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**Tackling Gender-Based Discrimination and Gender-Based Violence.
A comparative perspective between Europe and Africa.**

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*The opinions expressed in this paper are those of the author and not those of the Dondena Centre,
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ABSTRACT

European Constitutions contain a generic principle of equality before the law and a correspondent non-discrimination clause that includes sex among other parameters, but they do not expressly mention women. African Constitutions, instead, often underline women's equal dignity and rights in an affirmative form. This research concerns the different approaches to the European legal framework (where European is intended as related to the Counsel of Europe's sphere of influence) and the African context. Due to the peculiar features of each legal system, it became necessary to adopt regional instruments in order to better enact the CEDAW and adapt its principles to the needs and characteristics of every framework. These regional instruments in their turn have influenced Constitutions and/or national legislations. This paper briefly recalls the CEDAW (and the "UN corpus") and reviews case law relevant for its implementation and analyze regional instruments' main peculiarities. Afterwards, the paper examines national Constitutions and legislation complying with such indications. In the end, there will be a focus on the transposal of the Istanbul Convention in Italy and some concluding considerations.

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INTRODUCTION

The present work on women's status will be developed, as far as possible, from the perspective of a comparison between the European legal framework (where European is intended as related to the Counsel of Europe's sphere of influence) and the African one. The selection of such two frameworks has been made after a deep examination of the main source used for this study, which is the UN Women's Global Constitutional Database.¹

In particular, the choice stems from the observation that the two scenarios in question seem to enhance women's rights in very different ways. A first glance at the constitutional wording is enough to reveal such different approaches.

European Constitutions often contain a generic principle of equality before the law and a correspondent non-discrimination clause that includes sex among other parameters, but they do not expressly mention women,² whereas African Constitutions mostly underline women's equal dignity and rights in an affirmative form.³

As will be clarified below, this work sets out to study such different models, learn their origins and impact on legislation, as well as their influence on the protection of women in terms of effectiveness.

Actually, if one wants to better understand the aforementioned difference and examines the legislation at all levels, he will find out that the status of women has been and still is a sensitive, complex, and long lasting issue, involving several legislative and non-legislative bodies. Discrimination against women is a phenomenon difficult to address because, especially when it turns into violence, it has many shades and it is influenced by many factors. This is the reason why the development of measures of contrast has been gradual and divided into many steps.

The issue has been faced at an international level namely through the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (hereinafter "CEDAW").⁴

Due to the peculiar features of each scenario⁵, soon it became necessary to adopt regional instruments in order to both better enact the CEDAW and adapt its principles to the needs and characteristics of every framework. Thus, in 2003 the African Union⁶ adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter "the Maputo Protocol"), which entered into force in 2005.⁷ Only in 2011 did the Council of Europe adopt its most important document

¹ Available at <http://constitutions.unwomen.org/en>.

² This is the prevalent approach, as proved for instance by the frameworks of Spain, France, Belarus, Austria, Moldova, Bulgaria, Estonia and other countries. Then there are two different approaches that can be adopted: one is to mention women directly in the general principle of equality, as happens in Germany, Portugal and Greece. The other is, we can say, a hybrid alternative, that is on the one hand the general principle of equality does not refer to women and equality is said to pertain to all citizens or individuals while on the other hand the Constitution contains provisions specifically meant for women. This is what happens in Italy, where art. 3 states a general principle of equality and in the meantime art. 37 specifically provides women with the same protection as men at work, art. 48 expressly provides them with the right to vote and art. 51 guarantees equal opportunity in the access to public functions. It emerges that equality is not a value pursued with strict approaches, that is either guaranteeing it only in general or touching all the matters that it might involve. Things are often much more blurred. However, the resort to a general equality clause seems to be the prevalent tendency within the European scenario, which is the reason why we decided to try to make this comparison. For further differences in constitutional drafting see again <http://constitutions.unwomen.org/en> together with UN Women, 'Guidance note. Women's human rights and national Constitutions', August 2012, <http://www.onu.cl/onu/wp-content/uploads/2016/06/Womens-Human-Rights-and-National-Constitutions-Guidance-Note.pdf>.

³ The paramount example of this are the recently reformed Constitutions of Kenya and Zimbabwe. See *infra* Sec. 4.1.

⁴ Adopted by the General Assembly on 18 December 1979 (A.G. Res. 34/180) and entered into force on 3 September 1981.

⁵ As a matter of fact, reservations have been made to the CEDAW. To have a complete picture of them see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en.

⁶ For information on the birth of the African Union see L.G. Franceschi, *The African Human Rights Judicial System: Streamlining Structures and Domestication Mechanisms Viewed from the Foreign Affairs Power Perspective* (Cambridge Scholars Publishing 2014).

⁷ The American continental scenario has its own regional covenant on the protection on women as well, which actually has been the very first regional instrument of this kind. It is called Interamerican Convention to Prevent, Prosecute and Eradicate Violence against Women. It was adopted at Belém do Pará in Brazil on 6 September 1994 and then entered into force on 3 May 1995. On the topic see L.P. Mejía, 'La

on the matter of the protection of women,⁸ that is the Convention on preventing and combating violence against women and domestic violence (hereinafter “the Istanbul Convention”), which came into force in 2014.⁹

These regional instruments in their turn have influenced – and will still influence - Constitutions and/or national legislations.

When it comes to women’s rights, a comparative perspective is actually hard to maintain, as discrimination and violence against women are phenomena that manifest in many ways and refuse clear-cut labels.

Hence, before starting the analysis, some definitions are necessary, as the following concepts will be recurring in this paper. In addition, an effort to give definitions is useful because the reciprocal interferences and overlaps between them will show how wide and hard to circumscribe the issues at stake are.

By “gender-based violence” (hereinafter also “violence against women” “g.b.v.”, “v.a.w.”), we refer to ‘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 deprivation of liberty’.¹⁰

By “domestic violence” we refer to ‘all acts of violence that occur in the family or domestic unit, but also those that occur between former or current spouses or partners, whether or not the perpetrator and the victim share the same residence’.¹¹ The episodes involving partners may be referred to as “intimate-partner violence” as well.

Of course, violence is not limited to the abovementioned notions,¹² nor is it the only mistreatment or humiliation women can be subjected to. In order to lay out this confused and indefinable initial context, we might say that, on the one hand, violence can take many forms, and, on the other hand, it constitutes only one of the possible ways of discriminating against women.¹³

Having made this clear, however, in order to make significant comparisons it is necessary to limit the topics to examine.

In our choice, we will take advantage of a selection made directly at a normative level: since the Istanbul Convention seems to adopt a relatively narrow perspective,¹⁴ we will focus our reasoning mostly on

Comisión Interamericana de mujeres y la Convención de Belém do Pará’ [*The Interamerican Commission on Women and the Belém do Pará Convention*], *Revista interamericana y europea de derechos humanos* (2012) p. 189 ff.

⁸ However, some important steps were already taken in the past. On the topic it is worth recalling Recommendation CM/Rec(2007)17 of the Committee of Ministers to member states on gender equality standards and mechanisms and Recommendation CM/Rec(2010)10 of the Committee of Ministers to member states on the role of women and men in conflict prevention and resolution and in peace building, available at www.coe.int. On the matter, see also Gender Equality Commission, ‘Council of Europe Gender Equality Glossary’ (2015) available as well on www.coe.int, last visited on 11 June 2017.

⁹ The complete text is available at www.coe.it. For an exhaustive analysis on the whole Convention see A. Di Stefano, ‘Violenza contro le donne e violenza domestica nella nuova Convenzione del Consiglio d’Europa’ [*Violence against women and domestic violence in the new Council of Europe Convention*], *6 Diritti Umani e Diritto internazionale* 1 (2012); A. Di Stefano (ed.), *Gender Issues and International Legal Standards. Contemporary Perspectives* (editpress 2010).

¹⁰ CEDAW Committee, Recommendation n. 19, § 6. This is the first definition of gender-based violence ever given, since, as we will see, the CEDAW does not expressly mention it. It is worth noting that the Recommendation immediately tries to widen the given notion, stating also, still at § 6: ‘Gender-based violence may breach specific provisions of the Convention, regardless to whether those provisions mention violence’. This is a demonstration of the indeterminate nature of the phenomenon in question and of the impossibility to address it from a unique perspective and with a univocal approach.

¹¹ Art. 3(b) of the Istanbul Convention.

¹² For instance, the abuses and harassments perpetrated at work and in general by public actors must not be forgotten, as well as the structural inequalities in terms of rights pertaining to man and women. On the matter see among others H. Pietila and J. Vickers, *Making Women Matter. The role of the United Nations* (Zed Books 1990); J. Kerr (ed.), *Ours by Right, Women’s Right as Human Rights* (Zed Books 1993).

¹³ In this sense, some argue that there is a “bidirectional” link between violence and inequality (i.e. discrimination). On the one hand, inequality stimulates violence, which is an expression and a consequence of inequality itself. On the other hand, violence contributes to increase inequality determining a real loop. See P. Degani, ‘Recenti orientamenti della comunità internazionale in materia di human security al femminile’ [*Recent policies of the international community on the matter of women and human security*], *1 Peace human rights* (2004) p. 91 at p. 110.

¹⁴ See *infra* Sec. 3.2.

domestic violence. Yet we will highlight the integrated approach that the Convention embraces.¹⁵ Moreover, as far as Africa is concerned, it has to be taken into account that the Maputo Protocol covers many more aspects¹⁶ than violence in itself, such as inheritance, citizenship, marriage, and above all sexual and reproductive rights.

So in our comparison, although privileging the topic of violence – and especially domestic violence - we will never set aside the broader concept of discrimination.

First of all, the intent is to show how the protection of women varies both from a vertical and a horizontal point of view. That is, the attempt is to examine the matter both moving down from the supranational to the national level and, in doing so, moving “back and forth” between the two continental frameworks. This operation aims to observe how the issue is characterized by uniform or at least homogeneous tendencies at international and supranational levels and then tends to acquire different features as one considers the local frameworks.

The second aim of this work is to try to look for answers to some questions, related to the effectiveness of the whole body of measures meant to protect women from violence. Do international covenants, Constitutions and laws actually make a difference in the enhancement of women’s rights? To what extent do they do so, that is, are they enough? Do different approaches, revealed by different constitutional wordings, imply different levels of protection? And, most of all, in case of affirmative answer, which is the best model?

Only a deep analysis of norms and case law at all levels can help us to understand the state of the art and can show its lights and shadows.

From this perspective, Section 1 illustrates the international framework that is CEDAW and “the UN *corpus*”. Section 2 deals with relevant case law (namely by the CEDAW Committee and the EC(t)HR, as well as some African cases). It is important to analyze case law before other norms, in order to observe how it played a very significant and propulsive role in facilitating the adoption of the abovementioned regional instruments. Some very recent paramount cases will be briefly recalled too.

Section 3 examines the Maputo Protocol and the Istanbul Convention, while Section 4 is about some national legislation (Constitutions and laws), applying the principles contained therein or in any case complying with such principles.

It has to be remarked that the outcome of the comparison between national legislations is unavoidably partial, because the implementation of neither the Maputo Protocol nor the Istanbul Convention at a national level is complete.

More precisely, as to the African scenario, the abovementioned examples of national legislation involve mostly the sub-Saharan zone because neither the Northern African countries, nor the East-African ones have ratified the Protocol.¹⁷ With specific regard to the European scenario and the Istanbul Convention instead, the dedicated body has not yet completed the very first evaluation procedure on its transposal, the results of which are expected only in 2019.

However, a comparative examination at national level is interesting and useful from the perspective of the enhancement of women’s rights, although providing fragmentary data. Therefore, for this specific part of the work, the studies of the European Institute of Gender Equality (EIGE),¹⁸ as well as the reports

¹⁵ Apart from domestic violence, the Convention stigmatizes various forms of violence as a result of the holistic approach it aims to adopt, covering the entire area from prevention to recovery, not forgetting criminalization of conducts. See *infra* Sec. 3.2.

¹⁶ See *infra* Sec. 3.1.

¹⁷ For a complete pictures about signatures, ratifications and reservations made to the Maputo Protocol, also in a visual form, see the recent work ‘Women’s rights in Africa’, a joint report elaborated in 2016 by the ACHPR and UN Women, available at <http://www.ohchr.org/Documents/Issues/Women/WRGS/WomensRightsinAfrica/>, last visited on 11 June 2017. Please note that the definitions of Northern and Eastern Africa may be not coincident with their geographical meaning: they are taken from the UN glossary as examined in the abovementioned paper.

¹⁸ It is important to underline that the EIGE is an institution interested in the research of commonalities and differences in legislative definitions within the European Union context, which is not the same thing as the Council of Europe one. Although resorting to its reports might result a little confusing in the light of the aims of this work, it seems however reasonable. In fact, lacking feedback on the overall implementation of the Istanbul Convention from the GREVIO, we do not have the means to make an all-encompassing comparison. However, since all the Member States of the EU are in the meantime States Parties of the Council of Europe, observing the evolution of the

of the African Commission on Human and Peoples' Rights (ACPHR) and UN Women's Global Constitutional Database are the main sources of the research, aimed at giving examples of best practices. In the light of the findings obtained from such sources, countries that went further in developing regional instruments or in complying with their provisions are picked as paramount cases, without the ambition of being exhaustive.

Section 5 focuses on the implementation of the Istanbul Convention in Italy, which signed it in 2011 and ratified it in 2013.

Concluding remarks will follow.

1. THE INTERNATIONAL LEGAL FRAMEWORK

In the last few decades, the international human rights law has been subject to significant developments from two points of view. On the one hand, we observe a progressive acknowledgement of the universal extent of human rights and a consequent trend to implement such rights in positive rules. On the other hand, correlatively, the acknowledgment in question leads to an ongoing specification and clarification of values demanding protection, so that brand new rights come into existence. In this sense, the attempt to embrace and consolidate a gender-based perspective – especially with regard to women – in the enforcement of human rights is a key passage. Not only does it contribute to the effectiveness of gender equality, but it also promotes the evolution of human rights law as a whole.¹⁹

As regards international regulations, the issue of violence against women is strictly linked to the notion of discrimination in general, for v.a.w. is intended as an obstacle to the total enforcement of gender equality (or, we can say, non-discrimination on grounds of sex). This link is likely to determine an overlap of perspectives. In fact, the non-discrimination approach often protects single individuals in specific contexts and does not face structural problems, as the inequality between men and women is.²⁰

On the one hand, it is undeniable that the development of women's rights in this light has allowed considering violence against women as a human rights-related problem. In fact, v.a.w. has gradually become a public policy issue and the separation between public and private spheres in approaching the phenomenon progressively vanished.²¹

European Union framework seems a good solution. As to the difference between the Council of Europe and the European Union, suffice it to say that the former is an international organization in Strasbourg which comprises 47 countries of Europe. It was set up to promote democracy and protect human rights and the rule of law in Europe. The latter instead is an organization of 28 Member States, bound by the Lisbon Treaty, that have delegated some of their sovereignty so that decisions on specific matters of joint interest can be made democratically at European level. No country has ever joined the EU without first belonging to the Council of Europe. For further information on the two organizations, their aims and their interactions see M. Kolb, *The European Union and the Council of Europe* (Palgrave Macmillan 2013). For information on the juridical role of agreements related to the EU and the EU framework see among others L. Daniele, 'Il diritto internazionale generale e gli accordi internazionali nel sistema delle fonti dell'Unione Europea' [*The global international law and the international agreements in the EU framework*], in L.F. Pace (ed.), *Nuove tendenze del diritto dell'Unione Europea dopo il Trattato di Lisbona* (Giuffrè 2012) p. 207 ff.

¹⁹ See P. Degani and R. Della Rocca, *Verso la fine del silenzio. Recenti sviluppi in tema di violenza maschile contro le donne, diritti umani e prassi operative* [*Towards the end of silence. Recent developments on male violence against women, human rights and operational policies*], (Cleup 2014) p. 15 ff. Correlatively, others say that human rights are a 'dynamic and tenacious construct' and that such a dynamism is due to the fact that 'the list of human rights has evolved, and will continue to change, in response to social and technological changes, the emergence of new techniques of repression, changing ideas of human dignity, the rise of new political forces, and even past human rights successes'. Respectively, C. Chinkin, 'Gender Inequality and International Human Rights Law', in A. Hurrell and N. Woods (eds), *Inequality, Globalization, and World Politics* (Oxford University Press 1999) p. 121, and J. Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2003) p. 58.

²⁰ However, it is true that classifying manifestations of violence against women as sex-based discrimination occurrences has allowed overcoming a gap in human rights law, that is the lack of an explicit prohibition of conducts amounting to violence against women in international covenants. This regardless to whether a legal definition of violence against women is expressly provided or not. In this sense see Degani and Della Rocca, *supra* n. 19.

