



Course of

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Introduction

The fight against gender-based violence against women has been a priority in the global agenda since the early 1990s. The gradual inclusion and participation of women in politics and international affairs shed light on a category of people that had been excluded from the development of international law and brought to the general attention issues that were thought to be private or of concern to women only. After extensive and constructive dialogue between women and political leaders across the world, States recognized the problem of violence against women and committed themselves to eradicate it. Several instruments have been created at the global and regional levels to tackle it, but gender-based violence continues to exist: every day 140 women or girls are killed by their intimate partners or other family members; by the time they are 19 years old, 1 in 4 adolescent girls who have been in a relationship are physically, sexually, or psychologically abused by a partner; 91% of trafficking victims for sexual exploitation are women; over 230 million girls and women have undergone female genital mutilation.¹ Hence, it is necessary to raise a question: is the current international legal framework adequate to address this dreadful phenomenon?

Chapter 1 will provide a legal, theoretical and historical overview of gender-based violence against women, adopting an intersectional approach. It will explain what violence against women is, its causes, its forms and why it is gravely un- or underreported. Then, it will provide a historical analysis of the process that led to the recognition of women's rights as human rights and to the adoption of global documents on the topic, and it will discuss whether the prohibition of gender-based violence has evolved into a principle of customary international law.

After pointing out that no binding document on violence against women exists because the Declaration on the Elimination of Violence against Women is a soft law instrument, Chapter 2 will expound on how global human rights bodies have tried to close this normative gap. The two strategies that will be studied are the gender mainstreaming of existing human rights treaties and the conceptualization of gender-based violence as a form of discrimination against women. The Chapter will conclude with the debate on

¹ UN Women, "Facts and figures: Ending violence against women," November 25, 2024.

whether a new universal binding instrument for the elimination of violence against women is needed.

The last Chapter will consider how regional human rights systems have responded to gender-based violence. It will examine the Inter-American, ASEAN, African, and European systems and will make a comparative analysis of the efficacy of their frameworks.

Chapter 1: The concept of gender-based violence against women

Gender-based violence against women (GBVAW) is a deeply entrenched phenomenon that transcends cultural, political, social, and economic boundaries and that has historically underpinned the subordination of women worldwide. This chapter aims to provide a comprehensive understanding of GBVAW as both a manifestation of historical power imbalances and a critical human rights concern. To do so, the definition of GBVAW will be examined, and the process that led to the recognition of women's rights will be retraced from the founding of the United Nations (UN) onwards.

Section 1 will be devoted to a thorough analysis of what GBVAW is, who the perpetrators are, what motives cause it, what intersectional factors exacerbate women's vulnerability to violence, what forms GBVAW takes, and why it is difficult to eradicate it. Section 2 will be divided into five sub-sections, where the history of the establishment of women's rights will be explained with a particular focus on their recognition as human rights. Lastly, Section 3 will address the question of whether the prohibition of GBVAW amounts to a principle of customary international law.

1.1 The definition of gender-based violence against women

The phenomenon of violence against women (VAW) is extremely ancient and widespread in that it pervades every sector of society, and it has been, together with the more general concept of subordination of women, the foundation upon which societies all over the world have been built. Despite its frequency and diffusion, its theorization and definition are quite recent. The first definition at the international level was given only in 1992 by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) in its General Recommendation (GR) No. 19, where it states that "gender-based violence" is "violence that is directed against a woman because

she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”²

This text will adopt the expression used by the CEDAW Committee in its last General Recommendation on VAW, namely “gender-based violence against women” (GBVAW),³ but it will fill this “signifier” with the “signified”⁴ provided by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, also known as the Istanbul Convention. Article 3 of the Convention affirms that VAW “shall mean 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, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”⁵

On the one hand, the choice of the expression GBVAW follows the reasoning of the CEDAW Committee which points out that the term “GBVAW” is more precise than “VAW” due to its capacity to underline the “gendered causes and impacts of the violence”⁶ and to strengthen “the understanding of the violence as a social rather than an individual problem, requiring comprehensive responses, beyond those to specific events, individual perpetrators and victims/survivors.”⁷ On the other hand, the Istanbul Convention’s content of the definition is qualitatively and legally superior to the one provided by the CEDAW Committee. That is partly because, notwithstanding that GR No. 35 is the latest international instrument that deals with GBVAW, the CEDAW Committee failed to formulate a new, specific definition of VAW, and rather relied only

² UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), “CEDAW General Recommendation No. 19: violence against women”, July 26, 1992, Para. 6, <https://docs.un.org/en/CEDAW/C/GC/35>.

³ UN CEDAW Committee, “CEDAW General Recommendation No. 35: Gender-based Violence against Women, updating General Recommendation No. 19,” July 26, 2017, Para. 9, <https://docs.un.org/en/CEDAW/C/GC/35>. See also H/RES/1994/45, Para. 1

⁴ In his book “Course in general linguistics,” Ferdinand De Saussure interprets the “signifier” as the form or the recipient, and the “signified” as the concept or idea that gives it substance.

⁵ Council of Europe, “Council of Europe Convention on preventing and combating violence against women and domestic violence,” May 11, 2011, Art. 3(a), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210?module=treaty-detail&treatynum=210>

⁶ UN CEDAW Committee, “CEDAW General Recommendation No. 35: Gender-based Violence against Women, updating General Recommendation No. 19,” July 26, 2017, Para. 9.

⁷ *Ibid.*

on the content of the definition provided by GR No. 19 and by “international instruments and documents”⁸ not clearly specified.

In both the Istanbul Convention and the CEDAW Committee’s GR No. 19, gender is recognized as the motive behind VAW. However, in GR No. 19 the test to determine whether an act can be considered GBVAW is narrower than in the Council of Europe’s Convention: while the former refers to “acts that *inflict* physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty,”⁹ the Istanbul Convention includes not only effective harm or suffering, but also the *possibility* of causing them. This distinction is paramount because it gives relevance to the intention behind violence and not only to the result. Indeed, what characterizes GBVAW is not violence *per se*, but the motive behind it, i.e., gender. Additionally, the Istanbul Convention recognizes a greater number of forms of violence, namely physical, sexual, psychological, and economic violence - the latter not being listed by the CEDAW Committee - and enlarges the scope of application of the definition by stressing that GBVAW can be committed either in the public or the private sphere.

A common mistake in the understanding of GBVAW is believing that, since gender is the motive and the victims are women, men are the natural perpetrators of those acts. This apparently consequential implication of the expression “gender-based violence against women” is the result of the traditional binary distinction between women and men, who are usually represented as opposites and enemies. However, in reality, the expression GBVAW does not give any information on who the perpetrators are. As a matter of fact, notwithstanding the common belief that the agents of violence are men because of their gender (as opposed to “women”), GBVAW can also be inflicted by women. The most common cases are female genital mutilation or cutting (FGMC), which is usually carried out by female relatives on other women, and violence committed by same-sex partners. Thus, in determining whether an act is GBVAW, it is not the gender of the perpetrators that must be considered but rather their intention, i.e., causing harm to and exercising control over a woman because she is a woman.

⁸ *Ibid.*

⁹ UN CEDAW Committee, “CEDAW General Recommendation No. 19: violence against women”, 1992, Para. 6.

The international legal documents dealing with GBVAW have tried to explain the social causes that instigate it and that make it so widespread. In particular, the Declaration on the Elimination of Violence against Women (DEVAV) provides an in-depth and precise analysis according to which “violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.”¹⁰ The unprecedented content of this clause might not stand out today, however, it represented the first time that an international document highlighted the existence of power relations between men and women and recognized it as the cause of the subordinate position and unfavorable conditions to which women are subjected. More recently, in GR No. 35, the CEDAW Committee affirmed that it considers GBVAW to be “rooted in gender-related factors, such as the ideology of men’s entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behavior” which are factors that contribute to the social acceptance of VAW.¹¹

Furthermore, GBVAW is recognized to pervade every sector of society regardless of age, class, level of education, income, geographical location, ethnicity, culture, and religion. However, the impact and the chance of suffering from GBVAW change based on several variables. For this reason, international instruments tend to adopt an intersectional approach, i.e., to recognize that many different factors and forms of discrimination intersect and interplay with gender, increasing or decreasing women’s vulnerability to GBVAW. The most complete list of grounds for further discrimination has been provided by GR No. 35 which recognizes that “ethnicity/race, indigenous or minority status, color, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital status, maternity, parental status, age, urban or rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, seeking asylum, being a refugee, internally displaced

¹⁰ UN General Assembly, “Declaration on the Elimination of Violence against Women,” A/RES/48/104, December 20, 1993, preamble, <https://www.ohchr.org/sites/default/files/eliminationvaw.pdf>

¹¹ UN CEDAW Committee, “CEDAW General Recommendation No. 35,” 2017, Para. 19

or stateless, widowhood, migration status, heading households, living with HIV/AIDS, being deprived of liberty, and being in prostitution, as well as trafficking in women, situations of armed conflict, geographical remoteness and the stigmatization of women who fight for their rights, including human rights defenders”¹² are characteristics that increase the impact that GBVAW has on women.

The forms of violence that have been recognized at the international level have increased over the years due to enhanced awareness and the rise of new instruments, such as the Internet. The current most exhaustive catalog of types of violence can be found in the ASEAN Regional Plan on the Elimination of Violence Against Women (ASEAN RP on EVAW), which states that VAW encompasses:

- a. Physical, sexual, psychological, and economic violence occurring in the family;
- b. Physical, sexual, and psychological violence occurring within the general community; and
- c. Physical, sexual, and psychological violence perpetrated or condoned by the State or non-State entities in the public and private spheres.¹³

All the legal instruments on GBVAW make a distinction between the different contexts in which violence takes place, namely the family, the community, and the actions perpetrated by State actors or condoned by the State.¹⁴ Former UN Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo, added to those three levels the violence that occurs in the transnational sphere,¹⁵ meaning the acts that take place at the border, during conflicts, in refugee camps, on the migration route, and while requesting asylum. Unfortunately, as the ASEAN RP on EVAW points out, new forms of GBVAW are emerging that are increasingly involving information and

¹² UN CEDAW Committee, “CEDAW General Recommendation No. 35:,” 2017, Para.12.

¹³ Association of Southeast Asian Nations (ASEAN), “ASEAN Regional Plan of Action on the Elimination of Violence against Women,” 2015, pp. 6-7

¹⁴ UN General Assembly “Declaration on the Elimination of Violence against Women,” 1993, Art. 2; Organization of American States, “Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,” Art. 2; UN Specialized Conferences, “Beijing Declaration and Platform of Action,” 1995, Para. 113; ASEAN, “ASEAN Regional Plan of Action on the Elimination of Violence against Women,” 2015, pp. 6-7.

¹⁵ Rashida Manjoo, “The Continuum of Violence against Women and the Challenges of Effective Redress,” in *International Human Rights Law Review* 1 (2012): 1–29, <https://doi.org/10.1163/22131035-00101008>.

communications technology (ICT), such as online harassment, online abuse, stalking,¹⁶ revenge pornography, doxing, non-consensual sexting, and cyberbullying.¹⁷

The phenomenon of GBVAW is extremely difficult to eradicate because it is strikingly unreported. However, even if it seems that it is women's fault if they do not individually report the cases of violence to the authorities, the actual reason why they decide not to denounce it is structural. Rashida Manjoo explains that the reasons why women do not report are fear of retaliation, family or community pressure, economic dependency, poor awareness of rights, lack of support services, and perception that the police will not respond adequately.¹⁸ The first element can be associated with the last one, in that retaliation occurs when the authorities do not intervene firmly to protect the woman and thus leave her in the hands of the aggressor. In this regard, Manjoo highlights that police officers tend to encourage informal dispute resolution and reconciliation, especially in cases of domestic violence, which, instead of protecting the victim, makes her return to the abusive environment from which she tried to escape. As far as family and community, the social structures in which women live pressure victims not to denounce because that would make their violence a public matter, whereas women's oppression has traditionally been treated as a private concern. The third reason for not reporting, namely economic dependency, implies that women cannot denounce their aggressor because they are not economically autonomous from him, therefore, they could not afford to live with dignity with their own economic resources. However, even if it might appear a personal reason, the particular family dynamics are just the mirror of social and, in some cases, also legal, norms according to which women's life has to be controlled by someone else and their role as women is taking care of the home and looking after children, without the possibility of choosing to work. For this reason, even if the victim were able to free herself from the subjugation of her spouse, she would not have the economic resources to live on her own. Lastly, poor awareness of rights and lack of support services are two examples of the failure of the State in reaching people and in meeting their needs. An additional factor that discourages women from reporting

¹⁶ ASEAN, "ASEAN Regional Plan of Action on the Elimination of Violence against Women," 2015, p. 7.

¹⁷ UN Women, "FAQs: Types of Violence against Women and Girls," UN Women – Headquarters, June 27, 2024, <https://www.unwomen.org/en/articles/faqs/faqs-types-of-violence-against-women-and-girls>.

¹⁸ Rashida Manjoo, "The Continuum of Violence against Women and the Challenges of Effective Redress," 2012

GBVAW is the fear of secondary victimization, which refers to the practice of blaming the victim for having been subjected to an episode of violence. A common example concerns the cases of rape in which the woman is asked what she was wearing or why she had not escaped¹⁹ – assuming that she had put herself in the situation of violence. In their article “Working against violence against women: how far have we come?”, Luwaya Nolundi and Omar Jameelah explain that secondary victimization occurs when institutions place traditional stereotypes above the needs of the victim, humiliating her and causing her additional trauma.²⁰ In the case *Karen Tayag Vertido v. The Philippines*, the CEDAW Committee found that the State was in breach of Article 2(f) and 5(a) of the CEDAW because it had not eliminated prejudices and blamed the victim on the basis of gender stereotypes.²¹ However, the possibility for women to bring a State before an international body for cases of discrimination is a quite recent achievement of the long process that culminated with the recognition of women’s rights as human rights in the XX century.

1.2 Women’s rights as human rights

For a long time, human rights have not been really universal. They were narrowly conceived as the State’s violations of civil and political rights, leading to the exclusion of more than half the world population’s rights.²² The excuses made by governments for not recognizing women’s rights as human rights were mainly four:

“ (1) sex discrimination is too trivial, or not as important, or will come after larger issues of survival that require more serious attention; (2) abuse of women, while regrettable, is a cultural, private, or individual issue and not a political matter requiring state action; (3) while appropriate for other action, women’s rights are not human rights per se; or (4) when the abuse of women is recognized, it is considered inevitable or so pervasive that any consideration of it is futile or will overwhelm other human rights questions.”²³

¹⁹ *Karen Tayag Vertido v. The Philippines*, CEDAW Committee, Communication No.18/2008, July 16, 2010

²⁰ Nolundi Luwaya and Jameelah Omar, “Working against Violence against Women: How Far Have We Come?,” in *Acta Juridica* 1 (2020): 1–26, <https://doi.org/10.10520/EJC-1fa65b1ce5>.

²¹ *Karen Tayag Vertido v. The Philippines*, CEDAW Committee, Communication No. 18/2008, para. 8.4

²² Charlotte Bunch, “Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights,” in *Human Rights Quarterly* 12, No. 4 (1990): pp. 486–498, <https://www.jstor.org/stable/762496>

²³ *Ibid.*

Those justifications were outrageous and incorrect. In fact, sexism must not be treated as a minor issue because not only does it disfavor women, but it also kills them at every stage of life. In many regions of the world, male children are preferred over female children because men are believed to be the only ones who can work for and support the family, inherit properties, carry the family name, and/or make decisions for the family unit. For these reasons, in some cases, sex selection is carried out before birth through amniocentesis, resulting in the abortion of more female fetuses.²⁴ During childhood, girls are fed less and are more likely to suffer and die from malnutrition²⁵ or marry at a very young age. In their adulthood, women might be denied the right to make choices about their life and their job and can even be killed by their partner.

As far as the second excuse presented by Charlotte Bunch, the author claims that the abuse of women is not a private issue, but rather a political one because it is a consequence of the structural relationships of power between men and women, which are based on the oppression of the former on the latter.²⁶ In the words of Aisha K. Gill, “violence is a key factor in the production, maintenance and legitimization of domination and subordination ... This is especially true regarding violence against women.”²⁷ Feminists have stressed that the misconception that abuse of women is a private issue derives from the liberal way of organizing society, which has led to the distinction between the public and the private sphere,²⁸ the former being the male, most significant dimension, and the latter being the private, female one.²⁹ In such a constructed reality, the two spheres are deeply divided, and the State is supposed not to interfere with the private domain, namely, the family. The consequence of such discourses is that “what happens at home stays at home,” and for this reason States have rarely intervened in addressing and punishing domestic violence.³⁰ However, in reality, States do intervene in the private sphere through their policies. A

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Aisha K. Gill, “Violence against Women and the Need for International Law,” in *The Legal Protection of Women from Violence, Normative Gaps in International Law* (Routledge, 2018).

²⁸ Adaena Sinclair-Blakemore, “Cyberviolence against women under international human rights law: Buturugă v Romania and Volodina v Russia (No2),” in *Human Rights Law Review*, No. 23 (2022): 1–27 <https://doi.org/10.1093/hrlr/ngac033>

²⁹ Hilary Charlesworth, Christine Chinkin, and Shelley Wright, “Feminist Approaches to International Law,” in *The American Journal of International Law* 85, No. 4 (1991): 613–45, <https://www.jstor.org/stable/2203269>.

³⁰ Sara De Vido, *Violence against Women’s Health in International Law* (Manchester: Manchester University Press, 2020), p. 8.

clear example is represented by population policies, which are aimed at either increasing or decreasing the size of the population by controlling the number of births that take place in the State territory for public interest reasons; nevertheless, they have practical implications on the life of individuals, and, in particular, are carried out at the expenses of women's autonomy to freely decide on their reproductive health.³¹ Hence, segregating women's oppression to the private and "untouchable" sphere is a tool to uphold and continue perpetrating such dynamics to maintain and reaffirm current public and political power relationships. Since the abuse of women is not a private issue, it is the duty of the State to act to protect women and their rights.

Thirdly, it is not true that women's rights are not human rights (HR) per se. Even if HR were originally shaped from a male point of view, that is, according to what men deemed important and of concern to them, the concept of HR is not static, and its scope expands "as people reconceive of their needs and hope in relations to it."³² An example is given by the original idea of rights as civil and political liberties which was enlarged by the inclusion of economic, social, and cultural rights. In the same vein, feminists have long advocated for redefining HR to also encompass women's experience of oppression and making them responsive to women's peculiar condition.

As far as the fourth justification, the abuse of women is not inevitable. Charlotte Bunch claims that the sole resistance to the normative and social change that would grant women control over their bodies shows the importance that exercising control over women has³³ for the State and society as a whole. Therefore, the decision to make women's oppression "inevitable" and "pervasive" rests in the hands of the State and is not a natural condition.

The aforementioned excuses of governments not to recognize women's rights as HR show the strong opposition that feminist activists and scholars have faced with regard to their fight for equality. Hilary Charlesworth, Christine Chinkin, and Shelley Wright justified such hostility by affirming that the international legal system is gendered and made by men to adapt to men's concerns and priorities, perpetuating the unequal position

³¹ *Ibid.*

³² Charlotte Bunch, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights," 1990.

³³ *Ibid.*

of women.³⁴ According to Sinclair-Blackemore, the domestic dichotomy between the private and the public sphere is reflected in the distinction between domestic and international law.³⁵ In this line of reasoning, international law originally regulated only matters of public concern, such as the relations between States, without interfering with the *domaine réservé* of States, i.e., domestic law.³⁶ However, the progressive “humanization” of international law has led to the reshaping of principles of international law from an HR perspective, granting individuals some rights *vis-à-vis* States. This implied that international law started to interfere with the conduct of States toward individuals under their jurisdiction, which had always been a “private” matter. Even if such an approach represented a big step forward in the discipline and in reducing the separation between the international and the domestic spheres, the humanization of international law was nonetheless carried out from a male point of view. In fact, women’s needs and concerns were not considered and had remained excluded from the formulation and content of HR.

As Jutta M. Joachim explained in her book “Agenda Setting, the UN, and NGOs. Gender Violence and Reproductive Rights,” the work of women was paramount to include women’s rights in the international HR agenda.³⁷ The UN Blue Book on the Advancement of Women divides the process that has led to the – partial - achievement of equality into four periods: securing the legal foundations of equality (from the mid-1940s to the early-1960s), recognizing women’s role in development (from the early-1960s to the mid-1970s), the UN Decade for Women (from the mid-1970s to the mid-1980s), and “towards equality, development and peace” (from the mid-1980s to the mid-1990s).³⁸ However, since the document was written in 1996, it did not include what happened afterward, so we will add a fifth supplementary subsection called “the new millennium.”

³⁴ Hilary Charlesworth, Christine Chinkin, and Shelley Wright, “Feminist Approaches to International Law,” 1991

³⁵ Adaena Sinclair-Blackemore, “Cyberviolence against women under international human rights law: Buturugă v Romania and Volodina v Russia (No2),” 2022

³⁶ *Ibid.*

³⁷ Jutta M. Joachim, “From the Margins to the Center – Women’s Rights, NGOs, and the United Nations,” in *Agenda Setting, the UN, and NGOs. Gender Violence and Reproductive Rights* (Washington D.C.: Georgetown University Press, 2007).

³⁸ United Nations, “The United Nations and the advancement of women. 1945-1996,” Department of Public Information, United Nations, New York, The United Nations Blue Books Series, Volume VI, revised edition <https://digitallibrary.un.org/record/214867?v=pdf>

1.2.1 Securing the legal foundations of equality (1945-1962)

Since its creation, the UN has been tasked with the promotion and protection of HR worldwide. Article 1 of the UN Charter establishes that one of the purposes of the UN is “to achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”³⁹ In compliance with its function of promoting respect for HR, the Economic and Social Council (ECOSOC) established the Commission on Human Rights (CHR),⁴⁰ which was tasked with providing information and making recommendations to the ECOSOC in HR matters.⁴¹ Considering the CHR’s vast mandate, women’s organizations advocated for a specific mechanism to deal with women’s rights that would be autonomous from the more general Commission on Human Rights, as they believed that, due to its large scope, the latter could not deal with the issue of women appropriately. Their claim was heard by the ECOSOC, which created the Subcommission on the Status of Women that responded to the CHR for matters regarding the status of women.⁴² However, the members of the Subcommission manifested their dissatisfaction with that mechanism due to its dependency on the CHR and asked for the establishment of an independent and fully-fledged body that would cooperate with, without being dependent on, the Commission on Human Rights. Thus, the ECOSOC established the Commission on the Status of Women (CSW) which sends report and makes recommendations directly to the ECOSOC on political, economic, civil, social and educational rights of women – and not on the general “status of women” -, and on “urgent problems requiring immediate attention in the field of women's rights.”⁴³ The autonomous mandate allows the CSW to communicate with and influence the ECOSOC without the mediation of the Commission on Human Rights. Furthermore, the detailed scope of its functions improves CSW’s quality of work, investigation, and recommendations, making them more specific and effective.

The first great triumph of the CSW was its decisive role in shaping the language of the UN Universal Declaration of Human Rights (UDHR). In fact, at that time, international

³⁹ United Nations, “United Nations Charter,” 1945, Art. 1(3).

⁴⁰ United Nations Charter, 1945, Articles 62(2) and 68.

⁴¹ Economic and Social Council, E/RES/5(1), February 16, 1946

⁴² *Ibid.*

⁴³ Economic and Social Council, E/RES/11, June 21, 1946.

documents did not employ gender-sensitive language and applied masculine terms, such as “men,” to all human beings. As Hilikka Pietilä pointed out, women did not want “men” to be used as a neutral and generic word because they acknowledged that it refers to one gender and not to the whole human species.⁴⁴ Even if it might seem a shade of meaning, the implications of using a more inclusive language were fundamental. Firstly, the use of the term “men” could be easily manipulated, especially by States that did not recognize the equality between men and women, to exclude the latter from the enjoyment of the rights enshrined in the Declaration by saying that the convention applied only to men. Secondly, the explicit inclusion of all human beings in the UDHR served as the legal basis for later conventions and action promoting equal rights between men and women.

