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Laima VAIGĖ

DOCTORAL THESIS

VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL LAW: FILLING THE GAPS AT INTERNATIONAL, REGIONAL AND NATIONAL LEVELS

SOCIAL SCIENCES,
LAW (01 S)
VILNIUS, 2016

MYKOLAS ROMERIS
UNIVERSITY

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Laima Vaigė

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ABBREVIATIONS

VAW – violence against women
GBV – gender based violence
DV – domestic violence
CEDAW – The UN Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee – the Committee under the CEDAW
CEVAWG – Draft Convention for the Elimination of Violence against Women and Girls
GR 19 – General Recommendation No. 19 of the CEDAW Committee
ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR – The European Court of Human Rights
CoE – Council of Europe
PO – protective order
EU – European Union
EPO – European protection order
TFEU – Treaty on the Functioning of the European Union
ECJ – European Court of Justice
EIGE – European Institute for Gender Equality
HCCH – Hague Conference on Private International Law
HR – human rights
UN GA – General Assembly of the United Nations

KEY NOTIONS USED IN THE THESIS *

Violence against women (VAW) – all types of violence against women and girls and violation of human rights, which is closely related to discrimination.

Gender based violence (GBV) – since 1990s, understood as violence directed against a women because she is a woman. Recently is often understood as including violence against all persons who do not comply with the stereotypical understanding of gender roles: lesbian, gay, bisexual, transgender, and intersex persons. In many settings still used as interchangeable term with VAW.

Gender- neutral – not referring to either sex or gender. Gender-neutral provisions can be praised for encompassing variety of people but criticized for lacking gender sensitivity and even being gender-blind.

Sexual violence – rape, sexual assault, sexual harassment and other types of sexual(ized) physical violence. Sexual violence may occur in different settings, e.g. marriage, dates, acquaintances rape. Under international law, there is a dilemma whether sexual VAW should focus on consent or coercion.

Intimate partner violence – violence between intimate partners, which mostly constitutes men's violence against women, but can also involve same-sex partners, women's violence against men and mutual / situational violence.

Domestic violence – violence in domestic environment, which encompasses intimate partner violence, and violence against children and elderly.

Femicides – murders of women, including female infanticides, which are closely related to gender inequality and discrimination.

Female genital mutilation (FGM) – harmful practice of removing all or part of female genitalia in order to control sexuality of women and subordinate them to men.

Harmful traditional practices – the frame developed at the UN level to tackle practices such as FGM or so called "honour crimes." Recently criticized for associating VAW with certain cultures and denying the structural global pattern of VAW.

Stalking – persistent unwanted attention to another person, which can also include cross-border element and cyber-stalking. In most cases it falls under the definition of psychological violence and involves threats and intimidation.

Protection order – both pre-trial and post-trial orders ensuring protection of survivors of violence and stalking, by ordering the perpetrator not to approach the victim, or to search contact with her/him, and to move out of the common residence. Protection orders can be administrative, civil and criminal, and can also apply in cross-border settings.

Restraining order usually refers to immediate protection, and can be issued for a short term.

Due diligence duty – duty of states to investigate cases of VAW, to prosecute those responsible, to protect the victims from VAW and prevent further VAW, once it becomes known to state agents. Breach of due diligence duty results in state responsibility.

Due diligence standard – standard of care with regards to state's positive due diligence duty. Due diligence standard in cases of VAW is high. Legislative measures and formal en-

forcement of law is not sufficient. The state agents must take adequate measures once they become aware of the risk, which is foreseeable and imminent.

Perpetrator of VAW – a private person who inflicts violence upon another person. May also be called "offender" or "defendant" in certain contexts.

Victim of VAW – a private person who is a survivor of VAW.

VAW frame – legal framework that is based on the notion of "violence against women" and connects the said violence to gender discrimination.

Private-public divide – in international law is usually understood as contrast of state responsibility for violations of human rights, seen in an androcentric manner, and women's rights violations, which are often seen as private and individual concern.

Sexing and gendering – approaches used in international law' analysis in order to pay attention to sex and gender of a person. "Sexing" legal framework refers to connecting it to body and culture, and "gendering" refers to social roles and mind. Suggested as simultaneous techniques in the end of 1990s, but recently some scholars suggest heavier focusing on gendering.

Feminist methodology of law – variety of theories which analyse the nature, scope and gaps of law through the lens of consideration of its effects on women.

Gender neutrality – approach increasingly advocated and sometimes used in recent legal documents, which offers to look at the issue of violence in a neutral way.

Asymmetric- the CEDAW is said to be asymmetric, because it is aimed particularly at women rights and not the rights of men and women symmetrically. Violence is also asymmetric because it disproportionally affects women.

Gender and sex – gender is understood as social roles of the person, which they and/or the society attribute to themselves. Gender most often relates to categories "men", "women", "transgender", "fluid" and "neutral". Sex is related to the body and most often refers to categories "male", "female", and "intersex."

Gender mainstreaming – the process of including issues of sex/ gender discrimination into the international human rights agenda. It has been strategically approved by the UN treaties monitoring bodies and also used in European law.

Identity politics – theory that focuses on interests of persons and their groups with which the persons most identify: gender, race, religion, social class, age, etc. Identity politics is criticized for being single dimensional and leaving the room for VAW that is seen as justified by culture. It is argued that multiculturalism can also be bad for women, i.e. cultural relativism allows tolerance of VAW.

Intersectionality – theory that claims identities of persons are interrelated and together create a network of oppressions and discrimination. Although all persons can be discriminated sometimes, persons whose identities include a few discriminated categories can face intersectional discrimination: e.g. precisely as black women, precisely as disabled women, etc.

Indicator – measuring tool for evaluation of state response to its positive duties and international law developments, including soft-law instruments. Indicators are recommendatory tools which may be used for self-evaluation as well as evaluation by treaty monitoring bodies.

Essencialization – treatment of women as a homogenous group that has essentially same features.

Restorative justice – alternative (to penal) justice model, where the needs to victims and offenders are put in the front and the focus falls on restoration of justice rather than retribution. Involves reconciliation and mediation between the victim and the offender.

Plural justice systems – systems that are based on religious, customary, indigenous, community laws and practices and coexist with laws and regulations.

*The notions are explained by method of a popular summary. For precise and contextual definitions, see the text of the thesis

INTRODUCTION

The relevance of the problematics. It is difficult to believe that in the 21st century, violence against women remains a global problem of epidemic proportions.[1] It is not a problem only relevant to some parts of the world but also widespread in Europe. According to the survey presented by the European Union's (EU) Fundamental Rights Agency (FRA) on the scope of violence against women in 28 EU member states, 62 million women are victims of violence against women (VAW).[2] Furthermore, the cost of violence against women is enormous: according to the calculations of the European Institute for Gender Equality (EIGE), it amounts to billions of euros annually.[3] It is clear that the problem is not only pertinent to separate states, and thus, it requires a global solution under international law.

Historically, international law focused on states' relations, and then included violations committed by the state against individuals, while VAW committed in domestic environments was treated as falling outside the field of the obligation of the state and into exclusively private matters between individuals.[4] It was gradually established that states have a positive obligation to act with *due diligence* to prevent violence against women, and to provide for the right to remedy once violations take place.[5] Due to various developments in the last decade, it can also be more convincingly argued than before that prohibition of VAW comes within the scope customary international law.

Nevertheless, at the global level, the debate continues as the guiding regulatory frameworks tackle VAW as a form of discrimination, or declare it as a part of their classical human rights agenda. The problem is addressed by the use of different methods at the regional and national level, where the techniques employed are not necessarily asymmetric, and often are highly technical and procedural. The discussion is ongoing on the conceptual (relating to conceptual strategies), procedural (relating to the certain way off doing something) and substantive (relating to the substance of the law) challenges of addressing women rights under international law. There is no consensus on the strategies to undertake at global, regional and national levels, and discussions range from calls for more normativity and feminism to complete change of strategies to gender neutral and de-regulation. In order to provide a solution of the research problem tackled, it is essential to analyse the law on different levels, while keeping international law at the central focus of attention.

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1 The World Health Organisation (WHO) describes violence against women as a "global health problem of epidemic proportions." See *Global and regional estimates of violence against women.* Clinical and policy guidelines (Geneva: WHO, 2013).

2 *Violence against women: an EU wide survey* (Vienna: European Union Agency for Fundamental Rights, 2014).

3 *Estimating the costs of gender-based violence in the European Union*, European Institute for Gender Equality (Luxembourg: Publications Office of the European Union, 2014). http://eige.europa. eu/sites/default/files/documents/MH0414745EN2.pdf.

4 Christine Chinkin, "A Critique of the Public/Private dimension," *European Journal of International Law* 10, 2 (1999): 387-395.

5 CEDAW Committee's General Recommendation No 19 on Violence against women, UN Doc. A/47/38, eleventh session, 1992, General Comments, para. 11.

The thesis focuses on VAW perpetrated by private individuals, in particular domestic violence and sexual violence in the community. It has been recognized at the international level that the most common form of VAW around the world is physical violence inflicted by an intimate partner (domestic violence).[6] Legal doctrine is undoubtedly influenced by the disciplines of psychology and sociology in this area. It is significant to distinguish between incidents of violence which may be situational, and the type of violence which has a pattern and the tendency to increase with time. The second type of systematic individual violence has been described as "coercive control"[7] or "intimate terrorism."[8] Violence which is not situational but has a pattern is more dangerous: empirical data shows that homicide is more likely in cases of coercive psychological control than previous physical violence,[9] and it is also directly related with subordination of the partner and thus is most likely to affect women. Although anybody can experience DV, including men and same sex partners, the global spread of DV against women and sometimes even legal justifications for this type of VAW reveals that it is a systemic problem on a macro level, and is not pertinent only to specific cultures. Sexual violence perpetrated in the community is very common both globally and in Europe, whereas gender-stereotyping contributes to general atmosphere that tolerates rape.[10] Only a minority of the EU member states have established adequate legal rules on rape in the legislation[11] which requires pondering the question whether national law translates the global and regional standards into adequate legal system, or the core message is actually "lost in translation."

The problems posed by DV and sexual VAW in the community are particularly relevant to Lithuania, which is a small state (2, 8 million persons) and a member of the EU. It adopted the Law on Protection Against Domestic Violence (further—the Law on DV) in 2011,[12] and during the first year of coming into the force of this Law, almost 50,000 calls on "conflicts in the family" have been reported to the police.[13] The high number of calls has not been triggered by the Law itself, because in 2010 the police also received a very similar amount of calls. The key difference is in that the police and other institutions now have the

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6 United Nations Department of Public Information, U.N. Secretary-General's Campaign, *Unite to End Violence, Factsheet*, DPI/2498 (Feb. 2008), available at http://www.un.org/en/women/endviolence/pdf/VAW.pdf.

7 Evan Stark, *Coercive control, How Men Entrap Women in Personal Life* (Oxford University press, 2009).

8 Michael P. Johnson, "Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women." *Journal of marriage and family*, 57, 2 (1995): 83 – 129.

9 Jacquelyn Campbell et al, "Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study", *American Journal of Public Health*, 93, 7 (2003): 1089–1097. Connie J.A. Beck, Chitra Raghavan. "Intimate partner abuse screening in custody mediation: the importance of assessing coercive control," *Family court review*, 48, 3 (2010): 555 – 565.

10 *Barometer of rape in the EU*, European Women's Lobby (June, 2013), 11. Available at http://www.womenlobby.org/2013-EWL-Barometer-on-Rape-Report?lang=en.

11 *Ibid.* Lithuania and few other countries were seen as the countries with non-corresponding legislation on rape, whereas only UK and the Netherlands were found to have legislation which established better standards than the minimum.

12 Law for the Protection against Domestic Violence, No. XI-1425, 26 May 2011.

13 Data on domestic violence for 2011, Police department under the Ministry of the Interior, http://www.bukstipri.lt/uploads/Policijos%20statistika%202011.pdf. Subsequently 18 268 of them were registered as domestic violence instances.

instruments that enable and require them to react. According to the data presented by the Police Department at the end of the first year of implementation of the Law on DV (eleven months of 2012), 7,856 pre-trial investigations were initiated by the police. 83 % of victims were women (9%—men, 8%—children), and in 95.6 % of instances suspects were men (4%—women).[14] The data of 2014 remains rather similar, where the majority of victims are women and the majority of perpetrators are men.[15] Thus it could be seen immediately from statistics that the aspect of gender seems to play a role in domestic violence cases. However, Lithuania, as many other countries, has chosen to apply the gender-neutral model of protection against violence.[16] There are no legislative measures or strategic responses to sexual violence against women in the community, despite repeated rapes and femicides that shake the society and are used for political speculations on the return of the death penalty. Despite high numbers of VAW, Lithuania has not yet ratified the CoE Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)[17] and signed it with a broad declaration[18] of arguable effect. Thus, it is worthwhile to analyse Lithuania as an example, considering that it demonstrates the tensions arising from the reception international law standards and internal concerns.

Main research problems. The doctoral thesis focuses on these key problems in the area of legal regulation on elimination of VAW:

1. While it is recognized by the CEDAW Committee and the ECtHR that states have positive obligations to protect women against VAW, at the same time it strikes an eye that this area is mainly regulated by soft-law instruments: General Recommendations of the CEDAW Committee, UN GA resolutions and etc. If so, how can these positive obligations be taken seriously by the states? The questions whether a new convention should be adopted, and if so, in which form, or should soft law instruments be updated,[19] are part of the procedural challenge, but they also interconnected with conceptual and substantive issues. The issue of disappearing gender analysis and/or equality analysis at the international and regional legal documents

14 Conference organized by the Police Department of the Republic of Lithuania. *Apsaugos nuo smurto artimoje aplinkoje įstatymas: tendencijos ir įgyvendinimo problemos.* Statistics presented by Tomas Babravičius. 17 December 2012.

