

States' duty to prevent and eliminate violence against women in the European Union

El deber de los Estados de prevenir y luchar contra la violencia de género en la Unión Europea

Magaly Thill

Universidad Nacional de Educación a Distancia (España)
thillmg@yahoo.es

Recepción: Septiembre 2014

Aceptación: Octubre 2014

ABSTRACT

The European Union has placed the elimination of gender based violence among the political priorities of its Strategy for equality between men and women. This insight of declarations and instruments adopted by European regional institutions to eradicate this violation of human rights shows that, although the Parliament and the Council repeatedly requested a comprehensive strategy to combat violence against women, the EU did not establish common standards across Member States. This role was played by the Council of Europe, through the European Court of Human Rights Law case and the Convention on preventing and combatting violence against women and domestic violence.

Keywords: Gender equality Violence against Women, European Union, Istanbul Convention

JEL Classification: K33.

RESUMEN

La Unión Europea convirtió la violencia de género en prioridad de su estrategia por la igualdad. El análisis de las declaraciones e instrumentos adoptados por las instituciones regionales europeas contra esta violación de los derechos humanos demuestra que a pesar de las reiteradas demandas del Parlamento y Consejo de una estrategia integral de lucha, la UE no estableció estándares comunes para los Estados Miembros. Quien lo hizo fue el Consejo de Europa, en la jurisprudencia del Tribunal Europeo de Derechos Humanos, y mediante el Convenio Europeo para prevenir y combatir la violencia contra las mujeres y violencia doméstica.

Palabras clave: Igualdad de género, Violencia contra las mujeres, Unión Europea, Convenio de Estambul.

Clasificación JEL: K33.



1. INTRODUCTION

Until the last decade of the 20th century, European courts dealt with very few cases of gender based violence against women. Most of the forms of violence against women were not considered criminal offences and victims usually did not report to the police neither file complaints in the court. When they did, the rate of attrition was very high as most of them were convinced to withdraw their demands. When judges could continue with the procedures, concepts like passion, honour or privacy were commonly evoked in order to hinder or minimize charges against the male perpetrator.

Impunity was quite absolute in the field of intimate partner violence and sexual violence was categorized as a crime against morality. There was a lack of public awareness and no political will to eradicate this extended phenomenon, which was at the time, and still is nowadays, the first not natural reason for death of women in the world and one of the most effective means to reproduce gender discrimination and men's control over women's life and body.

2. REGIONAL FRAMEWORK TO COMBAT VIOLENCE AGAINST WOMEN IN EUROPE

45

2.1. United Nations' leadership in prevention and elimination of VAW

After years of pressure by feminist organizations and women's rights defenders, CEDAW Committee defined gender-based violence as a "violence that is directed against a woman because she is a woman or that affects women disproportionately", as well as a form of discrimination of Article 1 of the Convention on the Elimination of all forms of Violence against Women (CEDAW)¹. In 1993, the United Nations Conference on Human Rights in Vienna finally recognized that women's rights are human rights and that violence against women is a violation of human rights².

In December of the same year, the General Assembly approved a Declaration on the elimination of Violence against Women³ (DEVAW). Composed of a preamble and 6 articles, this foundational document defined violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life"⁴. The General Assembly endorsed the gender perspective developed by feminist theory to conceptualize violence against women (VAW), while declaring that "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”⁵.

In the DEVAW, the General Assembly also recognized that violence against women, including when committed by the husband or other intimate partner, is a violation of human rights and therefore pertains to the field of International Law of Human Rights. Another significant step forward was the recognition that states have the obligation to exercise due diligence to prevent, investigate and punish acts of violence against women, whether those acts are perpetrated by the State or by private persons. Gender based violence was not any more a private question to be accepted, tolerated, silenced or addressed within the family. It was categorized as a crime which entailed legal consequences for the perpetrators and for the states. The Declaration set up the conceptual frame and legal referent for regional and national institutions. On one side, DEVAW supplies international community with a definition of violence⁶ inspired in the feminist theory which encompasses several forms of violence (physical, psychological and sexual), which transcends the traditional patriarchal dichotomy between private and public spheres, giving legitimacy to the States to interfere in private and family life⁷ in order to protect women victims of violence⁸.

46

States’ legal duty to prevent and combat gender based violence was delimited by the standard of due diligence. Before being embedded in DEVAW, this concept of due diligence was first used in relation with VAW in CEDAW Recommendation N°19. Due diligence was later developed by Special Rapporteurs on Violence against Women in their Reports to the UN Commission of Human Rights in Geneva (COOMARRASWAMY, 1996 and ERTRÜK, 2006).

The UN General Secretary, in his Study Ending violence against woman: From words to Action (ANNAN, 2006) defined the scope of due diligence standard: “The standard is not one of strict liability, in which the State would be held accountable for acts of violence against women regardless of the circumstances, but rather one of reasonableness. It is based on principles of non-discrimination and good faith in application. The standard of due diligence therefore requires a State to act with the existing means at its disposal to address both individual acts of violence against women and the structural causes so as to prevent future violence”⁹. UN Secretary General pointed out the need to apply the standard of due diligence to investigation, prosecution of gender based violence and protection of the victims. According to Secretary General’s Study, States also must exercise due diligence also to prevent this violation of human rights by attacking its roots, which might imply the duty to act against sexism, misogyny and devaluation of women, as well as gender based discrimination in laws and policies.



2.2. Violence against women and European Union

According to the Macro-Survey published by the European Union Agency for Fundamental Rights last March 2014, one in three women in the EU has been victim of physical or sexual violence and one in five by intimate partner¹⁰. Another third of the 42,000 women surveyed have experienced psychologically abusive behaviour either by their current partners or previous ones. 18 % of women have experienced stalking since the age of 15, and 8 % by a previous partner. An estimated rate of 3,7 millions of women have experienced sexual violence in the last 12 months. Approximately one in two women (between 45 and 55%) has experienced sexual harassment at least once since the age of 15, and between 13 and 21 % in the year before the survey¹¹.

Gender based violence hinders gender equality and constitutes a violation of human rights, two values claimed to be at the core of European Union construction¹². Concretely, Violence against women and girls seriously violates and impairs or nullifies the enjoyment of several rights upheld for all European citizens in the EU Charter of Fundamental Rights: the right to life (Article 2), the right to the integrity of the persons (Article 3), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), the right to liberty and security of persons (Article 6) and equality between men and women (Article 23), which is also a founding value of the European Union as stated in Article 2 of European Union Treaty (EUT). These are reasons enough to expect that the prevention and elimination of this extended phenomenon would be enshrined in EU institutions mandate and effectively enforced in all the member states. But the picture is not really matching with this a priori deduction, as the following insight will show.