²¹ This has much to do with the so-called "due diligence obligation" that falls upon States and that they sometimes fail to comply with, as we will see further below, especially when it comes to conducts taking place in the private sphere, such as domestic violence. See again Degani and Della Rocca, *supra* n. 19.

On the other hand, despite this positive outcome, the abovementioned overlap of perspectives remains. Having violence against women fall within the exclusive scope of discrimination may be a problem. This is because the concept of violence comprehends many conducts that can take place regardless of this dimension. In other words, such conducts may be considered as individual crimes regardless of the sociological and political context in which they occur, as remarked in some international case law.²² However, in the current international legal framework, as recalled, the reference to human rights when it comes to g.b.v. (namely violence against women) requires the existence of a link between the acts of violence and discrimination.²³

On these grounds, it comes as no surprise that the CEDAW, as anticipated,²⁴ does not contain a specific definition of g.b.v. or v.a.w., addressing instead discrimination.

More precisely, art. 1 of the CEDAW provides a definition of discrimination against women,²⁵ not including gender, g.b.v., v.a.w. in general or domestic violence. Art. 2 condemns discrimination against women in all its forms and mainly requires States to: insert the principle of equality between men and women in national Constitutions and relevant laws and ensure its enforcement; apply sanctions if needed; repeal all national legislation that somehow legitimizes discrimination against women, as well as customary law of the same kind.²⁶ Art. 5 again refers to customary law, requiring the elimination of all practices grounded on the idea of the superiority or inferiority of either sex.²⁷ Such articles clearly exemplify how the CEDAW aims to contrast not quite g.b.v., but discrimination, of which g.b.v. is just a manifestation.²⁸ Therefore, the CEDAW adopts an emancipatory perspective, in order to allow women to enjoy rights that until then pertained only to men, failing to individuate a specific sphere of rights

²² ICTY 22 February 2001, Case No IT-96-23. T and IT-96-23/1. T, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*. In this case, the indicted people's lawyers argued that rape was an individual fact and not a fact inserted in a specific political context.

²³ This feature does not occur in any other field of international human rights law. The CEDAW is often compared with the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). While the latter at art. 4 expressly prohibits violence ('Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'), the CEDAW, as we will better see below, punishes discrimination. In other words, the CEDAW prohibits the cause, while the CERD prohibits the single conducts that descend as effects from such a cause. In this sense see Degani and Della Rocca, *supra* n. 19 and A. Edwards, *Violence against Women under International Human Rights Law*, (Cambridge University Press 2011). See also P. Degani, *supra* n. 13.

²⁴ Compare n. 10 *supra*.

²⁵ Art. 1: 'For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

²⁶ Art. 2: 'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women'.

²⁷ Art. 5: 'States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases'. See also art. 10 (c), which requires: 'the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods'.

²⁸ Compare n. 13 *supra*.

pertaining to women as such. In this sense, there is no mention within the CEDAW of an express women's right to live free from violence.²⁹

Owing its importance at an international level to the fact of being the first treaty that ever designed a global notion of discrimination (especially overcoming the public-private dichotomy³⁰), the CEDAW does not manage to face the phenomenon of v.a.w. adequately.³¹

To overcome the normative gap in question, during the Third World Conference on Women held in Nairobi in 1985 a dedicated Plan of Action was adopted.³² The transversal nature of v.a.w. in the context of family and society was acknowledged and some measures were suggested, but the inertia of the States emerged clearly.

A great role was then played by the CEDAW Committee, operating since 1981, the prerogatives of which are described in artt. from 17 to 22 of the CEDAW.³³ Its main functions are: adopting recommendations in order to interpret the CEDAW and fill its gaps, monitoring the compliance state of art through the mechanism of periodical reports and, since 2000,³⁴ receiving complaints from alleged victims of a breach of CEDAW who have exhausted domestic remedies.

In fact, in 1989 the Committee adopted Recommendation n. 12,³⁵ through which, recalling artt. 2, 5, 11, 12 and 16 of the Convention, it asked national governments to take appropriate measures in order to protect women from every kind of violence, as well as to include in their periodical reports information on such legislative or operational measures.³⁶ In addition, the Committee asked States Parties to provide support services to victims of violence and submit surveys on the phenomenon.

Recommendation n. 12 was followed three years later by Recommendation n. 19,³⁷ which approached the issue in a more substantive way. Above all, for the first time it provided a definition of v.a.w., as anticipated,³⁸ describing it as '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 deprivation of liberty'. As to this provision, it is significant to remember that Recommendation n. 19 was adopted after, in 1991, the Economic and Social Council of

²⁹ Several articles actually refer to particular kinds of violence, such as art. 6 (human trafficking and prostitution) and art. 16 (forced marriage). In general, however, many provisions have an only programmatic meaning, in the sense that, unlike other Conventions, the CEDAW does not provide concrete examples of how to prevent violence and discriminatory stereotypes. See Counsel of Europe, 'The Istanbul Convention and the CEDAW framework: a comparison of measures to prevent and combat violence against women', 2014, available on www.rm.coe.int, last visited on 25 February 2017.

³⁰ P. Degani and R. Della Rocca, *supra* n. 19, p. 36. See in particular the aforementioned artt. 2 lett. e) and 16. Not only are the States Parties obliged to take action when public actors are involved, but they are also in respect of people and organizations of every kind. The protection of women touches both the public and the private sphere, referring to equality even in the familiar context. Other treaties, such as the ICCPR and the UDHR, do refer to family in the same sense, that is as a fundamental unit that deserves to enjoy protection from the State.

³¹ Actually this is not the only weakness shown by the CEDAW, in the light of the high number of reservations made to the treaty, raising doubts as to whether or not they really are willing to comply with the obligations therein. The main reason why State Parties make reservations is the clash between the emancipatory spirit of the treaty and women's inferior position under religious and customary norms. On the matter of reservations to the CEDAW see R. Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women', 30 *Va. J. Int'l L.* (1990) p. 642 ff.; B. Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women', 85 *Amer. J. Int'l L.* (1991) p. 281 ff; E. Lijnzaad, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women', in E. Lijnzaad, *Reservations to Un-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff 1994) p. 298 at p. 371.

³² See U.N. New York, 'Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace', 15-26 July 1985, available at <http://www.un.org/documents/ga/conf177/nfls/thirdwcw1985-nfls.htm>, last visited on 25 February 2017.

³³ On the matter see mainly A. Byrnes, 'The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women', 14 *YJIL* 1 (1989).

³⁴ When the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women entered into force.

³⁵ CEDAW Committee, 'General recommendation No. 12: Violence against women', Eighth Session, 1989, available at www.tbininternet.ohchr.org, last visited on 25 February 2017.

³⁶ Actually this monitoring mechanism is quite ineffective, due to the delay of States Parties to deliver their periodical reports.

³⁷ CEDAW Committee, 'General recommendation No. 19: Violence against women', Eleventh Session, 1992, available at www.tbininternet.ohchr.org, last visited on 25 February 2017.

³⁸ Compare *supra* p. 1.

the UN acknowledged the need to elaborate an international instrument specifically meant for v.a.w. However, the political intents were weak, implying the risk of the lack of an adequate number of ratifications to stress the importance of the issue, as well as the lack of consensus on a univocal definition of g.b.v. That is the reason why a more “soft” act was indicated, even though the ability of a recommendation to bind States’ approach to v.a.w. raised doubts.³⁹

The problem related to the binding effect can be solved considering that the Recommendation promptly leads back to the CEDAW (the binding effect of which is not under discussion). In fact, the cited paragraph 6 expressly clarifies that v.a.w. amounts to a form of discrimination against women. Such an interpretation manages to turn the CEDAW into a treaty that contrasts not only discrimination but also violence, both as a form of discrimination and as a trigger for discrimination in general.⁴⁰

Unlike the CEDAW, Recommendation n. 19 mentions different kinds of v.a.w. (although not providing a specific definition of each type), as family violence and abuse, forced marriage, female gender mutilation, sexual exploitation of women, rape, sexual harassment, compulsory sterilization and abortion, battering and coercion.⁴¹ It is stated that such forms of violence contribute to either maintain women in inferior roles or to see women as sexual objects rather than people, promoting the idea of difference as a “minus” in respect of men.⁴²

Another important aspect of Recommendation n. 19 is that for the first time it has elaborated the concept of “due diligence”, more precisely “duty of due diligence”. The notion in question is related to the scope of States’ liability under international law. As a premise, pursuant to paragraph 8, the conducts perpetrated by public actors amount not only to a breach of the CEDAW but also to a violation of the general principles of international human rights law.⁴³

Yet, the Recommendation goes beyond this, as paragraph 9 clarifies that discriminatory conducts are not limited to public subjects’ actions or to actions committed on behalf of public authorities. That is, States may be held liable for actions committed by private actors in case they fail to use due diligence to: prevent such conducts; prosecute such crimes; adequately punish such acts or omissions; compensate victims.⁴⁴ The standard of due diligence is essential to understand the extent of States’ obligations and evaluate their acts or omissions, that is one of the main aims of the CEDAW Committee.⁴⁵

Another important international document is the Declaration on the Elimination of Violence against Women (“DEVAW”) of 1993.⁴⁶

It represents a further elaboration of the cited Recommendations, but its non-binding nature limits its effects. Like Recommendation n. 19, it refers to different forms of v.a.w. listing many specific rights to protect, like right to life, equality, freedom, security and equal protection before the law.⁴⁷ Moreover, it

³⁹ See Degani and Della Rocca, *supra* n. 19, p. 45.

⁴⁰ See A. Edwards, *supra* n. 23. According to the Author this is a deep transformation of the original nature of the CEDAW.

⁴¹ See Counsel of Europe, ‘The Istanbul Convention and the CEDAW framework: a comparison of measures to prevent and combat violence against women’, *supra* n. 29.

⁴² See P. Degani and R. Della Rocca, *supra* n. 19, p. 46.

⁴³ Recommendation n. 19, § 8: ‘The Convention applies to violence perpetrated by public authorities. Such acts of violence may breach that State’s obligations under general international human rights law and under other conventions, in addition to breaching this Convention’.

⁴⁴ Recommendation n. 19, § 9: ‘It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on States Parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation’.

⁴⁵ On the matter of due diligence see, among others A. Byrnes and E. Bath, ‘Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women— Recent Developments’, 8 *Human Rights Law Review* 3 (2008) p. 517 at p. 533.

⁴⁶ A/Res/48/104, United Nations, Plenary Session of 20 December 1993.

⁴⁷ Art. 3: ‘Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic social, cultural, civil or any other field. These rights include, inter alia: (a) The right to life; (b) The right to equality; (c) The right to liberty and security of person (d) The right to equal protection under the law; (e) The right to be free from all forms of discrimination; (f) The right to the highest standard attainable of physical and mental health; (g) The right to just and favourable conditions of work; (h) The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment’.

charges States with the obligation of due diligence.⁴⁸ In addition, another similarity to the aforementioned texts is that the DEVAW still does not define freedom from violence as an autonomous human right. However, the DEVAW also has a peculiarity: it identifies violence as a means of social control and coercion that allows maintaining women in a position of inferiority both within a couple and in society, because of unbalanced gender roles. In the Preamble, v.a.w. is explicitly acknowledged as a manifestation of the historically unequal distribution of power between men and women.⁴⁹ In other words, for the first time the DEVAW faces v.a.w. making express reference to the notion of “power”, that is it abandons the general perspective of the relation “State-individual liberties” to privilege the more specific one “men-women”.⁵⁰

2. RELEVANT CASE LAW: THE CEDAW COMMITTEE, THE EC(T)HR AND SOME AFRICAN CASES

2.1. THE CEDAW COMMITTEE

An important contribution to the gradual implementation of the CEDAW comes from several jurisdictional bodies. The most important is undoubtedly the CEDAW Committee, that has elaborated the concrete content of the obligation of due diligence upon States in the first place. In particular, the interpretational activity of the Committee has been very significant in respect of episodes of violence perpetrated by private actors emotionally linked to victims. This work will examine the cases *A.T. v. Hungary*,⁵¹ *Goecke v. Austria*,⁵² and *Yldrim v. Austria*,⁵³ as they are all paramount cases that deal with the issue of domestic violence.⁵⁴

However, the scenario faced by the Committee has been very heterogeneous and the principle drawn from it has always been the same. Not only the States Parties to the CEDAW are liable for public actors’ conducts (that they must prevent, prosecute and punish), but also, they must take positive steps in order to ensure potential victims adequate protection from violence perpetrated by private subjects.⁵⁵

In *A.T.* the applicant was a woman repeatedly subjected to domestic violence episodes which resulted in several hospitalizations. Ultimately, her husband threatened to kill her and rape the children. Hence, the applicant attempted to obtain a restraining order against him, which she was denied, therefore she changed the locks of the family house to prevent him from gaining access and filed a motion for injunctive relief for her exclusive right to the apartment. The Regional Court, however, ruled in favour of the husband, stating that he had a property-based right to return and use their apartment. She then resorted to the Committee to request the introduction of adequate and immediate protection for victims of domestic violence in Hungary, as well as effective interim measures.

The Committee held that Hungary’s domestic violence case law was rooted in sex-based stereotypes, which constituted a violation of the State’s Article 2 obligation to facilitate equality on grounds of sex.

⁴⁸ See art. 4 of the DEVAW.

⁴⁹ [...] Recognizing 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 [...].

⁵⁰ For a wide comment on the contents of the DEVAW, see among others H. Charlesworth, ‘The UN Declaration on Violence Against Women’, 17 *Social Justice* (1994) p. 53 at p. 70.

⁵¹ CEDAW 26 January 2005, Communication No. 2/2003, *A.T. v. Hungary*.

⁵² CEDAW 6 August 2007, Communication No. 5/2005, *Goecke v. Austria*.

⁵³ CEDAW 1 October 2007, Communication No. 6/2005, *Yldrim v. Austria*.

⁵⁴ There is also, among others, the case *N.S.F. v. United Kingdom*, but it is less significant because it is not a decision on the merits.

⁵⁵ For other cases on several matters such as forced sterilization, right to asylum due to threats of domestic violence, right to asylum due to conflicts, rape, sexual exploitation, sexual harassment in detention and so on see Open Society Justice Initiative, ‘Case Digests. UN Committee on the Elimination of All Forms of Discrimination against Women (2004 - 2012)’, June 2013, available at <https://opcedaw.files.wordpress.com/2012/06/open-society-justice-initiative-op-cedaw-digest-2012.pdf>, last visited on 3 March 2017.

Moreover, Hungary's lack of specific legislation to contrast domestic violence amounted to a violation of both art. 5 – that obliges States to remove prejudices and customs stemming from female inferiority – and art. 16 of the CEDAW – that obliges States to end discrimination against women in matters relating to marriage and the family.⁵⁶ Consequently, the Committee recommended that the State 'take immediate and effective measures to guarantee the physical and mental integrity of [the applicant] and her family.'⁵⁷ It also instructed Hungary to enact domestic and sexual violence legislation, and allow victims to apply for restraining and exclusion orders, which forbid the abuser from entering or occupying the family home. This is a first concrete example of the aforementioned principle according to which even the inertia of States in taking positive measures to combat private crimes may constitute a breach of the CEDAW. *Goecke* and *Yldrim* can be analyzed together as they are similar cases. Both the stories of violence originating the complaints ended with the death of the involved women and both the cases were brought to the attention of the Committee by NGOs (the Vienna intervention Centre Against Domestic Violence and the Association for Women Access to Justice) on behalf of the victims' heirs. In both cases, the perpetrators were so dangerous that they were subject to reiterated prohibition-to-return orders; however, there was a refusal to detain them. In both cases, the abusers were ultimately able to kill their wives, and this happened even though the victims made positive efforts to safeguard their integrity and even though the police and the authorities knew (or should have known) about their critical situation. The Committee found the State's failure to respond effectively to the pleas to constitute a breach of its obligations to protect the victim under Articles 1, 2 and 3 of the CEDAW. It also held that the perpetrator's rights - including the presumption of innocence, right to private life, and right to personal liberty - should not supersede the woman's human rights to life and to physical and mental integrity. More precisely, by allowing the perpetrator's rights to supersede the victim's right to life and to physical and mental integrity, Austrian law enforcement violated its obligations under Article 2 to end sex-based discrimination through appropriate legislation, and its Article 3 duty to guarantee women's equal access to human rights. In the end, the Committee recommended enhanced training of, and coordination amongst, the State's law enforcement and judicial officers, to ensure that all levels of the national criminal justice system worked together to protect victims of sex-based violence.

