015 in a case of rape and abduction (*Equality Now and EWLA v. Ethiopia*)<sup>198</sup>. As a result, in both proceedings violations of women’s human rights were found to be within the framework of the African Charter. However, none of the decisions mentioned the Maputo Protocol, considering Egypt has not yet signed the instrument and Ethiopia had not ratified it by the time of the decision.

Finally, the African Commission established in 1999 the Special Rapporteur on the Rights of Women in Africa, one of the African Commission’s members to be elected for a two-year term to act as a central point to reinforce and promote women’s human rights in the continent, thus focusing attention on African women.<sup>199</sup>

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<sup>193</sup> African Charter, (fn. 176), article 62.

<sup>194</sup> *Vijoen*, (fn. 175), p. 257 et seqq.

<sup>195</sup> *Ssenyonjo*, Responding to Human Rights Violations in Africa - Assessing the Role of the African Commission and Court on Human and Peoples’ Rights (1987–2018), IHRL 2018, p. 4.

<sup>196</sup> *Vijoen*, Introduction to protocol to African charter on human and people’s rights on rights of women in Africa, WLJRSJ 2009, p. 40.

<sup>197</sup> ACHPR, *Egyptian Initiative for Personal Rights & Interights v. Egypt*, Communication no. 323/2006, 16/12/ 2011.

<sup>198</sup> ACHPR, *Equality Now and EWLA v. Ethiopia*, Communication no. 341/2007, 16/11/2015.

<sup>199</sup> *Budoo*, (fn. 192), p. 64.

## b) African Court

The African Court on Human and Peoples' Rights ("African Court") was established in 1988 and came into force in 2004 through a Protocol<sup>200</sup> to the African Charter. The African Court was introduced as complementary body to reinforce the African Commission's protective mandate, being the judicial body with binding decisions.<sup>201</sup> Under the Maputo Protocol (article 27), the African Court also has competence to interpret issues related to the protocol's implementation.

Significantly, in 2018 the African Court decided for the first time in a case regarding violation of the Maputo Protocol (*APDF & IHRDA v Republic of Mali*)<sup>202</sup>. The court ruled that many articles of the Malian Persons and Family Code were violating the Maputo Protocol for the reason of allowing marriage of children under the age of 18 (para. 124 and 135, ix). Thus, it was determined that Mali should amend the mentioned code to be in compliance with its international obligations, including the Maputo Protocol (para. 135). Yet, this was the only case the African Court decided under the Maputo Protocol, although the Court ruled on other cases involving women's human rights in the African Charter's context. The lack of other decisions mentioning the protocol can be justified by the barriers to access the court, especially the challenging admissibility criteria that results in many applications not even being considered on merits.<sup>203</sup>

Nevertheless, despite the limited reference to it in the African Court jurisprudence, other courts, both national and international, have been basing their decisions on the Maputo Protocol, which shows its positive effect for women's human rights protection. In the particular context of domestic violence, in *Naidoo v. Minister of Police*<sup>204</sup> (2015), the Supreme Court of Appeal of South Africa ruled that the police wrongfully reacted to a complaint of domestic violence, and hence failed to protect the victim from VAW.<sup>205</sup> For reasoning its decision the South African court recalled the country's obligations to protect women, mentioning among others the CEDAW and the Maputo Protocol (para. 27). Likewise, in the case *Mary Sunday v. Nigeria*<sup>206</sup> (2018), the Economic Community of West African States' Court of Justice decided a case of access to justice of a domestic violence victim, in which the plaintiff alleged that the

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<sup>200</sup> OAU, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 10/06/1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

<sup>201</sup> *Budoo*, (fn. 192), p. 62.

<sup>202</sup> ACtHPR, *Association pour le progrès et la défense des droits des femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*, Application 46/2016 11/05/2018.

<sup>203</sup> *Budoo*, (fn. 192), p. 62.

<sup>204</sup> Supreme Court of Appeal of South Africa, *Naidoo v Minister of Police*, Case No. 1462/14, 01/12/2016.

<sup>205</sup> *Omondi/Waweru/Srinivasan*, *Breathing Life into the Maputo Protocol: Jurisprudence on the Rights of Women and Girls in Africa*, [https://www.equalitynow.org/maputo\\_protocol\\_case\\_digest](https://www.equalitynow.org/maputo_protocol_case_digest) (02/11/2020).

<sup>206</sup> ECOWAS Community Court of Justice, *WARDC & IHRDA (on behalf of Mary Sunday) v. Nigeria*, Case No. ECW/CCJ/APP/26/15, 17/05/2018.