47

When we look at European primary law, we find that neither the European Union Treaty nor the European Charter on Human Rights mention gender based violence. The only wording about violence against women in the text of the European Treaties is a small declaration annexed to the Treaty on the Functioning of the European Union (TFEU). The non-binding Declaration n°19 on Article 8 TFEU goes quite unnoticed among the annexes to the text, but it confers to the EU institutions and EU Member States the responsibility to combat domestic violence against women: “In its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence. The Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims”.¹³

2.2.1. EU declaration of intent on eradication of VAW

On the ground of this commitment, the European Union has enshrined eradication of violence against women in its political framework on gender equality. On the wave of the 2010 International Women's Day, the European Commission, in the Declaration A Strengthened Commitment to Equality between Women and Men, A Women's Charter, set “Integrity, Dignity and an end to gender based violence” among EU principles for equality between men and women¹⁴, solemnly pledging to “step up efforts to eradicate all forms of

violence and to provide support for those affected” and “put in place a comprehensive and effective policy framework to combat gender-based violence”.¹⁵ Both the European Strategy for equality between Men and Women 2011-2015¹⁶ and the European Pact for gender equality 2011-2020 adopted by the European Council respectively in September 2010 and on 7th March 2011¹⁷, reaffirmed that the elimination of VAW is a priority to reach equality between men and women in the European Union. In the Strategy for equality between men and women 2011-2015, which was aimed at defining specific measures to be undertaken in the six areas of work of Women's Charter, the Council requested the Commission to adopt a “EU-wide strategy on combating violence against women, for instance female genital mutilation, using all appropriate instruments, including criminal law, within the limits of the EU’s powers, supported by a Europe-wide awareness-raising campaign of awareness on violence against women”.¹⁸

48

The setting up of a European Strategy on combatting gender based violence was officially proposed for the first time in April 2010 in the European Commission bold Action Plan implementing the Stockholm Programme, Delivering an area of freedom, security and justice for Europe's citizens. At the time, the Commission resolved to produce in years 2011-2012 a comprehensive EU strategy and Action Plan to combat violence against women, domestic violence and female genital mutilation and scheduled it for 2011-2012¹⁹. Unfortunately this strategy was never published despite the Commission initiated some work for this purpose and the Parliament insisted on the need of adopting such a comprehensive strategy to put an end to violence against women and girls.

2.2.2. EC Advisory Opinion on EU Strategy on VAW and Feasibility Study

In order to explore the possibilities and suggest contents for such a specific strategy, the Division on Employment, Social Affairs and Equal Opportunities of the European Commission published an Advisory Opinion on EU Strategy on Violence against Women and Girls²⁰. This study recommended that the Strategy should be broad, integrated, human rights based, informed by gender equality, addressing the specific needs of different groups of women, comprehensive, cross sectorial, adequately funded, coherent with the broader EU policy framework, and mainstreamed into EU and national policy.

The Commission affirmed that the development and implementation of an EU strategy under the coordination of Commissioner of Justice would ensure that efforts to eliminate VAW across Europe are more comprehensive and coherent and would demonstrate a clear political will for action. The Advisory Opinion recommended objectives, contents and actions in the following areas: policy making (legislation, research and development, external relations; prevention (in the education sector, towards public services and professionals, through public awareness campaign targeting society at a whole and specific audiences); prosecution (ensuring that Member States will investigate and prosecute with due diligence); provision of services to victims and children witnesses (European helpline, shelters, rape crisis centres, safe housing) and perpetrators; and infrastructure



(Observatory, European Year, coordination and cooperation with civil society, action planning, monitoring and evaluation). Regarding the legal measures to put in place, the Commission Advisory Opinion stressed the need of a “feasibility study on standardisation of legislation, currently under way through the Daphne project, of all legal instruments in place to tackle violence against women” which would allow for “greater clarity on the respective areas of competence of Member States and EU institutions”. Surprisingly, this Feasibility study to assess the possibilities, opportunities and needs to standardize national legislation on violence against women, violence against children and sexual orientation violence¹⁶ published the same year, addressed and examined responses to three different kinds of violence: VAW, violence against children (VAC) and sexual orientation violence (SOV).

This three-fold approach can be partially explained by the fact that the purpose of DAPHNE Programme is to contribute to protect not only women against violence, but also children and young persons as well as victims and groups at risk²². Nonetheless, a fear could emerge that European Commission might depart from the UN approach of combatting VAW separately, as a form of gender based discrimination aimed at maintaining men’s control over women and reinforcing patriarchal values and structures²³, watering down the preventive and symbolic impact of this international approach on the unequal relations between men and women²⁴. As well, although violence against LGTBI people shares perpetration factors with VAW as highlighted in this study²⁵, and the prevention of both kinds of violence points at changing the stereotyped masculine identity featured both by patriarchy and heteronormativity, most of international and national instruments address VAW and SOV separately.

49

The Feasibility Study concluded that there is a limited basis for harmonization in the field of substantive criminal law on VAW because, except in the case of trafficking in human beings and sexual exploitation of women and girls, the offences pertaining to VAW are not included in the list of crimes that fall within the EU competence to propose approximation of laws, under Article 83 TFEU²⁶. It neither found a clear legitimacy for standardization of EU Member States laws and policies related to prevention of VAW, except as an issue of general health education (Article 168.1 TFEU) or as an measure to fight discrimination based on gender (Article 8 TFEU in combination with Article 19).

In the field of investigation and prosecution of VAW, the authors affirm that Article 82.2 TFEU²⁷ allows for publication of Directives establishing minimum rules to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension mutual admissibility of evidence between Member States and that shall concern mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, rights of victims of crime and any other specific aspects of criminal procedure which the Council has identified in advance by a decision (as evidenced by the Council Framework Decision of 15 March

2001 on the standing of victims in criminal proceedings and later by the Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime which replaced the Framework Decision 2001).

The establishment of minimum standards of protection of victims against VAW is also possible in relation with migratory policy through Article 79.1 and 2 TFEU²⁸ in relation with the recognition of protection orders under Article 82.1(d) TFEU, as evidenced later by the adoption of the Directive 2011/99/UE of European Order of Protection and Regulation (UE) N° 606/2013 on mutual recognition of measures of protection in civil matters). Harmonization in the sphere of training and capacity building might also be justified by Article 82.1(c) TFEU but only to the extent that it is required in the context of judicial cooperation in criminal matters. Finally, the Feasibility Study concludes that although support and assistance services for victims is a primary competence of the member states, standards could be introduced on the wave of the revision of the EU Framework Decision on the standing of victims in criminal proceedings²⁹.

2.2.3. European Parliament and VAW

50 On its hand, the European Parliament has insisted since 2009 on the European Commission to develop an EU comprehensive multidisciplinary strategy that would include social, political and legal measures, as well as an integral Directive to combat VAW. In its Resolution of 26th November 2009 on elimination of violence against women³⁰, the Parliament asked for a specific and more coherent policy to combat all forms of violence against women, including concrete measures and more coordinated response. It was the first time that the Parliament called on the Commission to start work on drafting a proposal for a comprehensive directive on action to prevent and combat all forms of violence against women³¹. This demand, which has not been satisfied until now, although it turned to be a leitmotif of all following European Parliament resolutions related to elimination of VAW and gender equality, was immediately perceived by feminist lawyers as a promising step towards the unification of criteria to combat gender based violence in Europe³².

