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'Women's sexual and reproductive health rights under International Law: the case of obstetric violence'

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ABSTRACT (English)

This paper examines the concept of *obstetric violence* in the context of Public International Law. To do so, a doctrinal, and normative analysis of the main human rights' legal instruments in the field of health and women's rights has been carried out. Additionally, this has been supplemented with a jurisprudential review of the reasoning of the Committee of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW Committee) in three leading cases regarding *obstetric violence.*

Although the theme is mainly approached from a Public International Law perspective, and, more particularly, through the lens of International Human Rights Law, a brief overview of the Spanish situation and legal framework regarding this type of violence has been included, to contrast it with the examined international human rights legal standards.

Key words: obstetric violence, human rights, pregnancy, international law, women's sexual and reproductive health rights, non-discrimination, gender equality.

ABSTRACT (Español)

Este trabajo examina el concepto de violencia obstétrica en el contexto del Derecho Internacional Público. Para ello, se ha realizado un análisis doctrinal y normativo de los principales instrumentos jurídicos de derechos humanos en el ámbito de la salud y los derechos de la mujer. Adicionalmente, se ha complementado con una revisión jurisprudencial del Comité de la Convención sobre la Eliminación de todas las formas de Discriminación contra la Mujer (Comité CEDAW) en tres destacados casos sobre violencia obstétrica.

Aunque el tema se aborda principalmente desde la perspectiva del Derecho Internacional Público y, más concretamente, desde la óptica del Derecho Internacional de los Derechos Humanos, se ha incluido una breve referencia de la situación y el marco jurídico español en relación con este tipo de violencia para su contraste con los estándares normativos del derecho internacional de los derechos humanos.

Palabras clave: violencia obstétrica, derechos humanos, embarazo, derecho internacional, derechos sexuales y reproductivos de las mujeres, no discriminación, igualdad de género.

I. INTRODUCTION

It is hard to find any statistics on the number of women suffering from obstetric violence in the world. But, even if there were more, those numbers would not be accurate since most women are not aware that they are being abused or that the suffering they face during pregnancy, partum and postpartum is far from being 'normal'.

There is a lack of information, studies and papers addressing this issue. Most of them are written by women and have been published from 2019 onwards. Luckily enough it can be stated that the silence against it is now starting to be broken.

From a legal perspective, there is not an international treaty or convention exclusively addressing this type of violence. Instead, a 'scattered' regulation can be found. Therefore, in this paper a review of the most important conventions, treaties and instruments, as well as soft-law instruments -namely, the Universal Declaration of Human Rights, the Declaration on the Elimination of Violence against Women, the Convention on the Elimination of All Forms of Discrimination Against Women; the Beijing Declaration and Platform of Action, the Report of the UN Special Rapporteur on violence against women, its causes and consequences on a human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence; or the Report of the UN Working Group on Discrimination against Women and Girls on women's and girls' sexual and reproductive health rights in crisis- will be done. This analysis will be carried out in order to determine the current *legal paradigm* on the topic from a Public International Law perspective.

Additionally, an examination of the three main cases addressed by the CEDAW Committee on obstetric violence will be included, which will contribute to understanding the most recent interpretation of the Convention safeguard.

Thus, the aim of this dissertation is to provide a theoretical framework regarding this type of violence by delimitating its legal meaning and scope, as well as to identify the interrelationship between the different human rights that are affected by it.

II. WOMEN'S SEXUAL AND REPRODUCTIVE RIGHTS AND SEXUAL HEALTH RIGHTS: MAIN LEGAL INSTRUMENTS FOR THEIR PROTECTION

1. GENERAL OVERVIEW OF THE RIGHT TO HEALTH

It is generally agreed that the right to health is basic and essential since it is a *pre-requisite* for the enjoyment of other rights. Under Public International Law, it was first formally recognised in the 1946 Constitution of the World Health Organization (WHO), where it is defined as *a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.*[1]

Subsequently, it was enshrined in other international instruments, treaties and conventions such as in article 25 of the 1948 Universal Declaration of Human Rights and article 12 of the 1966 International Covenant on Economic, Social and Cultural Rights; as well as in regional instruments like the 1981 African Charter on Human and Peoples' Rights or the 1969 American Convention on Human Rights. Additionally, the right to health has been established in certain legal instruments for the protection of specific groups of persons such as article 24 of the 1989 Convention on the Rights of the Child and articles 11(1) (f), 12 and 14 (2) (b) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women.

Notwithstanding the work done by the treaty bodies monitoring these instruments that have adopted general comments and recommendations on the right to health that provide, and authoritative interpretation of the provisions found in the treaties[2] and enable their practical implementation.

This extensive work in the field of the right to health shows the huge importance this right has and evidences the common agreement of the whole community in the need of its protection. Hence, States must make every possible effort to ensure the right to health. This is not a programmatic goal but an immediate obligation; and it needs to be outlined that a country's difficult financial situation does not absolve it from having to take action to realize the right to health. This means that States must guarantee the right to health to the maximum of their available resources.[3]

2. THE RIGHT TO HEALTH WITH A GENDER PERSPECTIVE

Certain groups of peoples have special needs to have their right to health fully ensured. This might be caused by different reasons such as biological or socio-economic.

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[1] Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 31: The right to health*, June 2008, page 1. Available at: https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-31-right-health [Accessed on 11/04/2023]

[2] *Ibid,* page 10.

[3] *Ibid,* page 5.

