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FROM THE CEDAW TO THE ISTANBUL CONVENTION: Effectiveness in tackling Violence Against Women

Supervisor

Dr. Sara De Vido

Co-supervisor

Ch. Prof.ssa Bruna Bianchi

Graduand

Andreea Maria Serbu
842538

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*Le choix est possible dans un sens, mais ce qui n'est pas possible,
c'est de ne pas choisir.
Je peux toujours choisir, mais je dois savoir que si je ne choisis pas,
je choisis encore.*

(Jean Paul Sartre - L'Existentialisme est un humanisme)

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in questo momento in cui il futuro mi appare indefinito e mi incute timore.*

ABSTRACT

Il presente lavoro analizza il fenomeno della violenza di genere con focus sulla violenza nei confronti delle donne nell'ambito del diritto internazionale. In particolare due Convenzioni internazionali rappresentano il fulcro dell'indagine sulla violenza nei confronti delle donne del presente lavoro: la Convenzione sull'eliminazione di ogni forma di discriminazione della donna (CEDAW) e la Convenzione del Consiglio d'Europa sulla prevenzione e la lotta alla violenza nei confronti delle donne e la violenza domestica (Convenzione di Istanbul). L'una entrata in vigore nel 1981 contiene disposizioni che mirano all'eliminazione, in modo sistematico, di ogni forma di discriminazione nei confronti delle donne. La seconda entrata in vigore nel 2014 e adottata nel quadro del Consiglio d'Europa si focalizza nel dettaglio sulla prevenzione ed eliminazione della violenza nei confronti delle donne e la violenza domestica.

Il fenomeno della violenza nei confronti delle donne non è nuovo nella storia dell'umanità. Un report dell'Organizzazione Mondiale della Sanità (OMS) pubblicato nel 2013, riferisce che a livello mondiale il 35% delle donne ha subito durante la propria vita una qualche forma di violenza fisica o sessuale il più delle volte da parte di un partner. A livello europeo, il report dell'Agenzia dell'Unione Europea per i diritti fondamentali del 2014 basato su un campione di 42000 sondaggi compilati da donne nei paesi del continente europeo nel 2010, segnala che almeno il 33% delle donne che hanno preso parte al sondaggio ha subito qualche forma di violenza durante la propria vita. Inoltre, il report riferisce che una donna su due è stata vittima di qualche forma di molestia sessuale. I dati sulla

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violenza nei confronti delle donne confermano come il fenomeno sia altamente diffuso a livello mondiale e europeo. D'altro canto, questo lavoro indaga il fenomeno della violenza a livello internazionale, tenendo conto delle differenze nella percezione della violenza da parte delle donne. È stato infatti statisticamente analizzato come la percezione di essere vittime di violenza, ad esempio, cambi da donna a donna a livello europeo in diversi Stati e a livello nazionale da un'area all'altra dello Stato stesso.

Il punto di vista adottato in questo lavoro si focalizza sulla violenza nei confronti delle donne dal punto di vista delle misure prese a livello internazionale per combattere il fenomeno. Difatti, esso ripercorre gli step che hanno portato all'inclusione della violenza nei confronti delle donne come violenza di gender nel diritto internazionale. Innanzitutto, in un excursus temporale, si definiscono le tappe che hanno portato alla progressiva affermazione dell'uguaglianza di genere come argomento di dibattito a livello delle Nazioni Unite durante il *Decade for Women* tenutosi dal 1975 al 1985. L'elaborazione della CEDAW a livello internazionale si colloca precisamente in questo scenario in quanto è stata adottata nel 1979 ed è poi entrata in vigore nel 1982. In seguito alle Conferenze mondiali sulle donne tenutesi a Città del Messico, Nairobi e Copenhagen, durante la Conferenza mondiale sui diritti umani del 1993 a Vienna, la violenza nei confronti delle donne è stato uno dei temi principali affrontati nel quadro dei diritti umani a livello mondiale. In particolare, la Dichiarazione di Vienna risultata dalla Conferenza ha sviluppato la definizione di violenza nei confronti delle donne come forma di discriminazione e violazione dei diritti umani. Il passo successivo venne fatto nella Conferenza di Pechino del 1995 che nei 12 punti del *Platform for Action*

prende in considerazione anche la violenza nei confronti delle donne collegata alla parità di genere. Per quanto riguarda il livello internazionale regionale e la violenza nei confronti delle donne, due Convenzioni hanno preceduto l'adozione della Convenzione di Istanbul: l'una a livello americano, la Convenzione di Belém do Pará adottata nel 1995 dai paesi dell'Organizzazione degli Stati Americani; l'altra, nel contesto africano, il Protocollo di Maputo adottato dall'Unione Africana, ed entrato in vigore nel 2005.

La discussione sui documenti e sulle Convenzioni internazionali che trattano della violenza nei confronti delle donne come violenza di genere risultano fondamentali nell'argomentazione sostenuta nel presente lavoro per il fenomeno della *cross-fertilization*. Difatti, quest'ultimo spiega come a livello internazionale l'*opinio iuris* influenzi lo sviluppo di principi a livello internazionale, in questo caso legati alla violenza di genere. Un esempio viene fornito dal Comitato CEDAW creato dalla CEDAW che attraverso *General Recommendations* ha sviluppato e interpretato la discriminazione nel quadro della Convenzione con riferimento alla violenza sulle donne nonostante essa non fosse originariamente prevista nello scopo della CEDAW.

L'analisi delle definizioni contenute nella CEDAW e nella Convenzione di Istanbul in merito alla violenza nei confronti delle donne servono come punto di partenza per identificare i maggiori limiti nell'approccio delle due Convenzioni. In particolare, a partire da quest'analisi, si ricava che la violenza nei confronti delle donne come forma di discriminazione e violazione dei diritti umani, è originata nella disuguaglianza strutturale tra donne e uomini. Per questo motivo, i principi e gli standard contenuti nella CEDAW e nella Convenzione di Istanbul vengono presi in

considerazione in merito alla loro efficacia nello sradicare la disuguaglianza strutturale collegata ai rapporti di dominio e subordinazione che si creano tra uomini e donne nella società. A questo riguardo, si argomenta che l'approccio delle due Convenzioni dovrebbe concepire il principio di non-discriminazione come parità sia formale che sostanziale tra uomini e donne in modo da sradicare la disuguaglianza strutturale causa di violenza di genere.

Il lavoro, inoltre, si sviluppa attraverso l'analisi di tre principali limitazioni che vengono identificate nel quadro della CEDAW e della Istanbul Convention in merito all'efficacia del proprio approccio nel combattere la violenza nei confronti delle donne come violenza di genere.

La prima limitazione che viene individuata risiede, in generale, nella nozione di universalità dei diritti umani. Si argomenta che l'universalità dei diritti umani venga continuamente messa in discussione su diversi piani. Innanzitutto per quanto riguarda la partecipazione degli Stati al regime dei diritti umani, la loro universalità viene messa in discussione in merito alla ratificazione e all'attuazione dei trattati sui diritti umani. Di fatto, benché gli Stati ratifichino trattati sui diritti umani, la loro attuazione è difficilmente valutabile per i deboli meccanismi di controllo che esistono a livello internazionale. Talvolta, la ratificazione di trattati internazionali da parte degli Stati viene accompagnata da riserve ai trattati stessi che possono essere contrarie all'oggetto e allo scopo del trattato stesso. Un esempio è dato dalle riserve alla CEDAW fatte da alcuni Stati in nome della religione o della cultura. Attraverso le riserve, gli Stati limitano l'applicazione della CEDAW sulla base della compatibilità delle disposizioni che essa contiene con la cultura o la religione di un dato Stato.

In particolare, l'universalità dei diritti umani delle donne viene analizzata in merito a due aspetti principali nel quadro della CEDAW e della Convenzione di Istanbul. Il primo aspetto riguarda la rappresentazione delle donne come gruppo omogeneo. Sebbene questa rappresentazione delle donne come categoria omogenea sia stata benefica per la progressiva affermazione delle questioni di disuguaglianza di genere a livello internazionale, essa presenta anche dei limiti. Il rischio principale dell'omogenizzazione consiste nel non adottare approcci efficaci per combattere la discriminazione e le forme di violenza nei confronti delle donne, poiché non viene colta la complessità dei fattori che determinano l'identità e le esperienze delle donne. Effettivamente, la discriminazione e la violenza nei confronti delle donne avvengono all'intersezione di vari assi o elementi che caratterizzano le esperienze delle donne, come classe sociale, etnia ed età. Per questo motivo, si sostiene che strumenti come la CEDAW e la Convenzione di Istanbul debbano promuovere un approccio *intersezionale* che tenga conto della complessità delle esperienze delle donne per combattere violenza e discriminazione. Il secondo aspetto che viene problematicamente identificato in merito all'universalità dei diritti umani delle donne è la nozione di cultura. Le riserve fatte dagli Stati Parti alla CEDAW sono discusse per sottolineare come la cultura venga invocata per escludere l'applicazione di alcune disposizioni della Convenzione. Queste riserve basate su motivi culturali o religiosi rispecchiano l'argomentazione di relativismo culturale usata per contrastare generalmente l'universalità dei diritti umani. Tuttavia, il presente lavoro sostiene che suddetta argomentazione sia rafforzata dall'utilizzo ambiguo della nozione di cultura a livello internazionale e soprattutto a livello della CEDAW e della Convenzione di Istanbul. Ad esempio, nella CEDAW la nozione di

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cultura viene talvolta descritta come statica con pratiche dannose alle donne, mentre altre volte viene dipinta come dinamica con la caratteristica inerente di svilupparsi ed evolversi nel tempo. La tesi perciò argomenta che la nozione di cultura a livello internazionale dovrebbe essere interpretata nel suo aspetto dinamico per evitare la stigmatizzazione di intere culture che inevitabilmente vengono collegate alle pratiche dannose per le donne (ad esempio la mutilazione genitale femminile). Oltretutto, una suddetta interpretazione della nozione di cultura permetterebbe di cogliere la similarità tra pratiche che portano diversi nomi ma che ugualmente intaccano l'integrità fisica delle donne. Soltanto attraverso l'adozione di una nozione di cultura che possa sottolinearne l'aspetto dinamico, è possibile promuovere i diritti delle donne a livello internazionale escludendo argomentazioni di relativismo culturale e intaccare la disuguaglianza di genere a livello strutturale.

La seconda limitazione identificata nel presente lavoro riguarda l'esclusivo focus sulle donne nella CEDAW e nella Convenzione di Istanbul. Il focus sulle donne è stato incoraggiato dall'attenzione accordata alle questioni di genere a livello internazionale dagli anni Settanta agli anni Novanta e dalla diffusa incidenza della violenza nei confronti delle donne a livello globale. Tuttavia, nel presente lavoro si afferma che il focus sulle donne, benché necessario in passato per includere il tema a livello internazionale, attualmente non permetta di svelare le radici della violenza contro le donne. Partendo da questa premessa, l'analisi della nozione di *gender* dimostra come le disuguaglianze strutturali tra uomini e donne siano insite nei ruoli sociali attribuiti a uomini e donne sulla base di caratteristiche fisiche. Attraverso l'indagine delle nozioni di sesso e *gender*, viene argomentato che le

disuguaglianze strutturali tra individui non sono basate su caratteristiche fisiche che da essi possedute, al contrario, esse derivano dalla costruzioni sociali dei ruoli di genere attribuiti a donne e uomini nella società.

Da un lato, il focus esclusivo sulle donne da parte della CEDAW e della Convenzione di Istanbul impedisce di comprendere la violenza di genere come fondata nella costruzione sociale delle relazioni di genere. Inoltre, la focalizzazione sulle donne perpetua una politica di protezione maschile da parte dello Stato nei confronti delle donne basata su un rapporto di subordinazione della donna che deve rimanere in tale posizione in virtù della protezione che le viene data. Infine, il focus esclusivo sulle donne nelle due Convenzioni risulta problematico in quanto esclude gli uomini come soggetti delle relazioni di genere non tenendo conto di come anche la nozione di uomo sia una costruzione sociale.

La riflessione sul *gender* aiuta nell'indagine delle disuguaglianze strutturali perpetuate attraverso le relazioni di genere e rispecchiate anche nelle istituzioni che conservano così relazioni di dominio e subordinazione tra gli individui. Infine, la riflessione sul *gender* aiuta a sostenere che la CEDAW e la Convenzione di Istanbul dovrebbero superare la categorizzazione binaria degli individui in uomini e donne per catturare invece l'essenza delle disuguaglianze strutturali inerenti a queste categorie.

La terza ed ultima limitazione identificata nel quadro della CEDAW e della Convenzione di Istanbul viene analizzata in collegamento all'essenza stessa del diritto internazionale che è fondato sull'esperienza maschile. Nonostante la progressiva inclusione di questioni collegate alle donne nei trattati sui diritti umani, sembra ci sia ancora una tendenza ad adottare a livello internazionale una

prospettiva di *gender* apparentemente neutrale. Tuttavia, nel presente lavoro si sostiene che il diritto internazionale non è neutrale dal punto di vista del *gender*, al contrario esso si è sviluppato sulle esperienze cosiddette maschili. Prima di tutto, l'essenza stessa delle relazioni internazionali basata sulle relazioni tra gli Stati è concentrata sull'esperienza maschile. Ciò viene ritrovato soprattutto nella divisione tra la sfera pubblica e privata che ha relegato l'esperienza della donna alla seconda. Concretamente, questa divisione ha portato all'esclusione della violenza nei confronti delle donne, che avviene maggiormente entro le mura di casa, dallo scopo del diritto internazionale competente invece nella sfera pubblica. Per quanto riguarda lo sviluppo dei diritti umani, si è sostenuto che la differenziazione tra pubblico e privato sia stata abbattuta dallo sviluppo dell'obbligo di dovuta diligenza in capo agli Stati. Secondo questo principio, lo Stato ha sia l'obbligo negativo di non interferire con il godimenti dei diritti umani da parte degli individui, sia l'obbligo positivo di intervenire per prevenire la violazione e promuovere il godimento degli stessi nella sfera pubblica e privata. Benché l'importanza del principio di dovuta diligenza sia analizzato soprattutto in merito alla giurisprudenza, si argomenta che il principio non sia adeguatamente sviluppato per includere una prospettiva di genere che possa effettivamente contrastare le disuguaglianze strutturali causa di violenza contro le donne.

Le tre limitazioni identificate nel presente lavoro mettono in discussione l'efficacia degli approcci delle due Convenzioni nell'affrontare le complesse disuguaglianze strutturali frutto della violenza di genere nei confronti delle donne. Il presente lavoro costituisce un'analisi approfondita delle suddette Convenzioni e di altri trattati e documenti internazionali che hanno definito e regolato dal punto di vista

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internazionale il fenomeno della violenza nei confronti delle donne. Inoltre, il pensiero femminista in merito alle questioni di *gender* viene preso in considerazione per dimostrare come la dimensione del *gender* debba essere inclusa per svelare le radici delle disuguaglianze strutturali causa di violenza di genere. Infine la giurisprudenza in merito alla discriminazione e violenza nei confronti delle donne costituisce anche fonte primaria per analizzare l'approccio adottato a riguardo a livello internazionale.

In conclusione, il lavoro afferma la necessità di trascendere la categorizzazione binaria e dualistica di uomo/donna a livello internazionale perché attraverso di essa vengono perpetuati sistemi di oppressione. A riguardo, a livello internazionale, il regime dei diritti umani viene identificato come limitato ma anche come mezzo indispensabile che presenta la potenzialità di promuovere una prospettiva di *gender* attraverso il principio di dovuta diligenza in capo agli Stati. Difatti, mediante una prospettiva che identifichi i sistemi di oppressione basati sulle relazioni di genere che creano rapporti di subordinazione e dominio di alcuni soggetti verso altri, è possibile comprendere e far fronte adeguatamente alle cause della violenza nei confronti delle donne come violenza di genere.

LIST OF ABBREVIATIONS

CAHVIO	Committee for Preventing and Combating Violence against Women and Domestic Violence
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CEDAWC	Committee of the CEDAW
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CHR	Commission on Human Rights
CoE	Council of Europe
Convention Belém do Pará	Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women
CSW	Commission on the Status of Women
CWGL	Center for Women’s Global Leadership
DAW	Discrimination against Women
DEVAW	Declaration on the Elimination of Violence against Women
DV	Domestic Violence
ECHR	European Court of Human Rights
EU	European Union
FGM	Female Genital Mutilation
FRA	EU Agency for Fundamental Rights
GR 12	CEDAW General Recommendation No. 12: Violence against women
GR 19	CEDAW General Recommendation No. 19: Violence against women

List of Abbreviations

GR 25	General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures
GREVIO	Group of Experts on Action Against Violence Against Women and Domestic violence
HRC	Human Rights Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHR	Inter-American Court of Human Rights
IO	International Organization
Istanbul Convention	Convention on preventing and combating violence against women and domestic violence
NGO	Non-governmental Organization
OAS	Organization of American States
PFA	Platform for Action
PRWA	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
TNC	Transnational Corporation
UNCAT	United Nations Convention Against Torture
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UDHR	Universal Declaration of Human Rights
VAW	Violence against Women
WHO	World Health Organization

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“Amore e maestà non vanno insieme,
non possono convivere. Perciò,
messo da parte il suo solenne scettro,
Giove, signore e padre degli dèi,
che nella destra ha i fulmini a tre punte
e con un cenno fa tremare il mondo,
preso l’aspetto di un candido toro
mugge e si aggira sul tenero prato
in mezzo alle giovenche.

(...)

Meravigliata,
la figliuola di Agenore lo guarda:
è bello e niente affatto bellicoso.
Ma pur se mansueto, sulle prime
non ardisce toccarlo, poi, però,
gli si avvicina porgendo dei fiori
verso il suo bianco muso. E quello gode,
l’innamorato, e le bacia le mani,
già pregustando il piacere sperato.

(...)

Finché, disperso in lei ogni timore,
ora le porge il petto, che lo palpi
con la virginea mano, ora le corna,
che le involuppi di fresche ghirlande.

A un certo punto la figlia del re
osa sedersi sul suo dorso, ignara
di chi egli sia. In quell’istante il toro
con fare indifferente si allontana
dall’asciutto imprimendo le sue orme
sulla battigia, poi, più avanti ancora,
si porta via la preda in mezzo al mare.

Terrorizzata, lei si volge indietro
a guardare la riva ormai lontana.
La destra stringe un corno, la sinistra
s’appoggia sulla groppa. Tremolando,
le si gonfia la veste nella brezza.”

Introduction

The *Rape of Europa* is a well-known myth narrated by many ancient Greek and Latin authors which is associated with the origin of the name of the European continent. Myths normally tell traditional stories which explain natural or social phenomena involving supernatural beings. As a matter of fact, Europa, is a figure of Greek mythology, daughter of Aegenor, King of the Phoenician city of Tyre. Fascinated by the beauty of Europa, Zeus, the father of all gods and chief of the sky, decides to deceive her in order to make her his spouse. By turning into a beautiful snow white bull, Zeus approaches Europa and when she climbs his back enchanted by the beauty of the bull, he abducts the girl to the island of Crete by fleeing through the sea. Once revealed his real identity, Zeus rapes Europa, he makes her his wife and names her Queen of the island of Crete. From that moment onwards, the territories extending on the North of Crete have been designated with the name Europa.

The *Rape of Europa* is just one among many myths which include some type of gender violence or violence against women. Indeed, *Myths* and *History* are characterized by gender violence. However, these stories are so embedded in culture and have an appearance of naturalness for it is almost impossible to discern the underlying meanings they tell.

First, gender violence is not a new phenomenon in the world. Indeed, it seems to be one of the oldest myths narrated today and also much alive more than ever involving human beings rather than supernatural beings. Second, gender violence is not necessarily accompanied by bodily injuries or bruises, it can be psychologic and economic. Third, gender violence happens in heterosexual or same sex relationships. Fourth, gender violence is seen as a way to maintain structural inequality among gender roles.

Worldwide gender violence is experienced, at least, by one woman out of three in

different forms.¹ For this reason, gender-based violence and violence against women are used, most of the times, interchangeably.²

The focus of this paper will be on violence against women as gender-based violence at international level. In particular, in the paper it will be taken into consideration how the phenomenon of violence against women is envisaged in the framework of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

The CEDAW entered into force in 1981 and it constitutes a comprehensive framework setting standards at global level for the elimination of all forms of discrimination against women. Meanwhile, the Istanbul Convention entered into force in 2014 and it constitutes an international regional instrument adopted at European level which specifically envisages measures to deal with violence against women and domestic violence. The decision to focus specifically on the Istanbul Convention, excluding the other international regional instruments, such as the Convention Belém do Pará at American level, and the Maputo Protocol at African level, both on violence against women, is given by the fact that the Istanbul Convention is the most recent instrument on the international scenario and it has been considered as one of the more advanced to tackle violence against women. Furthermore, the choice has also been influenced by the fact that the Istanbul Convention focuses on the European area which is where I was born and raised as a human being and as a woman.

On the one side, the CEDAW represents a comprehensive framework aimed at eliminating discrimination against women. On the other side, the Istanbul Convention defines violence against women as a form of discrimination and a violation of human rights. With this regard, this dissertation aims at assessing the approaches to violence against women at international level in the context of the two Conventions, in order to question their effectiveness in tackling the issue at its roots.

¹ See the WHO report García-Moreno, Claudia, et al. *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence*. World Health Organization, 2013. Print.

² <http://eige.europa.eu/gender-based-violence/what-is-gender-based-violence>

Introduction

For this purpose, this study represents a qualitative research based on international treaties and international documents which have defined throughout decades the notion of violence against women at international level. Furthermore, it takes into consideration the jurisprudence which has emerged at international level with regard to discrimination and violence against women. Finally, the study includes a qualitative research of feminist scholarship dealing with issues such as gender, discrimination, violence, human rights in international law.

This dissertation aims at unveiling the complexities behind the phenomenon of gender based violence by taking into consideration both theoretical and practical issues encountered by the CEDAW and the Istanbul Convention.

The first Chapter analyzes the steps which have brought to the progressive inclusion of violence against women on the agenda at international level. In particular, this has been enhanced from the Decade for Women in the 70s with the attention to issues of gender equality. Furthermore, definitions of gender-based violence, violence against women and domestic violence will be analyzed within the frameworks of the CEDAW and the Istanbul Convention. Finally, the principle of non-discrimination and equality are taken into consideration as related to discrimination against women and violence against women.

The second Chapter deals with the progressive development of women's human rights at international level. In particular, the notion of universality of human rights is explored linked to the emergence of women's human rights. Furthermore, the challenges to women's human rights and their universality are taken into consideration. These are identified as stemming from the lack of an intersectional approach and the perpetration of cultural stigmatization in international instruments dealing with violence against women. With this regard, women's human rights as universal will be analyzed through a new notion of universality.

The third Chapter explores the limitations of the exclusive focus on women in the CEDAW and the Istanbul Convention. In particular, the notion of gender and its use and evolution at international level will be regarded as useful to explore measures to effectively deal with gender-based violence. This reflection is derived from reflections of the feminist scholarship on notions of gender and sex. In particular, the understanding of gender as overcoming the binary categorization of humanity will be found as crucial to tackle violence against women rooted in structural inequality.

The fourth and final Chapter explores the notion of human rights as men's human rights. In particular it will be taken into consideration the fact that international relations are not gender neutral as it has been asserted. Conversely, they will be found as build on experiences of men by excluding those of women. In the same way the State, which is the main actor within the framework of the CEDAW and the Istanbul Convention, is analyzed as build on characteristics linked to masculinity. Furthermore, the public/private divide will be investigated as the ground which has enhanced the dominance of male structures in the public sphere while excluding women's perspectives. With this regard, the due diligence principle will be analyzed both as a way of disrupting the public/private in the human rights regime and as a limited and vague principle failing to fully prevent and combat violence against women.

CHAPTER 1

DAW AND VAW FROM THE CEDAW TO THE ISTANBUL CONVENTION

VIOLENCE AGAINST WOMEN IS PERHAPS THE MOST SHAMEFUL HUMAN RIGHTS VIOLATION.
IT KNOWS NO BOUNDARIES OF GEOGRAPHY, CULTURE OR WEALTH.
AS LONG AS IT CONTINUES, WE CANNOT CLAIM TO BE MAKING REAL PROGRESS TOWARDS
EQUALITY, DEVELOPMENT AND PEACE.¹

1.1 VAW from the CEDAW to the Istanbul Convention

In this chapter, the focus will be on two main international instruments that deal with discrimination against women (DAW) and violence against women (VAW). First, the Convention on the Elimination of All Forms of Discrimination Against Women (1979), henceforth (CEDAW), envisages the implementation of its principles in order to adopt “measures required for the elimination of such discrimination in all its forms and manifestations” (CEDAW, Preamble). Additionally, in General Recommendation 19 on VAW (1992), the scope of the CEDAW is further enlarged to deal with VAW as a form of discrimination. Second, the Council of Europe (CoE) Convention on preventing and combating violence against women and domestic violence (2011), henceforth Istanbul Convention, contains principles “aspiring to create a Europe free from violence against women and domestic violence” (Istanbul Convention, Preamble).

First, the main steps that have brought to the inclusion of VAW on the international agenda as a gender issue will be recalled. In particular, this will be done by retracing the emergence of women’s issues during the so-called Decade for Women in the 70s, marking

¹ Kofi Annan, United Nations General Assembly New York, 5–9 June 2000.

the first steps towards the shift from the blind approach to gender pursued for many decades by the United Nations. The gradual inclusion of gender issues in international fora have been the ground for the development of international soft law instruments and binding Conventions that included gender perspectives. Furthermore, there will be a focus on the emergence of women's human rights by taking into consideration the main human rights treaties which deal with VAW.

Second, there will be a focus on the definitions of gender based violence and VAW included in the CEDAW and GR. 19 by the Committee of the CEDAW (CEDAWC), and the Istanbul Convention. A close analysis of the definitions given in the two Conventions, will show the differences and main aspects that define gender violence and violence against women at international level. Furthermore, it will show the theoretical developments that have shaped these definitions.