In its Resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women, the European Parliament reaffirmed the need for a new comprehensive policy approach against gender-based violence that would include: a criminal-law instrument in the form of a directive against gender-based violence and measures to address the 'six-P' framework on violence against women (policy, prevention, protection, prosecution, provision, and partnership); plans to develop methodological guidelines and undertake new data collection efforts to obtain comparable statistical data on gender-based violence; policy proposals to help victims rebuild their lives, ensure their safety and re-establish their physical and psychological health; the establishment of a European charter setting out a minimum level of assistance services to be offered to victims of violence against women; the declaration in the following five years, of a



European Year Against Violence Against Women with the aim of raising awareness among European citizens, etc.³³

Among the demands listed in this exhaustive resolution, the Parliament also urged the Commission to consider launching an observatory on violence against women and the Member States to define rape and sexual violence against women as a crime based on the absence of consent, including by husband, intimate partner or relative. In its Resolution of 13 March 2012 on equality between men and women, the Parliament again requested a European Year, an observatory and a European Strategy to put an end to VAW which would include a judicial instrument of criminal law.

After raising the need for an EU-wide strategy and a comprehensive directive to effectively prevent and combat VAW in the European Union for more than four years, the European Parliament finally adopted Resolution of 25 February 2014 with recommendations to the Commission on combating Violence against Women. In an attempt to remove all possible obstacles to the establishment of such a political and legal framework, the Parliament requested the Commission to submit, by the end of 2014, on the basis of Article 84 TFEU³⁴, a proposal for an act establishing measures to promote and support the action of Member States in the field of prevention of violence against women and girls (VAWG), as well as to activate the passerelle clause, by adopting a unanimous decision identifying violence against women and girls (and other forms of gender based violence) as an area of crime listed in Article 83(1) TFEU. It also recalled the Commission to present an EU-wide Strategy and an Action Plan to combat all forms of violence against women and girls (VAWG), as foreseen in 2010 in the Action plan implementing the Stockholm programme. Additionally, it called the Commission to promote national ratifications and launch the procedure for the accession of the EU to the Istanbul Convention on violence against women, and to supply a revised proposal for a Regulation on European statistics that would target violent crimes and include a coherent system for collecting statistics on gender-based violence in the Member States.

51

2.2.4. Balance of EU action against gender based violence against women

In 2010, under Spanish presidency, European Union showed encouraging signs of a stronger commitment to combat gender based violence to ensure human rights of women and girls and to contribute to equality between men and women. Besides the instruments listed above, European Council adopted specific conclusions on VAW (Conclusions on eradication of Violence against Women of 8th March 2010³⁵ and Conclusions on improving prevention to tackle violence against women and care to its victims within the scope of law enforcement³⁶ of 26th April 2010). It published a Handbook of Best Police Practices on Tackling Violence against Women and requested the Fundamental Rights Agency to carry out a survey on VAW in all the member states. It also supported actions against VAW through DAPHNE Programme.

Two European Directives of protection of victims passed in the following years were gender mainstreamed to specially contribute to protect victims of VAW. The Directive 2011/99/UE of European Order of Protection³⁷ aimed at ensuring that protection orders for victims of crimes are valid in all EU countries, therefore contributing to the protection of women victims of gender based violence, encouraged Member States, while implementing it, to take into account the rights and principles enshrined in CEDAW.

The Directive 29/2012/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA underscored the need of special protection of victims of gender based violence, which was defined as “a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called ‘honour crimes’³⁸”.

52

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims was also adopted³⁹. This latter Directive did not explicitly recognize the special vulnerability of women trafficked for the purpose of sexual exploitation, although it represents a vast majority of the crimes that fall under the scope of this binding instrument within European Union, but it acknowledged the “gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes”. In this favourable context, the European Union failure to comply with its own commitment to develop a European Strategy which would include a specific directive or another binding instrument against VAW may be understood as a lack of political will to attack this manifestation of gender inequality and women’s subordination to men. Despite VAW is the first cause for not natural death of women, there is currently no strategy, neither legislation, in place at the level of the EU that addresses this problematic in a comprehensive manner⁴⁰. The Macro-survey carried out by the Fundamental Rights Agency, foreseen to be published in 2012, was delayed two years. Moreover, the Commission declared in June 2011 that a European Observatory on VAW was “unnecessary”, in spite of the shortage of regional and comparative research across Europe and the disparity of criteria used to register and monitor gender based offences against women across the Member States.

2.3. Violence against Women and the European Council

2.3.1. European Council: Recommendation Rec (2002)5

The Council of Europe, with its 47 Member States was more effective than the European Union to promote the adoption of common standards to combat VAW. On 30th April 2002, the Committee of Ministers of the Council adopted the Recommendation (2002)5 on protection of Woman against Violence. This non-binding instrument contributed to harmonize definitions and concepts and align national legislations, policies and programs



with UN standards. The Council of Europe Rec (2002)⁵ acknowledged that states have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the state or private persons, and to provide protection to victims. It recommended that States parties recognize that male violence against women is a major structural and societal problem based on the unequal power relations between women and men, and that they adopt and implement in the manner they consider the most appropriate in the light of national circumstances and preferences, a set of 85 practical measures described in an appendix to this recommendation.

States should ensure that police and other law enforcement bodies would receive, treat and counsel the victims in an appropriate manner, based on respect for human beings and dignity, and handle complaints confidentially (Rec. 29), as well as take all necessary measures to ensure that none of the victims suffer secondary (re)victimisation or any gender-insensitive treatment by the police, health and social personnel responsible for assistance, as well as by judiciary personnel (Rec. 30).

In the field of criminal and civil law, Member States should for instance, provide for appropriate measures and sanctions in national legislation (Rec. 33). They are required to penalize sexual violence and rape between spouses, regular or occasional partners and cohabitants; any sexual act committed against non-consenting persons, even if they do not show signs of resistance; (...) any abuse of the position of a perpetrator, and in particular of an adult vis-à-vis a child (Rec 35). They also should ensure that victims receive appropriate compensation for any pecuniary, physical, psychological, moral and social damage suffered, corresponding to the degree of gravity, including legal costs incurred (Rec 36); make provisions to ensure that criminal proceedings can be initiated by the public prosecutor (Rec. 39); encourage prosecutors to regard violence against women and children as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest (Rec. 40). About violence within the family, States should take special measures, for instance, classify all forms of violence within the family as criminal offence (Rec. 55) or consider, where needed, granting immigrant women who have been/are victims of domestic violence, an independent right to residence (Rec. 59).