Women are one of these groups since *the prevalence of poverty and economic dependence among women, their experience of violence, gender bias in the health system and society at large, discrimination on the grounds of race or other factors, the limited power many women have over their sexual and reproductive lives and their lack of influence in decision-making are social realities which have an adverse impact on their health.*[4]

Additionally, from a biological perspective, physiological processes are equal to men's and, although in many aspects women may be affected by the same conditions as them, women experience them in a different way.[5]

One of the main biological differences between women and men is pregnancy. This constitutes one of those special needs: only by women having access to proper obstetric services and good quality medical attention during pregnancy, partum and postpartum could gender equality be ensured regarding the access to medical health-care services.

This has been attempted by the 1979 Convention on the Elimination of All Forms of Discrimination Against Women -hereafter, 'CEDAW' or 'the Convention'-. Already in its preamble, it refers to the *social significance of maternity* and outlines that *the role of women in procreation should not be a basis for discrimination.*[6] This wording shows how women's reproductive rights are often protected not for their own sake; that is, not as an end in themselves, but as a *means* to guarantee reproduction. Nevertheless, this Convention still constitutes a decisive legal instrument for women's reproductive rights, since it was the very first treaty dealing with them.

Firstly, article 11 (f) specifically recognises women's right to health and, particularly *the safeguarding of the function of reproduction.* Secondly, the Convention imposes State Parties a series of obligations such as the need to *take all appropriate measures to eliminate discrimination against women in the field of health care,* which includes providing women *appropriate services in connection with pregnancy, confinement, and the post-natal period.*[7] In this regard, it cannot go unmentioned the Committee on the Elimination of Discrimination against Women -'CEDAW Committee'-, which is the body that monitors and assesses the implementation of the Convention by each State Party. Its decisions are also essential for the progressive interpretation of women's health and reproductive rights.[8]

Subsequently, the Convention on the Elimination of All Forms of Discrimination Against Women's provisions have been complemented by other legal instruments in the Public International Law sphere:

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[4] *Ibid*, page 12.

[5] *Ibid,* page 12.

[6] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, *preamble.* Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women [Accessed on 11/04/2023]

[7] *Ibid,* article 12.

[8] For more information about CEDAW see Section IV of this paper: *'Leading cases on obstetric violence: an analysis of the CEDAW's decisions.'*

The 1993 Declaration on the Elimination of Violence against Women[9] aims at *strengthening and complementing*[10] the Convention. However, although it refers to women's right to *the highest standard attainable of physical and mental health*[11] and imposes States Parties the obligation to ensure women's access to appropriate *health and social services*[12], it does not specifically mention the need to protect their reproductive rights, including those during pregnancy, partum and postpartum.

During the 1995 Fourth World Conference on Women in Beijing, where the Beijing Declaration and the Platform for Action[13] was unanimously adopted by 189 countries, women health and reproductive rights were included in the agenda for women's empowerment: the differences regarding the enjoyment of the highest standard of health between women and men are highlighted and *the limited power many women have over their sexual and reproductive lives* is stated to be one of the factors that generates this differentiation.[14] It also provides a definition of how reproductive health must be understood -something that cannot be found in previous legal documents and that certainly improves legal certainty- : '*a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes'*[15] This undoubtedly supposes the *right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth.*[16]

More recently, the 2030 Agenda for Sustainable Development[17] adopted by the United Nations in 2015 recognises in its goal number five -to achieve gender equality and empower all women and girls- the need to *ensure universal access to sexual and reproductive health and reproductive rights,* hence reaffirming the Beijing Declaration.[18]

Yet, despite the existence of all these instruments -that certainly show the commitment of States to ensure and protect women's right to health and, more specifically, those of a sexual and reproductive nature- practice shows that most women continue suffering violations of these rights during pregnancy, childbirth, and the postpartum period.

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[9] UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-violence-against-women [Accessed on 16/04/2023]
[10] *Ibid*, preamble.
[11] *Ibid*, article 3 (f)
[12] *Ibid*, article 4 (g)
[13] United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995. Available at: https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf [Accessed on 16/04/2023]
[14] *Ibid*, paragraph 92.
[15] *Ibid*, paragraph 94.
[16] *Ibid,* paragraph 94.
[17] UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1. Available at: https://documents-dds ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement [Accessed on 16/04/2023]
[18] *Ibid,* Goal 5 (6), page 18.

III. THE CASE OF OBSTETRIC VIOLENCE

1. MEANING OF THE TERM AND THEORETICAL FRAMEWORK

Article 1 of the Declaration on the Elimination of Violence against Women defines the term ‘violence against women’ as any *act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women […]* Similarly, the Council of Europe Convention on preventing and combating violence against women and domestic violence -e.g., the Istanbul Convention-[19] states that it must be understood as *a violation of human rights.*[20]

On the other hand, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women acknowledges discrimination against women as *any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, […] on a basis of equality of men and women, of human rights and fundamental freedoms […].*

Consequently, when women are prevented from access to good-quality healthcare services during pregnancy, partum and postpartum; or when they are subjected to harmful and obsolete practices when delivering their babies that generate them not only physical but psychological damage, this should be described as violence and discrimination against women; and, more precisely, as obstetric violence.