15 Data on domestic violence for 2011, Police department under the Ministry of the Interior, years 2012-2014, accessed 03 June 2015. http://www.bukstipri.lt/lt/statistika.

16 This legislative approach is in principle allowed, although not recommended at the international level, see *Handbook for Legislation on Violence against Women*, UN Division for the Advancement of women, ST/ESA/329. (New York: United Nations publication, 2010).

17 Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, 11 May 2011. CETS No.210.

18 Declaration contained in a *Note Verbale* from the Ministry of Foreign affairs from Lithuania, dated 6 June 2013, handed over the Secretary General at the time of signature of the Instruments, on 7 June 2013.

19 Notably, to mark 25 years of work on VAW, the CEDAW Committee has presented a draft update of General Recommendation 19, see its Draft General Recommendation No. 19 (1992): accelerating elimination of gender-based violence against women, Addendum of 28 July 2016. CEDAW/C/GC/19/Add.1. This is not the final version of the document. The Committee is currently analysing the initial comments on the draft text, which will be subsequently reviewed. The author uses the version of July 2016.

signifies a conceptual problem of framing the prohibition of VAW. Can the documents really protect from gender-based violence, if they provide for a gender-neutral definition of such violence?[20] Can gender-specific frame co-exist with multiculturalism and concerns for intersectionality? The question is raised whether we have already reached the level of development, which allows the change and widening of the concept of gender-based violence. The question on public/private divide also re-emerges in different context, when private international law instruments address the issue of VAW. Problems arise due to globalization, which leads to cross border movement and uneven economic development, with a clear effect on women's lives and experiences of VAW. The thesis hence aims at evaluating whether the global convention, which was called for various stakeholders and legal scholars, is necessary at this moment of time.

2. Various regional documents have been adopted at the level of Council of Europe (CoE) and European Union, which directly address the issue of VAW and finally provide the necessary focus on protection of victims and prevention of femicides; however, these two major regional law creators are not coordinated and may even be claimed to move in slightly different directions. While the CoE new Convention specially targeted VAW and retained clear links with gender equality paradigm and with the CEDAW, the EU addressed the issue neutrally and introduced legal acts aimed at procedural protection of all victims of violence. While the Istanbul Convention lays the basis for a substantive reform, the EU Victim rights package focuses on procedural issues. The question arises whether the regional response is adequate regarding prevention of VAW. From the legal point of view, the prevention of repetition of VAW is the most significant legal issue, because failures may result in breach of due diligence duty of the state. The states have an interest to protect women against secondary victimisation and femicides, because it is directly related to state responsibility. Meanwhile, primary prevention that requires slow movement towards transformative equality, requires much more effort, does not immediately result in liability of state agents, and adequately, it gains less attention in some parts of the world, where the states do not "own" or understand the need for transformative equality. These concerns can even be seen as not worthy of consideration in a dissertation in the area of law, however, this is misleading. Transformative change is the ultimate goal of treaties at global and regional level.
3. There is a problem of implementation of international standards in this area, and global and regional gaps sometimes turn into dead-ends at the national level. The example of Lithuania serves well to reveal how international law is misunderstood and ignored, leading to the lack of protection for certain groups of women, no prevention measures capable of addressing structured nature of VAW, and failure to address substantial problems with relation to DV and sexual VAW. The situation results in possible violations of individual human rights in particular cases. Thus, the thesis attempts to crystalize the main recommendations for domestic legislation

20 European Institute for Gender Equality. *An analysis of the Victims' Rights Directive from a gender perspective*. (2015), p. 12, http://eige.europa.eu/sites/default/files/documents/mh0115698enn.pdf

in the field of protection against VAW and to come up with specific suggestions for improvement of the Lithuanian legislation regarding primary prevention.

Review of the research already undertaken in this area. At the international level, the issue of protection against gender-based violence and domestic violence has been most recently addressed in *Women's Human rights and the Elimination of Discrimination*, edited by Maarit Jänterä Jareborg and Hélène Tigroudja (2016).[21] Including the author's contribution, the book reveals the most current picture of women's human rights globally, and also focuses on conceptual and specific VAW issues. *Comparative Perspectives on Gender Violence: Lessons From Efforts Worldwide*[22] (2015) looks into national contexts, and *Women's human rights: CEDAW in international, regional and national law*,[23] edited by Anne Hellum and Henriette Sinding Aasen (2013), focuses on the impact of the Women's Convention on different levels. VAW under international law has been analysed by Alice Edwards in her book *Violence against Women under International Human rights law* (2011),[24] largely based on her Doctoral thesis from 2008. This Doctoral thesis is limited only to VAW perpetrated by private individuals: DV, sexual GBV and femicides, and addresses the legal gaps in protecting women against VAW, rather than global governance strategies. The problem of DV under international law has been analysed by Bonita Meyersfeld in *Domestic violence and international law* (2010),[25] who investigated whether there is a customary international law norm on DV and what is the extent of due diligence obligation of the states to prevent further VAW in intimate relationships. It must be noted that since the release of the book, there have been some major developments that may be seen as relevant to customary international law, and also the normative regional regulation.[26] Similarly, *Due Diligence and Its Application to Protect Women From Violence* (2008),[27] edited by Carin Benninger-Budel, comprises contributions from various scholars and former special Rapporteurs on VAW. Finally, the works of scholars of political science (Neil A. Englehart,[28]

21 Maarit Jänterä Jareborg, Hélène Tigroudja, *Women's Human rights and the Elimination of Discrimination* (The Hague: Brill/Hague Academy of International Law, 2016).

22 Rashmi Goel, Leigh Goodmark (eds), *Comparative perspectives on gender violence: lessons from efforts worldwide* (Oxford: Oxford University press, 2015).

23 Anne Hellum, Henriette Sinding Aasen (eds), *Women's human rights: CEDAW in international, regional and national law* (Cambridge: Cambridge University press, 2013).

24 Alice Edwards, *Violence Against Women under International Human Rights Law* (Cambridge: Cambridge University Press. 2011. 3rd printing in 2012).

25 Bonita Meyersfeld, *Domestic violence and international law* (Oxford: Hart publishing, 2010, reprinted in 2012.)

26 The case of Lenahan v USA, as discussed further, in 2011 established that states have a duty protect women against VAW, despite the fact that USA was not a party to a regional convention on the matter. Istanbul Convention and the EU legislative package were also adopted on the matter. Most significantly, different methodologies and different conclusions are being made in this thesis. Jessica Lenahan (Gonzales) v. United States of America. Inter-American Commission. Report No. 80/11. July 21, 2011.

27 Carin Benninger-Budel, ed., *Due Diligence and Its Application to Protect Women From Violence (*Nijhoff Law series, Brill. 2008).

28 Neil A. Englehart, "CEDAW and gender violence: an empirical assessment", *Michigan state law review,* 265 (2014): 265-280.

David. L. Richards, Jillienne Haglund)[29] must be mentioned, because they offer a useful empirical approach and analyse quantitative data on state compliance with international law. Their research can also be seen as important for establishing the state practice in the area.

VAW has also been addressed by a large volume of scholarly papers: e.g. paradigmatic changes to sexualised gender crimes under international law have been analysed by Catharine A. MacKinnon,[30] gender-neutrality debate in regulating VAW was addressed by Julie Goldscheid,[31] who also analysed the scope of due diligence obligation to protect against GBV under international law.[32] Different scholarly articles analysed various aspects of problems underlined above: e.g. protection orders, the due diligence obligation under the CEDAW, ECHR or other regional Conventions, prevention of VAW, protection against VAW and compensation for VAW. However, none of the books or articles analyse the most recent developments: Draft Convention on VAW suggested at the global level, the CEDAW GR 19 update, the EU Victims package and etc. Some problems analysed in this thesis have been noticed and discussed in conferences and working groups, but have not been thoroughly researched. The author also takes a very different stance from the previous authors, who have offered adoption of a global Convention, by finding that filling the gap with the global Draft Convention is not plausible at the moment.

The Lithuanian research in this area has been scarce. Some problems have been analysed by scholars in the field of psychology (Alfredas Laurinavičius, Rita Žukauskienė)[33] and other researchers of social sciences and the humanities (Giedrė Purvaneckienė,[34] Laima Ruibytė and Vilius Velička,[35] Marytė Gustainienė,[36] and others). From the point of national criminal law and criminology, the issue of domestic violence has been analysed by Brigita Palavinskienė and Saulė Vidrinskaitė,[37] Jolita Šukytė, Renata Marcinauskaitė[38] and more

29 David. L. Richards, Jillienne Haglund, *Violence against women and the Law* (London: Paradigm / Routledge, 2015).

30 Catharine A. MacKinnon, "Creating international law: gender as leading edge," 36 *Harvard Journal of Law and Gender* 105 (2013): 105-121.

31 Julie Goldscheid, "Gender Neutrality and the "Violence Against Women " Frame," *University of Miami Race and Social Justice Law review,* 307 (2015).

32 Julie Goldscheid, Debra Liebowitz, "Due diligence and Gender Violence: Parsing its Power and its Perils", *Cornell International Law Journal*, 48, 2 (2015): 301-345.

33 Alfredas Laurinavičius; Rita Žukauskienė, "Pakartotinio smurto prieš sutuoktinę/partnerę rizikos įvertinimo galimybės taikant b-safer metodiką." *Socialinis darbas : mokslo darbai*, 8, 1 (2009): 103-111.

34 Giedrė Purvaneckienė, *Smurtas prieš moteris. Lietuvos moterų pažanga:iššūkiai ir realybė 1990 –2005*, (Vilnius: UAB Mokslo aidai, 2005).

35 Laima Ruibytė, Vilius Velička, "Dirbančių ir būsimų policijos pareigūnų nuostatos į smurtą artimoje aplinkoje," *Public security and Public Order*, 7 (2012): 166-180.

36 Marytė Gustainienė, "Smurto prieš moteris priežastys ir prevencija," *Sociologija. Mintis ir veiksmas,* 1 (2005): 110-121.

37 Birutė Palavinskienė, Saulė Vidrinskaitė, "Smurtas prieš moteris," *Feminizmas, visuomenė, kultūra*. 4 (2002): 67-77.

38 Jolita Šukytė, Renata Marcinauskaitė, "Kai kurie psichinės prievartos doktrinos probleminiai aspektai," *Socialinių mokslų studijos*, 4, 2 (2012): 685–695.

recently and significantly– Ilona Michailovič[39] and Salomėja Zaksaitė.[40] Karolis Jovaišas[41] attempted to analyse the causes of violence. Prior to adoption of the Law on Protection against Domestic Violence in 2011, Darius Urbonas wrote a paper on the right of the police officers to detain a person in domestic violence situations in Lithuania.[42] The Ministry of the Interior administers a website with relevant legal information,[43] and a group of specialists presented a number of methodological recommendations for police officers.[44] Nevertheless, the research from the point of view of adherence to the standards of international law is lacking. It is necessary, considering that the discussion on the efficiency of the national efforts, and the state's obligations under the international law is on-going in conferences and ministerial debates.

The novelty of the Doctoral thesis. The analysis undertaken in the book of "Violence against women and the Law" is only limited to the laws in force during the period of 2007-2010 and focuses on policy-making rather than law; the authors are scholars in political science. Many important things have happened afterwards, for instance, the draft UN Convention for the Elimination of Violence against Women and Girls (CEVAWG) was opened for discussions in the summer of 2015[45] and the draft update for General Recommendation on VAW was only suggested in summer of 2016.[46] Significant changes also happened at the European level: the adoption and coming into force of the Istanbul Convention in 2014, the coming into force of the EU legislative package ensuring the rights of victims (in 2015), with particular references to violence against women, domestic violence and gender based violence.

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39 Ilona Michailovič, "Kai kurie smurto šeimoje problematikos aspektai," *Teisė*, 82 (2012): 26-40. Ilona Michailovič. "Kai kurie smurto artimoje aplinkoje aspektai socialinės kultūrinės lyties požiūriu," *Kriminologijos studijos*, 2 (2014): 155-172.

40 Salomėja Zaksaitė, "Apsauga nuo smurto artimoje aplinkoje" In *Aktualiausios žmogaus teisių užtikrinimo Lietuvoje 2008–2013 m. problemos: teisinis tyrimas*. Lina Beliūnienė, Kristina Ambrazevičiūtė, Mindaugas Lankauskas et al. (Vilnius: Lietuvos teisės institutas, 2014), pp. 55-69.

41 Karolis Jovaišas, *Smurto šeimoje prevencija: iliuzijų anatomija*, (Vilnius: Eugrimas, 2009). This book, however, has been criticized as justifying domestic violence as an "eternal" phenomenon that is caused by inclination of human beings to aggressiveness, and for the suggestion that women are often provoking or inventing violence. Marija Aušrinė Pavilionienė, Presentation at a conference "Lyčių lygybė: dabartis ir perspektyvos." Lygios galimybės, kurios pakeitė pasaulį. *Social Sciences Studies*, 1, 5 (2010): 365–370.

42 Darius Urbonas, "Policijos pareigūnų teisė sulaikyti ir pristatyti asmenį į policijos įstaigą smurto privačioje erdvėje kontekste," *Public security and public order*, 5 (2011): 220–240.

43 Ministry of the Interior of the Republic of Lithuania. Information site on violence against women, accessed on 16 July 2015, www.bukstipri.lt

44 Rokas Uscila; Neringa Grigutytė; Evaldas Karmaza, *Metodinės rekomendacijos policijos pareigūnams, sprendžiantiems konfliktų šeimoje atvejus.* (Vilnius: Policijos Departamentas prie Vidaus reikalų ministerijos, 2008).