Finally, in the chapter the main aspects of the principle of non-discrimination in the international human rights regime will be analyzed. In particular, the close connection between the principles of non-discrimination and equality will be considered in relation to DAW and VAW as of the CEDAW and the Istanbul Convention. This analysis is relevant to the paper since it explains the approaches of the two Conventions to gender based violence and VAW. Indeed, the CEDAW is aimed at eliminating all forms of discrimination against women while the Istanbul Convention considers VAW as a form of discrimination and a violation of human rights. The analysis of the principle of non-discrimination and the principle of equality of women compared to men adopted in the CEDAW and the Istanbul Convention, will show unsatisfactory in the pursuit of the elimination of gender based violence and VAW.

1.2 VAW on the international agenda

The phenomenon of violence against women, and of discrimination against women in general, is not a secret to anybody anywhere in the world. It is a phenomenon that still happens today despite the ongoing concern with DAW and VAW at international level. By looking at the report of World Health Organization published in 2013, it shows that worldwide about 35% of women have experienced physical and/or sexual violence either by an intimate partner or not (García-Moreno 2). Additionally, the report states that one woman out of three has experienced either physical or sexual violence when in a relationship (García-Moreno 2).² With focus on the European Union, the Agency for Fundamental Rights (FRA) assists EU institutions and member States in tackling issues linked to the safeguard of fundamental rights of people.³ In particular a report by the FRA of 2014, based on a survey done by 42,000 women in 2010, presents a comprehensive picture of women's experiences linked to violence in the 28 countries of the EU. Before briefly mentioning the main findings of the FRA report, there are a premise to be done on fieldwork reports based on surveys. Indeed, much of the fieldwork research conducted at EU level shows how the perceptions of VAW change among people in EU States. For example, the report *Domestic Violence against Women (DVAW)* on a survey conducted at EU level in 2010 presents the differences on awareness, perception and causes of VAW among individuals (DVAW 38).⁴ Therefore, when considering the comprehensive results of the report by the FRA, it has to be taken into consideration that VAW is perceived in different ways across countries in the European Union. These perceptions may change, for example, among women who live in different EU countries or in different areas of the same country. In all probability, this is also accurate for surveys conducted at global level

² See the whole Report by the World Health Organization of 2013 available at http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf?ua=1.

³ About FRA. Available at <http://fra.europa.eu/en/about-fra>

⁴ Domestic Violence against Women is a report requested by the Directorate-General for Justice, Freedom and Security of the European Commission. In-depth details on the report available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_344_en.pdf.

which taken into consideration greater parts of the world's population. However, the results of the FRA report 2014 show that the issue of VAW is still of great concern at EU level. Indeed, it is reported that at least 33% of the 42,000 women who took the survey, has experienced either physical or sexual violence (FRA 167). Also, one woman out of two has experienced some form of sexual harassment throughout her life (FRA 167). By looking briefly at a few data on VAW, both at international level and at regional level, in the European Union, it seems evident that much is still to be done in order to overcome the widespread practice of violence against women.

1.2.1 VAW at international level

The CEDAW and the Istanbul Convention represent the focus of this paper as far as international instruments concern in tackling the problem of DAW and VAW. Despite the narrow focus on these two Conventions, some remarks on other international Conventions and soft law instrument will be made. Indeed, VAW has been brought on the agenda at international level in the 90s (Edwards 7). However, the concern with gender equality began during the 70s, in particular, at the World Conference of the International Women's Year held in Mexico City between June and July 1975.⁵ Subsequently, Resolution 3520 (XXX) adopted by the United Nations General Assembly (UNGA) proclaimed the UN Decade for Women in December 1975.⁶ Indeed, from the Conference in Mexico City, two more conferences took place, the Copenhagen Conference (1980)⁷ and the Nairobi Conference (1985). These three Conferences of the Decade for Women are considered to be the firsts that had taken into consideration the issue of women's equality compared to men at international level. Indeed, up to that moment the UN system had not specifically included gender issues in its system (Chen 477-8). The shift of the UN in considering

⁵ World Conferences on Women. <http://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women>

⁶ UN General Assembly, *World Conference of the International Women's Year*, 15 December 1975, A/RES/3520, available at: <http://www.refworld.org/docid/3b00f1a814.html>.

⁷ The draft of the CEDAW was presented at the Copenhagen Conference and entered into force in 1981. Further remarks on the history of the CEDAW <http://www.un.org/womenwatch/daw/cedaw/history.html>.

issues of gender equality, or more precisely women's equality compared to men, was attributed to the great recognition and official participation of women-led NGOs in the Conferences during the Decade for Women (Chen 480). However, despite this remarkable shift in dealing with discrimination against women, VAW was not explicitly included in on the agenda in either of the three Conferences. Reasons for this shortcoming are attributed both to structural issues of the Conferences and the lack of resources (Jutta 142-3). As far as structural issues concerns, the Conferences included representatives from a wide number of States⁸ and many NGOs. However, the wide representation practically meant diverging positions which politicized the Conferences and directed their focus on certain issues rather than that of VAW (Jutta 145). Additionally, there was a lack of resources especially linked to expertise on the issue of gender. Thus, there was a limited the sphere of action in international forums, in particular VAW was considered as concerning only women and was not directly taken into consideration (Jutta 148).

The adoption of the CEDAW in 1979 puts itself in the framework of the UN Decade for Women. However, VAW was not explicitly considered in either of its articles.⁹ With the adoption of General Recommendation 12 (GR. 12) of 1989 and General Recommendations (GR. 19) of 1992 by the Committee of the CEDAW, VAW was formally considered within the regime created by the CEDAW on DAW and it was consequently discussed in the 1993 World Conference on Human Rights. The preparatory meetings held at regional level in different areas of the world for the 1993 World Conference and resolution 1993/46 of the Commission on Human Rights¹⁰ (CHR) on appointing a UN Special Rapporteur on VAW from the following year on, have brought to the examination of VAW as a violation of human rights. Eventually, the developments on the issue have been mirrored in the outcome document of the World Conference called Vienna Declaration and Programme of Action (Vienna Declaration) (Sullivan 152-155). Indeed,

⁸ The Decade for Women took place during the so-called Cold War period in which block alliances influenced the agenda of international fora.

⁹ Further remarks on the CEDAW will be made in the following section.

¹⁰ Resolution 1993/46 CHR. Available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=160.

the Vienna Declaration¹¹ broadly considers VAW as a form of discrimination, by recalling CEDAW's Committee GR. no. 19, and as a violation of human rights (Vienna Declaration, section 3). Additionally, the Vienna Declaration considered violence against women in situations of both peace and conflict. Since the conflict in Yugoslavia of 1991, there had been, as a matter of fact, focus and concern on the use of violence against women, in the form of sexual assault, as a warfare tool.¹² Furthermore, the Vienna Declaration also includes the principle of universality of human rights which is equally applied to women's human rights which should be protected by States and it rejects justifications for gendered based violence which stem from cultural prejudices.¹³ The Vienna Declaration was followed by the UNGA Res. 48/104 Declaration on the Elimination of Violence against Women (DEVAW) of December 1993 prepared by the Commission on the Status of Women (CSW). This Declaration by the UNGA was the first document in which the States at UN level gave a definition of VAW which was intended as gender based violence.¹⁴ Anew, in its content it is expressed the principles that violence against women should be tackled by States both in the private and public life and that justifications based on customs, traditions or religion should not be invoked in order to justify VAW.¹⁵ In 1995, the 4th conference on women took place in Beijing and it resulted in the Beijing

¹¹ The Vienna Declaration was adopted on 25 June 1993. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

¹² International Criminal Tribunal for the former Yugoslavia (ICTY) was one the first international tribunal which advanced IHL with regard to sexual violence. See <http://www.icty.org/en/in-focus/crimes-sexual-violence>

¹³ In I.18 of the Vienna Declaration it is stated that "The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community. Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. (...)".

¹⁴ In Article 1 of the DEVAW the definition of "(...) "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."

¹⁵ In Article 4 of the DEVAW "States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. (...)".

Declaration and the Platform for Action (PFA) which had been adopted by 189 States.¹⁶ The PFA includes 12 areas of concern linked to women, among which VAW and human rights of women are explicitly mentioned. The PFA also encouraged States to ratify and implement the CEDAW, since it was the only comprehensive international instrument that granted legal protection of women (Palatiner 1268). The unanimous consensus, reflected in the adoption of the Beijing Declaration and the PFA, showed the widespread concern at international level and the willingness to set common standards in order to tackle issues related to women and violence.

All in all, the instruments that so far have been taken into consideration, do not have the legal status of the CEDAW which is a treaty binding for the States ratifying it.¹⁷ However, the aforementioned declarations¹⁸ (the Vienna Declaration and the GA Declaration on violence against women) and the other international fora which directly or indirectly have dealt with the issue of gender inequality and VAW, have enhanced the spread of the concern on the issue at international level. When looking back in time, progress has been made on the issue of VAW. Indeed, there has been a development from a blind silence on the topic in the 70s at UN level, to the inclusion of VAW and the first acknowledgements of women's human rights in UN international fora which were not originally mean to deal with VAW.

1.2.2 VAW at international regional level

The Istanbul Convention places itself in the framework of international regional instruments adopted with regard to VAW. Indeed, as previously mentioned, the Istanbul Convention has been adopted in the Context of the CoE. However, as far as the international regional level concerns, the Istanbul Convention is not the only one. Previous

¹⁶ World Conferences on Women. <http://www.unwomen.org/ar/how-we-work/intergovernmental-support/world-conferences-on-women>

¹⁷ As of May 2017 present 189 States have ratified the CEDAW. Notably, 193 States are Parties to the UN. This, shows an almost universal acceptance of its provisions and principles. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en

¹⁸ Declarations by the CHR serve at understanding, implementing and developing international human rights law. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

to the Istanbul Convention, two treaties have been adopted at the American and African level dealing specifically with VAW.

First, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, also called Convention of Belém do Pará, entered into force in 1995. It was adopted at the 24th session of the General Assembly to the Organization of American States (OAS) in 1994. The OAS was established by the adoption of the Charter of the OAS in 1951.¹⁹ The Convention was ratified, as of 30 May 2017, by 32 State Parties to the OAS. Remarkably, the Convention of Belém do Pará has not been either signed or ratified only by 2 States Parties to the OAS namely Canada and the United States.²⁰ Similarly, the United States, as of 30 May 2017, has not ratified the CEDAW despite having signed it in 1980. As far as its content concerns, the Convention of Belém do Pará, establishes VAW as physical, sexual and psychological violence, whether it happens in the private or public sphere (Article 1).²¹ Furthermore, VAW is considered as a violations of human rights and States parties have the obligation to take measures to prevent, punish and eradicate VAW (Convention of Belém do Pará Article 7b). Despite being the first international regional instrument dealing with VAW and the widespread consensus it had achieved at American regional level, in its 2004 report, Amnesty International asserts that the Convention of Belém do Pará is far from being implemented.²²

Second, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (PRWA), also called Maputo Protocol, was adopted in by the African Union in 2003 and it entered into force in 2005. The African Union is a regional international organization established in the African Continent in 2001. As of 30 May 2017, the PRWA has been ratified by 36 States Parties to the African Union. As far as the

¹⁹ About the OAS. http://www.oas.org/en/about/who_we_are.asp

²⁰ Status of the Convention Belém do Pará. <http://www.oas.org/juridico/english/signs/a-61.html>

²¹ Article 1 of the Convention of Belém do Pará states: *For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.*

²² See the whole report Amnesty International. *Organization of American States: effective implementation of the Convention of Belém do Pará. A task still to be done.* 10 October 2004: 10. Available at <https://www.amnesty.org/en/documents/ior62/003/2004/en/>

content of the PRWA concerns, also economic harm is included in the definition of VAW together with physical, sexual and psychological violence (Article 1b).²³ Additionally, the PRWA contains an article with the specific focus on harmful cultural practices, such as female genital mutilation (Article 5). Again, as in the Convention of Belém do Pará, States Parties have the duty to eliminate VAW in both private and public spheres (PRWA Article 3b). The Istanbul Convention mirrors the developments that have been made both at international and regional level in including and defining VAW. However, the effectiveness of the instruments that have been adopted so far, is still problematic as explained by the data reported at the beginning of the chapter on VAW.

1.3 CEDAW: discrimination against women

The CEDAW was adopted in 1979 by resolution 34/180 by the UN General Assembly. It was formally presented at the 1980 World Conference on Women in Copenhagen where 64 States immediately signed the Convention. Afterwards, the CEDAW entered into force on 2 September 1981 after having reached the minimum number of 20 ratifications.²⁴ The CEDAW is often referred to as the Bill of Rights for women or Women's Convention. Indeed, it represents a comprehensive international legal framework that aims at eliminating discrimination against women. Despite the fact that other instruments at international level affirmed equality between man and women, from the Universal Declaration on Human Rights (1948) to the International Covenants on Civil and Political Rights (ICCPR) and on the Economic, Social and Cultural Rights (ICESCR) (1966), their approach was perceived to be fragmented²⁵ and the urgency to achieve an

²³ Article 1 of the PRWA states: "*Violence against women*" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

²⁴ See Short History of the CEDAW, <http://www.un.org/womenwatch/daw/cedaw/history.htm>.

²⁵ See Short History of the CEDAW, <http://www.un.org/womenwatch/daw/cedaw/history.htm>.

international legal framework that would comprehensively address the issue of discrimination against women was largely perceived at international level.

In the CEDAW discrimination against women is defined in Article 1 as:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, 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

This definition of discrimination against women highlights two elements: (i) the basis for discrimination against women is sex which (ii) prevents women from enjoying their human rights and fundamental freedoms. The aforementioned definition is the basis of the CEDAW's development for the further provisions it contains. Indeed, the following articles the CEDAW mirror the intent of its promoters to have a homogenous body of provisions and deal with different fields where discrimination against women happen. In this paper, there will not be specific focus on each article, however, the fields mentioned in the CEDAW's articles deal with the elimination of discrimination against women to promote the enjoyment of rights by women as far as political participation, nationality, education, employment, work, health, economy concerns.²⁷ Furthermore, it has to be noted that in the CEDAW there is no direct reference to violence against women. Only later has VAW been included in the framework of the CEDAW in 1989 and in 1992, with General Recommendations no. 12 and no.19²⁸ adopted by the Committee on the Elimination of Discrimination against Women, CEDAWC.²⁹ After the entry into force of the CEDAW, States Parties were gradually asked to deal with the incidence of VAW in their national reports as required under the CEDAWC (Evatt 540). However, rarely did national reports

²⁶ CEDAW, article 1.

²⁷ See Articles contained in Part II of the CEDAW.

²⁸ Henceforth GR 12 and GR 19.

²⁹ The Committee of the CEDAW has been established by the articles contained in part V of the CEDAW. Each State Party to the Convention is bound to submit reports to the Committee on the measures adopted at national level to enforce the CEDAW. As established by Article 20 of the CEDAW, the CEDAWC prepares annual reports in which it can include general recommendations based on the reports submitted by the State Parties.

include information on VAW at national level. Indeed, notwithstanding the encouragement by the CEDAWC, few State Parties actually included statistics, legislation or measures taken in order to deal with VAW at national level. Therefore, the Committee formalized this request through GR 12 and 19 (Evatt 546). The former, brief in content, recommends States Parties to include in their reports measures taken to tackle the issue of VAW.³⁰ The latter, instead, represents an in-depth analysis of VAW and it is based on draft recommendations prepared by State Parties at the 11th Session of the Committee in 1992. The final version of GR 19 includes different elements related with VAW which will be the focus of the following paragraph.

1.3.1 General Recommendation 12 and 19: definitions

The first element contained in GR 19 is the definition of gender-based violence in the Preamble:

A form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.³¹

Interestingly, in GR. no. 19 violence is defined as a further form of discrimination as it is stated in the part on General Comments. The second element contained in GR. 19 is that of State's responsibility. Indeed, the State can be held responsible for VAW both if this is perpetrated by public authorities and by "any other person, organization or enterprise" (General Comment 9). In particular, the due diligence³² of States with regard of VAW is mentioned to invoke States' responsibility both if it is perpetrated, irrespectively, in the public or private life of the victim. The third element of GR 19, that further amplifies the scope of the CEDAW, is its specification that gender-based violence violates all the

³⁰ GR 12 specifies that States should include in their reports: legislation in force, other measures adopted, existence of support and statistical data on the issue of VAW. Available at <http://www.refworld.org/docid/52d927444.html>.

³¹ GR 19, para. 1.

³² Due diligence "does not represent a subjective element of responsibility but rather the content of a specific international duty" see Pisillo-Mazzeschi, Riccardo. "The due diligence rule and the nature of the international responsibility of states." *German YB Int'l L.* 35 (1992): 17.

articles of the CEDAW even though these do not explicitly mention violence (paras 11-24). The fourth element of the GR 19 is the reference to traditions which “maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities” through violence (para. 11). Paragraph 11 is referred to articles 2, 5 and 10 of the CEDAW that explicitly mention the need to socially transform the idea of inferiority of women compared to men. Lastly, specific recommendations outlined in GR 19 underline the need to adopt at national level laws that prevent VAW, protect and support women who are victims of violence (para. 24). The two General Recommendations. no. 12 and 19 are not formally part of the text of the CEDAW and therefore they are not binding. However, they represent interpretations of the CEDAW by the CEDAWC with link to VAW. Therefore, even if they do not impose obligations on States Parties, they provide a source of interpretation on the provisions of CEDAW when these are applied (Byrnes 46).

A step forward, within the framework of the CEDAW, was marked by the entry into force of the Optional Protocol in 2000. The Optional Protocol³³ establishes a individual complaint procedure and an inquiry procedure. By ratifying or acceding to the Optional Protocol, States parties to the CEDAW agree on allowing the Committee of the CEDAW to hearing individual complaints of individuals and inquiries on violations of the CEDAW (Articles 2-10). As of the 30 March 2017, there are 109 States that have ratified the Optional Protocol, while there are currently 189 States Parties to the CEDAW.³⁴ Notably, there is an imbalance that can be observed by looking at the divergence in the number ratifications of the CEDAW and its Protocol.

³³ As it is indicated by Carreau and Marrella the word protocol is another term to formally indicate agreements among States. Indeed, different terminologies have been used and continue to be used to identify agreements among States at international level. See Carreau, Dominique and Marrella, Fabrizio. *Diritto Internazionale*. Giuffr  Editore, Milano 2016: 93.

³⁴ Status of the Optional Protocol to the CEDAW. Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&clang=en

1.4 Istanbul Convention: violence against women and domestic violence

The Convention on preventing and combating violence against women, has been adopted by the Committee of Ministers of the Council of Europe in April 2011 and, as of 30 May 2017, it has been ratified by 23 States of the European continent.³⁵ It was opened for signature in May 2011 in Istanbul and it entered into force on 1 August 2014 after reaching the minimum number of 10 ratifications.³⁶ The Council of Europe (CoE) is a regional international organization founded 1959 and, at present, States Parties are 47, 28 of which are members of the European Union.³⁷ The main values of the CoE are human rights, democracy and rule of law.³⁸ The Istanbul Convention was adopted in the wake of 2006-2008 European campaigns to combat violence against women during which it became clear that European countries were adopting very different measures to deal with VAW. Therefore, in 2008 the Ad Hoc Committee for Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) formed by experts was set up by the CoE. The drafting of the Istanbul Convention by the CAHVIO lasted for 2 years and its aim was to set common standards at European level to combat and prevent VAW and domestic violence.

The Istanbul Convention is seen as the regional instrument codifying GR 19 of the CEDAWC (Šimonović 604). Additionally, its provisions envisage prevention of VAW and domestic violence, protection of the victims and prosecution of the perpetrators. In Chapter IX it establishes a mechanism for monitoring the implementation of the provisions of the Convention by States Parties. The mechanism consists in the creation of the Group of Experts on Action Against Violence Against Women and Domestic violence (GREVIO). The GREVIO, as specified by articles 66, 67 and 68, shall be composed by experts elected

³⁵ Turkey has been the first country to ratify the Istanbul Convention on 14/03/2012. <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>

³⁶ For the Historical Background see Council of Europe available at <http://www.coe.int/en/web/istanbul-convention/historical-background>

³⁷ See *Who we are*, Council of Europe available at <http://www.coe.int/en/web/about-us/who-we-are>

³⁸ See *Values*, Council of Europe available at <http://www.coe.int/en/web/about-us/values>.

by the Committee of the Parties, meaning the representatives of the States Parties to the Convention. More specifically, States Parties to the Istanbul Convention are asked to prepare reports on the measures taken to give effect to the Convention on the basis of a questionnaire prepared by the GREVIO (Art. 68 para 1 and 2). Interestingly, the GREVIO receives reports from the States Parties and lay out evaluation procedures on the compliance of the State Parties with the Convention (Art. 68 para. 3). Also, the GREVIO can receive information from the civil society and NGOs, and it can undertake country visits to assess the situation in States Parties (art. 68 para. 9).³⁹

1.4.1 Article 3: definitions

The provisions under Article 3 of the Istanbul Convention provide the definitions of its object. These definitions include VAW, domestic violence, gender, gender based violence, violence and women. To begin with, the Istanbul Convention provides a more systematic definition of VAW which envisages new elements compared to GR 19. Article 3(a) states that VAW is:

A violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.⁴⁰

First, in the GR. no 19 of the Committee of the CEDAW, violence against women was only contemplated as a form of discrimination, while in the Istanbul Convention it is considered as a violation of human rights. Second, the definition outlines the different aspects of violence: physical, sexual, psychological and economic. In the GR 19 VAW was referred to “physical, mental or sexual harm or suffering” (Preamble), while the Istanbul Convention

³⁹ As of May 2017. 4 countries, namely Austria, Monaco, Albania and Denmark, have been already evaluated by the GREVIO and the Reports are due to be published in July and November 2017. See <http://www.coe.int/en/web/istanbul-convention/timetable>.

⁴⁰ Istanbul Convention, Article 3(a).

considers also economic harm as a type of VAW. Third, VAW is considered as a form of discrimination and violation of human rights both in the private and public life.

A second element of the Istanbul Convention, which lacks in GR. no. 19, is the definition of domestic violence as stated in Article 3(b) and envisaged as:

*All acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.*⁴¹

The Istanbul Convention, extends its aim at tackling a particular form of violence which is linked to what has been considered the private sphere of life whether or not the victim lives in the same place of the perpetrator. Indeed, a discussion paper of the World Bank asserts that in many countries police or judicial authorities do not intervene in cases of domestic violence since they are considered to be issues relegated to the private or family life, therefore, sacrosanct and outside the scope of their roles (Heise 1).

Third, as in GR 19, the Istanbul Convention defines gender based violence against women in Article 3(d) as:

*Violence that is directed against a woman because she is a woman or that affects women disproportionately.*⁴²

Indeed, in GR 19 gender based violence is seen as violence that inhibits women from enjoying the same rights as men, on the basis of the equality principle between men and women. In contrast, the Istanbul Convention, does not refer to the principle of equality between men and women in its definition of gender based violence.

⁴¹ Istanbul Convention, Article 3(b).

⁴² Istanbul Convention, Article 3(d).

1.5 CEDAW and Istanbul Convention: cross-fertilization

In 2016, the work of the CEDAWC has brought to the drafting of an addendum to GR. 19 of 1992, entitled Draft General Recommendation No. 19 (1992): accelerating elimination of gender-based violence against women (the Draft). First, in the Draft, it is specified that “the practice of States parties has endorsed the Committee’s interpretation for over 25 years” (The Draft para. 1). Indeed, the new document “complements and updates the guidance to States Parties set out in General Recommendation No. 19, and provides further clarification of their obligations to all women within their territories” (The Draft para. 6).

The Draft is a document example of the so-called cross-fertilization phenomenon which happens among international instruments. In particular, the influence that international instruments or documents exert on each other results in a “repetition of statements through a cross-section of international fora which strengthens the argument for the requisite *opinio iuris*” (Charlesworth and Chinkin 75). Indeed, in paragraph 8 of the Draft, it is underlined that national legislations or other international instruments “that are more conducive to the achievement of equality between women and men will prevail over the obligations in the Convention, and accordingly, the recommendations in this document”. This provision of the Draft acknowledges the fact that there are other international instruments which already establish standards to enhance equality between men and women. Indeed, one of these can be considered the Istanbul Convention at European level, the Convention Belém do Pará at American level and the Maputo Protocol at African level. However, the work of the CEDAWC in the Draft shows how even at the level of non-binding General Recommendations, the *opinio iuris* plays an important role.

The phenomenon of cross-fertilization has been theorized in the framework of International Human Rights Courts (Henneble 32). According to Hennebel, there has been an emergence of a global jurisprudence which has been enabled by the use of the “*référéncement croisé*”⁴³ by experts of the HR Committee at UN level and by judges of the

⁴³ Here translated as cross-fertilization.

ECHR and the Inter-American Court of Human Rights in their work (32). This could be considered as a sign of a philosophy supporting the universality of human rights (Hennebel 32). Furthermore, cross-fertilization refers also to the fact that norms might arise in particular areas of international law and they could be possibly applied also to “different subject matter areas of international law” (Sands 105). On the one side, the CEDAW and the Istanbul Convention are treaties and not Courts, however interpretations given by the CEDAWC is influenced by the developments at international level as far as discrimination and violence against women concerns. In particular, this is proved by the Draft to GR 19, in which new elements are taken into consideration by the CEDAWC. First, the definition of women includes also girls as it is stated in the Istanbul Convention in Article 3(f). Second, in paragraph 11 of the Draft it is observed that women “may be subject to specific and intersecting forms of discrimination”, which takes into consideration intersectionality which will be later discussed in Chapter two. Third, the Draft’s emphasis on Prevention, Protection and Redress (para. 15) echoes the great attention given to prevention and protection under Chapters III and IV of the Istanbul Convention.

1.6 VAW as a form of discrimination and a violation of Human Rights

The previous two sections presented the main steps towards the inclusion of VAW at international level from the 70s until the firsts years of the 21st century and the definitions of VAW as included in the CEDAWC’s GR 19 and the Istanbul Convention. Since the focus of this paper is narrowly on the CEDAW and the Istanbul Convention, the following section will contain an analysis of the approaches taken in the two conventions to VAW as gender based violence. First, the CEDAW is aimed at eliminating all discrimination against women in any form. Thus, gender-based violence is defined as a form of discrimination in the later GR 19 of 1992 since the CEDAW did not deal with it. Second, the Istanbul Convention makes another specification: violence against women and domestic violence are not only a form of discrimination but also a violation of human rights (Article 3a). Indeed, this progress in the definition of VAW from the CEDAW to the

Istanbul Convention has been fostered by international attention to the issue as described in the previous sections. However, the following section will focus on how discrimination is intended at international level in connection to human rights. Additionally, it will consider how the so-called “rhetoric of equality” (Edwards 141) are repeated in the CEDAW and the Istanbul Conventions and the limitations in tackling the “structural nature of violence against women”⁴⁴ by following the equality principle.