The term ‘obstetric violence’ referrers to a set of practices that demeans, oppresses, and intimidates women in various ways within reproductive healthcare, primarily in pregnancy, delivery and postpartum.[21]

Following the sociologist Johan Galtung’s *theory of the violence triangle* in the context of conflict theory[22], it can be stated that it constitutes cultural, symbolic, and structural violence: obstetric violence has its roots in a social structure that does not ensure women’s access to proper resources for their obstetric needs, as well as does not respect their rights to be informed and to make decisions as patients -structural violence-;[23] and it normalizes gender stereotypes and roles, therefore perpetuating and invisibilizing asymmetrical systems of power -symbolic violence-.[24] Accordingly, obstetric violence is extremely dangerous since it often goes unnoticed, and this hinder its treatment and eradication.

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[19] Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, November 2014, ISBN 978-92-871-7990-6. Available at: https://rm.coe.int/168008482e [Accessed on 13/04/2023]
[20] *Ibid*, article 3 (a)
[21] GARCÍA, E.M. (2018), ‘Una aproximación teórica a la violencia obstétrica’, *Partos arrebatados. La violencia obstétrica y el mercado de la sumisión femenina,* Madrid, Ménades Editorial, page 32.
[22] GALTUNG, J. (1969). ‘Violence, Peace, and Peace Research’, *Journal of Peace Research*, 6(3).
[23] GARCÍA, E.M. (2018), ‘Una aproximación teórica a la violencia obstétrica’, *Partos arrebatados. La violencia obstétrica y el mercado de la sumisión femenina,* Madrid, Ménades Editorial, page 35.
[24] *Ibid,* page 25.

2. THE ROLE OF THE UN SPECIAL RAPPORTEUR ON VIOLENCE AGINST WOMEN AND GIRLS, ITS CAUSES AND CONSEQUENCES

Special Rapporteurs are one of the so-called *Charter-based bodies* under the United Nations human rights system.[25] They are independent experts on certain areas, appointed by the United Nations Human Rights Council -UNHRC-.

In 1994, the United Nations Commission on Human Rights[26] appointed a Special Rapporteur on violence against women[27] aiming at facilitating the implementation of some international human rights instruments on women's rights that at the time had recently been adopted by the United Nations -e.g. the Convention on the Elimination of All Forms of Discrimination against Women or the Declaration on the Elimination of Violence against Women-.[28]

From 2015 to 2021, Dubravka Šimonović, who had been member and Chairperson of the Committee on the Elimination of Discrimination against Women -CEDAW- for twelve years, was appointed as the United Nations Special Rapporteur on Violence Against Women.

During her mandate, she submitted a report specifically addressing violence and discrimination suffered by women regarding reproductive health services and pregnancy. It is the very first UN human rights document solely focusing on obstetric violence.[29] As such, it has been essential for the clarification of the term and for the delimitation of its scope.

The Special Rapporteur starts by justifying her choice of the theme and highlights how mistreatment and violence against women during childbirth - and in other reproductive health services- had lately gained utmost attention[30]. Therefore, she does not refer to a *new* form of discrimination against women but to a *widespread and systematic* phenomenon, which has been remained largely unchanged for centuries.[31]

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[26] The United Nations Commission on Human Rights was established in 1946 and was replaced in 2006 by the United Nations Human Rights Council -UNHRC-.
[27] UN Commission on Human Rights, *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women*, 4 March 1994, E/CN.4/RES/1994/45. Available at: https://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1994-45.doc [Accessed on 11/04/2023]
[28] *Ibid,* preamble.
[29] UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on a human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence*, 11 July 2019, A/79/137. Available at: https://digitallibrary.un.org/record/3823698 [Accessed on 13/04/2023]
[30] To this regard, the Special Rapporteur refers to different social movements calling for women's reproductive rights during childbirth that have contribute to break the silence on obstetric violence. E.g. social media campaigns in Italy (#bastacere: le madri hanno voce); Croatia (#PrekinimoSutnju); France (#PayeTonUtérus); the Netherlands (#Genoeggezwegen); Hungary (#Másállapotot); and Finland (the Roses revolution and #Minä Myös Synnyttäjänä)
[31] *Ibid*, paragraph 4.

When addressing the scope of the report, the Special Rapporteur outlines the existence of *a wider context of structural inequality, discrimination, and patriarchy*, as well as a lack of *respect for women's equal status and human rights* regarding men.[32] Mention to the social context is not meaningless since it is precisely that what justifies the existence of violence against women and not a simple medica malpractice. The Special Rapporteur clarifies this by stating that *in certain circumstances some forms of mistreatment could about to violence against women in individual cases, depending on the circumstances, while others could be determined to be human rights violations based on human rights standards and human rights jurisprudence.*[33]

The Special Rapporteur defines 'obstetric violence' as: 'Violence experienced by women during facility-based childbirth.' She acknowledges that it is a term frequently used in South America -where some countries have national laws penalizing it-, in contrast to the international human rights law paradigm, where the term is not that popular.[34]

In her report, the Special Rapporteur details -in a non-exhaustive way- different *manifestations of gender-based violence in reproductive health-care services and during facility-based childbirth.*[35] This serves as a guide for the detection of obsolete protocols and techniques that need to be changed: the symphysiotomy -a technique consisting on the surgical separation and widening of the pelvis to facilitate childbirth that causes lifelong pain and disability to numerous women-; force sterilization and forced abortion; physical retention of women during labour with bed restraints and mouth gags; the post-childbirth detention of women and their new-borns in the hospital because they are not able to pay for the medical fees; the overuse of caesarean section just because it is 'faster'; the episiotomy -a technique consisting a deep cut in a woman's perineum into the pelvic floor muscle to help the vaginal delivery-; the overuse of synthetic oxytocin to induce contractions and labour; the so-called 'husband stich' -which supposes a tight stitching after a episiotomy to supposedly please the husband; or the humiliation, verbal abuse and sexist attacks during childbirth, are an example of these harmful practices and mistreatments.