The second step of the work of the CSW was the codification of women’s rights. Consistent with the history of feminist claims, the first women’s rights to be recognized were political rights, enshrined in the 1952 Convention on the Political Rights of Women.⁴⁵ In the same period, the CSW collaborated with the International Labor Organization (ILO) on women’s economic rights and recommended that the ILO adopt the Convention on Equal Remuneration, which guaranteed equal pay for work of equal value.⁴⁶ A few years later, the CSW shifted its attention to marriage, protecting women’s right to retain the nationality of their country of origin when it was different from their husband’s,⁴⁷ and addressing the practice of child marriage.⁴⁸ The Commission also worked with the UN Educational, Scientific and Cultural Organization (UNESCO) to develop basic education programs without distinction of sex.

Thanks to the CSW’s work, in the first 17 years of the UN, efforts were made to ensure the recognition of women’s rights as equal to men’s and to codify them at the international level. Nevertheless, in the early 1960s, it became clear that rights not only

⁴⁴ Hilikka Pietilä, “The Unfinished Story of Women and the United Nations” (United Nations , 2007).

⁴⁵ UN General Assembly, “Convention on the Political Rights of Women,” A/RES/640(VII), December 20, 1952, <https://www.refworld.org/legal/agreements/unga/1952/en/73672>

⁴⁶ International Labor Organization, “C100 - Equal Remuneration Convention”, 1951, No.100, 29 June 1951, <https://www.refworld.org/legal/agreements/ilo/1951/en/122497>

⁴⁷ UN General Assembly, “Convention of the Nationality of Married Women,” A/RES/1040, UN General Assembly, 29 January 1957, <https://www.refworld.org/legal/resolution/unga/1957/en/7204>

⁴⁸ UN General Assembly, “Convention and Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,” A/RES/1763(XVII), November 7, 1962 <https://www.ohchr.org/sites/default/files/convention.pdf>

had to be formally guaranteed but also had to be exercised in practice. To do so, it was necessary to tackle the broader socio-economic conditions for their realization.

1.2.2 Recognizing women's role in development (1963-1975)

During the 1960s and the 1970s, the UN underwent a profound change due to its enlargement as a result of the process of decolonization and of creation of new States. While the Organization was originally almost monopolized by Western countries, starting from the 1960s, newly independent nations belonging to the global South outnumbered developed countries. As a result, the UN began to include and take into consideration the Third World's interests.

In that context, the question of development became central and, despite the initial hope, industrialization and economic growth in developing countries did not result in a better quality of life for all but benefited men and disfavored women significantly. The roots of the so-called "feminization of poverty" are to be found in the androcentric political, social, and economic system. For centuries, women have been excluded from the labor market and secluded in the domestic dimension to take care of their husband, their children, and the home. They have been considered unproductive and economically inactive because their domestic work did not have economic visibility since it did not produce anything valuable in economic terms.⁴⁹ So, due to the public/private divide, women were excluded from the development process, which was led by men who engaged in activities that concerned the public sphere. In the rare cases where women were able to get a job, it was usually a low-status and low-paid position as a consequence of the lack of education women had access to.

That sociopolitical situation was addressed by the CSW, which acknowledged the difficulties and the needs of women living in rural communities and urged their participation in the process of development. This call was crystallized in the 1967 Declaration on the Elimination of Discrimination against Women (DEDAW), which stated that "the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women as well as men in all

⁴⁹ See Charlesworth, Chinkin, and Wright, "Feminist Approaches to International Law," 1991

fields.”⁵⁰ The importance of DEDAW lies in the fact that it was the first document ever to link development with the inclusion of women in all spheres. Nevertheless, its practical effects were extremely limited due to its non-bindingness and the lack of sensibilization of States on topics that were believed to concern only women. Scholars have claimed that in the case of Third World countries, despite the similarity of their quest for a radical change of the oppressive system and feminists’ critical stance towards the structure of society, they have shown little interest in feminist revindications.⁵¹ Developed countries did not respond efficiently either to the declaration’s provisions because they prioritized questions of high politics and importance in the international – public – dimension.

While the DEDAW listed women’s rights, the document adopted at the International Conference on Human Rights of Tehran in 1968 provided practical measures that States were invited to adopt to eliminate discrimination against women and to promote women’s rights.⁵² Among them were the guarantee of at least elementary education compulsory for all, the promotion of programs to facilitate women’s professional training to ensure their participation in the economic life, the establishment of national commissions on the status of women and of women’s social services, the promotion of educational programs for young and adult men and women to prepare them to share the responsibilities of family life, and the guarantee of economic equality.⁵³ Moreover, it also requested the UN – and not only States – to contribute to programs for the development of women. However, the document was not binding, i.e., its content could only guide and influence States’ actions but could not determine them, so it did not produce significant change.

To celebrate the 25th anniversary of its first meeting and to give visibility to women, in 1972, the CSW recommended that the ECOSOC and the UNGA designate 1975 as the International Women’s Year (IWY). The themes chosen by the UNGA on which IWY had to be focused were the promotion of equality, the integration of women

⁵⁰ UN General Assembly, “Declaration on the elimination of discrimination against women,” A/RES/2263(XXII), November 7, 1967, <https://digitallibrary.un.org/record/202972?v=pdf>

⁵¹ Hilary Charlesworth, Christine Chinkin, and Shelley Wright, “Feminist Approaches to International Law,” 1991

⁵² United Nations, “Final act of the International Conference on Human Rights,” A/CONF.32/41(IX), May 12, 1968

⁵³ *Ibid.*

in development, and the recognition of women's contribution to peace.⁵⁴ The paramount event that marked that year was the first World Conference for Women, which was convened in Mexico.

The Mexico City Conference took place between June 19 and July 2, 1975. While previous international conferences had focused on women *in relation to* other issues, this was the first world conference *on* women. Additionally, the location had a particular relevance in that Mexico had sponsored the Charter on the Economic Rights and Duties of States, which was at the forefront of Third World Countries' agenda that called for the establishment of a New Economic Order. Thus, with Mexico hosting the conference, the Global South's interests and ambitions were placed at the center of the event. Additionally, international political and economic tensions between the three blocs - Western, Soviet, and Southern - shaped the dynamics of the UN World Conference for Women. Not only did countries not have a conciliatory attitude, but they were also focused on geopolitical questions, which were considered more pressing than "women's issues" and tended to overshadow the work carried out during the Conference. Moreover, the frictions between Western and Southern feminists represented additional obstacles. On one hand, Western feminists called for legal equality, representation and the end of employment discrimination; on the other hand, Southern feminists linked women struggles with other factors - such as race and poverty -, and believed that, before addressing the questions raised by Western feminists, it was necessary to solve more practical and basic problems, such as the difficulties of some societies to guarantee subsistence to women.⁵⁵ Despite complications, the Conference represented a major event in that it created a momentum in which women's problems were made visible and were discussed at the international level, and women participated as policymakers, promoting their own agenda and setting in a slow process of change.⁵⁶ At the end of the Conference, the majority of States was in favor of calling for the end of sex discrimination and approved a final document that comprises the Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace, the World Plan of Action for

⁵⁴ UN General Assembly, "International women's year," A/RES/3010(XXVII), December 18, 1972

⁵⁵ Aoife O'Donoghue and Adam Rowe, "Feminism, Global Inequality and the 1975 Mexico City Conference," in *Women and the UN: A New History of Women's International Human Rights* (Routledge, 2021): 88–103, <https://doi.org/10.4324/9781003036708-6>

⁵⁶ *Ibid.*

the Implementation of the Objectives of the International Women's Year, and resolutions adopted by the Conference. The Declaration was an attempt to link the question of women to the agendas of the blocs. Western influence is evident in the content of the rights promoted,⁵⁷ whereas the Third World countries' position is observable in the linkage between inequality and underdevelopment.⁵⁸ In particular, priority was given to the establishment of a New International Economic Order because the attainment of economic and social goals would represent the framework for the realization of HR. The World Plan of Action, apart from being non-binding, gave national governments enormous power to decide how to implement the measures recommended. The reason was that "there are wide divergencies in the situation of women in various societies, cultures and religions, reflected in differing needs and problems,"⁵⁹ therefore, according to the participants in the Conference, each country had to identify its priorities and decide on how to act. The problem of making single States the final arbiters was that women were subjected to the contradictions between *de jure* and *de facto* end of discrimination and enforcement of rights, and their condition was not homogeneous at the international level.⁶⁰

Five months after, in December 1975, the UNGA, pressured by the CSW, women's organizations and the document approved in the 1975 Mexico City Conference, declared the 1976-1985 period the "UN Decade for Women: equality development and peace,"⁶¹ affirming that it had to be devoted to the implementation of the Mexico World Plan of Action.

1.2.3 The United Nations Decade for Women (1976-1985)

The UN Decade for Women began with an unexpected event. As a counterreaction to the World Conference for Women in Mexico, a small group of Northern European women organized the International Tribunal on Crimes against Women (ITCW) in

⁵⁷ UN Specialized Conferences, "Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace," July 2, 1975, para. 4-13 <https://www.un-documents.net/mex-dec.htm>

⁵⁸ UN Specialized Conferences, "Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace," 1975, para. 14-24

⁵⁹ UN Specialized Conferences, "World Plan of Action for the Implementation of the Objectives of the International Women's Year," July 1975.

⁶⁰ Judith P. Zinsser, "From Mexico to Copenhagen to Nairobi: The United Nations Decade for Women, 1975- 1985," in *Journal of World History* 13, No. 1 (2002): 139-168 <https://www.jstor.org/stable/20078945>

⁶¹ UN General Assembly, "World Conference of the international women's year," A/RES/3500(XXX), December 15, 1975, para. 2.

Brussels from March 4 to 8, 1976. The reason behind such an initiative was that the Mexico Conference had been perceived as distant from women because participants were mainly government delegations, and the women who took part in the event were chosen based on their kinship with male politicians and not on the basis of their expertise. The ITCW was established to give women the opportunity to share their stories and personal experiences, creating a network of communication and exchange of information among women. By listening to other women's testimonies, the 2000 participants from 40 different countries came to see that the violence they were subjected to was not merely personal but was a manifestation of a system that was constructed on their oppression. According to Jutta M. Joachim, the ITCW represented the beginning of women's international activism on gender violence.⁶² The urgency of tackling GBVAW internationally started to become evident in the 1980s, together with the emergence of public debate on the topic.

Following the UN practice of converting a declaration into a convention, the CSW drafted a convention working on the 1967 DEDAW. In 1976, the draft was forwarded to the UNGA to be voted on. However, due to the lack of consensus on several topics, such as women's rights in marriage and family, a long debate started. Only three years later, in 1979, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) was approved by the UNGA.⁶³ Even if it was adopted with no votes against, the 11 abstentions and the more than 40 reservations made in the following years show that there was no general agreement with the text. Nevertheless, the CEDAW is a pivotal convention in that it is the first international legal instrument to provide a definition of discrimination against women and to combat it in both the public and the private sphere.

As recommended by the Mexico City Conference, the UN organized the second World Conference for Women five years after the first one, in 1980, to review the status of implementation of the World Action Plan and to update it. The event took place in Copenhagen between July 14 and July 30, 1980, and was centered mainly on employment, health, and education. As a matter of fact, the failure in achieving the World

⁶² Jutta M. Joachim, "Women's rights as human rights. The case of violence against women," in *Agenda Setting, the UN, and NGOs. Gender Violence and Reproductive Rights*, (Washington D.C.: Georgetown University Press, 2007).

⁶³ UN General Assembly, "Convention on the Elimination of All Forms of Discrimination against Women," A/RES/34/180, December 18, 1979, <https://www.ohchr.org/sites/default/files/cedaw.pdf>

Action Plan's goals led to the necessity of reducing the focus to specific and urgent issues rather than establishing broad objectives. The Program of Action outlined national strategies, legislative measures, and the role of non-governmental organizations in advancing women's participation in economic and social development.⁶⁴ An important addition compared to the Mexico City Conference was the recognition of domestic violence against women as an offence to human dignity and a social problem.⁶⁵

The last World Conference for Women held during the UN Decade for Women was the 1985 Conference held in Nairobi, which took place from 15 to 26 July. The legacy of the Forward-looking Strategies (FLS) was the recognition of women as active agents who fight for their rights and not as passive subjects of legislation. The document called on individuals, both men and women, to encourage their government to implement the provisions of the Forward-looking Strategies and to collaborate with women to make policies.⁶⁶ The two main outcomes of the FLS were the recognition of women as individuals not confined to their role of mothers, wives, workers and citizens – as they were defined in the Mexico City Convention –, and the acknowledgment that women's advancement could not be subsequent to development, but it had to be its pre-condition.⁶⁷

The UN Decade for Women brought about many transformations and changes. It promoted the women's movement and made it truly international, creating "global sisterhood".⁶⁸ It provided spaces for women to meet both in the UN framework and in non-UN events – such as the ITCW - where they could build a network, share their experiences, and learn from each other. At the end of the decade, women were recognized as active agents who had an agenda and could create policies, and their advancement was understood as a precondition of national development. Nevertheless, even if the lives of some groups of women had improved, no significant progress was made at the global level, and the status of women had remained almost the same.

⁶⁴ UN Specialized Conferences, "Report of the World Conference of the United Nations Decade for Women: equality, development and peace," July 1980 <https://docs.un.org/en/A/CONF.94/35>

⁶⁵ *Ibid.*

⁶⁶ UN Specialized Conferences, "Report of the world conference to review and appraise the achievements of the United Nations Decade for Women: equality, development and peace," July 1985 <https://docs.un.org/en/A/CONF.116/28/Rev.1>

⁶⁷ Judith P. Zinsser, "From Mexico to Copenhagen to Nairobi: The United Nations Decade for Women, 1975- 1985," 2002

⁶⁸ Hilkkä Pietilä, "The Unfinished Story of Women and the United Nations," 2007

1.2.4 Towards equality, development and peace (1986-1996)

One of the issues discussed in the UN Decade for Women was VAW, but no comprehensive action was taken to tackle the problem structurally. While the Copenhagen Program of Action addressed mainly domestic violence,⁶⁹ the Nairobi FLS focused on women in situations of conflict,⁷⁰ women victims of trafficking and involuntary prostitution,⁷¹ and GBVAW.⁷² However, the document was limited to the recognition of the existence of the problem and did not provide guidelines to deal with it.

The initiative was taken by the CEDAW Committee which adopted GR No. 12 in 1989.⁷³ The General Recommendation declared that VAW falls under the scope of the CEDAW and recommends States to include in their reports to the Committee statistical data on the phenomenon and the measures they have taken to protect women and eradicate VAW.⁷⁴ Despite the recognition of the importance of monitoring, the GR does not explain what VAW is nor suggests practical measures to be implemented. Three years later, GR No. 19 explained that GBV is a form of discrimination against women, and for this reason, its exercise is in breach of the Convention.⁷⁵ However, the CEDAW Committee's General Recommendations are not binding and do not propose States concrete actions to tackle GBVAW. In response to this gap, the CSW drafted the Declaration on the Elimination of Violence against Women (DEVAW), a specific instrument on GBVAW that was adopted by the UNGA in December 1993.⁷⁶ In spite of its non-binding character, the document represents the international growing commitment to combat GBVAW.

The 1993 World Conference on Human Rights held in Vienna marked the culmination of a long process of review and debate over the status of HR and women's

⁶⁹ UN Specialized Conferences, "Report of the World Conference of the United Nations Decade for Women: equality, development and peace," 1980, Res. 5

⁷⁰ UN Specialized Conferences, "Report of the world conference to review and appraise the achievements of the United Nations Decade for Women: equality, development and peace," 1985, para. 261-262

⁷¹ UN Specialized Conferences, "Report of the world conference to review and appraise the achievements of the United Nations Decade for Women: equality, development and peace," 1985, Para. 290-291

⁷² UN Specialized Conferences, "Report of the world conference to review and appraise the achievements of the United Nations Decade for Women: equality, development and peace," 1985, Para. 288

⁷³ UN CEDAW Committee, "CEDAW General Recommendation No. 12: violence against women," A/44/38, 1989.

⁷⁴ *Ibid.*

⁷⁵ UN CEDAW Committee, "CEDAW General Recommendation No. 19: violence against women," A/47/38, 1992.

⁷⁶ UN General assembly, "Declaration on the Elimination of Violence against Women," A/RES/48/104, 1993.

rights. The Conference set as a priority for Governments and the UN the “full and equal enjoyment by women of all human rights”⁷⁷ and recognized the right of women to enjoy the highest standards of physical and mental health throughout their lives.⁷⁸ It established that

“The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.”⁷⁹

The implication of such affirmation is that women’s rights are not considered a “women’s issue” but an HR issue, thus, they must concern everyone and must be on the agenda of the UN and States. Furthermore, the Vienna Programme of Action emphasized that the elimination of VAW in public and private life and the elimination of discrimination against women are paramount to the realization of women’s HR. To achieve those goals, the Conference called for the ratification by all States of the CEDAW,⁸⁰ the adoption by the UNGA of the DEVAW,⁸¹ and encouraged the appointment of a special rapporteur on VAW. The following year, the UN Commission on Human Rights established the mandate of the Special Rapporteur on Violence Against Women, its Causes and Consequences (SRVAW),⁸² who is tasked with gathering information on VAW, collaborate with other Special Rapporteurs, and recommend measures at the national, regional and international levels to eradicate GBV and remedy to its effects.⁸³

In 1995, the last World Conference on Women took place in Beijing. The event was particularly successful in terms of participation and results. 189 delegations were present, more than at any other UN conference up to that moment.⁸⁴ The legacy of the

⁷⁷ UN World Conference on Human Rights, A/CONF.157/23,1993, Part II, Para. 36 <https://www.ohchr.org/sites/default/files/vienna.pdf>

⁷⁸ UN World Conference on Human Rights, “A/CONF.157/23, 1993, Part II, Para. 41

⁷⁹ UN World Conference on Human Rights, A/CONF.157/23, 1993, Part I, Para. 18

⁸⁰ UN World Conference on Human Rights, A/CONF.157/23, 1993, Part II, Para. 39

⁸¹ UN World Conference on Human Rights, A/CONF.157/23, 1993, Part II, Para. 38

⁸² 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,” H/RES/1994/45, March 4, 1994, Para. 6

⁸³ UN Commission on Human Rights, H/RES/1994/45, 1994, Para. 7

⁸⁴ Hilkkka Pietilä, “The Unfinished Story of Women and the United Nations,” 2007

conference was the Beijing Declaration and Platform for Action for Equality, Development and Peace, which shifted attention from reaching equality in a male-dominated society to the empowerment of women.⁸⁵ The Platform for Action set the agenda for the following five years to tackle 12 Critical Areas of Concern: the burden of poverty on women, unequal access to education and health, VAW, the effects of armed or other kinds of conflict on women, inequality in the economic and political spheres, the insufficient mechanisms to promote the advancement of women, inadequate protection of women's HR, the role of media, gender inequalities in the management of natural resources, and discrimination against and violation of the rights of girl children.⁸⁶ It is reiterated that women's rights are HR, and it is recognized that women have the right to live free of coercion, discrimination, and violence. The importance of this document lies not only in the consolidation of decisions previously made at other conferences⁸⁷ but also in the compilation of a comprehensive plan of action that includes and brings forward all of them. States have the responsibility for implementing the Platform for Action through the mainstream of gender perspective, i.e., adopting a gender-sensitive approach at all levels. Two years later, the ECOSOC integrated this perspective into the UN system as a strategy to achieve gender equality at the international level.⁸⁸

1.2.5 The new millennium (1997-present)

As pointed out in the previous subsection, the Beijing Platform for Action for Equality, Development and Peace set the agenda for national and international action for five years. At the 23rd Special Session of the General Assembly in 2000, it was decided to reconfirm the same goals for a period of another five years and to regularly assess their

⁸⁵ UN Specialized Conferences, "Beijing Declaration and Platform for Action for Equality, Development and Peace," September 15, 1995, https://archive.unescwa.org/sites/www.unescwa.org/files/u1281/bdpfa_e.pdf

⁸⁶ *Ibid.*

⁸⁷ 1975 UN World Conference on Women in Mexico City, 1980 UN World Conference on Women in Copenhagen, 1985 UN World Conference in Nairobi, 1990 World Summit for Children, 1992 UN Conference on Environment and Development in Rio de Janeiro, 1993 UN World Conference on Human Rights in Vienna, 1994 International Conference on Population and Development in Cairo, 1995 World Summit for Social Development in Copenhagen.

⁸⁸ ECOSOC, "Agreed Conclusions 1997/2," September 18, 1997.

implementation.⁸⁹ This decision has been reiterated, and every five years progress and objectives are discussed to coordinate the way forward.

This year, on the 30th anniversary review of progress on the Beijing Platform for Action, the center of attention was accelerating compliance with the 1995 commitments and the current global goals,⁹⁰ namely, the Sustainable Development Goals (SDGs). In fact, SDGs comprise not only gender equality,⁹¹ but also the end of poverty and hunger,⁹² access to health, quality education, clear water, affordable energy, decent work for all,⁹³ reduction of inequalities,⁹⁴ climate action,⁹⁵ and the promotion of peace and access to justice.⁹⁶ In light of the above, Beijing+30 aims at a digital revolution, freedom from poverty, end GBVAW, boost women's participation in decision-making, adopt a gender-responsive protection of women in conflicts, and climate justice.⁹⁷

Women's right to live free from violence has been internationally recognized, but is the prohibition of GBVAW a principle of international customary law?

1.3 GBVAW and customary international law

Customary international law is a source of international law⁹⁸ that binds all States regardless of their acceptance. This is evident in the case of newborn States to which existing customs apply automatically. Customary rules do not arise from written documents but from "general practice accepted as law."⁹⁹ Therefore, to exist, a custom must entail a rather homogeneous practice (*diurnitas*) and the shared belief that it is a legal duty to follow such practice (*opinion juris*). Thus, customary law entails an objective element – consistent State practice – and a subjective one – the opinion whereby that

⁸⁹ UN General Assembly, "Beijing+5 political declaration and outcome," A/55/341, June 2000, https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/CSW/PFA_E_Final_WEB.pdf

⁹⁰ UN Women, "Women's rights in review 30 years after Beijing," March 2025, <https://www.unwomen.org/sites/default/files/2025-03/womens-rights-in-review-30-years-after-beijing-en.pdf>

⁹¹ UN General Assembly, "Transforming our world: the 2030 Agenda for Sustainable Development," A/RES/70/1, September 25, 2015, Goal 5.

⁹² UN General Assembly, A/RES/70/1, 2015, Goals 1 and 2.

⁹³ UN General Assembly, A/RES/70/1, 2015, Goals 3, 4, 6, 7 and 8.

⁹⁴ UN General Assembly, A/RES/70/1, 2015, Goal 10.

⁹⁵ UN General Assembly, A/RES/70/1, 2015, Goals 13, 14, 15.

⁹⁶ UN General Assembly, A/RES/70/1, 2015, Goal 16.

⁹⁷ UN Women, "Women's rights in review 30 years after Beijing," 2025

⁹⁸ International Court of Justice, "Statute of the Court of Justice," International Court of Justice, 1945, Art. 38, <https://www.icj-cij.org/statute>.

⁹⁹ *Ibid.*

practice is mandatory. “A rather homogeneous practice” means that a behavior does not necessarily require that all States of the world follow it to be a custom, but that it is representative of different legal systems. Hence, a custom is a behavior that is repeated over time by the generality of States because they accept it as a legal rule. Additionally, international customary rules can be codified into treaties by the International Law Commission (ILC) after an extensive analysis of State practice to make their content and interpretation clearer and more defined.

In 2017, the CEDAW Committee affirmed that “the *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law.”¹⁰⁰ This statement was justified on the basis that, since the adoption of GR No. 19 in 1992, many States, both parties and non-parties to the CEDAW, have strengthened their efforts to eliminate GBVAW through laws and policies, and have increased their collaboration with UN organs to achieve this goal. The Committee recognized as State practice also the adoption of UN documents – such as the 1993 the Vienna Programme of Action, the DEVAW, and the 1995 Beijing Platform for Action – and of regional conventions - the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women; the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; the Istanbul Convention; the ASEAN RP on EVAW; and the Arab Strategy for Combating Violence against Women -. Furthermore, the Committee claimed that judicial decisions of international courts – for instance, the cases of *Opuz v. Turkey* and *González et al. (“Cotton Field”) v. Mexico* - represent additional evidence that the prohibition of GBVAW has become an international customary rule.