Although Rec (2002)⁵ is not a binding instrument, it has provided the European Court of Human Rights (ECtHR) with a conceptual and legal background to appreciate if a State has acted with due diligence in a concrete case of VAW. This Recommendation has therefore contributed to the harmonization of national legislations of State Parties of the European Convention of Human Rights (ECHR). For instance, in *Bevacqua & S. v. Bulgaria* (2008), after reminding that the Committee of Ministers recommended that Member States should classify all forms of violence within the family as criminal offences (paragraph 50), the Court concluded that, because domestic violence could only be sued through private civil prosecution and not under criminal law when it caused minor injuries, Bulgarian legislation “did not provide for specific administrative and policing measures to protect

Bevacqua’s rights to private and family life” of Article 8 ECHR (paragraph 83). As Alija Fernández pointed out, “although ECtHR recognized to the State a margin of application to determine measures that might be sufficient to guarantee respect of private and family life, it seems to imply that [Rec (2002)5] might circumscribe in a certain way, the margin of appreciation of the State in cases of domestic violence⁴¹”.

2.3.2. European Court of Human Rights Jurisprudence

ECtHR’s case law has evolved over time. The Court’s initial gender blind approach was slowly replaced by a gender sensitive one while it started to take into consideration women’s special vulnerability to domestic and sexual violence and the discriminatory nature of violence against women. The Court has also been a powerful instrument in hands of national judiciary and legislative bodies to figure out states’ positive obligations to prevent and eliminate gender based violence between individuals. *X. & Y. v. Netherlands* (1985) was ECtHR’s first sentence that acknowledged states horizontal or indirect responsibility in a case of VAW. Netherlands was found to have breached a minor and mentally handicapped victim of rape’s right to private life, a concept which, as declared by the Court, covers the physical and moral integrity of the person, including his or her sexual life (paragraph 22). The reason for this breach was the fact that the law did not enable the victim’s father to file, on her behalf, a complaint for being sexually abused by the son-in-law of the director of the center where she was living, a case which disclosed a gap in the law of Netherlands.

54

Several states were subsequently hold accountable for the violation of one of the rights enshrined in the European Convention of Human Rights (ECHR) due to a breach of their positive obligation to combat VAW. When the state did not adopt the necessary measures to minimize or eliminate the risk for women under their jurisdiction, to be victims of a violation of rights embedded in ECHR, the state was found responsible for an a priori violation (*Kontrova v. Slovakia*, 2007; *Branko Tomašić & other v. Croatia*, 2009; *Opuzv. Turkey*, 2009; *E.S. & others v. Slovakia*, 2009; *Hajduova v. Slovakia*, 2010; *Kalucza v. Hungary*, 2012; *Eremia & others v. Moldavian Republic*, 2013). If the state failed to investigate properly the violation or punish the perpetrator, it was found to have committed an a posteriori violation (*M.C. v. Bulgaria*, 2003; *Kontrova v. Slovakia*, 2007; *Branko Tomašić & other v. Croatia*, 2009; *A. v. Croatia*, 2010; *Valiuliene v. Lithuania*, 2013; *Eremia and others v. Moldavian Republic*, 2013).

The ECtHR has widened the scope of rights violated by VAW throughout its jurisprudential activity. During years, gender based violence committed by individuals was appreciated to contravene the right to integrity which stemmed from the right to private and family life of Article 8 ECHR. The Court early recognized that sexual violence can amount to torture and inhuman or degrading treatment either perpetrated by state agents (*Aydin v. Turkey*, 1997; and *Maslova & Nablantov v. Russia*, 2008) or by private individuals (*M.C. v. Bulgaria*, 2003)⁴², but it took more time to admit that domestic violence against women is also a



form of torture. It happened to be in year 2009 in a sentence that constitutes a remarkable milestone in the international case law on VAW. As far as the Court found that by concluding that Article 3 had been violated in a case of domestic violence, *Opuz v. Turkey* (2009) acknowledged the seriousness of the physical and psychological suffering of women at the hands of their present or former husband or intimate partner. This was not an easy deal and the Court decisions throughout subsequent cases have evidenced the instability of this categorization. Although breach of Article 3 ECHR was confirmed in *E.S. v. Slovakia* (2009), *Valiuliene v. Lithuania* (2013) and *Eremia and others v. Moldavian Republic* (2013), the ECtHR ruled it out in *A. v. Croatia* (2010) y *Kalucza v. Hungary* (2012).

Opuz v. Turkey also emphasized states' positive obligation to protect victims of domestic violence in an appropriate way. Taken into consideration that the Turkish authorities knew about an immediate and real risk against *Opuz* and her mother (doctrine of foreseeable risk), and that they did not provide with appropriate means of protection, Turkey was found to have failed to its obligation to apply due diligence to protect victims, resulting in the violation of *Opuz*' right not to be subject to inhuman or degrading treatment by her husband (Article 3 ECHR) and her mother's right to life (Article 2 ECHR). Although the principle of due diligence had been mentioned in two sentences before (*M.C. v. Bulgaria and Bevacqua v. Bulgaria*), for the first time in *Opuz v. Turkey*, due diligence is used in its whole dimension to inform the interpretation of states' positive obligation towards victims of VAW. This qualitative leap can be explained by the fact that the *ius cogens* nature of the right to life (Article 2 ECHR) and prohibition of torture (Article 3 ECHR) required from the authorities a special diligence to abide with their obligations and from the Court to put forward a trustable standard of appreciation of states' failure to do so⁴³.

Following this sentence, ECtHR has defined several assumptions of states' positive obligation to protect, noting that national legal systems should ensure access to protective measures to all victims of domestic violence, respond promptly to women's demands of protection from their perpetrators (*E.S. c. Eslovaquia* (2009), *A. c. Croacia* (2010), *Kalucza c. Hungría* (2012)) and guarantee an effective implementation of restriction orders (*Eremia and others v. Moldavian Republic* (2013)) or security measures (*Branko Tomašić and others v. Croacia* (2009), *Hajduova c. Eslovaquia* (2010)).

The discriminatory nature of VAW⁴⁴ was also addressed in *Opuz*, as Turkey was found responsible for breaching Article 14 in relation with Articles 2 and 3 ECHR, stemming from the general and discriminatory judicial passivity towards domestic violence and from the discriminatory nature of that violence which mainly affects women. The Court concluded that in Turkey, the "overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence" (paragraph 201). The Court came to a similar conclusion in *Eremia and others v.*

Moldavian Republic (2013), although it happened to adopt in *A.C. v. Croatia* (2010) a more conservative opinion, alleging that there were not sufficient elements of evidence of a discriminatory action by the Croatian authorities.

Another significant advancement of *Opuz v. Turkey* is the recognition that a law or practice which automatically paralyzes a domestic violence investigation or prosecution where a victim withdrew her complain, may be in breach of the state due diligence obligations (paragraph 127), and that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest (paragraph 139).