To begin with, the definition in the Oxford Dictionary indicates that the word *discrimination* means:

- (1) *The unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age, or sex.*
- (2) *Recognition and understanding of the difference between one thing and another.*⁴⁵

There are, therefore, two meanings that can be commonly attributed to the word discrimination in today’s common understanding of the word. The first meaning explicits a negative connotation of the word discrimination and recalls the idea of a wrongful action because a person or a group is treated differently, in a negative way, on some grounds such as race, age, or sex. Meanwhile, the second meaning is not referred to something inherently negative. Conversely, discrimination in the latter sense can be defined as a skill possessed by someone to see the difference that there is between two people or things.

Second, in international human rights law the word discrimination bears both the negative and the meaning of the word as of the aforementioned definition.⁴⁶ In particular, in the human rights regime, the prohibition of discrimination or the principle of non-discrimination, constitutes one of the pillar principles.⁴⁷ The prohibition of discrimination

⁴⁴ In the Preamble of the Istanbul Convention it is stated that *the structural nature of violence against women as gender-based violence* is recognized by the Parties.

⁴⁵ See the definition as of the Oxford Dictionary available at <https://en.oxforddictionaries.com/definition/discrimination>

⁴⁶ Positive discrimination requires States to adopt measures to fulfill the equality principle.

⁴⁷ For an exhaustive overview of the principles at UN level see Shaw, Malcolm N. *International Law*. Cambridge, United Kingdom: Cambridge University Press, 2014.

stems from the idea that all individuals are equal and the principle of equality is affirmed in the UN Declaration of Human Rights (UDHR) of 1948 in Articles 1 and 7:

*All human beings are born free and equal in dignity and rights.*⁴⁸

*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*⁴⁹

According to this definitions non-discrimination refers to the equality of “all” before the law and in the application of the provisions of the UDHR itself, which has originated as principle included in municipal national laws (Vierdag 2). Additionally, the principle of non-discrimination at international level is characterized by a further element: it “requires the establishment of equality in fact as well as formal equality in law” (Shaw 286). In fact, there is differentiation between formal and substantive equality. The former is procedural in the sense that laws should be applied equally to everyone, while the latter is substantive in the sense that it searches remedies that cause discrimination (Fineman 3-4). Third, the UDHR strictly links the principle of equality to discrimination as far as individuals concerns. However, it does not provide a definition of what discrimination is. Additionally, there has been wide debate on the principle of equality and its link to discrimination. In particular, Alice Edwards asserts that discrimination should be “conceived as a subset of equality” (165). Nonetheless, there are other instruments at international level that define discrimination on the basis of different grounds i.e. civil rights in the ICCPR⁵⁰, economic, social and cultural rights in the ISCECR⁵¹ and race in the 1965 Convention on the

⁴⁸ UDHR, Article 1.

⁴⁹ UDHR, Article 7.

⁵⁰ Article 24 of the ICCPR reads: *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

⁵¹ Article 2(2) of the ISCECR states as an aim to: *guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Elimination of All Forms of Racial Discrimination (CERD).⁵² Also, in the CEDAW GR 19, discrimination is defined on the basis of gender. The three definitions included in the above mentioned legal instruments, have three elements in common in the way they define discrimination: difference in treatment (i) which has a certain effect (ii) and which is based on a prohibition (i) (Weiwei 8). As far as CEDAW's definition of gender based violence concerns, it represents a form of discrimination which has a negative effect on women and it is a violation of the principle of equality of all as stated in the UDHR's Article 1 (GR 19 para 1).

At international level, the study by Vierdag published in 1973 had a focus on the principle of discrimination and the international protection of human rights (2). In defining discrimination, Vierdag considers that there is a distinction between formal and material equality (18). The former is related to the concept of equality before the law; the latter is related to the concept of equality in the law. Scholars have defined this difference as treating equal cases equally and different cases differently.⁵³ After taking into consideration how discrimination had been defined at international level in different contexts, especially by looking at jurisprudence,⁵⁴ and his premise on equality, Vierdag states that:

Discrimination occurs when in a legal system an inequality is introduced in the enjoyment of a certain right, or in a duty, while there is no sufficient connection between the inequality upon which the legal inequality is based, and the right or the duty in which this inequality is made. (Vierdag 61)

Fundamentally, the definition by Vierdag underlines the fact that discrimination occurs in relation to a right or a duty. Also, the element of sufficient connection suggests that there are no grounds on the basis of the "unequalness of the subjects treated and the right or

⁵² Article 1(1) of the CERD reads: *any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

⁵³ See Wentholt, Klaartje. "Formal and Substantive Equal Treatment: The limitations and the potential of the legal concept of equality." *Non-Discrimination Law: Comparative Perspectives* (1999): 53-64 and Fineman, Martha Albertson. "Equality across Legal Cultures: The Role for International Human Rights." *Thomas Jefferson Law Review*, vol. 27, no. 1, Fall2004, pp. 1-13.

⁵⁴ For the definitions examined by Vierdag see Vierdag, Egbert Willem. *The concept of discrimination in international law: with special reference to human rights.* Springer Science & Business Media, 2012: 51-7.

duty” (Vierdag 70), meaning equal subjects should not be treated unequally. What is also relevant to the definition of discrimination by Vierdag, is that it can happen both directly and indirectly, both by taking action or by refraining from taking action (61).

The CEDAW’s definition of discrimination against women mirrors Vierdag’s definition of discrimination according to which it is a restriction or an exclusion on the basis of sex that hinders women from enjoying their rights as equals to men (CEDAW Article 1). Furthermore, this definition is reiterated also in GR 19, where VAW is considered as a form of discrimination whose effects provokes again inequality of women in enjoying rights as men (GR 19 para. 1). In the General Comments paragraph 7 of GR 19, the Committee of the CEDAW has listed the rights to which women are entitled such as the right to life, the right not to be subject of torture or degrading treatments, the right to be equally protected, the right to enjoy liberty and freedom, the right to be equal in the family and on the work place and to have equal access to health. In this sense discrimination can be considered as Vierdag has conceptualized it. However, it is impossible not to notice that when referring to discrimination, the definition is strictly linked also to the problematic interpretation of the principle of equality. In this regard, General Comment 18 by the Human Rights Committee established in 1989 that “the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance” (HRC para 8).⁵⁵ As stated at the beginning of the section, equality does not mean equal treatment. Therefore, there is the need to be extremely cautious when looking at CEDAW’s definition of discrimination, because enjoyment of rights does not mean sameness, in this case of men and women. Thus, it recalls the idea of difference between what is called formal and substantive equality. On the one hand, in the CEDAW, there is much attention to formal equality, since i.e. in Article 3(a) State Parties need to take measures to ensure “the principle of the equality of men and women in their national constitutions”. Not only shall States take legislative measures to establish equality in their Constitutions, but also in all the other fields that the CEDAW deals with. On the other hand, for example, Articles 4(1) and 5(2) of the CEDAW, also take into consideration the fact that temporary special

⁵⁵ See the whole report UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: <http://www.refworld.org/docid/453883fa8.html>

measures aimed at reaching equality in practice and measures linked to maternity shall be adopted and those will not be considered source of discrimination. This is an example of action taken directly to eliminate discrimination as expressed by Vierdag. However, taking everything into consideration, by looking at CEDAW's provisions, there is the recurring idea that discrimination against women hinders equality with men. In this case, the CEDAW aims at *eliminating all forms of discrimination* against women by providing a legal framework that acknowledges equality between men and women (Article 1).

By looking at the preamble of the Istanbul Convention, despite not being binding in nature as the operative clauses of the Convention itself, it stresses the importance of reaching *de facto* and *de iure* equality between men and women. Thus, it acknowledges the importance in promoting equality between men and women, both in practice and in law. By further going throughout the Istanbul Convention and its provisions, State Parties are encouraged to ensure formal equality. Indeed, Article 4(2) on *Fundamental rights, equality and discrimination* states that:

*Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it.*⁵⁶

Therefore, States Parties have the obligation to take legislative and other measures in order to eliminate discrimination such as VAW. In particular, this is reinforced by the State's due diligence obligation expressed in Article 5(2):

*(...) 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.*⁵⁷

Indeed, both State actors and non-state actors are responsible for VAW under the Istanbul Convention. Furthermore, among operative clauses of the Istanbul Convention Article 1(b) establishes that one of the purposes of the Convention is to reach substantive equality by

⁵⁶ Istanbul Convention, Article 4.2.

⁵⁷ Istanbul Convention, Article 5.2.

contributing “to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women”.

By recalling once more the preamble, the Istanbul Convention also acknowledges that:

Violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.⁵⁸

and in the following paragraph it recognizes:

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.⁵⁹

It could be assumed, by looking at the premises made by the Istanbul Convention’s preamble, that what is called substantive equality aims at protecting women from violence, preventing VAW and prosecuting perpetrators of VAW by overcoming the historical subordination of women to men. This perspective is recalled in Article 12 according to which:

Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.⁶⁰

From this analysis, it emerges a greater awareness that gender issues are not simply a matter of legislation which shall ensure women’s equality compared to men. Rather, the roots of discrimination against women and of VAW, as stated by the preamble of the Istanbul Convention, are structural and they developed throughout time.

The CEDAW and the Istanbul Convention take a specific approach in tackling the issue of gender based violence and VAW. Indeed, by taking into consideration the CEDAW,

⁵⁸ Istanbul Convention, Preamble recital 10.

⁵⁹ Istanbul Convention, Preamble recital 11.

⁶⁰ Istanbul Convention, Article 12.

in the Istanbul Convention it is acknowledged that VAW is, not only a form of discrimination, but a violation of human rights. Furthermore, the principle of equality and non-discrimination, used in the approach of the two Conventions, has helped in enhancing formal equality between women and man. However, in order to tackle the issue of violence, formal equality “does not take full account of women’s structural disadvantage” (Edwards 144). The categorization of VAW as a form of discrimination and violation of human rights, as it will be argued has to go beyond the equality principle. The main questions that will be tried to be answered in the following chapters is if the right based approach help in preventing, protecting victims of VAW and prosecuting its perpetrators. Most importantly, it will be looked at and if this approach influences or change the structural inequality between men and women identified as the basis of VAW. In particular, the following two chapters will deal with this issues and how the characteristics of universality and neutrality of international human rights instruments, such as the CEDAW and the Istanbul Convention, influence the effectiveness of their application.

CHAPTER 2

UNIVERSALITY OF WOMEN'S HUMAN RIGHTS

THE GOOD WE SECURE FOR OURSELVES IS PRECARIOUS AND UNCERTAIN,
IS FLOATING IN MID-AIR,
UNTIL IT IS SECURED FOR ALL OF US
AND INCORPORATED INTO OUR COMMON LIFE.¹

2.1 Remarks on the notion of Universality and Human Rights

The CEDAW and the Istanbul Convention, both acknowledge that discrimination and VAW are structural in nature and that they are based on the stereotyped roles of men and women in society. In particular, structural inequality enhances the position of subordination of women to men. The fact that inequality is structural invokes the idea that inequality is deeply embedded in society and it is a product and an element of society itself (De Vido 54). Indeed, DAW and VAW stem from the particular relationship of subordination created between men and women. The approach of the two Conventions have envisaged measures to establish equality between men and women *de iure* and *de facto*. In particular, State Parties to the Conventions shall comply with them by taking the appropriate measures at national level that should guarantee gender equality both in the private and public sphere. However, given the widespread incidence of DAW and VAW worldwide, the effectiveness of the approach of the CEDAW and the Istanbul Convention is questioned. Indeed, the provisions contained in the two Conventions aim at setting common standards for the protection of women and prevention of discrimination and violence against them. However, setting common standards means that these are applicable

¹ JANE ADAMS, *The Subjective Necessity of Social Settlements*, 1893

universally as are the human rights principles that they contain. However, before looking at how the approach of universality in applying human rights linked to women human rights is problematic in the CEDAW and the Istanbul Convention, it is required a clarification on what is intended by universality in this paper.

2.1.1 Universality: practical and theoretical reflections

International law developed at UN level is considered to have universal application (Chinkin, *Cultural relativism* 55). From a practical point of view, universality, as far as the human rights regime concerns, is a source of debate among scholars at international level. Some of the approaches to the human rights regime, look at the universality of human rights as lying in the legal acceptance of human rights treaties by States. The Universal Declaration of Human Rights (UDHR), adopted after World War II, is often considered to be first instrument that marks the universal acceptance of human rights. Additionally, there are at least six international human rights treaties at international level and about 80% of UN State Parties have ratified at least four of them.² Indeed, the international participation by States in the human rights regime is believed to be based on the fact that its norms are universally accepted (Baher 11). Therefore, on the one side, universality means, according to some scholars, that human rights are accepted at international legal level because States ratify human rights Conventions and they accept to take on legal obligations (Donnelly 94). This perception is further strengthened by the fact that human rights treaties are those which have been mostly ratified at international level (Bayefsky 71). On the other side, legal acceptance of international treaties, however, does not mean universal and effective implementation of the provisions they contain. Indeed, the CEDAW has been ratified by 186 States and this can be considered to be a sign of universal acceptance of its provisions which aim at eliminating discrimination against women. However, despite the large number of State Parties to the CEDAW, it must be noted also that the number of

² Anne, Bayefsky, in "The UN Human Rights Treaty System—Universality at the Crossroads." *The Hague: Kluwer Law International* (2001) identifies in her study all human rights treaties and their ratification as of 2001.

reservations³ by State Parties to the CEDAW is very high. Especially, reservations made by States Parties include very often reference to religious or cultural practices at national level that, in their view, come before the legal obligations under the CEDAW. For example, it has been estimated in 2001, that at least 76% of the reservations regarded the substantive provisions of the CEDAW (Bayefsky 71). From the consultation⁴ of the declarations, reservations and objections made by States to the CEDAW, it can be noted that at least 70 times *Sharia* law is invoked.⁵ *Sharia* or *Shari'a* is the law that constitutes "the revealed will of God; a divinely ordained system"⁶ in the Muslim world. The invocation of the *Sharia* by Muslim State Parties to the Convention, indicates that despite their ratification of the Convention, they consider themselves bound by the Islamic law which prevails in case of incongruence between the two. An example is provided by the general reservation made by Egypt which is willing to comply with Article 2 on the adoption of "appropriate means and without delay a policy of eliminating discrimination against women,⁷ provided that such compliance does not run counter to the Islamic *Sharia*".⁸ Similarly, other Islamic countries have declared that, the application of some provisions of the CEDAW, is restricted to their compatibility with the *Sharia* law.⁹ All in all, this proves that ratification of human rights Conventions does not mean actual and universal implementation of the human rights they envisage. Rather, the high acceptance by States at international level to participate in human rights regimes, is believed to be aimed at displaying adherence and gain recognition

³ In the Vienna Convention on the Law of Treaties (1969), article 2(d) states that: "'Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

⁴ Consultation as of 30 May 2017 of *Declarations, Reservations and Objections to CEDAW*. <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>.

⁵ See *Declarations, Reservations and Objections to CEDAW*. <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>

⁶ For an in-depth analysis of the *Shari'a* see Coulson, Noel James. *A history of Islamic law*. Aldine Transaction, 2011.

⁷ As of Article 2 of the CEDAW.

⁸ Reservation done by Egypt. See *Declarations, Reservations and Objections to CEDAW*. <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>

⁹ See for example reservations by Malaysia, Morocco, the Syrian Arab Republic <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>

as member of the civilized states and to receive funds from the so-called “developed States” (Merry 79).

Other approaches to the human rights regime, put into question its universality precisely by taking into consideration the argument of cultural relativism. However, cultural relativism is considered unacceptable within the CEDAW and the Istanbul Convention since women's human rights are considered to be universally legitimate. With regard to the Istanbul Convention, in article 12(5) it is explicitly prohibited the use of justifications for violence based on culture, custom, religion, tradition or “*honour*”.¹⁰ In any case, VAW as discrimination and a violation of human rights, cannot be accepted on the argument of cultural relativism, which openly challenges the universality of the human rights regime as a whole. Nonetheless, it is often argued that interpretations of human rights cannot be applied everywhere, in the same way (Freeman 495). Furthermore, the fact that the origins of the human rights system are attributed to the so-called “Western” world complicates more the picture when it comes to human rights and how they should be universally applied within different cultural contexts (Cook 171). In particular, if culture is looked at as a normative system, the human rights regime needs to be considered legitimate in order to promote the acceptance of its norms in a particular cultural context (Merry 90). However, the legitimacy of human rights is undermined if there is the reluctance of accepting them because they are a product of the so-called Western world or culture. Indeed, until human rights will not be considered as legitimate everywhere, the argument of cultural relativism will always represent an obstacle to their universal application. In this respect, the argument of cultural relativism as challenging the universality of human rights, has been resolved by asserting that local movements should take the lead in transforming cultural practices that result in harmful cultural practices (Coomarasawamy 12). In particular, by looking at the human rights regime as a mediating tool that serves at disrupting practices by favoring internal dialogues in societies in which the argument of cultural relativism is brought up (Coomarasawamy 12).

¹⁰ Istanbul Convention, Article 12.5.

From a theoretical point of view, the concept of universality does not pose less controversy than the practical point of view above discussed. Indeed, the common definition of the word universal is:

(1) *relating to or done by all people or things in the world or in a particular group; applicable to all cases.*¹¹

(2) *a thing having universal effect, currency, or application.*¹²

The definition of the word universal probably reflects the common and widespread understanding of the word. Therefore, according to this definition, when human rights are defined as universal, it is clear that they should at least be applicable to all cases, to anybody in the world who is human because they are human (Langlois 511). However, the actual meaning of the word universality when linked to human rights norms, has been described in ways that attributes to the word a certain degree of relativity. Indeed, as reported by UN Special Rapporteur on VAW, Radhika Coomaraswamy, there are challenges to the universality of human rights which lie in the definition of human (2). In particular, there are arguments which affirm that the idea of human acquires a meaning and develops when introduced in a particular cultural environment (Coomaraswamy 1-2). Furthermore, the notion of universal has been defined as a cultural universal that is predominant in a specific moment (Donnelly 280). The latter definition of universal is criticized as not being enough strong to define human rights as universally valid beyond arguments of cultural relativism (Langlois 513). Furthermore, the cultural universal has been further amplified by assertions claiming that human rights are not culturally specific (Franck 202). Instead, the universal human rights emergence at international level would rather be linked to specific historic contexts, like that of globalization at the present time (Franck 193). An additional definition of universality linked human rights provided by Judith Butler envisages the elements mentioned in the previous lines and serves the purpose of this paper. By pairing together the discourse on universality of human rights with the notion of universality developed by Butler, it is possible consider the development

¹¹ Definition of universal in the Oxford Dictionaries, available at <https://en.oxforddictionaries.com/definition/universal>

¹² Oxford Dictionary, above note.

of human rights as universally applicable in a practical way. This results particularly useful in the context of the CEDAW and the Istanbul Convention which have been confronted with challenges posed by cultural relativist arguments. Indeed, Butler asserts that the universal might only be “partially articulated” (46). One feature attributed to this definition of universal, is that of contingency: the universal is not something fixed, but it is continuously articulated. Indeed, Butler states that:

The universal begins to become articulated precisely through challenges to its existing formulation and this challenge emerges from those who are not covered by it, who have no entitlement to occupy the place of the "who," but who nevertheless demand that the universal as such ought to be inclusive of them. (Butler 48)

This definition of the universal implies that principles which can be claimed as universal, are continuously under articulation. In particular, their universality assumes continuously different meanings (articulations) when challenges to it are presented from what they do not include. This definition is useful to understand that, for example, principles contained in the CEDAW and the Istanbul Convention, such as those on women and reproduction or marriage rights, are partially universal because they are challenged by the Islamic *Sharia* in which these rights are not envisaged. Therefore, it seems accurate to look at what is not included in the universal definition of women's human rights and take them into consideration so as to enable their inclusion. By inclusion, it is not meant that different standards should be included in the human rights regime as a blend, rather that human rights principles shall take into consideration points of view which it does not include and be articulated so as to find universal application.

The practical and theoretical controversies on the notion of the universality of human rights, is considered to be even more complicated when women's human rights are taken into consideration. First, the development of the idea that there are women's human rights, has for long been excluded from the human rights agenda.¹³ Thus, by not specifying that there are human rights of women, the essence of the discrimination against women as based on gender was not captured. As Bunch stated, the rights violated in relation to

¹³ For example the UDHR contains throughout its text the pronouns “his” when referring to human rights.

women, are specifically based on gender (486-7). However, even in a context in which women's human rights have gained ground, the idea of universally applying standards in order to eliminate gender discriminations or VAW, or to apply and effectively implement women's human rights, encounters further challenges. In the following sections the boundaries of the challenges presented by the universality of human rights will be further pushed. In particular, it will be argued that the universal application of women's human rights is problematic for two reasons. The first reasons, as it will be demonstrated, lies in the fact that the CEDAW and the Istanbul Convention fail in the promotion of an intersectional approach to DAW and VAW because of the narrow essentialist focus on sex as the only underlying cause. Second, the two Conventions take into consideration the issue of culture linked to DAW and VAW. However, their right-based approach might lead to what has been defined as cultural essentialism (Narayan 86). In particular, it will be taken into consideration the fact that the acceptance of women's human rights and their effectiveness, indistinctly and everywhere, is problematic particularly from the point of view of culture. The question that the following pages will try to answer, is if the approach to DAW and VAW in the CEDAW and the Istanbul Convention, manages in tackling structural inequality as the root of these phenomena. Indeed, the two Conventions assume that the principles they encompass shall be applicable everywhere without taking into consideration that the idea of universality of human rights implies a notion of continuous articulation as expressed by Butler.

2.2 VAW: the complexity of structural inequality

After some brief remarks on the notion of universality, the paper now turns to the two Conventions and the main challenges to the universal application of the principles and provisions envisaged in their content. First, the focus will be on structural inequality as the basis for VAW as a form of discrimination and a violation of human rights. The main argument of this section will be that structural inequality cannot be effectively tackled because the universalistic approach of the two Conventions fails in addressing the the

complexities that structural inequality itself bears. Structural inequality results as complex, because sex is not only one element shaping women's experiences in the same way everywhere compared to men. Therefore, in the following section it will be demonstrated how there the idea of one homogenous category of women, as subjects of discrimination and violence, has developed at international level by neglecting other elements that characterize women's experiences. Indeed, the principles of the CEDAW and the Istanbul Convention, that are considered to be universally applicable, face the issue of effectiveness because of the presumption that women belong to a homogenous group.

In article 5(a) of the CEDAW, it is stated that there is the need to overcome:

*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.*¹⁴

This definition, which is rather general, underlines the fact that social practices have enhanced the idea that there are predetermined roles for men and women. Additionally, these roles are subject to a hierarchy which causes positions of superiority and inferiority. In this definition, it is not explicitly mentioned what is commonly known and what characterizes structural inequality: usually men are considered superior to women or women are considered inferior to men. In this sense, the Istanbul Convention abandons this degree of generality. In its preamble, it is recognized "the structural nature of violence against women as gender-based violence" and, further, that "violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men".¹⁵ In other words, the position of subordination of women to men is based on gender and it is perpetrated and reinforced through violence. The structural inequality between man and women is considered to be the basis upon which the subordination of women is founded and apparently this pattern of subordination is universal, since there is no specification that states the contrary in the two Conventions. Also, in Article 12(1) of the Istanbul Convention, it is stated that:

¹⁴ CEDAW, Article 5(a).

¹⁵ Istanbul Convention, Preamble recital 11.

*Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.*¹⁶

Again, a specific provision of the Istanbul Convention, underlines that women are considered as inferior compared to men in the society and also that there is the need to transform the idea that there are predetermined roles for men and women which enhances subordination. The Istanbul Convention aims at promoting “substantive equality between women and men”¹⁷ as the fundamental step to eliminate discrimination and VAW. However, in this regard, it has been argued that, precisely international instruments such as the CEDAW and Istanbul Convention promote the idea of equality of men and women before the law (Edwards 165) but not in practice. The right-based approach, adopted by international Conventions, promotes formal equality between men and women but does not effectively address the structural mechanism by which women are put in a subordinate position to men in society (Charlesworth 59). Nevertheless, the contribution of international instruments to enhancing a greater focus and attention to gender issues and to promoting the adoption of a gender oriented language is recognized (Otto 19). However, the underlying structural inequality between men and women in the society, that is fertile ground for DAW and VAW, is not effectively addressed under these international instruments. Consequently, their effectiveness is put into question when it comes to the practical elimination of DAW and VAW. In particular, the cause for this shortcoming of the CEDAW and the Istanbul Convention is found in this paper, in their approach that imply a universal application of their provisions that promote formal equality but do actually enhance substantive equality by taking into consideration the complexity lying behind the structural inequality through an intersectional approach to DAW and VAW.

What needs to be underlined, is that the CEDAW and the Istanbul Convention refer to a category of woman that seems to be homogenous and whose experiences are similar and influenced by the same elements. Indeed, it has been argued that by using the word

¹⁶ Istanbul Convention, Article 12.1.

¹⁷ Istanbul Convention, 1(b).

“woman” to indicate “a map of intersecting similarities and differences” among women generally, it is possible for feminists to achieve a politics of coalition to deal with women’s specific needs (Nicholson 207-8). Thus, this is the case of the CEDAW and Istanbul Convention where women is used as a general category useful to develop a politics of coalition or an identity politics (Crenshaw 1242). On the one side, the CEDAW and the Istanbul Convention envisage measures that shall be taken in State Parties to deal with DAW and VAW. Thus, they provide a legal ground upon which States can act in order to deal with the issue in order to eliminate the DAW and VAW. Thus, it is assumed that the causes of DAW and VAW are homogenous or rather present some common features that can be addressed through provisions which can be applied universally in States. However, both the CEDAW and VAW acknowledge that the roots of structural inequality, are deeply embedded in societies. Therefore, the provisions included in the two Conventions can be challenged as universally applicable, first of all, when the idea of structural inequality between man and women is invoked.