Through these and other cases it became clearer and clearer that States can be held liable for inertial and negligent behaviors. States' positive measures may deal with regulating private actors' activities, providing victims with many resources, such as dedicated phone lines and health-care services, consulting, legal assistance and financial aid. That is, States Parties do effectively comply with their due diligence obligations only if they adopt an integrated approach in the fight against v.a.w.

2.2. THE EC(T)HR

With regard to the evolution of the European framework on v.a.w., the EC(t)HR has been playing an important role. In fact, in the ECHR there is no explicit reference to the element of gender as a potential trigger of discrimination and violence, therefore the Court makes creative efforts to adapt the existing provisions to the protection of women.⁵⁸ Correlatively, the fact that the Court sometimes hesitates to totally embrace a gender-based perspective has stimulated the adoption of the Istanbul Convention, allowing the introduction of a specific covenant addressing v.a.w. in the CoE context.⁵⁹

As done for the CEDAW Committee's case law, the following analysis mainly shows the evolution of the reasoning on domestic violence. Some observe that the Court's precedents on the topic are scarce. More precisely, some authors note that while the Court has dealt with cases in which women were victims of State violence, it has rarely addressed situations in which the perpetrators were non-state actors, such

⁵⁶ Compare n. 27 *supra*.

⁵⁷ *A.T. v. Hungary*, *supra* n. 51, § 9.6.

⁵⁸ See A. Mowbray, 'The Creativity of the European Court of Human Rights', 5 *Human Rights Law Review* 1 (2005) p. 57 at p. 79.

⁵⁹ See A. Viviani, 'La violenza contro le donne nell'interpretazione della Corte di Strasburgo' [Violence against women in the interpretation of the Strasbourg Court], 4 *Diritti umani e diritto internazionale* (2010) p. 412 at p. 422.

as spouses, partners, or family members. In this sense, they also praise the Court's effort to take a step further, consistently trying to apply the principle of due diligence in the same way as the CEDAW Committee.⁶⁰ The most important cases to remember in order to follow this evolutional path are *Airey v. Ireland*,⁶¹ *Kontrovà v. Slovakia*⁶² *Bevacqua and S. v. Bulgaria*,⁶³ *Opuz v. Turkey*,⁶⁴ *A. v. Croatia*⁶⁵ and the very recent *Talpis v. Italy* case,⁶⁶ the judgement on which was delivered by the Chamber⁶⁷ on 2 March 2017. An exhaustive exam of the Court's case law (that is on topics other than domestic violence) would fall outside of the scope of this work; however, it is certainly important to underline that in the fight of v.a.w. judges do have made "creative" efforts in other fields than domestic violence, such as rape⁶⁸ and human trafficking.⁶⁹ The aspect that all cases, although pertaining to different types of violence, have in common

⁶⁰ See among others T. Abdel-Monem, 'Opuz v. Turkey: Europe's Landmark Judgment on Violence against Women', 17 *Human Rights Brief* 1 (2009) p. 29 at p. 33.

⁶¹ EC(t)HR 9 October 1979, Application No. 6289/73, *Airey v. Ireland*.

⁶² EC(t)HR 31 May 2007, Application No. 7510/04, *Kontrovà v. Slovakia*.

⁶³ EC(t)HR 12 June 2008, Application No. 71127/01, *Bevacqua and S. v. Bulgaria*.

⁶⁴ EC(t)HR 9 June 2009, Application No. 33401/02, *Opuz v. Turkey*.

⁶⁵ EC(t)HR 14 October 2010, Application No. 55164/08, *A. v. Croatia*.

⁶⁶ EC(t)HR 2 March 2017, Application No. 41237/14, *Talpis v. Italy*.

⁶⁷ Under Articles 43 and 44 of the ECHR, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution.

⁶⁸ The issues raised in rape cases are somehow comparable to those typical of domestic violence, as even in this case the Court has affirmed the existence of positive obligations upon States. First of all, it is worth recalling the case of *Aydin v. Turkey* of 25 September 1997: it was a case of State violence, Ms. Aydin was a detainee who was raped in jail. More precisely the applicant complained, apart from the lack of accuracy in the investigations on the alleged sexual violence, about being subject to a medical exam carried out by non-specialized professionals. The peculiarity of the case is that for the first time (in spite of following "ups and downs") the Court qualified rape in jail as torture under art. 3 of the ECHR, especially taking into account the weakness of the victim. In addition, the Court held a violation of article 13 (right to an effective remedy) for the failures of the State in the inquiry and medical examination. In other words, in such cases States' duty to investigate is particularly compelling, also determining the necessity of the intervention of specialized doctors (§ 107). See, among others I. Radacic, 'Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the State's Obligations', *Human Rights Law Review* 3 (2008) p. 357 at p. 375. The Court has remained on this path applying the notion of art. 3 to rapes perpetrated by non-State actors in the case *M.C. v. Bulgaria* of 4 December 1998. It held that rape infringes not only the right to personal integrity (both physical and psychological) as guaranteed by article 3, but also the right to autonomy as a component of the right to respect for private life as guaranteed by article 8. In addition, the notion of rape was redefined on the grounds of lack of consent instead of force. Finally, the Court "concretized" the duty of due diligence by ruling that 'the member States' positive obligations under articles 3 and 8 of the Convention must be seen as requiring the criminalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim' (§ 166). That is, the Court has clarified the scope of the positive duties of States, which are not limited to putting in place the necessary measures, in the form of criminal laws proscribing rape, but extend to the effective implementation of those measures to secure the relevant rights. This is similar to the reasoning of the CEDAW Committee in the cases *Goecke* and *Yıldırım* analyzed above. See among others J. Conaghan, 'Extending the reach of human rights to encompass victims of rape: M.C. v. Bulgaria', 13 *Fem. L.S.* (2005) p. 145 at p. 157 and P. Leach, 'Positive Obligations from Strasbourg – Where do the Boundaries Lie?', 15 *I. Bull.* (2006) p. 123 at. 126.

Two other cases worth mentioning are *C.R. v. United Kingdom* and *S.W. v. United Kingdom* of 22 November 1995, even if they are quite different from the other case law of the Court. The interesting feature is that such cases would meet all the requirements to be dealt with as common domestic violence cases, but they have been brought before the Court by the perpetrators and not by the victims. The applicants, who had been convicted for raping their wives, argued a breach of art. 7 of the ECHR. More precisely, they claimed that forcing their wives to engage in sexual intercourse could not be considered as rape, since it was an established rule of common law that, in getting married, a woman was deemed to have consented once and for all to intercourse with her husband. Thus, the removal of the marital rape exemption by the domestic courts constituted a violation of their rights under article 7 of the Convention, the right against retrospective criminal liability. In declaring that the decision of the domestic Courts was compliant with the purpose of art. 7 of the ECHR, the Court completely delegitimized the resort to the so-called "marital exemption". See P. Ghandhi and J. James, 'Marital rape and retrospectivity – The human rights dimensions at Strasbourg. CR v. UK and SW v. UK', 9 *CFLQ* 1 (1997) p. 17 at p. 31.

⁶⁹ It is necessary to recall the landmark cases of *Siladin v. France* of 26 July 2005 and of *Rantsev v. Cyprus and Russia* of 7 January 2010. In *Siladin*, the Court declared for the first time the existence of positive obligations under article 4 (prohibition of slavery) and *Rantsev* is the first judgment concerning cross border human trafficking in Europe, also dealing with the application of article 4 to the field of gender-based violence. *Siladin* can be defined as a case of domestic servitude as it involved a girl who was kept by a French family as a real servant. In particular, she was brought to France with the promise of regularizing her immigration status and arranging for her education, but she was

is the attempt to define the scope of positive obligations lying upon States, in the idea that the law should go beyond mere deterrence and act as both an effective deterrent and a punishment.

As to domestic violence, the first step made by the Court is the acknowledgement that the protection of family and private life under art. 8 of the ECHR is not only a matter of “privacy” (intended as the absence of State interference in private relationships). In fact, it has also a “positive counterpart”, that is States have to take affirmative measures to allow individuals enjoy their private life. The chance to define the extent to which States should intervene in a domestic relationship – without excessively interfering in private affairs – came with the case *Airey v. Ireland*.⁷⁰

Ms. Airey was subjected to various mistreatments by her husband and wanted to divorce him. However, because of her low incomes she could not hire an attorney to represent her in divorce proceedings. Therefore, she brought the case before the EC(t)HR, arguing that the Irish government’s failure to assure her access to legal proceedings and enable her to seek divorce amounted to a breach of art. 8. The Court ruled in her favour noting that, as said, not only does art. 8 prevent States from interfering with individuals’ privacy, but also gives rise to a positive obligation upon States to safeguard the ability of the very same individuals to enjoy their private lives. In the case in question, Airey’s right to enjoy respect for her private life depended on her ability to divorce her husband. As a result, Ireland’s failure to make family law legal services available to her effectively violated art. 8.

The reasoning just described has been confirmed in subsequent cases, namely *Bevacqua and S. v. Bulgaria*.⁷¹ Again, Ms. Bevacqua sought divorce from her husband but in addition (unlike Airey) she wanted custody of her child. She claimed that Bulgaria failed to adequately protect her from her husband or initiate proper legal proceedings with due diligence. While again recognizing that the primary purpose of Article 8 was to prevent undue State intrusion into private life, the Court added that protecting private and family life might imply ‘a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals’.⁷² The Court enriched the reasoning by specifying that such a duty arises in particular when it comes to the protection of ‘vulnerable individuals’.⁷³

Since Bulgarian domestic Courts dismissed Bevacqua’s claims for protection, the EC(t)HR found Bulgaria liable for the violation of art. 8.

A step further has been taken in *Kontrovà v. Slovakia*.⁷⁴ In fact, the Court not only reaffirmed that States may have to comply with positive obligations when private matters are at stake, but also univocally established when the duty to take action comes to existence.

deprived of her liberty and carried out forced labour for years for the couple against her will, receiving no remuneration. The Court recalled its case law on positive obligations grounded on art. 3 and 8 of the ECHR and linked art. 4 to those, stating that it entails a core value of democratic countries and that its prohibition admits no derogation. Thus, art. 4 gives rise to positive obligations on States, consisting in the adoption and effective implementation of criminal-law provisions making slavery and servitude a punishable offence. France was convicted for failing to comply with such an obligation. This case is special because it is not a situation of “pure” violence. Nevertheless, it falls within the case law that articulates the scope and content of the concept of positive obligations for the protection of women. In *Rantsev*, a young Russian girl who arrived to Cyprus with an artists’ visa was forced to prostitute herself and eventually died in unclear circumstances. Among other violations, the Court found that both Cyprus and Russia breached art. 4 of the ECHR. On the one hand, Cyprus failed to provide appropriate normative and administrative instruments to contrast human trafficking (as a result of the existing artists’ visas regime), as well as the Cyprian police failed to protect Miss Rantseva from the deprivation of liberty, despite having clear signals that the girl was involved in trafficking activities. On the other hand, Russia was liable for an indirect and procedural violation of art. 4, because it did not manage to clarify the circumstances of the girl’s recruitment by the traffickers. See among others H. Cullen, ‘Siliadin v. France: Positive obligations under Article 4 of the European Convention on Human Rights’, 6 *Hum. Rts. L. Rev.* 3 (2006) p. 585 at p. 592 and A. Nolan, ‘Trafficking as a ECHR violation – A crucial European Rights law development’, 10 January 2010, available on www.humanrights.ie/international-law/international-human-rights/trafficking-as-an-echr-violation-a-crucial-european-human-rights-law-development/, last visited on 11 March 2017.

⁷⁰ Compare n. 61 *supra*.

⁷¹ Compare n. 63 *supra*. Despite the chronological profile, it may well be analyzed after *Airey*, being very similar to it.

⁷² *Bevacqua and S. v. Bulgaria*, *supra* n. 63, § 65.

⁷³ Id. § 64.

⁷⁴ Compare n. 62 *supra*.

Ms. *Kontrovà* alleged that she had suffered years of physical and emotional abuse by her husband, including a beating with an electric cable that left her unable to work for a week.⁷⁵ After her husband threatened to kill himself and her children, she repeatedly asked the local police for help, obtaining no significant intervention. Ultimately, the man did actually kill their children, after which she filed a complaint before the EC(t)HR. The Court held Slovakia liable under artt. 2 (right to life) and 8 of the ECHR for failing to adequately intervene. The core principle of the decision – which is also the reason why this ruling is a step forward in respect of the aforementioned ones – is the following. For a positive obligation to arise, two things have to be ascertained. First, it has to be established that the 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. Second, it has to be proved that, despite this awareness, they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁷⁶ This is how the scrutiny to determine whether a positive obligation to act lays upon States is structured. The line of precedents was thus reinforced, clarifying that state authorities do in fact have positive obligations to intervene within the private sphere in situations of clear and real danger to specific individuals.

Hence, *Airey* and *Beracqua* acknowledged the existence of positive obligations in the first place, and explained their scope, while *Kontrovà* made the moment when they raise clear.

All these cases paved the way for *Opuz v. Turkey*,⁷⁷ that can be considered a landmark ruling for more than one reason.⁷⁸ Firstly, it has been the first case in which the Court has declared that a situation of domestic violence amounted to a breach of art. 3 of the ECHR (in other words it amounted to torture). Secondly, for the first time the Court has generalized its reasoning, mentioning not simply domestic violence, but expressly violence against women (also referring to the CEDAW). Thirdly (and correlatively), the EC(t)HR has tried to address v.a.w. as a structural problem, which it is, stemming from the imbalance of powers between men and women. In this sense, it held that the systematic failure to comply with the aforementioned positive obligations constitutes a violation of art. 14 of the ECHR (prohibition of discrimination).

The facts of the case are very similar to *Kontrovà*: Nahide Opuz was married to a violent man who repeatedly subjected her – and her mother and sister – to various physical and emotional abuses. Consequently, numerous charges were filed against the man, but some were dismissed while others resulted in nothing due to lack of evidence. The cycle of violence continued and, after repeated threats of death by her husband, Opuz filed for divorce and requested police protection. He was put under trial by the local prosecutor and placed in detention. Afterwards, Opuz and her mother withdrew their complaints out of fear of retaliation. Despite the withdrawal, the man was convicted in first instance due to the seriousness of the situation. He was sentenced to three months' imprisonment but the sentence was then reduced to a mere fine. He was then fined for a knife assault after stabbing his wife seven times and kept threatening her without any further charges being filed. The violence came to a climax when Opuz's mother attempted to move to another community. The man confronted her, and in plain view of a witness, took out a gun and shot her. She died instantly. He was charged with murder and sentenced to life in prison. However, the sentence was reduced due to his good conduct and, pending appeal, he was released.

In front of the ineffectiveness of criminal justice, Opuz ultimately brought the case before the EC(t)HR. She alleged that the Turkish government violated artt. 2 and 3 of the ECHR for the murder of her mother and her own anguish and suffering, respectively. In addition, she also argued a violation of art. 14 on the grounds that the States' ineffective attempts to protect her and her mother reflected widespread gender discrimination in Turkish legal institutions and Turkish society in general. As anticipated, the Court ruled in her favour under all profiles. Regarding art. 2, the Court reaffirmed the scrutiny elaborated in *Kontrova*,

⁷⁵ *Kontrovà v. Slovakia*, *supra* n. 62, § 8.

⁷⁶ Id. § 50.

⁷⁷ Compare n. 64 *supra*.

⁷⁸ See T. Abdel-Moneim, *supra* n. 60.

identifying a duty to intervene insofar as the authorities knew or should have known about the risks for the victim's life.⁷⁹ With reference to art. 3, the Court held that Opuz's treatment actually rose to the level of torture or inhuman treatment, especially considering 'the vulnerable situation of women in south-east Turkey'.⁸⁰ In regard to art. 14, instead, the Court recalled the international framework on v.a.w.⁸¹ and observed that 'the State's failure to protect women against domestic violence breaches their right to equal protection under the law' and that 'this failure does not need to be intentional'.⁸² The choice to underline the irrelevance of intentionality is linked to the fact that, as anticipated, the Court recognized that domestic violence against women is a systemic problem reflecting a fundamental imbalance of power. In other words, it recognized that, although individual acts of violence within the private sphere can be attributed to specific persons, violence against women is generally perpetuated through male domination of judicial and law enforcement institutions.⁸³ It is in this perspective that the Court's judgment places a strong burden on States to protect women from domestic violence, affirming already known principles in a more all-encompassing way.