The Special Rapporteur also outlines the importance of informed consent, usually overlooked by healthcare professionals during labour, in contrast to what happen in other medical procedures.[36]

Unfortunately, most of these techniques and practices are extremely common and this makes it hard to find a woman who has not been subjected to any of them, even without knowing that they had been victims of violence.

Another section of the report focuses on the root causes of mistreatment and violence against women in reproductive health services.[37] Most of them -discriminatory laws,

[32] *Ibid*, paragraph 9.
[33] *Ibid*, paragraph 13.
[34] *Ibid,* paragraph 12.
[35] *Ibid*, paragraph 15.
[36] *Ibid*, paragraphs 32-38.

harmful gender stereotypes or the excessive pathologisation of pregnancy and partum- are of a structural nature, meaning that they have to do with the historic situation of women -often relegated to a minor role- and traditional customs in a patriarchal society; hence being difficult to change. Additionally, the poor working conditions of many health professionals, limited resources, and bad labour conditions at hospitals aggravate the situation.

Finally, the Special Rapporteur makes a series of recommendations not only for States but for other stakeholders too[38], and she urges states to address the problem of obstetric violence by elaborating national strategies on reproductive health services and childbirth;[39] trying to solve the structural problems and the factors behind the discriminatory socioeconomic structures where their reproductive health-care systems lies[40] or by enacting laws[41] aiming at combating these practices and thereby safeguard women's reproductive rights and eradicate inequalities.

3. THE UN WORKING GROUP ON DISCRIMINATION AGAINST WOMEN AND GIRLS: REPORT ON WOMEN'S AND GIRLS' SEXUAL AND REPRODUCTIVE HEALTH RIGHTS IN CRISIS'

Along with the Special Rapporteur, the Working Group on discrimination against women and girls ('WG') is one of the *special* mechanisms created by the UN Human Rights Council for the protection of human rights with a decisive role.

After the release of the 2019 Special Rapporteur Dubravka Šimonović's report, different NGOs and international organizations decided to draw their attention to the issue of sexual and reproductive rights of women and girls. The WG also decided to address this issue. Thus, through virtual sessions from July 2020 to January 2021 it gathered information from a variety of actors.[42] It is remarkable that the report specifically refers to the enjoyment of these rights in situations of crisis, particularly, the COVID-19, since accordingly, '*crises exact a disparate and heavy toll on the sexual and reproductive health of women and girls, compounding and further deepening the systemic disadvantages and discrimination that they face'*[43]

The report outlines the view that systematic disadvantages and gender inequality may be considered as a crisis itself -a crisis that have been ignored for centuries-.[44] Moreover, it remarks the existence of *structural discrimination* and *patriarchal oppression* suffered by women and girls which is the basis for distinguishing obstetric violence from a mere medical malpractice.

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[37] *Ibid,* paragraphs 39-68.
[38] *Ibid,* section IV, *'Conclusion and recommendations for States and other stakeholders'*, pages 21-23.
[39] *Ibid,* paragraph 79.
[40] *Ibid*, paragraph 80 (a).
[41] *Ibid,* paragraph 75.
[42] A/HRC/47/38, paragraphs 2-4. Available at: https://www.ohchr.org/en/documents/thematic-reports/ahrc4738-womens-and-girls-sexual-and-reproductive-health-rights-crisis. [Accessed on 12/04/2023]
[43] *Ibid,* paragraph 8.
[44] *Ibid*, paragraph 63.

The reports also provide data of the number of women suffering violence and discrimination within their sexual and reproductive life. As such, it does not only refer to maternal deaths but also to unsafe abortions, the lack of access to modern contraception or the inability to manage their monthly menstrual cycle safely and with dignity as examples of these violations. [45]

It is remarkable that the WG also addresses the issue of *transactional discrimination.*[46] Intersectionality refers to the *complex ways in which social identities overlap and, in negative scenarios, can create compounding experiences of discrimination and concurrent forms of oppression*.[47] Is the case of indigenous women and girls, those of African descent or Roma women and girls. They are not only discriminated because of gender, but for their social background and origins too.

Finally, the WG calls states on prioritizing sexual and reproductive rights and removing discriminatory laws, policies, and practices. It specifically refers to obstetric violence and the need of its eradication.[48]

4. INTERRELATIONSHIP WITH OTHER HUMAN RIGHTS: A HOLISTIC STRUCTURE

Obstetric violence does not exclusively suppose a violation of women's rights to health, but also of the principles of equality and non-discrimination. Therefore, it is a type of violence that serves as an example of the interaction of different human rights and the need of considering all of them as a whole. This has already been stated in the 1993 Vienna Declaration and Programme of Action:

> *'All human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis [...]'*[49]

The previously analysed report of the Special Rapporteur Dubravka Šimonović shows how she needed the cooperation of different human rights bodies and organizations not directly dealing with women's rights -e.g. the World Health Organization or the Parliamentary Assembly of the Council of Europe- to accurately address the topic.