The structural configuration of a society characterized by inequality between men and women has been indicated by scholars with the word patriarchy. Patriarchy indicates a type of society composed by families which are led by their oldest male member, or in which the male members have the power and use it for their advantage.¹⁸ Indeed, further definitions of patriarchy, especially feminists definitions, highlight that a patriarchal system is made of “social arrangements that privilege males, where men as a group dominate women as a group, both structurally and ideologically - hierarchical arrangements that manifest in varieties across history and social space” (Hunnicuttt 557). In this framework of social arrangements, domestic violence is seen as: “systemic and structural, a mechanism of patriarchal control of women that is built on male superiority and female inferiority, sex-stereotyped roles and expectations, and economic, social, and political predominance of men and dependency of women” (Copelon 120).¹⁹ To go deeper in the analysis, the body of the women is seen as a means of perpetrating the subordinate

¹⁸ See the definition of the word patriarchy on the Cambridge Dictionary available at <http://dictionary.cambridge.org/it/dizionario/inglese/patriarchy>.

¹⁹ In Cook, Rebecca J., ed. *Human rights of women: National and international perspectives*. University of Pennsylvania Press, 2012.

position of women. As a matter of fact, when it comes to women's rights "the importance of control over women can be seen in the intensity of resistance to laws and social changes that put control of women's bodies in women's hands: reproductive rights freedom of sexuality whether heterosexual or lesbian, laws that criminalize rape in marriage, etc" (Bunch 491). All in all, structural inequality is based on a patriarchal social system that is reinforced by VAW and maintained by laws that control women's bodies. This definition of patriarchy, and its consequences on women's lives, is widely used as an explanation for women's subordination. Furthermore, some scholars claim that one result of the patriarchal system is the public/private divide as far as the life spheres concerns (Walby 178). Thus, the result is that women are subordinate under two systems of patriarchy in the so-called private life and in the public life (Walby 178). If it is assumed that women's bodies are the means by which their subordination is achieved, it would be logical to think that instruments such as the CEDAW and the Istanbul Convention help at eliminating subordination. Indeed, the two Conventions' right-based approach shall guide State Parties in guaranteeing women's rights and the control over their bodies. However, the principles encompassed in the two Conventions and the right-based approach seems to lack the understanding of the complexity of structural inequality and how this complexity plays out in women's lives.

The questions that follow after analyzing the definitions of structural inequality and patriarchy are two: does the subordination of women, and the consequent discrimination and violence against women, happen everywhere in the same way on the basis of sex? Also, if international standards are agreed upon by States, such as those of the CEDAW and the Istanbul Convention, are they effective in tackling DAW and VAW on the premise that structural inequality is the same everywhere? The answer to these questions is negative since, first, women cannot be considered a homogenous group which are under a system of structural inequality created by patriarchy everywhere in the same way. Second, since women do not represent a homogenous group, the measures taken at international level in order to be effective, need to take into consideration the intersections at which DAW and VAW happen because they are not based only on sex or gender. In support of this position, there are two levels that need to be taken into consideration. The first level is that of

systems of oppression. Indeed, Charlesworth asserts that there is the tendency to consider the existence of one universal system of patriarchy responsible for women's subordination without acknowledging the fact that there are different systems of oppression interacting with each other to create the condition of subordination of women (384). The second level regards the identity of a woman. Crenshaw, adds precisely that the definition of the identity of women is problematic. On the one side, there has been the development of an identity politics among women at international level in order to deal with common issues such as DAW and VAW (Crenshaw 1241). On the other side, this has brought to ignoring differences among and within groups of women (Crenshaw 1241). In particular, as Harris suggests that "to be fully subversive, the methodology of feminist legal theory should challenge not only law's content but its tendency to privilege the abstract unitary voice, and this gender essentialism also fails to do" (585).

2.2.1 Intersectionality

The theorization of intersectionality has challenged the basic assumption upon which it is assumed that DAW and VAW are experienced only on the basis of sex (male and female) in the same way by every woman, as suggested by the definition of patriarchy. The perpetration by international Conventions of binaries such as man/women do not seem to be sufficient to explain DAW and VAW because sex is not the only element that characterizes women's identity and experience. Consequently, Conventions result unsatisfactory in their approach to addressing issues linked to gender, discrimination and violence. At the beginning of the 1990s, Crenshaw's study focused on the experiences of Black women and argues that their experiences cannot be totally understood if only specific categories, such as sex and race, are taken into consideration (1243-4). Furthermore, in her analysis she shows how three types of intersectionality, structural, political and representational, play out in shaping Black women's experiences in the United States and how they are relevant in order to account for violence or discrimination (1245). Therefore, she sees intersectionality at three different levels in the so-called public sphere which witnesses the difficulty of describing women's experience.

The first developments of the theory of intersectionality started during the 19th century with feminists' struggles against slavery and in their intent to achieving women's suffrage. Black feminists were claiming that only one category of women was represented in the political discourses around suffrage: the white middle-class western woman (Brah and Phoenix 76; Vakulenko 198). In particular in these struggles, feminists underlined how the links between gender, race, sex and social class played out in determining women's identities.²⁰ Therefore, when only the white middle-class woman was represented in the political discourses, this representation could not account for the experiences of other women, such as women of color whose experiences of discrimination amounted to different levels such as those described by Crenshaw. These discourses have been further developed during the 1970s and the 1980s and underlined the fallacy of only focusing on one dimension in order to define women's experiences (Brah and Phoenix 78). Therefore an intersectional approach seem to be more appropriate when dealing with women's human rights. Intersectionality is broadly defined as:

The complex, irreducible, varied, and variable effects which ensue when multiple axis of differentiation – economic, political, cultural, psychic, subjective and experiential – intersect in historically specific contexts. (Brah and Phoenix 76)

This definition, underlines two elements. The first is that of the complexity of elements that together account for a certain outcome. The second is the dependance of the outcome on a certain specific context. These studies on the intersectional approach have contributed to the inclusion of intersectionality in human rights law and legal practice from the end of the 1990s on. Indeed, human rights bodies such as the Human Rights Council (HRC), the UN Committee on the Elimination of Racial discrimination (CERD) or feminist activist platforms, such as the Center for Women's Global Leadership (CWGL), started to consider

²⁰ Sojourner Truth's speech is reported in Brah and Phoenix's article. Her speech, culminating in the phrase "Ain't I a woman", as a black enslaved women reveal how her identity is constructed in relation to other white women or slave men.

fact that the identity of a woman could not be conceived only in terms of one element such as gender (Vakulenko 203-4).²¹

2.2.1 Intersectionality in the jurisprudence of ECHR

With regard to intersectionality, two cases will be taken into consideration in order to thoroughly understand how the intersectional approach has gained importance in jurisprudence at international level. The first case regards the judgement by European Court of Human Rights (ECHR) *Dahlab v. Switzerland* (2001). The case is often considered by scholars as an example of how the Court has not applied an intersectional perspective in its approach to the case.²² In Switzerland, a Catholic woman and teacher started to wear the headscarf in class in a public school in Geneva after converting to Islam. A few years later the woman was prohibited by Swiss law to wear a headscarf in class because it was an open sign of her religious belief.²³ The applicant brought her case to the ECHR and claimed under, the European Convention on Human Rights, a violation of her rights to manifest her religion (Article 9) and a discrimination based on sex (Article 14)²⁴ since a Muslim man could have taught at a public Swiss school without any restriction because he would not wear a headscarf. In its decision the Court found that the case was inadmissible because either of the two violations were found. Indeed, the Court

²¹ The CERD had to deal with cases of women in which discrimination was based on more factors such as sex and race. See Vakulenko, Anastasia. "Islamic Headscarves' and the European Convention On Human Rights: an Intersectional Perspective." *Social & Legal Studies* 16.2 (2007): 183-199.

²² See Vakulenko, Anastasia. "Islamic Headscarves' and the European Convention On Human Rights: an Intersectional Perspective." *Social & Legal Studies* 16.2 (2007): 183-199

²³ See *The circumstances of the case* in *Dahlab V Switzerland* (Application No. 42393/98, Echr 2001-V). (2001), available at <http://hudoc.echr.coe.int/eng?i=001-22643>.

²⁴ These are violations of Articles 9 and 14 of the European Convention on Human Rights (ECHR). Article 9 states: *1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.* Article 14 states: *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

stated that the woman was free to wear the headscarf outside the school environment and that the prohibition by Swiss law was founded and motivated by the non-denominational character of public schools in the country so the decision by Swiss authorities was “justifiable and proportionate as a measure to protect the freedoms of others.”²⁵ Furthermore, no discrimination on the basis of sex has been found as of Article 14, since, according to the Court, also a men would have encountered the same prohibition under Swiss national law.²⁶

The reasoning of the Court in this case is interesting. Indeed, for the Court it was “difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils”.²⁷ This case has been highly debated by scholars and the reasoning by the Court has been contested as far as the absence of an intersectional perspective. First, the Court seems to have considered that the headscarf is, in any case, an oppressive patriarchal practice which is not or cannot be freely chosen by women (Radacic 853). Second, the State’s prohibition of wearing the headscarf in a place of a public sphere is problematic. Indeed, according to the Court the headscarf is considered a sign of women’s oppression, therefore, it should not be worn in public places such as school because it does not transmit to the pupils the idea of gender equality. Nevertheless, the Court does not elaborate on what gender equality is in its reasoning (Vakulenko 189). Third, the Court found no violation of article 9 of the ECHR since the wearing of the headscarf was only prohibited in the public sphere. Thus, indirectly the law was allowing women’s oppression in their private lives by saying that the teacher could wear the headscarf outside the school environment (Radacic 855). However, as it is stated by the CEDAW and the Istanbul Convention, gender equality, should be achieved both private and in the public sphere. Paradoxically, the Court considers the headscarf as a sign of inequality between men and women within the Muslim culture, nevertheless it does accept the fact that this inequality is perpetrated in the private sphere outside the school.

²⁵ Dahlab v Switzerland, p. 4.

²⁶ Dahlab v Switzerland, p. 14.

²⁷ Dahlab v Switzerland, p. 7.

Therefore, the Court seems to have only applied the principle of formal equality when differentiating the public from the private sphere and when it rejected the applicant's claim that she was discriminated on the basis of sex by Swiss law (Vakulenko 189). Indeed, the Court ruled that "such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith".²⁸ This unveils what has been defined the paternalistic and simplistic approach by the ECHR (Radacic 853), because the Court does only consider formal equality and also does not consider the double oppression that it imposed on a woman who wanted to wear a headscarf, as her free choice, but was prohibited to do so at her workplace. Furthermore, the Court considers that a Muslim men would have been treated in the same way as the applicant without taking into consideration the fact that Muslim men are not recognizable by a practice such as that of wearing a headscarf. Despite the fact that this case does not directly deal with violence, it is representative of the ECHR's jurisprudence in dealing with the concept of gender equality and intersectionality. Indeed, the case was not considered admissible on the basis of sex discrimination, because the Court has applied principles which are considered universal but which do not take into consideration the complexity of the systems of oppression under which the woman lived. In this respect the approach of the Court seems to lack the awareness that "it is the intersections of class, race, (hetero)sexuality, and nation, then, that position us as women" (Mohanty 13).

On the contrary in the later case *B.S. v Spain* (2012), the ECHR's approach to the case has been considered to take an intersectional perspective (Yoshida 196). Specifically, the case involved a Nigerian woman working as a prostitute in Spain who was physically harassed in different occasions by the same police officers. The applicant alleged violation of Article 3 on the Right to life, in conjunction with Article 14 on non discrimination of the European Convention on Human Rights. Indeed, the applicant had claimed to have suffered ill-treatment perpetrated by the police officers and to have been discriminated because of her skin color. Indeed, the police officers had stopped the Nigerian woman on the street and not other women with the so-called "*European phenotype*".²⁹ With regard to

²⁸ Dahlab v Switzerland, p. 14.

²⁹ *B.S. v Spain*, no. 47159/08, 24 July 2012: p. 6, available at <http://hudoc.echr.coe.int/eng?i=001-112459>

violence and discrimination linked to the skin color, the Court found that the Spanish authorities had not complied with their duty to investigate the link between the two elements: “domestic courts failed to take account of the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute”.³⁰ Notwithstanding the fact that the Court does not explicitly mention that Spanish authorities should have adopted an intersectional approach, the Nigerian woman’s experience of being ill-treated by state officials, had to be considered, according to the Court, along the different axis of discrimination to which she was subject. Instead, the approach of the Spanish judicial system had been irrespective of discriminations that the Nigerian woman had suffered.

The jurisprudence of the ECHR shows a shift towards the inclusion of intersectional perspectives in its judgements. Indeed, the ECHR has been defined as a living instrument that develops throughout time to include what previously was not included in its jurisprudence based on current challenges.³¹ Indeed, these seems to be the case as far as intersectionality concerns. However, the two cases aforementioned show how the interpretation of DAW and VAW at legal level is problematic in order to assess weather they happen or not. Similarly, the right-based approach of the CEDAW and the Istanbul Conventions and the principles they envisage with regard to DAW and VAW, result problematic when implemented at national level through laws. The first reason is linked to the fact that the two Conventions rely on the fact that DAW and VAW depend on structural inequality based only on sex. Nevertheless, only recently in the framework of the CEDAW, the Draft of GR. 19 on VAW elaborated 2016 interprets VAW under the CEDAW through an intersectional approach. The second reason can be found in the fact that women human right’s presupposes an universal application. However, only formal equality can be achieved by applying those principles universally. What about substantive equality? The intersectional approach is needed and this kind of approach should be underlined in both the CEDAW and the Istanbul Convention since women do not universally experience DAW and VAW in the same way. Indeed, intersectionality as “the differential ways in

³⁰ B.S. v Spain, para. 59.

³¹ See for example Letsas, George, *The ECHR as a Living Instrument: Its Meaning and its Legitimacy* (March 14, 2012). Available at SSRN: <https://ssrn.com/abstract=2021836> or <http://dx.doi.org/10.2139/ssrn.2021836>

which different social divisions are concretely enmeshed and constructed by each other and how they relate to political and subjective constructions of identities” (Yuval-Davis 205), underlines the inherent problematic approaches of the CEDAW and the Istanbul Convention and what they lack to take into consideration. Furthermore, under the two Conventions women are categorized as individuals who identify themselves as women and who considers themselves to fit into the category. However, women’s experiences are defined by various elements of the society which pose them in a position of subordination. Thus, a case by case approach shall be also necessary in order to effectively tackle VAW and DAW. In this sense, the concept of universality as developed by Butler, informs that universality cannot be conceived as something definitively articulated. Precisely, the universal principles as conceived in the CEDAW and the Istanbul Convention, need to take into consideration what they exclude in order to rearticulate the universality of the principles they envisage. As shown by the cases earlier discussed, DAW and VAW cannot be only considered on the basis of sex because there are other elements that cause them in the experiences of women.

2.3 VAW and culture

In the previous section it has been argued that an intersectional approach is needed in order to understand the complexity behind the structural inequality which envisage women as subordinate to men. The intersectional approach allows to understand how the category and/or identity of women is shaped by the complex interaction of different social elements and how DAW and VAW lie at the intersections of these social divisions. The approach, therefore, of the CEDAW and the Istanbul Conventions result unsatisfactory in taking into consideration the wide range experiences of women as far as violence as a form of discrimination and violation of human rights concerns since they are exclusively focused on sex.³² While the Conventions bear principles that should be shared universally,

³² Chapter 3 will further discuss the notions of sex and gender and their use in international human rights instruments, with particular focus on the CEDAW and the Istanbul Convention.

they should also take into consideration the fact that the only right-based approach³³ to deal with DAW and VAW is not sufficient and exhaustive. A further issue that is directly linked to the universal application of the provisions of CEDAW and the Istanbul Convention is referred to culture. As explained in the first section of this Chapter, cultural relativism is one of the main arguments put forward when human rights are invoked universally. Therefore, a fundamental clash is inevitable when women's human rights are invoked as universal in their application in every State that adheres to the regime. How can cultural practices that, at times, enhance VAW and DAW and the protection of the principles encompassed in the CEDAW and the Istanbul Convention be reconciled together? The question also is: is culture an obstacle to gender equality? The responses that will be developed in this sense focus on how culture can be considered as an obstacle for women's human rights because of its inaccurate interpretation.

2.3.1 Culture, custom and tradition in the CEDAW and the Istanbul Convention

First, the issue of culture linked to DAW and VAW is mentioned both in the CEDAW's Committee GR 19 and the Istanbul Convention. To begin with, in the CEDAW there is a reference in article 2(f) about "customs and practices which constitute discrimination against women".³⁴ However, even though the word customs can be referred to cultural practices or traditions, culture is not explicitly mentioned.³⁵ Furthermore, in GR

³³ At UN level the human-rights based (HRBA) has been defined as: *1. All programmes of development cooperation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments. 2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process 3. Development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.* See the UNDG. *The UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming* (the Common Understanding), 2003, available at <http://hrbaportal.org/the-un-and-hrba>

³⁴ CEDAW, Article 2(f).

³⁵ In the English language customs is considered as: *a way of behaving or a belief that has been established for a long time.* See definition in the Cambridge Dictionary available at <http://dictionary.cambridge.org/it/dizionario/inglese/custom>.

19 Article 12 paragraph 19, it is acknowledged that VAW endangers women's health and in the following paragraph of the same Article it is stated that:

In some States there are traditional practices perpetuated by culture and tradition that are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation.³⁶

In particular, culture is mentioned since some practices are perpetrated in some States which put especially women's health at risk. Among these, female circumcision and genital mutilation are mentioned. Additionally, in the Istanbul Convention, as previously mentioned, envisages in article 12(5) that:

Parties shall ensure that culture, custom, religion, tradition or so-called "honour" shall not be considered as justification for any acts of violence covered by the scope of this Convention.³⁷

Indeed, according to this provision justifications based on culture shall not be accepted when VAW takes place. This is further restated in article 42 of the Istanbul Convention which explicitly lists unacceptable justifications for crimes as within the scope of the Convention:

Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts.³⁸

This provision establishes the positive duty for States to take legislative measures which ensure that justifications based on culture, custom, religion, tradition or based on honor are not accepted under national law. Also, in the Draft of GR 19 of 2016, within the scope of the Recommendation, paragraph 9 underlines the fact that gender based violence in all its forms can be affected by "cultural, economic, ideological, political, religious, social and

³⁶ GR 19, Article 12, para. 20.

³⁷ Istanbul Convention, Article 12(5).

³⁸ Istanbul Convention, Article 42.

environmental factors, as evidenced in the case of harmful practices”.³⁹ Furthermore, in paragraph 13 on general obligations of the States related to gender based violence and the due diligence obligation to take positive action, it is underlined that “delays cannot be justified on any grounds, including on cultural or religious grounds.”⁴⁰ Finally, under the section entitled Prevention paragraph 15(j), States shall “Repeal all legal provisions that directly or indirectly discriminate against women, and thereby encourage, justify or tolerate gender-based violence against them; including in customary, religious and indigenous laws”⁴¹. Additionally, in 15 (j)(ii) it is underlined that State shall repeal:

*Discriminatory justifications evidentiary rules and procedures, including legal defences or mitigating factors based on culture, religion or male privilege, such as the so-called ‘defence of honour’, traditional apologies, pardons from victims’ families or the subsequent marriage of the victim/survivor of sexual assault to the perpetrator.*⁴²

As previously pointed out throughout Chapter 1, there is a cross-fertilization of international instruments at international level. Indeed, the Draft of GR. 19 of 2016 show the influence that has been exerted by instruments dealing with DAW and VAW linked to culture. The presence of specific references to cultural practices, underlines the fact that principles which shall prohibit universally DAW and VAW can be challenged by States in the name of culture. However, it is important to understand how culture is conceived at international level and what consequences have these references to culture in the CEDAW and the Istanbul Convention.

Recurrently the notion of culture has been intended as tradition invoking a sense of temporary evolution of culture from a primitive to a civilized status (Merry 12). By thinking at culture as tradition, normally the States of the so-called Global South are envisaged as traditional as opposed to States of the so-called Global North which are considered civilized (Merry 12). This particular relationship or link between culture and

³⁹ The Draft, para. 9.

⁴⁰ The Draft, para. 13.

⁴¹ The Draft, para. 15.

⁴² The Draft, para 15(j).

tradition results problematic. Indeed, feminists debates often are filled with critics which underline the danger of reproducing the so-called North-South divide in the name of saving women who are oppressed under backward cultural/traditional practices (Steans 15). In the CEDAW there is no mention of tradition besides the attention that is given in the preamble to the fact that “traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women”.⁴³ Also, GR 19 underlines in paragraph 19 that there are “traditional attitudes by which women are regarded as subordinate to men”.⁴⁴ Additionally, as remarked in the previous lines, in article 19 paragraph 12 culture and tradition are considered to enhance traditional practices which endanger women's and children's health. Furthermore, in article 16 paragraph 23, traditional attitudes are again mentioned to underline the fact that they cause all kinds of violence against women.

In the Istanbul Convention, Article 12 establishes the general obligation for States to eradicate “traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men”.⁴⁵ Also in Article 42, as previously reported, tradition is invoked together with culture, custom, religion or honor in order to exclude the aforementioned as justifications for gender based violence. Indeed, the articles, linked to the CEDAW and the Istanbul Convention, in which tradition is mentioned put, to a certain extent, culture, customs and tradition on the same level. It is clear that tradition, as referred to in these Articles do not point out at a particular culture. Instead, traditional practices which enhance DAW and VAW do stem from culture, customs or tradition in general because they envisage practices which result discriminatory or violent for women. Despite the fact that tradition is not linked to a particular culture as enhancing DAW and VAW, in the Istanbul Convention there are references to specific cultural practices. One of those practices is female genital mutilation (FGM) which is mentioned both in the preamble and the substantive provisions of the Istanbul Convention. Indeed, in the preamble it is stated that States recognize that:

⁴³ CEDAW, Preamble recital 14.

⁴⁴ GR 19, para. 19.

⁴⁵ Istanbul Convention, Article 12.

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.⁴⁶

Additionally, articles from 32 to 40 of the Istanbul Convention envisage what is considered gender based violence within the scope of the Convention. In Article 38, FGM is one of these forms and Articles 36 and 37 regard sexual violence including rape and forced marriage. These articles are explicitly mentioned in Article 44 on jurisdiction and particular attention is given in paragraph 3 and 4 to Articles 36, 37 and 38. Indeed, according to Article 44(2) and 44(3), when there are violations on articles prohibiting sexual violence including rape, forced marriage and FGM, States shall, respectively, apply extraterritorial jurisdiction and start criminal proceedings even if the victim has not reported the alleged crime.⁴⁷ Despite the fact that the Istanbul Convention envisages in its articles some specific practices which are linked to certain cultures and/or traditions, it should be underlined that traditions causing DAW and VAW are not only referred to cultures that are considered more backwards or primitive. Certainly, harmful practices such as FGM are part of the tradition of some areas of the world such as Africa and South-East Asia. Also, they are considered the "worse injury because it affects sexual organs and hence the essence of being woman" compared to VAW or domestic violence (De Vido 99). However, as stated in the CEDAW, there are practices that envisage a traditional role of women in society and puts them in a relationship of subordination to men. Consequently, this relationship of subordination paves the way to DAW and VAW. However, what might result problematic in the approach of the CEDAW and the Istanbul Convention, is that it might enhance the stigmatization of certain cultures or they might lead to what has been called cultural essentialism (Narayan 88).

⁴⁶ Istanbul Convention, Preamble recital 12.

⁴⁷ Istanbul Convention, Article 44.

2.3.2 Cultural essentialism and stigmatization

The notion of cultural essentialism relies on that of gender essentialism which will be later discussed (Nayaran 87). However, cultural essentialism has been theorized by feminists, because of the tendency to create binaries about culture. This binaries often result in assumptions that there two cultures, Western and non-Western culture (Nayaran 87). This binary is further enriched by categories within it that tend to homogenize differences among women by pointing to the cultures and religions. Examples of these categories are the Third World woman, the Muslim woman, the Indian woman and so forth (Nayaran 87). The major challenge posed by cultural essentialism is the fact that it “often equates the values, worldviews, and practices of some socially dominant groups with those of "all members of the culture.”” (Nayaran 87). Indeed, cultural essentialism results as dangerous for two reasons: it brings on a process of stigmatization of certain cultures and it represents culture as static.

In the field of DAW and VAW, cultural essentialism plays a crucial role in enhancing direct or indirect of stigmatization of certain cultures. First, the references that there are in the CEDAW and the Istanbul Convention about culture result messy. Indeed, at times it seem that cultural practices or tradition enhance DAW and VAW indiscriminately because they cause structural inequality among men an women. However, in the CEDAW and the Istanbul Convention, motivations based on culture for DAW and VAW shall not be accepted. In particular, the mention of motivations based on culture refers explicitly to cultural practices such as FGM. Unexpectedly, some cultures are pointed out in these two instruments more than others, namely those in which forced marriage, honor killings and FGM are traditionally practiced and which are linked to the so-called non Western cultures. The focus on some cultures and the practice of indicating and naming harmful cultural practices by human rights activists (Merry 12), might create a stigmatization of certain cultures within the binary of the so-called global North-South. Additionally, this focus might indirectly underestimate the other cultural or traditional practices that are harmful to women also in the so-called Western world as explained by the fact that DAW and VAW happen because of the traditional role of men and women in the society. However, those

that are defined as harmful cultural practices tend to be directly linked with a culture and tend to explain the behavior of a community in general.

The case of the honor killings is just an example of how at international level a particular practice has gained attention and has started to be considered as characterizing the Muslim world. Thus, it has brought to a stigmatization of Muslim culture as if the honor killings was something that mainly constituted it without taking into consideration the complex moral system behind the Muslim culture (Abu-Lughod 18). The argument brought forward by Abu-Lughod with regard to honor killings underlines, on one side, that “naming and criminalizing forms of violence may have positive effects in particular communities” (18), however, this should be done without defining a culture as violent or backward as a whole. The Istanbul Convention, in this sense, points out in its text what are specifically the crimes which may be culturally motivated and prohibits them. Indeed, Article 38 on FGM reflects the prohibition of culturally motivated practices which could be used as mitigating motives in courts. Therefore, the concept of culture appears problematic because it might lead to stigmatization and evokes a sense of responsibility from outside which translates at times in catchphrases such as “Muslim women need saving”.⁴⁸ On the one side, the notion of culture, as expressed in the CEDAW and the Istanbul Convention, might lead to stigmatizations of other cultures in the sense that they refer to precise harmful practices linked to a culture without taking into consideration the fact that honor killings differ little in the result from other types of murders of women that happen in other places within other cultures. In particular, this leads to “deny to certain people the kind of complex social, cultural, and emotional life that we recognize in ourselves” (Abu-Lughod 52).