In this context, the subsequent case of *A. v. Croatia*⁸⁴ presents controversial aspects and some legal scholars consider it a step back in the pace set by the Court.⁸⁵

The victim's ex-husband (suffering from mental disorder), who had been injuring and abusing her for years, tormented her. Ultimately, she requested a Court restraining order to prevent him from stalking and harassing her, a request that was dismissed because she allegedly had shown no immediate risk to her life. As a result, the Court found Croatia liable for the breach of art. 8 for failing to implement many of the measures ordered by the Court to protect the victim and to deal with the perpetrator, whose mental disorder seemed to be the cause of his violent behavior. However, the applicant's complaint under article 14 – in contrast with the wider vision of the problem adopted in Opuz – was judged inadmissible. In particular, the Court declared that the applicant failed to provide sufficient evidence (such as reports or statistics) to prove the discriminatory nature of the measures and practices adopted in Croatia against domestic violence. In addition, the Court refused to apply art. 3 to the mistreatments in question.

The outcome of this case is somehow disappointing, especially because there seemed to be no peculiar reason to disregard the *stare decisis* principle, even if it is true that some principles normally require more than one precedent.⁸⁶

In conclusion, although taking place after the adoption of the Istanbul Convention, the recent case of *Talpis v. Italy* deserves mentioning because, unlike *A. v. Croatia*, it goes back to the "wider vision" referred to in Opuz. In this case, like in many precedents, a woman married to a violent man uselessly lodged many complaints against him (after requesting protection measures) and ultimately witnessed her son's murder at his father's hands, during a fight.

In its first instance judgement,⁸⁷ the Court held that Italy breached artt. 2, 3 and 14 of the ECHR. Art. 2 was deemed applicable in respect of Ms. Talpis' deceased son and of Ms. Talpis herself, the latter having suffered acts which, by their very nature, had endangered her life. Therefore Italy failed to act with due

⁷⁹ In this sense, the Court added some "clues" the existence of which may reveal a situation at risk. Among others the seriousness of the alleged offense; whether or not a weapon was used; the amount of threats and degree of planning behind the violence; the effects of domestic violence on children living in the household; and the previous history of the alleged perpetrator. (§§ 139-140).

⁸⁰ Id. §§ 160-161.

⁸¹ Namely the CEDAW and the Belem do Para Convention. Id. §§ 184-190.

⁸² Id. § 181.

⁸³ See T. Abdel-Monem, *supra* n. 60.

⁸⁴ Compare *supra* n. 65.

⁸⁵ See among others H. Padraig, 'Recent developments in European Convention on Human Rights Standards on the prevention of domestic violence', 16 *I. Bull.* 4 (2011).

⁸⁶ Compare *supra* n. 85.

⁸⁷ For a first comment see the Court's press release on the case available on <http://www.giurisprudenzapenale.com/wp-content/uploads/2017/03/Scarica-il-comunicato-stampa-della-Corte-ENG.pdf>, last visited on 12 March 2017. See also M. Castellaneta, 'Violenza contro le donne: da Strasburgo condanna all'Italia' [Violence against women: the Strasbourg Court convicts Italy], *Marina Castellaneta. Notizie e commenti sul diritto internazionale e dell'Unione europea*, 8 March 2017, www.marinacastellaneta.it/blog/violenza-contro-le-donne-da-strasburgo-condanna-allitalia.html.

diligence according to the *Kontrowà* scrutiny. The Court also stated that Ms. Talpis could be considered as belonging to the category of “vulnerable persons” entitled to State protection, noting that the violence inflicted, including bodily harm and psychological pressure, had been sufficiently serious to qualify as ill-treatment within the meaning of Article 3 of the Convention.

Above all, it has to be remarked that the Court found a breach of art. 14 of the ECHR, observing that the authorities knew about the sensitive situations in question and yet did not take action under many profiles. In fact, not only did they fail to investigate on the perpetrator’s behavior, but also they did not adopt the protection measures that were regularly requested, although such a passive approach was completely unjustified. The Court therefore concluded that by underestimating, through their inertia, the seriousness of the violence in question, the Italian authorities essentially endorsed it. In this sense the Court harshly stigmatized the ‘persistence of socio-cultural attitudes of tolerance’⁸⁸ aggravating the dramatic issue of v.a.w. In deciding the matter, the Court expressly referred to *Opuz v. Turkey* as a pertaining case and it consequently reaffirmed the all-encompassing vision of v.a.w. that emerged therein.

2.3. SOME AFRICAN CASE LAW

As a premise, it is important to underline that only case law functional to the comparative analysis carried out in this paper will be taken into account. Given the multiplicity of jurisdictional and quasi-jurisdictional bodies existing in Africa and the potential and actual overlaps between their scopes of competence, such a complex framework is hard to understand and to interpret correctly for a non-African observer, so the aim is definitely not to give a clear and complete picture of it.

Since the focus of the present work is discrimination and violence against women, the selection of cases is based on their significance in this sense, as well as on their representativeness of Africa’s efforts to receive the related principles of international law (above all due diligence), rather than on the ambition to exhaustively examine the African jurisdictional framework.

Some preliminary indications may be however useful.⁸⁹

First of all, the African Commission on Human and Peoples’ rights (hereinafter “Commission”, “ACHPR”) is the first body ever created to protect and enhance human rights in Africa (under art. 30 of the African Charter on Human and Peoples’ rights⁹⁰ that came into force in 1986). More precisely, the mandate of the Commission consists in promoting and ensuring the protection of human rights in compliance with the principles set out in the Charter, performing a mostly advisory and interpretative function.⁹¹ The Commission also drafts principles and rules on which Governments may base their legislation. Because it has preceded the creation of the African Court on Human and Peoples’ rights –

⁸⁸ *Talpis v. Italy*, *supra* n. 65, § 57, § 145.

⁸⁹ For a complete and detailed analysis of the human rights protection system in Africa, see L.G. Franceschi, *The African Human Rights Judicial System: Streamlining Structures and Domestication Mechanisms Viewed from the Foreign Affairs Power Perspective* (Cambridge Scholars Publishing 2014).

⁹⁰ Art. 30: ‘An African Commission on Human and Peoples’ Rights, hereinafter called “the Commission”, shall be established within the Organization of African Unity to promote human and peoples’ rights and ensure their protection in Africa’.

⁹¹ Art. 45: ‘The functions of the Commission shall be:

1. Promote human and peoples’ rights and in particular to:
 - a. to collect documents, undertake studies and researches on African problems in the field of human and peoples’ rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights and, should the case arise, give its views or make recommendations to Governments.
 - b. to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislation.
 - c. to cooperate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.
2. Ensure the protection of human and peoples’ rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.’

hereinafter “AfCPHR” or “the Court” - (through a dedicated Protocol to the African Charter adopted in 1998⁹²), the Commission has probably been the most proactive body of the AU. However, the enforcement of its decisions is weak, because it does not have a follow-up policy to monitor the steps taken by the State Parties to implement them. Together with the lack of an institutionalized follow-up mechanism, the non-binding nature of its recommendations acts as a disincentive to compliance.

In parallel, it is not rare to refer to the Commission as to a quasi-judicial body. In fact, because of the initial absence of a proper Court, the Commission has been provided with the power to consider complaints, otherwise known as communications, alleging violations of human rights guaranteed by the Charter.

Beside the Commission, as anticipated, there is the AfCPHR, constituted in 1998 and active since 2004. The Court is expected to complement the protective mandate of the Commission in the promotion and protection of human rights. In other words, on the one hand, the Commission should endorse the Court’s decisions through its interpretative function, on the other hand the Charter should facilitate the Commission’s protective mandate through binding and non-appealable decisions. Actually, on the one hand, some consider that the creation of the Court has progressively taken away the exclusive interpretative function of the Commission, but, on the other hand, the Commission continues to be the chief body in what pertains to the protection of individual human rights. This is because, out of 54 States constituting the AU, only 24 have ratified the 1998 Protocol and are therefore bound by the Court’s decisions.

Other jurisdictional bodies besides the AfCPHR do exist: incidentally, it is impossible not to mention the African Court of Justice and human rights, created in 2008 because of the transformation of the Organisation of African Union (OAU) into the African Union (AU). Due to the delayed entry into function of the AfCPHR, the bounds between their scopes of competence were blurred in the first place, so the immediate step forward should have been, according to the legislator, the merge of such two Courts. However, the project did not succeed, hence the African Court of Justice and human rights never entered into function.⁹³

Sub-regional courts and tribunals with mandates that overlap with those of ACPHR and AfCHPR represent another component of the African jurisdictional system.⁹⁴ Some deem this to be the result of the absence, in international law, of a mandatory jurisdiction and, consequently, of a hierarchical court system as in national law.⁹⁵ Among these sub-regional bodies, the one that deserves to be mentioned is the Court of Justice of the Economic Community of West African States (hereinafter “ECOWAS”). It owes its importance to the fact that, unlike the ACHPR and the AfCHPR, it accepts complaints lodged by single individuals.⁹⁶ Ultimately, of course, at the bottom of the system, we have domestic jurisdiction. Given this complex context, with specific regard to the issue of discrimination and violence against women it is worth recalling: 1) two decisions of the Commission 2) a case deemed admissible by the ECOWAS. Namely, the cases *sub 1)* are *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (an affirmation of the obligation of due diligence upon States contemporary to the adoption of the Maputo Protocol), and *EIPR and Interights v. Egypt* (a 2013 decision dealing specifically with g.b.v. and making explicit

⁹² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, available at www.achpr.org/instruments/court-establishment/.

⁹³ On the matter see M. Du Plessis and L. Stone, ‘A Court Not Found’, *7 Afr. Hum. Rts. L. J.* (2007) p. 552 ff. and V.R. Wright, ‘Finding an Impetus for Institutional Change at the African Court on Human and Peoples’ Rights’, *24 Berkeley J. Int'l L.* (2006) p. 463 ff.

⁹⁴ C.A. Odinkalu, ‘Complementarity, competition or contradiction: The relationship between the African Court on Human and Peoples' Rights and Regional Economic Courts in East and Southern Africa’, 9-10 December 2003, available on www.africacourtcoalition.org, last visited on 19 March 2017.

⁹⁵ K. Oellers Frahm, ‘Judicial and Arbitral Decisions, Validity and Nullity’, *The Max Planck Encyclopedia of International Law* (Oxford University Press 2011) directly available on <http://opil.ouplaw.com/home/EPIL>, last visited on 19 March 2017.

⁹⁶ Actually, the African Charter on Human and Peoples' Rights refers to “other communications” that is communications different from the inter-state ones, lodged by NGOs or single individuals. However, it does not explicitly mention any form of direct complaint, as well as the related Protocol that constituted the African Court. On the contrary, as for the ECOWAS, while at the beginning only the Authority of Heads of State and Government and the Member States could file complaints, in 2005 the Community adopted a dedicated Additional Protocol to univocally allow individuals to sue Member States. For further information see www.achpr.org.

reference to the Maputo Protocol). The case *sub 2*) is the first domestic violence case ever brought towards the ECOWAS, worth mentioning because it happened in 2017. Such cases show how the African jurisdictional bodies, as well as the EC(t)HR, do try to implement the principles of international law (most of all the principle of due diligence) illustrated above.

In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*,⁹⁷ it happened that violence erupted in Zimbabwe between the constitutional referendum of 2000 and the parliamentary elections. Supporters of ZANU (PF) engaged in various human rights violations including the rape of women and girls. The respondent State claimed that it could not be held accountable because those committing the crimes were non-State actors and the actions were not encouraged by any government policy. The Commission determined that '[a] State can be held complicit where it fails systematically to provide protection of violations from private actors who deprive any person of his/her human rights'.⁹⁸ It is worth noting that the Commission adverted to the Belém do Pará Convention, the Inter-American Court's case law and the CEDAW (that is, international *corpus* of legal instruments and judicial reasoning against v.a.w.) and used them as a parameter to widen the meaning of art. 1 of the African Charter.⁹⁹ Through this article, States bound by the Charter agree to recognize and protect the rights guaranteed therein: in this decision the Commission made it clear that the provision in question is nothing less than a "due diligence" obligation.¹⁰⁰ Here, the Commission found that Zimbabwe violated the victims' rights to judicial protection and to have their case heard under articles 1 and 7(1), respectively, of the African Charter. It explained that the state had adopted Clemency Order 1 of 2000 (which permits those who have committed politically motivated crimes to be exonerated, with the exception of murder, rape, and other similar crimes) and that Zimbabwe did not "demonstrate due diligence" in providing justice for the victims of the violent crimes. The Commission requested Zimbabwe to investigate the reported crimes, bring those who committed the crimes to justice, and provide victims with adequate compensation. This case is important because it establishes that a state can be held accountable for the human rights violations of private actors. Therefore, if the state does not address mass rape with "due diligence," then the State itself can be held accountable. The ACHPR, in the interpretation of the African Charter, envisages positive obligations upon States to prevent violence even when the perpetrators are private actors, embracing the same approach taken by the CEDAW Committee previously and by the EC(t)HR afterwards. This proves that the two regional legal systems under examination in this paper do try to fight v.a.w. on the grounds of the same tendency.

Also, in *EIPR and Interights v. Egypt*¹⁰¹ the Member State lost its case for failing to use due diligence, but the decision is interesting for the references to the Maputo Protocol¹⁰² and to the notions of g.b.v. and inhuman and degrading treatment (similar to art. 3 of the ECHR).

The complainant represented four victims (all women) involved in a protest led by the Egyptian Movement for Change. During the protest, riot police surrounded the protestors and did nothing while members of the National Democratic Party (supporters of then President Mubarak), sometimes at the instruction of State Security Intelligence ("SSI") officers, beat, insulted, intimidated, as well as sexually harassed and violated the victims. The commission first ruled that the state violated the prohibition of discrimination and its obligation to eliminate discrimination against women (articles 2 and 18(3) of the Charter) because the acts committed against the victims were acts of gender-based violence perpetrated by state actors (and non-state actors under the control of state actors) that went unpunished. Next, the commission found that because the treatment against the victims was inhuman and degrading, and investigations into the treatment were not conducted, the actions (and omissions) by the State constituted a violation of article 5. Taken together, the violations of such provisions of the African Charter amounted

⁹⁷ ACPHR 39th Ordinary Session, 11-15 May 2006, Communication No. 245/02, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*.

⁹⁸ *Id.* § 160.

⁹⁹ Art. 1: 'The Member States of the Organisation of African Unity, Parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.'

¹⁰⁰ *Id.* §§ 144-145.

¹⁰¹ ACPHR 10th Extraordinary Session, 12-16 December 2011, Communication No. 323/06, *EIPR and Interights v. Egypt*.

¹⁰² *Id.* § 121.

to a violation of article 1, since there was sufficient evidence that the state had failed to perform its positive duty to prevent and investigate such violations.

Finally, the 2017 ECOWAS case deserves mentioning because, as anticipated, is the first individual claim against domestic violence ever dealt with, at least by this sub-regional Court.¹⁰³ Two NGOs – the Women Advocates Research Documentation Centre (WARDC) and the Institute for Human Rights and Development in Africa (IHRDA) –jointly filed a suit on behalf of Nigerian citizen, Ms. Mary Sunday, an alleged victim of severe domestic violence from her fiancé (a policeman), which took place in August 2012. WARDA and IHRDA allege that the Nigerian authorities have failed to carry out an independent and impartial investigation on the allegations of severe domestic violence suffered by Ms. Sunday. As a result of the lack of effective investigation and prosecution of the offender, they argue that the Nigerian government has violated several rights of the African Charter on Human and People's Rights; the Protocol to the African Charter on the Rights of Women in Africa, and other international human rights agreements. These rights include the right to dignity, to freedom from torture and other forms of cruel, inhuman or degrading punishment, and the right to a remedy. Actually, at the moment, the Court has just deemed the case admissible, while its merits will be decided on 20 March, 2017. However, the decision is significant, as it represents a clear signal to local governments that the ECOWAS does intend to examine cases related to women human rights. Hence, it certainly amounts to a step forward in the enhancement of women's rights.

3. THE REGIONAL LEGAL INSTRUMENTS: THE MAPUTO PROTOCOL AND THE ISTANBUL CONVENTION

As anticipated at the beginning of this work, the fight against v.a.w. owes much to the adoption of specific regional instruments, the function of which is to translate the principles of international law analyzed so far and adapt them to the peculiarities of the single legal framework. In their turn, such instruments owe much to the abovementioned case law and especially to its concrete affirmation of the principle of “due diligence” and acknowledgement of positive obligations upon States. In fact, both the Maputo Protocol and the Istanbul Convention place “to do” obligations on States in respect of the implementation of their content, reaching for a proactive approach to the protection of women. In the meantime, understanding commonalities and differences between such homologous treaties is important, because it reveals distinctions that affect the enhancement of women's rights.