45 Addendum to the Human Right Council Thematic report of the Special Rapporteur on Violence, its Causes and Consequences (A/HRC/29/27)pp. 8-22, draft of Convention for the Elimination of Violence against Women and Girls (CEVAWG).

46 CEDAW Committee, Draft General Recommendation No. 19, *supra* note 19. In case of any future changes, the author states that the version available in August 2016 has been used.

The attention to women rights of scholarship in international law has been gradually growing.[47] However, the focus of the literature for the most part is wider, i.e. on the feminist strategies in international law, and mostly at the level of the UN.[48] The thesis and the book of Alice Edwards is the closest to the topic of this Doctoral thesis, however, it also has a very different perspective. Her thesis focused on a critical assessment of feminist strategies on VAW under international law at a global level. Meanwhile, this dissertation considers that it was possible in 2000-2008 to focus solely on the developments and strategies used at the UN level, because regional (European) development was not so prominent. Now it seems inevitable to analyse the novel documents adopted, and the mixed strategies used at the regional level (CoE and EU). Moreover, the thesis of Alice Edwards included VAW during conflicts, and gave most of the examples from this area, whereas this Doctoral thesis focuses solely on VAW perpetrated by private individuals at the time of peace. Thus, the scope of the covered VAW is very different. Finally, the perspective is quite different. At the background of this thesis is the preliminary question "How can we fill in the remaining gaps of preventing and protecting against VAW from the perspective of international law?" rather than "Are the current feminist strategies on VAW under international law still valid or a better strategy should be proposed?" Thus the thesis of the author is more oriented at the gaps in legal instruments and case practice rather than the gaps in policy-making strategies and global governance. In that sense, this thesis is more dogmatic and practical and the feminist theories on governance is merely the context rather than the object of the thesis.

The thesis also goes beyond the purpose of the book by Bonita Meyersfeld on DV under international law (2010), which aimed to establish whether a rule of international law exists that obliges states to prevent systemic intimate partner violence against women. At this moment, considering the developments at regional and global level, this has arguably been convincingly established. The normative gap, which Alice Edwards and Bonita Meyersfeld suggest filling with a normative treaty, still exists – but its significance needs to be re-examined. It must also be evaluated whether indeed all violent acts on the basis of gender (crimes of sexist character) must be tackled under one regulatory framework, which has been suggested by some legal scholars.

The thesis analyses the most recent legal developments up to the summer of 2016. However, considering that some national developments were adopted in autumn of 2016 and are coming into force in 2017, and the CEDAW developments are still pending, the thesis focused on the said novelties inasmuch as it was physically possible, considering the late stage of development of the thesis, which was already reviewed by anonymous reviewers at the time. The development in this area, as well as different areas of human rights law, is evolving.

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47 In particular, see Hilary Charlesworth, Christine Chinkin, *The boundaries of international law: a feminist analysis,* (Manchester: Melland Schill studies in international law. Juris Publishing. Manchester University press. 2000). Also see Sari Kouvo, Zoe Pearson, *Feminist perspectives on contemporary international law* (Oxford: Hart publishing, 2011).

48 See the PhD dissertation on gender mainstreaming in international law by Sari Kouvo, *Making just Rights? Mainstreaming Women's Human Rights and a Gender Perspective* (Uppsala: Iustus Forlag., 2004). The book of Alice Edwards focuses on the analysis of key feminist strategies in international law in the context of VAW, *supra* note 24.

Structure of the thesis and its added benefits. The first part of the thesis focuses on the objective of analysing the legal regulation of VAW and the recent shifts towards more normativity and gender neutrality under international law. The second part of the thesis aims at analysing the legal regulation on protection and prevention of VAW at the level of the CoE and EU law. The last part analyses the domestic compliance with international law, and the thesis is finished with conclusions and recommendations. The structure of the thesis has not been instigated by sources of law (i.e. global, regional and domestic) but rather, by the very different sets of problems that exist at these levels.

The first part of the thesis is useful and novel because it focuses immediately on the problems – the normative, conceptual and substantive gaps under the global international law on VAW and the most recent global developments. The potentiality of the draft CE-VAWG is assessed in the light of these problems and the key challenges to the vision of women rights under international law. The second part's added benefit is shown both by the novelty of the documents that it analyses (the Istanbul Convention came into force in 2014, and the relevant EU documents – in 2015) and by the victim-centred approach. Instead of the focus in previous literature on the focus on punishment and prosecution of the perpetrator, prevention of VAW and protection of the victim are chosen as the focus points of this Doctoral thesis. Finally, the third part of the work uses the victim-centred approach to assess the domestic law's compliance in the area of prevention and protection against VAW with the international law. Such analysis has not been undertaken before, and considering the scale of VAW and the priority of the problem in Lithuania, it is long overdue.

The object of the thesis and its delimitation. The object of the thesis is protection and prevention of violence against women under international law. It must be noted that it would not be possible to analyse the issue of violence against women under all international law documents, and ponder into all aspects of it. Therefore it is important to delimitate the object of the thesis in the introduction and explain the relevant concepts employed in this thesis, adequately providing the limits for analysis.

First, the thesis will not focus on typology of violence against women, in the attempt to avoid being descriptive and also on perpetuating extensive research already done both on national and international levels. For instance, David L Richards and Jillienne Haglund devote a chapter on "Forms of Violence against Women,"[49] the types of violence against women are described by Rokas Uscila[50] and others. Some examples of specific types of violence are of course, inevitable. The thesis mainly focuses on violence perpetrated by private persons, and in particular DV, i.e. mostly intimate partner physical violence, and sexual VAW in the community, excluding harassment.

Second, the thesis may seem as tailored to include only certain issues of VAW and not the others: e.g. the key focus falls on protection and prevention of the victim but not prosecution and punishment of the offender. In the recent UN developments, a so-called "5 P" system is being distinguished: it encompasses prevention, protection, prosecution, pu-

49 David. L. Richards, Jillienne Haglund, *supra* note 29, pp. 1-21.

50 Rokas Uscila, *Viktimologijos pagrindai* (Vilnius: Mokslo aidai, 2005).

nishment, and providing redress. [51] In the recent European developments, even "6 Ps" are mentioned: prevention, protection, prosecution, policy, provision and partnership may be distinguished.[52] Of course, all "Ps" need to be balanced in order to tackle VAW. Furthermore, the "Ps" are partly overlapping – policy often interconnects and overlaps with prevention, and obligations in the areas of protection, prevention and punishment may also overlap. The recent debate on due diligence obligation involves convincing critical analysis on over-emphasis on criminal justice responses[53] (prosecution and punishment) both in state responses and scholarship. Therefore, it seems necessary to delimitate the scope of the thesis by targeting the most relevant and problematic aspects: to the author, these were the aspects of prevention and protection against VAW.[54] As the title says, the Doctoral thesis is aimed at filling in the gaps, which necessitates choosing a part of the big picture.

Relevant definitions. Attention should be paid to the fact that main concepts (violence against women, gender based violence) are not harmonized and may mean slightly different things at different levels. At the CoE level, the problem is regulated by the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), which provides that "violence against women" is understood 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, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life[.]"[55] Meanwhile, "gender - based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately[.]"[56]For the purposes of Istanbul Convention, "domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim[.]"[57] Thus, domestic violence may also encompass violence against men.

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51 Yakin Ertürk, Special Rapporteur on VAW, *The Due diligence standard as a tool for elimination of Violence against women,* E/CN.4/2006/61 (2006).

52 Report No. A7-0075/2014 with recommendations to the Commission on combating Violence Against Women (2013/2004(INL)) Committee on Women`s Rights and Gender Equality Rapporteur: Antonyia Parvanova, p. 18.

53 Julie Goldscheid, Debra Liebowitz, "Due diligence and Gender Violence: Parsing its Power and its Perils", *Cornell International Law Journal*, 48, 2 (2015): 301-345. See in general: Leigh Goodmark, *A troubled marriage: domestic violence and the legal system* (New York: New York University Press, 2011).

54 Similarly, the CEDAW Committee in its draft update of GR 19 also distinguished prevention, protection and redress, and then data monitoring and international cooperation, as the key areas for specific recommendations. *Supra* note 19. It seems that in the light of contemporary problems of VAW, prevention and protection are in fact the key concerns.

55 Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, CETS No.210, *supra* note 17, Art. 3 a.

56 *Ibid*, Art. 3 d.

57 *Ibid*, Art. 3 b.

Under the global UN Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW), however, VAW is seen as a form of discrimination, and domestic violence – one type of such discrimination.[58] Hence, violence against women and gender based violence are used interchangeably, and domestic violence is one form of VAW (GBV).[59] The CEDAW Committee, which is entrusted with the task of treaty implementation, recognizes that "Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."[60]The Committee also considers that "Family violence is one of the most insidious forms of violence against women."[61] Regarding the EU, there is no definition of VAW or domestic violence so far;[62] the definition of gender-based violence was recently provided only in a preamble of a Directive on victims' rights,[63] which focuses on procedural guarantees for all victims of all crimes. A gender neutral definition of GBV was entrenched.

Hence, the definitions are varied. The title shows that the Doctoral thesis focuses on "violence against women", even though the VAW frame the broader term of "gender based violence" or "gendered violence" has been suggested by some scholars (see part 1.3 and 1.4 of Part I). There are two reasons for that. The official legal frameworks mentioned above still use the VAW frame. In addition, the author considers, as discussed further (see part 1.3 of Part I) that although violence against a person on the basis of sexual orientation and gender identity is partially covered by these frameworks, the shape and depth of the normative gap in the case of such violence (e.g. violence against a gay man) is different. A separate Doctoral thesis could be written on this topic, and it would involve other legal sources, which are even "softer" than the sources that cover VAW.[64] At the same time, it must be recalled that women have have distinct identities and some women are affected by multiple forms of discrimination,[65] thus seeing them as one group with essentially same concerns (essencialization) should be avoided.

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58 Gradually, the understanding is widened and more groups of victims are included under prohibition of violence. At the same time, the question arises whether the focus is lost due to mixing up of different legal frameworks and widening of concepts at the European level.

59 The same approach is also taken in the draft UN Convention for the Elimination of Violence against Women and Girls (CEVAWG), which defines VAW as GBV, *supra* note 45.

60 CEDAW Committee, General Recommendation No 19 on Violence against women, *supra* note 5, para 1.

61 *Ibid,* para 23. Moreover, UN GA Resolution 58/147 recognized that "domestic violence against women is, inter alia, a societal problem and a manifestation of unequal power relations between women and men."

62 However, the European Commission was set to adopt the Strategy on VAW by the Action Plan to implement the Stockholm Programme, as well as under the European Commission's Strategy for Equality between Women and Men 2010-2015.

63 Preamble of the EU Directive of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, indent 17. "Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence."

64 The discussions in this area started more recently than in the area of VAW, see UN GA Report of the Office of the United Nations High Commissioner for Human Rights.Discrimination and violence against individuals based on their sexual orientation and gender identity. A/HRC/29/23. 4 May 2015.

65 In particular critical race theory or "black feminist criticism", as called by Gary Minda (also K. Crenshow used the term "black feminist critique"), has been instrumental in this debate. See generally, Gary Minda, *Postmodern legal movements* (NY: New York University, 1995), 147-148.

The purpose and the objectives of the thesis. The **purpose** of this thesis is to critically assess the gaps of legal regulation on protection and prevention of VAW, focusing on procedural, conceptual and substantive challenges that arise at international, regional and national levels.

For that purpose, the thesis sets the following **objectives:**

1. To analyse the issue of normative gap and conceptual, as well as substantial problems of the legal regulation on VAW at the level of international law, and critically assess the suggested draft UN Convention on Violence against women. Would the Draft Convention bring an added value to international law at the global level?
2. To analyse the regional legal regulation on VAW, focusing on the aspects of protection and prevention in order to evaluate the extent of states' due diligence obligations in these areas and critically assess the remaining gaps. How could the complex regional system of European law provide comprehensive protection against VAW?
3. To analyse domestic compliance with international law, by focusing on the key problems in protection and prevention of VAW and evaluating the compliance of Lithuanian legal regulation on VAW against the international standards. What key changes are necessary in Lithuanian legislation to protect against VAW?

The statements of the dissertation to be **defended** are:

1. The alleged normative gap of international law in the area of VAW, which is attributed to the fact that the current regulatory framework is mainly created by soft-law instruments and international case law, does not in itself necessitate the adoption of a new UN Convention, unless it would bring additional benefits in addressing the conceptual and substantial challenges in the area.
2. Regional organisations (the EU and the CoE) have crucial roles in prevention of and protection from VAW in Europe and these forces should be consolidated through the greater effort of the EU.
3. In accordance with its obligations under the international law, the Lithuanian legal regulation on protection against VAW features procedural, conceptual and substantive gaps, which should be the main focus of the further improvement.

The methodology. Dogmatic legal methodology has been widely used in the Lithuanian legal doctrine and doctoral dissertations. Hierarchy of the legal sources is carefully observed and the formalistic logic is largely applied.[66] Doctoral dissertations imply the argumentative logic, i.e. the statements to be defended are asserted, and then primary focus falls on the qualitative analysis, sometimes with empirical elements. The analysis focuses on systematic order of legal instruments and jurisprudence, in order to defend the asserted statements. In this dissertation, the author analyses legally binding treaties and the contents of customary international law, the jurisprudence of courts and treaty monitoring bodies, and scholarly articles. Furthermore, international law research in this area also necessarily

66 Audrius Gintalas, "Metodologijos ir metodo samprata", *Socialinių mokslų studijos* 3, (2011): 992. The author explains that the dogmatic method is recently being supplemented by more complex method in order not to limit the cognition with formalistic logical measures.

involves the analysis of soft law instruments and contextualization, which is in deviation from classic methodology in law.