This idea of culture, which is at time identified with specific religious systems of morality is also perpetrated in another sense. Indeed, as previously explained, the types of reservations made to the CEDAW and the invocation of Sharia law before the provisions of the CEDAW, explain that the cultural motivations still gain ground in avoiding their application by some States. These ways of using the notion of culture is biased. Also, it is

⁴⁸ See Abu-Lughod, Lila. "Do Muslim women need saving?." (2014).

problematic because it gives controversial ideas of cultures when it comes to the defense of cultural rights.

At international level, Article 27 of the UDHR establishes the right to participate in cultural life: “Everyone has the right freely to participate in the cultural life of the community to enjoy the arts and to share in scientific advancement and its benefits.”⁴⁹ This is one of the first provisions that at international level deals with cultural life. This section will not exhaustively take into consideration all the steps that have brought to the development of cultural rights beginning from the UDHR and all the different aspects that encompass cultural rights.⁵⁰ Instead, the focus will be on the alleged clash between the cultural human rights of a group and women's human rights. The first remark needs to be made on the apparent conflict that there is between collective and individual human rights. This conflict stems from the fact that group human rights, such as cultural rights, may prevail on individual human rights (Francioni 4). This may be a consequence of the fact that cultural human rights have not been exhaustively developed at international level neither in the UDHR nor in the two Covenants on Human Rights, the ICCPR and the ICESCR (Francioni 1). On the contrary, the United Nations Educational, Scientific and Cultural Organization (UNESCO) has created legal texts on cultural rights beyond the aforementioned treaties that specifically deal with human rights. First, the UNESCO Universal Declaration on Cultural Diversity of 2001 establishes in Article 1 that:

*Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.*⁵¹

⁴⁹ UDHR, Article 27.

⁵⁰ On the issue see Stamatopoulou, E.. *The Universal Declaration of Human Rights Ser. : Cultural Rights in International Law : Article 27 of the Universal Declaration of Human Rights and Beyond* (1). Boston, NL: BRILL, 2007 and Francioni, Francesco, and Martin Scheinin, eds. *Cultural human rights*. Vol. 95. BRILL, 2008.

⁵¹ UN Educational, Scientific and Cultural Organisation (UNESCO), *UNESCO Universal Declaration on Cultural Diversity*, 2 November 2001: Article 1, available at: <http://www.refworld.org/docid/435cbcd64.html>.

Despite culture expresses diversity in a “uniqueness and plurality of identities”, the definition of cultural diversity by the UNESCO underlines the fact that culture is dynamic in the sense that it changes over time and space. In the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage offers a further definition which serves the scope of this paper. In Article 2(1) there is the definition of intangible cultural heritage as:

*The practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.*⁵²

From this definition is clear that what is intended by intangible culture rights envisages also practices or traditions that form the cultural heritage of a community. Therefore, beyond the tangible elements of cultural heritage, or what is directly visible because it is embodied in certain symbols or physical objects, there are also ways of living which are part of the intangible cultural heritage. The scope of the Convention for the Safeguarding of the Intangible Cultural Heritage is precisely to safeguard and ensure respect for intangible cultural heritage and communities, groups and individuals concerned with such intangible cultural heritage.⁵³ However, the discourse on cultural rights becomes problematic when they include some traditions or ways of living which envisage certain roles for men and women, with the latter in a position of subordination, or, with practices such as FGM.

Also, the right to religious freedom comes to be involved in the discourse on cultural relativism. Indeed, in Article 18 of the UDHR it is stated that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either

⁵² UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Article 2.1.

⁵³ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Article 1.

*alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*⁵⁴

Furthermore, this is reiterated in Article 18 of the ICCPR.⁵⁵ The freedom of religion which is a well established principle at international law, it the one that is invoked to a certain extent in the reservations of Muslim States in their reservations to the CEDAW. As Okin claims, group cultural rights guarantee to ethnic minorities, indigenous groups or religious groups special rights in liberal societies where they can enjoy special rights (11). The issue comes when these groups are deeply patriarchal and their practices aim at the subordination of women by various means, such as physical control through practices such as FGM. Indeed, religion and culture might seem, at times, competing values which are also acknowledged human rights (Guinn 60). Therefore, can in this context women's human rights and cultural or religious human rights be protected at the same time? Since there are some practices which are part of the cultural heritage or religious tradition of a community that are harmful or discriminatory to women, how can women be protected? If it is considered that human rights, and consequently women's human rights constitute a cultural system (Edwards 16), how can this be reconciled with the fact that there might be cultural clash? Furthermore, how can this be reconciled with the fact that "the human rights regime articulates a particular cultural system, one rooted in a secular transnational modernity?" (Merry, *Constructing a Global Law* 945). The answer to this incongruence between human rights of a group and of individuals has been resolved in the sense that it would be "a contradiction in terms to recognize as human rights of a group, customs and practices that violate the human rights of half of the group, namely women" (Stamatopoulou 234). In particular, under international law, States need to comply with their legal obligations linked to human rights, which also include the rights of women (Chinkin 59) if States are Parties to the CEDAW. However, in feminists debates, very

⁵⁴ UDHR, Article 18.

⁵⁵ Article 18 of the ICCPR states: 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

often, the defense of human rights, especially when women's human rights are invoked, are portrayed as paternalistic and ethnocentric attitudes of some Western liberal feminists (Parolari 880). In particular the cultural relativist argument is further reinforced when claims are made linked to the so-called Western World where principles of human rights have coexisted with practices such as slavery. Therefore, the question often posed is what is the right to impose western values to other populations? (Narayan 90). Despite critiques to feminists practices and accusations, it is believed that "it is first of all clear that change of culture, whether traditional or not, that violates the human rights of women will be the result of change from within, with women as agents of change, with influence from outside" (Stamatopoulou 234). Indeed, both the global and the local aspects in the protection and promotion of women's human rights and violations can be achieved. With regard to this, it is claimed that women's human rights need a local translation since there is a gap between the context in which they are created and that in which they are applied (Merry 3). Cultural relativism, in particular, stems again from essentialist views of culture which at times is employed at international level too. The essentialist view of culture stems in particular from the fact that culture is often seen as static. This happens on two levels. On the one side, for example, culture and religion are invoked in the reservations to CEDAW made by States according to which Sharia law has to be respected before the principles of the CEDAW and that Sharia law does not give space to issues as they are envisaged in the CEDAW. Thus, invocation of culture or religion and compliance with international standards is seen as an abuse which helps in perpetrating the control by authoritarian regimes within their boundaries (Steans 13). On the other side, the Committee of the CEDAW adopts unclear definitions of culture. Since the Committee's main task is to develop the principles and interpret them, its role is fundamental when it is addressed to other cultures. As a matter of facts, in the CEDAW discussions there have been different understandings of culture. Merry underlines the fact that in CEDAW's discussions culture is invoked in two senses (*Constructing a Global Law* 946).⁵⁶ On the one side, when culture is invoked as a resource it is portrayed as static. For example, when practices such

⁵⁶ Merry, Sally Engle. "Constructing a global law—violence against women and the human rights system." *Law & Social Inquiry* 28.4 (2003): 941-977.

as FGM are taken into consideration. In particular, traditional patriarchal systems in which harmful practices are seen as the result of static cultures well embedded in the society (Merry, *Constructing a Global Law* 947). On the other side, when women's human rights are promoted it is underlined that there is the need to transform local or national cultural practices in order to avoid DAW and VAW. Therefore, culture is seen as "a process of continually creating new meanings and practices that are products of power relationships and open to contestation among members of the group and by outsiders" (Merry, *Constructing a Global Law* 947). All in all, the very understanding of culture, seems to pose problematic concerns. Indeed, the idea promoted of culture shall be rather one that underlines its dynamics and its potential to change over time by responding to inputs from outside. Only by taking into consideration culture as dynamic, the argument on universality of women's human rights can be fully supported. In particular Chinkin offers a solution to overcome cultural relativists arguments by allowing a constructive dialogue both at international and at national level (62). Only through constructive dialogue:

Greater inclusion of all women's voices will inevitably create a multiplicity of voices, and may promote disharmony and lead to the formation of new elites claiming a legitimacy that they do not necessarily possess. Such disharmony is necessary if human rights law is to evolve to encompass those previously silenced. (Chinkin 62)

This view is in line also with Butler's definition of universality which underlines the need to have cultural translation when it comes to human rights. In particular, through what Butler defines as cultural translation the current universal is rearticulated through other competing universals and only in this way the limits of the current universal are reworked (51-2). In this way universality can be saved, and critics against the CEDAW as an instrument pretending to be universal while inhibiting cultural variation, can be rejected (Rosenblum 118).

CHAPTER 3

THEORETICAL ISSUES IN THE APPROACH OF THE CEDAW AND THE ISTANBUL CONVENTION ON WOMEN

ONE IS NOT BORN, BUT RATHER BECOMES, A WOMAN.¹

3.1 The CEDAW and the Istanbul Convention on women

The focus of the present chapter will be on how in the framework of the CEDAW and the Istanbul Convention specifically women are envisaged within the scope of their provisions. In particular, the Istanbul Convention envisage State's prevention of violence against women, State's protection of women against violence and finally State's prosecution of those, most likely men, who perpetrate violence against women (Article 1a). The implications of this exclusive focus on women compared to men and the dualistic approach (Otto, *International Human Rights Law* 2), of the CEDAW and the Istanbul Convention to VAW as a form of discrimination and a violation of human rights, results in perpetrating gender binary assumptions which are far from being helpful for the eradication of these phenomena. Indeed, it was stated in Chapter 1 that the phenomenon of violence, wither physical or sexual, is directed against one out of three women worldwide.² Thus, it proves the wide occurrence of violence against women. However, the concern towards women experiences of discrimination and violence must be taken into

¹ Simone de Beauvoir, *The Second Sex*, 1952.

² See 1.2 Towards VAW on the international agenda: international and regional instruments.

consideration in its complexity in order to enhance effective measures to tackle them. In Chapter 2, the portrayal of women has been linked to the fact that it is assumed at international level that they represent a homogenous category by overlooking the intersections of social factors that define their experiences. Thus, the most contested risk of an approach as such is that by only representing one homogenous category of women with one voice, some others are silenced (Harris 583). As far as the category of women concerns, it is pointed out that adopting a simplified category is useful in organizing experience even if experience is diversified among women (Edwards 86). In this way, it could be asserted that women's experiences can be categorized based on their experiences of discrimination and violence. However, this universalizing category of women's human rights would not fit the universal as posited by Butler as something that is continuously articulated (Butler 51-2). Indeed, the universal categorization of women is constantly challenged by women's experiences of DAW and VAW by elements which intersect with each other in causing them.³ In the following chapter, however, the focus will be on the gender binary approach of the two Conventions in tackling DAW and VAW. As Butler posits, with regard to the category "woman" there has been a tendency "to consider the status of the category itself and, indeed, to discern the conditions of oppression which issue from an unexamined reproduction of gender identities which sustain discrete and binary categories of man and women" (*Performative Acts*, 523). Precisely, the focus will be on how considerations of women linked to sex and gender as envisaged in the approach of CEDAW and the Istanbul Convention might lead to fallacies and ineffectiveness of the measures envisaged within the two Conventions. Indeed, it is fundamental, for the purpose of this paper, to underline how gender has been envisaged in documents at UN level and how this is related to the understanding of gender by the two Conventions. Furthermore, it is necessary at this point to recall that both in the CEDAW and the Istanbul Convention it is asserted that there is the need to transform the social and cultural patterns of behaviors which envisage a relationship of superiority or inferiority of either men or women and the stereotypical roles envisaged for men and women.⁴ Indeed, the norms within the CEDAW and the Istanbul

³ See 2.2.1 *Intersectionality* in Chapter 2.

⁴ See Article 5(3) of the CEDAW and Article 12(1) of the Istanbul Convention.

Convention are build upon the premise that there needs to be a transformation on how men and women are envisaged in society. A reflection on gender, therefore, cannot be ignored since the two Conventions refer to the fact that there is a relation of subordination of women to men which is social and stereotypical.⁵ Indeed, it is put forward that DAW and VAW do not stem exclusively from biological criteria applied to identify individuals as males or females (West & Zimmerman 127). Rather, DAW and VAW are a consequence of the social meaning that it is given to women and, consequently, to men, and their association with sex or, in other words, to notions of masculinity and femininity (Connell 73). West and Zimmerman assert that a biological determinist approach entail claims according to which social arrangements are based on sex, meaning based on the notion that there are men and women in the society (128). They further state that “things are the way they are by virtue of the fact that men are men and women are women a division perceived to be natural and rooted in biology, producing in turn profound psychological, behavioral, and social consequences” (128). This means that the category of men and women are perceived as biologically fixed because associated with certain elements such as chromosomal sex, gonadal sex, hormonal sex, internal reproductive organs, and external genitalia. The consequence of this perception is that social arrangements which follow are based on these characteristics. However, it is posited that practices related to the body do not stem from the body itself, rather they are constituted through interaction at social level and through institutions (Connell 73). Therefore, the question would be how can international instruments address the fact that DAW and VAW lay upon these social arrangements or rather on the social meanings that are given to whom is identified with a specific sex expressed in a binary categorization of identities? Indeed, what seems to lack to the two Conventions is the understanding that “doing gender involves a complex of socially guided perceptual, interactional, and micropolitical activities that cast particular pursuits as expressions of masculine and feminine “natures”” (West and Zimmerman 126). This particular lack of understanding gender enhances an essentialist view of women

⁵ Gender stereotyping has been defined i.e. by Cook as a “*generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group*”. See Cook, Rebecca J., and Simone Cusack. “Understanding Gender Stereotyping.” *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, 2010, pp. 9–38.

because it lacks the understanding of gender as a social construction which is relational in nature (Charlesworth and Chinkin, *The boundaries of IL 3*). Therefore, women should not constitute the main focus in the approach to deal with DAW and VAW as gender based phenomena. Indeed, this dual understanding of gender perpetrates stereotypical views about men and women which in turn enhance a protective (Otto, *International Human Rights Law 17*) approach towards women that does not take into consideration the social aspect behind gender relations (Charlesworth and Chinkin, *The boundaries of IL 3*) although they acknowledge that it exists.

3.1.1 Gender from the CEDAW to the Istanbul Convention

In the present section, the focus will be on the CEDAW and the Istanbul Convention and how the notion of gender is expressed within their frameworks. Thus, the effectiveness of these two Conventions in their approach to DAW and VAW will be questioned in relation to how gender is understood in their provisions. First, both Conventions identify two issues: the CEDAW aims at eliminating all forms of discrimination against women while the Istanbul Convention represents a framework for eliminating violence against women and domestic violence. Second, these two Conventions, therefore, identify DAW and VAW and envisages them as directly linked to women. Nevertheless, violence against women as a form of discrimination and a violation of human rights lacks the subject specifying the agent exerting discrimination and violence against women within the framework of the two Conventions. However, it is reiterated, several times, throughout both the provisions of the Conventions that there is structural inequality between men and women. Thus, discrimination and violence are linked directly to the existing relationship of subordination of women to men. Despite this relational element, which is explicitly mentioned, that characterizes DAW and VAW, the CEDAW and the Istanbul Convention are highly focused on women ignoring the relational aspect originating discrimination and violence based on gender. Therefore, by taking into consideration the two aforementioned points, the attempt will be to investigate if the focus

on women by establishing standards through the CEDAW and the Istanbul Convention has positive effects on eliminating and combating DAW and VAW.

On one side, the only focus on women has enhanced arguments which have brought to notions such as that of gender essentialism according to which women are categorized under one voice which is juxtaposed to the voice of men in a binary categorization (Edwards 71). The issue of representing a homogenous category has been dealt with in Chapter 2 by asserting that an intersectional approach is needed in order to deal with DAW and VAW and overcome gender essentialism. Nevertheless, Edwards' claim is that this type of gender essentialism which categorizes women as a homogenous group shall not be rejected "just because an individual does not fit within the same socio-economic, political, or racial group" and that this homogenous categorization of women does not mean that they "cannot empathise with other women, or that she does not share experiences" (Edwards 86). Thus, it is exactly the empathy or shared experiences that brought the focus on women's issues on the international agenda during the Decade for Women (Chan-Tiberghien 461). However the problem lies in the fact that, from the 90s, in particular from the Vienna Declaration in 1993, there has been an increasing focus on gender which, however, was considered "even in this most hailed document" as referring "primarily either to women as equal to or different from men" (Chan-Tiberghien 463).

It is interesting to see how the 1979 CEDAW and the 2011 Istanbul Convention reflect this development at international level. Thus, both Conventions seem to associate DAW and VAW with the social arrangements as expressed by West and Zimmerman (128) based on the binary understanding of sex as constituted by men and women. However, both Conventions also seem to focus, in this binary categorization, exclusively on women without even defining what is intended by the word woman within their provisions. This lack of definition can be linked to the vagueness of language in international which underline the political purpose to enhance greater ratification or to avoid reservations by States.⁶ Furthermore, the general reference to women envisaged in within biological

⁶ See for vagueness linked to language used in international law see Endicott, T. *Vagueness in Law*. Oxford University Press, UK. 2001.

features, has enhanced cooperation among States with regard to discrimination and violence (Rosenblum 125).

In the Istanbul Convention under Article 3(f) on definitions, it is stated that ““women” includes girls under the age of 18”.⁷ However, as in the CEDAW, also in the Istanbul Convention there is a lack of specific elements that define women besides the demographic indication of age. Nonetheless, both the CEDAW and the Istanbul Convention identify women as victims of discrimination and violence. However, they both underline the fact that DAW and VAW happen because it is enhanced by a position of subordination of women compared to men: because inequality is structurally constructed and perpetrated by institutions within a patriarchal framework (Bunch 491). Nevertheless, without any further definition of what is intended by women, the only possibility left is to reduce women to the biological category based on physical characteristics that are identified as belonging to and/or that identify men and women.

The further remark is on the fact that the word gender is never mentioned in the CEDAW’s text of 1979. Thus, it reflects the trend of the 70s when there was exclusive focus on women’s issues during the so-called Decade for Women. However, in the 1992 CEDAWC’s GR 19 on violence against women, the expression gender based violence was used to indicate that it a form of discrimination that hinders women from enjoying their rights and freedoms as men do. This expresses the so-called equality paradigm prevailing in international fora during the 90s in which women’s issues are considered in comparison to men (Chan-Tiberghien 460). Despite this reference to gender in GR 19, there is not a definition expressing how gender is envisaged in the recommendation. Indeed, it might be interpreted that gender is intended as sex based on physical characteristics (Muehlenhard and Peterson 793). In the Istanbul Convention there is a definition of gender under Article 3(c) on definitions:

*“Gender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.*⁸

⁷ Istanbul Convention, Article 3(f).

⁸ Istanbul Convention, Article 3.

This definition of the Istanbul Convention envisages gender as the social construction of *roles, behaviors, activities and attributes* that are assigned by a society to men and women reiterating the binary categorization of gender.

The inclusion of the word gender in the 90s in documents at UN level, as in the case of the CEDAWC Gr. 19, has been enhanced by the gender mainstreaming approach which has been promoted at international level from the Beijing Conference of 1995. An analysis of how gender has been approached at international level will follow in the next paragraph. However, it is necessary to notice, at least as far as the Istanbul Convention concerns, that the definitions of gender has been highly influenced by the positions of conservative States such Russia and the Holy See during the drafting of the Convention (De Vido 31). Indeed, it takes into consideration that gender encompasses strictly men and women, reiterating the gender binary.

3.1.2 Gender, women and men

As far as gender concerns in the UN context, there has been an under theorization of the concept especially because many UN outcome documents have used and referred to the word gender without defining it (Oosterveld 66). Despite the reference and use of the word gender in many UN outcome documents, rarely have sex and gender been included in human rights treaties and, at times, they have also been used as synonyms (Edwards 3). Indeed, the CEDAW does not refer to gender at all. However, in the CEDAWC GR. number 19 there are references to gender. It is only in few documents, such as the Istanbul Convention, that a definition of gender is given. Since the Vienna Declaration of 1993, when there has been the acknowledgement of women's human rights as integral part of the human rights regime, it was clear that women's human rights had to be taken into consideration in the activities at UN level with the so-called gender mainstreaming approach (Charlesworth and Chinkin, *The boundaries of IL* 246-7). However, the response by the monitoring bodies in that respect has not been consistent (Charlesworth and Chinkin, *The boundaries of IL* 246). On the one side, gender mainstreaming has stemmed

from the feminists pushes to pay attention to women's issues, but "mainstreaming signifies a push towards systematic procedures and mechanisms within organizations - particularly government and public institutions - for explicitly taking account of gender issues at all stages of policy-making and programme design and implementation" (Baden and Goetz 5). However, as also can be seen in the timeframe from the CEDAW to the Istanbul Convention, in human rights instruments, there is still reluctance when it comes to using the word gender or to giving it a definition that goes beyond its link with women's issues and the binary categorization men/women. Nonetheless, the discussion of gender at international level, is relevant, as Sheperd explains, because gender is strictly linked to the social meanings that are attributed to physical bodies (Sheperd 4). Precisely for this reason, when dealing with instruments such as the CEDAW and the Istanbul Convention, it is necessary to look at how these instruments perpetrate meanings attached to the bodies of women because women constitute their exclusive focus.

In international fora, such as those of the Decade for Women, as well as among scholars gender has been used as a synonym for women by feminists (Charlesworth 15; Scott 1056). In particular this has been enhanced by the fact that mainly women's issues have been put forward from the 70s on but particularly during the 90s. Especially, at the 1995 Beijing Conference feminists have tried to prioritize women's issue on the agenda (Palatiner 1263). Furthermore, despite this push in the Beijing Conference towards attention to women's issues, the Conference has adopted the language of gender and gender mainstreaming in its outcome, the Platform for Action (Baden and Goetz 5). Indeed, gender mainstreaming stemmed from the will to achieve greater gender equality and has been translated into practices aimed at including women in decision making process, through political representation in parliaments and governments and gender expertise in the civil society (Walby 467). Indeed, Otto underlines the fact that gender mainstreaming has brought to the recognition of women as subjects of international law, to the enhancement of institutional change and, lastly to the formal institutional affirmation of women's equality and rights which be a powerful organizing tools for informal local and international women's networks and movements (Otto, *The Exile of Inclusion* 15). However, despite these institutional changes, what Otto finds problematic is that there is

the coexistence, at UN level, of “deeply conservative views about gender” and at the same time the claim that there are “opportunities for radical change” of gender inequalities (20).

One example, which reiterates this dualistic categorization of gender as encompassing men and women is represented by the definition of gender as contained in Article 7(3) of the Rome Statute of 1998 which entered into force in 2002 establishing the International Criminal Court (ICC).⁹

The word gender is contained nine times in the text of the Rome Statute¹⁰, and the need of a definition was considered to be necessary since it would have had an impact on the cases that the ICC was competent to prosecute and on the interpretation by the judges (Oosterveld 57). As within the scope of the ICC “it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above” (Rome Statute, Article 7.3). Indeed, this definition has been widely criticized at international level as being limited and narrow (Oosterveld 56). First, the criticism stemmed from the fact that the definition of gender by the ICC refers to two sexes, namely male and female. Meanwhile, it has been acknowledged during the preparatory work of the Rome Statute that while this definition of gender encompasses only male and female, “in modern society, “gender” is capable of expansion well beyond traditional conceptions of male and female” (Wilkins, Perry and Mumford paragraph B). However, it is clear that this focus on two sexes has been strongly endorsed by those countries who feared that by not explicitly linking gender to the male and female sexes, would have meant including other genders in the definition (Oosterveld 72). Indeed, this is the result of this definition comes from influence exerted by gender-skeptic States which conceive gender exclusively as difference between women and men (Chan-Tiberghien 462). Furthermore, the definition by the ICC underlines that gender refers to male and female sexes within the context of a society. This might be intended, as Oosterveld claims, as limiting the understanding of gender as influenced by a multiplicity

⁹ The consideration on the definition of gender in the Rome Statute is relevant since in the preamble of the Istanbul Convention a connection with the ICC is established in the provision “*Having regard to the Rome Statute of the International Criminal Court (2002)*”.

¹⁰ See the UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html>

of range of factors or as a social construction (74). Indeed, this definition perhaps limits the understanding of gender as “a familiar part of daily life that it usually takes a deliberate disruption of our expectations of how women and men are supposed to act to pay attention to how it is produced” (Lorber 54). The reflection on the definition of gender by the ICC mirrors the perpetration at international level of the dualistic conceptualization of gender and sex as theorized by Otto. Furthermore, if it is considered that the definition of gender by the ICC is one of the most advanced contained at international law level, its analysis results limited. Indeed, in other UN documents gender has been defined in ways that have mirrored the feminist scholarship on gender. For example, in GR 25 by the CEDAWC on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, in paragraph 7 it is stated that:

*Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.*¹¹

In this paragraph, the document references a definition of gender which has been elaborated at UN level by the GA 1999 World Survey on the Role of Women in Development: Globalization, Gender and Work:¹²

Gender is defined as the social meanings given to biological sex differences. It is an ideological and cultural construct but is also reproduced within the realm of material practices; in turn, it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and the enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and

¹¹ See UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004, available at: <http://www.refworld.org/docid/453882a7e0.html>

¹² See the whole report available at http://www.ucl.ac.uk/dpu-projects/drivers_urb_change/urb_society/pdf_gender/UN_1999_World_Survey_Women_in_Development.pdf.

women as a pervasive trait. Thus, gender is a social stratifier, and in this sense it is similar to other stratifiers such as race, class, ethnicity, sexuality and age. It helps us understand the social construction of gender identities and the unequal structure of power that underlies the relationship between the sexes. (1999 World Survey, para. 15)

This definition encompasses several elements which are strictly connected to gender. First, the fact that gender is defined as the totality of social meanings based on biological sex differences. Indeed, this definition of gender does not express the fact that there are exclusively two sexes that define the identity of men or women. On the other hand, it is acknowledged that there are biological differences but these are not classified in the definition of gender in the binary categorization of men and women. Second, the definition underlines the fact that gender is a cultural and ideological construction which, nonetheless, has practical consequences which is exactly the claim by Bunch when she asserts that inequality is structural (Bunch 491). Third, the definition acknowledges that these practical consequences affect men and women in an asymmetric way in society. Finally, it is underlined that gender is a “*social stratifier*” such as “*race, class, ethnicity, sexuality and age*”. Therefore, it points out that the similar nature of gender and other social elements, makes gender something that cannot be conceived individually since it is intrinsically linked to other factors.