Starting from what the Maputo Protocol and the Istanbul Convention have in common, they both stem from the UN *corpus* (namely the CEDAW, which they aim to implement). In fact, when it comes to the protection of women's rights, many commentators identify a normative system in the three “continental” conventions – Belém do Pará, Maputo, and Istanbul – that find their common root in the main international legal instrument that is the CEDAW.¹⁰⁴ In addition, they both expressly address domestic

¹⁰³ See namely S. Airey, ‘Landmark decision in first case of domestic violence brought to ECOWAS Community Court of Justice (ECCJ) (Ruling ECW/CCJ/APP/26/15, 24th January 2017)’, 19 February 2017, available on www.ilg2.org/2017/02/19/landmark-decision-in-first-case-of-domestic-violence-brought-to-ecowas-community-court-of-justice-eccj-ruling-ecwccjapp2615-24th-january-2017/, last visited on 19 March 2017.

¹⁰⁴ On this topic see G. Pascale, ‘L'entrata in vigore della Convenzione di Istanbul sulla prevenzione e la lotta contro la violenza nei confronti delle donne’ [The entry into force of the Istanbul Convention on preventing and combating violence against women and domestic violence], *Rivista AIC* (2014) available at www.osservatorioaic.it and legal scholarship cited therein, namely L.P. Mejia, *supra* n. 7 and F. Quillère-Majzoub, ‘Le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits de la femme en Afrique: un projet trop ambitieux?’ [The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a too ambitious project?], 73 *Revue trimestrielle des droits de l'homme* (2008) p. 127 ff. On these profiles see also B. Rudolf and A. Eriksson, ‘Women's rights under International Human Rights Treaties. Issues on Rape, Domestic Slavery, Abortion and Domestic Violence’, 5 *International Journal of Constitutional Law* (2007) p. 507 ff.

violence¹⁰⁵ and demand States to repeal customary and religious law that humiliates, prejudices and keeps women in an inferior position in respect of men.¹⁰⁶

However, despite adopting a holistic approach towards the problem it intends to face, the Istanbul Convention shows a more sectorial aim than the Maputo Protocol, being dedicated specifically to v.a.w. and to the even narrower topic of domestic violence. In other words, the Maputo Protocol has a wider scope, providing express acknowledgment to various women human rights: v.a.w. is one of the problems it addresses, but not the only one.¹⁰⁷ This is because the Protocol has the function to complement and integrate the African Charter on Human and Peoples' Rights, guaranteeing all the rights that the latter fails to enhance. In fact, it was unacceptable that the Charter, although being the fundamental document of the AU, had so many gaps to fill, as will become clearer below.

¹⁰⁵ Compare art. 3(b) of the Istanbul Convention and artt. 3[4] and 4[2][a] of the Maputo Protocol.

¹⁰⁶ Compare art. 12(1) of the Istanbul Convention and art. 1(g) of the Maputo Protocol.

¹⁰⁷ This difference in terms of aims becomes evident with a simple glance to the Preambles of the two instruments. The Instanbul Convention clarifies how it intends to face the specific problem of violence: '[...]Recognising the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men; Recognising, with grave concern, that women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called "honour" and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men; Recognising the ongoing human rights violations during armed conflicts that affect the civilian population, especially women in the form of widespread or systematic rape and sexual violence and the potential for increased gender-based violence both during and after conflicts; Recognising that women and girls are exposed to a higher risk of gender-based violence than men; Recognising that domestic violence affects women disproportionately, and that men may also be victims of domestic violence; Recognising that children are victims of domestic violence, including as witnesses of violence in the family; Aspiring to create a Europe free from violence against women and domestic violence [...]. Instead a more general perspective comes out of the Preamble of the Maputo Protocol: [...] considering that Article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter, and that the Assembly of Heads of State and Government of the Organization of African Unity meeting in its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to draft a Protocol on the Rights of Women in Africa; considering that Article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status; further considering that Article 18 of the African Charter on Human and Peoples' Rights calls on all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions; noting that Articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter; recalling that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights; noting that women's rights and women's essential role in development, have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995; recalling also United Nations Security Council's Resolution 1325 (2000) on the role of Women in promoting peace and security; reaffirming the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development; further noting that the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to pay greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women recognising the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy; bearing in mind related Resolutions, Declarations, Recommendations, Decisions, Conventions and other Regional and Sub-Regional Instruments aimed at eliminating all forms of discrimination and at promoting equality between women and men; concerned that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices; firmly convinced that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated; determined to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights [...].'

Such a different mission of the Protocol explains not only its wider scope, but also the fact that it places upon States an explicit obligation to constitutionalize its provisions when possible (at least as to non-discrimination against women). This in its turn explains why, after the adoption of the Protocol, reforms have re-written Constitutions in a gender-sensitive perspective.¹⁰⁸

As it aims to prevent and prosecute violence rather than to acknowledge rights at a para-constitutional level, the Istanbul Convention mainly relies on ordinary legislation for its implementation.¹⁰⁹

Actually, it is true that even the Istanbul Convention, pursuant to art. 4,¹¹⁰ requires States Parties to recognize equality on the grounds on sex inserting it in their Constitutions, so on this point the difference between the two treaties is not so radical.

However, the spirit of the Convention seems to be, in general, less programmatic and more concrete and precise than the Maputo Protocol's, because its scope, as explained above, is more circumscribed.

After this premise, it is possible to analyze these two instruments in brief.

3.1. **THE MAPUTO PROTOCOL**

Only 37 States out of the 54 State Parties to the AU have so far ratified the Protocol, created in 2003 and entered into force in 2005. A few have made reservations to the treaty, which, as well as the African Charter, is silent on the matter.¹¹¹ The Protocol has been adopted, as anticipated, in order to integrate the African Charter, which has been deemed an insufficient text since its entry into force.¹¹² The main failures of the Charter are considered the incapacity to explicitly define discrimination against women; the lack of guarantees to the right to consent to marriage and to equality in marriage; the emphasis posed on traditional values and practices that have long impeded the advancement of women's rights in Africa.¹¹³ On this specific point, it is worth noting that, on the one hand, the Charter apparently repeals every kind

¹⁰⁸ The reference is mainly to Kenya (2010) and Zimbabwe (2013) but also Namibia deserves mentioning. See <http://constitutions.unwomen.org/en>.

¹⁰⁹ As an example, art. 5 of the Istanbul Convention: [...] Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors'.

Instead, see art. 2[a] of the Maputo Protocol: [...] include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application'.

¹¹⁰ Art. 4: 1 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.

Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by:

- embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realization of this principle;
- prohibiting discrimination against women, including through the use of sanctions, where appropriate;
- abolishing laws and practices which discriminate against women.

The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status. Special measures that are necessary to prevent and protect women from gender-based violence shall not be considered discrimination under the terms of this Convention'.

¹¹¹ For further information on the content of reservations and interpretative declarations to the Maputo Protocol see the ACHPR report by justice Lucy Asuagbor, 'Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa', 18 March 2016, available at www.achpr.org, last visited on 12 June 2017.

¹¹² See F. Quillère-Majzoub, *supra* n. 104.

¹¹³ On this specific matter see F. Naa-Adjeley, 'Religious and Cultural Rights: Reclaiming the African Women's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture', 44 *Am. U. L. Rev.* (1995) p. 1351 and p. 1376. In the view of this Author the Charter "leaves substantial room for ambiguity in the interpretation of what constitutes prohibited discrimination" and "The reference to cultural values requires definition and the questions of which traditional values are recognized by the community and who makes that determination leave a lot of uncertainty in the interpretation of the rights in the Charter." In the same sense, see Women in Law and Development in Africa (WiLDAF), WiLDAF News, The African Charter on Human and People's Rights & the Additional Protocol on Women's Rights', available at <http://site.mweb.co.zw/wilda/news5.html>, last visited on 12 June 2017.

of discrimination, but on the other hand, it recalls customary and religious law with the intent to valorize it. As a result, since the Charter fails to distinguish the “positive” customs from the “negative” ones that contrast with international law (such as FGM, polygamy, incapacity to inherit, forced marriages and alimentary restraints) even the latter continue to exist and gain an authority of sorts¹¹⁴ The Protocol was drafted with the intent to fix this problem, but the States’ welcome has not been completely positive.¹¹⁵ In spite of this last circumstance, it is undeniable that, from the perspective of the protection of women, the treaty in question represents a step forward. In brief, it requires States: to promote and respect women’s right to health, including sexual and reproductive health; to provide adequate, affordable and accessible health services to women; to guarantee women’s right to consent to marriage; to set the minimum age of marriage at 18 and ensure equal rights for women in marriage. In addition, it requires to protect women against all forms of violence in armed conflicts; to enact and enforce laws prohibiting all forms of v.a.w., including unwanted and forced sex; to reform laws and practices that amount to a discrimination against women (among others on the matter of inheritance).¹¹⁶

Some aspects need to be discussed in more detail.

The Maputo Protocol is the first legally binding human rights instrument that expressly articulates women’s reproductive rights as human rights and that explicitly guarantees women’s right to control their fertility.¹¹⁷ It also provides a more precise explanation than international human rights instruments of women’s right to reproductive health and services. In other words, it affirms a right to reproductive choice and autonomy and makes the African States’ duties explicit in relation to women’s sexual and reproductive health.¹¹⁸ It is worth noting that this somehow affects African Constitutions, that make reference to this category of rights more often than European ones and, when they do, they mention sexual and reproductive health – paying attention specifically to women – rather than the protection of family.¹¹⁹ In the light of this, it comes as no surprise that the Protocol is the first human rights treaty to explicitly recognize abortion.¹²⁰ It is also the only treaty to include protection from HIV/AIDS within the scope of women’s sexual and reproductive rights.¹²¹

With specific regard to v.a.w., the Protocol affords legal protection against g.b.v. in both the public and the private sphere, including domestic abuse and marital rape.¹²² In other terms, everyday abuses

¹¹⁴ On the point see F. Ouguergouz, ‘La charte africaine des droits de l’homme et des peuples. Une approche juridique des droits de l’homme entre tradition et modernité’ [*The African Charter on Human and Peoples’ Rights. An approach between tradition and modernity to human rights*], 25 *Études internationales* 2 (1994) p. 213 at p. 393.

¹¹⁵ See F. Quillère-Majzoub, *supra* n. 104 p. 136 at p. 140.

¹¹⁶ On the effective implementation of the provisions of the Protocol through the years, especially in terms of dedicated budget, see J. Klugman, ‘Women’s health and human rights: Public spending on health and the military one decade after the African Women’s Protocol’, 14 *AHRLJ* (2014) p. 705 at p. 734.

¹¹⁷ Specifically on the category of sexual rights see E. Duroye and L. Nkatha Murungi, ‘The African Women’s Protocol and sexual rights’, 18 *The International Journal of Human Rights* 7-8 (2014) p. 881 at p. 897.

¹¹⁸ E. Duroye and L. Nkatha Murungi, *supra* n. 117. On this specific topic see also Center for Reproductive Rights, ‘The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights’, February 2006, available at www.reproductiverights.org, last visited on 13 June 2017.

¹¹⁹ Compare *supra* n. 2. Just as an example, Italy does not expressly mention abortion in the Constitution: the right to have access to abortion under certain strict conditions is provided at an ordinary level as a combined interpretation of art. 2 and 32 of the Constitution. This kind of differences in normative models have inspired the present work: on the one hand, one could think that the express reference made at a constitutional level could make in itself such a right more effective, but this inference cannot be automatic. In particular, insofar as a right is recognized at a constitutional level but not transposed at an ordinary one (as happens in Kenya, v. the Concluding Remarks *infra*) there is a high risk that the constitutional provision is intended to have a mere programmatic meaning and that, therefore, it is weakened.

¹²⁰ Art. 14[2][c]: protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. See E. Duroye and L. Nkatha Murungi, *supra* n. 117.

¹²¹ Art. 14: States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes: d) the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS;

e) the right to be informed on one’s health status and on the health status of one’s partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices. See E. Duroye and L. Nkatha Murungi, *supra* n. 117.

¹²² For a comment on all the related provisions see in detail Center for Reproductive Rights, ‘The Protocol on the Rights of Women in

occurring in the private sphere are relocated to the public realm of rights violations States can be held accountable for. Overcoming the public-private dichotomy is consistent with the efforts made by both international legal instruments and supranational case law, analyzed above. Provisions that guarantee equal rights within marriage and prohibit forced marriage and other abuses respond to the same tendency.¹²³

As mentioned above, the Protocol binds States to refrain from any act that would defy its purpose and to uphold its declared objective: ‘to ensure that the rights of women are promoted, realized and protected in order to enable them to enjoy fully all their human rights’.¹²⁴ Therefore, the States Parties must implement the Protocol at national level by adopting criminal laws that penalize g.b.v., including domestic violence, laws that prohibit F.G.M., laws that guarantee equal rights in marriage (including right to land, property ownership after the dissolution of marriage and right to inherit), laws that penalize sexual harassment. In order to monitor this transposing process, art. 26 of the Protocol requires States to send periodical reports to the ACHPR.¹²⁵ Such reports are a useful tool to examine the state of art in the evolution of the African national legislation and in the implementation of the Protocol, which is not yet complete.¹²⁶

As to the actual enforcement of the Protocol,¹²⁷ States that have already incorporated it in their legislative framework may use their courts to uphold their international obligations to protect women’s rights. For those who have not done it yet, domestic courts can still play a crucial role enforcing domestic laws on sexual and reproductive rights.¹²⁸

3.2. THE ISTANBUL CONVENTION

As remarked already, the Istanbul Convention is more focused on the phenomenon of v.a.w. than the Maputo Protocol.¹²⁹ Of course, this has much to do with the more general topic of women’s rights – in fact the Convention recognizes that g.b.v. is determined by an imbalance of power between men and women¹³⁰ – but it affects the structure of the treaty in question, which is different from the Maputo Protocol’s, as will become clearer below.

To proceed with order, the Istanbul Convention, opened for signature in 2011, is the most recent treaty to address directly the problem of v.a.w. Despite its origins linked to the European context, it has strong potential to become a global norm-setting instrument, as it can be made accessible to third countries, which are not members of the Council of Europe, pursuant to art. 76(1).¹³¹

Africa: An Instrument for Advancing Reproductive and Sexual Rights’, *supra* n. 118.

¹²³ For a comment on all the related provisions see in detail Center for Reproductive Rights, ‘The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights’, *supra* n. 118.

¹²⁴ See the Preamble, n. 107 *supra*.

¹²⁵ Art. 26: States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.

States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.

¹²⁶ See below Sec. 4.1.

¹²⁷ See art. 25: ‘States Parties shall undertake to:

a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;
b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law’.

¹²⁸ See again Center for Reproductive Rights, *supra* n. 118.

¹²⁹ Compare n. 107 *supra*.

¹³⁰ As anticipated above this becomes clear since the Preamble. For further information see A. Di Stefano, *supra* n. 9.

¹³¹ Art. 76(1): ‘After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consultation of the Parties to this Convention and obtaining their unanimous consent, invite any non-member State of the Council of Europe, which has not participated in the elaboration of the Convention, to accede to this Convention by a decision taken by the majority provided for in Article

Many features of the Convention reveal it as the foreseeable development of the efforts made at an international level to understand the problem of v.a.w. and to contrast it. In fact, the Convention frequently reminds of Recommendation n. 19's wording, like when it defines gender¹³² and when it refers to domestic violence in a gender-sensitive perspective. With specific regard to domestic violence, actually, it has to be remarked that the Convention represents a progress indeed if confronted with international instruments, giving a definition wider than ever. In fact, it recognizes domestic violence has a larger scope than family violence, covering people that are no longer in a relationship. In parallel its definition covers not only intimate-partner violence but also intergenerational violence, regardless of biological ties. Finally and most importantly, although recognizing that women are affected disproportionately, the Convention gives a gender-neutral definition that encompasses victims and perpetrators of both sexes.¹³³

Moreover, the Convention proves being the outcome of both the normative and the jurisprudential elaboration analyzed above in stating explicitly the due diligence principle at art. 5.¹³⁴

However, the Convention also presents unique profiles that make it different from other human rights treaties. If human rights treaties do usually refer (mainly) to rights – and this is what for instance the Maputo Protocol does¹³⁵ – then the Istanbul Convention is no average human right treaty.¹³⁶ What we mean here, is that the Convention presents an ambition of interdisciplinarity and holism not common to other human right treaties, at least not in such a precise, detailed and evident manner. In other words, the Convention pursues a holistic approach towards v.a.w. not only in a programmatic but also in a concrete way, identifying precise areas of intervention.¹³⁷ For instance, it gives recognition to the sociological understanding of roots and causes of v.a.w. and therefore places emphasis on educational measures to promote equality, non-violence, conflict resolutions and to teach about g.b.v. It aims to involve in the fight against v.a.w. a multitude of players, starting from all members of society (especially boys) up to governments, NGOs, but also actors beyond the law enforcement sector. In particular, art. 17 requires Parties to cooperate with representatives of the private sector, especially with media, information, and communication technology, to set guidelines and self-regulatory standards aimed at prevent v.a.w.¹³⁸ These is just an example of the abovementioned integrated approach which makes the difference between the Istanbul Convention and other human rights treaties. In brief, according to some commentators a greater awareness of the transversal nature of v.a.w. (in terms of measures to be taken) emerges from the Istanbul Convention rather than from other human rights treaties.¹³⁹

In the light of this, it is easier to understand the dual nature that the Convention presents: it contains both human rights and criminal law provisions relevant to v.a.w. and domestic violence. Another important feature is that it encourages a victim-centered perspective to preventing and combating v.a.w.: victims' rights, health, support and well-being are included within the aims of the Convention.