Additionally, the Committee against Torture described techniques like the symphysiotomy as torture.[50] Similarly, the Special Rapporteur on torture of the Human Rights Council has referred to the abuse of surgical miscarriage procedures during

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[45] *Ibid*, paragraph 16.
[46] *Ibid*, paragraphs 63-70.
[47] UN Secretary-General (UNSG), *Guidance Note on Racial Discrimination and Protection of Minorities*, March 2013, page 3. Available at: https://www.ohchr.org/sites/default/files/documents/issues/minorities/30th-anniversary/2022-09-22/GuidanceNoteonIntersectionality.pdf [Accessed on 17/04/2023]
[48] A/HRC/47/38, paragraph 77 (c)
[49] UN General Assembly, *Vienna Declaration and Programme of Action,* 12 July 1993, A/CONF.157/23, Section I (5). Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action [Accessed on 17/04/2023]
[50] Committee against Torture, *concluding observations*, Ireland (CAT/C/IRL/CO/2), paragraphs 29-30.

partum, such as *stitching after delivery to the absence of anaesthesia*.[51] Thus, a cooperative work of all human rights bodies and institutions is required to tackle obstetric violence since it affects several human rights of women.

IV. LEADING CASES ON OBSTETRIC VIOLENCE: AN ANNALYSIS OF THE CEDAW COMMITTEE'S DECISIONS

1. ABOUT THE COMMITTEE AND ITS ACTIVITY

Article 17 of the CEDAW foresees the creation of a Committee composed of renowned experts in order to assess the progress of the State Parties regarding the application of the Convention.

As such, States Parties must periodically submit a report stating the legislative, administrative, judicial and any other kind measures adopted for the implementation of the CEDAW.[52] One of the main functions of the Committee is to review this documentation and make recommendations on how the State Parties could efficiently fulfil the standards settled by the Convention.

Additionally, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women -hereafter, the Protocol-, recognizes the competence of the Committee to consider 'communications'[53]. These can be submitted by any person who, being under the jurisdiction of a State Party, claims to be victim of a violation of any of the rights set forth in the Convention.[54] The Committee acts in these cases as a '*sui generis* court' or '*soft* court' whose scope of action is limited to potential violations of the CEDAW: as any other court or tribunal, it must first decide on the communication's admissibility and, secondly, on the merits; but in this case this would be constrained to whether it has been a violation or not of the Convention.

Nevertheless, the decision rendered by the Committee is strictly different to that provided for a judge or tribunal since, according to the Protocol, it can only make suggestions, recommendations[55] or 'invite the State Party concerned to take measures'[56]. *Strictu sensu,* and according to the wording of its provisions, it could be argued that the Committee's decisions lack binding nature and could be considered *soft law*.

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[51] Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, A/HRC/31/57, paragraph 47.

[52] CEDAW, article 18.

[53] OP CEDAW, article 1.

[54] *Ibid*, article 2.

[55] *Ibid*, article 7.3.

[56] This can be observed in the wording of some of the OP CEDAW articles, such as article 7 ('The Committee **may invite** de State Party to submit further information [...]') or article 9 ('The Committee **may invite** the State Party concerned to include in its report [...]'), among others. [Author's underlining]

Notwithstanding the consideration of Human Rights Treaty Bodies' decisions as soft law by most scholars, it is also widely recognised their importance regarding the evolution of human rights and international law.[57]

In fact, it should be noted that the recognition by the ICJ of the authoritative legal value of the assessments by human rights bodies, both Charter-based bodies[58] -like the Special Rapporteur-, and treaty bodies[59], has long been established. Moreover, the Spanish Supreme Court recognized[60] the binding nature of the CEDAW's decisions[61] in the Angela González Carreño case, who submitted a communication before the Committee in 2012 as a victim of domestic violence. This has been an historical decision and a precedent of huge relevance in the field of the protection of human rights and, more specifically, of women's rights.[62]

2. THREE PARADIGMATIC DECISIONS OF THE CEDAW.

Three are the cases solved by the CEDAW Committee concerning obstetric violence. In two of them is concluded that Spain violated its Convention obligations against the discrimination of women and girls. Although there are still at least two cases pending before the Committee -one against Argentina and the other against Spain-[63], it can be observed the evolution on the reasoning of the Committee regarding this type of violence:

2.1. Alyne da Silva Pimentel Teixeira (deceased) v. Brazil, 2011.

This Communication was presented before the CEDAW Committee by Alyna's mother on behalf of her deceased daughter.[64] She claimed Brazil's violation of articles 2[65] and

[57] KACZOROWSKA A. (2015), 'Sources of International law', *Public International Law*, London and New York, Routledge, pages 64-65.
[58] E.g., ICJ, Advisory Opinion 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', referring to the views of several Special Rapporteurs, paragraph 133; ICJ, Dissenting opinion of Judge Cançado Trindade, Judgment of 3 February 2015, Case 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), paragraphs149 and 158; and Application instituting proceedings against the United Kingdom of Great Britain and Northern Ireland, Case 'Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)', paragraph 9.
[59] *Ahmadou Sadio Diallo Judgment, (Republic of Guinea v. Democratic Republic of Congo) (2010), International Court of Justice:* 'The Court observes that although it is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that **it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty**. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled'. [Author's underlining]
[60] Spanish Supreme Court Decision 1263/2018, 17 July 2018.
[61] CEDAW/C/58/D/47/2012
[62] https://www.ohchr.org/es/press-releases/2018/11/spain-sets-milestone-international-human-rights-law-say-un-womens-rights [Accessed on 05/04/2023]
[63] https://www.ohchr.org/en/treaty-bodies/cedaw/individual-communications [Accessed on 05/04/2023]
[64] This is a possibility foreseen in article 1 of the OP CEDAW.