3.1.3 Sex and gender

It seems at this point necessary to draw the main lines on how the relationship between sex and gender has been explored by scholars in order to investigate the CEDAW and the Istanbul Convention’s approaches VAW as gender-based violence and a form of discrimination and violation of human rights. The following section does not have the presumption of exhaustively investigating how sex and gender have been defined in feminist scholarship, instead it will contain limited remarks on the distinctions made on sex and gender. Indeed, the CEDAW “emphasizes a vision of gender relations in terms of equal rights for men and women and explicitly prohibits discrimination on the basis of sex” (Merry, *Constructing a Global Law* 952). Furthermore, in the Istanbul Convention

VAW is defined “as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women” (Article 3). In order to better understand the latter definition it is necessary to recall that, within the Convention, gender is considered as the social roles attributed to men and women with the specific focus on the categories of men and women. However, in Article 4.3, it is stated that the implementation of the Istanbul Convention is shall be granted without discrimination on the basis of sex among others.¹³ Indeed, in Article 4.3 there is a return to the category of sex which results inconsistent because, as previously mentioned, in the Istanbul Convention there is no definition of what is intended by woman linked to sex, besides the one given in Article 3 which includes among women girls under the age of 18. This switch from sex to gender with reference to VAW need to be clarified in order to understand what it may be intended.

First, it is relevant to look at how sex and gender are defined in the English language. To being with in the Oxford Dictionary sex is defined as:

*Either of the two main categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions.*¹⁴

Meanwhile, in the same dictionary gender is defined as:

*Either of the two sexes (male and female), especially when considered with reference to social and cultural differences rather than biological ones. The term is also used more broadly to denote a range of identities that do not correspond to established ideas of male and female.*¹⁵

¹³ The grounds of discrimination as of Article 4.3 of the Istanbul Convention are: *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.*

¹⁴ See the complete definition of *sex* at <https://en.oxforddictionaries.com/definition/sex>.

¹⁵ See the complete definition of *gender* at <https://en.oxforddictionaries.com/definition/gender>.

From these definitions, it is remarkable that male and female are defined as the two main sex categories based on the reproductive functions of individuals, indirectly implying that there may be others. As far as gender concerns, it is defined as either the female and male biological sex in connection to the cultural and social differences. Furthermore, gender as of the definition, may be used in connection to identities that do not correspond to *ideas* of male or female. All in all these definitions strictly link sex and gender with biological features of individuals.

Second, scholarship of sex and gender has proved to be very broad. On the one side, sex has been defined by looking at the differences of chromosomes, hormones and reproductive anatomy between males and females (Muehlenhard and Peterson 796). Thus, women belong to the female sex because of certain biological characteristics and men belong to the male sex, in the same way, because of specific biological characteristics that the female sex does not manifest. The biological characteristics may be conceived also as reproductive functions as in the definition of the Oxford Dictionary. However, studies such as that of Anne Fausto-Sterling cannot be disregarded when this binary division on biological characteristics of sexes is done. Indeed, Fausto-Sterling posited that “biologically speaking, there are many gradations running from female to male; and depending on how one calls the shots, one can argue that along that spectrum lie at least five sexes-and perhaps even more” (68). From a biological point of view, this study shows how sex cannot be only classified as male or female based on biological characteristics since there other are biological variants that impede this plain and clear-cut identification. Indeed, arguments such as those by Fausto-Sterling have opened the floor to further reflections which state that even sex can be intended as a *social constructed dichotomy*.¹⁶ Furthermore, the definition of male and female categories from a biological point of view and the classification of people as male and female is also social (Eckert and McConnell-Ginet 2). This has also been supported by Judith Butler who claims that “if the immutable character of sex is contested, perhaps this construct called “sex” is as culturally constructed as gender” (Butler, *Gender Trouble* 9). Also, Muehlenhard and Peterson examine how

¹⁶ See Rosenblum and Travis as cited in Muehlenhard, Charlene L., and Zoe D. Peterson. "Distinguishing between sex and gender: History, current conceptualizations, and implications." *Sex Roles* 64.11-12 (2011): p. 797.

gender and sex have been defined in the field of psychology and they found that the distinction has been a useful way to dismiss expectations of what the sex roles should be according to a biological determinist view (801). Insofar as gender concerns, the word has been used to indicate the social aspect of the distinctions of sex (Scott 1054). Scott, identifies in the use of gender two more characteristics: first, the relational aspect between what are called sexes, and second, the social construction of what is thought to be the appropriate roles for man and women (1056). Indeed, gender can be identified as a social institution organizing the lives of individuals (Lorber 55). By understanding gender in this way, it means that individuals are born with a certain sex but they learn to develop *gendered personalities* in the societies in which they live (Lorber 57). A further definition of gender by Butler, underlines other elements of the concept which are relevant to the investigation VAW. Butler defines gender as:

The repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being. A political genealogy of gender ontologies, if it is successful, will deconstruct the substantive appearance of gender into its constitutive acts and locate and account for those acts within the compulsory frames set by the various forces that police the social appearance of gender. (Gender Trouble, 17)

In this definition the body, which is shaped by gender, is the main focus of the definition of gender without referring to sex and departing, therefore, from the biological arguments linked to the categorization of sexes. Additionally, as of Butler's definition, gender is created through repetition of acts which acquire a sense of naturalness because of their continuous reproduction or performance by individuals. Eckert and McConnell-Ginet have further posited that gender is performed through a set of practices by individuals which identify them as either belonging to the category of men or women from when they are born (17). Indeed, the process of gender construction and the identification with either the category of men or women starts for individuals from the very moment of the birth when parents behave differently with their boys or girls children and goes on in the system of education (Eckert and McConnell-Ginet 18). However, individuals can adhere to the gender practices in place which identifies them as men or women and accept these as part

of their identity or struggle within the limitations they impose.¹⁷ Thus, this idea of gender which appears as “a natural sort of being” is strictly connected to the fact that there is structural inequality which stems from this repetition of gendered acts. Indeed, inequality is structural in the sense that it is conceived as substantive, not as a social construction deriving from gender relations constituted as the repetition of acts which gives structural inequality the characteristic of a natural appearance. The question of why is this understanding of gender important will be developed in the next section.

3.2 The CEDAW and the Istanbul Convention: reinforcing the gender binary

The reflections on gender and sex outlined in the previous section show how the scholarship is still debating on how the two notions shall be considered. However, the identification of gender as a social construction and its dismissal of the strict link with sex or with certain physical characteristics, is supported in this paper as the solution to achieve effectiveness to deal with VAW as a form of discrimination and a violation of human rights. The previous paragraph on sex and gender results useful to the analysis of how the CEDAW and the Istanbul Convention are focused on women and what are the limits of their measures if there is the perpetration of a women/men gender binary. First the perpetration of the gender binary as constituted by women as opposed to men, enhances the woman-victim subject¹⁸ and the depiction of men as perpetrators of DAW and VAW. Furthermore, the focus on women does not capture the relational or collaborative aspects of gender linked to DAW and VAW since it exclusively focus on women and indirectly

¹⁷ Gender is fundamentally linked to three principles which underline the fact that gender is learned, it is collaborative and finally it is something that individuals do. Gender is collaborative, in the sense that it is not simply learned but also taught since it imposes constraints on behavior and asymmetries. See Eckert and McConnell-Ginet 31-32.

¹⁸ The expression victim-subject is that employed by Kapur, Rarna in "The Tragedy of Victimization Rhetoric: Resurrecting the " Native" Subject in International/Post-Colonial Feminist Legal Politics." *Harv. Hum. Rts. J.* 15 (2002): 1.

excludes men. Indeed, the focus on gender as the social construction of roles attributed to individuals, in the CEDAW and the Istanbul Convention, rather than on women, would be more efficient in unveiling the social construction behind gender identities of humans which are relationally build. Only by looking at gender in this way, the social constructions of gender, in which DAW and VAW are grounded can be effectively tackled.

Rosenblum explains why the CEDAW should be unsexed in order to enhance its accurateness and effectiveness in dealing with discrimination against women (193). However, paradoxically, Rosenblum's claim is that the CEDAW shall be unsexed from the focus on women, by focusing again on either sex or gender. Indeed, his reasoning will be found useful as applied to the Istanbul Convention. However, while Rosenblum claims to use sex or gender rather than women as a category, the argument made in this paper is that gender shall be used and sex shall be dismissed in order to avoid biological determinist arguments. Also, by only adopting gender it is possible to appropriate the root causes of inequality. In particular, Rosenblum asserts that the CEDAW's focus on women isolates and hinder the human rights discourse on gender equality (160). Nevertheless, the focus on women has been enhanced by the incidence of discrimination and violence against women. However, a shift of the focus from women, which would not mean not dealing with experiences of discrimination or violence suffered by women, is necessary to understand how structural inequality is build through a gender perspective. To some degree, as Rosenbulum asserts, a focus on sex and gender, might have promoted the universality of the provisions of the CEDAW (134). Instead, the reluctance of some conservative States towards the word gender which understood as sexual orientation has undermined the universal approach that the CEDAW could have adopted in tackling discrimination against women (Rosenblum 161-2). Similarly, in the Istanbul Convention the focus is on women, also reflecting the trend of cross-fertilization of international instruments which have previously directed their attention on women.¹⁹ However, it might be asserted that despite the focus on women and the perpetration of the gender binary, in the Istanbul Convention it is stated that “violence against women is a manifestation of historically unequal power relations between women and men” (*Preamble*) underlining, therefore, the relational aspect

¹⁹ See 1.5 of the present paper on cross-fertilization.

of the gender identities categorized as women and men. However, in the following sections, it will be discussed how the perpetration of the gender binary men/women have consequences in portraying women as victims of VAW and men as perpetrators.

3.2.1 Women as victims

The first remark on the exclusive focus of women in the CEDAW and the Istanbul Convention concerns the biased depiction of women as a general category of victims. First of all, along the gender binary women/men, by specifically focusing on women it is not given attention to how DAW and VAW happen. Indeed, the CEDAW is generally build on the premise made in Article 1 according to which DAW is a mechanism which impairs women from enjoying human rights and fundamental freedoms on the basis of equality with men (Article 1). Furthermore, the phrasing of the following articles of the CEDAW reiterate the pattern of Article 1 by linking the need for State Parties of taking measures because women should enjoy human rights and freedoms “on a basis of equality with men”. Indeed, this phrasing is problematic because women are portrayed as victims compared to men who can enjoy human rights and fundamental freedoms. Furthermore, in GR. 19 of 1992, violence against women is defined as “form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men” (para. 1). The portrayal of women as victims is restated because gender-based violence seems to be exclusively directed to women. This can be similarly found in the provisions of the Istanbul Convention. Indeed, the definition of Article 3(d) “gender-based violence against women” shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately” specifically links gender based violence to women. Additionally, in Article 3 on definitions, women are directly associated with girls under 18.

It has to be acknowledged that gender-based violence affects more women than men, however, it is not an issue that exclusively involves women. Furthermore, the juxtaposition of women with minors under 18 years old, or young girls enhance the idea of

a vulnerable group which needs protection.²⁰ This portrayal has two specific consequences. On the one side, women are portrayed as subordinate victims (Edwards 25). Furthermore, not only are women indirectly portrayed as victims, but also there is an exclusion within the definition of gender based violence of other persons that are not women but may be victims as well. This portrayal of women as victims have been analyzed as problematic by Kapur with the focus on three aspects (1). The first issue is linked to the depiction of women as victims based on the gender essentialist assumption (Kapur 6) that there is a homogenous group of women who are victims of violence. Second, the depiction of women as victims enhance essentialist cultural assumptions towards what has been defined the so-called Third World women (Kapur 12). Indeed, these two aspects have been dealt with in the second Chapter by proving that women's experiences derive from an intersection of different factors and by stating that there are risks of cultural stigmatization when adopting universalizing measures to deal with VAW. Finally, the third risk identified by Kapur, is the fact that women-victim subject linked to VAW enhances States' protectionist approach towards women (6). Indeed, the latter problematic consequence of women as victims enhances Otto's argument that the perpetration of the gender binary limits the understanding of gender as a social construction, which she calls "*technology of power*", that affects gender identities in general and not only women (*International Human Rights Law* 12). The depiction of women as victims results problematic since it portrays women as vulnerable and enhances and approach by the State which Young has defined as masculinist protection (2). Young explains in her study of the analysis of the US' war on terror after 2001, how a gender perspective can be adopted in order to understand these events. Despite the fact that the issues dealt with by Young are not linked to the scope of this paper, Young's reasoning on gender results useful for the analysis of this section with regard to the concept of masculinist protection because as she asserts that "in this patriarchal logic, the role of the masculine protector puts those protected, paradigmatically women and children, in a subordinate position of dependence and obedience" (2).

²⁰ In particular at international level, in the framework of protection of civilians, women and children have been portrayed as innocent and victims jeopardizing the gender-based vulnerabilities of other individuals. See Lewis, Dustin A. "Unrecognized victims: Sexual violence against men in conflict settings under international law." *Wis. Int'l LJ* 27 (2009): 1, and Scully, Pamela. "Vulnerable women: A critical reflection on human rights discourse and sexual violence." *Emory Int'l L. Rev.* 23 (2009): 113.

Paradoxically, if women are portrayed as vulnerable and victims in need of protection because they are the main subjects of discrimination and violence, the State takes upon himself the role of the protector. The role of the protector, however, derives from the view of the good man who takes upon himself the responsibility to protect the women of his household (Young 4). Remarkably, the crucial feature that allows the development of the masculinist protection is the fact that there is the need of women to be positioned in subordination to men for their own good so as to be protected. This role of the protective men, according to Young, is adopted by the State at national level towards its citizens who, for their own security need to accept a position of subordination or a limitation of their rights (16). A parallel can be done with the State's responsibility for women's protection against discrimination and violence. Indeed, this is the aim of the CEDAW and the Istanbul Convention in which women are portrayed as victims, which encourage states to adopt legislative measures to protect women. Indeed, Article 1(a) of the Istanbul Conventions points out among the purposes to "protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence." In this process, however, women still remain subordinates since they are considered as victims in need of protection by the State within the logic of the masculinist protection. Young's conclusion with reference to the Security State which adopts the role of protector by keeping its citizens subordinates, is that there should be the rejection of the category protector/protected in order to reach democracy (22). Specifically, this category is promoted by exclusively focusing on women and perpetrating the gender binary men/women.

3.2.2 Men as perpetrators

In the previous section it has been argued that the CEDAW and the Istanbul Convention risk to develop an approach to DAW and VAW which enhances masculinist protection by the State towards women. Indeed, this risk is rooted in the exclusive focus on women and their depiction as victims. Thus, adopting a protectionist approach does not enhance the understanding of women as bearers of rights (Otto, *International Human*

Rights Law 5) and furthermore does not effectively address the root causes of structural inequality lying in the social arrangements. It will be argued in this section that an additional reason for such ineffectiveness is that the CEDAW and the Istanbul Convention fail to take into consideration the relational aspect of gender within the perpetration of the women/men gender binary (Charlesworth and Chinkin, *The boundaries of IL* 3). First, the relational aspect of gender cannot be explored when taking into consideration only women because it perpetrates the gender binary men/women (Baden & Goetz 7) and excludes the fact that gender is something which is done and learned (Eckert and McConnell-Ginet 31). On the contrary, there is the need to understand how gender groups and their interaction undermine gender relations (Scott 1054). However, in the CEDAW the only focus is on women and not on gender, underestimates the fact that also men can be victims of discrimination which may arise from the same rights which are accorded to women.²¹ The relational aspect of gender might be implicitly understood as contained in the preamble of the Istanbul Convention stating that VAW is “manifestation of historically unequal power relations between women and men”. However, throughout the text of the Istanbul Convention the relational aspect of gender is not identified in its social construction of ideas on the role of men and women. On the contrary the Istanbul Convention always underlines the need to reach equality between men and women, using men as the standard to measure women’s equality (Otto, *International Human Rights Law* 8). Therefore, as in the CEDAW, also, in the Istanbul Convention men result exclusively as perpetrators of DAW and VAW.

The representation of men as perpetrators, does not take into consideration the fact that men need to conform to notions of what means to be a man (Cohen 512). Indeed, masculinity, as well as femininity, encompasses the broad spectrum of practices which are normally attributed to men in a stereotypical way (Kiesling 655). Therefore, also the idea of masculinity as socially constructed needs attention when dealing with VAW as

²¹ Rosenblum explains that when in the CEDAW it is established in Article 11 that “*States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women*”, it is problematic because statistics have shown that i.e. in the employment field men take riskier jobs. See Rosenblum, Darren. "Internalizing gender: Why international law theory should adopt comparative methods." *Colum. J. Transnat'l L.* 45 (2006): 759.

stemming from unequal power relations. In particular, it is posited that even though there are more masculinities there is, above all, a hegemonic masculinity occupying the hegemonic position over gender relations in a specific context, which is based on the dominance of men over women, and of men over other men who do not conform to the features of the hegemonic masculinity.²² In particular, hegemonic masculinity has three main characteristics: non-femininity, heterosexuality and physical aggression (Cohen 522). The characteristic of heterosexuality is the framework within which the binary description of gender is reiterated because it strictly envisages men and women as gender identities. Furthermore, if the hegemonic masculinity is directly associated with physical aggression, it puts men in the position of the perpetrator of violence against what is non-feminine and against other men who do not adhere to the notion of hegemonic masculinity (Hooper 220). Indeed, in the Draft of GR. 19 of 2016, it is stated that the CEDAWC considers gender based violence “to be rooted in gender-related factors such as ideas of men’s entitlement over women, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour” (para. 20). However, it is not taken into consideration that gender roles evoke a notion of hegemonic masculinity which is perpetrated by men. On the contrary, this consideration means that gender constructs only stereotypical ideas about women, as if men would all adhere to a set of fixed characteristics of masculinity. On the other hand, there are stereotypical ideas about men, and even if there are multiple masculinities, there is one hegemonic in gender relations associated with specific features. Also, in this view, men who do not conform to the hegemonic masculinity, are not envisaged as subordinate victims in gender relations. Furthermore, if men are acknowledged some type protection because subordinates and victims, they tend to be associated with women or feminine characteristics.²³

²² See Connell in Kiesling, Scott Fabius. "Men’s identities and sociolinguistic variation: The case of fraternity men." *Journal of Sociolinguistics* 2.1 (1998): 71.

²³ See Mackinnon as cited in Rosenblum, Darren. "Unsex Cedaw, or What's wrong with Women's Rights." *Colum. J. Gender & L.* 20 (2011): 140.

3.3 Beyond the binary

The final part of the current chapter will discuss the main reasons for which the gender binary perpetrated through the focus on women by the CEDAW and the Istanbul Convention does not effectively tackle violence suffered by women as a form of discrimination and a violations of human rights. As previously explained, the perpetration of the binary represents women as victims and men as perpetrators of violence. However, what this paper wants to prove is that by shifting the focus of discrimination and violence from women exclusively on gender, and not on either sex or gender as Rosenblum has argued (193), further universal application and effectiveness of the principles of the CEDAW and of the Istanbul Convention may be achieved. Indeed, through the investigation of gender and the hierarchies it creates, it is possible to challenge the inevitability and naturalness of gender categories (Charlesworth and Chinkin, *The boundaries of IL* 336). The reasons for this claim lay in the fact that gender, even though some States Parties may apply the concept as limited so as to encompass exclusively men and women, should be understood as a social construction in continuous, in Judith Butler's words, reiteration through acts determining the stylization of the body. Indeed, it is important to unveil the fact that gender is not self evident, given and individual; rather it should be understood as an accomplishment, an effect and as social (Eckert and McConnell-Ginet 1).

First, through the focus on gender it is possible to understand the origins of structural inequality which is envisaged as the root of DAW and VAW in the CEDAW and the Istanbul Convention. Indeed, through the understanding of gender as a social construction, subordination of women to men or domination of men over women are revealed in their social function (Lorber 62). Thus, this view allows a departure from the biological determinist²⁴ argument which identify men and women within a binary which necessarily sees one as subordinate of the other at social level. As a matter of fact, the

²⁴ By biological determinist is meant gender seen as "*the result of sex, procreation, physiology, anatomy, hormones, or genetic predispositions*" as in Lorber at p. 62.

binary categorization of humanity in the categories of men and women is the root of subordination by the latter of the former (Rosenblum 104) and of an asymmetry of power between the two. Indeed, the asymmetry of power cannot be overcome in the CEDAW and the Istanbul Convention since the exclusive focus on women envisages them as victims. Furthermore, through an interpretation of gender as something not fixed or natural it is possible to depart from what has been called the male standard, which at times is mistaken with gender neutrality and the standard according to which women need protection.

Second, the understanding of gender as a social construction helps in overcoming the binary division of humanity and the mere understanding of individuals based on their sexes in the society. Indeed, gender must be considered along with other categories such as age, class and ethnicity which are the origins of institutions.²⁵ In the same way, the perpetration of the binary gender system encompassing the men/women categories by the State in its institutions is seen as non natural since they perpetrate assumptions which are based on the dualistic view of sex which has been challenged by biological studies (Fausto-Sterling 4). Furthermore, gender as an institution attributes different characteristics to the individuals within the two categories of men and women which normally posits men as superior to women (Lorber and Martin 255). This understanding of gender would unveil the fact that gender is not natural as it is not the subordination of women in relation to men which is perpetrated at social and cultural level. Indeed, the behaviors that are associated with men and women are different and they contribute to the perpetration of the binary women/men and to shaping the relationship, respectively of subordination/dominance.

This remarks on gender are fundamental in challenging the practices of DAW and VAW which are explicitly gender based. Indeed, gender identity is built through repetitions of acts, which are divided and different between men and women and which create asymmetrical power relations. It is asserted that efficient subordination within structure created by gender needs to maintain its characteristics of naturalness and of dimorphism of gender identities perpetrated through the differentiation of behaviors which shape individuals to subordination and dominance (Frye 34). However, if these behaviors

²⁵ Indeed, school is one of the main fields in which the gender binary has been perpetrated in the past through same sex schools. See Eckert and McConnell-Ginet 30-32

are envisaged as acts which contribute to the stylization of the body in time, the way towards transforming the relationship of subordination and dominance among gender identities lies in the acts themselves (Butler, *Gender Trouble* 192). In the CEDAW and the Istanbul Convention this is not achieved because of the exclusive focus on women. On the one side, the the provisions of the two Conventions may foster social process by enhancing greater equality among men and women before the law and a higher degree of protection of women against practices of discrimination of violence. On the other side, DAW and VAW shall be envisaged as the result of the social construction of gender which creates asymmetry in power between individuals by dividing them into two groups and not as phenomena linked to biological features of human beings.

CHAPTER 4

PRACTICAL ISSUES IN THE APPROACH OF THE CEDAW AND THE ISTANBUL CONVENTION TO VAW

4.1 Whose human rights?

In the previous chapter it has been pointed out how from a theoretical point of view the understanding of gender might enhance an effective application of the provisions of the CEDAW and the Istanbul Convention. Indeed, it has been argued that at theoretical level, the focus on women by these two Convention brings on the binary categorization of identities and it juxtaposes women to men without tackling the grounds of structural inequality from which DAW and VAW stems. Indeed, in order to tackle issues of DAW and VAW gender should be understood in its performative and relational aspect which categorizes individuals within predetermined binary roles (Butler, *Gender Trouble* 34). Precisely, from this binary or dual categorization of humanity stem relationships of subordination and domination. By bearing in mind the discussion on gender, the main issues that will be dealt with in the present chapter regard the practical issues of the application of the CEDAW and the Istanbul Convention. On the one side, the CEDAW and the Istanbul Convention focus on women. Furthermore, if we are to consider the notion of gender as relational, the mere focus on women is not exhaustive. On the other side, it is fundamental to consider that the international field is said to be constructed upon the male model (Charlesworth and Chinkin, *The boundaries of IL* 197). Thus, if the male model is the grounds on which international relations is build, there will not be effective inclusion of women's issues at international level since again the binary categorization of individuals is perpetrated.

The French expression for human rights is *Droits de l'homme*. The French word *homme* indicates “Être humain du sexe masculin”¹ and the expression *droits de l'homme* finds its origins in the Declaration of the Rights of Man and of the Citizen of 1789 adopted at the time of the French Revolution which was directed to male individuals. However, it has been pointed out the preservation of the expression *Droits de l'homme* to indicate human rights in French as indicating the human rights of the 1948 UDHR, while all the other languages have changed it to indicate all human beings, results problematic because of its sexist connotation.² Also, in the French speaking part of Canada the expression *Droits de la personne* is used. Upon this premise, it will be taken into consideration why among scholars, international human rights law is indicated as containing human rights of men. Indeed, the main claim is that human rights have been developed to protect men in the so-called public sphere as opposed to the private one.³ In the second part, it will be taken into consideration how the State is considered to be built upon notions of masculinity as opposed to femininity (Charlesworth and Chinkin, *The boundaries of IL* 136). In particular, as far as the implementation of human rights and women's human rights concerns, the emergence of the due diligence principle of States will be identified as the tool to disrupt the public/private divide and to tackle DAW and VAW. However, further problematics will be pointed out in the obligations of States under the due diligence. With this regard, the recent ECHR judgement in the case *Talpis v Italy* will be taken into consideration in order to unveil the problematics of the due diligence principle and its ineffectiveness in tackling structural inequality.

¹ Larousse definition of the word *homme* available at <http://www.larousse.fr/dictionnaires/francais/homme/40240?q=homme#40153>

² Hochberg, Julie. "Les droits de l'Homme seraient-ils sexistes?" *Le Figaro*. N.p., 21 May 2015. 3 Mar. 2017 available at <http://madame.lefigaro.fr/societe/les-droits-de-lhomme-seraient-ils-sexistes-210515-96670>.

³ Nevertheless the UDHR states in Article 1 that “All human beings are born free and equal in dignity and rights”.