Many legal scholars have expressed their disagreement with the CEDAW Committee’s statement. Already in 1993, Chinkin and Charlesworth affirmed that VAW is “one of those rare areas where there is genuinely consistent and uniform state practice,”¹⁰¹ meaning that State practice consists in condoning GBVAW rather than prohibiting it. One might argue that the context in which the two authors wrote their article was different than the GR No.

¹⁰⁰ UN Committee on the Elimination of Discrimination against Women. “CEDAW General Recommendation No. 35” 2017, Para. 2

¹⁰¹ Christine M. Chinkin and Hilary Charlesworth, “The gender of *jus cogens*,” in *Human Rights Quarterly* 15 (1993): 63–76, https://repository.law.umich.edu/book_chapters/478.

35's one and that, indeed, the prohibition of GBVAW is now a customary rule. However, the sole fact that the DEVAW has not been transformed into a convention after more than 30 years and remains non-binding shows the lack of willingness by States to formally commit to eradicating GBVAW.

As Sara De Vido pointed out, the prohibition of VAW as a socio-legal notion does not amount to a principle of customary international law, but the prohibition of some of its forms could.¹⁰² For instance, even if the degree of liberalization of abortion varies from State to State – some allow it on request, others under specific circumstances, such as in cases of rape or fetal deformations and to save the mother's life¹⁰³ –, only in a few countries in the world there is a total ban; this implies that abortion – in its different forms – is a State practice and is believed to be legitimate and/or necessary by States.¹⁰⁴ Therefore, it can be said that the prohibition of some forms of GBVAW is progressively turning into customary international law, but not the prohibition of GBVAW as a broad category.

1.4 Conclusion

This chapter examined GBVAW in its conceptual, historical and legislative dimensions. At first, the phenomenon was defined and analyzed in detail, explaining who perpetuates GBVAW, for what reasons, and in what forms. It emerged that both men and women can be agents of violence, either as individuals or as State organs, and that violence is exercised against women as a result of the power structures and cultural stereotypes that depict women as subordinated to men because of their gender.

Then, the path toward the recognition of women's rights as HR was explored. The period examined began with the foundation of the UN and concluded in March 2025 with the Beijing+30 review. The trajectory was characterized by a progressive overcoming of the public/private dichotomy and by the inclusion of women's rights and their experience of

¹⁰² Sara De Vido, "The Prohibition of Violence against Women as Customary International Law? Remarks on the CEDAW General Recommendation No. 35," in *Il Mulino* 2 (2018), <https://doi.org/10.12829/90772>.

¹⁰³ Center for Reproductive Rights, "The World's Abortion Laws," Center for Reproductive Rights, 2024, <https://reproductiverights.org/maps/worlds-abortion-laws/>.

¹⁰⁴ Sara De Vido, "The Prohibition of Violence Against Women as Customary International Law? Remarks on the CEDAW General Recommendation No. 35," 2018

oppression in the national and international agenda of States. Nevertheless, today, there is still no binding instrument to combat and eradicate GBVAW at a global level.

Lastly, even if the adoption of many international documents, such as the CEDAW, the DEVAW, and the Beijing Platform for Action, demonstrated a growing international interest in addressing the problem, the prohibition of GBVAW has not yet become a principle of customary international law. At the moment, only some specific forms of GBVAW might be regarded as prohibited by custom, but not GBVAW as a phenomenon.

Chapter 2: Universal legal instruments on gender-based violence against women

In the previous chapter, it was demonstrated that no universal binding legal instrument on GBVAW exists. However, this normative gap has been partially overcome through two strategies adopted by HR treaty bodies, namely gender mainstreaming of existing universal binding HR instruments and the conceptualization of GBVAW as a form of discrimination. In the early 1990s, the Declaration on the Elimination of Violence against Women (DEVAW) was adopted by the UNGA as the first specific document on the issue. Nevertheless, since they are soft law, none of these means has truly closed the gap in international law; so, the idea of a new, universal, binding instrument has emerged.

Section 1 of this chapter will be dedicated to the work of HR treaty bodies to integrate GBVAW in their jurisdiction. In particular, Section 1.1 will deal with the first strategy, i.e., mainstreaming gender perspective into HR documents. The cases analyzed will be those of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (subsection *a*), the International Covenant on Civil and Political Rights (subsection *b*), and the Rome Statute (subsection *c*). Section 1.2 will discuss the second strategy and the understanding of GBVAW as discrimination in the International Covenant on Economic, Social and Cultural Rights (subsection *a*) and in the CEDAW (subsection *b*). Then, Section 2 will examine the DEVAW, its innovative character and its drawbacks. Finally, in Section 3, it will be discussed whether, after reviewing the current normative *status quo*, a new universal binding instrument on GBVAW is needed.

2.1 General universal instruments

As a consequence of the lack of binding provisions that prohibit GBVAW, HR treaty bodies have adopted two strategies to make States accountable for perpetrating or

condoning GBVAW. On the one hand, they have stretched the interpretation and scope of existing binding HR treaties to include this type of violence; on the other hand, they have treated GBVAW as a form of discrimination against women.¹⁰⁵

2.1.1 Gender mainstreaming of universal HR treaties

The aim of this strategy is to incorporate women's experience in the framework of general HR treaties. In fact, since no specific binding treaty on GBVAW exists, women have relied on universal instruments to get protection and seek redress for the violence they have been subjected to. The advantage of claiming violations of general HR is that such rights are already recognized by the global community and are well-established within the international legal framework.

However, this approach does not come without problems. First of all, as mentioned in chapter 1 section 2, HR have been drafted using men's concerns as the standard; therefore, their framing tends to leave aside women's specific issues resulting from their disadvantaged position. As a matter of fact, HR treaties protect individuals from abuses committed by State actors, but not from those committed by non-State actors, perpetuating the public/private divide. This understanding of HR is particularly detrimental to women because, contrary to men, they are extremely more likely to experience violence committed by private actors. Additionally, the need to stretch the scope of application of HR treaties to include women further reinforces the idea that women's concerns are just "added" to universal – read "male" – issues. Lastly, in order to integrate GBVAW under their mandate, treaty bodies have adopted soft law instruments, namely general comments or general recommendations, which are not binding and do not have a strong legal power.

a. Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment

In the absence of universally legally binding provisions, GBVAW has been equated to torture or ill-treatment. The 1984 Convention against Torture and Other Cruel,

¹⁰⁵ Alice Edwards, "Violence Against Women under International Human Rights Law," (Cambridge University Press, 2010).

Inhumane or Degrading Treatment or Punishment (CAT) provides separate definitions for these two types of HR violations. Article 1 states that torture

“means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”¹⁰⁶

Therefore, the elements that characterize torture are 1) being an act that causes severe physical or mental suffering, 2) being inflicted intentionally 3) to obtain information, to punish a person, to coerce he or her, or because of discrimination, and 4) being inflicted by, at the instigation of, or with the consent or acquiescence of a person acting in an official capacity.

On the other hand, cruel, inhumane or degrading treatment or punishment (CIDTP) refers to acts “which do not amount to torture ... committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.¹⁰⁷ Since it does not require a specific intention, this definition is applicable to a greater number of situations compared to torture.¹⁰⁸

The CAT framing of the prohibition of torture and CIDTP has been deeply criticized by feminist legal scholars.¹⁰⁹ The main reason is that it requires an act of torture or ill-treatment to occur in the public sphere, that is, at the hands of a public official or a person acting in an official capacity. Therefore, this definition is said to reinforce the

¹⁰⁶ UN General Assembly, “Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,” UN Doc. A/RES/39/46, December 10, 1984, Art. 1

¹⁰⁷ UN General Assembly, UN Doc. A/RES/39/46, 1984, Art. 16

¹⁰⁸ Julie A. Tchoukou, “The silences of international human rights law: the need for a UN treaty on violence against women,” in *Human Rights Law Review* 23, (2023): 1–25, <https://doi.org/10.1093/hrlr/ngad016>

¹⁰⁹ See Christine M. Chinkin and Hilary Charlesworth, “The gender of jus cogens,” University of Michigan Law School, 2006; Julie A. Tchoukou, “The silences of international human rights law: the need for a UN treaty on violence against women,” 2023; Alice Edwards, “Torture and other cruel, inhuman, or degrading treatment or punishment,” in *Violence Against Women Under International Human Rights Law* (Cambridge University Press, 2010)

public/private dichotomy, in that it reflects men's experience of torture and excludes other cases of abuse that take place in the private dimension, to which women are more - and the most - subjected.¹¹⁰ This perspective is also strengthened by the employment of masculine pronouns to refer to the victim. Moreover, the separate definition of CIDTP and the fact that some provisions on the measures that States shall take in terms of prevention and protection are applied to cases of torture only,¹¹¹ seem to suggest that ill-treatment is somehow a second-class crime which is less serious than torture.

The CAT Committee has addressed the aforementioned concerns in General Comment (GC) No. 2, situating GBVAW within the framework of the convention. Firstly, it affirmed that, acknowledging that the conditions that give rise to CIDTP facilitate torture, the obligation to prevent torture must also be applied to prevent ill-treatment.¹¹² This statement also implies that the norms that prohibit CIDTP are non-derogable under the CAT. Moreover, the GC reiterates that the prohibition against torture is absolute, and no exceptional circumstances can be invoked to justify acts that derogate it.¹¹³ In addition to the unaccepted grounds of justification enunciated in Article 2(2 and 3) of the Convention, the Committee also dismisses protection of public safety, emergencies, and religion or tradition as justifications.¹¹⁴ This provision is particularly relevant in cases of GBVAW because religion and custom are frequently invoked to defend some practices that harm women, such as female genital mutilation (FGM). In this way, those justifications are explicitly rejected, and States can be held accountable for torture in *any* case.

Then, the GC proceeded to specify what the previously mentioned element 4) of the definition of torture means. The Committee highlighted that the convention is binding on States and not on individuals.¹¹⁵ Nevertheless, "States bear international responsibility for the acts and omissions of their officials and ... others acting in an official capacity."¹¹⁶ This means that the State is held accountable not only if its agents directly commit an act

¹¹⁰ Julie A. Tchoukou, "The silences of international human rights law: the need for a UN treaty on violence against women," 2023

¹¹¹ UN General Assembly, UN Doc. A/RES/39/46, 1984, Artt. 2, 3, 4, and 14.

¹¹² UN Committee against Torture (CAT Committee), "General Comment No.2," UN Doc. CAT/C/GC/2, January 24, 2008, para. 3 and 4 <https://www.ohchr.org/node/84504>

¹¹³ UN CAT Committee, UN Doc. CAT/C/GC/2, 2008, para. 5

¹¹⁴ *Ibid.*

¹¹⁵ UN CAT Committee, UN Doc. CAT/C/GC/2, 2008, para. 15

¹¹⁶ *Ibid.*

of torture, but also if the State does not act, i.e., fails to take the “effective legislative, administrative and judicial measures”¹¹⁷ to prevent the occurrence of torture. The implication of due diligence is that the State is also liable when the crime is committed by private individuals if the State has not respected its obligations to prevent, investigate, prosecute, punish, and ensure redress to victims. In other words, the State’s inaction tolerating acts of torture, whether committed by public or private agents, represents a *de facto* permission of the crime of torture, thus amounts to a violation of the CAT.¹¹⁸ The Committee stressed that it had found violations of the obligation of due diligence in cases concerning GBVAW, in particular for cases of sexual violence,¹¹⁹ FGM,¹²⁰ domestic violence,¹²¹ and trafficking.¹²²

Further, GC No. 2 emphasized the obligation of States to protect the categories of people more vulnerable to torture. The Committee adopted an intersectional approach, affirming that “gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment.”¹²³ In particular, it identified the contexts in which women are more at risk and listed them as deprivation of liberty, medical treatment, and violence in communities and homes exercised by private actors.¹²⁴ To address the vulnerability of the cited specific categories of people, States not only have the obligation of due diligence, but are also recommended to add to their reports to the Committee disaggregated data on the basis of, *inter alia*, gender. This would allow a more detailed analysis of the effects of the implementation of the convention on groups especially at risk.¹²⁵

Lastly, in addition to Articles 2(1) and 4 of the Convention and Paragraph 23 of the GC, the Committee included the positive measures that States shall adopt to comply with the obligations arising from the Convention. One of the paramount preventive measures is

¹¹⁷ UN General Assembly, UN Doc. A/RES/39/46, 1984, Art. 2(1)

¹¹⁸ UN CAT Committee, UN Doc. CAT/C/GC/2, 2008, para. 18

¹¹⁹ *G.N. v. Burundi*, CAT Committee, Communication 579/2013, 1 May 2017.

¹²⁰ *Mayantie Jasmina Soumahoro v. Netherlands*, Communication No. 757/2016, May 3, 2019.

¹²¹ CAT/C/ROU/CO/3 para. 19 and 20.

¹²² CAT/C/ESP/CO/7 para. 43.

¹²³ UN CAT Committee, UN Doc. CAT/C/GC/2, 2008, para. 22.

¹²⁴ *Ibid.*

¹²⁵ UN CAT Committee, UN Doc. CAT/C/GC/2, 2008, para. 23.

educating both the general population on the prohibition of torture and ill-treatment, and persons acting in an official capacity to refrain from engaging or being complicit in acts of torture or CIDTP and, when dealing with such cases, to pay particular attention to the most vulnerable groups.¹²⁶ To better implement this measure, States are encouraged to hire persons belonging to minority or disadvantaged groups to work in the educational, medical, and legal sectors¹²⁷ to foster empathy and build a “culture of respect”.¹²⁸ Moreover, States should continuously monitor the conditions to prevent, investigate and punish acts of torture and ill-treatment committed by private actors.¹²⁹

Rhonda Copelon pointed out that recognizing GBVAW as torture has several beneficial effects. In fact, it spreads awareness on the gravity of the violent acts that perpetuate gender discrimination and the subordination of women, it shifts the responsibility of the acts from the ashamed woman to the perpetrator and the State that tolerates them, and it attributes to the protection of women from (some forms of) GBVAW the status of non-derogability.¹³⁰

However, this approach is controversial. The claim that rape, FGM, domestic violence, and trafficking may amount to torture fails to acknowledge that GBVAW is a violation of HR worthy in its own right of condemnation and prohibition.¹³¹ Associating those forms of GBVAW with gender-neutral terms, such as torture and ill-treatment, adumbrates the social and structural character of this type of violence. The consequence is that acts of GBVAW recognized as torture cannot be eradicated if they are treated as forms of violence that can affect both men and women. Additionally, the need of qualifying rape, FGM, domestic violence, and trafficking as torture and CIDTP reinforces the idea that those crimes are taken more seriously if condemned as torture rather than as GBVAW.

¹²⁶ UN CAT Committee, UN Doc. CAT/C/GC/2, 2008, para. 17 and 25.

¹²⁷ UN CAT Committee, UN Doc. CAT/C/GC/2, 2008, para. 24.

¹²⁸ Rhonda Copelon, “Gender Violence as Torture: The Contribution of CAT General Comment No. 2,” in *The City University of New York Law Review* 11, no. 2 (2008).

¹²⁹ UN CAT Committee, UN Doc. CAT/C/GC/2, 2008, para. 25.

¹³⁰ Rhonda Copelon, “Gender Violence as Torture: The Contribution of CAT General Comment No. 2,” 2008

¹³¹ Julie A. Tchoukou, “The silences of international human rights law: the need for a UN treaty on violence against women,” 2023.

b. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) has been interpreted by the Human Rights Committee (HRC) through the lens of Article 3, which established the equal enjoyment by men and women of the rights enshrined in the text.¹³² In particular, General Comment No. 28 set States' obligations to adopt measures to protect women from GBVAW with regard to the right of life,¹³³ the prohibition of torture and CIDTP,¹³⁴ the prohibition of slavery,¹³⁵ the right to liberty and security of person,¹³⁶ the right to freedom of movement,¹³⁷ the right to be recognized as a legal person,¹³⁸ the right to marriage,¹³⁹ and the right to privacy.¹⁴⁰

Article 6(1) establishes the right to life of every human being and the prohibition of arbitrary deprivation of life.¹⁴¹ The HRC affirmed that the right to life must not be interpreted narrowly as to concern the obligation by States only to prevent arbitrary death of individuals, but also to include their obligations to ensure a dignified life in relation to economic and social rights.¹⁴² Similarly to the CAT, the ICCPR is binding on States, which have the responsibility of adopting positive measures to implement the right to life even against violations committed by private actors. The problem, nonetheless, is that GC No. 36 recognizes as private actors only criminals, organized crime, militia groups, including armed or terrorist groups, and irregular armed groups, such as private armies.¹⁴³ It has been claimed that the ICCPR framing is shaped on men's experience, since the great majority of the intentional killings of women is made at the hands of an intimate partner or a relative,¹⁴⁴ who are not included in the list of private actors provided by GC No. 36.

¹³² UN General Assembly, "International Covenant on Civil and Political Rights," UN Doc. A/RES/2200A (XXI), December 16, 1966, Art. 3 <https://www.ohchr.org/sites/default/files/ccpr.pdf>

¹³³ UN General Assembly, A/RES/2200A (XXI), 1966, Art. 6

¹³⁴ UN General Assembly, A/RES/2200A (XXI), 1966, Art. 7

¹³⁵ UN General Assembly, A/RES/2200A (XXI), 1966, Art. 8

¹³⁶ UN General Assembly, A/RES/2200A (XXI), 1966, Art. 9

¹³⁷ UN General Assembly, A/RES/2200A (XXI), 1966, Art. 12

¹³⁸ UN General Assembly, A/RES/2200A (XXI), 1966, Art. 16

¹³⁹ UN General Assembly, A/RES/2200A (XXI), 1966, Art. 23

¹⁴⁰ UN General Assembly, A/RES/2200A (XXI), 1966, Art. 17

¹⁴¹ UN General Assembly, A/RES/2200A (XXI), 1966, Art. 6

¹⁴² Alice Edwards, "The right to life," in *Violence Against Women Under International Human Rights Law* (Cambridge University Press, 2010).

¹⁴³ Human Rights Committee, UN Doc. CCPR/C/GC/36, 2019, para. 21.

¹⁴⁴ UN Women, "One woman or girl is killed every 10 minutes by their intimate partner or family member," November 25, 2024, <https://www.unwomen.org/en/news-stories/press-release/2024/11/one-woman-or-girl-is-killed-every-10-minutes-by-their-intimate-partner-or-family-member>

Even if femicides are not committed by organized groups but by “normal” individuals and are more difficult to deal with, they represent a threat to women’s right to life which cannot be overlooked. The cases of deprivation of life of women because of their gender are not isolated but are part of the structural phenomenon of GBVAW. By excluding the actors of femicide, the HRC fails to acknowledge and recognize the threat to life that half the global population is systematically subjected to because of its gender. An additional missing piece in Article 6 and in the General Comments is the question of when life begins, i.e., whether the right to life applies already to fetuses or only to children after their birth.¹⁴⁵ Even if no answer has been given by the HRC, emphasis has been placed on the right to life of pregnant women, especially in cases involving voluntary termination of pregnancy. The committee stated that, even if States might adopt laws that limit the right to abortion, those measures must not jeopardize or result in a violation of the woman’s right to life. In fact, restricting voluntary termination of pregnancy makes women resort to unsafe abortion, which is a practice that puts their lives at risk. To ensure the right to life of pregnant women, the HRC affirmed that States must provide safe, legal and effective access to abortion where the life and health of the woman are at risk, or where carrying a pregnancy to term would cause the pregnant woman substantial pain or suffering, especially when pregnancy is the result of a violence or when the pregnancy is not viable.¹⁴⁶ In *Norma v. Ecuador*,¹⁴⁷ the HRC found the State in violation of Article 6(1) ICCPR. Norma at the time of the facts was 13 years old and, after being repeatedly sexually violated by her father, became pregnant by incest. She had left school the year before when her custody was given back to her father, who started sexually abusing her. She found out that she was pregnant on the 27th week and was told by the doctor that it was too late to have an abortion. Norma did not want to be a mother, so she manifested her will to have a therapeutic abortion, which she was denied by doctors, and then her intention to give the child up for adoption, but she was given false information. In the meantime, even if she had denounced her father, the criminal proceedings never came to an end because official authorities did not act with due diligence, and, finally, the father died. Norma gave birth to the child and was obliged to take care of him. At 16 years old, she left her aunt’s house and started working to earn money to take care of the child,

¹⁴⁵ Alice Edwards, “The right to life,” 2010

¹⁴⁶ Human Rights Committee, UN Doc. CCPR/C/GC/36, 2019, para. 8.

¹⁴⁷ *Norma v. Ecuador*, CCPR, Communication No. 3628/2019, October 31, 2024.

studying on Sundays and struggling economically. In its views, the HRC confirmed that the right to life has to be interpreted in a comprehensive manner; therefore, Ecuador was found to have failed to protect Norma's right to life for three main reasons. The first one was that the State allowed the perpetration of sexual violence, since it did not protect the girl from her father, who had already been denounced for similar acts.¹⁴⁸ Secondly, the actors representing the State, despite the national law authorizing voluntary interruption of pregnancy for children younger than 15 years old due to high risk of maternal mortality,¹⁴⁹ did not listen to Norma's request to terminate the pregnancy, putting her life at risk.¹⁵⁰ Lastly, Ecuador violated the right to a *dignified* life because it did not question (a) the fact that the complainant had left school as a consequence of the sexual violation, (b) that, after giving birth to the child, she could not study again stably because of her role of mother that was imposed on her, and (c) that, being only an adolescent, she had to work with no perspective of professional growth just to pay the expenses of the son she had as a result of sexual violence.¹⁵¹ To monitor the right to life of women, GC No. 28 specified that, when reporting on Article 6, States should provide gender-disaggregated data on infant and maternal mortality rates.¹⁵² Additionally, they should also give information on the measures adopted to protect women from practices that violate their right to life, such as life-threatening abortions, female infanticide, the burning of widows, and dowry killings.

As far as torture and CIDTP, the ICCPR prohibits them and adds that "no one shall be subjected without his free consent to medical or scientific experimentation."¹⁵³ In GC No. 28, the HRC linked torture and ill-treatment to some forms of GBVAW, namely, forced abortion, forced sterilization and FGM, encouraging States to provide information on the measures adopted to prevent such practices, when reporting on Article 7.¹⁵⁴ In *Norma v. Ecuador*, the HRC declared that the State violated the prohibition of torture because of its acts and omissions. The Committee underlined that denial of access to

¹⁴⁸ *Norma v. Ecuador*, CCPR/C/142/D/3628/2019, para. 11.4

¹⁴⁹ National Assembly of Ecuador "Código Orgánico Integral Penal," art. 150.

¹⁵⁰ *Norma v. Ecuador*, CCPR/C/142/D/3628/2019, para. 11.5

¹⁵¹ *Norma v. Ecuador*, CCPR/C/142/D/3628/2019, para. 11.8

¹⁵² Human Rights Committee, "General comment No. 28," UN Doc. HRI/GEN/1/Rev.9 (Vol. I), March 29, 2000, para. 10.

¹⁵³ UN General Assembly, A/RES/2200A (XXI), 1966, Art. 7.

¹⁵⁴ Human Rights Committee, HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 11.

abortion when the physical or mental health of the woman is at risk amounted to a violation of Article 7, especially being Norma a minor.¹⁵⁵ Moreover, not only was the moment of giving birth traumatic, but the complainant also had to take care of the child she did not want, and she did not receive psychological help from the State to deal with her mental suffering.¹⁵⁶

Regarding the prohibition of slavery, GC No. 28 interpreted it as requiring States to take measures to eliminate trafficking in women and forced prostitution within the country or across borders.¹⁵⁷

As far as the right to liberty and security of the person enshrined in Article 9, the HRC clarified that liberty refers to freedom from confinement of the body, and security concerns bodily and mental integrity.¹⁵⁸ GC No. 28 affirmed that a violation of such provision would be the confinement of women within the house on an arbitrary or unequal basis with the husband or a relative.¹⁵⁹ Similarly, the exercise of marital powers over the wife or of parental power over adult daughters that limits the woman's right to freedom of movement constitutes a violation of Article 12.¹⁶⁰ On this regard, States should inform the HRC on the practices that deprive women of their right to liberty¹⁶¹ and to freedom of movement, and should repeal laws that prevent women from exercising the latter, such as the requirement of consent of a third party to the issuance of a travel document to an adult women.¹⁶² Furthermore, if the deprivation of liberty amounts to lawful incarceration, the State has to guarantee that women are guarded only by female guards and that pregnant women receive humane treatment and respect for their inherent dignity at all times, especially during labor and after birth.¹⁶³

Commenting on Article 16 on the right of everyone to be recognized as a legal person, the HRC highlighted that the implementation of this right is often undermined for

¹⁵⁵ *Norma v. Ecuador*, CCPR/C/142/D/3628/2019, para. 11.13.