To be even clearer on the intents of the treaty under examination, we might consider that it attempts to contrast v.a.w. at all the stages of its development, that is: to avoid the occurrence of v.a.w. episodes; to

20.d of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Parties entitled to sit on the Committee of Ministers'.

¹³² This becomes clear comparing mainly art. 3 of the Istanbul Convention and § 6 of Recommendation n. 19.

¹³³ Compare n. 132 *supra*.

¹³⁴ Compare n. 132 *supra*.

¹³⁵ While the Convention is divided into different areas of intervention instead of presenting a list of values to protect, as will become clearer *infra*. See in detail A. Di Stefano, *supra* n. 9.

¹³⁶ In this sense among others O. Jurasz, 'The Istanbul Convention: a new chapter in preventing and combating violence against women', 89 *Australian Law Journal* 9 (2015) p. 619 at p. 627.

¹³⁷ See *infra*.

¹³⁸ Art. 17: '1 Parties shall encourage the private sector, the information and communication technology sector and the media, with due respect for freedom of expression and their independence, to participate in the elaboration and implementation of policies and to set guidelines and self-regulatory standards to prevent violence against women and to enhance respect for their dignity.'

2 Parties shall develop and promote, in co-operation with private sector actors, skills among children, parents and educators on how to deal with the information and communications environment that provides access to degrading content of a sexual or violent nature which might be harmful.'

¹³⁹ See mainly P. Degani and R. Della Rocca, *supra* n. 19.

prosecute and punish such episodes when they do happen; to protect victims and help them in their recovery; to provide efficient processual instruments and facilitate compensation; to work on society as a whole and definitely eradicate the issue of v.a.w.

On these grounds, the Convention requires the States Parties to act within four areas of intervention: 1) prevention, 2) protection of victims, 3) prosecution of offenders, 4) integrated policies, (the “4Ps”).

Without being exhaustive, the following lines will try to give an overview of how the aforementioned aims are pursued.¹⁴⁰

The concept of “prevention”, *sub 1*), includes, for instance, the measure referred to in art. 16. The article in question requires States to empower rehab programs for perpetrators of violent acts, in order to encourage them to adopt a non-violent behavior and prevent new episodes of violence.¹⁴¹

As “protection”, *sub 2*), the Convention intends information and both general and specialized support dedicated to victims. In particular, information is necessary to afford protection, hence victims have to be provided with the ability to receive adequate information on services and available legal measures, in a language they understand.¹⁴² In addition, the encouragement of whistleblowing falls within the concept of “information”.¹⁴³ The definition of general support to victims refers to legal consulting, psychological and financial aid, education, access to health and legal services.¹⁴⁴ Instead, shelters, dedicated phone-lines and medical centers for victims of sexual violence (where they can receive primary assistance) constitute specialized support.¹⁴⁵ It emerges that, pursuant to the Convention, together with judiciary prosecution a body of protection measures has to be set out in order to face v.a.w. efficiently.¹⁴⁶

Arts. 33-41, which concretize the aim *sub 3*), “prosecution of offenders”, enumerate criminal offences that States Parties have to include within their framework.¹⁴⁷ It may be stated that this is one of the most

¹⁴⁰ See A. Di Stefano, *supra* n. 9, and also O. Jurasz, *supra* n. 136.

¹⁴¹ Art 16: ‘1 Parties shall take the necessary legislative or other measures to set up or support programmes aimed at teaching perpetrators of domestic violence to adopt non-violent behaviour in interpersonal relationships with a view to preventing further violence and changing violent behavioural patterns.

2 Parties shall take the necessary legislative or other measures to set up or support treatment programmes aimed at preventing perpetrators, in particular sex offenders, from re-offending.

3 In taking the measures referred to in paragraphs 1 and 2, Parties shall ensure that the safety of, support for and the human rights of victims are of primary concern and that, where appropriate, these programmes are set up and implemented in close co-ordination with specialist support services for victims.’

¹⁴² Art 19: ‘Parties shall take the necessary legislative or other measures to ensure that victims receive adequate and timely information on available support services and legal measures in a language they understand.’

¹⁴³ Art 27-28.

¹⁴⁴ Art. 20: ‘1 Parties shall take the necessary legislative or other measures to ensure that victims have access to services facilitating their recovery from violence. These measures should include, when necessary, services such as legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment.

2 Parties shall take the necessary legislative or other measures to ensure that victims have access to health care and social services and that services are adequately resourced and professionals are trained to assist victims and refer them to the appropriate services.’

¹⁴⁵ We are especially referring to articles from 21 to 26 of the Convention.

¹⁴⁶ See O. Jurasz, *supra* n.136.

¹⁴⁷ Article 33 – Psychological violence

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats is criminalised.

Article 34 – Stalking

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised.

Article 35 – Physical violence

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of committing acts of physical violence against another person is criminalised.

Article 36 – Sexual violence, including rape

1 Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;

b) engaging in other non-consensual acts of a sexual nature with a person;

c) causing another person to engage in non-consensual acts of a sexual nature with a third person.

sensitive aspects of the implementation of the Convention, due to the dishomogeneity of legal definitions among the different European frameworks.¹⁴⁸ In addition, it has to be remembered that, as well as of the Maputo Protocol, the Convention places upon States an obligation to repeal all customary and religious rules that discriminate, prejudice or harm women.¹⁴⁹

With regard to the aim *sub 4*), “integrated policies”, pursuant to art. 7 and 18(2) States Parties have to involve in the fight against v.a.w. the judiciary, police, social services, NGOs, as well as national, regional and local parliaments and authorities.¹⁵⁰ Functional to the pursuance of the aim in question is also the effort promoted by the Convention towards normative harmonization throughout States Parties with the help of statistical data collection and scientific research.¹⁵¹

Since the Convention binds States to draft new laws or modify their internal legislation, and, in general, to comply with “to do” obligations, many of the States Parties (as well as it has happened with the Maputo

2 Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.

3 Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.

Article 37 – Forced marriage

1 Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.

2 Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised.

Article 38 – Female genital mutilation

Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

- a) excising, infibulating or performing any other mutilation to the whole or any part of a woman’s labia majora, labia minora or clitoris;
- b) coercing or procuring a woman to undergo any of the acts listed in point a;
- c) inciting, coercing or procuring a girl to undergo any of the acts listed in point a.

Article 39 – Forced abortion and forced sterilisation

Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

- a) performing an abortion on a woman without her prior and informed consent;
- b) performing surgery which has the purpose or effect of terminating a woman’s capacity to naturally reproduce without her prior and informed consent or understanding of the procedure.

Article 40 – Sexual harassment

Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.

Article 41 – Aiding or abetting and attempt

1 Parties shall take the necessary legislative or other measures to establish as an offence, when committed intentionally, aiding or abetting the commission of the offences established in accordance with Articles 33, 34, 35, 36, 37, 38.a and 39 of this Convention.

2 Parties shall take the necessary legislative or other measures to establish as offences, when committed intentionally, attempts to commit the offences established in accordance with Articles 35, 36, 37, 38.a and 39 of this Convention.

¹⁴⁸ Compare n. 166 *infra* and see *infra* Sec. 4.1.

¹⁴⁹ See *supra* Sec. 3.

¹⁵⁰ Art. 7: ‘1 Parties shall take the necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention and offer a holistic response to violence against women.

2 Parties shall ensure that policies referred to in paragraph 1 place the rights of the victim at the centre of all measures and are implemented by way of effective co-operation among all relevant agencies, institutions and organisations.

3 Measures taken pursuant to this article shall involve, where appropriate, all relevant actors, such as government agencies, the national, regional and local parliaments and authorities, national human rights institutions and civil society organisations’.

¹⁵¹ Art. 11: ‘1 For the purpose of the implementation of this Convention, Parties shall undertake to:

- a) collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of this Convention;
- b) support research in the field of all forms of violence covered by the scope of this Convention in order to study its root causes and effects, incidences and conviction rates, as well as the efficacy of measures taken to implement this Convention.

2 Parties shall endeavour to conduct population-based surveys at regular intervals to assess the prevalence of and trends in all forms of violence covered by the scope of this Convention.

3 Parties shall provide the group of experts, as referred to in Article 66 of this Convention, with the information collected pursuant to this article in order to stimulate international co-operation and enable international benchmarking.

4 Parties shall ensure that the information collected pursuant to this article is available to the public’.

Protocol) have been facing the Convention with a non-enthusiastic approach, coming up with reservations and interpretative declarations. Actually, at the moment, only three Member States of the Council of Europe (Armenia, Azerbaijan and Russia¹⁵²) have neither signed nor ratified the Convention. However, there are 22 signatures not followed by ratification, 15 reservations (pursuant to art. 78¹⁵³) and 5 interpretative declarations (which are not regulated by the Istanbul Convention and not even defined by the Vienna Convention on the Interpretation of Treaties).¹⁵⁴

The monitoring on the actual implementation of the Convention depends on the cooperation between two ad hoc bodies: the Group of Experts on Violence (hereinafter “GREVIO”) composed of independent experts and the Committee of Parties, composed of States’ representatives. The GREVIO has the function to examine and evaluate periodical State reports, constantly maintaining a dialogue with the involved State with regard to further information received by NGOs and scientific researches pursuant to art. 11. Under the Convention, after collecting all the needed data the GREVIO has to draft a report which will be immediately published so that, on its grounds, the Committee of Parties may decide to adopt consequent recommendations. The efficiency of the procedure in question, as well as the level of implementation of the Convention reached by the States Parties, has not been verified yet. In fact, the Convention entered into force only in 2014 (that is when the minimum number of ratifications was obtained¹⁵⁵). Consequently, the GREVIO began its very first country-by-country evaluation procedure only in 2015. The monitoring process will not be complete (and it will not be possible to analyze the GREVIO’s concluding report) before 2019.¹⁵⁶

One last thing deserves to be underlined, as it marks an interesting difference between the Istanbul Convention and the Maputo Protocol.¹⁵⁷ The Istanbul Convention does not attribute either to the

¹⁵² Russia actually has recently approved a draft of a provision partially decriminalizing domestic violence. See I. Nechepurenko, ‘Russia Moves to Soften Domestic Violence Law’, *The New York Times*, 25 January 2017, available on www.nytimes.com, last visited on 13 June 2017; N. Tumashkova, ‘Russian lawmakers are giving domestic abusers a green light’, *the guardian*, 30 January 2017, available on www.theguardian.com, last visited on 13 June 2017; R. Oliphant, ‘Vladimir Putin signs controversial law partially decriminalizing domestic violence’, *The Telegraph*, 7 February 2017, available on www.telegraph.co.uk, last visited on 13 June 2017; F. Solomon, ‘Vladimir Putin Just Signed Off on the Partial Decriminalization of Domestic Abuse in Russia’, *TIME*, 8 February 2017, available on www.time.com, last visited on 13 June 2017.

¹⁵³ Art. 78: ‘1 No reservation may be made in respect of any provision of this Convention, with the exceptions provided for in paragraphs 2 and 3.

2 Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the provisions laid down in:

- Article 30, paragraph 2;
- Article 44, paragraphs 1.e, 3 and 4;
- Article 55, paragraph 1 in respect of Article 35 regarding minor offences;
- Article 58 in respect of Articles 37, 38 and 39;
- Article 59.

3 Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right to provide for non-criminal sanctions, instead of criminal sanctions, for the behaviours referred to in Articles 33 and 34.

4 Any Party may wholly or partly withdraw a reservation by means of a declaration addressed to the Secretary General of the Council of Europe. This declaration shall become effective as from its date of receipt by the Secretary General.’

¹⁵⁴ See <https://www.coe.int/it/web/conventions/full-list/-/conventions/treaty/210/signatures>, last visited on 24 March 2017. On the matter of interpretative declarations see M. McRae, ‘The Legal Effect of Interpretative Declarations’, 49 *British Yearbook of International Law* 1 (1979) p. 155 at p. 173.

An interesting issue on the matter of signatures, ratifications and transposals concerns whether or not the European Union itself should accede to the Istanbul Convention. Many reasons why it would be a right choice are explained by the European Union Fundamental Rights Agency – FRA in its recent study ‘Violence against Women. An EU-Wide Survey’ available at fra.europa.eu, last visited on 14 June 2017. On the matter see also S. Peers, ‘Should the EU ratify the Istanbul Convention on Violence against Women?’, 23 April 2014, available at eulawanalysis.blogspot.com, last visited on 14 June 2017.

¹⁵⁵ 10 States of which 8 Member States of the Council of Europe.

¹⁵⁶ See GREVIO’s timetable at <http://www.coe.int/en/web/istanbul-convention/timetable>. Only Albania, Austria, Denmark and Monaco have sent their reports until now.

¹⁵⁷ And also the Belém do Pará Convention.

GREVIO or to the Committee of Parties the competence to receive individual complaints and inter-state communication over alleged violations of rights recognized therein. Instead, it has been repeatedly observed¹⁵⁸ that the Maputo Protocol elaborates a system of periodical reports to send to the ACHPR and that it is also possible for the AfHCPR to deal with such complaints on the grounds of its wide *ratione materiae* competence pursuant to art. 3 and 7 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.¹⁵⁹

4. THE PROGRESSIVE EVOLUTION OF NATIONAL LEGISLATIONS IN EUROPE AND AFRICA

The international normative and jurisdictional steps analyzed so far – both at an international and at a regional level - have had and are still having a deep impact on the evolution of national legislation, both at a constitutional and at an ordinary level.

The aim of this section is to underline, at last, the resemblances and differences between the various legislations as clearly as possible.

However, the outcome of this comparison, as it was anticipated at the beginning of this paper (and as it has gradually become clear in the previous sections) is likely to be partial. In fact, the implementation of neither the Maputo Protocol nor the Istanbul Convention is complete. Especially on the latter, very few data are available, since the GREVIO has not yet completed its first evaluation procedure, which will end in 2019.¹⁶⁰ However, such a confrontation is significant in the perspective of the further enhancement of women's rights.

The main sources utilized will be the following: the Global Constitutional Database powered by UN Women;¹⁶¹ the 2016 report of the ACHPR on the implementation of the Maputo Protocol;¹⁶² a joint report by UN Women and the ACPHR of March 2017;¹⁶³ (in the year 2016 a particular attention was paid to Africa as the AU 2016 theme was the empowerment of women's rights¹⁶⁴); the most recent study on v.a.w of the European Institute for Gender Equality (EIGE).¹⁶⁵

With specific regard to the last source mentioned, it is important to clarify that the EIGE is actually interested in the state of the art of the legislation within the European Union context, which does not coincide with the Council of Europe one.¹⁶⁶ It is undeniable that this discrepancy is not functional to the

¹⁵⁸ See Sec. 2.3. and Sec. 3.1 *supra*.

¹⁵⁹ Art. 3: 'The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.'

Art. 7: 'The Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the States concerned.'

¹⁶⁰ See *supra* § 3.2.

¹⁶¹ See www.constitutions.unwomen.org/ last visited on 31 March 2017.

¹⁶² See www.peaceau.org/uploads/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf last visited on 31 March 2017.

¹⁶³ See www.ccdg.ecowas.int/wp-content/uploads/State-of-Womens-Rights-Report-March-2017-ilovepdf-compressed.pdf last visited on 31 March 2017.

¹⁶⁴ 'This report is the result of a yearlong collaboration with the UN-OHCHR, the African Union Special Rapporteur on the Rights of Women and UN-Women. It is a contribution to honor the AU 2016 theme "year of human rights with a particular focus on the rights of women", celebrate gains and continue advocacy for the voiceless. It started as a conversation on a knowledge product that would shed light on topics which are not as prominent in mainstream discussions and took the final shape of a full fledged report which will enable us move a step forward the rights of women by tracking and reporting progress. It has undergone several iterations and your feedback will ensure follow-up editions continue to meet our knowledge and advocacy needs'. These are the words of Mahawa Kaba Wheeler, Director of the Division Women Gender and Development of the African Commission on the report of March 2017.