Nigerian Government committed violations under the Maputo Protocol and the decision was partially favourable to the victim.<sup>207</sup>

### III. Council of Europe – Istanbul Convention (2011)

#### 1. Background

Violence against women is the most prevalent women’s human rights violation in Europe and it is present in all the Members States of the Council of Europe (“CoE”). In regard to inter-partner violence, a study from the European Union Agency for Fundamental Rights, carried out across all the Europe Union (“EU”) member states, demonstrates that among women that had ever had a male partner, 22% have suffered physical or sexual violence by them.<sup>208</sup> Albeit the fact the EU member states are fewer in number than the member states of the CoE, the research results are believed to be indicative for the whole continent.<sup>209</sup>

Notably, the CoE has been acting systematically in preventing and combating domestic violence, including the considerable number of cases tackling the issue by the European Court of Human Rights (“ECtHR”). The court has several times applied the due diligence standard obligation in its decisions, and since 2007 it has been using the European Convention on Human Rights (“ECHR”) as a living instrument in addressing cases of domestic violence, following the international understanding of States’ responsibility, and therefore extending their obligations to acts of gender-based violence committed by private parties.<sup>210</sup> In the context of gendered domestic violence, the matter was acknowledged initially in the cases *Bevacqua and S. v. Bulgaria*<sup>211</sup> and *Opuz v. Turkey*<sup>212</sup>. In the last one, considered to be a landmark case on the subject, the Court held for the first time that under the ECHR, domestic violence “*may be regarded as gender-based violence which is a form of discrimination against women*”<sup>213</sup>, since women are victims of this violation disproportionately (para. 200). On the whole, the ECtHR case law has established that States’ failure to protect women from domestic violence may lead to a violation of diverse human rights, depending on the factual and legal backgrounds,<sup>214</sup> with most violations on the subject found under ECHR’s article 2 (Right to life), article 3 (Prohibition of torture and inhuman or degrading treatment), article 8 (Right to respect for private and family life) and article 14 (Prohibition of discrimination).

However, the CoE efforts to combat VAW are not restricted to the ECtHR case law. Particularly, in 2002 the Committee of Ministers adopted the ‘Recommendation (2002)5 on the

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<sup>207</sup> *Omondi/Waweru/Srinivasan*, (fn. 205).

<sup>208</sup> [https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14\\_en.pdf](https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf) (02/11/2020).

<sup>209</sup> *McQuigg*, *The Istanbul Convention, Domestic Violence and Human Rights*, 2017, p. 2.

<sup>210</sup> *Hasselbacher*, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection*, NJIHR 2010, p. 200.

<sup>211</sup> ECtHR, application no. 71127/01, *Bevacqua and S. v. Bulgaria*, 12/06/2008.

<sup>212</sup> ECtHR, application no. 33401/02, *Opuz v. Turkey*, 09/06/2009.

<sup>213</sup> *Ibid*, para. 200.

<sup>214</sup> *Jakštienė*, *Domestic Violence in Case-Law of European Court of Human Rights*, PSO 2014, p. 84.

Protection of Women against Violence<sup>215</sup> and later, between 2006 and 2008, the organization promoted a campaign “to Combat Violence against Women including Domestic Violence”<sup>216</sup>, in which a task force was designated to evaluate the issue throughout Europe. At the end, the group of experts agreed on the necessity of a binding instrument to combat VAW and proposed the draft of a new convention, based on “the gendered nature of the phenomenon of domestic violence and the structural causes of violence against women”<sup>217</sup> Thus, the CoE founded in 2008 the ‘Ad Hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence’ (“CAHVIO”), composed of forty-seven Members States’ representatives and with the aim to elaborate the new convention. In addition, CAHVIO’s meetings also had a strong attendance of international organizations and NGOs’ representatives.

Based on the previous extensive work that had been done by the CoE on VAW and equality, and filling a previous normative gap present in Europe on the subject,<sup>218</sup> the Convention on preventing and combating violence against women and domestic violence<sup>219</sup> (“Istanbul Convention”) was adopted in 2011 by the Committee of Ministers and came into force on 1 August 2014. Currently forty-five States and the EU have signed the Convention, of which thirty-four have already ratified it.<sup>220</sup> The instrument is also open to signature by non-member States of the CoE and international organizations, but so far only the EU has signed and not yet ratified it. In addition, in contrast to the already mentioned recent global increase in number of domestic violence cases,<sup>221</sup> both the Polish and Turkish governments’ representatives have mentioned intentions to withdraw from the Istanbul Convention.<sup>222</sup> In a statement in response to the news involving Poland, the CoE has considered the withdrawal manifestation “*highly regrettable and a major step backwards*”<sup>223</sup>.