The theoretic discourse is connected with practical discourse. The so called "hard cases"[67] arise in practice, and the analysis of these cases provide a possibility to fill in the gaps of law. The author employs systemic analysis of cases in order to reveal positive obligations of the state regarding VAW, in particular where it is inflicted by private perpetrators and the scope of state liability is not entirely clear. International law is seen as setting the standards which have the effect on the national law. It seemed necessary to analyse the national level in order to have the full and real picture. Even though the opposite is also true, i.e. national legal systems affect international law, these opposite effects are not analysed. The thesis also evaluates the compliance of national legislation with the standards under international and regional law. However, the thesis does not compare the Lithuanian system with the other national systems in the area, save for some exceptions. Comparative analysis would have been repetitive, considering that such studies have been undertaken by groups of scientists at the EU level,[68] and would have made the thesis much too broad. Instead, a more thorough view at one national system was chosen for a deeper analysis and reflection on some hard cases.

Furthermore, the traditional method in this dissertation is enriched by the feminist methodology, which brings along the use of policy documents, empirical data, and narratives.[69] The author uses the feminist research methodology[70] in the sense that the questions on the experiences of women and the effect of the law on the women are always at the forefront of the thesis. Asking these questions are inevitable when writing this type of thesis, considering that to a large extent, feminist scholarship had the major effect on the international law[71] in this area. There are many types of feminisms, as well as legal feminisms, but researchers tend to agree that various problems arise from a subordinate approach to women. Thus, a legal scholar in this area should think what problems the law does not yet solve, and what practical challenges work for the detriment to women. Feminist legal research is well-known for its use of narratives and statistics, and the author throughout the thesis also uses narratives, and empirical data.

It must also be explained at the beginning that the thesis analyses the problems of VAW regulation through the use of categorization of challenges into procedural /normative, conceptual, and substantive challenges. This categorization has been employed by some

67 Ronald Dworkin, "Hard cases", *Harvard Law Review* 88, 6 (1975): 1057-1109.

68 For instance, see Chapter "Comparative analysis of national law" in the most recent study of Kevät Nousiaainen and Christine Chinkin, *Legal implications of the EU accession to the Istanbul Convention. European network of legal experts in gender equality and non-discrimination* (Luxembourg: Publications office of the EU, 2016.)

69 A simple definition of narratives is that they are reportable data / stories / cases / situations. The use of personal narratives has been used widely in feminist writings but this thesis does not employ personal narratives. In this text, narratives appear through analysis of cases, and other times, sources of narratives are media reports and hypotheticals.

70 See Maggie Sumner, "Feminist research" In *SAGE dictionary of social research methods*, Victor Jupp (ed) (SAGE publications online, 2011 SAGE Publications Ltd, doi: 10.4135/9780857020116): 117-119.

71 See Dianne Otto, Feminist Approaches to International Law, *Oxford bibliographies,* 2012, http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0055.xml.

scholars who analysed feminist challenges in contemporary international law. Besides occasional naming of a certain challenge as "conceptual" or "substantive", the model that coherently distinguished between procedural, conceptual and substantive challenges of women rights in international law was suggested by Aaron Xavier Fellmeth in 2000.[72] The author of this thesis uses his model but also classifies challenges slightly differently and retains a different focus. The different approach was needed, considering that: 1. A. Fellmeth's article reflects a broad approach to feminist challenges under international law, and this thesis focuses only on VAW; 2. Many changes occurred during the 16 years[73] since publishing of A. Fellmeth's paper, and 3. It would be artificial to have a very rigid categorization, considering that the critique challenges categorical divisions (e.g. public/private) because their effect has been detrimental of women. The consistency of this categorization is kept as much as possible; however, it must be clear in advance that the "procedural" in the sense of international /global[74] law is understood very differently from the meaning of "procedural" in national law. Hence, it seemed logical to analyse these different sets of problems in separate parts of the work. The same solution was mainly employed by other scholars[75] who had written on this topic.

Practical significance of the thesis. The thesis may be considered as a contribution to the ongoing global and European debate on what the prospective international instruments should entail and which way the international law on VAW should develop. Feminist legal scholarship in the area of international law has been largely created by Western thinkers and the perspective of someone from the post-soviet environment may present a valuable addition and a different angle. International law has been seen as largely created by the "centre" and imposed on the "periphery"[76] but the classical dichotomies, such as centre/

72 Aaron Xavier Fellmeth, "Feminism and International law: theory, methodology, and substantive reform", *Human Rights Quarterly* 22, (2000): 58-733.

73 More recently, see Ilona Cairns, "The costs of (partial) inclusion: the evolution, limits and biases of the principal feminist challenges to international law." In *Women's Human rights and the Elimination of Discrimination*, *supra* note 21, 153-181. This author also flexibly uses A. Fellmeth's typology of procedural, conceptual and substantive challenges. The paper reflects broad challenges to women rights under international law.

74 The thesis refrains from the use of "universal" in the title, because one of the main critiques under international law is that it was not universal, but had been applied in a gendered way. Furthermore, the CEDAW is not universal but rather is an asymmetric (gendered) document. Finally, it is also argued that from sociological perspective, women's experiences are also not universal but contextual. Hence, the author used the distinction between "international, regional and national" law, even though regional law is also international. The same solution was also reached by other scholars, see Anne Hellum, Henriette Sinding Aasen, eds, *Women's human rights: CEDAW in international, regional and national law* (Cambridge: Cambridge University press, 2013).

75 *Ibid.* Also see Bonita Meyersfeld, *supra* note 25, who argues that "it is important that we do not compare international law to domestic law", p. 255. International law is special and thus the challenges that arise at the level of international law are also different from those that arise at domestic level.

76 Anthony Anghie, "Finding the peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", *Harvard International Law Journal*, Vol.40 (1999): 1-80. From the perspective of post-colonial critique, the centre used international law for justifying the unjustifiable: colonialism, oppression, and inequality in international treaty law.

periphery, as well as private/public, need to be challenged. The author's analysis, as someone coming from the state, which rather recently (1991) broke free from occupation and which then joined the EU (in 2004), can be important for building bridges of understanding between the Western European and Eastern European legal scholars. Lithuania can be a good example of a country at crossroads of influence: the EU, Russia, and the Holy See being some of the most important geo-political centres of impact. Thus, the analysis of the Lithuanian legal system, from the perspective of international law, can also be interesting for the international stakeholders.

Furthermore, the thesis is significant for the Lithuanian legal system, which needs to be in compliance with the international standards. The work addresses the most current and most significant legal developments and legal issues arising in the field of violence against women. Thus it could serve as a guidebook for the state officials, who are entrusted with the task of solving the problems addressed in this thesis, while drafting legislative amendments on elimination of VAW or implementing programs and strategies. In addition, it may be useful for students of public international law, private international law, and human rights law, as well as women rights NGOs and advocates.

1. THE INTERNATIONAL REGULATION ON ELIMINATION OF VAW: TOWARDS THE CLOSING OF GLOBAL GAPS?

In the area of violence against women (VAW), developments regarding state responsibility under international law are relatively new. They are based on state obligations to respect, protect and fulfil human rights[77] and are largely contained soft-law instruments, or *de lege interpretata* of the treaties by relevant treaty monitoring bodies. The monitoring bodies under relevant international conventions have explained that states must act with *due diligence* in situations of VAW: i.e. once the state agents are aware of the risk of violence, they must prevent further violence, investigate the instances of VAW, prosecute and punish the perpetrators, and provide compensation to victims.[78]

The aim of this part of the dissertation is twofold, i.e. to analyse the global regulation from the perspective of key challenges of addressing VAW under international law, and to address some essential challenges that arise, placing the legal issues in theoretical contextualization. Considering that there are no global treaty norms which would directly prohibit VAW, a significant portion of the text is devoted to analysis of jurisprudence of international treaty monitoring bodies. The proposal of a Draft Convention is also assessed as part of a possible strategy to address the issue of VAW under international law. Challenges of procedural (relating to the certain way of doing something), conceptual (relating to key concepts and strategies) and substantive (relating to the substance of the law) nature are analysed.

1.1. The main challenges of addressing VAW under international law

Various feminist scholars who criticized the response of international law to VAW and other women rights issues have often focused on the common points of departure. They criticized the lack of representation of women among the creators and interpreters of international law, they enlightened how human rights bodies still use an androcentric approach to human rights (seeing human rights as men's rights), third, they claimed the issue of VAW is largely seen as a private matter and this public/private dichotomy leads to marginalization of "private" violence.[79] Finally, some of them[80] criticized the current strategies on VAW under international law, which they say leads to essencialization of VAW, i.e. treat-

77 The role of the state under international human rights law has been changing. In the early stage of development, human rights were considered more of a political notion and the states were only considered responsible for the actions that they can or should control. However, gradually international and regional documents, or interpretation of the living human rights instruments led to present theory: the states have positive duties not only to respect human rights (refrain from violations), but also protect (against the third parties) and fulfil (strive for substantive equality) human rights.

78 CEDAW Committee, General Recommendation No 19 on Violence against women, *supra* note 5.

79 Alice Edwards, *Violence Against Women under International Human Rights Law*, *supra* note 24, pp. 43-86.

80 The said argument of essencialization comes with postmodern legal feminism, see in general Judith G. Greenberg, "Introduction to Postmodern legal feminism" in *Postmodern legal feminism*, Mary Joe Frug, i-xxxv, (London: Routledge, 1992.) Alice Edwards, Julie Goldscheid, Pamella Scully and others adopted this criticism to different degrees, in particular in the context of VAW, as further discussed.

ing women as similar to each other and different from men, and basically seeing them as potential victims.[81]

1.1.1. Challenges of procedural nature

The criticism on the lack of representation is a challenge of procedural nature. The absence of women among the decision makers was especially prominent a few decades ago, when Hilary Charlesworth, Christine Chinkin and Shelley Wright explained that "[b]ecause men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence, for example, these matters can be consigned to a separate sphere and tend to be ignored."[82] This procedural challenge also leads to conceptual and substantive challenges. Due to the lack of in depth understanding of the dynamics of violence in women's lives, private-perpetrator VAW is tucked away and treated as private matters; furthermore, international law retains an androcentric focus and tends to avoid substantive changes.

The numbers of women among decision makers at the UN level has been rising slowly since, e.g. in 1991, there were 4, and in 2015, there were 11 women serving as heads of state (and 10 serving as heads of government) across the UN member states.[83] Nevertheless, in bodies mandated to interpret international treaties, the progress was also "gendered", i.e. women participation increased in those bodies which deal with "soft issues."[84] The empiric analysis of David Richards and Jillienne Haglund showed that involvement of women has an impact in creation of domestic laws on VAW: "[c]ountries with greater percentages of women in their national legislatures have stronger marital rape, domestic violence, and sexual harassment laws."[85] Thus it is true that even numeric representation has an influence, although the critical focus has gradually shifted from demands for numerical[86] to substan-

81 Pamela Scully, "Vulnerable women: a critical reflection on human rights discourse and sexual violence", *Emory international law review* 23, (2009): 113-123.

82 Hilary Charlesworth, Christine Chinkin and Shelley Wright, "Feminist approaches to international law," *85 American Journal of International Law*, 613 (1991): 622. Also see Hilary Charlesworth and Christine Chinkin, *The Boundaries of International law* (Juris Publishing. Manchester University press, 2000): 70- 88. Also see Alice Edwards, *supra* note 24, p 96-100.

83 UN Women, accessed 5 May, 2016. http://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures

84 Christine Chinkin, Shelley Wright, Hillary Charlesworth, "Feminist approaches to international law: reflections from another century," In *International law: modern feminist approaches*, Doris Buss, Ambreena Manji, (eds) (Oxford: Hart Publishing, 2005): 21. The authors note that "hard" areas of law such as trade law did not face a similar increase. It can be added that the International Court of Justice (3 out of 15) and the European Court of Justice (7 out of 39) in summer of 2016 had up to 20 percent of women participation.

85 David. L. Richards, Jillienne Haglund, *supra* note 29, p. 124.

86 Considering that numerical representation on average does have an influence, initiatives to increase it still continue, This is especially true for attempts to increase participation in police forces, as shown by the EU victims directive, which requires for women victim to be interviewed by female police officer, and Special General Assembly of the Kigali International Conference Declaration, which declares a commitment "to recruit and promote more women officers" (2010).

tive representation.[87] It can be clearly seen from the analysis of some central decisions at the European Court of the Human Rights (the ECtHR) that male Judges sometimes offered feminism-inspired opinions,[88] and opinions of female Judges[89] sometimes distanced themselves from it and offered a gender-neutral and rationalized approach. Thus, the gender of decision makers does not automatically lead to elimination of all difficulties in ensuring inclusive and transformative justice, although all male panels are notorious to face these difficulties. Substantive understanding of the dynamics of VAW is more significant than gender, and this understanding / competence can come from experience, but it can also be learned.

The question whether a new Convention should be adopted to fill in the normative gap[90] (i.e. the lack of treaty norms), or perhaps it should take a form of a protocol to the CEDAW Convention,[91] or the existing soft law instruments should be improved[92] can also be seen as a procedural question.[93] At the same time, it is also more than that, because the solution relates to the discussion on conceptual challenges (private/public dichotomy, criticism of the human rights' approach, increasing gender neutrality) and substantive (debate on what the contents of the international law should entail, in particular considering the challenges faced by globalization, single identity politics, and social economic contexts/ causes of VAW) challenges of international law.[94] The said discussion on the normative gap is absolutely central, to the author of the thesis and in contemporary scene, thus this is where the focus falls.