¹⁵⁶ *Ibid.*

¹⁵⁷ Human Rights Committee, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 12.

¹⁵⁸ Human Rights Committee, "General Comment No. 35," UN Doc. CCPR/C/GC/35, December 16, 2014

¹⁵⁹ Human Rights Committee, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 14.

¹⁶⁰ Human Rights Committee, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 16.

¹⁶¹ Human Rights Committee, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 14.

¹⁶² Human Rights Committee, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 16.

¹⁶³ Human Rights Committee, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 15.

women. GC No. 28 established that, within the marriage, women must have the capacity to own property and enter into a contract, and that this right may not be restricted on the basis of their marital status.¹⁶⁴ Moreover, States shall take measures to prohibit the treatment of women as objects and parts of the husband's property.¹⁶⁵ The GC also addressed the question of women giving their consent to marry. Article 23 recognizes the right of men and women of marriageable age to marry and to found a family, and it establishes that no marriage shall be entered into without the free and full consent of the intending spouses.¹⁶⁶ However, the HRC pointed out that several factors might impede a woman from marrying with her free and full consent. The first problem is that the ICCPR does not set a minimum age for marriage and leaves it to the States to determine it.¹⁶⁷ Another issue might be the existence of a guardian, usually a man, who gives his consent to the marriage, depriving the woman of making a free choice.¹⁶⁸ Laws and social stigma are also factors that influence women's consent to marriage. In cases of rape, women are pressured to marry their rapist either because of the social necessity to repair the family's honor or because of the legal framework that mitigates or extinguishes the rapist's criminal responsibility if he marries the victim.¹⁶⁹ Moreover, laws that impose restrictions on remarriage by women and not by men are recognized as discriminatory and as limiting women's right to marry.¹⁷⁰ Lastly, polygamy is found to be inconsistent with Article 23 because it violates the dignity of women and discriminates against them.¹⁷¹ Therefore, States must ensure that men and women have the same rights and obligations both within marriage and after the dissolution of marriage.¹⁷²

Article 17 on the right of privacy has been widely applied in cases concerning women's reproductive rights. GC No. 28 specified that gender violations of this provision usually occur in cases of women's sterilization when the husband's authorization is required, when the woman is a certain age, or when she has a certain number of

¹⁶⁴ Human Rights Committee, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 19.

¹⁶⁵ *Ibid.*

¹⁶⁶ UN General Assembly, UN Doc. A/RES/2200A (XXI), 1966, Art. 23(2) and 23(3).

¹⁶⁷ Human Rights Committee, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 23.

¹⁶⁸ *Ibid.*

¹⁶⁹ Human Rights Committee, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 24.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Human Rights Committee, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 25 and 26.

children.¹⁷³ In *Norma v. Ecuador*, the HRC established that State's inaction *vis-a-vis* Norma's decision to interrupt pregnancy and then to give her child up for adoption constituted an interference with her right to privacy and family,¹⁷⁴ showing a gendered stereotype on women's reproductive function and their role as mothers.¹⁷⁵

c. The Rome Statute

In the field of international criminal law, some forms of sexual violence have been recognized as crimes. Already in the 1990s, the Statutes of the International Criminal Tribunal for the former Yugoslavia and of the International Criminal Tribunal for Rwanda included serious bodily and mental harm committed with intent to destroy, in whole or in part, a specific group as acts of genocide,¹⁷⁶ and enslavement, rape, torture and inhumane treatment as crimes against humanity.¹⁷⁷

For more than 10 years, the International Criminal Court (ICC) has been applying a gender analysis to the three main crimes under its jurisdiction, namely genocide, crimes against humanity, and war crimes.¹⁷⁸ The Rome Statute expressly established that the Prosecutor shall carry out an effective investigation and prosecution of crimes respecting "the interests and personal circumstances of victims and witnesses, including ... gender"¹⁷⁹ and shall take into account the nature of the crime, especially in cases of gender violence.¹⁸⁰ In this regard, recognizing that some forms of violence are acts of GBVAW leads to a comprehensive understanding of the reasons, the means and the consequences of such conducts. This allows victims to be given appropriate remedies and international criminal law to become more responsive to the reality of conflicts. In this view, the 2023 Policy on Gender-based Crimes adopted by the Office of the Prosecutor specifies that its gender-mainstreaming approach is aimed at contributing to the *development* of international jurisprudence and best practice regarding accountability for gender-based

¹⁷³ Human Rights Committee, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000, para. 20.

¹⁷⁴ *Norma v. Ecuador*, CCPR/C/142/D/3628/2019, para. 11.17

¹⁷⁵ *Norma v. Ecuador*, CCPR/C/142/D/3628/2019, para. 11.22

¹⁷⁶ UN Security Council, "Statute of the International Criminal Tribunal for the Former Yugoslavia," UN Doc. S/RES/827, May 25, 1993, art. 4(2)(b); UN Security Council, "Statute of the International Criminal Tribunal for Rwanda," UN Doc. S/RES/955, November 8, 1994, art. 2(2)(b).

¹⁷⁷ UN Security Council, S/RES/827, 1993, art. 5; UN Security Council, S/RES/955, 1994, art. 3.

¹⁷⁸ The Office of the Prosecutor, "Policy Paper on Sexual and Gender-Based Crimes," ICC, June 2014.

¹⁷⁹ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, "Rome Statute of the International Criminal Court," UN Doc. A/CONF.183/9, July 17, 1998, art. 54(1)(b).

¹⁸⁰ *Ibid.*

crimes.¹⁸¹ Furthermore, Article 21(c) established that the application and interpretation of the ICC Statute must be consistent with internationally recognized HR without distinction of, *inter alia*, gender.¹⁸² In particular, the Office of the Prosecutor has committed to gender mainstreaming and an intersectional approach throughout all stages of its work.¹⁸³ According to the Office, a gender-competent analysis is paramount to raise awareness on the differences in power and needs of people, and on how people's vulnerability may vary based on gender.¹⁸⁴ Therefore, the role of the Office has been recognizing how apparently neutral crimes can be gendered in nature or can target individuals on the basis of their actual or perceived gender.¹⁸⁵

In the case of genocide, the crimes encompassed are:

- “a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”¹⁸⁶

They constitute acts of genocide when committed with the intent to destroy completely or partly a national, racial, ethnic, or religious group. Even if these crimes can be committed against both men and women, the latter are at higher risk of being targeted due to the role they have in reproduction within society. As a matter of fact, impeding women to procreate or coercing them to a forced pregnancy or abortion are means used to take control over a group and to determine its end. Serious bodily or mental harm can be inflicted on women in the form of sexual violence or enslavement, which serve as means used by the perpetrator – usually a man - to exercise power dynamics over the victim, destroying the group through the annihilation of the individual. Moreover, measures

¹⁸¹ The Office of the Prosecutor, “Policy on gender-based crimes,” ICC, December 2023, para. 5(v).

¹⁸² UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 21(c).

¹⁸³ The Office of the Prosecutor, “Policy Paper on Sexual and Gender-Based Crimes,” ICC, June 2014; The Office of the Prosecutor, “Policy on gender-based crimes,” ICC, December 2023

¹⁸⁴ The Office of the Prosecutor, “Policy on gender-based crimes,” ICC, December 2023, para. 24.

¹⁸⁵ The Office of the Prosecutor, “Policy on gender-based crimes,” 2023, para. 30.

¹⁸⁶ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 6.

imposed to prevent births within the groups are also more likely to affect women. In fact, they include forced sterilization and birth control, mutilation, and “intentional infliction of trauma by violent acts intended to ensure the victim does not procreate,”¹⁸⁷ the deliberate impregnation of women by men belonging to another group to change or “improve” the “race”. Additionally, the Office recognized that forcibly transferred children can experience the genocide differently on the grounds of their gender.¹⁸⁸

The crimes against humanity to which women are particularly subject are enslavement,¹⁸⁹ torture,¹⁹⁰ rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization,¹⁹¹ persecution on the basis of gender,¹⁹² and inhumane acts causing great suffering or serious physical or mental injury.¹⁹³ Enslavement, sexual violence and sexual slavery are demonstrations of the power of ownership exercised by the perpetrator and the whole group he belongs to over a woman and her group. When women are deprived of their liberty or are under the custody or control of another group, they are very vulnerable to GBVAW acts, in particular sexual violence, and the violence women experience may amount to torture or cruel treatment. In the cases listed in Article 7(1)(g), each crime protects a separate interest of the perpetrator: sexual slavery reinforces the power dynamics of ownership, rape attacks the victim’s – read “her group’s” - sexual autonomy, forced pregnancy denies the woman her sexual and reproductive rights, and enforced sterilization deprives the woman of her biological reproductive capacity.¹⁹⁴ In addition, women as a group can also be persecuted, meaning that their fundamental rights can be intentionally denied because of their gender identity. Lastly, Article 7(1)(k) encompasses other inhuman acts that, due to their vagueness, represent an open category applicable to a vast array of crimes, including GBVAW.¹⁹⁵ All the aforementioned forms of gender-based violence are under the jurisdiction of the ICC only when they are part of a widespread or systematic attack directed against a civilian population.

¹⁸⁷ The Office of the Prosecutor, “Policy on gender-based crimes,” 2023, para. 53.

¹⁸⁸ *Ibid.*

¹⁸⁹ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 7(1)(c)

¹⁹⁰ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 7(1)(f)

¹⁹¹ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 7(1)(g)

¹⁹² UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 7(1)(h)

¹⁹³ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 7(1)(k)

¹⁹⁴ The Office of the Prosecutor, “Policy on gender-based crimes,” 2023, para. 59, 60, 61

¹⁹⁵ The Office of the Prosecutor, “Policy on gender-based crimes,” 2023, para. 63

War crimes can be gendered in their motive and/or consequences, too. This type of crime encompasses breaches of the 1949 Geneva Conventions – which codify rules of international humanitarian law (IHL) - and of the laws and customs applicable in international and non-international conflicts. Among the breaches of the Geneva Conventions of 12 August 1949, torture or inhuman treatment¹⁹⁶ and the intentional causing of great suffering or mental or bodily harm¹⁹⁷ are crimes that can be motivated or aggravated by gender. On the other hand, the extensive and unjustified destruction and appropriation of property¹⁹⁸ can have gender-specific consequences, such as women's increased vulnerability and dependence on others, which might be taken advantage of. The underlying reason is that women tend to have fewer financial resources, which makes it more difficult for them to recover from property damage, to pay for medical assistance, and to reintegrate into the community when the conflict is over. In the case of non-international armed conflicts, due to their gender, women are more likely to be subjected to violence against life and person, in particular to mutilation, cruel treatment and torture,¹⁹⁹ and outrages upon personal dignity, such as humiliating and degrading treatment.²⁰⁰ With regard to international laws and customs applicable in international and non-international armed conflicts, women are the most targeted individuals for genital mutilation with no medical justification,²⁰¹ for outrages against personal dignity, encompassing humiliating and degrading treatment,²⁰² and for sexual violence.²⁰³ Additionally, even if women are not chosen intentionally as victims, they might nonetheless suffer the effects of some acts in a different manner compared to men. For instance, Article 8(2)(b)(xx) prohibits the employment of weapons and methods of warfare which cause “superfluous injury or unnecessary suffering.”²⁰⁴ Even if this provision seems to foresee protection for everyone, Renata H. Dalaqua et al. have contended that its interpretation has not included gender perspectives and has, thus,

¹⁹⁶ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 8(2)(ii)

¹⁹⁷ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 8(2)(iii)

¹⁹⁸ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 8(2)(iv)

¹⁹⁹ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 8(2)(c)(i)

²⁰⁰ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 8(2)(c)(ii)

²⁰¹ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 7(2)(b)(x) and 7(2)(e)(xi)

²⁰² UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 7(2)(b)(xxi) and 7(2)(c)(ii)

²⁰³ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 7(2)(b)(xxii) and 7(2)(e)(vi)

²⁰⁴ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 8(2)(b)(xx)

excluded women's specific conditions.²⁰⁵ This gender-neutral approach has failed to ban weapons that cause superfluous injury or unnecessary suffering to women only, for instance, when they have long-term implications for women's health, such as sex-specific cancers and complications related to pregnancy.²⁰⁶

Notwithstanding the paramount value of the Rome Statute and the 2023 Policy on Gender-based Crimes, the major limitation of international criminal law is that it is focused almost exclusively on sexual violence. Moreover, it incorporates the distinction between the public and the private dimensions since it condemns all the aforementioned crimes because they are committed with the intent of destroying or attacking a community,²⁰⁷ as part of a plan,²⁰⁸ or on a large scale,²⁰⁹ and not as crimes against the individual.²¹⁰ This means that the suffering and violence that women are subjected to are worth persecution only if they take place in the public dimension. Moreover, even if individual criminal accountability and international trials against perpetrators of GBVAW in armed conflicts have symbolic value and are important to ensure effective redress to victims, they are not enough to eradicate the problem. As long as the structural causes that allow GBVAW in peacetime persist and the relations of power and domination are not modified,²¹¹ no real change could ever take place.

2.1.2 GBVAW as discrimination

The second strategy adopted by HR treaty bodies has been conceptualizing GBVAW as discrimination to make it fall under their mandate. In particular, the Committee on Economic, Social and Cultural Rights explained how some forms of gender-based violence, understood as manifestations of discrimination, impair the equal enjoyment of rights by men and women. Similarly, the CEDAW Committee justified its jurisdiction over GBVAW cases by claiming that the VAW is gender-based discrimination,

²⁰⁵ Renata Hessmann Dalaqua et al., "Missing Links: Understanding Sex and Gender-Related Impacts of Chemical and Biological Weapons" (Geneva: UNIDR, 2019).

²⁰⁶ *Ibid.*

²⁰⁷ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 6 and 7.

²⁰⁸ UN Diplomatic Conference of Plenipotentiaries, A/CONF.183/9, 1998, art. 8.

²⁰⁹ *Ibid.*

²¹⁰ Hilary Charlesworth, "Feminist Methods in International Law," in *The American Journal of International Law* 93, No. 2 (1999), pp. 379-394

²¹¹ *Ibid.*

thus it is in breach of the Convention on the Elimination of all Forms of Discrimination against Women.

The shortcomings of this approach are several. The most evident one is that treating GBVAW as a manifestation of discrimination severely reduces the recognition of the gravity and the impacts of the phenomenon on the lives of women. This is the consequence of overlooking the structural reasons underlying GBVAW, which are the power relations through which women are placed in a subordinate position by men. Without acknowledging its systemic causes, it is impossible to eradicate the oppression of women. Secondly, both the International Covenant on the Economic, Social and Cultural Rights and the CEDAW are based on the idea that equality can be achieved only if men and women have the same rights. This goal is controversial in that it measures the rights and the protection of women according to their correspondence with men, making men – once again – the standard.²¹² This “sameness approach,” however, does not take into account gender differences and questions the need for gender-specific norms and guarantees. In this framework, the recognition of GBVAW as a crime *per se* is not foreseen, as it would apply to cases concerning women only; therefore, it has been associated with discrimination, to which both men and women can be subjected. Lastly, it must be pointed out that the means by which GBVAW has been included in the aforementioned documents are general comments or recommendations, i.e., soft law instruments. This implies that those provisions are not legally binding and that States are not obliged to respect them, showing the little importance attributed to the issue.

a. International Covenant on Economic, Social and Cultural Rights

Article 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes that States must ensure that men and women enjoy on an equal basis all rights set forth in the document.²¹³ In particular, the Committee on Economic, Social and Cultural Rights (CESCR) clarified that, in order to respect such an obligation,

²¹² Julie A. Tchoukou, “The silences of international human rights law: the need for a UN treaty on violence against women,” 2023.

²¹³ UN General Assembly, “International Covenant on Economic, Social and Cultural Rights,” UN Doc. A/RES/2200A(XXI), December 16, 1966, art. 3.

States have to refrain from engaging in discriminatory actions,²¹⁴ have to protect equality by eliminating gender stereotypes and by adopting positive measures,²¹⁵ and must ensure substantive equality.²¹⁶ Additionally, in GR No. 16, the CESCR explicitly affirmed that gender-based violence is a form of discrimination that hinders the equal enjoyment by men and women of economic, social and cultural rights.²¹⁷ However, its approach can be criticized for two main reasons: it fails to understand the real causes of the GBVAW and, thus, it identifies only one manifestation of the phenomenon.

The only form of GBVAW recognized by the CESCR is domestic violence, and States' obligations in this respect are assisting victims in finding safe housing and in accessing remedies and redress.²¹⁸ Even if the Committee stated that domestic violence affects mainly women, the great majority of the measures suggested to States in order to fulfil their obligation of protecting the family²¹⁹ are gender neutral: preventing child and coerced marriage, setting the same legal age of marriage for men and women, and ensuring that both of them can choose if, whom and when to marry.²²⁰ The only obligation in relation to women's specific condition is guaranteeing women equal rights to property within and after marriage or after the husband's death.²²¹ Nevertheless, avoiding economic violence and ensuring that men and women enter marriage under the same conditions is not sufficient to avoid domestic violence. The serious problem with CESCR's approach is that it fails to acknowledge the systemic causes underlying GBVAW and therefore treats it as a form of discrimination. As a consequence, the Committee has addressed the issue by recommending States to guarantee the same rights to men and women; however, this strategy is not efficient in the case of GBVAW because it requires a change in power relations which the "sameness approach" cannot undertake. Thus, the first step for CESC to appropriately deal with the issue should be recognizing the structural nature of the phenomenon and suggesting the adoption of measures that must be specific to prevent GBVAW as a breach of ICCPR in its own right.

²¹⁴ UN Committee on Economic, Social and Cultural rights, "General comment No. 16," UN Doc. E/C.12/2005/4, August 11, 2005, para. 18.

²¹⁵ UN Committee on Economic, Social and Cultural rights, E/C.12/2005/4, 2005, para. 19.

²¹⁶ UN Committee on Economic, Social and Cultural rights, E/C.12/2005/4, 2005, para. 21.

²¹⁷ UN Committee on Economic, Social and Cultural rights, E/C.12/2005/4, 2005, para. 27.

²¹⁸ *Ibid.*

²¹⁹ UN General Assembly, A/RES/2200A(XXI), 1966, art. 10.

²²⁰ UN Committee on Economic, Social and Cultural rights, E/C.12/2005/4, 2005, para. 27.

²²¹ *Ibid.*

Additionally, the CESCR was blind before other forms of GBVAW because it either cited them without categorizing them as such or overlooked their existence. In the first case, FGM was listed in GR No. 16 as an obstacle to the full realization of the right to the enjoyment of the highest attainable standard of physical and mental health.²²² However, despite being clearly a violent and not a mere discriminatory practice, the Committee did not define it as a manifestation of GBVAW. This is the consequence of the failure to conduct an in-depth analysis of the causes underlying this phenomenon; in fact, by investigating the practice of FGM, it would emerge that the reason behind it is exercising control over the woman by depriving her of the freedom to dispose of her body. Due to the avoidance of a thorough examination of the phenomenon, the CESCR has not been able to frame effective measures that States should adopt to eradicate GBVAW. Furthermore, being unable to define properly what GBVAW is, the Committee has failed to acknowledge breaches of the ICCPR which do not amount to discrimination but to manifestations of GBVAW. The clearest example is the recommendation on the right to just and favorable conditions of work,²²³ in which the CESCR confined its analysis to discrimination in opportunities and to the gender pay gap,²²⁴ but it did not tackle the problem of harassment in the workplace. Nevertheless, this kind of violence *de facto* impairs women's enjoyment of the right to work because it creates an intimidating, hostile, and humiliating environment for the person who is subject to it, which may *also* result in discrimination if the harassed person denounces or rebels against this treatment.

Overall, the CESCR did not prove to be courageous in addressing GBVAW in that it limited itself to recognizing that phenomenon as an additional form of discrimination, failing to acknowledge its specificity and gravity. Thus, the Committee did not make use of the opportunity to give visibility to manifestations of gender-based violence other than domestic violence because it was able to categorize GBVAW correctly. Therefore, despite being a discrete starting point, GC No. 16 does not provide a solid basis which can be relied upon to eradicate GBVAW because it excludes many forms of GBVAW from the ICESCR's jurisdiction and does not recognize gender-based violence as a stand-alone violation of the document.

²²² UN Committee on Economic, Social and Cultural rights, E/C.12/2005/4, 2005, para. 29.

²²³ UN General Assembly, A/RES/2200A(XXI), 1966, art. 7.

²²⁴ UN Committee on Economic, Social and Cultural rights, E/C.12/2005/4, 2005, para. 24.

b. Convention on the Elimination of All Forms of Discrimination against Women

As mentioned in the first chapter, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the UNGA in 1979 and it entered into force in 1981. It is a legally binding document that aims at achieving *de jure* and *de facto* equality between men and women by requiring States to take action to eliminate discrimination against women. The latter is defined as the exclusion, distinction or restriction that impairs or nullifies women's enjoyment or exercise of HR and fundamental freedoms.²²⁵ To realize full equality, it is necessary to adopt legislative measures that eliminate discrimination against women by the State, private individuals, organization, or enterprises,²²⁶ and to eradicate social and cultural stereotypes.²²⁷ The convention aims to ensure women the same rights as men with regard to nationality,²²⁸ education,²²⁹ employment,²³⁰ health care,²³¹ marriage and family relations,²³² legal capacity,²³³ and political rights.²³⁴

As far as GBVAW, the CEDAW remains silent. The only provision in this regard is Article 6, which condemns the traffic in and exploitation of prostitution of women,²³⁵ but which does not tackle the whole phenomenon of VAW. The Committee has tried to overcome this gap by adopting General Recommendations that treat gender-based violence as a form of discrimination, placing it under the Committee's mandate. The first step was inviting States to add to their reports statistical data on VAW,²³⁶ and information on the measures undertaken to eradicate it²³⁷ and on the existence of support services for victims of abuses.²³⁸ Even if States are not obliged to comply with this request, since

²²⁵ UN General Assembly, "Convention on the Elimination of All Forms of Discrimination against Women," A/RES/34/180, 1979, art. 1

²²⁶ UN General Assembly, A/RES/34/180, 1979, art. 2(e).

²²⁷ UN General Assembly, A/RES/34/180, 1979, art. 5(a).

²²⁸ UN General Assembly, A/RES/34/180, 1979, art. 9.

²²⁹ UN General Assembly, A/RES/34/180, 1979, art. 10.

²³⁰ UN General Assembly, A/RES/34/180, 1979, art. 11.

²³¹ UN General Assembly, A/RES/34/180, 1979, art. 12.

²³² UN General Assembly, A/RES/34/180, 1979, art. 16.

²³³ UN General Assembly, A/RES/34/180, 1979, art. 15.

²³⁴ UN General Assembly, A/RES/34/180, 1979, art. 7 and 8.

²³⁵ UN General Assembly, A/RES/34/180, 1979, art. 6.

²³⁶ CEDAW Committee, "General Recommendation No. 12," 1989, 4

²³⁷ CEDAW Committee, "General Recommendation No. 12," 1989, 1 and 2

²³⁸ CEDAW Committee, "General Recommendation No. 12," 1989, 3

General Recommendations are soft law instruments, GR No. 12 represented a momentum where GBVAW entered the framework of CEDAW. The Committee has later on dealt with specific forms of GBVAW, namely female circumcision as a traditional practice harmful to women,²³⁹ domestic violence,²⁴⁰ and violence that affects women's health.²⁴¹ Furthermore, it has adopted an intersectional approach, in that it recognizes and analyzes the peculiar forms of discrimination and violence that women may suffer due to additional factors, such as AIDS,²⁴² disability,²⁴³ migration status,²⁴⁴ living in conflict or post-conflict situations,²⁴⁵ age,²⁴⁶ living in rural areas,²⁴⁷ living in natural disaster situations,²⁴⁸ being trafficked,²⁴⁹ and being indigenous.²⁵⁰ The two most important General Recommendations that address GBVAW are GR No. 19 and GR No. 35.