4.1.1 Human rights as men's rights

It is considered that the access at international level in decision-making processes is reserved to privileged individuals while the voices of the oppressed are not heard (Mertus 221). Furthermore, the structures of international institutions are considered to be sexed and gendered (Charlesworth and Chinkin, *The boundaries of IL* 171) especially because historically they have been dominated by the presence of men. Indeed, human rights are considered inadequate to deal with the position of women since they have developed by excluding women's perspective (Charlesworth and Chinkin, *The boundaries of IL* 231). In particular, the claim of objectivity and neutrality of human rights law have been questioned since they reflect men's experience in the public field while excluding those of women who are relegated to the private field (Charlesworth, *Human rights* 106). Furthermore, since human rights are conceived to be constructed around men's lives, the male model is further reinforced in the approach to women's human rights at international level by the tendency of occasionally mentioning women and girls in already existing norms (Edwards 4). Therefore, the inadequacy of human rights in dealing with women's experiences of discrimination and violence has been based on claims that human rights are male rights. As a matter of fact, the dominance of men in human rights has been found both in the process, in terms of women's absence or lower participation in international decision-making roles, and in the substance of international law, in terms of the content of human rights which are focused on the public sphere built on male experience (Charlesworth, *Human rights* 110). As for the structure, the inclusion of gender perspectives has been enhanced by the gender mainstreaming approach promoted during the 1995 Beijing Conference. In particular, in the PFA it was considered that States shall commit to give equal opportunities and enhance equal participation of women and men in decision-making processes of bodies at national, international and regional level (PFA, Global framework, para. 6). As for the content of human rights, if, on the one side, experiences of DAW happen both in the public and private sphere, VAW, on the other hand, happens at private level e.g. in the family (Okin 36). Therefore, the private seems relegated outside the public sphere and solutions to

overcome this in order to include VAW envisage measures such as women's equal representation, and training in equal opportunity (Charlesworth, *Human rights* 110).

The public/private divide has been considered as one of the main issues in international human rights law hindering the inclusion of VAW on the agenda. In the Vienna Declaration of 1993 it has been declared, for the first time, that violence constitutes a form of discrimination and a violation of women's human rights, establishing that there are human rights of women.⁴ Furthermore, discrimination and gender based violence are mentioned in the Declaration which also encourages States to take measures to eliminate VAW both in the public and private life.⁵ Indeed, the Vienna Declaration has paved the way to understanding that violations of human rights happen and should be tackled both in the public and the private sphere, by underlining, however, that the majority of the violations of human rights for women, such as VAW, happen in the private sphere (Mertus 203). Indeed, advocates of women's human rights acknowledged that VAW was excluded from the public sphere, therefore, they focused on violence in order to advance universal recognition of the problem at international level during the Conference on Human Rights in Vienna (Mertus 209).

The formalization of women's human rights in the Vienna Declaration, stems from decades of activism which have brought women's issues on the international agenda. Indeed, the human rights of women have been separately defined because it was considered that traditional human rights were linked to men. However, the definition of women human rights have also encountered further problems. First, the approach that has been taken at international level linked to women's human rights, is rather one of adding and stirring them in the processes at international level (Mertus 233). Second, the emergence of women's human rights has promoted the pattern of the so-called traditional equality paradigm in which the human rights of men are simply extended to women, on the grounds that human rights shall be enjoyed by women on the basis of equality with men as

⁴ Paragraph 18 of the Vienna Declaration states: *The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights.* UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.

⁵ Paragraph 38 of the Vienna Declaration states: *The World Conference on Human Rights calls upon the General Assembly to adopt the draft declaration on violence against women and urges States to combat violence against women in accordance with its provisions.*

of the provisions of the CEDAW (Otto, *Holding Up half the Sky* 9). Indeed, the danger of the equality paradigm is that it rather contributes to the maintaining of the structures already in place based on gender hierarchies and inequality (Otto, *Holding Up half the Sky* 15). Third, the definition of women's human rights have brought to the marginalization of women's issues to specialized agencies, an example is provided by the CEDAW, which has been given lesser priority compared to the mainstream human rights (Charlesworth and Chinkin, *The boundaries of IL* 219). Fourth, the definition and the struggle of the protection of women's human rights have led rather to a decreased protection of women at a national level (Guinn 59). Fifth, it is recognized that the opening to women's human rights have enhanced greater participation of women and inclusion of women's issue at international level through gender mainstreaming (Charlesworth and Chinkin, *The boundaries of IL* 197). Furthermore, if on the one side, it is posited that power is at the core for violence against women (Mertus 226) access of women to decision making roles seems the solution. On the contrary, the problem of power creating relations of domination and subordination cannot be resolved by exclusively enhancing participation of women or by naming human rights that are specifically of women. Indeed, having more women in higher position does not mean effectively tackling women's issues if in the meantime the structure of the processes of decision making or of power are kept in place (Otto, *A post-Beijing reflection* 115). Therefore, even if there is greater access of women at international level in institutions or organizations, this does not mean that there is a change in the male-oriented perspective in international human rights law since women continue to act within male structures perpetrating structural inequality.

4.2 The public/private divide at international level

International law is considered to be androcentric (Charlesworth and Chinkin, *Feminist Approaches* 644). This claim derives from the fact that international law is constructed upon gendered dichotomies, in particular on the public/private binary which has allowed women's voices or experience to be silenced (Charlesworth and Chinkin,

Feminist Approaches 625). Furthermore, the division between the private and the public spheres are conceived as a creation and characteristic of the so-called Western States⁶ (Chinkin, *A Critique of the Public/Private Dimension* 389, Fenster 12), but also as Eurocentric since it derives from western legal thinking which is based on gender assumptions specifically organizing the society (Charlesworth and Chinkin, *Feminist Approaches* 644). Indeed, it is posited that the distinction of the private and public areas is different from culture to culture according to the cultural meaning attributed to space (Fenster 12). Thus, the distinction of the private/public spheres in international relations are rooted in the designation of the State according to criteria which are formally recognized since the Treaty of Westphalia of 1648 within a specific European context (Carreau and Marrella 7).

The first expression of the public/private in the international field itself represented by international law. According to international legal theory,⁷ there is a distinction between public and private international law (Carreau and Marrella 1). While the former, public international law, governs the relations among States at international level, the latter, private international law, designates national or domestic legal systems (Carreau and Marrella 1). The second expression of the public private divide in international law regards the fact that States are sovereign, therefore, international law cannot intervene in matters of national domestic law insofar as States do not decide to create and accept international laws according to their preferences (Carreau and Marrella 302). Indeed, international law is founded on the notion that States enter voluntarily into agreements, on the basis of the social contract (Romany 97, Ertürk 32). This represents the further division of the public/private which is translated into international/domestic sphere in international relations (Hooper 92). Furthermore, the public/private divide between States at international level, is parallel to the distinction State/family at domestic level (Boyd 11). Third, public international law is defined as gendered and it is attributed to the division of labor based on

⁶ The denomination of the Western World, compared to the Eastern world has emerged as an ideological conflict during the 1945-1989 period. See Carreau, Dominique and Marrella, Fabrizio. *Diritto Internazionale*. Giuffr  Editore, Milano 2016: 17.

⁷ On liberal international theory see Burley, Anne-Marie Slaughter. "International law and international relations theory: a dual agenda." *The American Journal of International Law* 87.2 (1993): 205-239.

sex and on the traditional roles attributed to men as the providers of the family and of women as home caretakers (Charlesworth and Chinkin, *The boundaries of IL* 56). However, not only has labor enhanced a division between the public and the private spheres, but also all the activities which were associated previously with men such as the economic, law, political and the intellectual sphere (Charlesworth, Chinkin and Wright 626). Additionally, this divide results in the subordination of women who remain relegated to the private sphere, since those are activities conceived as male's activities and are not accessible to them (Fenster 12). Finally, human rights law had developed by having regard to the public private/divide since States incur in responsibilities of violations of human rights when these are perpetrated by persons acting as State officials or which happen within the State's competence (Chinkin 389). Therefore, as far as the human rights regime was concerned, what happened outside the public sphere and produced violations of human rights seemed to fall outside its scope. In the case of VAW, it happens mostly at private level among individuals outside the State's public sphere, therefore, it does not involve the State.

One of the paradoxical examples which underlines the fact that the international field fails to see the political feature of VAW is that of torture. Indeed, at international level the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT) of 1984 establishes a framework at international level for the prevention of torture. The main elements that classify torture in the Convention in Article 1 are: the infliction of physical or mental pain or suffering; the intention of harming; the purpose of obtaining some type of information or control, and finally the passive or active involvement of the State.⁸ Furthermore, the former UN Special Rapporteur on Torture,

⁸ Article 1 of the UNCAT: *For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.* See UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html>

Manfred Nowak has identified an additional element which characterizes acts as torture which is powerlessness, meaning the complete control by the perpetrator on the person tortured.⁹ Indeed, DV happens similarly between people who are in a relationship in which the men inflicts deliberately violence on women by overwhelming them.¹⁰ The prohibition of torture, as of the elements of the UNCAT definition, have been analyzed in connection to VAW and DV by underling the fact that there is still a “neutral or traditional state-centered ordering of international law” (Copelon 297) and in this sense political. Indeed, by narrowly considering torture acts presenting the aforementioned characteristics, as happening only if there is some degree of involvement of the State, there is the perpetration of the public/private divide which allows impunity for VAW. Indeed, VAW is compatible with the definition of torture, but the involvement of the State lacks. However, this results in the impunity of men who perpetrate VAW at private level and cannot be held in violation of international law since they do not act with the involvement of the State.¹¹

4.2.1 VAW beyond the public/private in the CEDAW and Istanbul Convention

In the next paragraph it will be into consideration how the public/private divide is expressed in the CEDAW and the Istanbul Convention. To begin with, the CEDAW establishes the prohibition of discrimination of women, as of Article 15, compared to men before the law. Indeed, in the CEDAW it is established that the State shall adopt legislative and other measures to ensure equality before the law of women compared to men in different areas such as participation (Articles 7,8), nationality (Article 9), education (Article 10), employment and maternity rights (Article 11), health (Article 12), economy and social life (Article 13), family rights (Article 16). However, these provisions regard the public sphere of international law, since they establish that there shall be no discrimination

⁹ UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment : note / by the Secretary-General, 28 July 2008, A/63/175, available at: <http://www.refworld.org/docid/48db99e82.html>

¹⁰ See the interview to Manfred Nowak, (a cura di) Candiotta, Laura; De Vido, Sara, “INTERVISTA A MANFRED NOWAK, già UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment”, *Home-Made Violence*, Milano, Mimesis, 2016: 179-188.

¹¹ For the analysis of the elements of torture as VAW see Copelon, Rhonda. "Recognizing the Egregious in the Everyday: Domestic Violence as Torture." *Columbia Human Rights Law Review* 25.2 (1994): 291-368.

on the basis of sex between men and women as far as the application of the law concerns. In GR 19 on VAW it is further established under paragraph 19, that under international law, States may be held responsible for acts of VAW perpetrated by private actors if they fail to prevent, punish or investigate such acts (para. 19). Furthermore, under the section *Specific Recommendations*, paragraph 24(a) establishes that States shall take measures to overcome gendered based violence perpetrated both by public and private actors. It is remarkable that since the 1979 CEDAW to the CEDAWC GR 19 of 1992, there was a greater recognition that violence against women, as a form of discrimination, needed to be tackled by States both in the public and in the private sphere as entailed in GR 19.

In the Istanbul Convention further reference to the public and private life is found. First, in Article 3(a), VAW is defined as occurring both in the private and the public life. Second, in Article 4 on *Fundamental rights, equality and non-discrimination* it is stated that women shall live free from violence both in the public and in the private sphere. All in all, there is an acknowledgment that VAW is a concern of the public international law even though it happens in what is defined as the private sphere among non-state actors. Despite this acknowledgement, however, the reasoning of the CEDAW and the Istanbul Convention still work along the public/private binary, which emphasizes the fact that the role and experience of the women are connected to the private sphere away from the public one (Edwards 22). As far as jurisprudence concerns, the ECHR case *Opuz. v Turkey* is considered to be one of the crucial cases at European level dealing with the public/private divide and VAW. Indeed, the ECHR, with regard to this case, establishes in its judgment the positive duty of the State to adopt measures in order to assure the enjoyment of rights by private individuals (Londono 657). In particular, the case is relevant to the reflection on the private/public divide for two reasons. First, the ECHR's competence is established under the European Convention on Human Rights by the CoE to which Turkey is part. Indeed, the case was filed by the applicant against Turkey for violations of Article 2 on the right to life and of Article 3 on the prohibition of torture, both in combination with Article 14 on non discrimination the basis of sex (*Opuz v Turkey* para. 177). Therefore, the complaint against Turkey invoked also discrimination on the basis of gender because the State had failed to protect the right to life and prevent inhuman treatment of the applicant.

Second, the case regarded episodes of domestic violence against a woman and her mother by the husband of the daughter who were all Turkish nationals.¹² Therefore, the case concerned a private fact that happened within the family walls in Turkey. However, the ECHR disrupted the public/private divide invoked by Turkey within the Article 8. In fact, Turkey stated that the authorities did not intervene in the case in order to protect the right to family of the individuals (*Opuz v Turkey* para. 195). The Court, however, held Turkish authorities responsible for not intervening in the case, since there was evidence of the danger represented by the man who had already committed violent acts against his wife and her mother. Furthermore, the Court specifically ruled that there had been discrimination based on gender since in Turkey “domestic violence is tolerated by the authorities and that the remedies indicated by the Government do not function effectively” (*Opuz v Turkey* 197). However, the case will be further analyzed in the next section where the state and the principle of due diligence will be taken into consideration.

4.3 The State as male

This section will analyze the reflections made on the State in relation to gender. Indeed, the notion of State needs to be investigated to see how critics, mostly feminists, assert that the state is male or rather that it is built on male experiences (Charlesworth and Chinkin, *The boundaries of IL* 124). Furthermore, it is also asserted that the State in its configuration in international law produces and perpetrates ideas of masculinity (Hooper 92). On the other hand, scholars of International Relations have considered the State to be genderless by following the substantialist view that States exist as fixed entities which create interactions and are unaffected by the influences of these interactions (Wadley 41).

First, at international level States are conceived as the primary subjects of international law. This prominent position of States in international law is grounded in historic and structural reasons. Indeed, historically States have been the first subjects of

¹² *Opuz v Turkey*, Application no. 33401/02, Council of Europe: European Court of Human Rights, 9 June 2009, available at: <http://www.refworld.org/cases,ECHR,4a2f84392.html>

international law. Furthermore, States' structural characteristic of having a territory, a population and an effective government, constitutes them as unique sovereign subjects at international level (Carreau and Marrella 301). In the Montevideo Convention of 1933 it is established that States are sovereign and equals at international level, and must have a permanent population, hold effective control over a territory and have the capacity to enter into relations with other States in order to be considered as such.¹³ The position of scholars who maintained that States alone are subjects of international law has evolved since other entities have started to be prominent at international level such as international organizations (IO), non-governmental organizations (NGO) and transnational corporations (TNCs) (Carreau and Marrella 301). As a matter of fact, only recently have individuals been considered as subjects of international law together with NGOs (Carreau and Marrella 416). As far as the entry into relations with other States concerns, the basis is the social contract which in international law assumes the form of treaty. Furthermore, because States are sovereign they cannot be constrained under laws they do not agree to.

It is asserted that States enter in relations with each other, or agree to be bound by treaties when there are common interests for States in dealing with a common problem (Tanaka 331). This has been considered as the basic principle ruling treaties, the principle of reciprocity, according to which States are encouraged to agree on an issue with another States because there are mutual benefits deriving from the agreement (Tanaka 334-5). However, when it comes to human rights law, treaties which strictly encompass human rights, do not protect mutual interests of states, rather they protect the interests of the international community (Tanaka 335). Therefore, human rights treaties, despite being ratified by States at international level, are not ruled by the principle of reciprocity. Indeed, the protection of human rights is perceived as the interest of the community. Consequently, State Parties are less likely to comply with their obligations since compliance does not mean mutual benefit. Furthermore, States cannot intervene directly to protect violations of human rights in other States because of the principle of territorial integrity.

¹³ Article 1 of the Montevideo Convention on the Rights and Duties of States. See Montevideo Convention on Rights and Duties of the States, 1933, 165 LNTS 19, available at <https://www.ilsa.org/jessup/jessup15/MontevideoConvention.pdf>.

Second, as mentioned in the previous section, the State is conceived within the public and private dichotomy. Thus, the role of the State in international law is conceived in the traditional way as composed by its organs and other separate entities (Chinkin 390). Indeed, at the State level there is the public/private divide. In the case *Opuz v Turkey*, the government invoked precisely the public/private divide before the ECHR by claiming that Turkish authorities did not intervene in the case because it did not want to interfere with the right of private life and family life of the individuals as of Article 8 of the European Convention on Human Rights.¹⁴ Apparently, in this case the public/private divide involves two competing rights: the right to life and the right to family or private life. Furthermore, the conduct of the Turkish authorities proves that it is practice of the state to give priority to certain human rights rather than others (Romany 104).

Third, Charlesworth and Chinkin assert that the State is build drawing from men's characteristics as opposed to those attributed to women (*The boundaries of IL* 125). They identify within the definition of the State at international level, characteristics which are attributed to men as opposed to women. Indeed, the notions of permanent population, integrity of the territory, effective government and capacity in entering relations with other States are structured on ideas of masculinity (Charlesworth and Chinkin, *The boundaries of IL* 125-16). Furthermore, the notion of the State is constructed upon the opposition of what are considered male and female characteristics because, at times, States are represented as strong and protectors (men), while other times they are represented as vulnerable in need of protection (women) (Charlesworth and Chinkin, *The boundaries of IL* 137-8). In this framework, the States reflects the binary notions of the sexual differences between men and women, where the focus is on men and women's interests are not represented (Charlesworth and Chinkin, *The boundaries of IL* 170).

¹⁴ Article 8 of the ECHR states that: *1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.* See Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

Fourth, the State is build upon notions that restate the binary division of men/women at national level in the distinction between what is public and private with the reference to family as the basic unit of society. Indeed, the general principle of non-intervention in the family by the State and the absence of regulations on violence in the family, perpetrates the binary division of the public/private which serves at maintaining hierarchical and inequality in the family where VAW happens (Boyd 13). In particular, this respect to family life does not challenge the idea of the male as the head of the house, which creates relations of subordination of women (Romany 101-2). Indeed, the liberal State is founded on a social contract, essentially based on a sexual contract, in which equal participation of women as compared to men is not envisaged (Otto, *Holding Up half the Sky* 28). This presumption of non-intervention by the State, however, is ideological since there are different spheres of the private life in which the State intervenes such as education, work and the administration of marriage as the basis for the family (Erturk 33). Additionally, within this view, private life is the foundation of public life but, at the same time, it is kept separated from what is considered public (Hooper 101). For this reason, the domestic field and the family life, and consequently its members such as women and children, are not included within the State's scope (Hooper 59).

The human rights regime is seen as imposing a dual system of constraints on States. Indeed, human rights have been classified into three generations. First, the civil and political rights, classified as first generation of human rights which are contained in the ICCPR. Second, the economic, social and cultural right, classified as the second generation of human rights which are contained in the ICESCR. Finally, the third generations of rights which are indicated as collective human rights and rooted in the challenge posed by the so-called developing States as in opposition to the individual rights of the so-called liberal world.¹⁵ With regard to the generations, the first system of constraints imposed is negative in the sense that human rights are established as a negative prohibition for States which must refrain from interfering in the lives of the individuals or of a group. Meanwhile, the second system of constraints imposed on States is considered positive since it presumes the

¹⁵ See the three generations of rights in Charlesworth, Hilary, and Christine Chinkin. *The boundaries of international law: A feminist analysis*. Manchester University Press, 2000: 233-243.

action of the State in order to grant certain human rights (Donnelly 34). In particular, what has been found in common in the three generations of rights is the fact that they all exclude women's perspectives (Charlesworth and Chinkin, *The boundaries of IL* 231). Thus, the development of women's human rights seem to fill the void left by the human rights in general. Indeed, both the CEDAW and the Istanbul Convention impose standards for the elimination of VAW as a form of discrimination and a violation of human rights. However, if international law and the States are build on a male structures as described in the present section, it is hard to establish the effective implementation of women's human rights which have been long excluded. Also, if the provisions of the two Conventions are implemented, it still has to be assessed if DAW and VAW are effectively tackled and eliminated.

In the next section, the principle of due diligence as an obligation for States will be taken into consideration and it will be assessed at the end of the Chapter what are the main its main challenges.

4.4 Overcoming the public/private divide: the due diligence principle

In the following section the due diligence principle linked to DAW and VAW will be taken into consideration as breaking the public/private divide constructed at State level.¹⁶ Indeed, the due diligence principle and its establishment at international level as conventional and customary law, has enhanced according to scholars, the disruption of the private/public divide with regard to gender based violence (Ertürk para. 30). However, it will be maintained that despite the developments which have brought to the emergence of the due diligence principle, the structural male model is maintained in tackling DAW and VAW in the CEDAW and the Istanbul Convention which negatively influences the effectiveness of eradicating structural inequality between men and women at its roots.

It is necessary at this point to briefly introduce the notion of responsibility at international level linked to due diligence. International responsibility is invoked in

¹⁶ The due diligence principle is encompassed at international level in different areas of international law e.g. transnational corporations in international business law.

international law whether there is an internationally wrongful act, meaning a violation of an international norm (Carreau and Marrella 483). Furthermore, a violation of an international norm can stem both from an action or an omission linked to an international obligation¹⁷ and from an action which is considered lawful at domestic level, meaning within the domestic legal framework, but unlawful at international level (Carreau and Marrella 483-4). Lastly, internationally wrongful acts can derive from the violation both of conventional obligations or customs (Carreau and Marrella 484). In international law State's responsibility can be invoked for unlawful acts by the State or its organs at legislative, administrative, judicial levels (Carreau and Marrella 488-492). State's responsibility for unlawful acts committed by privates does not generally imply State's responsibility (Carreau and Marrella 493). However, as Carreau and Marrella explain, this does not mean that States do not have a responsibility to prevent unlawful acts or to punish perpetrators of unlawful acts (493).

As far as human rights are concerned, it needs to be reiterated that States have both negative and positive obligations in order to avoid violations. If on the one side, State shall not intervene in the enjoyment of human rights (negative aspect), the positive aspect involves that States have both an obligation of result and of observing a certain conduct in order to fulfill the enjoyment of the human right (De Vido 370). The observance of a certain conduct of States to human rights has been defined as the obligation of due diligence.

To begin with the due diligence principle is envisaged as a state centric obligation (Ertürk 28). Indeed, the principle of due diligence had emerged with respect to diplomatic protection, within the framework of States' protection of foreigners. However, no definition had been given in that context about the content of the principle (Bourke-Martignoni 48).

¹⁷ In Article 2 of the ICL's Responsibility of States for Internationally wrongful acts it is stated: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State." See UN General Assembly, Responsibility of States for internationally wrongful acts : resolution / adopted by the General Assembly, 8 January 2008, A/RES/62/61, available at: <http://www.refworld.org/docid/478f60c52.htm>

In jurisprudence, the principle of due diligence has been envisaged by the Inter-American Court of Human Rights (ICHR) in the judgment *Velasquez Rodriguez v Honduras* of 1988 which regards violations of human rights by non-state actors. Indeed, in the Velasquez case the ICHR affirmed that violations of human rights are imputable to States if perpetrated by public officials. However, it also maintained that the State has an obligation to prevent, investigate and punish violations of human rights. Furthermore, the ICHR stated that a violation of human rights is imputable to the State if the State has not complied with its obligation of due diligence (*Velasquez Rodriguez v Honduras* para. 172). Similarly in the jurisprudence of the ECHR, the aforementioned *Opuz v Turkey* case has considered the due diligence principle in examining the effectiveness taken by Turkish authorities to protect the right to life. Indeed, the case regarded several years of physical abuse of the applicant and her mother by the former's husband (H.O), the perpetrator.¹⁸ In particular the Court acknowledged violations of Articles 2 (right to life), Article 3 (prohibition of torture) in combination with Article 14 (prohibition of discrimination). Also, the Court held that there had been a violation of the European Convention on Human rights of the prohibition of discrimination, since it relied on reports by organizations which showed that VAW in Turkey happened mainly towards women (*Opuz v Turkey* para. 194). Furthermore, the Court noted that Turkey had adopted a law establishing remedies for victims of domestic violence. However, this law has not been effectively implemented since, for example, reports showed that police officers would act as mediators in cases of complaints by women for domestic violence rather than taking measures to deal with cases of VAW, thus, de facto demonstrating tolerance towards episodes of DV (*Opuz v Turkey* para. 195-7). Furthermore, the Court acknowledged that the violence inflicted to the applicant and the mother resulted in "gender-based violence which is a form of discrimination against women" because deriving from the general inaction of Turkish authorities which affected mostly women (*Opuz v Turkey* para. 200). The Court considered fundamental the question of whether "the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive

¹⁸ In the judgement by the ECHR six assaults are analyzed within the facts taken into consideration by the Court and the final assault causing the death of the applicant's mother. See *Opuz v Turkey*, paras. 9-53.

measures against H.O. despite the withdrawal of complaints by the victims” (Opuz v Turkey para. 129). Indeed, it is also reiterated that States have positive duties in guaranteeing the rights under the ECHR. In particular, Turkey has been found as in violation of the due diligence principle as far as the right to life of Article 2 concerns, since the authorities had enough information to assess the “real and immediate risk” to the life of the mother’s applicant (Opuz v Turkey para. 129). However, in the same paragraph it is stated by the Court that positive obligations under the due diligence principle shall not “impose an impossible or disproportionate burden on the authorities”, therefore, *de facto* acknowledging the limits of the due diligence principle on taking positive measures to prevent, protect and fulfill violations of human rights.

With reference to VAW as DAW, the principle of due diligence and State’s responsibility for DAW by public or private actors was already contained in CEDAWC GR in 19 paragraph 9 which states 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.¹⁹

At international level, the principle of due diligence of States for acts committed public and private actors has been underlined in connection with VAW also in the DEVAW of 1993. Indeed, in Article 4 it is underlined that States should “Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”²⁰. Indeed, it identifies three elements of the due diligence principle: prevention, investigation of acts of VAW and punishment of the perpetrators.

¹⁹ GR 19, para. 9.

²⁰ DEVAW, Article 4(c).