## 2. Istanbul Convention Overview

The Istanbul Convention goals are extensive and the instrument has a ‘four Ps approach’: i. Prevention of violence (Chapter III), precisely requiring States to exercise due diligence in regard of acts of committed by private parties (article 5, 2.); ii. Protection and

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<sup>215</sup> CoE, Committee of Ministers, Recommendation (2002)5 of the Committee of Ministers to member states on the protection of women against violence, 30/04/2002.

<sup>216</sup> Jones, The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence (Istanbul Convention), in: Rashida/Jones (eds.), The Legal Protection of Women from Violence - Normative Gaps in International Law, 2018, p. 140.

<sup>217</sup> [https://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/Final\\_Activity\\_Report.pdf](https://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/Final_Activity_Report.pdf) (02/11/2020).

<sup>218</sup> De Vido, The Ratification of the council of Europe Istanbul convention by the EU: a Step Forward in the Protection of Women from Violence in the European Legal System, EJLS 2017, p. 75.

<sup>219</sup> CoE, Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series - No. 210, Istanbul, 11/05/2011, 11.V.2011.

<sup>220</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures> (02/11/2020).

<sup>221</sup> See section A, p. 1 and section C, I, p. 13.

<sup>222</sup> <https://ijrcenter.org/2020/08/06/turkey-poland-consider-leaving-istanbul-convention-on-violence-against-women/> (02/11/2020).

<sup>223</sup> <https://go.coe.int/VS9H4> (02/11/2020).

support of women and girls already subjected to violence (Chapter IV); iii. Prosecution of perpetrators, including criminal investigation and procedure law (Chapter VI); and iv. Integrated Policies (Chapter II), aiming to induce the States to adopt comprehensive and coordinated policies carried out among different government agencies, NGOs and institutions (article 7) – the latter being added later after the evaluation that VAW cannot be eradicated through isolated measures, rather, the issue calls for systematic and integrated policies.<sup>224</sup>

Moreover, the Convention's preamble recognizes that VAW is both a "*serious violation of the human rights [...] and a major obstacle to the achievement of equality between women and men*"<sup>225</sup>, in fact being a "*manifestation of historically unequal power relations between women and men*"<sup>226</sup> that results in women being deprived of full emancipation. It is also acknowledged that not only women, but also girls are victims of gendered violence; while children, of both sexes, may be victims of domestic violence, including indirect victims - due to the fact that they may witness violence in the family (preamble).

Hence, the instrument presents a broad definition of VAW, encompassing "*all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women [...] whether occurring in public or in private life*"<sup>227</sup>, both in situations of peace or armed conflict (article 2, 3.). Further, the substantive law presented in the convention (Chapter V) includes both violence that exclusively happens to women (forced abortion or female genital mutilation), as well as other manifestations of violence that women suffer disproportionately more often when compared to men, like rape, harassment, sexual abuse, domestic violence, forced marriage and forced sterilization. Therefore, States are expressly required to criminalize a vast number of violations. In addition, the convention is innovative when requiring States to adopt protective measures for foreign women and includes the regulation of important issues regarding migration and asylum in a specific chapter (Chapter VII).

Furthermore, the Istanbul Convention clearly differentiates 'domestic violence' from its general definition of 'violence against women', presenting an unbound definition for this violation: "*all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim*"<sup>228</sup>. While the separate definition of 'domestic violence' emphasises the Convention's commitment to combating the

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<sup>224</sup> Grans, The Istanbul Convention and the Positive Obligation to Prevent Violence, HRLR 2018, p. 136; Niemi et al., Introduction: The Istanbul Convention as a Response to Violence against Women in Europe, in: Niemi et al., International Law and Violence Against Women - Europe and the Istanbul Convention, 2020, p. 8.

<sup>225</sup> Istanbul Convention, (fn. 219), preamble.

<sup>226</sup> Ibid.

<sup>227</sup> Istanbul Convention, (fn. 219), article 3, a.