In General Recommendation No. 19, gender-based violence is recognized as a form of discrimination that is directed against women because of their gender.²⁵¹ It consists of acts, or threats of such acts, that cause physical, mental or sexual harm or suffering to women, and that deprive them of liberty.²⁵² It is deemed to impair or nullify women's HR and fundamental freedoms established by general international law and HR conventions, namely the right to life, the prohibition of torture and CIDT, the right to equal protection under IHL, the right to liberty and security of person, the right to equal protection under the law, the right to equality in the family, the right to the highest standard attainable of physical and mental health, and the right to just and favorable conditions of work.²⁵³ Since gender-based violence is considered a form of discrimination against women under the convention, States are called on to take action to eliminate it

²³⁹ CEDAW Committee, "General Recommendation No. 14," February 3, 1990

²⁴⁰ CEDAW Committee, "General Recommendation No. 21," 1994

²⁴¹ CEDAW Committee, "General Recommendation No. 24," 1999

²⁴² CEDAW Committee, "General Recommendation No. 15," 1990

²⁴³ CEDAW Committee, "General Recommendation No. 18," 1991

²⁴⁴ CEDAW Committee, "General Recommendation No. 26," December 5, 2008; CEDAW Committee, "General Recommendation No. 32," November 5, 2014.

²⁴⁵ CEDAW Committee, "General Recommendation No. 30," November 1, 2013

²⁴⁶ CEDAW Committee, "General Recommendation No. 31," May 8, 2019; CEDAW Committee, "General Recommendation No. 27," December 16, 2010.

²⁴⁷ CEDAW Committee, "General Recommendation No. 34," March 4, 2016; UN General Assembly, A/RES/34/180, 1979, art. 14.

²⁴⁸ CEDAW Committee, "General Recommendation No. 37," March 8, 2018.

²⁴⁹ CEDAW Committee, "General Recommendation No. 38," November 5, 2020.

²⁵⁰ CEDAW Committee, "General Recommendation No. 39," October 26, 2022.

²⁵¹ CEDAW Committee, "General Recommendation No. 19," 1992, para. 6.

²⁵² *Ibid.*

²⁵³ CEDAW Committee, "General Recommendation No. 19," 1992, para. 7

and to act with due diligence when it is perpetrated by private actors.²⁵⁴ In particular, the Committee recommends States to adopt legislative and other measures to protect victims of VAW and respect their integrity and dignity,²⁵⁵ to establish support services,²⁵⁶ and to provide effective remedies.²⁵⁷ Furthermore, GR No. 19 affirmed that States should overcome attitudes, customs and practices that perpetuate VAW and hinder women's equality.²⁵⁸ In fact, prejudices, according to which women are seen as subordinate to men or they have to follow specific conducts on the basis of their gender, perpetuate coercive practices, such as VAW, that result in the control of women and in depriving them of the enjoyment of their rights.

25 years after 1992, the CEDAW Committee updated GR No. 19 by adopting GR No. 35, due to the still high rate of gender-based violence committed against women and its impunity. The 2017 text recognized that GBVAW not only is perpetrated in any region of the world, but it occurs in both the public and the private dimensions and in all contexts, including digital ones.²⁵⁹ Additionally, it is reiterated that the ideology based on the control of men over women contributes to the social acceptance of GBVAW,²⁶⁰ which is, at the same time, a means by which gender roles are perpetuated.²⁶¹ Therefore, eradicating stereotypes is a State obligation, together with refraining from acts or omissions that discriminate against women. Moreover, as discussed in Chapter 1, Section 3, the Committee suggested that the prohibition of GBVAW has evolved into a principle of customary international law,²⁶² which is a statement that remains controversial.

The implementation of the CEDAW is monitored by the Committee on the Elimination of Discrimination against Women, which is composed of twenty-three experts acting in their personal capacity.²⁶³ The CEDAW Committee evaluates the progress made by States by examining their reports on the measures taken domestically, adopts concluding observations on those reports, and can make general recommendations.

²⁵⁴ CEDAW Committee, "General Recommendation No. 19," 1992, para. 4, 8, 9 and 24.

²⁵⁵ CEDAW Committee, "General Recommendation No. 19," 1992, para. 24(b) and (t).

²⁵⁶ CEDAW Committee, "General Recommendation No. 19," 1992, para. 24(k) and (o).

²⁵⁷ CEDAW Committee, "General Recommendation No. 19," 1992, para. 24(i).

²⁵⁸ CEDAW Committee, "General Recommendation No. 19," 1992, para. 24(e) and (f).

²⁵⁹ CEDAW Committee, "General Recommendation No. 35," 2017, para. 20.

²⁶⁰ CEDAW Committee, "General Recommendation No. 35," 2017, para. 19.

²⁶¹ CEDAW Committee, "General Recommendation No. 35," 2017, para. 10.

²⁶² CEDAW Committee, "General Recommendation No. 35," 2017, para. 2.

²⁶³ UN General Assembly, A/RES/34/180, 1979, art. 17(1)

A paramount novelty was introduced by Article 2 of the Optional Protocol, according to which individuals can submit communications to the Committee if a State party commits a violation of the rights enshrined in the Convention against them.²⁶⁴ Such complaints are admissible only if domestic remedies have been exhausted, the matter is not *res judicata*, the communication is compatible with the provisions of the Convention, it is not manifestly ill-founded, it does not represent an abuse, and the facts are subsequent to the entry into force of the Optional Protocol for the State party.²⁶⁵ This complaint mechanism is an incredibly important means for women because it gives them the possibility of being heard and of obtaining redress. Moreover, it provides an alternative way to State reports to evaluate national measures implementing the convention, making their failure or inefficiency evident, so the CEDAW Committee can make precise recommendations to tackle the specific issue at stake. However, the Optional Protocol has two main shortcomings. The first one is that its ratification is dependent on the political will of States, and at the moment it has been ratified only by 114 States out of the 189 of the convention. This results in a heterogeneous protection of women across the world in that some women can start an individual complaint and make States accountable, whereas others do not have this possibility and cannot receive redress nor expose the flawed implementation of the CEDAW by the State. Secondly, the recommendations that the Committee gives in individual complaints, concluding observations or general recommendations are instruments of soft law, therefore they do not bind States. In fact, States shall only “give due consideration to the views of the Committee”²⁶⁶ and six months after shall submit a response with information on the measures taken in light of the Committee’s views.²⁶⁷ Additionally, the Committee has also been criticized for dedicating a restrained amount of time to consider reports, which has been considered inadequate because it impedes an in-depth evaluation of all issues.²⁶⁸

In conclusion, the CEDAW is a useful document to protect women’s rights for four main reasons: it is legally binding - thus creates obligations -, it deals specifically

²⁶⁴ UN General Assembly, “Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,” UN Doc. A/RES/54/4, October 6, 1999, art. 2.

²⁶⁵ UN General Assembly, A/RES/54/4, 1999, art. 4.

²⁶⁶ UN General Assembly, A/RES/54/4, 1999, art. 7(4).

²⁶⁷ *Ibid.*

²⁶⁸ Maram Falk, Alexandra Sevet and Laura Walker Boem, “Prospects for a New Global Convention on the Elimination of Violence against Women,” University of Minnesota, 2017.

with women, it has an enforcement mechanism – the Committee and the Optional Protocol -, and it allows for individual women to raise their claims against States.²⁶⁹ However, it is not an effective instrument for cases of GBVAW. The shortcomings of the text have major resonance in the application of the convention. Firstly, even if the CEDAW is binding, its general recommendations are not. This means that the provisions on GBVAW, which have been established in general recommendations, do not have a strong legal value and cannot be relied upon. Secondly, the enforcement mechanism is not efficient, and States might decide not to be bound by some provisions of the Optional Protocol in the first place.²⁷⁰ Lastly, despite being one of the most ratified universal HR treaties, the numerous reservations to the convention have affected and limited its implementation. States have made reservations to the text mainly due to the incompatibility of some women's rights in the family²⁷¹ with the Islamic Law, and due to the conflict between the elimination of discrimination against women in legislation²⁷² and national rules on succession to the Crown. Even if the possibility of making reservations should be appreciated, since it has allowed an increase in the number of State parties, it should not be abused and it should not be used as an excuse to maintain laws and practices that discriminate against women.

2.2 Specific universal instrument: DEVAW

In 1993, the UNGA adopted the first legal instrument specific to GBVAW: the Declaration on the Elimination of Violence against Women (DEVAW). This was a breakthrough in the efforts to combat GBVAW in international law because it is the only universal document that addresses the issue and makes it a global concern. Nevertheless, it has a huge drawback that cannot be overlooked: it is not binding.

The DEVAW overcame two of the major limitations of the CEDAW in that it included a stand-alone prohibition of VAW, and it did not adopt the sameness approach. In its preamble, the declaration acknowledges that violence against women is “a manifestation of historically unequal power relations between men and women, which

²⁶⁹ UN General Assembly, “Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,” UN Doc. A/RES/54/4, 1999, art. 2.

²⁷⁰ *Ibid.*

²⁷¹ UN General Assembly, A/RES/34/180, 1979, art. 16.

²⁷² UN General Assembly, A/RES/34/180, 1979, art. 2.

have led to ... discrimination against women.”²⁷³ Hence, the UNGA asserts that GBVAW is not a form of discrimination, but it is a separate “social mechanism by which women are forced into a subordinate position.”²⁷⁴ This implies that, as such, GBVAW has to be recognized as a violation of HR and fundamental freedoms in its own right and cannot be associated with discrimination. Moreover, by recognizing the peculiar nature of GBVAW, it is impossible to adopt the sameness approach, since it is acknowledged that this kind of violence is directed only against women on the basis of their gender and there is no equivalent for men. In particular, Article 3 declared that women are entitled to the equal enjoyment of HR and fundamental freedoms²⁷⁵ without mentioning the principle of equality between men and women.²⁷⁶ This wording implies that women must be guaranteed the same rights as any other human being, including as any other woman, and not only the same *as men*. Therefore, DEVAW creates an opportunity for framing women’s rights outside the male experience²⁷⁷ and to adapt them to women’s specific needs.

The declaration defines VAW 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, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”²⁷⁸ Similarly to what has been said in Chapter 1, Section 1 on the Istanbul Convention, the main difference with the CEDAW’s framing is that, in the case of DEVAW, not only the result, but also the intention is to be considered. This element is key because it highlights that GBVAW is not merely the action of harming a woman, but it is a means by which women’s subordination is perpetuated; therefore, understanding the intent is paramount to determine if the type of violence committed or attempted was gender-based. Moreover, DEVAW was the first universal document to acknowledge that GBVAW occurs in both public and private life. In this way, it explicitly pointed out that States are responsible and liable in any case and no justification such as “what happens at home stays at home” is admissible. Thus, States are required to tackle

²⁷³ UN General Assembly, A/RES/48/104, 1993, preamble.

²⁷⁴ *Ibid.*

²⁷⁵ UN General Assembly, A/RES/48/104, 1993, art. 3.

²⁷⁶ A/RES/34/180, 1979, art. 2.

²⁷⁷ Julie A. Tchoukou, “The silences of international human rights law: the need for a UN treaty on violence against women,” 2023.

²⁷⁸ UN General Assembly, A/RES/48/104, 1993, art. 1.

GBVAW actively even in the private domain, which was originally considered exempt from State interference.

Then, the document lists some forms of VAW that occur in the family, within the general community, and violence perpetrated or condoned by the State, giving a concrete character to its content and providing specific, non-exhaustive examples of cases to which it applies.²⁷⁹ In addition, the DEVAW, just like the other international instruments, affirms that States should not invoke customs or religion as justifications for the breach of their obligation to eliminate VAW.²⁸⁰ Furthermore, the text outlines numerous measures that States should take to eradicate gender-based violence against women, such as ratifying the CEDAW,²⁸¹ exercising due diligence,²⁸² adopting gender-sensitive laws to avoid secondary victimization,²⁸³ providing specialized assistance to women,²⁸⁴ training public officials,²⁸⁵ modifying stereotyped patterns of conduct,²⁸⁶ and promoting research and data collection.²⁸⁷

Despite being a paramount document for the recognition of GBVAW as a stand-alone crime, the DEVAW lacks bindingness. The only solution to effectively give value to the document would be converting it into a convention, but it is improbable that it will be done in the near future, considering that 32 years have already passed since its adoption as a declaration.

2.3 A new universal instrument?

There are dissenting opinions on whether the current international legal framework on GBVAW is sufficient and effective. In 2016, the SR on VAW, Dubravka Šimonović, called all UN members and other global and regional stakeholders to submit their views on the adequacy of the international legal framework on VAW and their proposals to improve it.²⁸⁸ Global and regional mechanisms were mainly in favor of

²⁷⁹ UN General Assembly, A/RES/48/104, 1993, art. 2.

²⁸⁰ UN General Assembly, A/RES/48/104, 1993, art. 4.

²⁸¹ UN General Assembly, A/RES/48/104, 1993, art. 4(a).

²⁸² UN General Assembly, A/RES/48/104, 1993, art. 4(c).

²⁸³ UN General Assembly, A/RES/48/104, 1993, art. 4(f).

²⁸⁴ UN General Assembly, A/RES/48/104, 1993, art. 4(g).

²⁸⁵ UN General Assembly, A/RES/48/104, 1993, art. 4(i).

²⁸⁶ UN General Assembly, A/RES/48/104, 1993, art. 4(j).

²⁸⁷ UN General Assembly, A/RES/48/104, 1993, art. 4(k).

²⁸⁸ Statement by Ms. Dubravka Šimonović, Special Rapporteur on violence against women, its causes and consequences at the sixty session of the Commission on the Status of Women, March 14, 2016,

maintaining the *status quo*, whereas the majority of civil society's responses pushed for a new universal binding treaty.

2.3.1 Opposition to a new stand-alone treaty on GBVAW

Some groups of civil society and many global and regional bodies have claimed that no new binding treaty on GBVAW is needed by the international community and that the current international legal framework is sufficient and appropriate to deal with the issue.

Firstly, it has been argued that, since the CEDAW Committee has been able to include GBVAW in the framework of the convention as a form of discrimination²⁸⁹ and other bodies have developed a rich body of case law on the issue,²⁹⁰ there is no normative gap on GBVAW to be addressed at the global level. On the other hand, a new treaty would require a bargaining process that is likely to result in the adoption of standards inferior to the GR No. 19's ones, as a strategy to encourage the highest number possible of States to ratify the new document with fewer reservations. Nevertheless, this would undermine the content of current provisions, would reduce women's protection and would pose a challenge to CEDAW's authority.

Furthermore, it has been proposed that a new treaty should have its own monitoring mechanism. However, its establishment would result in diverting some resources from the CEDAW Committee and the office of SR on VAW to the new body. The consequence would be the existence of three institutions with similar mandates and a few means available to each of them. Hence, it is not clear how the new monitoring body would be more successful than the existing ones.²⁹¹

The current international legal system can, nonetheless, be improved. To do so, the focus should be on reinforcing existing implementation mechanisms.²⁹² In fact, instead of creating new obligations, such as reporting to an additional body, which would represent a supplementary burden to States and a waste of resources, international efforts should be

<https://www.ohchr.org/en/statements-and-speeches/2016/03/statement-ms-dubravka-simonovic-special-rapporteur-violence-against>

²⁸⁹ UN general Assembly, A/72/134, 2017, para. 15 and 59.

²⁹⁰ UN general Assembly, A/72/134, 2017, para. 17.

²⁹¹ UN general Assembly, A/72/134, 2017, para. 61.

²⁹² UN general Assembly, A/72/134, 2017, para. 18.

directed at enhancing States' accountability.²⁹³ One strategy that has been proposed to consolidate the CEDAW is the adoption of a new optional protocol²⁹⁴ that should incorporate and consolidate regional and universal provisions. This document should also have its own monitoring body to hold States accountable and to assist the overstretched CEDAW mechanism.²⁹⁵

2.3.2 Proposal of a new stand-alone treaty on GBVAW

A great number of civil society organizations pointed out that the current international legal framework does not address GBVAW properly and comprehensively, hence a new universal treaty is necessary to close such normative gap.

As a matter of fact, there is no single binding definition of GBVAW at the global level²⁹⁶ and, even if CEDAW Committee's GR No. 19 and Article 1 DEVAW provide their own definitions, they are partly different and neither of them is legally binding. Although soft law instruments are influential in developing norms thanks to their ability to prepare the social and cultural background for the change, they do not make States accountable for their actions or inactions.²⁹⁷ Moreover, since they allow States to decide what aspects of the prohibition they want to apply, they create inconsistency in application across States. Therefore, the adoption of a universal hard-law instrument with clear and standard language on GBVAW is presented as a solution to overcome current limitations and ensure legal certainty. Furthermore, while in the past survivors' views were not taken into account when drafting universal documents, it emerged from 2016 submissions that the experience of survivors and the work of society groups are deemed paramount in the negotiation phase.²⁹⁸ Thus, a new treaty drafted in consultation with women would ensure the adoption of a survivor-centered approach that truly protects victims. This would imply not only protection from secondary victimization, but also combating stereotypes, stigma and addressing intersecting factors that increase vulnerability, such as poverty.

²⁹³ UN general Assembly, A/72/134, 2017, para. 56.

²⁹⁴ UN general Assembly, A/72/134, 2017, para. 62.

²⁹⁵ Rashida Manjoo, "Closing the normative gap in international law on violence against women: developments, initiatives and possible options," in *The Legal Protection of Women from Violence. Normative Gaps in International Law* (Routledge, 2018).

²⁹⁶ UN General Assembly, "Adequacy of the international legal framework on violence against women," UN Doc. A/72/134, July 19, 2017, Para. 42.

²⁹⁷ UN general Assembly, A/72/134, 2017, para. 43.

²⁹⁸ UN general Assembly, A/72/134, 2017, para. 48.

In addition, the new treaty would be provided with its own monitoring body. It was argued that it is improbable that a new international body would be more successful than the existing ones, especially considering that its resources would not be greater and its mandate not very different. However, it is clear that, despite the existence of the CEDAW Committee and the figure of SR on VAW, States continue to tolerate and accept GBVAW without facing real consequences. The solution would not be merely adding a third universal monitoring body, but changing current implementation mechanisms. Thus, since the new convention would finally treat GBVAW as a crime in its own right, there would be no need for the CEDAW Committee to deal with cases of gender-based violence as forms of discrimination. Therefore, the already overstretched CEDAW Committee would be relieved from this task and could focus on cases of discrimination only, while the new treaty body would replace – if resources are scarce - or cooperate with the SR on VAW.

2.4 Conclusion

In this chapter, the evolution and limitations of universal legal instruments on GBVAW were examined. In particular, it was pointed out that no dedicated, binding universal treaty on the issue exists at the moment and that, despite HR treaty bodies' work, a universal normative gap remains.

It was explained that HR treaty bodies have pursued two principal strategies to address VAW: the gender mainstreaming of existing universal HR instruments and the conceptualization of GBVAW as a form of discrimination. In the first case, the analysis of the CAT, the ICCPR, and the Rome Statute revealed both the potential and the shortcomings of mainstreaming GBVAW into general HR frameworks. Although these instruments have been interpreted to encompass certain forms of GBVAW, their original male-centric framing and the persistence of the public/private divide place GBVAW under neutral categories such as torture or ill-treatment, obscuring the structural and gendered nature of such violence. In the second case, the CESCR and the CEDAW Committee have included GBVAW under their jurisdiction through general comments and general recommendations, relying on non-binding means. While these approaches have enabled incremental progress - most notably through interpretative expansions by treaty bodies and the adoption of soft law instruments - they have not fully bridged the normative gap.

The chapter has also highlighted the innovative yet limited character of the DEVAW, which, despite its symbolic significance, remains a soft law instrument lacking enforceability.

Lastly, it was discussed whether a new universal binding treaty is needed. On the one hand, there is a significant gap in the universal legal framework which consists in the lack of a single definition of VAW and in the absence of binding State obligations with respect to its elimination. To address this deficiency a new binding treaty would be a good option, but its negotiation process might lead to the adoption of inferior standards of protection compared to the current ones. On the other hand, the implementation of existing law instruments is inconsistent across States and monitoring systems are overstretched. Therefore, the creation of a new body would relieve other organs from the burden of evaluating State action and would enable a specific and precise monitoring of the progress made domestically to tackle GBVAW.

Chapter 3: Regional legal instruments on gender-based violence against women

Violence against woman is a deeply entrenched and widespread phenomenon that is present in all areas of the world. This Chapter analyzes how regional systems, namely the Organization of American States, the African Union, ASEAN, and the Council of Europe, have responded to gender-based violence. The study will include all the legal instruments, both general and specific, that women can invoke in cases of GBVAW and their monitoring mechanism to evaluate States' accountability and women's access to justice. The examination of the different definitions of VAW, States' obligations, enforcement mechanisms, and possibility of redress for victims is aimed at highlighting both the progress made and the gaps within each regional system. The sequence of the regional systems will be chronological, since it will depend on the year of the adoption of the first specific legal instrument tackling GBVAW in the region.

Section 1 will be dedicated to the Organization of the American States, which has been at the forefront of the fight against VAW and was the first system ever to adopt a treaty on the issue in 1994. This section will explore the Inter-American system comprising the Commission of Women, the Commission on Human Rights and the Court of Human Rights, and the main three documents that protect women's rights, i.e., the

American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and the Belém do Pará Convention with its monitoring mechanism – MAESCVI -.

Nine years after the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the African Union adopted the 2003 Protocol to the African Charter on the Rights of Women in Africa, which was followed by the 2025 African Union Convention on Ending Violence Against Women and Girls. These two text will be studied in Section 2 together with the general African Charter on Human and Peoples' Rights, the African Commission and the African Court on Human and Peoples' Rights, and the Special Rapporteur on the Rights of Women in Africa.

Section 3 will examine the ASEAN Human Rights Declaration and the more specific 2004 Declaration on the Elimination of Violence against Women in the ASEAN Region and 2013 Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in ASEAN. The study will also encompass the 2016-2025 ASEAN Regional Plan of Action on the Elimination of Violence against Women as a program intended to guide the implementation of the 2013 Declaration.

The last regional HR system to be analyzed will be the Council of Europe, which adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence in 2011. The institutional bodies that will be dealt with are GREVIO, the Committee of the Parties and the European Court on Human Rights, and the other regional treaty that will considered is the European Charter on Human Rights.

The Chapter will be concluded with a comparative analysis of the regional frameworks, underscoring the similarities and differences, and a final assessment on whether current legal instruments are adequate in granting women protection from GBVAW.

3.1 The Inter-American system

In the 20th century, the American continent has been in in the vanguard of the protection of HR, and, more specifically, women's rights. As a matter of fact, it counts with three records: it is the place where the most ancient regional body on women's HR - the Inter-American Commission of Women (CIM) - was established; where the first

modern catalogue of HR – the American Declaration of the Rights and Duties of Man – was adopted in May 1948, a few months before the UDHR; and it is the region where the first binding treaty tackling GBVAW was signed.

The Inter-American Commission of Women (CIM) was created in 1928 and is a policy forum aimed at the realization of women's rights and gender equality. To achieve its goal, the CIM works with the Organization of American States (OAS) at both the regional and the national level. Regionally, it advises the OAS in relation to women's rights and contributes to the development of jurisprudence on the topic; domestically, it supports Member States in their compliance with universal and Inter-American HR instruments and in the implementation of gender equality.

The Organization of American States is a regional agency of the UN established in 1948, and it is composed of 35 countries of the American continent.²⁹⁹ The four pillars on which the OAS is based are security, democracy, HR, and development. Its HR system has evolved over the years, becoming increasingly more broad-ranging. In particular, it started from adopting instruments of general protection – the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights – and it has progressively focused its attention on specific matters such as the prohibition of torture³⁰⁰ and death penalty,³⁰¹ the eradication of GBVAW,³⁰² the forced disappearances of persons,³⁰³ and the elimination of discrimination against persons with disabilities.³⁰⁴

²⁹⁹ Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela

³⁰⁰ Organization of American States, "Inter-American Convention to Prevent and Punish Torture," 1985.

³⁰¹ Organization of American States, "Protocol to the American Convention on Human Rights to Abolish the Death Penalty," 1990.