1.1.2. Challenges of conceptual nature

The gap of normativity is accompanied by vivid conceptual discussion on the best strategy for further development. The conceptual criticism of international law has been traditionally connected with private / public dichotomy, critical approach to human rights, and to the calls for abandoning the frame on VAW. In the absence of explicit treaty provisions, two main conceptual strategies have been used to tackle VAW under international law since 1990ies: treatment of VAW as sexual discrimination (VAW = SD) under the CEDAW, and mainstreaming it under different global instruments on "traditional" human rights,

87 Ilona Cairns, *supra* note 21, p. 166-167.

88 Concurring opinion of judge Pinto de Albuquerque in European Court of Human Rights case Valiulienė v Lithuania, 26 March 2013, application no. 33234/07.

89 As discussed further, see the dissenting opinion in Valiulienė v Lithuania, app. no. 33234/07, 26 March 2013, and also dissenting opinion in Y. v. Slovenia, application no. 41107/10, 28 May 2015.

90 Such a new Convention was suggested by SR VAW in 2015, *supra* note 45.

91 Such proposal was forwarded by Alice Edwards, who also said the Protocol could be attached either to CEDAW or ICCPR, *supra* note 24, p. 338.

92 In 2016, the discussions on update of GR 19 under the CEDAW were ongoing. See Report of the Special Rapporteur on VAW, 19 April 2016, A/HRC/32/42, para 16.

93 For instance, the discussion whether current gendered strategies on VAW are to be continued can be seen as a procedural challenge, see Ilona Cairns, *supra* note 21, p. 168.

94 These challenges are not easily divided into categories (procedural, conceptual, substantive) and often overlap, yet throughout the thesis, the author attempts to provide an analysis along these lines.

which prohibit violence and torture ("gender mainstreaming" or GM).[95] The first strategy with its advantages and drawbacks has gradually gained recognition, with the CEDAW Committee placing VAW firmly into the centre of its agenda. The second strategy also has gained partial success, in particular with regards to VAW during armed conflicts.

Some prominent commentators argue for changing of the strategies dramatically or at least by the way of expansion of the legal frame on VAW. The general argument that "a break from feminism"[96] should be taken in law has been echoed by suggestions to turn to gender neutrality in tackling VAW.[97] One must not understand that the arguments put forward by Janet Halley or Julie Goldschied are basically anti-feminist; quite contrary, they can be read as attempts to "queer-up"[98] the feminist critique and renew it with more focus on women's agency.[99] The question remains, however, whether we have reached the post-modern state, where post-feminism[100] is needed as a response to "governance feminism" in international law. The author argues that this is not yet the case. The law may be "indeterminate," which is a central claim for postmodern feminism[101] and critical legal studies. However, the degree of this indeterminacy is not such as to render all efforts to regulate unreasonable.

At the same time, intersectional approach has been significant while discussing VAW and multiple identities of women.[102] In the end of 1980s and beginning of 1990s, the term *intersectionality* was coined by Kimberle Crenshow, the law professor and the critic of single-ground identity politics.[103] She marked that black women do not only face discrimination because they are black, but also because they are women, and this taken together creates unique vul-

95 More on these two main strategies, see Alice Edwards, *supra* note 24. The author argues that both of the strategies are not entirely satisfying and need to be altered.

96 Janet Halley, *Split decisions: How and Why to take a break from feminism*, (Princeton, Princeton University press, 2006).

97 Julie Goldscheid, Debra J Liebowitz, "Due diligence and Gender Violence: Parsing its Power and its Perils", *Cornell International Law Journal*, 48, 2 (Spring 2015): 301-345.

98 Queer legal theory is a critical theory that emerged in 1990s in connection to homosexual identity politics and which criticized assimilation and subordination and inter alia was critical of second wave feminism, which was seen as sex negative and essencialising. See, in general Martha Fineman, Jack Jackson, Adam Romero (eds), *Feminist and queer legal theory: intimate encounters, uncomfortable conversations* (Ashgate, 2009).

99 Janet Halley, "Take a break from feminism?" In *Gender and Human Rights*, Karen Knop (ed), (Florence: Collected courses of the Academy of European Law, 2004): 57-81. The influences of queer theory and postfeminist thought are clearly visible throughout the argument. Similarly, Julie Goldschield and partially Alice Edwards are also concerned with essencialization of women experiences.

100 The main assumption of the critics is that feminism is by now a successful and governing strategy. Janet Halley, however, denies that her criticism is post-feminist and also subsequently became critical of the queer theory itself, see e.g. the contribution in "Queer theory by men," *Feminist and queer legal theory: intimate encounters, uncomfortable conversations,* offering instead the "politics of theoretic indeterminacy", at p. 28. The concept of indeterminacy is pivotal to critical legal studies.

101 Gary Minda, *Postmodern legal movements* (NY: New York University, 1995): 144.

102 The CEDAW Committee identified intersectionality as "basic concept for understanding the scope" of States parties obligations under the Convention. General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para 18.

103 Kimberle Crenshow, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color." *Stanford Law Review* 43, (6, 1991):1241-1299.

nerability. The minority women often stand at traffic intersections (the illustration suggested by K. Crenshow) of various grounds of discriminations and thus, they sometimes can experience discrimination as black persons, or as women, and sometimes – as black women.[104] Recognition of intersectionality, she argued, was essential to fight marginalization from within, for instance, black women's experiences of VAW and rape must not be suppressed in order to avoid compromising anti-racial identity politics.[105] Thus, reconceptualization of complex identities (which include both gender, poverty, and belonging to an ethnic minority group) under the theory of intersectionality can be used, and is currently used, for the development of effective substantial responses to VAW under global and regional law.

1.1.3. Challenges of substantive nature

International law has been criticized as a "thoroughly gendered system"[106] – and it is considered the core substantial challenge to this date.[107] The international law may be accused[108] of a focus that has indirectly privileged men over women,[109] and overprotected the government / the state[110] and thus indirectly complied with violations of women rights committed by VAW. Nowadays, when gender mainstreaming has been used at least partially successfully and when various treaties and treaty monitoring bodies have at least theoretically embraced women rights, it would be difficult to claim[111] that it is still a completely gendered system. However, the thesis attempts to reveal how a nuanced and subtle prioritization remains, and also focuses on the draft text of the proposed Convention on VAW to illustrate potential substantial problems.

Substantive challenges encompass discussions on the very definitions of rape and domestic violence, which can be understood differently under various legal systems. The debate continues whether the definition of rape should indeed focus on coercion or consent (see further 1.4.3.), and whether domestic violence should be described under the concept of "series of events" that cause continuous harm (see further 1.4.2.). Substantive solutions may require

104 Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* (1989), 57-80.

105 Kimberle Crenshaw, 1991, *op.cit.,* p. 1299.

106 Hillary Charlesworth, et al, *American Journal of International Law, supra* note 82, 613.

107 Ilona Cairns, *supra* note 21, p. 181.

108 For an overview of these feminist arguments under international law and comparison of liberal and radical criticism, see Fernando Tesón, "Feminism and International law: a reply," *Virginia Journal of International law* 33, 627 (1993):647-684. Note, however, that Tesón has argued that the argument of "gendered rules" is overstretched, see p. 655.

109 For instance, by the focus on combatants rather than civilians, where most combatants are men and civilians are women.

110 This corresponds with the private/public dichotomy, where the state in most cases avoids responsibility for "private" VAW, e.g. domestic violence or sexual violence, which again happens mostly to women.

111 Ilona Cairns claims that "principal problem lies with under enforcement of substantively neutral rules when they affect or involve women rather than with the rules of international law themselves." S*upra* note 21, p. 172.

structural responses that go beyond these definitions and beyond the straightforward attempts to balance the system, in order to avoid the gendered effect. They may require focusing on such issues as international distributive justice, and economic and social rights of the victims.

1.2. The "normative gap" and its major fillers

It stands out immediately that global efforts to tackle VAW have been generally limited to recommendations and resolutions. Already in 1984 the U.N. Economic and Social Council passed Resolution No. 1984/14 on violence in the family. Based on this resolution, the UN General Assembly adopted Resolution No. 40/36 on domestic violence in 1985,[112] urging States to take specific actions without delay with regard to protection from and prevention of domestic violence. Other important, although at the same time – not normative, global steps were taken after in 1993,[113] in the form of the adoption of the Declaration on the Elimination of Violence against Women by the General Assembly of the UN and the appointment of the Special Rapporteur on the causes and consequences of violence against women.[114] These were the significant steps, which placed VAW at the highest level of the UN agenda.

The Declaration on the Elimination of Violence against Women[115] (DEVAW) reiterated the rights' approach on VAW, which it described as gender based violence: "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."[116] It is a significant document because it is a global agreement on VAW, albeit in the form of soft-law instrument. However, it can also be criticized for enlisting rights, which could be infringed by violence directed against women, and thus giving the impression that there is still room to claim that violence becomes important only when there is significant damage. The DEVAW provided for the due diligence principle "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" (Article 4(c), required a wide range of remedies and also recognized (Article 4(g) that children of domestic violence victims may need specialized assistance. The Declaration proclaimed: "historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women's full advancement."[117]Nevertheless, in operative parts, the DEVAW failed to name VAW as a human rights violation. Moreover, a possibility of wider integration of certain categories of women human rights has not been realized: for instance, the Declaration did not mention the right to divorce or the right to shelter, and did not suggest other substantive needed developments.

112 UNGA A/RES/40/36,29 on domestic violence, November 1985, 96th plenary meeting.

113 For the developments prior 1993, see Pamela Goldberg, Nancy Kelly "International Human Rights and Violence against Women," *Harvard Human Rights Journal* 6, 195 (1993): 195-209.

114 UNCHR UN Doc E/CN.4/RES/1994/45, 4 March 1994.

115 UNGA A/RES/48/104, 85th plenary meeting, 20 December 1993.

116 Article 1 of Declaration on the Elimination of Violence against Women. UNGA Declaration on the Elimination of Violence against Women. A/RES/48/104, 85th plenary meeting, 20 December 1993.

117 Preamble of the Declaration on the Elimination of Violence against Women, *supra* note 116.

The appointment of Special Rapporteur on violence against women, its causes and consequences (further – Special Rapporteur on VAW) signified a practical change. The Special Rapporteur on VAW was appointed by the UN Commission on Human Rights by its resolution 1994/45, adopted on 4 March 1994. The mandate was later extended in 2003, by the resolution 2003/45, and in 2013 by resolution 23/25. The Special Rapporteur on VAW is expected to: gather information on VAW, recommend measures at international, regional, national and local level to combat VAW, and adopt a comprehensive and universal approach while doing that. The Special Rapporteurs can submit thematic reports, undertake country visits, and transmit individual complaints regarding VAW. In the latter case, the Special Rapporteur does not analyse the case herself; but instead addresses the Governments with the plea to ensure effective protection.[118]

Fighting violence against women was set as one of the twelve priorities in the Fourth World Conference of Women, which took place in Beijing in 1995. The Beijing Declaration affirmed that "women's rights are human rights."[119] It further assured that "violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms."[120] However, the Beijing Declaration has been criticized as stressing the fact that VAW is impairing or nullifying women's enjoyment of human rights and not just as a violation of human rights themselves.[121] Right to be free from violence should be clearly stated as a right in itself, rather than an additional obstacle to enjoyment of women's rights. Furthermore, the Beijing documents failed to make a clear reference to the Declaration on VAW, which shows the lack of coordination between the soft law documents. A question arises whether the states can really be expected to treat these instruments seriously if the different actors, even at the same UN level do not always take them into consideration.

Subsequently, the CEDAW Committee adopted the General Recommendation (GR) 12 and GR 19 and brought the theme of VAW into its agenda. The analysis provided further in the thesis presents the extent and the scope of the existing due diligence duty that the CEDAW Committee interpreted under the Convention. However, despite all the efforts, the documents adopted to this date are of persuasive nature. Even though violence on the basis of race, or violence on the basis of disability, have special articles under international treaties, violence on the basis of gender does not. Moreover, despite international recognition that VAW can be seen as torture and HR violation,[122] women rights violations are still seen as separate and political (rather than legal) issue which depends on the good will of the

118 UN Human rights office of the High Commissioner. Individual Complaints. http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/Complaints.aspx

119 The Beijing Declaration, adopted during Fourth World Conference on Women, September 1995, Paragraph 14.

120 The Beijing Platform for Action, adopted in Fourth World Conference of Women, September 1995, Strategic Objective D.1. Violence against women. Paragraph 112.

121 Dianne Otto, "A Post-Beijing Reflection on the Limitation and Potential of Human Rights Discourse for Women," *In Women and International Human Rights Law* Volume I, Kelly D. Askin, Dorean M. Koenig (eds), (New York: Transnational Publishers Inc., 1999), 131-132.

122 See Alice Edwards, "The ´Feminizing´ of torture under international human rights law," *Leiden Journal of international law,* 19 (2006), pp. 349-391. The author argues that despite the feminist efforts and declaration that VAW can be seen as torture, the room is still left for gender stereotyping.

stakeholders. The CEDAW itself is the treaty with most reservations.[123] Meanwhile, VAW is only included under it through the method of persuading state parties that it is a form of sexual discrimination. Thus, the current legal basis is still rather insecure.