¹⁶⁵ See <http://eige.europa.eu/sites/default/files/documents/Violence-against-Women-Victim-Support-Report.pdf>, last visited on 31 March 2017.

¹⁶⁶ Compare *supra* n. 18. See EIGE's work mainly through the paper 'Combating Violence against Women', available at www.eige.europa.eu/rdc/eige-publications/combating-violence-against-women-european-union, last visited on 13 June 2017, and the database on definitions of the different types of violence, which is still being built up, available at <http://eige.europa.eu/gender-based->

present investigation, drawing a fragmentary picture. However, in the lack of overall feedbacks from GREVIO and considering that all the EU Members are as well States Parties of the Counsel of Europe, resorting to the EIGE's findings appears to be a consistent choice.

4.1. THE AFRICAN NATIONAL LEGISLATION: SOME EXAMPLES

As regards Africa, it is essential to start the analysis from the constitutional framework. In fact, on the one hand the present work was inspired, as anticipated, by a sensitively different constitutional wording from European countries; on the other hand, the Maputo Protocol, with its explicit aim to integrate the disposal of the African Charter, is a powerful source capable of having a deep impact at a constitutional level.

From a general perspective, in respect of the topic of constitutional wording, if one checks the section called “women’s rights” of UN Women’s Global Constitution Database, most of the provisions found are from African Constitutions.¹⁶⁷ The enunciation of the principle of equality, rather than through a non-discrimination clause that mentions sex among other parameters, is often made through an explicit affirmation of women’s equal dignity in respect of men (Gambia, Uganda, Swaziland).¹⁶⁸ Then, there are Constitutions that refer not to the problem of discrimination in general but to the most specific problem of discrimination against women (Democratic Republic of Congo).¹⁶⁹ In other cases, women are not expressly mentioned, but the non-discrimination clause includes parameters – unusual to the European framework – such as marital status and pregnancy, that were added with the aim to face the issue of discrimination of women rather than discrimination of individuals in general (Kenya).¹⁷⁰ This tendency to make gender-sensitivity explicit, especially in the field of non-discrimination, is probably due to the influence of the Maputo Protocol, the aim of which, as remarked above, is to complement the Charter (and therefore to become a source at the same level as the Charter) and to fill its gaps. One of the most intolerable aspects of the Charter was exactly the failure to well define the prohibition of discrimination. A brief clarification might be useful. The observations just made obviously do not imply that European Constitutions are not sensitive to gender issues, as will become clearer below. Actually on this point the importance of the historical context comes out: African Constitutions are more recent, which is a plausible explanation to the tendency to make certain topics explicit directly in their texts; European ones instead have been “integrated” and “powered” by case law. Yet, it is undeniable that a different wording reveals a different approach to the same issues, which has been the point of departure of the present work.

Having made such an important digression, returning to the impact of the Maputo Protocol on Constitutions, there are countries, such as Malawi, that have “received” it at such a degree that the

violence/regulatory-and-legal-framework/legal-definitions-in-the-eu.

¹⁶⁷ See <http://constitutions.unwomen.org/>, 16 results for Africa, 8 for Asia, only 2 for Americas and none for Europe.

¹⁶⁸ For instance Sec. 28 of the Constitution of Gambia: ‘Women shall be accorded full and equal dignity of the person with men. Women shall have the right to equal treatment with men, including equal opportunities in political, economic and social activities’. Similarly Sec. 24 of the Constitution of Malawi: ‘Women have the right to [...] be accorded the same rights as men in civil law’. The same can be said for art. 33(1) of the Constitution of Uganda: ‘Women shall be accorded full and equal dignity of the person with men’ and Sec. 28(1) of the Constitution of Swaziland: ‘Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities’. New 2015 Constitution of Rwanda, Preamble: ‘[...] Committed to ensuring equal rights between Rwandans and between women and men without prejudice to the principles of gender equality and complementarity in national development [...]’.

¹⁶⁹ This is the case, for instance, of art. 14 of the Democratic Republic of Congo: ‘The public powers see to the elimination of any form of discrimination concerning women and assure the protection and the promotion of their rights.

They take, in all the domains, notably in the civil, political, economic, social and cultural domains, all the measures appropriate to assure the total realization and full participation of women in the development of the Nation.

They take measures to struggle against all forms of violence made against women in public and in private life. [...]

¹⁷⁰ This is the case of art. 27(4) of the Constitution of Kenya: ‘The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth’.

wording is almost identical and deals with all the analyzed issues (among which marriage, property, inheritance rights) within the same “women-favorable clause”.¹⁷¹

Other countries (namely Namibia), instead of recalling all the contents of the Protocol, have simply included it all within their domestic legislation.¹⁷²

As a consequence of the efforts of the Maputo Protocol in framing human rights specifically pertaining to women, Kenya, Zimbabwe and Rwanda have recently reformed their Constitutions, taking a gender sensitive dimension that enhances women’s rights. Such reforms tackle issues such as violence against women, stereotypes, nationality, discrimination and poverty.¹⁷³

In particular, for what concerns Kenya, the new Constitution states, for instance, that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid, therefore protecting women against “harmful practices” and repealing related customary law in compliance with art. 5 of the Maputo Protocol.¹⁷⁴ Within the new Constitution of Kenya, great importance must be given to art. 21(4) which states that ‘the State shall enact and implement legislation to fulfil its *international obligations* [italics added] in respect of human rights and fundamental freedoms’.¹⁷⁵

On harmful practices, Sec. 80(3) of the 2013 Zimbabwe Constitution states that ‘all laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement’. Moreover, beyond the new Supreme Law mandating gender equality, the new Constitution includes extended maternity leave rights and the outlawing of child and forced marriage, as well as other more general changes including the right for Zimbabweans to hold dual nationality.

All these provisions, recalled as mere examples, confirm that the influence of the Protocol has been deep. The same can be said with reference to the particular attention that the Protocol pays to sexual and reproductive rights. Many of the States that ratified the Protocol present a constitutional right to health (South Africa, Kenya, Democratic Republic of Congo, Benin, Swaziland, Zimbabwe and Rwanda) and,

¹⁷¹ Everything is included in the aforementioned Sec. 24: (1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right—

(a) to be accorded the same rights as men in civil law, including equal capacity—
(i) to enter into contracts;
(ii) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status;
(iii) to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and
(iv) to acquire and retain citizenship and nationality.
(b) on the dissolution of marriage, howsoever entered into—
(i) to a fair disposition of property that is held jointly with a husband; and
(ii) to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.

(2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as—
(a) sexual abuse, harassment and violence;
(b) discrimination in work, business and public affairs; and
(c) deprivation of property, including property obtained by inheritance.

¹⁷² Pursuant to art. 144 of the Constitution of Namibia, all international law norms (hence also the Maputo Protocol) binding upon Namibia form part of its domestic legislation.

¹⁷³ Also Rwanda in 2015 adopted a new Constitution enshrining the principle of gender equality. Compare *supra* n. 168.

¹⁷⁴ Art. 2(4) of the Kenyan Constitution of 2010.

¹⁷⁵ For more precise indications on the step by step implementation of the Protocol in the Kenyan Constitution and legislation see Dechert LLP, ‘Implementing the Protocol on the Rights of Women in Africa: Analysing the Compliance of Kenya’s Legal Framework’, March 2014, available at <http://policy-practice.oxfam.org.uk/publications/implementing-the-protocol-on-the-rights-of-women-in-africa>, last visited on 31 March 2017.

among them, some articulate the right in question referring to a specific right to reproductive health and even a “right to abortion”¹⁷⁶ when functional to the protection of the woman’s health.¹⁷⁷ Apart from Constitutional amendments, also many legislative interventions related to discrimination and violence against women reveal the Protocol’s influence in the enhancement of women’s rights. Without being exhaustive, some examples can be made.¹⁷⁸

Benin approved new laws to combat g.b.v. In particular, Act 2011-26 of January 2012 on the Prevention and Repression of Violence Against Women protects women from domestic violence, FGM, forced marriages and other traditional harmful practices against women. Mozambique amended its criminal code, so that now it includes marital rape as an offence, putting an end to the practice of “shotgun weddings”. Angola adopted a specific Domestic Violence Act. Liberia amended its Criminal code and broadened the definition of rape. It also established a specialized court to try cases of sexual violence. The Namibian Combating of Domestic Violence Act, in force since 2003, contains an extensive definition of domestic violence including sexual, economic, verbal, emotional and psychological violence, intimidation and harassment. In Malawi, the legal age for marriage has been set at 18 – as expressly required by the Maputo Protocol – and various provisions have been modified. Sexual violence against women is now a crime and the Gender Equality Act outlaws the notion of sexual harassment. Moreover, the Gender Equality Act prohibits harmful practices, defined as social, cultural or religious practices which, on the account of sex, gender and marital status, do or are likely to undermine the dignity, health or liberty of any person. Gambia, which is one of the countries with a high prevalence rate of FGM, in 2015 passed a law that criminalizes genital circumcision.

To summarize, although progresses have been made in the protection of women, gaps in implementation still have to be filled. In this sense, it is significant that, apart from the inertia in ratifying the Protocol or removing reservations, there are States – which in theory have ratified the Protocol - that are late in submitting their reports to the ACPHR.¹⁷⁹

4.2. THE EUROPEAN NATIONAL LEGISLATION: SOME EXAMPLES

Since the comparison was originally drawn on the grounds of a different technique of constitution-drafting, even in the case of Europe it is necessary to start the examination – as always without the ambition of being exhaustive – from the constitutional level. Art. 4 of the Istanbul Convention requires States Parties to include a gender equality clause in their Constitutions. Many of the States within the sphere of influence of the Council of Europe not only do comply with such a requirement, but they do so in the most certain way to ensure an effective protection. They combine an affirmation of the value of equality in a gender-neutral manner with a non-discrimination clause including sex within the

¹⁷⁶ It is worth noting that the explicit reference to the right to abortion is a peculiarity of African Constitutions, as in most of the European ones, like Italy, France, Spain, Poland and Ireland, the issue is usually solved through a balancing between the right to health (of the mother) and the right to life (of the unborn). See on this point L. Violini, *Temi e problemi di diritto pubblico comparato [Comparative public law issues]* (Maggioli 2014). This is another sign of the Maputo Protocol’s impact being it the first human rights treaty mentioning abortion. See *supra* § 3.1.

¹⁷⁷ Constitution of Kenya, art. 26(4): ‘Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law’. Constitution of Swaziland Sec. 15: Abortion is unlawful but may be allowed -

(a) on medical or therapeutic grounds including where a doctor certifies that –
i. continued pregnancy will endanger the life or constitute a serious threat to the physical health of the woman;
ii. continued pregnancy will constitute a serious threat to the mental health of the woman;
iii. there is serious risk that the child will suffer from physical or mental defect of such a nature that the child will be irreparably seriously handicapped;
(b) where the pregnancy resulted from rape, incest or unlawful sexual intercourse with a mentally retarded female; or
(c) on such other grounds as Parliament may prescribe. Constitution of Zimbabwe Sec. 76(1): ‘Every citizen and permanent resident of Zimbabwe has the right to have access to basic health-care services, including reproductive health-care services’.

¹⁷⁸ Compare *supra* n. 162.

¹⁷⁹ Compare *supra* n. 162.

parameters being listed.¹⁸⁰ This way protected subjects can afford exhaustive protection regardless of their individual features, without the risk of imbalances.

It has to be remarked that, due to the different ambition of the related regional instruments, the European Constitutions have experimented less modifications since the approval of the Istanbul Convention than the African ones since the approval of the Maputo Protocol. Another reason may be that, after all, the Istanbul Convention only entered into force in 2014, so some more time should pass before one can appreciate the outcome of its impact.¹⁸¹

The same can be stated concerning the solution of the legislative measures, since at the moment it is only possible to analyze some isolated best practices.¹⁸² Generalizing on these issues would be in any case difficult: it gets even more difficult with partial results. However, bearing in mind the areas of intervention identified by the Convention, some interesting observations can be made.

Great implementation has already been given to three of the 4Ps, namely prevention, protection of victims and integrated policies.

As regards prevention, for instance, awareness raising campaigns (in compliance with art. 14) have been conducted in Belgium and Germany, while specific training programs for police and prosecutors (art. 15) have been enacted in Serbia, Turkey and Sweden. In Luxembourg, the Domestic Violence Act imposes an obligation on perpetrators under a barring order to appear before a specialized service dedicated to them that files a periodical report to prosecutor (art. 16, preventive intervention and treatment programs). Similarly, the Gender Equality Act passed in France in 2014 – as a consequence of its ratification of the Istanbul Convention - inserts in the criminal code the obligation to undergo awareness training on preventing and combating g.b.v. at the perpetrator's expense, with provisions relating to obligations that a court may impose as a part of a criminal ruling.

As far as the protection of victims is concerned, it is even harder to generalize on provisions, because they are so different. Two of the most significant examples, however, are Belgium and Austria.

In particular, Austria introduced the first law on protection from domestic violence in 1997, already extending it to all victims, regardless of their gender, age, or family status. By not defining the relationship with the perpetrator, the law protects victims from any violence and in any place.

In addition, many States, including Belgium, adopted favourable provisions for immigrant women subjected to v.a.w so that they do not lose their refugee status if they leave their abusive husband.

An interesting sector of the area of protection of victims is the protection they enjoy in proceedings. There is no explicit legal or quasi-legal provision prescribing to treat victims with respect and dignity in many States.¹⁸³ However, at least all 27 States Members of the EU¹⁸⁴ acknowledge victims' right to be involved as an affected party (i.e. right to be heard), with special provisions for the audition of children. In the same sense, all EU Member States are compliant with the requirement of the Convention to ensure legal and/or financial aid to victims, even if provisions are differently designed depending on the fields of violence interested.

¹⁸⁰ This is for instance the case of Moldova (art. 16), Croatia (art. 14), Bulgaria (art. 6), Slovakia (art. 12), Montenegro (art. 15) Austria (art. 7), Italy (art. 3), Finland (Sec. 6). There are some examples of Constitution that prefer to provide women with the same rights as men rather than to acknowledge that all individuals are equal. The latter solution implies that women shall not be discriminated against in respect of men, but also that men shall not be discriminated against in respect of women, as well as of men in respect of other men and women in respect of other women. This is the case of France, Germany, Portugal and Belgium. On different drafting techniques see also UN Women, 'Guidance note, Women's Human Rights and National Constitutions', August 2012, available at www.constitutions.unwomen.org, last visited on 31 March 2017.

¹⁸¹ An aspect to take into account is that there is not a homologous Protocol to the Maputo one in the European framework, indeed, there are many instruments that protect women and ensure them equal rights with men (namely art. 14 of the ECHR, as well as art. 21 of the Charter of fundamental rights of the European Union - but nothing comparable to a dedicated Protocol setting out specific rights pertaining to women).

¹⁸² Compare *supra* n. 162.

¹⁸³ Bulgaria, Cyprus, Croatia, Finland, France, Malta, Latvia, Romania.

¹⁸⁴ Compare *supra* n. 18.

A negative aspect is, instead, that many of the States that ratified the Istanbul Convention do not respect the strict prohibition, entailed by the Convention, to resort to ADR systems instead of criminal proceedings in cases of v.a.w.¹⁸⁵

As to integrated policies, many States have adopted dedicated Plans of Action. Even the EU as a whole is collaborating; the most significant example in this sense is the Mutual Learning Program enhanced by the European Commission.¹⁸⁶

The most difficult area to examine is the one related to prosecution of offenders, because even though the majority of States have criminalized most forms of v.a.w., it is clear that the harmonization within national legislations as promoted by the Istanbul Convention is an aim still far to reach.

First of all, as regards domestic violence (art. 3b. of the Convention), whether it is criminalized or not varies. In fact, there are two approaches to face domestic violence (or intimate partner-violence). One is to frame it within existing crimes, considering such existing criminal offences as aggravated if they are committed within the family or against a close person or current or ex-partner. The approach in question allows using all provisions of criminal law while imposing higher sentences, but normally no gender distinction is introduced. Another is to include within the criminal code a dedicated, gender-sensitive offense.¹⁸⁷ Only ten States have embraced the second approach and considered domestic violence as a crime in its own right.¹⁸⁸ A peculiar case is Spain, which both resorts to existing provisions and makes gender distinctions.