³⁰² Organization of American States, "Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)," 1994.

³⁰³ Organization of American States, "Inter-American Convention on Forced Disappearance of Persons," 1994.

³⁰⁴ Organization of American States, "Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities," 1999.

3.1.1 Instruments of general protection

The two main documents of general HR protection in the Inter-American system are the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, also known as the Pact of San José. The former document, as the name suggests, is not binding; however, the jurisprudence of the Inter-American Court and of the IACHR have practically enforced it, especially with respect to States which have not yet ratified the American Convention, such the United States and Canada.

a. The American Declaration of the Rights and Duties of the Man

The American Declaration of the Rights and Duties of Man (American Declaration) was adopted at the Ninth International Conference of American States on May 2, 1948,³⁰⁵ seven months before the UNGA approved the UDHR. In addition to its formidable timing, the Declaration is an interesting instrument for the protection of women's rights. The text established civil, political, economic, social and cultural rights and duties, responding to the need for change after WWII.

The American Declaration is aimed at protecting essential HR and at creating the circumstances for people to achieve progress and happiness. In doing so, it sets numerous rights that are inherent to every human being, without distinction as to, *inter alia*, gender. For this reason, almost every provision, with the exception of Article 7, is framed in a gender-neutral manner in that it refers to every person. Among them, the rights that are particularly important to grant women a decent life and to protect them from violence are the right to life, liberty and security,³⁰⁶ the right to equality before the law,³⁰⁷ to fair trial,³⁰⁸ to privacy,³⁰⁹ to residence and movement,³¹⁰ to the preservation of health and well-being,³¹¹ to education,³¹² the right to work and fair remuneration,³¹³ the right to

³⁰⁵ Inter-American Commission on Human Rights (IACHR), "American Declaration of the Rights and Duties of Man," May 2, 1948.

³⁰⁶ IACHR, "American Declaration of the Rights and Duties of Man," 1948, art. 1.

³⁰⁷ IACHR, "American Declaration of the Rights and Duties of Man," 1948, art. 2.

³⁰⁸ IACHR, "American Declaration of the Rights and Duties of Man," 1948, art. 18.

³⁰⁹ IACHR, "American Declaration of the Rights and Duties of Man," 1948, art. 5.

³¹⁰ IACHR, "American Declaration of the Rights and Duties of Man," 1948, art. 8.

³¹¹ IACHR, "American Declaration of the Rights and Duties of Man," 1948, art. 12.

³¹² IACHR, "American Declaration of the Rights and Duties of Man," 1948, art. 12.

³¹³ IACHR, "American Declaration of the Rights and Duties of Man," 1948, art. 14.

recognition of juridical personality and civil rights,³¹⁴ and the right to property.³¹⁵ In addition, as anticipated, Article 7 includes a right framed specifically for women, i.e., the right to special protection for mothers and children during pregnancy and the nursing period.³¹⁶

Despite the wide range of rights it enshrines, the American Declaration is not a valid instrument for women's protection or redress in that it is not binding, hence, it does not create obligations for States.

b. The American Convention on Human Rights

The American Convention on Human Rights, also known also the Pact of San José, is the most general binding instrument in the Inter-American HR system and its legal value makes it an instrument that can be efficaciously used in guaranteeing women rights and protection from violence.

The American Convention set a list of civil and political rights and freedoms to which State parties must give effect without discrimination as to, *inter alia*, gender. The 1988 Additional Protocol to the to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, called the Protocol of San Salvador, integrated economic, social and cultural rights in the Inter-American HR framework. In particular, the most important provisions of the Pact of San José and its Additional Procol in protecting women from violence are the right to life,³¹⁷ to humane treatment,³¹⁸ to personal liberty and security,³¹⁹ to privacy,³²⁰ to health,³²¹ to freedom of movement,³²² to judicial personality,³²³ to equal³²⁴ and judicial³²⁵ protection, and freedom from slavery.³²⁶ Moreover, the two documents also encompass the right to the protection of the family

³¹⁴ IACHR, "American Declaration of the Rights and Duties of Man," 1948, art. 16.

³¹⁵ IACHR, "American Declaration of the Rights and Duties of Man," 1948, art. 23.

³¹⁶ IACHR, "American Declaration of the Rights and Duties of Man," 1948, art. 7.

³¹⁷ Organization of American States, "American Convention on Human Rights," 1969, art. 4.

³¹⁸ Organization of American States, "American Convention on Human Rights," 1969, art. 5.

³¹⁹ Organization of American States, "American Convention on Human Rights," 1969, art. 7.

³²⁰ Organization of American States, "American Convention on Human Rights," 1969, art. 11.

³²¹ Organization of American States, "Additional Protocol to the to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Pact of San Salvador)," 1988, art. 10.

³²² Organization of American States, "American Convention on Human Rights," 1969, art. 22.

³²³ Organization of American States, "American Convention on Human Rights," 1969, art. 3.

³²⁴ Organization of American States, "American Convention on Human Rights," 1969, art. 24.

³²⁵ Organization of American States, "American Convention on Human Rights," 1969, art. 25.

³²⁶ Organization of American States, "American Convention on Human Rights," 1969, art. 6.

which entails the need for both spouses to give their free and full consent to marry,³²⁷ the equality of rights during and after the dissolution of the marriage³²⁸ - including the right to property³²⁹ -, special assistance to mothers before and after childbirth,³³⁰ and the enactment of programs to train families to create an harmonious environment.³³¹ Lastly, the right to work³³² is essential to ensure that women have the possibility of securing the means for a dignified life and to give them the opportunity to be economically independent.

The Pact of San José is paramount within the Inter-American HR system because, in addition to the aforementioned provisions, it established a monitoring mechanism for the implementation of the rights enshrined in Inter-American documents. This mechanism is made up of two bodies, namely the Commission and the Court, which monitor States' compliance with treaty obligations.

The Inter-American Commission on Human Rights (IACHR) was established to promote the observance and defense of HR in the region, and it is composed of seven independent experts who meet in Washington D.C.. To guarantee respect for HR, the Commissioners engage in different activities, i.e., they make country visits, prepare reports on a particular thematic issue or on the situation in one country,³³³ make recommendations to Member States,³³⁴ and can establish rapporteurships. Furthermore, the IACHR examines petitions submitted by individuals or organizations concerning alleged violations of Inter-American HR treaties by a State Party.³³⁵ In these cases, when a country is found to have violated the HR of an individual, the IACHR issues a report encompassing recommendations to act with due diligence in investigating the case, to change legislation and/or make reparations.

The Inter-American Court of Human Rights³³⁶ was established as an autonomous body headquartered in San José, Costa Rica, and, similarly to the IACHR, it is made up of

³²⁷ Organization of American States, "American Convention on Human Rights," 1969, art. 17(3).

³²⁸ Organization of American States, "American Convention on Human Rights," 1969, art. 17(4).

³²⁹ Organization of American States, "American Convention on Human Rights," 1969, art. 21.

³³⁰ Organization of American States, "Pact of San Salvador," 1988, art. 15(3)(a).

³³¹ Organization of American States, "Pact of San Salvador," 1988, art. 15(3)(d).

³³² Organization of American States, "Pact of San Salvador," 1988, art. 6.

³³³ Organization of American States, "American Convention on Human Rights," art. 41(c).

³³⁴ Organization of American States, "American Convention on Human Rights," art. 41(b).

³³⁵ Organization of American States, "American Convention on Human Rights," art. 44.

³³⁶ Organization of American States, "American Convention on Human Rights," art. 52.

seven judges acting in their personal capacity and not as representatives of their government. The Court has three functions in that it solves legal disputes, orders provisional measures and has an advisory function with regard to the interpretation of HR treaties and to the compatibility of domestic norms with Inter-American HR conventions. On one hand, the Court's judgements have a stronger legal value than IACHR's recommendations because the former must be executed³³⁷ and are not soft law instruments. On the other hand, the Court's mandate is more limited than the IACHR's one because it can only decide cases brought by State parties that have accepted the Court's contentious jurisdiction. This means that States can decide whether they want to be brought before the Court, and that the Court is not directly accessible to individual applicants. However, if the State has accepted the Court's contentious jurisdiction, the IACHR may decide to refer to the Court a case raised by an individual petition.

3.1.2 Instrument of special protection: the Belém do Pará Convention

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, also called the Belém do Pará Convention, was the first regional treaty addressing GBVAW and the first binding treaty on the topic at the global level. The fact that it is the most ratified instrument in the Inter-American HR system³³⁸ shows a consensus within the region on the urgency of combating this phenomenon.

The Belém do Pará Convention describes VAW 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.”³³⁹ This definition is very limited compared to the others presented in the previous Chapter because it only looks at the result and not at the intention, and it also does not expressly include threats of such acts, coercion and other deprivations of liberty, considerably reducing its field of application. However, contrary to the CEDAW Committee's GR No. 19, it acknowledges the public-private dichotomy and expressly denounces violence that occurs both in the public and in the private domain, namely in the family, the community and with the acquiescence of

³³⁷ Organization of American States, “American Convention on Human Rights,” 1969, art. 68(1).

³³⁸ It has been ratified by 32 States out of the 35 members of the OAS. Canada, Cuba and the United States are the only three countries that have not ratified it.

³³⁹ Organization of American States, “Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará),” June 9, 1994, art. 1.

the State. Moreover, Article 1 of the Inter-American Convention enlarged the scope of the first category – the family - by encompassing also acts that occurs within the “domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman,”³⁴⁰ protecting women’s right to be free from violence also in contexts where women are not legally bonded with the perpetrator.

The Convention clearly states that “every woman has the right to be free from violence”³⁴¹ and that every woman has the right to the enjoyment and protection of all HR, in particular of the right to life, to physical, mental and moral integrity, to personal liberty and security, to be free from torture, to privacy, to equal protection before the law, and to equal access to public services.³⁴² In fact, VAW is recognized as an offense against human dignity and a manifestation of the unequal power relations between men and women.³⁴³ Furthermore, the document stresses the relationship between GBVAW and discrimination, pointing out that women’s right to be free from violence includes the prohibition of discrimination and the right to be educated without gender stereotypes based on the inferiority of women.³⁴⁴

To tackle GBVAW, States’ obligations under the Belém do Pará Convention are listed in Article 7 and correspond to refraining from engaging in any violent conduct against women,³⁴⁵ applying due diligence in the prevention, investigation and redress,³⁴⁶ modifying legal or customary practices tolerating VAW,³⁴⁷ and adopting legislative and other measures to prevent, punish and eradicate such violence.³⁴⁸ Moreover, States should progressively promote awareness and observance of women’s HR, including the right to be free from violence,³⁴⁹ modify stereotyped gender roles,³⁵⁰ appropriately train law enforcement officers,³⁵¹ and provide specialized services for women who have been subjected to violence.³⁵² The Convention foresees three mechanisms to ensure State’s

³⁴⁰ Organization of American States, “Convention of Belém do Pará,” 1994, art. 2.

³⁴¹ Organization of American States, “Convention of Belém do Pará,” 1994, art. 3.

³⁴² Organization of American States, “Convention of Belém do Pará,” 1994, art. 4.

³⁴³ Organization of American States, “Convention of Belém do Pará,” 1994, preamble.

³⁴⁴ Organization of American States, “Convention of Belém do Pará,” 1994, art. 6.

³⁴⁵ Organization of American States, “Convention of Belém do Pará,” 1994, art. 7(a).

³⁴⁶ Organization of American States, “Convention of Belém do Pará,” 1994, art. 7(b).

³⁴⁷ Organization of American States, “Convention of Belém do Pará,” 1994, art. 7(e).

³⁴⁸ Organization of American States, “Convention of Belém do Pará,” 1994, art. 7(h).

³⁴⁹ Organization of American States, “Convention of Belém do Pará,” 1994, art. 8(a).

³⁵⁰ Organization of American States, “Convention of Belém do Pará,” 1994, art. 8(b).

³⁵¹ Organization of American States, “Convention of Belém do Pará,” 1994, art. 8(c).

³⁵² Organization of American States, “Convention of Belém do Pará,” 1994, art. 8(d).

compliance with the document: reports, advisory opinions and petitions. In the first case, States are required to include in their reports to the Inter-American Commission of Women information on the measures they have adopted to apply the Convention's content.³⁵³ Secondly, States Parties, together with the CIM, can request an advisory opinion on the interpretation of the text of the document to the Inter-American Court of Human Rights.³⁵⁴ Lastly, Article 12 of the Belém do Pará Convention allows individuals, groups of persons and NGOs to lodge petitions with the IACHR to denounce violations by a State Party of the obligations encompassed in Article 7.³⁵⁵

Since 2004, the Follow-up Mechanism to the Belém do Pará Convention (MESECVI) ensures a continuous evaluation of the progress made by States Parties, addresses non-compliance and fosters the exchange of information and good practices. Its two main organs are the Conference of States Parties and the Committee of Experts. The former is composed of competent Government representatives, while the latter is integrated by experts who evaluate State reports and issue recommendations. However, compared with other follow-up mechanisms in the OAS, such as the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption, the MESECVI is not allocated many resources; this is due mainly to the fact that the two richest States in the Organization, namely the United States and Canada, have not ratified the Belém do Pará Convention, thus do not contribute financially to the work of the MESECVI.

Nevertheless, the most important body by which States are held accountable remains the Inter-American Court, to which the IACHR can refer cases of women seeking redress. An example is the case *Linda Loaiza López Soto and family v. the Bolivarian Republic of Venezuela*,³⁵⁶ in which the petition lodged before the IACHR was submitted to the Court to ensure that the victims and her family could obtain justice. When she was 18 years old, Mrs. López Soto was abducted and deprived of her liberty for four months, in which she suffered severe physical, psychological and sexual violence at the hands of a private individual, Luis Antonio Carrera Almoina. The day after the plaintiff's disappearance,

³⁵³ Organization of American States, "Convention of Belém do Pará," 1994, art. 10.

³⁵⁴ Organization of American States, "Convention of Belém do Pará," 1994, art. 11.

³⁵⁵ Organization of American States, "Convention of Belém do Pará," 1994, art. 12.

³⁵⁶ *López Soto et al. v. Venezuela*, Series C No. 362, Inter-American Court on human Rights, September 26, 2018

one of Linda Loaiza López Soto's sisters reported the case to the authorities and during the following months she tried to file complaints on six occasions, but the police refused to receive them and did not initiate investigations. The Inter-American Court established that Venezuela had violated its obligations under the American Convention, the Belém do Pará Convention and the Inter-American Convention to Prevent and Punish Torture (ICPPT). In particular, the State had breached the right to humane treatment, personal liberty, privacy, fair trial, equal protection and judicial protection of the American Convention, the prohibition of torture under the ICPPT, and its obligations under Article 7(a) and (b) of the Belém do Pará Convention. As a matter of fact, Venezuela's institutional and legal framework was not designed to prevent VAW properly, it was discriminatory against women and inappropriate to protect victims, due to the lack of training of State officials, the secondary victimization of the plaintiff and the stereotypes on the woman's conduct and the inviolability of family. Moreover, the State failed to fulfil its obligation of due diligence, since, despite being aware of the risk for Linda Loaiza and knowing the identity of the perpetrator, public officials had an insufficient and negligent reaction that did not prevent or interrupt the course of the events, resulting in the tolerance and acquiescence of the acts of VAW and torture.

3.2 The African system

The African continent was one of the protagonists of the process of decolonization that began after the end of WWII. To promote the right to self-determination and foster cooperation among the African States, the Organization of African Unity (OAU) was founded in 1963, and was replaced by the African Union (AU) 40 years after. Since the priority of the OAU was obtaining political independence from the colonizers and promoting pan-Africanism, it was not until the 1980s that the Organization established its own HR system. The first instrument to be adopted was the African Charter on Human and Peoples' Rights (African or Banjul Charter)³⁵⁷ which was followed by the African Charter on the Rights and Welfare of the Child,³⁵⁸ the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights,³⁵⁹ the Constitutive

³⁵⁷ Organization of African Unity, "African Charter on Human and Peoples' Rights (Banjul Charter)," June 27, 1981.

³⁵⁸ Organization of African Unity, "African Charter on the rights and welfare of the child," July 11, 1990.

³⁵⁹ Organization of African Unity, "Protocol to the African Charter on Human and People's Rights on the establishment of an African Court on Human and People's Rights," June 10, 1998.

Act of the AU,³⁶⁰ the Protocol to the African Charter on the Rights of Women in Africa,³⁶¹ the Protocol on the Statute of the African Court of Justice and Human Rights,³⁶² the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa,³⁶³ and the Convention on Ending Violence Against Women and Girls. In the region, States' compliance with regional HR treaties is monitored by the African Commission and the African Court on Human and People's rights.

The creation of African Commission was established in the African Charter to promote and protect human and people's rights.³⁶⁴ It is a body composed of eleven experts, serving in their individual capacity, and has its seat in Addis Abeba, Ethiopia. Its three main functions are the promotion, the protection and the interpretation of the HR enshrined in the Banjul Charter.³⁶⁵ The task of promotion is carried out through the collection of documents and State reports, the organization of conferences, research, the issuing of recommendations,³⁶⁶ the formulation of rules, principles and guidelines to solve legal problems,³⁶⁷ and the cooperation with other regional and international institutions.³⁶⁸ The duty of protection has been implemented by allowing individuals and groups to submit communications before the Commission. Even if the Charter does not explicitly foresee *actio popularis*, it does not restrain it either, so, the African Commission has interpreted Article 55 in a broad manner as to encompass also private communications.³⁶⁹ Furthermore, the body can give an advisory opinion on the interpretation of the Charter's provision when a State Party or another AU body request it.³⁷⁰

³⁶⁰ Organization of African Unity, "Constitutive Act of the African Union," July 1, 2000.

³⁶¹ African Union, "Protocol to the African Charter on Human and People's Rights on the rights of women in Africa (Maputo Protocol)," July 11, 2003.

³⁶² African Union, "Protocol on the Statute of the African Court of Justice and Human Rights," July 1, 2008.

³⁶³ African Union, "African Union Convention for the protection and assistance of internally displaced persons in Africa (Kampala Convention)," October 23, 2009.

³⁶⁴ Organization of African Unity, "African Charter on Human and Peoples' Rights (Banjul Charter)," 1981, art. 30.

³⁶⁵ Organization of African Unity, "Banjul Charter," 1981, art. 45.

³⁶⁶ Organization of African Unity, "Banjul Charter," 1981, art. 45(1)(a).

³⁶⁷ Organization of African Unity, "Banjul Charter," 1981, art. 45(1)(b).

³⁶⁸ Organization of African Unity, "Banjul Charter," 1981, art. 45(1)(c).

³⁶⁹ Nicholas Wasonga Orago and Maria Nassali, "The African human rights system: challenges and potential in addressing violence against women in Africa," in *The Legal Protection of Women from Violence, Normative Gaps in International Law* (Routledge, 2018).

³⁷⁰ Organization of African Unity, "Banjul Charter," 1981, art. 45(3).

The African Court on Human and People's Rights was established in 2006 in Arusha, Tanzania, when the 1998 Protocol on the African Court on Human and Peoples' Rights received 15 ratifications. The Court was created to complement the protective function of the Commission,³⁷¹ and its two main functions are solving disputes and giving advisory opinions on any African HR instrument. Contrary to the Commission, the Court is accessible only to Member States, to organs of the AU and to African intergovernmental organizations recognized by the AU, excluding individual initiative. Moreover, Court's decisions are binding and must be executed by the parties to the dispute. In 2008, due to political and economic constraints, the OA tried to merge The African Court on Human and People's Rights with the African Court of Justice - which never came into existence – in the African Court of Justice and Human Rights.³⁷² This new court was supposed to become the main judicial organ of the AU and to have jurisdiction over the interpretation and application of all AU legal instruments. Nevertheless, the 2008 Protocol on the Statute of the African Court of Justice and Human Rights has not yet entered into force because it has been ratified only by 8 States. Therefore, in the *interim*, the African Court on Human and Peoples' Rights continues to hear cases.

3.2.1 Instrument of general protection: the Banjul Charter

The African Charter on Human and Peoples' Rights is different than other HR instruments in that it includes a collective dimension, namely people's rights. Nevertheless, the provisions that set the basis for the protection of women from violence are to be found among the individual rights.

The first two rights enshrined in the document are the right to equality before the law and to equal protection of the law³⁷³ which, together with the right to legal status and dignity,³⁷⁴ allow the recognition of women as individuals and not as objects or property of their husband or male relatives. Moreover, the right to life and integrity,³⁷⁵ the prohibition of exploitation and degradation – comprising slavery, slave trade, torture,

³⁷¹ Organization of African Unity, "Protocol to the African Charter on Human and People's Rights on the establishment of an African Court on Human and People's Rights," 1998, art. 2.

³⁷² African Union, "Protocol on the Statute of the African Court of Justice and Human Rights," July 1, 2008.

³⁷³ Organization of African Unity, "Banjul Charter," 1981, art. 3.

³⁷⁴ Organization of African Unity, "Banjul Charter," 1981, art. 5.

³⁷⁵ Organization of African Unity, "Banjul Charter," 1981, art. 4.

CIDTP -,³⁷⁶ the right to liberty and security,³⁷⁷ to freedom of movement,³⁷⁸ to property,³⁷⁹ and to the enjoyment of the best attainable state of physical and mental health³⁸⁰ are fundamental legal tools that guarantee HR to every person, but that are particular important for women. Differently than in other treaties, the right to the protection of the family³⁸¹ does not mention the need to establish a minimum age for marriage nor the fact that the spouses must enter the marriage with their free and full consent; nevertheless, it establishes that States must ensure the elimination of discrimination against women and the protection of their rights. This provision is key in acknowledging that women are treated differently than men within the family; however, Article 18 is limited to the recognition of discrimination and does mention GBVAW, which, as mentioned in the previous Chapter when dealing with CEDAW, is a different crime. An additional difference compared to other HR treaties is the right to receive information³⁸² that is particularly relevant in the field of healthcare and for women who have received no or poor education. In the case *Norma v. Ecuador*, cited in Chapter 2, the plaintiff was forced to become a mother and to take care of the child because she was given false information on her right to get an abortion and to give the baby into adoption. Therefore, ensuring that women are properly informed, for instance on their rights and on the medical treatments they can or cannot receive, gives them the possibility of making conscious and independent choices.

According to Article 62, States have the obligation to submit a report to the Commission every two years in which they enumerate the measures taken to give effect to the Charter's provisions. In the first fifteen years since the adoption of the Banjul document, States' reports and shadow reports submitted by NGOs showed a lack of progress in the improvement of women's conditions and in the protection of their rights; therefore, the African Commission decided to establish the Special Rapporteurship on the Rights of Women in Africa.³⁸³ The mandate of the Special Rapporteur (SR on the RWA) comprises

³⁷⁶ Organization of African Unity, "Banjul Charter," 1981, art. 5.

³⁷⁷ Organization of African Unity, "Banjul Charter," 1981, art. 6.

³⁷⁸ Organization of African Unity, "Banjul Charter," 1981, art. 12.

³⁷⁹ Organization of African Unity, "Banjul Charter," 1981, art. 14.

³⁸⁰ Organization of African Unity, "Banjul Charter," 1981, art. 16.

³⁸¹ Organization of African Unity, "Banjul Charter," 1981, art. 18.

³⁸² Organization of African Unity, "Banjul Charter," 1981, art. 9(1).

³⁸³ African Commission, "Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa," ACHPR/Res.38(XXV), May 5, 1999.

assisting national governments in developing and protecting women's rights in Africa, disseminating HR instruments and investigating the situation of women in the territory of the Union. Moreover, the SR on RWA can draft resolutions to be adopted by the Commission and can set guidelines for State reporting on women's rights. Despite the good intentions behind the creation of this rapporteurship, its effectiveness is hindered by two main factors. Firstly, the SR on WRA is a member of the Commission, which means that she has to fulfil other obligations in addition to those specific to the rapporteurship, implying that the attention and the time she can dedicate to women's issues are constrained. The other challenge is that her mandate is not adequately funded, which means that the resources available to perform her functions are very limited.