The due diligence principle is also contained in the Convention Belém do Pará in Article 7(b) stating that States “shall pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to” and “apply due diligence to prevent, investigate and impose penalties for violence against women”.²¹ Also, the PRWA within the African Charter envisages under Article 4 that VAW whether taking place in the public or private, States shall “adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women”.²²

As within the framework of the Istanbul Convention, States shall act with due diligence in relation to actions by public or private actors as of Article 5. Furthermore, in paragraph 2 of Article 5 it is established that “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”.²³ Within the scope of this definition it results that the elements of due diligence are: prevention, investigation, punishment and reparation with regard to actions of VAW which will be further discussed in the following section.

4.4.1 Elements of the due diligence principle: focus on the Istanbul Convention

In the CoE Istanbul Convention Article 5(b) establishes that due diligence in combating VAW and domestic violence encompasses four areas and these are spread throughout the Articles contained from Chapter III to VI of the Convention.

The first area regards prevention and the articles pertaining to it are contained in Chapter III of the Istanbul Convention. In particular, Article 12(1) on the General obligations states that prevention means a change society and cultural beliefs which entail stereotypes about men and women and which places women as subordinate to men. Indeed, this Article echoes Article 5(a) of the CEDAW. In particular, Article 5(a) has been

²¹ Convention of Belém do Pará, Article 7(b).

²² PRWA, Article 4.

²³ Istanbul Convention, Article 5.2.

analyzed by Holtmaat in connection to the due diligence principle, who has found that by concentrating on gender stereotypes the root causes of VAW can be tackled (64). In particular, she finds that under Article 5(a) of the CEDAW the due diligence principle implies two types of obligations for States: on the one hand, the representation of men and women in the social sphere; on the other hand the elimination of stereotypes in law and policies adopted by the State (65). By comparing the two types of obligations as expressed by Holtmaat with the provisions of the Istanbul Convention, it can be asserted that the strive to eliminate gender stereotypes can be found from articles from 13 to 17. Indeed, these articles express the need to overcome the stereotyped gender roles in several spheres such as education and media.

As for protection and support, Chapter IV is mainly focused on protection of victims from further acts of violence. The articles entailed in Chapter IV envisage measures that are aimed at supporting victims of VAW in particular by means of information, assistance, shelters, telephone helplines.²⁴ Indeed, all these support measures for victims envisage an intervention by the State together with non-State actors and the civil society.

Punishment for the perpetrators of VAW and domestic violence are envisaged in Chapter V of the Istanbul Convention under the title *Substantive law*. Indeed, on the one side, Articles from 19 to 32 regard the civil remedies and reparations for victims of VAW and domestic violence under the form of compensation. On the other hand, in Articles from 33 to 39 it is specified which practices of VAW and domestic violence shall be criminalized at national level. Furthermore, from Articles 41 to 48, the Istanbul Convention establish procedural measures that shall be adopted by States with regard to VAW and domestic violence.

Finally, Chapter VI contains the articles on investigation, prosecution, procedural law and protective measures such as the need to have and immediate response by State agencies in order to take preventive and protective measures as of Article 50. Indeed, the potential of the Istanbul Convention is seen in the fact that it could push the boundaries of

²⁴ In particular these are Articles from 18-28 of the Istanbul Convention.

the due diligence principle and may contribute to creating “the social and cultural environment which combats the roots of gender based violence” (De Vido 382).

4.4.2 The ECHR case Talpis v Italy

In the judgement *Talpis v. Italy* of 2 March 2017, the ECHR has established that there has been a violation of Articles 2, 3 and of Article 14 in combination with the aforementioned articles of the European Convention on Human Rights. In particular this case will be taken into consideration in order to analyze in the following section the challenges posed by the obligation of due diligence of States. Additionally, in its judgement, the ECHR takes into consideration the Istanbul Convention ratified by Italy and it refers to the definitions of VAW and domestic violence as of Article 3.

First, the facts of the case regard a Moldavian and Romanian national living in Italy with her husband A.T. and their daughter and son in Italy. In June 2012, the applicant had been victim of violence by her husband which she reported at the police. In her report at the police it was written that there were signs of aggression against the applicant and her daughter (*Talpis v Italy*, para. 20). In August of the same year, there was a second assault by A.T. which ended with the applicant’s need to go to the hospital. After this episode the applicant moved out of the house where she was living with the husband and went to an association for the protection of victims of VAW. Following this episode the applicant reported her husband for serious injuries at the police. During her stay at the association for the protection of victims of VAW, A.T. continued to call and send offensive messages to the applicant. Despite being urged several times to investigate the case by the prosecutor, the police started investigations on the complaint by the applicant in April 2013. In the meanwhile, from August 2012 until April 2013, the woman had to leave the association where she was hosted since there were no more funds available to support her, and went back to live with A.T.. When she was heard by the police for the first time in April 2013, she withdrew the complaint against her husband. Later, she claimed that she had done so because of the psychological pressures by her husband (*Talpis v Italy* paras 11-35). In November 2013 the third assault by A.T. to the woman happened and the police intervened

again: A.T. was drunk and he had broken the door of the bedroom of the house where the applicant, A.T. and their children were living. The wife claimed that she had called the police because she was worried for the husband who was drunk and she mentioned the fact that she had withdrawn a complaint against him in the past. The police took A.T. to the hospital and released him after a few hours. The same night, A.T. went back home and assaulted the wife and the son with a knife. In the episode, the son was killed and the wife reported severe injuries.

The Court found admissible the applicant's complaint for violations of Articles 2, 3 and 14 under the ECHR and it explicitly applied the general principles of the case *Opuz v Turkey*. As of Article 2, the Court found that the violation of the right to life applied both to the son and the applicant. Indeed, according to the Court, the State has the obligation to prevent both voluntary and involuntary death, by public or private actors, by adopting protective measures to prevent the potential threat to life for a person (*Talpis v. Italy* paras 107-9). Furthermore, the Court underlined the fact that protective measures need to be effective in practice not only in theory. With this regard, Italy's measures were not found effective since the complaint filed by the applicant had only been taken into consideration for investigation after 7 months while there were evidence of the gravity of the situation between the applicant and A.T (*Talpis v Italy* para. 112). Indeed, the night when the son was killed, the authorities had brought A.T. to the hospital and released him, despite the police were informed that he had already been reported at the police in the past for assaults against his wife. In particular, the authorities did not take into consideration the moral, physical and psychological vulnerability of the applicant when they released A.T. (*Talpis v Italy* para. 115). Furthermore, the Court reiterates that when there is domestic violence, "perpetrator's rights cannot supersede victims' human rights to life and to physical and mental integrity" therefore, the police should have considered the potential risks represented by A.T to his family when he was found drunk (*Talpis v Italy* para 123).

As for violations of Article 3, it is remarkable that the Court claims the lengthy procedures of the Italian judicial system since A.T. only in 2015, and after killing of the son, was sentenced for personal injuries against his wife. Thus, the passivity of the

authorities before the complaint by the applicant of having been inflicted injuries is underlined by the Court (*Talpis v Italy* paras. 127-130).

Finally, as for the violation of Article 14 in combination with Articles 2 and 3, the Court establishes that there was discrimination against the applicant as a woman.²⁵ Indeed, the Court analyses statistics provided at international level which confirm that VAW and domestic violence still are very high in Italy. Therefore, this was a further reason for the authorities to effectively protect and investigate the case (*Talpis v Italy* para 145).

4.5 Limitations of the due diligence principle

The due diligence principle has enhanced at international level the introduction of the private sphere in the so-called public one (Edwards 131). However, the due diligence principle is itself problematic for at least three reasons which will be discussed in the present section. The three reasons are not easily distinguishable, therefore it shall be taken into consideration that they may overlap sometimes.

First, the due diligence principle is considered to be vague at international level. It must be acknowledged that the Istanbul Convention extensively describes the obligations of State Parties within the framework of the due diligence principle in its articles contained in Chapters from III to VI. Also, the Istanbul Convention poses a major focus on prevention of VAW and domestic violence such as of Article 50 which establishes the need for preventive operational measures. Indeed, the Special Rapporteur on VAW Ertürk, in her report on “The Due Diligence Standard as a Tool for the Elimination of Violence Against Women” of 2006, had underlined that much more needed to be done by States with respect measures to prevent VAW (Ertürk para. 15). Therefore the Istanbul Convention binds States to take extensive preventive measures. However, the jurisprudence of the ECHR has also shown that violations of the due diligence principle at State level and what the State could have done in order to prevent VAW and DV are identifiable after these acts have

²⁵ It has to be remarked that the ECHR has found violations of Article 14 in only a few cases. One of them was the *Opuz v Turkey* case.

happened. Indeed, for example, in *Opuz and Talpis*, the Court has identified violations of due diligence when the case was brought at the ECHR following extreme acts of domestic violence culminated in the death, respectively, of the mother and the son of the applicants. Furthermore, even more striking is the fact that there may be measures taken at national legal level to prevent or combat VAW or DV. For example, as underlined both in the case *Opuz and Talpis* there were already national laws which might have enhanced a greater protection of victims of violence.²⁶ However, these were not applied by the authorities. However, it seems easier for the ECHR to identify a posteriori that a State is in violation of due diligence obligation. And even when non compliance with due diligence is confirmed, there is little indication on the precise standards that a State shall adopt in order to comply with its duty of due diligence. Furthermore, in the case *Opuz* the Court itself has acknowledged that the due diligence principle shall not require a burden which is disproportionate or impossible by the authorities (para. 129). Therefore, one issue within the obligation of due diligence regards also the threshold of impositions that can be made on States, that should, however, not over charge States and their authorities. Thus, by not defining a threshold and by treating the due diligence vaguely, arguments can be made by States that they, at least, have done something even if that something results in time as not being effective in preventing VAW and domestic violence. On the other hand, vagueness results also problematic within the due diligence obligation since it does not properly address what are the limits to State's intervention (Goldscheid and Liebowitz 320).

Second, the due diligence principle is State-centric and within this framework the State tends to be necessarily depicted as beneficent in its interventions (Goldscheid and Liebowitz 323). Indeed, the State is represented as the key to solving gender violence while not taking into consideration its limits (Goldscheid and Liebowitz 320). One of the limits of the State is the risk, for example, that States' intervention in eliminating

²⁶ In para. 91 of the case *Opuz v Turkey*, the Court takes into consideration that: *Under these circumstances, judges and prosecutors treat an action under Law no. 4320 as if it were a form of divorce action, whereas the point of the law is to take urgent action on behalf of women who are seeking to protect their own lives.* Therefore, there was a law which could have granted protection to victims of domestic violence, however, it was not properly applied.

In para. 51 of the case *Talpis v Italy* it is acknowledged that there had been new legal measures taken in Italy among which the criminalization of the practice of stalking.

discrimination against women, results in a decrease of protection of women (Guinn 59-60). Indeed, if domestic violence has been defined as a systemic and structural way to exercise patriarchal control on women built on stereotypical roles and on the fact that there is predominance of men in several sphere such as economic, social and political (Copelon 305), it means that also State's intervention needs to eradicate this at structural level in ways that go beyond the adoption of legal judicial measures. Additionally, it is pointed out that the State shall be beneficial to tackle structural inequality at its roots. In particular, the UN Special Rapporteur on VAW, has asserted that States' responsibility under the due diligence principle should be divided into two categories, one individual and one systemic.²⁷ The individual category regards the due diligence obligations of the State towards individuals and measures taken based on each case.²⁸ On the other hand, systemic due diligence envisages a comprehensive model of prevention, protection, punishment and reparations which shall include legislative measures and strategic plans aimed at eradicating structural inequality (Manjoo, para. 71). Indeed, it has been argued that the Istanbul Convention, as an international instrument, also based on the jurisprudence of the ECHR, has the possibility of pushing the boundaries of due diligence (De Vido 382). However, it is not clear what are the limits of States' intervention and there is skepticism in the effectiveness in the legal judicial measures as tackling the roots of VAW (Goldscheid and Liebowitz 344).

Third, Edwards, has found that in several case laws, with respect to the principle of due diligence, there is still the absence of a gender dimension in the approach to situations where VAW happens (262). Indeed, law is seen as encompassing only certain aspects of experience done by individuals and that "the language and imagery of the law underscore its maleness: it lays claim to rationality, objectivity, and abstraction, characteristics traditionally associated with men" (Charlesworth, *Women's HR* 65). This can be seen precisely in the dissenting opinion of judge Spano in the aforementioned case *Talpis v Italy*

²⁷ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, 14 May 2013, A/HRC/23/49, para. 70, available at: <http://www.refworld.org/docid/51b86a684.html>

²⁸ Examples of measures under the individual category are e.g. telephone hotlines, shelters, compensation to victims. See Manjoo, para. 70

on the violations of Articles 2 and 14. Indeed, in his dissenting opinion judge Spano underlines that “the law has its limits and human rights law has them too.”²⁹

As for article 2, judge Spano resonates on the real and immediate risk to the life of an identified individual or individuals as used in the cases *Osman* and *Opuz*, which implies State’s due diligence.³⁰ As for the immediate risk, the judge finds that between June 2012 and November 2013, when the son of the applicant was killed, fourteen months have passed.³¹ Thus, the period of time according to Spano was too long to assess the immediate risk by the authorities. As for the real risk, judge Spano links it with the immediacy of the risk and the severity of the attacks by the perpetrator. According to Spano, the gravity of the attacks in the case *Talpis* were less severe compared to the eight assaults analyzed in the case *Opuz* where violation of Article 2 was found.³² Furthermore, Spano maintains that as for the night where the son was killed by A.T. and the police intervened, there was not a real and immediate threat that A.T. might have killed the son.³³

As for Article 14, Judge Spano takes into consideration that in other cases before the ECHR,³⁴ there have been violations of Article 14 because of the passivity/inactivity of the authorities together with the tendency by the same of treating cases of DV and VAW in a way that would allow impunity of the perpetrators.³⁵ In particular, judge Spano claims that in the previous judgement *Rumor v Italy*, the Court had not found Italy in violation of Article 14 because the Italian system did not result discriminatory as a whole. It was simply characterized by inactivity of the authorities in the sphere of VAW. Furthermore, the judge posits that the high incidence of VAW does not signify that in general the system is discriminatory.³⁶

²⁹ Dissenting opinion by Judge Spano, *Talpis v Italy*, para. 1.

³⁰ Dissenting opinion by Judge Spano, *Talpis v Italy*, para. 3.

³¹ Dissenting opinion by Judge Spano, *Talpis v Italy*, para. 5.

³² Dissenting opinion by Judge Spano, *Talpis v Italy*, para. 6.

³³ Dissenting opinion by Judge Spano, *Talpis v Italy*, para. 13.

³⁴ For example in the case *Opuz v Turkey* and *Halime Kılıç v. Turkey*.

³⁵ Dissenting opinion by Judge Spano, *Talpis v Italy*, para. 19.

³⁶ Dissenting opinion by Judge Spano, *Talpis v Italy*, para. 20-.

The dissenting opinion by judge Spano with regard to Articles 2 and 14 follows the so called reasonableness criteria of time and reality of risk in order to assess violations of the due diligence principle. However, the issue with reasonableness is the question on who decides what is reasonable (Edwards 176).³⁷ In the present case, it seems that judge Spano relies on the number of months and of assaults to decide whether there has been a violation of due diligence or not. Thus, Spano's reasoning seems based on elements of objectivity and abstraction, as posited by Edwards, which do not allow a gender sensitive approach to the case. Indeed, this type of reasoning does not take into consideration that VAW can also be psychological as of Article 3 of the Istanbul Convention, and does not have to be witnessed strictly by several physical assaults in order to exist. Furthermore, when judge Spano posits that the high incidence of VAW in Italy does not mean that the institutional system is discriminatory, he does not take into consideration that gender violence is structural and systemic (Edwards 24) and identifies the inactivity by the authorities as a behavior which is not linked to the system and the responsiveness itself to issues of VAW or DV.

³⁷ See also Rashida Manjoo, para. 20 in which she recalls that: (...) *while laws, policies and resources are crucial to address effectively violence against women and girls, efforts must be coupled with renewed will and actions to combat the structural and systemic challenges which are a cause and consequence of such violence.*

Conclusion

This final dissertation has dealt with the phenomenon of violence against women as included within the framework of the CEDAW and the Istanbul Convention. First, it has taken into consideration how gender equality has been brought within the framework of the human rights regime at international level during the Decade for Women between the 70s and the 90s. Second, it considers that violence against women has progressively been included and discussed in international fora along with discussions on gender equality. This has culminated in the development of the definition of violence against women at international level. In particular, in 1993 in the Vienna Declaration, violence against women has been defined as a form of discrimination and a violation of human rights.

The CEDAW establishes a global framework for the elimination of all forms of discrimination against women and it is also one of the most ratified instruments at UN level. Nevertheless, it has been underlined that State Parties to the CEDAW have made several reservations which have been identified as inadmissible since they are against the object of the scope of the Convention. Meanwhile, the Istanbul Convention represents one of the most recent instruments for combating violence against women and domestic violence at regional international level. The provisions and the definitions linked to violence against women within the Istanbul Convention have been influenced by the Convention of Belém do Pará and the Maputo Protocol dealing with violence against women at the American and African level. Thus, it has proved that the phenomenon of cross-fertilization among international documents and treaties helps in fostering progress with regard to certain issues.

From the detailed analysis of the CEDAW and the Istanbul Convention, it has emerged that VAW as a form of discrimination and a violation of human rights has to be tackled at its roots. It has been argued that an effective approach to deal with VAW as a form of discrimination requires both formal and substantive equality between men and women. While formal equality before the law can be achieved through the adoption of legislative measures, as for substantive equality, it needs the adoption of measures that

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tackle structural inequality existing between men and women from which violence against women stems. In order to achieve substantive equality, it has been argued that legislative measures are beneficial but not enough.

Proceeding from this reflection on substantive equality, the dissertation has analyzed different levels at which the approach of the CEDAW and the Istanbul Convention is problematic. Indeed, structural inequality has been found as rooted in the structures and configuration of the society and as having a feature of naturalness which portrays and depicts individuals within predetermined roles. The predetermined roles attributed to men and women, in fact, presume relationships of dominance and subordination. Therefore, the provisions and principles encompassed within the CEDAW and the Istanbul Convention result ineffective in their intent to combat VAW as a form of discrimination and a violation of human rights if structural inequality is not tackled at its roots with the promotion of substantive equality. The reflection done on the two Conventions throughout the dissertation has identified the following three limitations in connection to the approach to violence against women.

The first limitation regards the universality of human rights in general. Indeed, it has been argued that the universality of human rights is continuously challenged at different levels. As far as the participation to the human rights regime concerns, the universality of human rights is challenged when it comes to the ratification and implementation of treaties by States. Indeed, even if States accept and take part in human rights treaties, the implementation at national level is difficult to assess. Also, at times, States make reservations which are incompatible with the content or the scope of the treaty. Furthermore, these reservations are often linked to religion or culture as it has been proved by several reservations done to the CEDAW by Muslim countries.

When women's human rights are taken into consideration the challenges to their universal validity come from two elements which are mutually reinforcing within the framework of the CEDAW and the Istanbul Convention. The first element regards women's portrayal as a homogenous group. Indeed, it has been argued that the focus on women as a homogenous group under a politics of identity has enhanced, above all, the emergence of issues of

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gender inequality and violence against women at international level. However, the same homogenization of women bears the risk of underrating the complexities underlying experiences of discrimination and violence of women. Therefore, it has been argued that an intersectional approach with regard to violence against women, needs to be promoted in order to take effective measures to combat the phenomenon. As a matter of fact, discrimination and violence against women happen at the intersections of different axis such as age, class, race which mutually interact and build experiences of women at different levels. The second problematic element is found in notion of culture. The reservations made by States to the CEDAW have been discussed so as to underline how culture is invoked in order to exclude compliance with some of its provisions. Indeed, mainly culture and religion are invoked as justification for non compliance. Commonly, this reflects arguments of cultural relativism used to contrast the plead of universal application of human rights. However, the dissertation argues that cultural relativist arguments are enhanced by the ambiguous use of the word culture, at times mixed with tradition and customs. Indeed, in the CEDAW and the Istanbul Convention, culture is seen both as static, with fixed and harmful practices for women, and as dynamic with an inherent feature of evolution and progress. This dissertation argues, however, that the two Conventions should interpret culture in its dynamic meaning in order to avoid cultural stigmatization through the focus on certain practices linked to specific cultures. For example, the practice of FGM which is typically carried out within certain communities, shall not be differentiated from other types of physical harms suffered by women such as rape which happens everywhere. Furthermore, practices linked to specific cultures should not be pointed out in isolation within specific articles of the Istanbul Convention so as not to underscore the severity of other types of violence happening against women. Evidently, harmful practices against women are not linked to a particular culture. Therefore, only by understanding culture as dynamic there can be space for improvement and for a universal development of women's human rights in every culture where violence against women is perpetrated. This interpretation of culture would promote a greater degree of universality of women's human rights because it would not allow cultural relativist arguments since the

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aim would be not to change some cultural practices for their own sake, but to hinder the perpetration of a culture of subordination and control of women through violence.

The second limitation, linked to the one aforementioned, is represented by the exclusive focus of the CEDAW and the Istanbul Convention on women. The focus on women has been fostered by the attention given to issues of gender equality during the 70s. Indeed, the attention on violence against women at international level has been backed, in the first place, through the focalization on women's issues. However, in the third Chapter of this dissertation it has been asserted that there is the need to tackle structural inequality in order to effectively combat violence against women. From this premise, the analysis of the notion of gender has shown how structural inequality among men and women, is due to the social roles attributed to men and women on the basis of physical features linked to sexual physical characteristics. However, it has also been posited that structural inequality is not naturally grounded in physical biological features that men and women have. Conversely, the analysis of gender has shown that structural inequality is contained in the social construction linked to the gender roles attributed to men and women in the society. On the one side, the exclusive focus on women hinders the understanding of violence as lying in the social construction of gender relations. Furthermore, the close focus on women to combat violence against women enables and perpetrates the protector/protected binary and establishes a framework of masculinist protection towards women. In this binary, women are seen as victims which need protection from violence while the State takes upon itself the role of protector of women. However, to assure the functioning of the masculinist protection women are required to remain in a position of subordination for the sake of being protected. Finally, the focus on women is problematic also because it excludes men from gender relations and it only considers them as comparators to measure women's equality. On the other hand, it also has to be taken into consideration how notions of what it means to be a men are socially constructed within gender relations.

The reflection on gender helps in understanding structural inequality as perpetrated by gender relations which are continuously reiterated through acts and institutions at social level that keep in place relationships of domination and subordination among individuals.

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Furthermore, the investigation of gender has suggested that the CEDAW and the Istanbul Convention should transcend the dual division of individuals in categories which attributes them to either the category of men or women, in order to capture the essence of structural inequality as lying precisely in the identification of these categories.

The third and final limitation identified in relation with the CEDAW and the Istanbul Convention focuses on the very essence of international human rights law as build upon male experience. Despite the progressive inclusion of women's issues within the framework of human rights treaties, it seems that there is still the tendency to adopt approaches that are thought to be gender neutral while they are gender biased. As it has been argued, international law is not gender neutral, on the contrary, it is build on men's experience. First, the essence of international relations is built on relations among States because it includes and represents male experience. In particular, this is grounded on the public/private divide, that exists both at international and at national level, which has enhanced the relegation of women's experiences to the private sphere. Thus, the private sphere has meant exclusion of violence against women from the focus of international law. Certainly, the private/public divide has been disrupted through the establishment of the obligation of due diligence by States at international level. Indeed, the State has an obligation of both non interfering with human rights and of preventing their violation and guaranteeing their enjoyment by individuals. However, the due diligence principle results unsatisfactory because it relies ultimately on the protection of human rights by the State. Although the importance of due diligence is acknowledged by looking at jurisprudence, it is maintained that it fails in understanding structural inequality.

The three limitations are analyzed within the framework on of the CEDAW and the Istanbul Convention. At present, it seems necessary to recall that it is posited that law has its limits and that human rights law has them too.¹ Indeed, what this dissertation has analyzed are precisely the limitations that the CEDAW and the Istanbul Convention contain in their approaches to combating discrimination and violence against women at its

¹ Dissenting opinion by Judge Spano, *Talpis v Italy*, para. 1.

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roots. However, the analysis carried out throughout this dissertation shall be used within the human rights regime to further analyze structural inequality causing violence against women. As a matter of fact, the limitations which have been analyzed seem to be grounded on the fact that law is based on rationality, abstraction, objectivity. However as some feminist have argued, law should also include irrationality, contextualization and subjectivity (Olsen 482). In this context, the principles envisaged in instruments such as the CEDAW and the Istanbul Convention, shall be understood under a gender perspective that captures the relational aspects underlying violence against women as a form of discrimination and a violation of human rights. In particular, it is argued that by departing from the binary categorization of humanity in two categories it is possible to explore the systems of oppression underlying gender relations in general.

The Istanbul Convention represents a comprehensive framework aimed at protecting victims of violence, at preventing and combating violence against women and at punishing perpetrators. However, it shall go beyond the promotion of a protectionist approach by State towards women. If the human rights regime imposes on States the obligation of due diligence to prevent violations of human rights, this shall be enhanced by tackling the structural inequality upon which gender roles are constructed. The criminalization at national level of acts of violence against women may work as deterrent and prevent violations, however, this approach is not fully satisfactory. The potential of human rights law lies in its ability of having universal reach. Therefore, the Istanbul Convention, as a human rights instrument, should deeply investigate the roots of violence against women as lying in gender relations, not in culture or on sex, in order to alter the status quo. This may require an ideological shift at the way gender is understood. Indeed, instead of seeing the word gender as an alarming and abnormal word, it shall be understood as a social stratifier which along with other social stratifiers such as class, age, race define relationships of dominance and subordination.

This dissertation has argued that, first, violence against women shall not be treated as an issue that only regards women. Indeed, the challenge is to focus on the mechanisms

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that enable the perpetration of VAW. Second, violence against women as grounded on structural inequality requires an approach that allows the disclosure of the complexities behind it. Third, there is the necessity of adopting a gender perspective in human rights law in order to unveil the complexities of structural inequality.

To conclude, the major challenge for human rights treaties, such as the CEDAW and the Istanbul Convention, is to develop a well determined content of the due diligence principle so as to include gender perspectives. Indeed, only by adopting a gender perspective it is possible to effectively tackle gender based violence which is structurally embedded in the society and to promote human rights universally.

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