<sup>228</sup> Istanbul Convention, (fn. 219), article 3, b.

issue, it also introduces a gender-neutral concept implying that men are also affected by this abuse. Significantly, this gender-neutral approach received some criticisms arguing that this decision may weaken the protection based on the structural VAW committed by men and on the women subordination.<sup>229</sup> In fact, the genderless conceptualization of domestic violence is a controversial issue; while it is unquestionable that men and boys are also affected by domestic violence, treating the issue in a non-gendered form denies the social-political perspective of the issue,<sup>230</sup> ignoring the grave and systematic male violence against women and “*thus nullifying the meaning of the very term violence against women and the rationale for the treaty in the first place*”<sup>231</sup>. Further, some scholars argue that addressing domestic violence using a gender perspective helps to develop better policies and programs both for victims and perpetrators.<sup>232</sup>

Nevertheless, the Istanbul Convention also recognizes that women are significantly more affected by domestic violence than men (preamble/ article 2, 1.), and the Convention’s Explanatory Report clarifies that States may decide whether or not to extend the Convention provisions to men and children victims of domestic violence, depending on the national situation and the development of the society.<sup>233</sup> In addition, other scholars understand that since the Istanbul Convention clearly differentiates in the sense that States are ‘encouraged’ to consider male victims under the Convention’s scope (article 2, 2.) rather than ‘obliged’, thus the initial focus of the instrument - on preventing and combating VAW, whether it occurs within the family or not – remains preserved.<sup>234</sup>

### 3. Istanbul Convention and the European Court of Human Rights

The Istanbul Convention continues the previous work done by the ECtHR on domestic violence, codifying as the States Parties obligation important issues brought through cases decided and raised by the Court, which were also crucial during the Convention negotiations.<sup>235</sup> Nonetheless, despite the Istanbul Convention being a ground-breaking instrument, the ECtHR jurisprudence on domestic violence may still be developed under the ECHR,<sup>236</sup> both because there is no direct mechanism for individual complaints under the new Convention and its monitoring mechanisms, although having potential, are in their initial stages, as observed

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<sup>229</sup> *De Vido*, (fn. 218), p. 76.

<sup>230</sup> *Nixon*, *The Power to Name: Conceptualizing Domestic Violence as Violence Against Women*, NSHR 2007, p. 13 ff.

<sup>231</sup> *Jones*, (fn. 216), p. 143.

<sup>232</sup> *Nixon*, (fn. 230), p. 13 ff.

<sup>233</sup> CoE, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, Council of Europe Treaty Series - No. 210, para. 37.

<sup>234</sup> *McQuigg*, (fn. 209), p. 75.

<sup>235</sup> *Jones*, (fn. 216), p. 159; ECtHR, Research Division, *Articles 2, 3 and 14 Equal access to justice in the case-law of the European Court of Human Rights on violence against women*, June 2015, para. 52 [https://www.echr.coe.int/Documents/Research\\_report\\_equal\\_access\\_justice\\_violence\\_women\\_ENG.PDF](https://www.echr.coe.int/Documents/Research_report_equal_access_justice_violence_women_ENG.PDF) (02/11/2020).

<sup>236</sup> *McQuigg*, *Domestic Violence as a Human Rights Issue: Rumor v. Italy*, EJIL 2016, p. 1023.



below. Furthermore, since the Istanbul Convention came into force, the ECtHR has often referred to the instrument,<sup>237</sup> using the new Convention as a key guideline in determining States' responsibilities while interpreting cases of domestic violence,<sup>238</sup> and thus expanding the ECHR scope of application.<sup>239</sup> For instance, in a recent case ruled on domestic violence, *Buturugă v. Romania*, the ECtHR emphasized that Romania did not take in consideration the special diligence required from States in the Istanbul Convention to deal with complaints of domestic violence.<sup>240</sup> In addition, the Court has cited the Istanbul Convention also in judgments involving States not parties of the Convention, as in the case *Volodina v. Russia*, in which the ECtHR stressed that it would not refrain from citing the instrument, even with Russia not being party to it.<sup>241</sup> Finally, it seems the ECtHR observes the Istanbul Convention as complementary to the ECHR, which demonstrates the Court's case law will remain important in combating domestic violence in Europe.

#### 4. Mechanisms of Control

The Istanbul Convention has established two bodies to oversee its monitoring mechanism: the Group of Experts on Action against Violence against Women and Domestic Violence ("GREVIO") and the Committee of the Parties. The GREVIO is an independent expert body, today composed of fifteen experts responsible for monitoring the Convention implementation, with mainly three attributions: managing the States' reports procedure, conducting an inquiry procedure (article 68) and issuing, when appropriate, general recommendations on matters related to the Istanbul Convention (article 69). On the other hand, the Committee of the Parties is a political body composed of States' representatives (article 67) that are responsible for the election of GREVIO's members. Further, the Committee of the Parties shall meet at any time when required by one-third of the Convention's parties, the Committee's President or the CoE Secretary General (article 67, 2.)