12[66] of the CEDAW on the basis the lack of proper and specialized medical attention during pregnancy.

Alyne da Silva died in November 2022 due to a digestive haemorrhage that, according to the doctors, was caused by the delivery of the stillborn foetus that had been death in the womb for several days. Alyne did not receive appropriated medical attention when she first visited the medical centre due to the severe nausea and abdominal pain that she was suffering.

This was the very first case in which the CEDAW Committee heard a case concerning obstetric violence, but it needs to be outlined that this term is still not used, neither by the actor nor by the Committee in its observations.

This case also evidences the importance of the context in order to justify that discrimination against women was behind Alyne's death. In fact, according to Brazil's observations *the failures in the medical assistance provided to Ms. da Silva Pimentel Teixeira did not fall under discrimination against women, but rather deficient and low-quality service provision to the population, resulting in the facts described.*[67] This observation is based on the findings of some Brazilian governmental institutions such the technical visit report of the Rio de Janeiro Audit Department or the State Committee on Maternal Mortality.

This is refuted by the actor's allegation of three essential indicators that, according to the United Nations Children's Fund (UNICEF), the World Health Organization (WHO) and the United Nations Population Fund (UNFPA) shows the availability and use of obstetric services in a certain State. These are: the geographical distribution of the emergency obstetric care facilities, that women's need for emergency obstetric care are met and the proportion of women with obstetric complications and die which must not exceed one per cent.[68] The analysis of those indicators in the Brazilian context shows that Alyne's death was not an isolated case but a systematic problem in Brazil, hence constituting a form of discrimination against women and a violation of the Convention.

Moreover, the CEDAW Committee recognizes the existence of *multiple discrimination*, since not only was Ms. da Silva discriminated for being a woman, but also for being of African descent and because of her socio-economic background.[69]

Finally, it recommends Brazil to provide appropriate reparation to the family of Ms. da Silva Pimentel Teixeira as well as to take all necessary measures to implement the Convention and the obligations to State Parties contain therein.[70]

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[65]This article refers to the State parties' obligation to adopt the necessary measures for the implementation of CEDAW.

[66] This article specifically refers to the State parties' obligation to ensure women access to proper services during pregnancy, partum and postpartum.

[67] CEDAW/C/49/D/17/2008, paragraph 4.7.

[68] *Ibid*, paragraph 3.8.

[69] *Ibid*, paragraph 7.6.

[70] *Ibid*, paragraph 8.

2.2. S.F.M v. Spain, 2020

S.F.M a pregnant woman whose pregnancy was normal and well-monitored, was unnecessarily intervened by the medical professionals of a public hospital: she was taken into a room with other six pregnant women without her partner being allowed to accompany her and she was subject to ten digital vaginal examinations, and she was given intravenous oxytocin to induce labour. During the *partum*, she was not allowed to sit up to give birth and she had a cut in her vagina -episiotomy-and her daughter extracted with a ventouse. After that, she had her placenta manually removed, which according to the scientific studies can harm the mother's pelvic floor and internal organs. All this without receiving any kind of information and without her consent being sought.[71]

Additionally, right after the birth S.F.M's daughter was taken to the neonatal unit due to her infection caused by E.coli bacteria; which might potentially be a consequence of the several digital vaginal examinations.[72] The baby remained in the hospital for seven days and during that time, S.F.M. was only able to stay with her for two periods of 30 minutes. Moreover, she was not able to breastfeed her daughter, who was bottle-fed without her permission just because *'mothers ringing the bell are a nuisance'*[73]

The relevance of this case resides in the used for the first time of the term *obstetric violence* to encompass *the gross human rights violations suffered by women at the hands of reproductive health service providers and the neglect, mistreatment, and physical and verbal abuse that they may receive during and after childbirth.*[74] Consequently, obstetric violence is not exhausted with maternal deaths during labour - like in Alyna da Silva's case-, but it includes other practices that often go unnoticed and result into violence and discrimination against women.

As such, in this Communication the actor does not only alleges the breach of articles 2 and 12 of the Convention, but also of articles 3 and 5 hence outlining the need of modifying those customary practices that perpetuate stereotypes of men and women. One of these is the pathologization of labour by abusing of medication and medical interventionism. All this is aggravated for a lack of information and consent.

On the other hand, this case also shows how obstetric violence is not only caused by the medical services themselves, but also by governmental institutions and courts of justice when rendering their decisions based on those stereotypes:

> *'[...] the Committee observes that the administrative and judicial authorities of the State party applied stereotypical and thus discriminatory notions by*

[71] CEDAW/C/75/D/138/2018, paragraphs 2.1-2.5.

[72] *Ibid*, paragraph 2.6.

[73] *Ibid*, paragraph 2.7.

[74] *Ibid*, paragraph 2.10.

> *assuming that it is for the doctor to decide whether or not to perform an episiotomy, stating without explanation that it 'was perfectly understandable' that the father was not allowed to be present during the instrumental delivery and taking the view that the psychological harm suffered by the author was a matter or 'mere perception' but that they did show empathy towards the father when he stated that he had been deprived of sexual relations for two years.'*[75]

It cannot be overlooked that the CEDAW Committee refers to the Report of the Special Rapporteur on violence against women, its causes and consequences[76] in its observations.[77] This shows the interrelationship between the different human rights' legal instruments for the protection of women's rights in this field.