3.2.2 Instruments of special protection

Since the beginning of the new millennium, the African Union has strengthened its legal framework on the prohibition of GBVAW. In 2003, it adopted the Protocol to the African Charter on the Rights of Women in Africa, which includes the prohibition of discrimination and violence against women, and, just a few months ago, at the end of February 2025, it adopted the Convention on Ending Violence Against Women and Girls specifically tackling the issue of GBVAW.

a. The Maputo Protocol

The first SR on RWA, Mrs. Julienne Ondziel-Gnelenga, supported the drafting of a protocol to the Banjul Charter that would deal specifically with women's rights. Due to the lack of economic resources, the creation of a separate treaty with its own monitoring body was not viable, so the AU preferred to adopt the Protocol to the African Charter on the Rights of Women in Africa, also known as the Maputo Protocol. The document entered into force on November 25th, 2005, two years after its adoption and reaffirmed AU's commitment to end discrimination and violence against women.

Article 1 of the Protocol recognizes that harmful practices, discrimination against women and violence against women are three different crimes. Discrimination refers to the differential treatment accorded to women on the basis of their gender which compromises their enjoyment of HR and fundamental freedoms;³⁸⁴ VAW is defined as all acts, or threats

³⁸⁴ African Union, "Protocol to the African Charter on Human and People's Rights on the rights of women in Africa (Maputo Protocol)," 2003, art. 1(f).

of such acts, perpetrated against women that cause or could cause them physical, sexual, psychological, and economic harm in private or public life and in peace time or during armed conflicts.³⁸⁵ It remains unclear why harmful practices are not included in the definition of violence against women and are, instead, considered a stand-alone category, even if GBVAW comprises actions that “cause or could cause ... harm.”³⁸⁶

The content of the first provision of the Maputo Protocol consists in the elimination of discrimination against women. It established that, in order to eradicate it, States must take measures to prohibit discrimination,³⁸⁷ take corrective and positive action,³⁸⁸ must adopt a gender perspective in formulating policies,³⁸⁹ and shall modify traditional stereotypes based on the inferiority of women.³⁹⁰ Article 5 prohibits harmful practices and requires States to raise awareness on the issue,³⁹¹ prohibit FGM,³⁹² protect women who are at risk of being subject to such harmful practices,³⁹³ and provide health care and legal and psychological support to victims.³⁹⁴ It is striking that the document does not enshrine a similar stand-alone provision on the elimination of GBVAW, but it mentions it within the context of the right to dignity³⁹⁵ and to life, integrity and security.³⁹⁶ Even if violence against women is, indeed, a form of violation of those rights, the choice of reducing its prohibition to a paragraph of other articles is not coherent with the rest of the text and does not give GBVAW the attention it requires. Nevertheless, the presence of provisions condemning it must be appreciated. In particular, the Protocol places upon States the obligation to prohibit all forms of VAW, whether they occur in the private or in the public sphere,³⁹⁷ to prevent, punish and eradicate them,³⁹⁸ to eliminate traditional practices and

³⁸⁵ African Union, “Maputo Protocol,” 2003, art. 1(j).

³⁸⁶ *Ibid.*

³⁸⁷ African Union, “Maputo Protocol,” 2003, art. 2(1)(b).

³⁸⁸ African Union, “Maputo Protocol,” 2003, art. 2(1)(d).

³⁸⁹ African Union, “Maputo Protocol,” 2003, art. 2(1)(c).

³⁹⁰ African Union, “Maputo Protocol,” 2003, art. 2(2).

³⁹¹ African Union, “Maputo Protocol,” 2003, art. 5(a).

³⁹² African Union, “Maputo Protocol,” 2003, art. 5(b).

³⁹³ African Union, “Maputo Protocol,” 2003, art. 5(d).

³⁹⁴ African Union, “Maputo Protocol,” 2003, art. 5(c).

³⁹⁵ African Union, “Maputo Protocol,” 2003, art. 3(4).

³⁹⁶ African Union, “Maputo Protocol,” 2003, art. 4(2).

³⁹⁷ African Union, “Maputo Protocol,” 2003, art. 4(2)(a).

³⁹⁸ African Union, “Maputo Protocol,” 2003, art. 4(2)(b).

beliefs that legitimize or tolerate gender-based violence,³⁹⁹ and to ensure rehabilitation and redress of victims.⁴⁰⁰

Overall, the Maputo Protocol is a comprehensive instrument that has been able to overcome, at least formally, the shortcomings of the Banjul Charter with respect to women's rights. In addition to the focus on the prohibition of discrimination and violence against women, it has also gender mainstreamed some rights of the Charter. For instance, it established that the minimum age of marriage for women must be 18 years old and that both spouses shall give their free and full consent.⁴⁰¹ It clarified that women enjoy the same rights as men in case of separation, divorce or annulment of marriage, and have the right to an equitable sharing of the joint property deriving from marriage⁴⁰² and to inheritance.⁴⁰³ Furthermore, when applying the right to equality and equal protection before the law, States are required to ensure effective access by women to judicial and legal services and to equip law enforcement organs with the capacity of enforcing gender equality. In the case of the right to education, States must not only give women access to it, but shall also eliminate stereotypes from textbooks and protect women and girl-child from abuse and harassment.⁴⁰⁴ Similarly, women shall have the right to work, but, in order to effectively guarantee this right, States must combat and punish sexual harassment in the workplace.⁴⁰⁵ As far as health and reproductive rights, States must provide adequate, affordable and accessible health services, ensure that women can choose whether to have children and their number, and authorize medical abortion to protect women's reproductive rights in cases of pregnancies that endanger the health of the mother or of the fetus, or that are the result of violence.⁴⁰⁶

The monitoring of the national implementation of the Protocol is set out in Article 26. It is established that in the report submitted to the Commission, according to Article 62 of the African Charter, States shall include the measures adopted to give effect to the

³⁹⁹ African Union, "Maputo Protocol," 2003, art. 4(2)(d).

⁴⁰⁰ African Union, "Maputo Protocol," 2003, art. 4(2)(f).

⁴⁰¹ African Union, "Maputo Protocol," 2003, art. 6.

⁴⁰² African Union, "Maputo Protocol," 2003, art. 7.

⁴⁰³ African Union, "Maputo Protocol," 2003, art. 20.

⁴⁰⁴ African Union, "Maputo Protocol," 2003, art. 12(1).

⁴⁰⁵ African Union, "Maputo Protocol," 2003, art. 13(c).

⁴⁰⁶ African Union, "Maputo Protocol," 2003, art. 14.

Maputo Protocol's provisions.⁴⁰⁷ Moreover, the African Court on Human and People's Rights is given the mandate of interpreting the Protocol.⁴⁰⁸

b. The Convention on Ending Violence Against Women and Girls

The African Union Convention on Ending Violence Against Women and Girls (AU-CEVAWG) is the world most recent legal document on GBVAW, since it was adopted by the AU on February 17th, 2025, following the request made by the AU Assembly two years before.⁴⁰⁹

In the preamble, the Heads of State and Government of the African Union's members acknowledged that GBVAW is a violation of women's HR and fundamental freedoms and that it is the result of "systemic multiple and interconnected forms of inequality and discrimination, including unequal power relations between men and women."⁴¹⁰ The definition of violence provided by Article 1 is similar to the Maputo Protocol's one, but it includes some aspects that reflect the evolution of research and sensibilization on the topic that have taken place in the last 20 years. VAW is said to refer to "acts perpetrated against women and girls which cause or could cause them verbal, emotional, 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 the private and public spheres, or cyberspace, in times of peace, armed conflict, transition, post-conflict, disaster and post disaster situations."⁴¹¹ This framing points out that the gender-based violence can be also be emotional and verbal, and that it may occur not only in the private or public dimension in times of peace or conflict, but also in the cyberspace and in times of transition, disasters and after conflicts and catastrophes.

The only right enshrined in the Convention is women's right to be free from violence, which is indivisible from, and interdependent on, other HR and fundamental freedoms.⁴¹²

⁴⁰⁷ African Union, "Maputo Protocol," 2003, art. 26.

⁴⁰⁸ African Union, "Maputo Protocol," 2003, art. 27.

⁴⁰⁹ African Union, AU/Dec.865. (XXXV), February 19th, 2023.

⁴¹⁰ African Union, "Convention on Ending Violence Against Women and Girls," February 17th, 2025, preamble, <https://archives.au.int/handle/123456789/10723?show=full>.

⁴¹¹ African Union, "Convention on Ending Violence Against Women and Girls," 2025, art. 1(k).

⁴¹² African Union, "Convention on Ending Violence Against Women and Girls," 2025, art. 2.

To give effect to this right, the AU-CEVAWG set three objectives. The first one is the creation of an environment free of VAW through the establishment and strengthening of mechanisms to give a coordinated response to the phenomenon and to make policies on the basis of the gender-disaggregated data collected.⁴¹³ Secondly, it aims to provide preventive measures to end VAW by including men, families, communities, and cultural and religious institutions in the process of women empowering and change of harmful practices.⁴¹⁴ The third objective is granting support services to victims and their families.⁴¹⁵

The State Parties' obligations imposed by the AU-CEVAWG to end GBVAW correspond to the enactment and enforcement of legislative, judicial and administrative preventive and protective measures, to the design of a criminal justice system that is able to deal with such cases, and to gender-responsive financing. Preventive measures shall promote the aspects of African culture and norms that do not encourage VAW, must raise awareness on the causes and consequences of such violence, and shall build and reinforce the capacity of State agents to prevent and address it.⁴¹⁶ Hence, States must ensure that customs and religion are not invoked as justifications of acts of GBVAW and that women have an effective access to remedies. Protective and supportive measures encompass the guarantee of legal and psychological assistance as well as the active participation of women in the development of such procedures.⁴¹⁷ For this reason, it is necessary to adopt a victim-centered approach that safeguards the victim and ensures her access to justice, for instance by conducting timely investigations and respecting the victim's right to privacy.⁴¹⁸ Additionally, to promote a behavioral change in perpetrators, the Convention affirms that punishment must be aimed at rehabilitating them and at avoiding recidivism.⁴¹⁹

The monitoring system of the AU-CEVAWG is the same as the Maputo Protocol's in that it consists in including in national reports to the Commission the domestic measures taken to eradicate GBVAW. The Convention is to be interpreted by the African Court on

⁴¹³ African Union, "Convention on Ending Violence Against Women and Girls," 2025, art. 4(a).

⁴¹⁴ African Union, "Convention on Ending Violence Against Women and Girls," 2025, art. 4(b).

⁴¹⁵ African Union, "Convention on Ending Violence Against Women and Girls," 2025, art. 4(c).

⁴¹⁶ African Union, "Convention on Ending Violence Against Women and Girls," 2025, art. 10.

⁴¹⁷ African Union, "Convention on Ending Violence Against Women and Girls," 2025, art. 11.

⁴¹⁸ African Union, "Convention on Ending Violence Against Women and Girls," 2025, art. 12.

⁴¹⁹ *Ibid.*

Human and People's Rights, to which the Commission can also refer matters on the enforcement of the document.

The obstacles that the AU-CEVAWG has to overcome, and that have already hindered Maputo Protocol's effectiveness, are several: no or poor implementation into domestic systems, lack of resources, inadequate data collection and political instability in some African countries. In such a challenging scenario, only time will tell whether this new Convention will have significative positive effects on the African society.

3.3 The ASEAN system

The Association of Southeast Asian Nations (ASEAN) was created in 1967 to enhance regional cooperation in Southeast Asia. Originally, it was established as a political organization and its founding document, the Bangkok Declaration, did not mention HR. Over the years, the association has set more specific rules and objectives, and, in 2007 it has adopted the ASEAN Charter as a "constitution." The document lists the main purposes of the organization, which are the maintenance of peace, security and stability, the creation of a single market, economic and sustainable development, the strengthening of democracy, the rule of law and HR protection, and the forging a community and a common identity.⁴²⁰

The impetus for the establishment of a regional HR system came quite late with the World Conference on Human Rights held in Vienna in 1993. Drawing from its Declaration and Program of Action, the ASEAN Charter called for the establishment of a body tasked with the promotion and protection of HR in the region.⁴²¹ Two years later, in 2009, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was created. Its mandate consists in establishing a framework for HR cooperation within ASEAN by collaborating with regional institutions and supporting States in the effective implementation of HR treaties to which they are parties.

The specific body that promotes women's rights within the organization is the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). The ACWC promotes the implementation of legal instruments related to the

⁴²⁰ Association of Southeast Asian Nations (ASEAN), "Charter of the Association of Southeast Asian Nations," November 20, 2007, art. 1.

⁴²¹ ASEAN, "Charter of the Association of Southeast Asian Nations," 2007, art. 14.

rights of women and children, such as the CEDAW and the Convention on the Rights of the Child, and develops policies and programs to promote and protect the rights of women and children. In particular, it provides technical assistance and training to stakeholders at all levels and assists, upon request, ASEAN Member States in preparing reports for the CEDAW Committee and the Committee on the Rights of the Child (CRC).⁴²²

3.3.1 Instrument of general protection: the ASEAN Human Rights Declaration

In 2012, the ASEAN Coordinated Council, composed of the Heads of State or Government of the Member States, adopted the ASEAN Human Rights Declaration (AHRD).⁴²³ It was the second HR instrument within the organization's framework, and it followed the 2007 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.⁴²⁴

The document affirms that “all persons are born free and equal in dignity and rights”⁴²⁵ and that the rights of women are an integral part of HR.⁴²⁶ In particular, the general rights that can be invoked to protect women from GBVAW are the right to legal personality and equal protection before the law,⁴²⁷ the right to an effective and enforceable remedy,⁴²⁸ to life,⁴²⁹ to liberty and security,⁴³⁰ to freedom of movement,⁴³¹ to property,⁴³² to privacy,⁴³³ to the enjoyment of the highest attainable standard of physical, mental and reproductive health and to basic and affordable health-care services,⁴³⁴ and the right to marry at an adult age with free and full consent.⁴³⁵ Additionally, the AHRD includes the prohibition

⁴²² ASEAN, “Terms of reference of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children,” 2010, art. 5.

⁴²³ ASEAN, “ASEAN Human Rights Declaration,” November 19, 2012.

⁴²⁴ ASEAN, “ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers,” January 13, 2007.

⁴²⁵ ASEAN, “ASEAN Human Rights Declaration,” 2012, para. 1.

⁴²⁶ ASEAN, “ASEAN Human Rights Declaration,” 2012, para. 4.

⁴²⁷ ASEAN, “ASEAN Human Rights Declaration,” 2012, para. 3.

⁴²⁸ ASEAN, “ASEAN Human Rights Declaration,” 2012, para. 5.

⁴²⁹ ASEAN, “ASEAN Human Rights Declaration,” 2012, para. 11.

⁴³⁰ ASEAN, “ASEAN Human Rights Declaration,” 2012, para. 12.

⁴³¹ ASEAN, “ASEAN Human Rights Declaration,” 2012, para. 15.

⁴³² ASEAN, “ASEAN Human Rights Declaration,” 2012, para. 17.

⁴³³ ASEAN, “ASEAN Human Rights Declaration,” 2012, para. 21.

⁴³⁴ ASEAN, “ASEAN Human Rights Declaration,” 2012, para. 29(1).

⁴³⁵ ASEAN, “ASEAN Human Rights Declaration,” 2012, para. 19.

of torture and CIDTP,⁴³⁶ and of slavery and trafficking,⁴³⁷ to which the ASEAN dedicated a whole convention, recognizing that women are particularly vulnerable to exploitation.⁴³⁸

Despite the important provisions enshrined in the ASEAN Human Rights Declaration, the document is a soft law instrument and does not create legally enforceable obligations for States. However, it carries moral weight and may be used in the future as a basis for the adoption of regional binding HR treaties.

3.3.2 Specific instruments

One of the first areas of HR to be addressed by the ASEAN has been GBVAW, on which the organization has issued two declarations, namely the 2004 Declaration on the Elimination of Violence against Women in the ASEAN Region and the 2013 Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in ASEAN. The second document shows a deeper understanding of the phenomenon and its causes but remains very general with respect to the measures to adopt to tackle gender-based violence. This problem has been overcome by the 2016-2025 ASEAN Regional Plan of Action on the Elimination of Violence against Women, which makes a correct and extensive analysis of GBVAW and spells out numerous and specific measures that States should adopt to eradicate violence against women and comply with the 2013 Declaration.

a. Declaration on the Elimination of Violence against Women in the ASEAN Region

After the momentum of the 1993 Vienna Convention on Human Rights and the 1995 Beijing Declaration and Platform for Action, the Declaration on the Elimination of Violence against Women in the ASEAN Region was adopted to tackle the issue of GBVAW. In fact, this phenomenon is considered by the Member States to violate and impair women's HR and to impede their advancement.⁴³⁹

⁴³⁶ ASEAN, "ASEAN Human Rights Declaration," 2012, para. 14.

⁴³⁷ ASEAN, "ASEAN Human Rights Declaration," 2012, para. 13.

⁴³⁸ ASEAN, "ASEAN Convention against trafficking in persons, especially women and children," November 23, 2015.

⁴³⁹ ASEAN, "Declaration on the elimination of violence against women in the ASEAN region," June 30, 2004, preamble.

The Declaration reiterates that States should fully implement the commitments with regard to the elimination of VAW and should, in particular, take action domestically and cooperate regionally. At the national level, States should reinforce legislation and establish mechanisms to prevent gender-based violence, enhance protection, assist survivors, help them recover and reintegrate, prevent secondary victimization, investigate, and punish perpetrators.⁴⁴⁰ To do so, States should change societal attitudes, disseminate information and train enforcement officers, social workers and health personnel. Moreover, discrimination against women should be eliminated, whereas women's empowerment and gender mainstreaming should be fostered, and States are encouraged to support initiatives undertaken by women's organizations and to strengthen collaborative relationships with them.⁴⁴¹ Regionally, cooperation should be enhanced, especially with regard to research, resource mobilization, sharing of best practices and data on the causes and consequences of gender-based violence and on the effects of the measures taken to address it.⁴⁴²

Despite the importance of the recognition of the need to eliminate GBVAW, this document is completely inadequate in combating violence against women, not only because it lacks bindingness, but also because of its content. In fact, the Declaration does not define what GBVAW is, and it fails to explain the structural character and the causes of this phenomenon. Furthermore, the text only provides prompts for action which do not have a strong legal value and which are excessively general, making it difficult for States to take concrete and efficient measures to implement them.

b. The Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in ASEAN

A few years after the creation of the ACWC, the regional organization adopted the Declaration on the Elimination of Violence against Women and Elimination of Violence

⁴⁴⁰ ASEAN, "Declaration on the elimination of violence against women in the ASEAN region," 2004, art. 2, 4, 6.

⁴⁴¹ ASEAN, "Declaration on the elimination of violence against women in the ASEAN region," 2004, art. 3, 5, 8.

⁴⁴² ASEAN, "Declaration on the elimination of violence against women in the ASEAN region," 2004, art. 1 and 7.

against Children in ASEAN.⁴⁴³ This document identifies gender bias and discriminatory and harmful traditional practices as the causes of violence against women and children and, for the first time, acknowledged that these types of violence can occur also in the cyber space. Therefore, it claims that it is fundamental to modify social and cultural patterns of behavior to eliminate stereotypes and practices based on the inferiority of women and that particular protection must be given to children and women in vulnerable situations.

Similarly to the 2004 Declaration on the Elimination of Violence against Women in the ASEAN Region, it foresees national and collective regional action. It affirms that States should strengthen national legislations for the elimination of violence against women and children and for the protection and rehabilitation of survivors, adopting a gender responsive, child sensitive, and age-responsive approach, and establishes they should include measures aimed at preventing violence against women and children in national development plans to ensure they have adequate resources. States' laws and policies should protect women and children and provide them with access to justice and services for the rehabilitation and reintegration in the community, should ensure that cases are investigated and perpetrators punished, should raise awareness and eliminate harmful practices which perpetuate gender stereotyping and violence. Additionally, when formulating national programs and implementing CEDAW or CRC's Concluding Observations and Recommendations, States might request the assistance of the ACWC. At the regional level, research and data collection are encouraged and the establishment of an ACWC network of social services is supported to facilitate the promotion of good practices, sharing of information and exchange of experts and service providers.

In contrast with the 2004 Declaration, this document includes an analysis of the causes of GBVAW which, even if it does not mention power relations between men and women, is fundamental in understanding the phenomenon and in determining the course of action to address it. However, the 2013 Declaration is only slightly more precise in the measures it suggests than the other document, and it continues not to create obligations on States in that it is a soft law instrument.

⁴⁴³ ASEAN, "Declaration on the elimination of violence against women and elimination of violence against children in ASEAN," October 2013.

c. The ASEAN Regional Plan on the Elimination of Violence against Women

Considering the aforementioned limits of the Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in ASEAN, the Heads of State/Government of ASEAN formulated, with the assistance of the ACWC, the ASEAN Regional Plan of Action on the Elimination of Violence against Women (ASEAN RPA on EVAW).⁴⁴⁴ The aim of this document was adopting a comprehensive and practical instrument to set a strategy that would guide State action in the implementation of the 2013 Declaration from 2016 to 2025.

The ASEAN RP on EVAW opens with an analysis of GBVAW which draws from the 2013 Declaration, but which adds the explicit recognition of unequal structural power relations and inequalities between men and women as causes.⁴⁴⁵ It further affirms that violence against women is a violation of HR which amounts to a form of discrimination against women⁴⁴⁶ and that women may suffer from multiple and intersecting forms of discrimination, increasing their vulnerability to violence.⁴⁴⁷ The RPA adopts the Beijing's definition by saying that VAW corresponds to acts of gender-based violence that result, or are 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."⁴⁴⁸ The ASEAN text also includes economic violence within the family and violence committed through technology among the forms that VAW can take.⁴⁴⁹

The RPA on EVAW is based on five principles, i.e., HR, due diligence, evidence, multi-disciplinarity, and partnership. The Plan adopts a HR-based approach in that it is aimed at guaranteeing women's HR, such as the right to live free from violence and to obtain remedies, and at embedding HR standards in laws and policies that address VAW.⁴⁵⁰ In particular, the latter should tackle unequal power relations and discriminatory gender norms, and should promote the realization of women's HR and gender equality by

⁴⁴⁴ ASEAN, "ASEAN regional plan on the elimination of violence against women," November 21, 2015.

⁴⁴⁵ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p. 3.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p. 7.

⁴⁴⁸ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p. 6.

⁴⁴⁹ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p. 6 and 7.

⁴⁵⁰ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p.13.

modifying social behaviors and prejudices. Additionally, States should adopt measures to prevent, protect, prosecute and provide rehabilitation for survivors, fulfilling their due diligence obligation.⁴⁵¹ Furthermore, the examination of evidence and data and women's participation must be included when formulating policies to make them accurate and responsive to real-life situations.⁴⁵² Programs should be made following a multi-disciplinary approach that involves different sectors, including education, health and justice, which should work together.⁴⁵³ Moreover, not only different disciplines, but also different stakeholders should cooperate to ensure effective prevention and response strategies to GBVAW.⁴⁵⁴

The ASEAN Regional Plan is articulated into 8 fields of action that include all steps to combat violence against women. The first one is prevention,⁴⁵⁵ which must be carried out domestically and regionally at the same time, with the dissemination of information and good international practices to guide the development and implementation of national frameworks for protection. Then, protection and support services⁴⁵⁶ should be provided by the State with the view of supporting the empowerment of victims. Thirdly, VAW should be penalized by national legislation. This would encompass reviewing the justice system⁴⁵⁷ to eliminate discriminatory stereotyping and to impede that religion, custom or honor are invoked as grounds of justification or mitigating factors; providing effective and urgent protection orders to victims; granting women access to justice; investigating and punishing acts of gender-based violence to end impunity; and strengthening the capacity of the judicial system to provide gender-sensitive responses to VAW. The fourth step would be capacity building⁴⁵⁸ with respect to service providers and enforcement agents, survivors and perpetrators. States should train their agents to provide well-coordinated, gender-sensitive, culture-sensitive and survivor-centered services, should develop programs to build women's capacities to resist violence and should educate abusers to non-violent models of behavior. Furthermore, research should be fostered and

⁴⁵¹ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p. 14.

⁴⁵² *Ibid.*

⁴⁵³ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p. 13 and 14.

⁴⁵⁴ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p. 14.

⁴⁵⁵ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p. 17-19.

⁴⁵⁶ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p. 19-21.

⁴⁵⁷ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p. 21-25.