Therefore, the Istanbul Convention primary monitoring mechanism is a detailed report to be submitted by States based on a questionnaire drafted by the GREVIO, regarding the measures adopted for the implementation of the Convention (article 68, 1.). After receiving the

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<sup>237</sup> See for instance: ECtHR, application no. 646/10, *M.G. v. Turkey*, 22/03/2016, para. 93, 94 and 106; application no. 63034/11, *Halime Kılıç v. Turkey*, 28/06/2016, para. 114-115; application no. 41237/14, *Talpis v. Italy*, 02/03/2017, para. 129; application no. 49645/09, *Bălșan v. Romania*, 23/05/2017, para. 79; application no. 41261/17, *Volodina v. Russia*, 09/07/2019, para. 60; and application no. 56867/15, *Buturugă v. Romania*, 11/02/ 2020, para. 37, 38 and 67.

<sup>238</sup> *Guney*, The Group of Experts under the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence and the ECtHR: Complementary or Contradictory Tools? <https://www.ejiltalk.org/the-group-of-experts-under-the-istanbul-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence-and-the-ecthr-complementary-or-contradictory-tools/> (02/11/2020).

<sup>239</sup> *De Vido*, States' Positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention on Human Rights, ER 2017, p. 10.

<sup>240</sup> ECtHR, *Buturugă v. Romania*, App. no. 56867/15, 11/02/2020, para. 67.

<sup>241</sup> ECtHR, *Volodina v. Russia*, App. no. 41261/17, 09/07/2019, para. 60.

States' reports, the monitoring body will develop its own report with conclusions on the measures embraced by the parties (article 68, 11.). During the procedure and when it is deemed necessary, the GREVIO may also conduct country visits (article 68, 9.). Further, the procedure also welcomes the participation of the general public and NGOs, allowing the submission of information directly to GREVIO (article 68, 5.). Finally, the Committee of the Parties may also issue specific recommendations to States Parties for implementing GREVIO's final observations (article 68, 12.).

Additionally, GREVIO may also conduct a special inquiry procedure when it has reliable information of situations requiring prompt action to prevent or limit serious cases of violence under the Istanbul Convention's scope (article 68, 13./14.). When aware of this information, the Group of Experts may require from States an immediate submission of a report regarding the measures taken in regard of the violation in question. Based on this report or "*any other reliable information available*"<sup>242</sup>, GREVIO may initiate an inquiry procedure designating one or more of its experts for this duty, who must report back to GREVIO urgently (article 68, 14.). The procedure may involve an on-site visit to the State investigated, with its due consent. After the assessment of the inquiry findings, GREVIO will report them to the State involved, which may be followed with comments or recommendations of the Committee of the Parties and the CoE's Committee of Ministers (article 68, 15.).

Furthermore, GREVIO issued its first 'General Activity Report'<sup>243</sup> in April 2020, covering its activities from June 2015 until May 2019, summarising the findings that resulted from the evaluation of the first eight States' reports. Significantly, the monitoring body criticized the gender-neutral approach of domestic law provisions in some countries (Albania, Sweden and Finland), pointing out that although the Istanbul Convention has a gender-neutral definition for domestic violence, the Convention also emphasizes that the violation is precisely gendered; while the mentioned countries failed to address the particularities experienced by female victims and therefore jeopardized their protection (para. 40). Further, the monitoring body also draws attention to the limited definition of domestic violence at national level in Portugal and Austria, not encompassing all the manifestations of the issue present in the Convention's article 3, b (para. 42).

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<sup>242</sup> Istanbul Convention, (fn. 219), article 68, 14.

<sup>243</sup> <https://rm.coe.int/1st-general-report-on-grevio-s-activities/16809cd382> (02/11/2020).

## **E. Violence Against Women – A Comparison**

### **I. Substantive law**

Firstly, as mentioned before, the CEDAW - the only international binding instrument with universal scope that protects the rights of women against gender discrimination – leaves, at first, out of its regulation one of the most serious forms of discrimination suffered by women globally: VAW, by virtue of being women. Therefore, the definitions used in the UN system, in regard to both VAW and domestic violence more specifically, are found in different legal documents, mainly in the DEVAW and General Recommendations 19 and 35, which through an extensive interpretation clarify that the CEDAW encompasses gender-based violence.