More than 30 years have passed since the first efforts at the level of international law; yet to this date there are no explicit rules that forbid VAW. Therefore, Special Rapporteur on violence against women, its causes and consequences (SR-VAW) Rashida Manjoo in her recent report of 2015 described the problem of the "normative gap" and called for re-opening of the debate on a specific Convention on VAW.[124] In particular, she stated that the existing normative gap begs for "crucial questions about the State responsibility to act with due diligence and the responsibility of the State as the ultimate duty bearer to protect women and girls from violence, its causes and consequences."[125] Even though due diligence duty of the state has been explained by Special Rapporteurs and global treaty monitoring institutions, it is difficult to require a strict standard where no normative text is available. Recommendations, general comments, and opinions discussed further, have no legal binding effect.

The UN states parties seem to have an agreement on prohibition of VAW, as further discussed in more detail, however, this broad agreement has not been transformed into normative texts, and even though non-textual rules can also be normative,[126] legal texts have a significant potential to transport a clear normative value.[127] In order for law to be binding on states and have clear effect for individuals, normative rules work better when they are codified. Thus, according to SR Rashida Manjoo, "[t]ransformative change requires a shift in thinking towards normativity."[128] As a response to this problem, she has put forward a new Draft Convention: the UN Draft Convention for the Elimination of Violence against Women and Girls (CEVAWG or Draft Convention) in 2015.[129] Does the proposed Draft Convention on VAW have the potential to fill the global normative gap and address conceptual challenges? Perhaps the prohibition of VAW is already covered by international law and soft law instruments? Perhaps the idea of a new Convention, which supposedly "fills the vacuum," only weakens the current (however insecure and imperfect) regulation by soft law instruments? These are the questions to hold while reading the further analysis.

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123 See for the list of all reservations and declarations: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en accessed 3 September 2016.

124 Rashida Manjoo, Special Rapporteur on violence against women, its causes and consequences. Annual report of 2015. A/HRC/29/27.29th session HRC, 10 June 2015.

125 *Ibid,* para 63.

126 *Jus cogens* rules could serve as an example. However, the relationship of customary international law and even just cogens law outside of treaties is not entirely clear.

127 It must be added that certain concepts used in legal language cannot be fully explained by texts themselves and the central concept of "gender" may serve as an example. Although it is defined in relevant legal instruments, it is also a performative concept, and only analysis of the texts cannot fully explain what constitutes gender. In other words, law has the normative power but it should not be credited with too much power and hence undermine individual agency.

128 GR 19, *supra* note 5, para 65.

129 Addendum to the Human Right Council Thematic report of the Special Rapporteur on Violence, its Causes and Consequences, 16 June 2015, A/HRC/29/27/Add.4.

The new SR on VAW Dubravka Šimonovic, instead of further promoting the Draft Convention, participated in the CEDAW Committee's discussion on the update of General Recommendation 19.[130] Thus rather than pushing further for normative clarity, the path towards continuation of soft-law efforts seems to be chosen for the moment.[131] The analysis of the Draft Convention is nevertheless relevant, because the idea of the treaty that explicitly forbids VAW has been alive for at least for a few decades.[132] It would not single-out women, because we already have treaties on race, children, and disabilities, and most importantly, would meet the challenge of the lack of implementation. Of course, "any new treaty will only be as strong as the political will to uphold it."[133] However, rather than political analysis, a substantive legal analysis of the draft treaty is also vital, considering that it is the first time that the idea has actually crystalized to the text and was proposed at the level of the SR on VAW.

The creation of a global normative framework on VAW may prove useful in those parts of the world where no regional instruments are available. Currently, the African, Inter American and European instruments partially fill the normative gap. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of *Belém do Pará*),[134] adopted in 1994, was the first specialised Convention on VAW worldwide, and the most ratified convention in Inter-American system of international law. In the landmark decisions *González et al. (Cotton Field) v. Mexico,*[135] *Véliz Franco* et.al *v. Guatemala*,[136] *Penha Maia Fernandes v. Brazil*[137] *and Jessica Lenahan (Gonzales) v.*

130 Report of the Special Rapporteur on VAW, 19 April 2016, A/HRC/32/42.

131 This choice does not only relate to the form of the document, i.e. a Convention, a Protocol, or a Recommendation, but it is also conceptual, i.e. choosing to build on the concept of VAW as a form of discrimination under the CEDAW.

132 For instance, Alice Edwards suggested a protocol on VAW, which could be attached to CEDAW or ICCPR. Alice Edwards, *supra* note 24, p. 338.

133 *Ibid*, p. 341.

134 Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of of *Belém do Pará* "), 9 June 1994.

135 Gonzalez v. Mexico (Cotton Field), Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, 294 (Nov. 16, 2009). In this case, three young women disappeared and later their bodies were found with clear marks of sexual abuse and inhumane treatment before murders. In the context of widespread VAW, the Court found that the state violated its duty to investigate human rights violations. The Court's decision was significant not only because it specified the contents of positive obligations of the Inter-American states regarding VAW but also because it addressed structural discrimination and provided for adequate reparations.

136 Veliz Franco et al v Guatemala. Judgment of 19 May, 2014. In this case of abduction and murder of a 15 year old girl, the Court found violations of Inter-American Human rights Convention, as well as Convention of *Belém do Pará. It rejected the state's objections regarding its competence, explaining that the international system of protection against VAW should be seen as a whole, see* Para 37.

137 Maria da Penha v. Brazil, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000). The victim was repeatedly attacked by a violent husband, which finally resulted in paraplegy; after 17 years, when the case reached the Inter American Commission, the husband was still not prosecuted. The Commission found violations of Article 8 concerning the right to fair trial, and Article 25 concerning judicial protection, in relation to article l(l) of the Convention of *Belém do Pará*. In consideration of the general tolerance of DV in Brazil, the Commission held there was a violation of state obligation to "condemn all forms of violence against women" under Article 7.

United States,[138] due diligence obligation on protection against VAW was found. However, the system also includes its challenges. The Convention does not explicitly include acts that are likely to cause damage,[139] thus may be interpreted as only applicable to those acts that actually cause harm. The lack of clarity of due diligence standard has been repeatedly criticized[140] and the more progressive legal standards are needed.[141] In Africa, a Special Rapporteur on VAW in Africa has been appointed[142] and the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol)[143] entered into force in 2005. It includes a prohibition of VAW but there have been deficiencies with enforcement[144] and criticism of "too Western" approach.[145] Finally, the European legal regulation represents the most elaborate and modern approach to VAW and employs different legal techniques ranging from gender neutrality[146] to a mixed-approach[147] to VAW.

Although the global normative gap has been partially closed for Europe, Africa and American states, it can be argued that it is not sufficient because some gaps certainly remain.[148] The importance of a more normative approach can be substantiated by the data showing that states which ratify international treaties on human rights tend to improve their standards on VAW domestically.[149] Women rights activists can use international law

138 Lenahan case, *supra* note 26. Despite a restraining order, the husband of the applicant abducted and killed their 3 daughters; the US Supreme Court found that the police had no specific duty on enforcing the restraining order and arrest of the suspected abducting father. Notably, the USA is not the party to the CEDAW nor Convention of *Belém do Pará, thus the American Declaration of the Rights and Duties of a Man of 1948 and customary international law was relied to find a breach of due diligence obligation.*

139 For instance, the Convention does not mention threats.

140 Amy J. Sennet "Lenahan (Gonzales) v. United States of America: Defining Due Diligence?" *Harvard International Law Journal,* 53, 2 (Summer 2012): 546.

141 SR VAW R. Manjoo report 2015, *supra* note 124, para 61.

142 Special Rapporteur on VAW in Africa was appointed in 1999.

143 Protocol to the African Charter on the Rights of Women in Africa. Adopted in 2nd Ordinary Session of the Assembly of the African Union in Maputo, 11 July 2003.

144 SR VAW Manjoo report 2015, *op.cit.* para 25.

145 See for instance Brenda Kombo, Rainatau Sow, Faiza Jama Mohamed, *Maputo Protocol. Journey to Equality: 10 years of the Protocol of the rights of women in Africa* (Oxfam, 2013), 127. The authors describe it as a "love and hate" relationship. Louise du Toit, "Human rights discourse: friend or foe of African women's sexual freedoms?" *Acta Academica*, 46, 4 (2014): 49 – 70. The author criticized Western approach to rights in the Maputo protocol and offered to re-interpret women's human rights in an African way. See p. 66.

146 The EU legislative package employs a gender neutral approach, including a gender neutral definition of gender based violence, as discussed in the second part of the thesis.

147 Istanbul Convention uses a mixed frame, where violence against women / gender based violence is seen as a form of discrimination but domestic violence is not clearly stated as such. *Supra* note 17.

148 For instance, many states in Europe have not yet ratified the Istanbul Convention and some are not planning to. The EU Victims' package does not directly target VAW, and have different aim than combatting VAW. The Inter-American and African regulations can also be criticized on different levels, including weak implementation. Some geographic areas, e.g. China, Japan, Australia, and Middle East are not covered by any regional regulation tackling VAW.

149 See regarding domestic legislative gaps in general, and the effect that ratification of CEDAW had on the domestic normative gaps David. L. Richards, Jillienne Haglund. *Supra* note 29.

and treaty commitments to demand for national or local legal reform.[150]Even if there is a general scepticism on the direct effect of international instruments, especially in the area of women rights, the advocates from within the country have some tools to convince the state agents that standards of protection need to be improved.

1.2.1. Prohibition of VAW under customary international law

VAW is not yet addressed in a global treaty level and is only tackled in international soft law instruments and regional conventions. It should not be understood in such a way that without a normative text of a treaty, the states' obligations are non-existent. The crucial question needs to be raised whether the positive duty to act with due diligence in cases of VAW exists under customary international law. The author argues, similarly as many scholars before, that VAW should be seen as prohibited under international custom. In 2016, there are arguably more convincing arguments than before to prove this case.

On the one hand, the empirical research shows that there are less and less countries in the world where VAW is not forbidden.[151] On the other hand, some countries of the world still justify mild VAW in some situations, e.g. chastising of wives is allowed in United Arab Emirates.[152] Countries that traditionally allowed justifications or ignored impunity for VAW, are going one step forwards and one step backwards, e.g. draft law on protection against VAW, and draft law that allows wife-beating, were both put forward in 2016 in Pakistan.[153] The so-called "honour" justifications serve to mitigate[154] or even limit criminal liability for VAW, including murders,[155] and "corroboration rule" applies in case of rape[156] – the burden of proof is high and rape needs to be witnessed. Some states[157] provide an exception

150 Elizabeth M. Schneider, "Transnational Law as a Domestic Resource," *New England Law Review* 38, (2004): 689-724.

151 David Richards, "Human Right Council Thematic report of the Special Rapporteur on Violence Against Women," 26 June 2015. The author summartzes the findings of the empirical study on 196 countries' laws, published together with Jillienne Haglund. On average, all areas of VAW had least a partial coverage of prohibition of VAW. The gap was identified in Western Asia. http://davidlrichards.com/blog/41-human-right-council-thematic-report-of-the-special-rapporteur-on-violence-against-women. However, recently the few states that the authors pointed out as having zero legal protection, also adopted the laws on DV or VAW.

152 Concluding observations on the combined second and third periodic reports of the United Arab Emirates. CEDAW/C/ARE/CO/2-3. 24 November 2015, para 27.

153 The Council of Islamic Ideology is a constitutional body that is entitled with giving legal advice to the Parliament. This particular advice came in connection to Protection of Women against Violence act, which was signed into law in Punjab in March 2016. The act was immediately challenged in Sharia court and the Council of Islamic Ideology as a response drafted an "alternate bill" which allows wife beating.

154 Concluding observations on the combined initial and second periodic reports of Afghanistan. CEDAW/C/AFG/CO/1-2. 30 July 2013, para 24.

155 Concluding observations of the Committee on the Elimination of Discrimination against Women: Yemen. CEDAW/C/YEM/CO/6. 9 July 2008, para 18.

156 Concluding observations on the seventh periodic report of Malawi. 24 November 2015 . CEDAW/C/MWI/CO/7, para 22.

157 Concluding observations of the Committee on the Elimination of Discrimination against Women: para 23. CEDAW/C/BGR/CO/4-7. 07 Aug 2012, para 23.

when rapist marries the victim, which renders proceedings impossible. The local customs of discriminatory nature are seen as threatening women's human rights.[158] The twofold question arises: whether the norm of international law (as the norm under customary law) exists, even if it is not established on a global treaty level, and second, can we say that it exists even if infringements are sometimes tolerated.

The statute of the International Court of Justice (ICJ) lists "international custom, as evidence of a general practice accepted as law (Article 38 part 1 b), among the sources of international law. The international custom consists of state practice and opinion juris elements. The first element is obejective and state laws are relevant on this matter.

The absolute unanimity of state practices is not required to prove the existence of international custom – the general practice is important. It is clear that the majority of the states have improved their practices towards women rights in general and gender based violence against women in particular.[159] It is striking that even the few states that provide these clearly discriminatory provisions, e.g. chastising of wifes, do prohibit VAW in principle. In the last decade in particularly, states started to adopt specific VAW and/ or DV legislation (Jordan, Zimbabwe, Maldives, Lebanon, China, Turkey, Guatemala, Colombia, Swaziland, Gambia, etc.).[160] At the very least, they would adopt a strategy, programme or an action plan to decrease VAW, which would supplement gender neutral criminal law provisions. Notably, countries may also prohibit torture (part of *jus cogens*), although in some exceptional instances, they close their eyes on it or even provide justifications for it. If we were to say that a step backwards (e.g. Guantanamo Bay camp) denies the whole argument that state practice exists, there would be hardly much norms left of customary international law.

Moreover, there is a strong proof of *opinio juris*, the subjective element of international custom, which was said to exist already in 2006, before the landmark cases under CEDAW, as well as before the landmark European and Inter-American jurisprudence of international human rights monitoring bodies. I.e. in 2006, the SR on VAW recognized that the duty to act with due diligence in cases of VAW has received a status of customary law.[161] She relied on *opinio juris*, as evidence by CEDAW GRs and jurisprudence, Inter-American Convention on VAW and Inter-American practice, the ECtHR case practice of that time, and the UN resolutions.