Just as in Alyne da Silva case, the Committee recommends Spain to provide appropriate reparation and to take measures for the implementation of the CEDAW to ensure women's right to safe motherhood and to eradicate obstetric violence.[78]

2.3. N.A.E. v. Spain, 2022.

> *'I was placed on the operating table like a doll. No one introduced themselves; no one spoke to me; no one looked me in the face. No one bothered to try to calm me down. I was crying a lot. They placed my arms out to the sides. The operating room was full of people; it was like a public square. [...] I was there alone and naked, and people were coming and going the door kept opening and closing [...]. They were talking among themselves about their business, what they had done over the weekend; they were talking without caring that I was there and was about to give birth to my son -my son who could only be born once and they did not let me experience it.'*

These were the N.A.E.'s words referring to her labour. Along with her partner, she submitted a birth plan to the public hospital that was not respected. She was also subject to eleven digital vaginal examinations and had labour induced without any medical reason for it and disregarding the waiting period of 24 hours established by the hospital's protocol. She was not allowed to eat, and she was performed a caesarean section even thought there was not a medical need to do so. All of this without her consent.

Moreover, she was operated and later sew up by students thus contravening Spanish health regulations that states that no patient may be used in a training program without consent.

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[75] *Ibid*, paragraph 7.5.
[76] A/74/137
[77] CEDAW/C/75/D/138/2018, paragraph 7.3.
[78] *Ibid*, paragraph 8.

Additionally, she was not able to initiate breastfeeding or to have skin-to-skin contact with her child since the baby was taken to the paediatrician for no reason. She could not even touch him because she had her arms strapped down from the operation.

As a result of these events, N.A.E. suffered from a physical and psychological trauma due to the violations of her physical and moral integrity, her dignity, and her personal and family privacy.[79]

In this case, there is a reference to the Committee's observations on the case of Pimentel v. Brazil, in which the context of the health system in that country was examined to assess whether maternity death was systematic. Similarly, the actor argues that according to the data of the Centre for the Monitoring of Obstetric Violence women in Spain are frequently subjected to mistreatment and degrading comments, as well as to practices that are not recommended by the most recent scientific literature. For instance, the number of caesarean sections and episiotomies exceed those recommended by WHO.[80]

It can also be observed how the actor's position in this case is supported by several reports and guidelines dating the year 2020[81], namely the data collected by the Centre for the Monitoring of Obstetric Violence, the report written by María Fuentes Caballero from the Artemisa Health Centre in Cádiz, the work done by the students from the Study Centre for Human Rights and Humanitarian Law of the Panthéon-Assas University in Paris or the Information Group on Reproductive Choice in Mexico, among others.- This reflects an increase of research and study in the field of obstetric violence in comparison to previous cases.

As to the recommendations made by the CEDAW Committee to Spain, they are essentially the same as those in *S.F.M v. Spain, 2020*, with the difference that it adds the need to *establish, publicize and implement a Patients' Bill of Rights*.[82]

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[79] CEDAW/C/82/D/149/2019, paragraph 2.18.
[80] *Ibid,* paragraphs 2.24-2.25
[81] *Ibid*, paragraphs 6-11.
[82] *Ibid,* paragraph 16 (v)

V. OBSTETRIC VIOLENCE IN THE SPANISH HEALTHCARE SYSTEM UNDER INTERNATIONAL HUMAN RIGHTS LAW STANDARDS.

While in States such as Argentina[83] or Mexico[84] obstetric violence is an offence, there is a lack of legal instruments in Spain addressing obstetric violence. The Spanish Constitution -hereafter, 'SC'- or Act 41/2002 of 14th November, on autonomy of the patient -hereafter, 'Act 41/2002'- generally mention some issues related to this type of violence, but without specifically addressing the situation of women during pregnancy, partum or postpartum. For instance, article 43 of the Spanish Constitution guarantees the right to health and Act 41/2002 sets a list of rights all patients have regarding information and consent in the medical healthcare system.

On the other hand, Act 1/2004, of 28th December on comprehensive protection measures against gender-based violence or, more recently, Act 10/2022, of 6th on the guarantee of sexual freedom; -both of them focusing on the protection of women's rights- do not legally recognised obstetric violence either.

This legal vacuum hampers the victims presenting their case to the Courts, since only those extremely serious cases have remote possibility of accessing justice. On the contrary, the vast majority of violations would go unnoticed -due to the excessive normalization of these practices during labour- or, at best, a mere complaints form will be submitted at the hospital.[85]

It is thanks to the work done by non-governmental organizations and civil associations - e.g. *El parto es nuestro*, *Donal Llum*, *Plataforma pro derechos del Nacimiento* or *Nacer en casa*- that women victims of obstetric violence are given the opportunity to speak out. It must be outlined the Observatory on Obstetric Violence – 'OVO', in Spanish acronym-, a non-profit organization that promotes the eradication of violence against women, specifically in health; enables women's access to maternity-assistance services; calls on investigation on women's sexual and reproductive health; and provides support to victims of obstetric violence.[86]

The OVO is composed of several experts in the field and one of them is Francisca Fernández Guillén[87], a Spanish lawyer that has been behind the two cases in which the CEDAW Committee has determined that Spain is internationally responsible for having practiced obstetric violence.