Secondly, the Inter-American Belém do Pará Convention is the first international treaty that breaks the human rights paradigm that excludes from State's responsibility acts committed by individuals, as they belong to the private sphere. Therefore, it regulates as VAW all forms of violence that take place in the family (implicitly including domestic violence), the community and the State. Finally, it obliges States to condemn VAW and to adopt measures for its prevention, punishment and eradication.

Thirdly, within the African context, despite the fact that the Maputo Protocol is not a text specifically drafted to eliminate VAW, but rather to recognize women's rights more generally, yet it contains important references to many types of gendered violence, and offers valuable and broad protection against these, in particular against harmful practices.

Finally, in Europe, the Istanbul Convention came up as the most complete and advanced instrument on combating VAW in international human rights law, precisely describing the rights protected and detailing the standards for State's protection of victims, prosecution and punishment of perpetrators, prevention of violations and integrated policies. Remarkably, the Istanbul Convention specifically protects from domestic violence, while it also creates a separate and gender-neutral definition for this violation, unbound from the general concept of VAW.

Therefore, while the Belém do Pará Convention and the Istanbul Convention are the only binding treaties specifically formulated to combat VAW, generally speaking, all the above-mentioned legal documents encompass the issue, explicitly or implicitly. Further, all the regional instruments analysed here have a similar concept for VAW, following the DEVAW definition of it. The Istanbul Convention and the Maputo Protocol go further and extend the concept to encompass 'economic violence' suffered by the victims, while the CEDAW and the Belém do Pará Convention limit their scope to 'physical, sexual and psychological

violence'. Nevertheless, the CEDAW jurisprudence<sup>244</sup> and the MESECVI Committee of Experts have already recognized 'economic harm' as a form of gender-based violence.<sup>245</sup>

Perhaps the most divergence among these instruments, in our context, is the Istanbul Convention's legal characterization of domestic violence separately from VAW and gender-based violence, thus differing from the UN documents related to the issue (DEVAW, GR 19 and 35), as well as the other two regional human rights instruments – all of them rejecting the gender-neutral concept of domestic violence and defending the position that the issue is a manifestation of VAW in the family, in which the man is the subject perpetrator and the woman the victim.<sup>246</sup>

## II. Mechanisms of Control

The primary monitoring mechanism common to all the instruments herein analysed is the States' Report procedure. The CEDAW, like other UN treaties, requires State Parties to present the report every two years; the Belém do Pará Convention and the Maputo Protocol established the same procedure, obliging States to submit progress reports on implementing the convention annually and the protocol every two years, respectively. Likewise, the main compliance mechanism under the Istanbul Convention is a reporting procedure, notably much more detailed than the others mentioned. In general, reporting mechanisms receive criticism related to the lack of compliance by the States that often delay submissions, and also the delay by the monitoring bodies in analysing the reports. Significantly, the GREVIO so far has been requesting two countries at a time to submit the reports, which seems to be an attempt to avoid the common backlog of reports as observed in other human rights systems.<sup>247</sup>

Moreover, individual complaints have been allowing women to obtain judicial protection against different forms of gender-based violence at international level, proving to be a valuable and effective tool for women's human rights protection. Thereby, under the CEDAW, the procedure is foreseen in the Convention's Optional Protocol, which limits the number of States submitted to the mechanism, since not all CEDAW States Parties have ratified the Optional Protocol.

In turn, the Belém do Pará Convention allows women to lodge petitions to the IACHR, which will later decide whether or not the case will be submitted to the Inter-American Court. However, some criticize the fact that women do not have direct access to the IACtHR, as well as the necessity of an express recognition of the IACtHR jurisdiction by the States. Nevertheless, a significant number of landmark cases have been decided by both the IACHR

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<sup>244</sup> See for instance *Cecilia Kell v. Canada*, CEDAW, Communication No. 19/2008, 28/02/2012, UNDoc. CEDAW/C/51/D/19/2008, para. 10.7.

<sup>245</sup> <http://www.oas.org/en/mesecvi/docs/MESECVI-SegundoInformeHemisferico-EN.pdf> (02/11/2020).

<sup>246</sup> *McQuigg*, (fn. 209), p. 78; Jones, (fn. 216) p. 142.

<sup>247</sup> *McQuigg*, (fn. 209), p. 115.

and the IACtHR under the Belém do Pará Convention,<sup>248</sup> some of them being considered as a reference on State's due diligence obligation for private actors' violations of human rights.