It must be admitted, however, that it was perhaps a bit too far-stretched in 2006. First, the tendency to adop laws on VAW or DV was not yet there in 2005-2006, but came in a few years. Second, the SR on VAW relied on the practice of the ECtHR and Inter-American court which did *not* have much to do with VAW, but solely entrenched a general due diligence duty to prevent violence, once the state becomes aware of the risk, which is foresee-

158 X and Y v Georgia, 25 August 2015, CEDAW/C/61/D/24/2009, para 9.7.

159 Review and appraisal of the implementation of the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session of the General Assembly. Report of the Secretary-General, E/CN.6/2015/3, paras. 120-139.

160 UN Women, Global database on VAW, accessed 15 September 2016, see *Legislation*, http://evaw-global-database.unwomen.org/en/search.

161 Report of the Special Rapporteur on violence against women, its causes and consequences, The Due Diligence Standard as a Tool for the Elimination of Violence against Women, Commission on Human Rights, Sixty-second session, E/CN.4/2006/61, January 20, 2006, para. 29.

able and imminent. However, the report wishfully stated: "On the basis of the practice and *opinio juris* [...], it can be concluded that there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence."[162] Furthermore, in a few years since this analysis, Bonita Meyersfeld analysed[163] whether an "emerging" international law norm exists to protect women against domestic violence. After the analysis of various international law documents and case practice at both regional and global level, she concluded that indeed there is such an emerging norm that requires states protect against systemic intimate violence in private area;[164] nevertheless, her suggestion that it would be better to have a specific treaty law to this matter has raised some doubts[165] whether she poses it as a very strong argument (i.e. that it is already a norm). The word *emerging* that she uses and also insisting that it is only severe and systemic DV[166] that needs to be addressed also raises some doubts as to the strength of the argument of prohibition under a norm of customary international law. The author of the thesis underlines that Bonita Meyersfeld's analysis is mainly focused on a classical understanding of international law,[167] and she herself agrees that it is only one way of looking at the sources of international law.[168] As explained later, there are alternative understandings of customary law and even *jus cogens*, which go beyond the treaty level. Moreover, and most importantly, some essential developments have taken place in this field since 2010, which need to be reflected, and which strengthen the argument even under the black letter approach to international law.

In particular, after a decade since the first wishful conclusion of the SR VAW, both Inter-American human rights bodies (e.g. *Jessica Lenahan (Gonzales) v. United States)* and the ECtHR (e.g. *Opuz v Turkey*)[169] have adopted landmark decisions that recognized breaches of state positive obligations in cases of DV. There is also more proof of *opinio juris* on high levels of the UN system. For instance, the United Nations Human Rights Council underlined in 2010 that States must exercise due diligence to prevent, investigate, prosecute and punish the perpetrators of violence against women and girl-children, and that the failure to

162 *Ibid.*

163 Bonita Meyersfeld, *supra* note 25, 7-107.

164 For instance, if the police refuse to investigate the cases of DV.

165 Anneke Meerkotter, Book review of Domestic Violence and International law by Bonita Meyersfeld, *South African Journal on Human Rights* 27, (2011): 214-215.

166 However, the word "systemic" in this context refers to micro-level. It is a term that is used to differentiate between instances of DV and systemic terrorizing behaviour which is continuous ("coercive control" or "intimate terrorism"). Meanwhile, most authors, including the author of the thesis, uses the word "systemic" to talk about macro-level, i.e. state responsibility for "systemic due diligence." It is the individual due diligence that Bonita Meyersfeld analyses, even in the context of systemic DV (i.e. it is systemic for the persons, and not systemic for the state.

167 The book itself is an example of classical legal methodology, e.g. focusing on "the normative" (chapters 1-2 on customary and treaty law), the state (chapter 3 on state liability), and the efficiency (chapter 3 on the benefits for victims).

168 Bonita Meyersfeld, *Domestic violence and international law, supra* note 25, p. 107.

169 Opuz v. Turkey, app.no. 33401/02, 9 June 2009. The ECtHR established that Turkey violated its positive obligations (Article 2, 3 and 14) to protect women from further VAW, once threats became known to the police.

do so "violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms."[170] Thus it is suggested that in 2016, the duty to act with due diligence while protecting VAW should be seen as a part of under customary international law.

The case of Jessica Lenahan (Gonzales) v. United States, decided by Inter American commission on human rights in 2011, is particularly instrumental. In this case, the applicant had divorced with her violent husband and despite a restraining order, the husband subsequently abducted and killed their 3 daughters; the US Supreme Court found that the police had no specific duty on enforcing the restraining order and arrest of the suspected abducting father. Before the Inter American Commission, the USA claimed that "it is not bound by obligations contained in human rights treaties it has not joined and the substantive obligations enshrined in these instruments cannot be imported into the American Declaration."[171] Notably, the USA was not a regional party to Convention of of Belém do Pará, which provides explicitly for the state's duty to act with due diligence in cases of VAW.[172] The Commission assessed the case under the American Declaration,[173] noting that its core provisions have been recognized as part of customary law.[174] It further recognized that the duty to protect women and children against domestic violence should also be seen as part of customary law. The Commission stated:

> "all States have a legal obligation to protect women from domestic violence: a problem widely recognized by the international community as a serious human rights violation and an extreme form of discrimination. This is part of their legal obligation to respect and ensure the right not to discriminate and to equal protection of the law. This due diligence obligation in principle applies to all OAS Member States."[175]

I.e. even if the USA was not a party of Convention of of *Belém do Pará*, it was still bound by customary law which provides the states with the duty to act with due diligence and prevent VAW in cases such as *Lenahan*, where the danger was imminent and protection order was issued. The Commission also found that in this particular case, "[t]he state apparatus was not duly organized, coordinated, and ready to protect these victims from domestic

170 United Nations General Assembly Resolution, Human Rights Council, *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*, A/HRC/14/L.9/Rev.1, 16 June 2010. Also see the latest resolution in the series, *Accelerating efforts to eliminate violence against women: preventing and responding to violence against women and girls, including indigenous women and girls.* A/HRC/RES/32/19, 19 July 2016.

171 Lenahan case, *supra* note 26, para 55.

172 Article 3 provides that every woman has the right to be free from violence. Article 7 *establishes the duty of the states to act with due diligence in order to prevent, investigate and impose penalties in private and public cases of VAW.* In 2004, the follow up mechanism has been established, consisting of the Conference of state Parties and the Committee of experts. Moreover, the implementation of the Convention of *Belém do Pará* is monitored by the Inter-American Commission of Human Rights.

173 American Declaration of the Rights and Duties of Man, 1948. The Declaration recognizes a wide range of civil, political, economic, social and cultural rights. In addition, the Inter American human rights system also includes a Charter of the Organization of American States, which also mentions human rights in some of its provisions, and the American Convention on Human rights, the main governing treaty of human rights in the Inter-American legal system.

174 Lenahan case, *supra* note 26, para 115.

175 *Ibid*, para 162.

violence",[176] thus the state failed to act with due diligence and violated the daughters' right to life. The normative basis that implied an obligation to protect women against domestic violence was seen as contained in Article II of the American Declaration (the right to equality before the law).[177]

Thus, it could be claimed that the duty to act with due diligence while protecting women against VAW is part of the international custom, as "general practice accepted as law" (Article 38 of the Statute of International Court of Justice). It includes the elements of state practice and the *opinion juris* of the international / regional courts and treaty monitoring bodies is consistent and general. Therefore, the states have a duty[178] to act with due diligence while protecting women against violence and femicide.

Some customary norms (e.g. prohibition of genocide, torture) also have a special status among all others. David L. Richards and Jillienne Haglund criticized the stance of the USA in the Lenahan case, noting that prohibition of VAW and protection against VAW falls under customary international law and providing examples in comparison with genocide.[179] It is more complicated to claim that the duty to act with due diligence in cases of VAW is also part of the *jus cogens* norms – the peremptory norms which generally allow for no derogation. It seems reasonable to suggest that extreme forms of systemic VAW, which violate the right to be free from torture and the right to life on a large scale, would also be seen as *jus cogens*.

At the same time, it can be admitted that the role of *jus cogens* norms (and customary international law *per se*) outside of the law of treaties is not crystal clear. Can we claim that customary law extends widely beyond the letter of the law in treaties? Surely it is possible to claim that VAW now comes under the CEDAW and the ECHR. However, how far can we go, while explaining the documents adopted 50 years ago and developing *de lege interpretata*? It is still the goal that the prohibition of gender discrimination would be accepted by the states as *jus cogens* rule.[180] The author of the thesis suggests that surely but also slowly, the customary international law is changing its interface. The push from the international treaty law would be a step forward. Furthermore, the ICJ itself could clarify whether VAW falls under customary international law. As it has been explained further, the ICJ has the competence under the CEDAW. While the global and explicit treaty and the ICJ interpretation are currently lacking, the interpretations of the bodies with the mandate under international treaties[181] should be taken into account, because they have been recognized as authoritative by the ICJ.

176 *Ibid*.

177 Article II of American Declaration provides "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."

178 On the basis of international jurisprudence, states can be seen as "clearly accountable for acts of gender based violence", Benedetta Faedi Duramy, "Judicial Developments in the application of international law to domestic violence", *Journal of gender, social policy and the law* 21, 2 (2012)413-436, p. 435.

179 D*avid L. Richards and Jillienne Haglund*, *supra* note 29, p. 49.

180 Ingrid Westendorp, "Using culture to achieve equality," in *The women's convention turned 30* (Cambridge: Intersentia, 2012), 126.

181 The ICJ's opinion is that they have a "great weight", Case concerning Ahmadou Sadio Diallo, ICJ, para 66.

Furthermore, there are many ways of looking at the customary international law. For instance, Robert Kolb's analysis of the definition of *jus cogens* norms reveals that during the last 15 years, *jus cogens* "spread in many different directions beyond the law of treaties."[182] The argument that prohibition of VAW and states' due diligence duty is part of *jus cogens* finds support in the light of this analysis, which in his mind does not require long time and not even an absolute non-derogability for the development of *jus cogens*.

In 2015, SR VAW has proclaimed that the normative gap on a treaty level "raises crucial questions about the State responsibility to act with due diligence and the responsibility of the State as the ultimate duty bearer to protect women and girls from violence."[183] This statement can be viewed critically, because even though the SR is right to suggest that treaty would help clarify state duties, it is not strategically wise to claim that there is a gap that raises doubts regarding state responsibility. Perhaps it should not be read as recognition that current developments are not significant but rather as an expression of ongoing frustration of the lack of treaty norms on VAW.[184] Some questions regarding the scope of state's positive duties remain, but not regarding the very existence of it. During the debate on the proposal of a new Convention, some of the participants worried that the new treaty "could potentially weaken CEDAW and erase important gains that have been made over the years".[185] There is indeed the risk that persistence on the argument on normative vacuum may weaken the role of the existing *de lege interpretata*[186] and weaken the arguments that it is part of customary international law. In many contexts, states still need to be convinced that their obligations under international law (even the treaty law) are not solely recommendatory and that actions are required. The same is true regarding in this area, i.e. the state's duty to protect persons from VAW.

Nevertheless, the prohibition of VAW during the last five years has been repeatedly acknowledged by global actors, regional stakeholders, and on the national level. The entirety of the evidence can hardly be refuted as a vacuum at this moment. The said acknowledgement does not always translate to effective implementation. However, that does not deny the existence of the rule itself. States all around the world, from Gambia to USA, are adopting laws on VAW or DV, and put great efforts to implement their duties regarding protection against VAW.

182 Robert Knob, *Peremptory international law-Jus cogens*, (Oxford: Hart publishing, 2015), 6. The author also considers that it would be wrong to think that jus cogens only concerns non- derogable rights, like torture, see p.78. For instance he argued that prohibition of discrimination, although a subject to many derogations, could also be treated as jus cogens.

183 Rashida Manjoo SR VAW report 2015, *supra* note 124, para.63.

184 The said statement and the whole report show the belief in the power of normativity in international law. However, it can be discussed whether treaty always results in more effectiveness than soft law. In some areas and during certain periods of time, it is strategically wiser to postpone a treaty.

185 Addendum to Rashida Manjoo Report 2015, *op.cit*.

186 Judicial decisions regarding VAW should be seen as sources of international law as well, as provided for in Article 38 (1) of the Statute of the ICJ. However, they are only secondary source of international law. Recommendations of the CEDAW should be seen as authoritative – but again, the states can refuse to accept them.

1.2.2. Gender mainstreaming VAW under the "classic" international law

Gender mainstreaming is the second important strategy to tackle VAW international law, besides inclusion of it under the CEDAW. It can also serve as proof of *opinio juris* that strengthens the argument on VAW prohibition as part of customary international law. Gender equality approach has been used since late 1990s and gender mainstreaming was agreed upon as the common strategy in 1997 by the major UN treaty monitoring bodies. It was described as follows:

> "the process of assessing the implications for women and men of any planned action, including legislation, policies and programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic, and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is achieve gender equality."[187]

Subsequently, it has also been offered at the level of Council of Europe and the EU in about a decade.[188] As noted by Catharine A. Mackinnon, "[g]ender as reality, analysis, and rubric has created some of the fastest and most far-reaching transformations in international law in our time."[189] The concept clearly stems from feminist ideas of inclusion and has been seen as a partial success.[190] However, despite the broad agreement to include it into the language of the institutions (widely it can even be seen as an agreement to use the feminist methodology at the institutional level), the question still remains whether it had a performative effect as well.