Having been it been found responsible for practising obstetric violence twice and with still one case pending before the CEDAW Committee, it is clear that the Spanish

[83] Ley Nacional 25.929 de Parto Humanizado de 2004.
[84] Ley de Igualdad entre Hombres y Mujeres and Ley de Derecho de la Mujeres a una Vida Libre de Violencia (modified in 2014).
[85] GARCÍA, E.M. (2018), 'Una aproximación teórica a la violencia obstétrica', *Partos arrebatados. La violencia obstétrica y el mercado de la sumisión femenina*, Madrid, Ménades Editorial, page 43.
[86] https://observatorioviolenciaobstetrica.es/ [Accessed 10/04/2023]
[87] https://www.franciscafernandezguillen.com/ [Accessed 10/04/2023]

healthcare system does not comply with the International Human Rights Law standards regarding the protection of women's reproductive and sexual health rights. Nevertheless, it is important to determine whether Spain is taking any measures to change this; that is, if Spain is at least complying with the CEDAW Committee's recommendations in *S.F.M v. Spain* (2020) and *N.A.E. v. Spain* (2022).

In fact, concrete steps have been made as an attempt to comply with those standards. As such, in February 2023, the Spanish Government modified Act 2/2010, of 3 March, on sexual and reproductive health and voluntary interruption of pregnancy. Despite it does not uses the term 'obstetric violence', it does refer to 'violence against women in the reproductive field', which, according to the definition provided therein, it might be considered an equivalent expression. Additionally, it adds a new chapter addressing *public policies for the promotion of sexual and reproductive rights*[88], and it establishes a series of objectives that must guide the action of public authorities. Among them, it specifically refers to t*he prevention, punishment, and eradication of any form of violence against women in relation to health, sexual and reproductive rights.*[89] Additionally, this law imposes public health services the obligation to provide *the highest possible quality of services during pregnancy, termination of pregnancy, childbirth, and the postpartum period.*[90]

Moreover, the law contains a chapter enumerating measures for the effective application of the law. These are mainly two kinds of actions: the elaboration of a National Strategy on Sexual and Reproductive Health and research in the field of health and sexual and reproductive rights.

Therefore, it can be stated that Spain has started its path forward the eradication of obstetric violence. Nevertheless, it will be necessary to assess the implementation of this new law in order to determine whether or not it is efficient for accomplishing that goal.[91]

[88] Ley Orgánica 1/2023, de 28 de febrero, por la que se modifica la Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo. Available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2023-5364 [Accessed 28/04/2023]
[89] *Ibid*, article 5 (h)
[90] *Ibid*, article 7 (c)
[91] For more information about the situation of women's sexual and reproductive health rights in Spain and its relation to International Human Rights Law see MIQUES ACOSTA, C: 'Claves feministas sobre la incorporación del Derecho Internacional de los derechos humanos de las mujeres en España', September 2009.

VI. CONCLUSIONS

When women are subjected to obsolete and inadvisable techniques and practices, infantilization and other mistreatment during pregnancy, at childbirth or during postpartum, they are not *just* suffering a medical negligence, but they are being victims of obstetric violence, since this is not an isolated event, but a structural and widespread issue.

Obstetric violence supposes not only a violation of women' health and reproductive rights, but moreover, an infringement of the principles of equality and non-discrimination which are *part of the foundation* of Human Rights Law[92] and are enshrined as rights in the first and second article of the United Nations Declarations of Human Rights[93], as well as in many States' internal legal order.

Additionally, obstetric violence jeopardizes women's rights to life[94] -since maternal mortality, as well as maternal morbidity are in most cases direct consequences of it-; to not being victims of torture[95]-inasmuch as some of the frequently used techniques during delivery such as episiotomy have already been declared to constitute torture-, and to an adequate standard of living[96] -because this right supposes a good-quality medical assistance and specially refers to maternity as a condition that has to be duly catered-. Notwithstanding the *transactional discrimination* 'racialized' and women with limited financial resources face.

On the other hand, there is a lack of updated legislation protecting women sexual and reproductive rights -the CEDAW Convention, the main legal instrument in this regard dates 1979-; and, although some States have enacted their own legal acts for the typification of this type of violence, most of them have not. Besides, the most recent legal instruments in this regard - that is, the 2019 Report of the UN Special Rapporteur on violence against women and girls, its causes and consequences, the interpretations of the CEDAW Committee and the Report of the UN Working Group on Discrimination against Women and Girls- are soft law. From a practical point of view this constitutes an obstacle for women's access to justice and only few cases reach the courts. This also supposes a threat to their right to equal protection before law against all type of discrimination[97] and to the right to an effective remedy by national courts.[98]

All in all, obstetric violence evidences a society in which equality between women and men has not been yet achieved. Although in recent years, thanks to the work of civil organization and stakeholders, the silence against obstetric violence has begun to be

[92] https://www.un.org/ruleoflaw/thematic-areas/human-rights/equality-and-non-discrimination/ [Accessed 24/03/2023]

[93] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III). Available at: https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf [Accessed 24/03/2023]

[94] *Ibid,* article 3.

[95] *Ibid,* article 5.

[96] *Ibid,* article 25.

[97] *Ibid*, article 7

[98] *Ibid*, article 8.

broken and many women have risen their voices and denounced the situation, there is still much more to do.

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