Further, although the Maputo Protocol does not directly allow individual complaints, the African Commission by extension may receive communications, since the protocol supplements the African Charter.<sup>249</sup> The same applies to the African Court, however here, States also need to ratify a different protocol to be binding by the court jurisdiction. However, as mentioned before, the African Union jurisprudence on VAW is considerably limited; under the Maputo Protocol specifically, the African Commission has not yet analysed any case, while the African Court decided for the first time mentioning the legal instrument in 2018.

Surprisingly, the Istanbul Convention does not contemplate the possibility of individual complaints to be lodged to GREVIO or to another body of the CoE, also excluding the jurisdictional control by the ECtHR. Nevertheless, the Court has already decided to draw upon the Convention when assessing violations of the ECHR and it continues to develop its jurisprudence on cases of domestic violence after the Istanbul Convention came into force.

In addition, both the OP-CEDAW and the Istanbul Convention provide for an Inquiry Procedure for urgent situations, which includes on-site visits to the country under investigation. Nonetheless, under the CEDAW, not all States are subject to this procedure, which is applicable only to those which ratified the OP-CEDAW, and the mechanism, which is also subject to an opt-out (OP-CEDAW, article 10), has been considered too bureaucratic and underutilized; while under the Istanbul Convention all State Parties are subject to it and no reservation is allowed to the mechanism (Istanbul Convention, article 68, (13) - (15) and article 78), with its effectiveness being still uncertain since so far GREVIO has not yet utilized it. In contrast, the Inter-American Commission of Human Rights is allowed, although not through the Belém do Pará Convention, to conduct country visits for a general overview of human rights situations or to investigate specific matters, which is considered to have an important political impact in the region.<sup>250</sup> In addition, the African Commission may carry out investigations under article 46 of the African Charter, but the procedure is not very detailed and so far no inquiry has been conducted under the Maputo Protocol.

Furthermore, although not legally binding, General Recommendations have been effective in guiding States on better implementing treaties in different human rights systems.<sup>251</sup> Under the CEDAW, the Committee is entitled to issue General Recommendations under article 2, 1. Significantly, these statements were fundamental on the clarification that VAW is a violation of women's human rights under the UN convention and the CEDAW Committee considers them

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<sup>248</sup> *Dauer*, Human Rights Response to Violence Against Women, in: Reilly, International Women Rights of Women, 2019, p. 23.

<sup>249</sup> *Budoo*, (fn. 192), p. 62.

<sup>250</sup> *Konefal*, Inter-American Commission on Human Rights, in: Leonard et al., Encyclopedia of U.S. – Latin American Relations Volume, 2012, p. 479.

<sup>251</sup> *McQuigg*, (fn. 209), p. 120.

as authoritative statements. Moreover, within the Belém do Pará Convention, the necessity of an on-going evaluation process for the States' compliance with the convention led to the creation of an independent agency, the MESECVI, in which its Committee of Experts, together with the CIM, have been issuing important detailed recommendations and guidelines for better implementation of the convention.<sup>252</sup> Likewise, under article 45, 1.b of the African Charter, the African Commission may issue General Comments or adopt guidelines and resolutions on different human rights issues. Notably, the African Commission has been using this mechanism to clarify provisions of the Maputo Protocol. Further, the Istanbul Convention in article 69 allows GREVIO to issue General Recommendations, having the Group of Experts recently established a work group to draft its 1<sup>st</sup> General Recommendation "on the Digital Dimension of Violence against Women"<sup>253</sup>.

## F. Conclusion

The recognition of domestic violence as a human rights issue was the result of the feminist movement's struggle, which faced primarily as a barrier for this achievement the boundaries created to separate public and private life that very often are used to contribute to reinforcing the patriarchy's structure.<sup>254</sup> On the whole, the guarantee of privacy protection in regard to State intervention within the family has led to the perpetuation of the authoritarian relationship of male dominance that limits women's autonomy and independence. In addition, the international protection from domestic violence only started to be developed after the recognition of VAW as a human rights violation in 1993 and formalized in the DEVAW, which also extended to violence being committed in the private sphere. Thus, the public/private dichotomy that initially prevailed in international law, in which acts committed by private parties were not accounted for as the State's responsibility, has been formally suppressed through the principle of due diligence. Hence, international human rights law today considers the prevention, protection, prohibition and punishment of domestic violence committed against women as the States' responsibility.