⁴⁵⁸ ASEAN, "ASEAN regional plan on the elimination of violence against women," 2015, p. 25, 26.

data collected to make effective policies and implement them correctly.⁴⁵⁹ After their formulation, policies must be monitored and evaluated at the national level.⁴⁶⁰ Their development should be made with the involvement of the private sector, civil society, and international and regional organizations.⁴⁶¹ Lastly, ACWC Representatives in each Member State should send report to the ACWC, which should review national and regional progress and share information and communications.⁴⁶²

While the ASEAN Regional Plan of Action on the Elimination of Violence against Women provides a framework for action and sets specific measures for Member States, the ASEAN HR system remains inadequate to tackle GBVAW. In fact, all regional instruments aimed at eradicating violence against women are soft law, hence they do not pose obligations on States. Additionally, women cannot rely on the only regional general HR document (the ADHR) either because it is not legally binding, nor can seek redress and make States accountable because the ACWC cannot receive complaints for breach of obligations that States do not have.

3.4 The Council of Europe system

In the European continent, HR protection is championed by the Council of Europe (CoE). This organization was founded in 1949, after the end of WWII, to achieve unity in the promotion and protection of democracy, HR and the rule of law.

To promote awareness of and respect for HR, in 1999, the Committee of Ministers instituted the office of Commissioner for Human Rights.⁴⁶³ The mandate of the Commissioner consists in raising awareness, assisting the effective implementation of HR in the Member States, and cooperating with Council of Europe and national institutions. To fulfil these functions, the Commissioner may make country visits and issue recommendations, opinions and thematic reports, such as the latest “Sexual and reproductive health and rights in Europe: progress and challenges”⁴⁶⁴. However, despite

⁴⁵⁹ ASEAN, “ASEAN regional plan on the elimination of violence against women,” 2015, p. 26, 27.

⁴⁶⁰ ASEAN, “ASEAN regional plan on the elimination of violence against women,” 2015, p. 27, 28.

⁴⁶¹ ASEAN, “ASEAN regional plan on the elimination of violence against women,” 2015, p. 28, 29.

⁴⁶² ASEAN, “ASEAN regional plan on the elimination of violence against women,” 2015, p. 29, 30.

⁴⁶³ Committee of Ministers, Resolution (99) 50, Council of Europe, May 7, 1999.

⁴⁶⁴ Commissioner for Human Rights, “Sexual and reproductive health and rights in Europe: progress and challenges,” Council of Europe, February 2024.

his or her symbolic function, the CoE Commissioner for Human Rights has limited powers and his or her recommendations and opinions are not binding on States.

The European Court of Human Rights (ECtHR) was set up in 1959 as the judicial body monitoring the implementation of the European Convention on Human Rights. It is based in Strasbourg, where it examines applications and adjudicates cases of HR violations by Member States. Its jurisdiction is compulsory, and, like the other regional courts, it issues binding judgements; however, differently than other systems, it is directly accessible to individual applicants.⁴⁶⁵ This means that individuals have the possibility to bring a case before the ECtHR, as long as they have exhausted domestic remedies and have submitted the application within four months since the final domestic decision.⁴⁶⁶ Over the years, this opportunity has been largely taken advantage of and is one of the fundamental means by which women can make States accountable for violations of their rights.

3.4.1 Instrument of general protection: the European Convention on Human Rights

The first and more general HR treaty of the CoE framework is the European Convention on Human Rights (ECHR), which was adopted in Rome on November 4th, 1950, and that entered into force on September 3rd, 1953. It was the first binding treaty drawn from UDHR and it lists seventeen rights and freedoms inherent to every individual without discrimination.⁴⁶⁷

The rights that are particularly important in protecting women from violence are the right to life,⁴⁶⁸ to liberty and security,⁴⁶⁹ to respect for private and family life,⁴⁷⁰ the prohibition of torture and inhuman or degrading treatment,⁴⁷¹ and the prohibition of slavery and forced labor.⁴⁷² Moreover, women victims of GBVAW acts must be guaranteed by the State the right to fair trial⁴⁷³ and effective remedy.⁴⁷⁴ The content of the ECHR has been

⁴⁶⁵ Council of Europe, “European Convention on Human Rights,” November 4, 1950, art. 34.

⁴⁶⁶ Council of Europe, “European Convention on Human Rights,” 1950, art. 35(1).

⁴⁶⁷ Council of Europe, “European Convention on Human Rights,” 1950, art. 14.

⁴⁶⁸ Council of Europe, “European Convention on Human Rights,” 1950, art. 2.

⁴⁶⁹ Council of Europe, “European Convention on Human Rights,” 1950, art. 5.

⁴⁷⁰ Council of Europe, “European Convention on Human Rights,” 1950, art. 8.

⁴⁷¹ Council of Europe, “European Convention on Human Rights,” 1950, art. 3.

⁴⁷² Council of Europe, “European Convention on Human Rights,” 1950, art. 4.

⁴⁷³ Council of Europe, “European Convention on Human Rights,” 1950, art. 6.

⁴⁷⁴ Council of Europe, “European Convention on Human Rights,” 1950, art. 13.

gradually enriched by the Protocols which enshrine additional rights aimed at enlarging the protection provided by the document. In particular, the rights that must be enforced to prevent GBVAW are the right to the protection of property,⁴⁷⁵ to education⁴⁷⁶ and to freedom of movement,⁴⁷⁷ which promote and foster women empowerment. Lastly, as far as family rights, the ECHR provides for the right to marry, which grants men and women (of a non-specified marriageable age) the right to marry and to found a family.⁴⁷⁸ Nevertheless, it does not contain any provision on the rights and duties during marriage or after its dissolution. It was only 34 years later that Protocol 7 established equality between spouses in relation to their children, during marriage, and after its dissolution.⁴⁷⁹

However, as any other general HR treaty, the ECHR encompasses gender-neutral provisions which set the basis for the protection of women from violence but are not sufficient to prompt positive State action to eradicate it.

3.4.2 The Istanbul Convention

On May 11th, 2011, the CoE adopted the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, also known as the Istanbul Convention. Like other CoE Conventions, it is open to accession by any country in the world and at the moment it has been ratified by 39 parties,⁴⁸⁰ including the European Union.

The Istanbul Convention recognizes that GBVAW is a structural phenomenon and that it is a manifestation of historically unequal power relations between men and women which have led to the subjection and discrimination of women by men. Violence against women is defined as a violation of HR and a form of discrimination against women, and it is said to comprise acts of gender-based violence that result in, or are likely to result in, physical,

⁴⁷⁵ Council of Europe, “Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms,” March 20, 1952, art. 1.

⁴⁷⁶ Council of Europe, “Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms,” March 20, 1952, art. 2.

⁴⁷⁷ Council of Europe, “Additional Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms,” September 16, 1963, art. 2.

⁴⁷⁸ Council of Europe, “European Convention on Human Rights,” 1950, art. 12.

⁴⁷⁹ Council of Europe, “Additional Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms,” November 22, 1984, art. 5.

⁴⁸⁰ Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom, EU.

sexual, psychological or economic harm to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in the public or in the private sphere.⁴⁸¹ The specific forms of gender-based violence that States are required to criminalize, according to the Convention, are forced marriages,⁴⁸² psychological, physical and sexual violence,⁴⁸³ stalking,⁴⁸⁴ FGM,⁴⁸⁵ forced abortion and forced sterilization,⁴⁸⁶ and sexual harassment.⁴⁸⁷ The peculiarity of this document compared to other regional documents on the topic lays in its separation between VAW and domestic violence, which is defined as “acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners.”⁴⁸⁸ This distinction is problematic because it presents domestic violence as a stand-alone phenomenon and not as part of the vast category of GBVAW. Even if Article 2(1) includes domestic violence among the forms of violence against women, the CoE weakly justified the choice of establishing it as a separate crime by admitting that, even if women are disproportionately affected by domestic violence, men can also be victims.⁴⁸⁹ However, shifting attention to men in a context specifically dedicated to women is quite controversial. This does not mean that male victims of domestic violence should not be protected, but it would be more appropriate to deal with the issue in other circumstances or in a general recommendation to the Convention. In fact, by unnaturally dividing domestic violence from VAW to include men, the whole document adopts a gender-neutral language that is not beneficial to women’s distinct protection. This is particularly evident in the wording of the text which replaced the right *of women* to be free from violence – as framed in the other regional treaties⁴⁹⁰ – with “the right for everyone, particularly women, to live free from violence.”⁴⁹¹ Looking at this provision, it appears clear that the document is not gender-specific and that the question of violence against

⁴⁸¹ Council of Europe, “Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention),” May 11, 2011, art. 3(a).

⁴⁸² Council of Europe, “Istanbul Convention,” 2011, art. 37.

⁴⁸³ Council of Europe, “Istanbul Convention,” 2011, art. 33, 35, 36.

⁴⁸⁴ Council of Europe, “Istanbul Convention,” 2011, art. 34.

⁴⁸⁵ Council of Europe, “Istanbul Convention,” 2011, art. 38.

⁴⁸⁶ Council of Europe, “Istanbul Convention,” 2011, art. 39.

⁴⁸⁷ Council of Europe, “Istanbul Convention,” 2011, art. 40.

⁴⁸⁸ Council of Europe, “Istanbul Convention,” 2011, art. 3(b).

⁴⁸⁹ Council of Europe, “Istanbul Convention,” 2011, preamble.

⁴⁹⁰ Organization of American States, “Convention of Belém do Pará,” 1994; African Union, “Convention on Ending Violence Against Women and Girls,” 2025.

⁴⁹¹ Council of Europe, “Istanbul Convention,” 2011, art. 4(1)

women is reduced to being only an aspect of the Convention. Hence, including men in the scope of the document's protection has the effect of depriving women of their own separate and exclusive spaces, showing that their rights are not worthy a stand-alone treaty and that they become of general interest only when they are shared (at least partially) by men.

The enunciated objectives of the Convention are (1) the protection of women against all forms of violence and the prevention, prosecution and eradication of VAW and domestic violence, (2) the promotion of substantive equality and women's empowerment, (3) the design of a overarching framework for the protection of and assistance to victims of all forms of violence covered by the document, (4) and the support of cooperation between law enforcement agencies and organizations.⁴⁹² As a matter of fact, the Istanbul Convention promotes concerted action by many different actors in that it believes that only a comprehensive strategy involving all level of government and civil society can lead to effective results.

States are required to ensure the practical realization of equality, abolishing laws and practices that discriminate against women,⁴⁹³ are demanded to refrain from engaging in acts of GBVAW⁴⁹⁴ and to apply due diligence for cases of violence covered by the Convention committed by non-State actors.⁴⁹⁵ In this regard, State action must align with the four pillars of the Convention, namely prevention, protection, investigation and prosecution.

To fulfil the obligation to prevent, States must promote changes in social and cultural stereotyped patterns of behavior based on the inferiority of women, shall foster programs for the empowerment of women, encourage all members of society, especially men and boys, to contribute actively to preventing the forms of violence covered by the Convention, and shall take measures to prevent such violence, taking into account the specific needs of the most vulnerable people.⁴⁹⁶ Specific duties entail raising awareness on the forms and consequences of violence against women and domestic violence through

⁴⁹² Council of Europe, "Istanbul Convention," 2011, art. 1(1).

⁴⁹³ Council of Europe, "Istanbul Convention," 2011, art. 4(2).

⁴⁹⁴ Council of Europe, "Istanbul Convention," 2011, art. 5(1).

⁴⁹⁵ Council of Europe, "Istanbul Convention," 2011, art. 5(2).

⁴⁹⁶ Council of Europe, "Istanbul Convention," 2011, art. 12.

campaigns and programs,⁴⁹⁷ disseminating teaching materials on gender equality at all levels of education,⁴⁹⁸ training professionals tasked with the enforcement of the Convention,⁴⁹⁹ and encouraging the private sector and the media to participate in the elaboration of policies and to set guidelines to prevent VAW and enhance women's dignity.⁵⁰⁰ Additionally, States shall set up or support programs aimed at preventing perpetrators from engaging in further violent acts and at teaching them how to adopt non-violent behaviors in interpersonal relationships.⁵⁰¹

States' general obligation in relation to protection consists in the adoption of HR-centered measures that protect victims from further acts of violence, avoid secondary victimization, coordinate State agencies, and aim at the empowerment and economic independence of women.⁵⁰² To do so, States must ensure that victims receive adequate and timely information on support services – such as legal and psychological counseling, housing, health care, centers for victims of sexual violence - and that can practically access them. Additionally, States shall provide, in a suitable geographical distribution, immediate, short- and long-term specialist support, taking into account also the rights and needs of minors who have witnessed acts of violence, and must set up telephone helplines to give immediate help to victims of violence.

The last two pillars impose the general obligation on States to carry out investigations and judicial proceedings without undue delay and with appropriate consideration of victims' HR.⁵⁰³ For this reason, States must guarantee the right to fair trial, legal assistance⁵⁰⁴ and compensation,⁵⁰⁵ and shall ensure that offences are punishable by effective, proportionate and dissuasive sanctions.⁵⁰⁶ While conducting investigations, the responsible law enforcement agencies shall make a risk assessment⁵⁰⁷ to provide safety and support to victims, and, when necessary, should issue restraining or protection orders

⁴⁹⁷ Council of Europe, "Istanbul Convention," 2011, art. 13.

⁴⁹⁸ Council of Europe, "Istanbul Convention," 2011, art. 14.

⁴⁹⁹ Council of Europe, "Istanbul Convention," 2011, art. 15.

⁵⁰⁰ Council of Europe, "Istanbul Convention," 2011, art. 17.

⁵⁰¹ Council of Europe, "Istanbul Convention," 2011, art. 16.

⁵⁰² Council of Europe, "Istanbul Convention," 2011, art. 18.

⁵⁰³ Council of Europe, "Istanbul Convention," 2011, art. 49.

⁵⁰⁴ Council of Europe, "Istanbul Convention," 2011, art. 57.

⁵⁰⁵ Council of Europe, "Istanbul Convention," 2011, art. 30.

⁵⁰⁶ Council of Europe, "Istanbul Convention," 2011, art. 45.

⁵⁰⁷ Council of Europe, "Istanbul Convention," 2011, art. 51.

against perpetrators.⁵⁰⁸ Moreover, victims must be provided protection, must be heard, must be given information,⁵⁰⁹ and shall not be asked evidence of their sexual history and conduct, except when it is relevant and necessary.⁵¹⁰ A key provision in the framework of investigation and prosecution is Article 55, which establishes that proceedings may continue even when victims withdraw their complaint.⁵¹¹ This was determined as a result of several ECtHR decision, in particular of the 2009 ruling of *Opuz v. Turkey*.⁵¹² The complainant had been suffering domestic violence for years and, together with her mother, filed numerous complaints to the public authorities against her husband. Nevertheless, the two women withdraw their accusations every time because the complainant's husband threatened to kill them and eventually killed the applicant's mother. He was sentenced to life imprisonment, but, due to his good conduct, he was released after less than ten years. The applicant then requested protective measures which were not taken by public authorities until she filed a complaint to the ECtHR. When deciding on the merits, the European Court of Human Rights found Turkey in violation of Article 2 (right to life), 3 (prohibition of torture) and 14 (prohibition of discrimination) of the ECHR because the State did not fulfil its obligation to take positive measures to stop the applicant's ill-treatment nor to protect her mother's right to life, and the general attitude of Turkish authorities was discriminatory against women reporting acts of domestic violence. Moreover, it affirmed that, even though Turkish law established that criminal proceeding shall not be continued if applicants withdrew their complaints, States have positive obligations in relation to the implementation of the ECHR. Turkey had positive obligations because "authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."⁵¹³ In this case, despite the withdrawal of complaints, the victims' situation was known to authorities who could have foreseen the perpetration of further violence, but who failed to act with due diligence because they wanted to protect the right to respect for private

⁵⁰⁸ Council of Europe, "Istanbul Convention," 2011, art. 53.

⁵⁰⁹ Council of Europe, "Istanbul Convention," 2011, art. 56.

⁵¹⁰ Council of Europe, "Istanbul Convention," 2011, art. 54.

⁵¹¹ Council of Europe, "Istanbul Convention," 2011, art. 55.

⁵¹² *Opuz v. Turkey*, Application No. 33401/02, European Court of Human Rights (ECtHR), June 9, 2009.

⁵¹³ *Opuz v. Turkey*, Application No. 33401/02, ECtHR, para. 129

and family life (Article 8 ECHR). However, according to the Court, authorities' interference might be necessary to protect the rights of an individual or to prevent commission of criminal acts⁵¹⁴ and, in domestic violence cases, perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity.⁵¹⁵

While the monitoring of the ECHR is carried out by the ECtHR, the monitoring mechanism of the Istanbul Convention consists of two bodies: the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) and the Committee of the Parties. On the one hand, GREVIO is the watchdog of the Convention, and it is currently composed of 15 experts acting in their personal capacity whose task is overseeing States' implementation of the document. GREVIO addresses questionnaires to Parties requiring data and information on the measures taken domestically to comply with their obligations, and examines the reports submitted by States, NGOs and civil society. Then, it publishes reports evaluating State performance and efficiency, and, when it notices serious violations of the Convention, it may initiate a special inquiry procedure. Additionally, GREVIO can adopt general recommendations to adapt the Convention's content to contemporary issues. Up to now, it has issued only GR No.1 on the digital dimension of violence against women,⁵¹⁶ expanding the scope of the Convention to acts of violence committed online or through technology. On the other hand, the Committee of the Parties is a political body, since it is made up of representatives of the States Parties to the Convention. The Committee elects the members of the Group of Experts and may address recommendations to States in order to help them to adopt measures to comply with GREVIO's reports.

Overall, the Istanbul Convention is a paramount instrument in eradicating GBVAW because it sets clear, precise and detailed legal obligations which bind States. However, the unnecessary inclusion of men within the framework of the Convention - and the use of gender-neutral language that resulted from it - partly undermines the document's value in combating violence against women.

⁵¹⁴ *Opuz v. Turkey*, Application No. 33401/02, ECtHR, para. 144.

⁵¹⁵ *Opuz v. Turkey*, Application No. 33401/02, ECtHR, para. 147.

⁵¹⁶ Group of Experts on Action against Violence against Women and Domestic Violence, "General Recommendation No.1 on the digital dimension of violence against women," October 20, 2021.

3.5 Are regional instruments sufficient?

In light of the analysis of the four HR systems, it is useful to reflect on whether current regional instruments are appropriate to address the issue of GBVAW. Independently of the existence of a global universal convention on the topic, regional treaties play a paramount role. In the absence of a universal binding document, they create obligations with regard to the prevention, protection from, prosecution and redress of violence against women, which bind States. Even if a global convention existed, regional treaties would be, nonetheless, important because they set standards specific to the historical and cultural context of the region. However, not all regional HR system effectively protect women from violence.

The ASEAN regional system is the most flawed one because it is characterized by the disparity between rhetoric and practice. As a matter of fact, while the adoption of several instruments on HR, including those specific to VAW and the ADHR, have shown the moral adherence of the States to the promotion of human rights, this commitment has not coincided with political action. Despite recognizing the existence of HR, ASEAN members have decided not to be bound by regional treaties nor to establish an enforcement mechanism, such as a committee or a court. This implies that State accountability is null and that HR violations cannot be sanctioned or punished. This is particularly problematic in the context of GBVAW, since this phenomenon is structural and dependent on power relations which only the State can address, and which is characterized by massive impunity because law enforcement bodies do not prosecute perpetrators.

The African Union system has recently strengthened its legal framework on the elimination of VAW by adopting the African Union Convention on Ending Violence Against Women and Girls. Nevertheless, the monitoring mechanism of the treaty remains the same as the Maputo Protocol and the Banjul Charter, namely State reporting to the African Commission. This is not negative *per se*, but it gives the Commission an additional burden and duty to fulfil, reducing the attention and time it can allocate to examine each part of State reports which become increasingly longer. Moreover, even if the African Court can adjudicate cases of violation of the AU-CEVAWG, it can do it only

with respect to countries that ratified the Protocol to the Banjul Charter on the Establishment of an African Court on Human and people's Rights.

The two regional systems that better protect women from GBVAW are the Inter-American system and the Council of Europe. Both of them have adopted a specific binding convention on the elimination of violence against women and have established its own monitoring body – the MESECVI for the Belém do Pará Convention and GREVIO and the Committee of Parties for the Istanbul Convention -. However, the two systems differ in the enforceability of these treaties. On the one hand, Inter-American Court has jurisdiction over the Belém do Pará Convention, meaning that States can be held accountable for violations of their obligation to eliminate GBVAW. Additionally, individuals can submit their petitions to the IACHR, which can either adjudicate them directly or refer them to the Court. Nevertheless, the major shortcoming of the Inter-American system is that States can be brought before the Court only if they have accepted its contentious jurisdiction. On the other hand, in the Council of Europe, the ECtHR is accessible to individuals and has compulsory jurisdiction, but it can only adjudicate cases concerning the ECHR. This means that women who have suffered GBVAW can make States accountable not for violations of specific obligations under the Istanbul Convention, but only with respect to the European Charter on Human Rights.

In conclusion, no regional HR system is perfect, but some successful attempts have been made to condemn and protect women from GBVAW. The most notable cases are the Inter-American and European ones, but it is still to see whether the new African Union Convention on Ending Violence Against Women and Girls will have a positive and meaningful impact on African society. As a result of the analysis carried out in this chapter, it can be asserted that the characteristics that a HR system must have to successfully combat VAW are (1) a general and a specific binding instruments that include women's right to be free from violence and the specific measures that have to be taken at the national level to guarantee this right, (2) a monitoring mechanism for GBVAW to avoid overloading other bodies and to ensure that appropriate time and resources are dedicated to the examination of State's progress, (3) ensuring that women can seek and receive redress, and that States are held accountable for violations of women's rights.

Conclusion

The persistence and the rise of new forms of gender-based violence against women reflect the profound structural nature of this phenomenon and the challenges it continues to pose, notwithstanding international efforts to combat it.

Chapter 1 provided a foundational analysis of GBVAW, defining its scope, causes, and manifestations through an intersectional lens. It traced the gradual inclusion of “women’s issues” in the international agenda and the acknowledgment that gender-based violence impairs women’s enjoyment of human rights. From a legal point of view, despite the statement of the CEDAW Committee in GR No. 35, the prohibition of VAW as a whole has not yet crystallized as a principle of customary international law, but the prohibition of some of its forms is gradually acquiring this status.

Chapter 2 analyzed the efforts of global human rights bodies to address GBVAW in the absence of a specific binding treaty. On the one hand, the CAT Committee, the Human Rights Committee and the ICC Prosecutor have applied gender mainstreaming to the treaties they monitor, namely the CAT, ICCPR and Rome Statute. Through policies and general comments, they have enlarged the scope of application of rights to make them more inclusive with respect to women and their vulnerability to gender-based violence. On the other hand, VAW has been included within the mandate of the CEDAW Committee and the CESCRC on the basis of general recommendations that treat it as a form of discrimination against women. An attempt to address GBVAW was made with the adoption of the Declaration on the Elimination of Violence against Women which, however, is not binding. Hence, it has been claimed that a normative gap at the global level exists and that it must be bridged with a new, ad hoc, hard law instrument with its own monitoring system. Nevertheless, a new document would risk including lower standards of protection for women and there is no guarantee that its enforcement system would be more efficient than existing ones.

In Chapter 3, the focus shifted to regional human rights systems and their legal frameworks addressing GBVAW. It was shown that the ASEAN has not developed an effective legal architecture to combat gender-based violence, in that all its instruments are soft law and States are not held accountable for violations of women’s rights. The African Union has recently renewed its commitment to the elimination of VAW by adopting a new

convention on the issue, and a concrete evaluation of its impacts and results will be done in the years to come. Lastly, the Inter-American and the Council of Europe systems have elaborated the most robust systems of protection, since they have established specific monitoring mechanisms and, even if with some limitations, ensure that women can seek redress against States' violations of their right to be free from violence.

Ultimately, regional systems are, indeed, fundamental to eradicating GBVAW, but they are not enough. Women that live in the ASEAN or in countries which are not parties to the other regional frameworks do not enjoy international protection and have no possibility of obtaining reparations for the damages and violence suffered. Therefore, it is necessary to reform the current global framework, either through the reinforcement of existing instruments or through the adoption of a new one, to include a single definition, common standards and binding obligations on States with respect to the elimination of gender-based violence against women.

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