Another significant example regards rape and sexual assault (art. 36). Although they are classified as criminal offences in many States (at least all the EU Member States), there are wide disparities in the definitions underpinning rape as an offence, notably when it comes to the use of force and/or to lack of consent. Actually, lack of consent on its own is a requirement in only two Member States. In other words, only two Member States have a solely consent based standard (which, to be precise, would be the more compliant with the notion set forth by the EC(t)HR¹⁸⁹).

The dishomogeneity of legislations comes up also with reference to sexual harassment (art. 40). Not only is sexual harassment rarely, and only recently, criminalized, but also it is often subject to strict limiting requirements; for example, it is often considered specifically within the context of employment, as opposed to a stand-alone offence, or requires a subordinate position of the victim.

Similarly, stalking (art. 34) is not always considered a crime in itself. Some States have a dedicated law and some prosecute it under other crimes in the criminal or penal code.

In the end, it must be recalled that there is an increasing tendency to recognize FGM (art. 38) as a crime and on the other hand no definition of femicide has ever been given.

As it is easy to understand and as it was anticipated at the beginning of this work, differences in the legal definitions of forms of violence against women and other related terms, as well as in data collection methods, make it challenging to obtain a comprehensive, accurate and comparable picture of the nature, extent and consequences of violence against women. This difficulty is what hinders the realization of a harmonized framework as the one called for by the Istanbul Convention. Some consider that, in the light of such disjointedness, a better option would be that the European Union as a whole should participate in the Convention.¹⁹⁰

Hopefully, the outcome of the first GREVIO evaluation procedure will constitute the grounds on which to come to more precise and exhaustive conclusions and find appropriate solutions.

5. FOCUS: THE IMPLEMENTATION OF THE ISTANBUL CONVENTION IN ITALY

¹⁸⁵ Compare *supra* n. 162. And see *infra* Sec. 5.

¹⁸⁶ On this topic see all the papers on v.a.w. available on <http://ec.europa.eu/social/main.jsp?catId=1047>, last visited on 13 June 2017.

¹⁸⁷ Actually there is also a third one which we call a “framework law”, sometimes overlapping, consisting in combining provisions of different domains of law.

¹⁸⁸ Austria, Czech Republic, Denmark, Spain, Italy, Poland, Portugal, Sweden, Slovakia, Slovenia.

¹⁸⁹ See *supra* Sec. 2.2.

¹⁹⁰ In this sense especially G. Pascale, *supra* n. 104, p. 9.

As repeatedly remarked, Italy signed the Istanbul Convention in 2011 and ratified it in 2013. More precisely, the Law Decree No. 93 of 2013 – then converted into Law No. 119 of 2013 – was adopted with the explicit aim of transferring the indications contained in the Convention into the Italian framework.

Hence, it is useful to devote a section to inquire in which way and to what extent the Convention has actually been implemented in Italy.

The first thing that deserves to be mentioned is that, at the very beginning, before the ratification, Italy's position towards the Convention was not univocal and clear. In fact, the Italian government had originally decided to deposit, when ratifying the Convention, an interpretative declaration¹⁹¹ with regard to some provisions. This choice, as it was explained in the first draft of the law meant to ratify the Convention, was due to the definition of gender given therein, which was deemed too wide and indefinite for the Italian framework. In particular, some considered that art. 3 b) of the Convention and its reference to socially constructed roles, activities and behaviors, could determine a clash with constitutional provisions.¹⁹² On the other hand, commentators welcoming the Istanbul Convention with favour replied that the interpretative declaration had the undeclared aim to restrain the scope of application of the Convention – especially with regard to LGBT rights – and that such an option was contrary to art. 3 of the Italian Constitution, which repeals discrimination on grounds of sex (and, consequently, on grounds of sexual orientation). In addition, resembling very much to a reservation contrasting with the aims of the Convention, the declaration would have violated the prohibition set forth by art. 78 of the Convention itself. For all these reasons, in the end Italy ratified the Convention without any interpretative declaration.

As to its actual implementation, commentators have observed that the Italian criminal law framework is mostly compliant with the ambition of the Convention to criminalize g.b.v. and domestic violence. Additionally, procedural guarantees should be empowered from the perspective of an effective involvement of victims in proceedings. In parallel, there is a necessity to correct an almost inertial approach to protection of victims.

In general, there are provisions that represent a step forward in the fight of v.a.w. and others that are not satisfying.

As regards the constitutional framework, equal rights within sexes in specific scopes are guaranteed by art. 51 of the Italian Constitution,¹⁹³ while the right to live free from violence stems from an extensive interpretation of art. 2 of the Constitution, which protects the inviolable and non-negotiable rights of man.¹⁹⁴ Moreover, it is now clear that all the definitions under art. 3 of the Convention are compatible with the Italian Constitution, that at art. 3¹⁹⁵ states a principle of equality which can be in its turn interpreted extensively.

¹⁹¹ For the problems that interpretative declarations may arise because of their unclear nature, see *supra* § 3.2. The declaration in question, actually deposited by Italy's Permanent Representative at the Counsel of Europe, stated: 'Italy declares that it will apply the Convention in conformity with the principles and provisions of the Italian Constitution.'

¹⁹² In particular, at the time the senator Dorina Bianchi pointed out the importance of an Italian interpretative declaration meant to avoid doctrinal and jurisprudential contrast within the Italian framework. The problem seemed to be the absence of a well circumscribed concept of gender in the Italian scenario, since the Italian laws refer to men and women, male and female sexes, without mentioning gender as such – or at least it did at the time. It was as well underlined how ambiguous the notion of gender seemed, in the context of a treaty in which women appeared to be put almost in contrast with men. For further information on these declaration and on how they were overcome see L. Betti, 'Femminicidio: Italia tra Convenzione di Istanbul e raccomandazioni CEDAW' [Femicide: Italy between the Istanbul Convention and CEDAW Recommendations], 1 June 2013, available on www.art.21.org, last visited on 14 June 2017.

¹⁹³ Art. 51: 'Any citizen of either sex is eligible for public offices and elected positions on equal terms, according to the conditions established by law. To this end, the Republic shall adopt specific measures to promote equal opportunities between women and men. The law may grant Italians who are not resident in the Republic the same rights as citizens for the purposes of access to public offices and elected positions. Whoever is elected to a public function is entitled to the time needed to perform that function and to retain a previously held job'.

¹⁹⁴ Art. 2: 'The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled'.

¹⁹⁵ Art. 3: 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country'. This is the general equality clause, then specified in various

As for the ordinary legislation, the aforementioned art. 3 of the Convention does not even require a change of Italian criminal definitions.

An innovative rule is the possibility for strangers that have been subjected to domestic violence to obtain a residence permit,¹⁹⁶ therefore the accordance of protection without discrimination on grounds of nationality and the prohibition of expulsion (*refoulement* is the technical term in French) (art. 59-61 of the Convention) are implemented. The problem is that the application of this provision requires a situation of violence, abuse or concrete and present danger is preventively ascertained, and the scrutiny in question is not always easy.

Another important indication of the Convention concerns rehab programs for perpetrators (art. 16): in Italy they may come as a consequence of the application of art. 165 of the Criminal Code¹⁹⁷ that requires the elimination of the harmful or dangerous outcomes of the crime.

Speaking of art. 16 of the Convention, contrary to art. 16 para. 3 security, support and human rights of victims are not a priority in Italy, and no specialized centers exist.¹⁹⁸ Adequate efforts of harmonization must be made in this field. Actually, allowing stalking victims to afford free legal service is a good way to begin, but some do not understand why such a benefit is not offered to victims of other types of violence determining a sort of reversed discrimination.

The fields on which Italy has focused the most, instead, are the prosecution of offenders and the involvement of victims in proceedings or, in general, the enactment of procedural measures that affect prosecutors and give importance to victims.

In this sense, it is worth noting that the Law Decree contains mostly modifications to criminal provisions and procedural rules for criminal proceedings. This circumstance has provoked the most transversal criticisms to the way Italy has chosen to implement the Convention: law decrees have a precarious nature as they are meant to deal with temporary matters of urgency. V.a.w. certainly is a sensitive problem, but for this exact reason, it would have needed a more “stable” instrument to be coped with, especially because, due to their task to solve urgent matters, law decrees usually contain heterogeneous provisions, which make organic reforms a hard challenge to win. In addition, apart from the fact that the matter to work on was v.a.w., criminal provisions in general need to be enacted through stable and not easy-changing provisions, because of the impact criminal law has on individual liberties.

Having incidentally recalled these strictures, it is useful to proceed with our reasoning.

As regards the issue of the prosecution of offenders, it can be positively remarked that the Italian framework actually acknowledges as crimes many of the conducts that the Istanbul Convention requires to criminalize. This is the case of sexual harassment, FGM, physical and psychological violence and stalking, forced abortion and forced sterilization.¹⁹⁹

Instead, forced marriages (as defined by art. 37 of the Convention²⁰⁰) are not covered by any specific provision. This is due to the fact that the concept of forced marriage arose in normative frameworks less

matters.

¹⁹⁶ See Degani and Della Rocca *supra* n. 19. On the specific topic of the implementation of the Istanbul Convention see in detail also S. Recchione, ‘Il decreto sul contrasto alla violenza di genere: prima lettura’ [*The decree on violence against women: a first glance*], 15 September 2013 and G. Battarino, ‘Note sull’attuazione in ambito penale della Convenzione di Istanbul sulla prevenzione e la lotta contro la violenza domestica’ [*Notes on the implementation of the Istanbul Convention*], 2 October 2013 both available at www.dirittopenalecontemporaneo.it, last visited on 14 June 2017.

¹⁹⁷ In the Italian framework, under certain conditions, the perpetrators of a crime, although convicted, may be sentenced to a punishment that is not effectively applied, like when it is the first time that a person commits a crime or when other circumstances occur. This mechanism is called “suspended sentence”.

¹⁹⁸ See G. Battarino, *supra* n. 196.

¹⁹⁹ See G. Battarino, *supra* n. 196.

²⁰⁰ Art. 37: ‘1 Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.

2 Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised’.

involved than the Italian one - so it was an issue originally not concerning Italy – but nowadays a provision is needed because of the rise of a multiethnic society.

Similarly, Italy does criminalize FGM, but it addresses only active conducts and not the act of providing means to perpetrate such crimes.

The scope of stalking has been widened, in the sense that now conducts prosecutable as stalking can be punished regardless of the relationship linking the victim to the prosecutors, while before partners could not be charged with the crime in question unless they were legally divorced. This reform is appreciable, even if some commentators have observed that it has determined an overlap between stalking and the offence of “mistreatments within the family unit” existing in Italy.²⁰¹ Another aspect related to stalking worth bringing up is the decision to prohibit the withdrawal of charges by the victim, so that the prosecution of crimes will no longer depend on the victim’s will and the State is facilitated in complying with its due diligence obligation. Such a decision, which resulted in a dedicated provision contained in the Decree, had great importance because it proved how the principles stated by the EC(t)HR (*Opuz v. Turkey*) were taken into account.²⁰² In the light of this, the opposite decision to remove the provision in question when converting the decree into law must be regarded as a step back.

As to circumstances of crimes, in compliance with artt. 5 and 42 para. 1 of the Convention, under the Italian Criminal Code customs and religion can never amount to a justification for all the forms of v.a.w. On the contrary, it is likely that such circumstances will make the penalty higher.²⁰³

A new aggravating circumstance, regardless to the type of violence perpetrated, states that the perpetrator will be subject to a higher sanction if he lets a minor see what is happening (s.c. assisted violence). Still on the topic of aggravating circumstances, it is interesting to dwell on the concept of “particular vulnerability”.

Whilst the Convention makes reference to individuals of particular vulnerability, in Italy the “homologous” circumstance only refers to particular conditions of time and space that further endanger the victim, but not to features strictly pertaining to the victim itself. Therefore, to comply totally with the Convention, the notion of “individual of particular vulnerability” should be introduced within the Italian framework.

As to procedural rules, paramount provisions are various forms of protected auditions, preventive cautions, and a wider use of the measure of banishment from the family home.²⁰⁴

Various obligations to inform the victim have been introduced and the terms of custody have been reformed, being geared towards the protection of the victim rather than the right to personal freedom of the prosecutor, which usually is the landmark value in Italy.

As it emerges from this short summary, some significant efforts to implement the Convention have been made by Italy. However, because of internal limits in the legislative framework, there is no sign of that integrated approach and balanced pursue of the 4Ps called for by the Convention.

CONCLUDING REMARKS

²⁰¹ As a matter of fact the Italian Criminal code contains a dedicated offence for those husbands that mistreat wives and children and viceversa. Legal scholars therefore pointed out an overlap between such a crime and stalking. This was overcome by case law, among others in Court of Cassation, IV Section, Decision No. 24575 of 24 November 2011, on the grounds that the values protected by the two provisions were different, hence they could coexist and, under certain circumstances, concur. More precisely, on the one hand the crime of “mistreatments within the family unity” protects the harmony inside the family, while on the other hand the crime of “stalking” protects the moral liberty of the victim regardless of blood ties. For further information on this complex topic see the note to the aforementioned decision by C. Minnella, ‘La Cassazione traccia la linea di confine tra il reato di maltrattamenti in famiglia e quello di stalking’ [*The Court of Cassation marks the limit between stalking and mistreatments within the family unit*], 20 July 2012, available at www.dirittopenalecontemporaneo.it, last visited on 14 June 2017.

²⁰² On the point see in detail P. Degani and R. Della Rocca *supra* n. 19.

²⁰³ See G. Battarino, *supra* n. 196.

²⁰⁴ It is a cautionary measure that prevents the suspected criminal from returning to the place where he could subject his victim to mistreatments.

It is now time to gather all the concepts developed so far and try to analyze the outcome of the comparison we attempted to draw, as well as to understand to what extent the goals of this work have been reached.

The top-down approach adopted in the examination of normative sources and case law has highlighted two things.

On the one hand, it has effectively shown that supranational rules and case law do present many elements in common as they pursue the same tendency in the protection of women. Such a “tendency” is mainly grounded on strengthening state liability and on tackling g.b.v. as a structural and not a sectorial problem. At least, this is what especially the ECHR’s and the APCHR’s efforts seem to prove.

However, on the other hand, it has revealed how this uniformity appears to weaken when we approach the national and “local” level of regulation.

The two continental scenarios have a different history, therefore the regional instruments, although still similar, pursue non-coincident aims, in a progressive divarication that turns into a proper “explosion” into many fragments when looking at national legislation.

At a national level, there appears to be no consensus on definitions, no reciprocal learning, no exchange of best practices (yet) and there seems to be no shared intent on how to proceed against the issue, in terms of continuous dialogue, feedbacks, confrontation and step-by-step roadmaps.

To be clearer, the feeling that the effort to make a comparison leaves is that the “top” level aims to mark a common trend to eradicate the problem, but then the “bottom” level (that is the single States) gets lost in its way to follow such a trend.

Moreover, the fragmentary picture that comes out of the examination of national legislation leaves us uncertain about the answer to give to the questions put at the beginning.

What we can say, along with what came out of the debate at the Symposium where this work was first presented, is that it is all about enforcement, not about the study of abstract models.

Just as an example, one of the peculiarities that impressed us in the first place about the African framework was the inclusion of sexual rights directly inside the Constitutions, to the extent that the Kenyan Constitution mentions abortion, which is something very unusual for European Constitutions. However, insofar as rights are weakened by substantial lack of application of norms, their acknowledgement is pointless. During the Symposium, a discussion on Kenya showed that this is exactly what happens. In fact, the Constitution does provide women with the right to resort to abortion under certain circumstances, but such circumstances depend from the will of a third person (the doctor) that has to certify them. It is then clear that, if most of the doctors deny the abovementioned certification, the mere fact that abortion may be legitimized at a constitutional level is not helpful *per se*.

Does this mean that the study of models is useless? Not at all, it simply shows that the awareness being gained about the importance of enforcement should be employed in the adoption of a bottom-up approach rather than (or better, after) a top-down one.

This is because international law is, we can say, “unreliable”: it has the potential to bind States, but only insofar as States themselves accept to be bound by it.

The same thing somehow happens with Constitutions, even if in the case of international law this is a structural and not contingent feature.

What we mean is that even the best possible model can be useless if it remains ineffective, and effectiveness comes from the “bottom” that is, from the deep perception and awareness of the problem that must be dealt with, from the involvement of all stakeholders and from the pursuit of consensus on the measures to adopt.

The only way to face an issue as complex and shaded as v.a.w. proves to be is, first, to find consensus over problems as well as over required remedies and, then, to follow a common trend set on the grounds of that consensus, not the other way round.

Therefore, rather than waiting for supranational directives to comply with, it is States themselves that should play a more active role, most of all in encouraging round tables, studies and exchanges of ideas at all levels, to increase sensitivity and find shared solutions.

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