In this context, the human rights systems analysed here - global and regional - have shown a growing consensus in States' due diligence obligation for cases of domestic violence, often referring to each other and with similar language in the reasoning of their decisions.<sup>255</sup> Thereby, although far from perfect and holding limitations, these systems have been playing

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<sup>252</sup> *Mcaleese*, (fn. 170), p. 417.

<sup>253</sup> GREVIO, List of decisions adopted at the 21st meeting (25 – 26 June 2020, KUDO), GREVIO/Inf(2020)LD21.

<sup>254</sup> *Baker*, Risking Difference: Reconceptualising the Boundaries Between the Public and Private Sphere, in: *Baker/ van Doorne-Huiskes, Women and Public Policy - The Shifting Boundaries Between the Public and Private Spheres*, 2019, p. 14.

<sup>255</sup> *Çağlar/Gür*, The State's due diligence obligation, in: *West/Bowman (eds.)*, *Research Handbook on Feminist Jurisprudence*, 2019, p. 500.

an important role in providing women international protection. At the UN level, the CEDAW Committee has developed vast jurisprudence interpreting the CEDAW as a living instrument and placing the DEVAW and GR19 as authoritative statements and key documents on the issue, being greatly cited in both national and international courts when ruling on VAW. Moreover, the Inter-American system through its highly ratified Belém do Pará Convention, was the pioneer international treaty to recognize the State's due diligence for cases of VAW. The Convention also established relevant compliance mechanisms, including an individual complaints system that allow the victims to lodge petitions to the IACHR, with the possibility of a future intervention by the IACtHR - which resulted in important jurisprudence on VAW that established international standards, with global repercussion for women's human rights protection. In addition, the African Union's Maputo Protocol, albeit the most timid instrument among the others considered herein, is still a progressive legal document with valuable provisions that offers protection for women against some forms of violence. Furthermore, in Europe, the Istanbul Convention, learning from the case law of the CEDAW and the Belém do Pará Convention, came out as the most advanced and vanguard treaty on VAW and domestic violence - explicitly requiring the States to criminalize various forms of violations, and expressly recognizing the principle of due diligence. In addition, despite being in its initial stages the Convention holds great potential to protect women in the continent and perhaps globally – since it is open for accession by States not part of the CoE pursuant to article 76.

Nonetheless, although all the progress that has been achieved at the international level, domestic violence remains widespread globally, either through physical, psychological, economic or sexual abuse. Further, the recent intensification in domestic violence cases in many countries during the COVID-19 lockdown shows how it is challenging to modify culture, traditions and social patterns that have intrinsic to them the idea of male dominance, thus reinforcing VAW and gender inequalities. In contrast, it is alarming that during the current crisis some governments have voiced intentions to withdraw their international commitments related to VAW, such as Turkey and Poland,<sup>256</sup> while a dramatic number of women's lives continue to be threatened daily. Thus, there is an urgent need to raise awareness about women living in abusive situations.

In this sense, some scholars have been defending the necessity of a universal legally binding instrument on gender-based violence to reduce the deficiencies present in IHRL today. Nevertheless, we cannot ignore two points, often discussed by the international experts' mechanisms on VAW: both the gap between the already existing norms on the issue and their implementation, and the gap between these global and regional treaties and the national laws.<sup>257</sup> Therefore, a more efficient protection of women against domestic violence on an

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<sup>256</sup> See section D, III, 1, p. 34.

<sup>257</sup> UNGA Res. 71/170, (fn. 90).

international level should be focused on improving the application of the existing legal frameworks, on a global and regional level, and the adequacy of these norms with regard to national legislations. In order for this to succeed, further interaction and cooperation among the human rights systems is crucial. In fact, as we observed, they have been influencing each other, including in establishing legal precedents, as well as joining in cooperation to tackling VAW, such as the creation of the EDVAW Platform. Yet they can and should go beyond, intensifying efforts for learning from and reinforcing each other in order to help correct their deficiencies, thus creating a more consistent force to combat domestic violence.

Finally, this paper argues that International Human Rights Law, from the perspective of the legal norms and mechanisms here analysed, has been an important and fundamental tool in protecting women against domestic violence, especially in holding States responsible when violations of women's rights have already occurred. However, considering that despite all the progress achieved the problem remains endemic, the human rights systems should demand more from States in regard of measures to prevent VAW, thus reaching the roots of the problem - the economic, social and cultural reasons that perpetuate power relationships and place women at a disadvantage in the full enjoyment of their human rights.



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