The positive obligation of the State to prevent VAW, which contains the existence of a deterrent legal framework that criminalizes gender based violence, was recognized in many sentences of the European Court (*X. and Y. v. Netherlands* (1985), *M.C. v. Bulgaria* (2003), *Opuz v. Turkey* (2009), *Kalucza v. Hungary* (2012)). This understanding of states legal obligation to prevent VAW contributed to the harmonization of European Council state parties criminal law, promoting for instance the adoption of a definition of rape based on the lack of consent without requiring physical resistance by the victim (*M.C. c. Bulgaria* (2003))⁴⁵. The two aspects of the obligation to prosecute have also been underscored by the Court. On one hand, states were reminded their duty to undertake thorough and effective investigation of alleged violations of the rights embedded in the ECHR (*M.C. v. Bulgaria* (2003), *Branko Tomašić and others v. Croatia* (2009), *Valiuliene v. Lithuania* (2013)), including when the woman withdrew her complaints under the pressure of the aggressor (*Opuz v. Turkey* (2009)). On the other hand, ECtHR found that some states did not exercise due diligence to prosecute the perpetrators, either by breaching the victim's right to remedy (*Kontrova v. Slovakia* (2007)) or due to their incapacity to enforce the punishment and execute the penalty (*A.C. v. Croatia* (2010), *Eremia and others v. Moldavian Republic* (2013)).

56

In the field of reparation of VAW, the jurisprudential activity of the ECtHR was not so remarkable. As far as the ECHR only provided that the Court should ensure, if necessary, a just satisfaction to the victim when the internal law of the High Contracting Party concerned allows only partial reparation to be made (Article 41 ECHR), it could not find a violation of the right to reparation as such, but as an aspect of the right to effective remedy enshrined in Article 13 (*Kontrova v. Slovakia* (2007)) or as a component of the right to life of Article 2 (*Branko Tomašić and others v. Croatia* (2009)) and not to be subject to inhuman or degrading treatment by her husband of Article 3 (*Aydin v. Turkey* (1997) and *Maslova and Nablantov v. Russia* (2008)).

Reparation was interpreted as monetary satisfaction, adopting a non-gender sensitive approach that omits other dimensions of the concept of reparation: provision of services,



symbolic reparation, physical and psychosocial rehabilitation, empowerment, professional reintegration, vocational training, housing support, etc.

As pointed out by the Special Rapporteur Rachida Manjoo, “the reparation framework traditionally embraced by the [European] Court [of Human Rights] is rather narrow and has not allowed full recognition of the moral and material harm that women subjected to violence experience. No measures of satisfaction, symbolic recognition, rehabilitation or guarantees of non-repetition have been granted and the treatment of pecuniary damages has been very narrow, as it requires high standards of proof and fails to include future expenses, even in cases where they are foreseeable. This approach does not reflect an understanding of either the true material harm following a violation, or its sex-specific dimension”⁴⁶. The Special Rapporteur also expressed her regret that in *Opuz v. Turkey* the Court missed the opportunity to suggest a broader agenda to deal with the structural problem of domestic violence, because it refused to link the reforms required to avoid the broad problem of impunity with the concept of reparation⁴⁷.

2.3.3. Istanbul Convention on VAW and domestic violence

While European Union was delaying the adoption of a specific strategy and a directive to combat VAW, the Council of Europe adopted in 2011, after two years of intensive work, the first binding regional instrument for the elimination of VAW and protection of victims of this kind of violence. Although its State Parties, especially the EU states members, seemed at first to be reluctant to ratify the European Convention on preventing and combatting violence against women and domestic violence, also called Istanbul Convention, it finally entered into force in 2014 after it was ratified by more than 10 countries.

Istanbul Convention constitutes a key instrument to progress towards a European comprehensive strategy to combat gender based violence and is expected to contribute to the harmonization of laws and policies across EU member states, especially in countries where some acts have not been yet criminalized and procedures still are not aligned with UN provisions and recommendations on VAW. It also provides the ECtHR with a set of recommendations to assess the application of the due diligence principle to the positive obligations of states to develop policies, prevent and prosecute VAW, to protect victims and provide services (five “P” approach).

As the complete title of Istanbul Convention suggests, the final text is the result of a compromise between two competing approaches: the feminist approach based on internationally accepted definitions, concepts and standards, which was demanding a binding document to combat all forms of this extended human rights violation, and a gender blind approach eager to address domestic violence against children, women and men at a whole. The final result is a gender mainstreamed Convention to prevent and combat all kinds of violence perpetrated against women, which emphasizes the

discriminatory aspect of domestic violence and may also apply to domestic violence against children and men (Article 2).⁴⁸

While domestic violence shall mean “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim”, the Convention defines VAW as “a violation of human rights and a form of discrimination against women [that] 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”, adding a new form of violence -economic violence- to the casuistic of DEVAW and Rec (2002)⁵. Likewise, “victim” shall mean any natural person who is subject to those two conducts (Article 3).

58

Istanbul Convention is based on three principles inspired by CEDAW General Recommendation n°19, and further conceptual, political and legal developments which have assessed gender based institutional response to VAW: 1°) Fundamental rights, equality and non-discrimination, including the right to a life free from violence which transcends the dichotomy between public and private sphere (Article 4)⁴⁹; 2°) State obligations and due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of the Convention that are perpetrated by non-State actors (Article 5); 3°) Gender-sensitive policies, which bind the Contracting Parties to gender-mainstream the implementation and evaluation of the Convention and to attack the roots of VAW through promotion of gender equality and empowerment of women (Article 6).

In the field of Integrated policies and data collection (Chapter II), states are encouraged to promote coordination between all agents (Articles 7, 9 and 10), allocate appropriate financial and human resources (Article 8) and collect disaggregated statistical data and support research to study VAW root causes and effects, incidences and conviction rates, as well as the efficacy of measures taken (Article 11). In the sphere of Prevention (Chapter III), states have the general obligation, inter alia, to take the necessary measures to combat prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men (Article 12). They should also undertake and fund awareness raising campaigns with the participation of women organizations (Article 13); promote education free of sexism and against gender based violence (Article 14); train professionals (Article 15); undertake preventive intervention and treatment programs (article 16) and raise awareness among private sector and the media (Article 17).

In the field of Protection and support (Chapter IV), contracting parties have the general obligation to take the necessary legislative or other measures to protect all victims from any further act of violence (Article 18). Istanbul Convention places the rights of the victim



at the center of states policies and it rules out that the provision of services depends on the victim's willingness to press charges or testify against the perpetrator (Article 18 (4)). Contracting parties shall inform the victim adequately, in time and in her language, on available support services and legal measures (Article 19); provide health care, social and general support services facilitating victims' recovery from violence (Article 20); give assistance in filing individual or collective complaints (Article 21); provide, in an adequate geographical distribution, immediate, short- and long-term specialist support services (art.22); ensure the setting-up of appropriate, easily accessible shelters in sufficient numbers and provide out-reach programs (Article 23); set up state-wide round-the-clock telephone helplines free of charge (Article 24); give support for victims of sexual violence (Article 25); give protection and support for children witnesses (Article 26); promote that witnesses, including professionals who work in contact with victims, report to the competent organizations or authorities (Articles 27-28).

As well, in the sphere of Substantive law (Chapter V), states shall criminalize irrespective of the nature of the relationship between victim and perpetrator (Article 43) the following offences: psychological violence; stalking; physical violence; sexual violence, including rape, which is defined as a sexual act without consent; forced marriage; female genital mutilation; forced abortion and forced sterilization (Articles 33-39). The Convention allows states to decide if to prosecute through criminal or civil law, sexual harassment (article 40) and aiding or abetting and attempt to commit an offence established in accordance with Articles 33, 34, 35, 36, 37, 38.a and 39 (Article 41).

Regarding sanctions, the Convention requires States to enable adoption of additional measures like monitoring or supervision of convicted persons or withdrawal of parental rights (Article 45), and to introduce aggravating circumstances for crimes committed in the family, if the offence was committed repeatedly, against a person made vulnerable by particular circumstances or against or in the presence of a child (Article 46). The Conventions also prohibits mandatory alternative dispute resolution processes or sentencing, like mediation (Article 48).

Under the chapter of Investigation, prosecution, procedural law and protective measures, contracting parties assume the general obligation to take legislative and other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure that VAW is investigated and prosecuted without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings (Article 49). Other procedural obligations encompass the provision of immediate and adequate response, prevention and protection (Article 50); the assessment of the lethality risk, the seriousness of the situation and the risk of repetition, especially if the aggressor is in possession of firearm, in order to manage the risk (Article 51); the availability of emergency barring orders (Article 52) and restraining or protection orders (Article 53); the protection of the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial

proceedings (Article 56); and the right to legal assistance and to free legal aid under the conditions provided by their internal law (Article 57). States shall also ensure that crimes of VAW do not depend totally on a private complaint by the victim, and that the prosecution will continue despite the withdrawal of the complaint (Article 55), avoiding by this means that the judicial action rests on the victim, therefore re-victimizing her⁵⁰.

The understanding of VAW as a global and transnational problem encouraged the Council of Europe to require that states jurisdiction on VAW will embrace crimes committed in their territory, on board a ship flying their flag, on board an aircraft registered under their laws, by or against one of their nationals or a person who has her or his habitual residence in their territory (Article 44). Aware of the high vulnerability of migrant and asylum seekers victims of VAW⁵¹, the Council of Europe has provided that contracting parties shall ensure that their migration and asylum policy is gender mainstreamed and migrant and asylum seekers women are protected against VAW (Chapter VII). States are required to adopt measures to guarantee that victims are not returned to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment (Article 61). The Convention obliges its contracting parties to ensure that migrant women victims' residency permit will not be cancelled if they get divorced from the perpetrator, and that victims' expulsion orders related to the residence permit of the perpetrators can be suspended. They shall expedite renewable permits and allow victims of forced marriage to regain their status of residents (Article 59). States are also required to recognize gender-based violence against women as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees, as well as a form of serious harm giving rise to complementary/subsidiary protection. They should furthermore grant refugee status to asylum seekers allegedly victims of VAW (Article 60).

60

In order to effectively launch, implement, monitor and evaluate the application of Istanbul Convention, international cooperation should be strengthened (Chapter VIII) and a monitoring mechanism called the Group of experts on action against violence against women and domestic violence (also referred to as "GREVIO") will be set up (Chapter IX).

3. CONCLUSIONS AND RECOMMENDATIONS

Both the European Council and the European Parliament have repeatedly required the Commission to demonstrate EU truth commitment to protect women against gender based violence. When the European Strategy for gender equality 2010-2015 is upon to reach its end, the promised EU-wide comprehensive Strategy on combatting gender based violence has not been adopted yet. No specific directive targeting all forms of VAW or other EU-wide binding instrument either enforced European states' obligation to exercise due diligence to prevent and combat this violation of human rights. No European Year against



VAW was declared and the EU didn't set up the expected Observatory on gender based violence against women.

In order to redress this situation, it is extremely urgent that the EU adopts a holistic Strategy that will use all appropriate instruments, including criminal law, to effectively ensure the adoption among member states, of minimum standards on policy, prevention, protection, prosecution, provision of services and partnership against VAW. EU shall alike put in place a solid infrastructure to implement, monitor and evaluate its efforts, ensuring that sufficient resources are allocated to the Plan of Action that will develop this Strategy. Special attention shall be paid to the harmonisation of data and research on VAW from a gender perspective. As well, prevention should challenge gender discrimination, stereotypes that underpin women's subordination and symbolic violence against women. In addition, the European Union and its Member States should give their genuine support to the work of the Council of Europe in the field of elimination of VAW by ratifying Istanbul Convention. This Convention constitutes a promising instrument in hands of European countries to enforce their declared pledge to eradicate gender based violence against women. This comprehensive document which is binding to all contracting parties, encompasses a wide range of legal and political concrete measures to prevent and combat this extended phenomenon which restrains gender equality, a core value of the European Union.

61

The Convention will consolidate the doctrine of due diligence in the European Court of Human Rights case law, and assess the criteria of the Court in its duty to determine in every case of VAW it will examine, if the parties of the European Convention on Human Rights have applied due diligence to prevent, protect, prosecute and provide reparation. These are all reasons that should vigorously encourage the EU to include Istanbul Convention in its common legal and political framework of protection of human rights.

As UN General Secretary suggested in his study on VAW published in 2008, to end violence against woman, it is necessary to pass from words to action. Women's human rights, freedom, dignity and equality are at stake.

BIBLIOGRAPHY

ABDEL-MONEM, T. (2009): "Opuz v. Turkey: Europe's Landmark Judgment on Violence Against Women", Human Rights Brief 17, No. 1, pp.29-33.

ALIJA FERNÁNDEZ, A. R. (2011): "La violencia doméstica contra las mujeres y el desarrollo de estándares normativos de derechos humanos en el marco del Consejo de Europa", Revista General de Derechos Europeo, No 24.

BALAGUER CALLEJÓN, M. L. (2010): "Crónica de Legislación Europea", in Revista de

Derecho Constitucional Europeo, La interacción constitucional entre la Unión Europea y los Estados miembros (I), No. 14, 2 semestre, pp. 519.

BUNCH, C. (1995): “Transforming Human Rights from a Feminist Perspective”, PETERS, J., y WOLPER, A., Women’s rights, Human rights, Psychology Press.

CANOSA USERA, R. (2006): El derecho a la integridad personal, Lex Nova, Valladolid.

DE MIGUEL, A., AMOROS, C. (2010): Teoría feminista de la Ilustración a la globalización, De la Ilustración al segundo sexo, Minerva Ediciones, Tome 1.

DEL POZO PÉREZ, M. (2012): “La orden europea de protección. Especial referencia a las víctimas de violencia de género”, Revista Europea de Derechos Fundamentales, No.19/1er semestre.

FIGUERUELO BURRIEZA, Á. (2013): “Igualdad y violencia de género en la Unión Europea después del Tratado de Lisboa”, en Violencia de Género e igualdad, una cuestión de derechos humanos, en Violencia, Género e Igualdad, Una cuestión de Derechos Humanos, Comares.

62 GÓMEZ SÁNCHEZ, Y. (2008): Derecho Constitucional Europeo: Derechos y libertades, Editorial Sanz y Torres, Madrid.

KELLY, L., LOWETT, J. (2009): Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries, Child and Woman Abuse Studies Unit.

HAGEMANN-WHITE, C., KELLY, L., ROMKENS, R. (2010): Feasibility study to assess the possibilities, opportunities and needs to standardize national legislation on violence against women, violence against children and sexual orientation violence, European Commission, Brussels.

HASSELBACHER, L. (2010): “State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection”, Northwestern Journal of International Human Rights, Northwestern University School of Law, Vol. 8, Issue 2.

INTERIGHTS (2009): European Court of Human Rights, application no. 33401/02 Nahide Opuz v. Turkey, Written Submissions.

LORENTE, M. (2009): Los hombres nuevos, Los miedos de siempre, Destino/Colección imago (Vol. 154), Barcelona.

NUÑO GÓMEZ, L. (2013): “Violencia y deshumanización de las mujeres: la gran sombra en la protección internacional de los Derechos Humanos”, Violencia de Género e igualdad, una cuestión de derechos humanos, Comares.



- OSBORNE, R. (2009): Apuntes sobre violencia de género, Ed. Bellaterra.
- PETERS, J. y WOLPER, A. (1995): Women's rights, Human rights, Psychology Press.
- TRUCHERO, J., ARNÁIZ, A. (2012): "Aproximación al Convenio Europeo de violencia contra las mujeres y violencia doméstica", en Revista Europea de Derechos Fundamentales, No. 19, 1er semestre, pp. 153.
- VARELA, N. (2012): La voz ignorada, Endebate.
- WAVE (2013): Country report 2012 Reality check on data collection and European services for women and children survivors of violence, a right for protection and support?, wave-office / Austrian women's shelter Network, Vienna.
- EUROPEAN COURT OF HUMAN RIGHTS (2012): A.A. and others v. Sweden
- EUROPEAN COURT OF HUMAN RIGHTS (1979): Airey v. Ireland
- EUROPEAN COURT OF HUMAN RIGHTS (2010): A. v. Croatia
- EUROPEAN COURT OF HUMAN RIGHTS (2005): A. T. v. Hungary
- EUROPEAN COURT OF HUMAN RIGHTS (1997): Aydin v. Turkey
- EUROPEAN COURT OF HUMAN RIGHTS (2008): Bevacqua and S. v. Bulgaria.
- EUROPEAN COURT OF HUMAN RIGHTS (2009): Branko Tomašić and others v. Croatia
- EUROPEAN COURT OF HUMAN RIGHTS (2013): Eremia and others v. Moldavian Republic
- EUROPEAN COURT OF HUMAN RIGHTS (2009): E.S. and others v. Slovakia
- EUROPEAN COURT OF HUMAN RIGHTS (2010): Hajduova v. Slovakia
- EUROPEAN COURT OF HUMAN RIGHTS (2012): Kaluczka v. Hungary
- EUROPEAN COURT OF HUMAN RIGHTS (2007): Kontrova v. Slovakia
- EUROPEAN COURT OF HUMAN RIGHTS (2008): Maslova and Nalbandov v. Russia
- EUROPEAN COURT OF HUMAN RIGHTS (2003): M.C. v. Bulgaria
- EUROPEAN COURT OF HUMAN RIGHTS (2009): Opuz v. Turkey
- EUROPEAN COURT OF HUMAN RIGHTS (2013): Valiuliene v. Lithuania
- EUROPEAN COURT OF HUMAN RIGHTS (1985): X. and Y. v. Netherlands

Explanatory report, Council of Europe Convention on preventing and combating violence against women and domestic violence, CM (2011)49 add final 7 April 2011.

General Recommendation No. 19, CEDAW Committee 11th period of sessions, 1992.

Integration of the human rights of women and the gender perspective: violence against women the due diligence standard as a tool for the elimination of violence against women, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, E/CN.4/2006/6, 20 January 2006.

Rec (2002)5 on protection of women against violence, Council of Europe, 30 April 2002.

Regulation (UE) No. 606/2013 of the European Parliament and Council of 12 June 2013, on mutual recognition of protection measures in civil matter.

Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, E/CN.4/1996/53.

Report of the Special Rapporteur on violence against women, its causes and consequences: Integration of the human rights of women and the gender perspective: violence against women the due diligence standard as a tool for the elimination of violence against women, Yakin Ertürk, E/CN.4/2006/61, 20 January 2006.

64

Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (2010), A/HRC/14/22 19 April 2010.

Review of the Implementation of the Beijing Platform of Action in the EU Member States: Violence against women, Victims Support, Main Findings, European Institute for Gender Equality, 2013.

UN Convention on Elimination of all forms of Violence against Women (1979).

Violence against women: an EU-wide survey, Main results, European Union Agency for Fundamental Rights, 2014.

3073th Employment, Social policy, Health and Consumer affairs council meeting, Brussels, 7 March 2011.

REFERENCES

¹ Recommendation n° 19 of CEDAW Committee.

² Idem, articles 1 y 2.

³ A/RES/48/104



States' duty to prevent and eliminate violence against women in the European Union

⁴ Idem, articles 1 y 2.

⁵ Declaration on Elimination of all forms of Violence against women, 85th plenary session, 20 th December 1993, Preamble.

⁶ Article 2: “(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;(b)Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;(c)Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

⁷ Which is a legal right protected by Article 8 of European Convention of Human Rights (CEDH):

⁸ NUÑO GÓMEZ, Laura, “Violencia y deshumanización de las mujeres: la gran sombra en la protección internacional de los Derechos Humanos”, in *Violencia de Género e igualdad, una cuestión de derechos humanos*, Comares, 2013.

⁹ Ending violence against woman: From words to Action, Study of the Secretary-General, 2006, pp. 90.

¹⁰ Violence against women: an EU-wide survey, Main results, European Union Agency for Fundamental Rights, p. 27.

¹¹ As evidenced by the Study of L. Kelly, J. Lowett, sexual violence showed that there is very low reporting rate of rape and 10 countries have low reporting rates of rape of less than 6 per 100,000, a further 10 have mid-range rates of between 6 and 10 per 100,000 and 6 have high reporting rates of more than 10 per 100,000. They also evidenced that rape has the lowest conviction rates for any crime and it has been falling in several countries between 2000 and 2009, while “attrition” in the course of investigations and prosecutions has risen. L. Kelly, J. Lowett, Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries, Child and Woman Abuse Studies Unit, 2009.

¹² See art 2 of Treaty of European Union.

¹³ TFEU, Annexes.

¹⁴ Equal economic independence for women and men; equal pay for work of equal value; equality in decision-making; dignity, integrity and ending gender-based violence; promoting gender equality beyond the EU; horizontal issues (gender roles, including the role of men, legislation and governance tools).

¹⁵ 5.3.2010 COM(2010)78, par. 4.

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strategy for equality between women and men 2010-2015, COM(2010) 491 final, Brussels, 21.9.2010.

¹⁷ European Pact for gender equality 2011-2020, 3073th EMPLOYMENT, SOCIAL POLICY, HEALTH AND CONSUMER AFFAIRS Council meeting Brussels, 7 March 2011.

¹⁸ Two other actions were: Mainstreaming gender in the EU policy of asylum and Publishing a report of men's health.

¹⁹ See: timetable annexed to the European Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme,

http://ec.europa.eu/justice_home/news/intro/doc/com_2010_171_en.pdf

- 20 Advisory Opinion on EU Strategy on Violence against Women and Girls, Division on Employment, Social Affairs and Equal Opportunities of the European Commission, December 2010.
- 21 Hagemann-White, Carol, Kelly, Liz, Romkens, Renee, Feasibility study to assess the possibilities, opportunities and needs to standardize national legislation on violence against women, violence against children and sexual orientation violence, European Commission, 2010.
- 22 Decision No 293/2000/EC of the European Parliament and of the Council of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women, see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0293:en:HTML>
- 23 While patriarchal ideology legitimates many manifestations of violence against women, like stalking and sexual harassment, it usually does not give license to abuse of children.
- 24 Feminist theory has criticized the process through which the Philosophers of Modernity deprived women from citizenship by their categorization as vulnerable and minor under the authority of their father or husband. See “Introducción” in De Miguel, Ana and Amoros, Celia, Teoría feminista de la Ilustración a la globalización, Tome 1, De la Ilustración al segundo sexo, Minerva Ediciones, 2010.
- 25 See http://ec.europa.eu/justice/funding/daphne3/multi-level_interactive_model/understanding_perpetration_start_unix.html
- 66 26 “The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime”. TFEU, article 83.
- 27 “To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.” TFEU, Article 82.2.
- 28 “The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.² For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification; (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation; (d) combating trafficking in persons, in particular women and children.”
- 29 Article 13 of the EU framework decision on the standing of victims in criminal proceedings urges the Member States to promote the involvement of victim support systems both for the initial reception of victims and for support and assistance thereafter.



States' duty to prevent and eliminate violence against women in the European Union

- 30 See <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0098+0+DOC+XML+V0//EN>
- 31 Paragraph. 11.
- 32 See: "Crónica de Legislación Europea", M^a Luisa Balaguer Callejón, in *Revista de Derecho Constitucional Europeo, La interacción constitucional entre la Unión Europea y los Estados miembros (I)*, n° 14, 2 semestre 2010, pp. 519.
- 33 See: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0127+0+DOC+XML+V0//EN>
- 34 "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonization of the laws and regulations of the Member States." TFEU, Article 84.
- 35 Doc. 6585/10.
- 36 Doc 8310/10.
- 37 Directive 2011/99/UE of European Order of Protection and Regulation (UE) N° 606/2013 on mutual recognition of measures of protection in civil matters.
- 38 "Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honor crimes'. Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimization, of intimidation and of retaliation connected with such violence".
- 39 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.
- 40 The answer given by Barroso to the on-line question made by an activist of End GFM European Campaign was quite eloquent about the priority given by the Commission to eradication of this human rights violation: "Europe is currently dealing with a financial crisis. There is another crisis which is costing Europe 33 billion euros every year (in each Council of Europe country), that of violence against women. Despite the commitments made by European Union institutions and member states to combat violence against women, little progress has been made. Any attempt to resuscitate an ailing economy and society cannot ignore the issue of violence against women. How do you propose to address this human rights crisis as you demand for a stronger Europe?" Barroso's response was the following: "Violence against women is a serious and dramatic issue. We have the EU Charter of Fundamental Rights. The EU is strong in defending those rights and fighting all forms of discrimination, including against women. Globally, we have a good role in this area. We are establishing networks and communication between national authorities to ensure work in this area." See <http://www.endfgm.eu/en/tracking-europes-response/european-union/european-commission/>
- 41 ALIJA FERNÁNDEZ, Ana Rosa, "La violencia doméstica contra las mujeres y el desarrollo de estándares normativos de derechos humanos en el marco del Consejo de Europa", in *Revista General de Derechos Europeo*, n° 24, 2011, pp.16.
- 42 Surprisingly, in *Bevacqua v. Bulgaria* (2008) the Court found that there was a violation of Article 8 but refused to assess a violation of Article 3.

- 43 Prior to the trial, Interights submitted to the Court an excellent paper on due diligence, see: European Court of Human Rights, application no. 33401/02 Hahide Opuz v. Turkey, written submissions of Interights.
- 44 One year before, the Court had refused to consider that the Bulgarian law was discriminatory as far as a woman victim of violence did not receive the same legal treatment as any other victim (*Bevacqua v. Bulgaria* (2008), as pointed out by Lee Hasselbacher, *op. cit.*, p.209.
- 45 “In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim” (paragraph 166) .
- 46 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (2010), A/HRC/14/22 19 April 2010, paragraph 79, pp. 32.
- 47 “The Court’s dismissal of the claim of pecuniary damages which was based on the deprivation of economic support from her mother; the failure to treat the applicant as her mother’s successor; the failure to compensate the applicant for material harm ensuing from the violation of her right not to be subject to inhuman or degrading treatment by her husband; and the non-recognition of other forms of reparation and the lack of guarantees of non-repetition and forward-looking recommendations” *Idem*, paragraph 81, pp.33.
- 48 “This Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately. Parties are encouraged to apply this Convention to all victims of domestic violence. Parties shall pay particular attention to women victims of gender-based violence in implementing the provisions of this Convention”.
- 68 49 “Parties shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere” (Article 4).
- 50 Javier Truchero and Amaya Arnáiz, “Aproximación al Convenio Europeo de violencia contra las mujeres y violencia doméstica”, in *Revista Europea de Derechos Fundamentales*, nº 19, 1st semestre 2012, pp. 153.
- 51 This vulnerability was evidenced including in the ECtHR case law, see: *A.A. v. Sweden* (2012).