In the context of VAW, this meant that VAW was declared a violation of human rights under various international treaties, and not just the CEDAW. The Rome statute of International Criminal Code has been changed to include rape and other sex crimes as crimes against humanity[191] and to prohibit persecution on the grounds of *inter alia* gender, which has been seen as a positive development by most scholars.[192] It is beyond the scope of this thesis to analyse these developments in detail. However, they must be seen as essential for VAW

187 UN Doc. A/52/3/Rev 1. Agreed conclusions. 1997/2 I.A., p. 24. See also Report of SG to ESOSOC. Mainstreaming the gender perspective into all policies and programmes in the UN system. UN Doc. E/1997/166, 12 June 1997.

188 See Johanna Kantola, *Gender and the European Union* (Basingtoke: Palgrave MacMillian, 2010).

189 Catharine A. Mackinnon, "Creating international law: Gender as new Paradigm." In *Non-State Actors, Soft Law and Protective Regimes*. Cecilia M. Bailliet(ed). (Cambridge: Cambridge University Press, 2013), p. 17.

190 See Ilona Cairns, *supra* note 21, p. 173-180. In general, see Sari Kouvo's dissertation on gender mainstreaming, *supra* note 48.

191 Rome statute of International Criminal Court, see Articles 7(1)(g), 7 (1) (h). A/CONF.183/9 of 17 July 1998, entered into force in 1 July 2002.

192 The inclusion of the term "gender" into Article 7 (3) of the Rome statute was also criticized, e.g. Sari Kouvo, *op.cit.* p. 249. It must be noted that the term gender under the Rome statute is *limited to biological sex*: "For the purpose of this Statute, 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 of the International Criminal Court, Article 7 (3).

committed by private individuals as well, inasmuch as they contributed to interpretation of certain substantive terms, such as rape and "consent." The consent -based approach to sexual VAW was gradually reflected in international criminal law. As rape has been recognized as crime against humanity under the Rome statute, and in case of *Prosecutor v. Kunarac, Kovač and Vuković*, International Criminal Tribunal for Yugoslavia found that consent must be:

> "given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[193]

Regarding the *actus rea*[194] of the crime, the Tribunal used the *Prosecutor v Furundžija*[195] definition, challenging its element of coercion as too indeterminate from the perspective of international law and focusing instead on the consent. By its argumentation in this case, the Tribunal formulated the stance where consent in principle cannot be implied in circumstances of war and genocide.

Eventually, in its General Comment No. 28 the UN Human Rights Committee explained that states have a duty under the International Covenant on Civil and Political Rights (ICCPR) to ensure the equal enjoyment of all rights to men and women, and VAW could constitute the breach of the right not to be ill-treated under Article 7 of ICCPR. Moreover, in the update of the General Comment to Article 3 of ICCPR, it has been affirmed that "[s]tates should ensure to men and women equally the enjoyment of all rights provided for in the Covenant,"[196] and not just "respect" human rights by means of non-intervention. In case of gender-based violence, which constitutes discrimination, state has a positive obligation to ensure that women are guaranteed the enjoyment of their rights. The Committee of Human Rights has underlined that "positive measures should be taken to ensure effective protection against domestic violence."[197] In order to comply with the obligation of prevention, simply enacting legislation is not enough, as admitted under the ICCPR.[198] In case of failure of due diligence obligation, state may carry responsibility for violating its international obligations. As to the scope of acting in due diligence, it is clear that state must take affirmative actions to "give effect to the precise and positive obligations under article 3" designed to guarantee positive enjoyment of rights.[199] Thus, international

193 Prosecutor v Kunarac, Kovač and Vuković, ICTY, 2001. Nos. IT-96-23-T & IT-96–23/1-T, para 460.

194 In criminal law, actus rea is the external element of crime, known as "guilty act," and mens rea is the internal element of "guilty mind."

195 Prosecutor v Anto Furundžija, Case IT-95-17/1-T, Judgement, 10 Dec 1998, para 185. It describes rape as: "(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person. (ii) by coercion or force or threat of force against the victim or a third person."

196 General Comment 28 on Article 3. CCPR/C/21/Rev.1/Add.10, CCPR General comment 28-29 March 2000. Point 2.

197 This has been proclaimed for at least 20 years. For instance, UN Human Rights Committee, CCPR. UN HRC. Ukraine, ICCPR, A/50/40 vol. I (1995) 57 at para. 326.

198 General Comment 28 on Article 3. CCPR/C/21/Rev.1/Add.10, CCPR General comment 28, 29 March 2000, point 2.

199 General Comment 4 on Article 3 of the International Covenant on Civil and Political Rights, Office of the High Commissioner for Human Rights, Thirteenth session, 1981.

community has gradually grown to admit that women's rights violations are violations of human rights, and VAW prescribes positive obligation to the state to investigate and prosecute human rights violators.

It must be noted, however, that the Human Rights Committee's jurisprudence has been so far connected with ex-post state responses rather than prevention of future violence, and limited to VAW committed by state agents. Alice Edwards underlines that despite the declaration of the willingness to integrate private VAW, the use of due diligence concept in Committee's jurisprudence has been "embryonic."[200] The obligations of states have not been recognized as having a horizontal direct effect[201]and to this date, jurisprudence mainly concerned violence committed by state officials or condoned by state officials.

Gender mainstreaming under the Convention against Torture and other cruel, inhuman or degrading treatment (CAT) could be used as an example. CAT is the only Convention that addresses violence globally, and also contains *jus cogens* norms. The Committee under CAT in its General Comment in 2008 used broad terms to define state obligations and also referred to VAW committed by private individuals:

> "where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials *or private actors* and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts."[202]

Therefore, various commentators claimed that rape[203] and domestic violence[204] should be seen as torture under the CAT. Some authors already before this General Comment have argued it could be used to fill-in the normative gap,[205] and it should be noted in this regard that the Special Rapporteur on torture already in 1995 claimed that gender based violence can also be seen as torture.[206] The Committee under the CAT found in 2000 that forcing the

200 Alice Edwards, *supra* note 24, p. 240.

201 HRC, General Comment No. 31 (2004), The Nature of General Legal Obligations on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8

202 UN Committee against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008 CAT/C/GC/2.

203 Felice D. Gaer, "Rape as a Form of Torture: The Experience of the Committee against Torture", *CUNY Law Review* 15, 2 (Summer 2012): 293-308.

204 Claire Wright, "Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence" *Hastings Women's Law Journal*, 24, 2 (Summer 2013): 457-578. Rhonda Copelon, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture," *Columbia Human Rights Law Review*, 25, 2 (Spring 1994): 291-368. Barbara Cochrane Alexander, "Convention against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims" *American University of International Law Review*, 15, 4 (2000): 895-940.

205 Alice Edwards, "The ´Feminizing´ of torture under international human rights law," *Leiden Journal of international law,* 19 (2006): 349-391.

206 Report of the Special Rapporteur Nigel S. Rodley: *Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* E/CN.4/1995/34, 12 January 1995, paras 15-25.

victim to return to the state where she had been forced into marriage and sexually abused would violate the Convention.[207] These two developments gave serious grounds for argumentation that some VAW can be seen as torture.

However, the recognition in the commentaries is largely declarative or visionary. As widely admitted, torture involves four elements (Article 1 of CAT, Article 7 of ICCPR), which limit the scope of reach of the international law: the serious nature of physical or psychological harm, the intent, the aim (interrogation, confession, arrest), and the perpetrator who is a state official (or torture committed with consent of person acting in official capacity). The recognition of VAW as torture is complicated due to private-public dichotomy and marginalization of VAW.[208] Although recognition of VAW of public perpetrators as torture was seen as a "feminist triumph,"[209] women still need to prove that their experiences are "serious enough" and worthy of recognition as torture. Under the CAT and according to the Committee's practice, VAW needs to meet the requirements of severe pain and suffering that amounts to torture; it needs to be directed at the victims for the prohibited purpose – e.g. to humiliate, intimidate, or punish; whereas the location of torture-VAW does not necessarily have to be[210] a detention centre.

It must be acknowledged that the Committee's approach to sexual VAW (by state agents) gradually improved: e.g., in 1996, in *Kisoki v Sweden*[211] the CAT Committee failed to reflect on claims of repeated sexual violence, but in a decade, in *V.L. v Switzerland*,[212] the Committee clearly admitted that "the sexual abuse by the police in this case constitutes torture,"[213] and consistently held this position.[214] Nevertheless, cases under the CAT committee have largely been limited to traditional constructs of violence, i.e. VAW committed by state officials. The definition of "torture" has been interpreted more restrictively under CAT, in comparison to ICCPR, and does not protect against VAW if the states have not *consented* to it – even it "may have failed in a more global sense in their responsibilities of due diligence."[215] There is still a theoretical possibility, however, that CAT also could apply to VAW perpetrated by private individuals, provided that state officials consented, instigated,

207 A.S. v. Sweden, CAT, 2000, CAT/C/25/D/149/1999 (15 February 2001).

208 Rhonda Copelon, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture", *Columbia Human Rights Law Review* 25, 2 (Spring 1994): 295-296.

209 Alice Edwards, *supra* note 24, p. 261.

210 See, e.g. V.L. v Switzerland, CAT 262/2005 (20 November 2006). The case concerned repeated sexual violence by Belarus officials. In para 8.10, the Committee states that violence does not necessarily have to be in detention centres.

211 Kisoki v Sweden, CAT 41/1996 (8 May 1996). The case concerned a case of political activist, who seeked asylum in Sweden and claimed she was raped 10 times while in detention in Zaire. The Committee failed to reflect on that particular statement. Moreover, in case of G.R.B. v. Sweden, CAT 83/1997 (15 May 1998), the CAT committee found that rape by NGO members was outside of Article 3.

212 V.L. v Switzerland, *op.cit*.

213 *Ibid*, para 8.10.

214 C.T. and K.M v. Sweden, Communication No. 279/2005, 17 November 2006, UN Doc. CAT/C/37/D/279/2005. (2007)

215 Alice Edwards, *op. cit*, p. 249.

or acquiescenced to such VAW.[216] In the said situations, state responsibility can be triggered under the concept of due diligence duty. However, considering the current interpetation, there is a high standard for recognition of sexual VAW or DV as torture under the CAT.

Another example is that of UN Convention on the Rights of the Child[217](CRC). Notably, VAW is experienced throughout the life span[218] and girls are particularly exposed to sexual VAW and genital mutilation. It requires states to take all appropriate measures to protect children from various forms of violence (Article 19).[219] The CRC Committee in 2011 explained that Article 19 includes special obligations of due diligence and the obligation to prevent violence or violations of human rights, the obligation to protect child victims and witnesses from human rights violations, the obligation to investigate and to punish those responsible, and the obligation to provide access to redress human rights violations.[220] The CRC Committee holds that "all forms of violence" in Article 19 (1) refers both to physical and mental violence, and that any violence, however light, is not acceptable.[221] The said measures should include legislating, budgeting, implementing, and enforcing measures. Article 19 part 2 requires the states to establish a holistic child protection system.[222] The CRC Committee in its General Comment No.13 provided clear guidelines on the specifics of each stage, for stakeholders, children, families and communities, professionals and institutions.[223] Finally, the role of CRC is significant with regards to female genital mutilation, thus the CEDAW and CRC Committees issued a joint general recommendation on harmful practices, which *inter alia* directly addresses the said form of VAW.[224]

Moreover, women and girls with disabilities may experience particular forms of violence, for instance, aversion shocks are sometimes used to control the behaviour, and young disabled women and girls face the threat of sterilization. The UN Convention on the

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216 Hajrizi Dzemajl et al. v. Serbia and Montenegro, Communication No. 161/200, 21 November 2002, UN Doc. CAT/C/29/D/161/2000. In this case, the Roma community suffered violence by private perpetrators, while the police stood by.

217 Convention on the Rights of the Child, New York, 20 November 1989. United Nations, Treaty Series, vol. 1577, p. 3. There were 195 state parties of the Convention in September 2015.

218 See update of CEDAW GR 19, *supra* note 19, para 9.

219 The CRC Convention in particular establishes the obligation of the states to take measures in order "to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child," *op.cit*., (Article 19 part 1).

220 Committee on the Rights of the Child under the UN Convention on the Rights of the Child, General Comment No. 13 on the Right of the child to freedom from all forms of violence, 18 April 2011.

221 *Ibid.* Article 19 uses the words "shall take", thus the Committee underlines the obligation of the states to undertake "all appropriate measures" to fully implement this right for all children.

222 The article specifies that the protective measures should include effective procedures for the establishment of social programmes to provide necessary support for the child and his carers, prevention, identification, reporting, referral, investigation, treatment and follow-up of instances, and, as appropriate, for judicial involvement.

223 *Ibid.* Paras 45-57.

224 Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, 4 November 2014.

Rights of Persons with Disabilities[225] entrenches the freedom from violence, exploitation and abuse (Article 16). The Convention proclaims that states should adopt "effective legislation and policies, including women- and child-focused legislation and policies" in order to tackle their obligations under this Convention.

It is clear that the said Conventions and treaty monitoring bodies *declare* inclusion but does it go any further than mere rhetoric? Dianne Otto among many others warned about the danger of the "institutional spread of feminist ideas"[226] which allows *presuming* that international law has now dealt with the women rights problems and can now "move on".[227] More specifically regarding VAW, Christine Chinkin noted that gender mainstreaming involved a possible marginalization of the work of the CEDAW Committee,[228] and Alice Edwards considered that "attempting to 'fit' violence against women within so-called masculine norms is pursued for valid, strategic purposes"[229], however it can only work as short-time strategy. The gender mainstreaming by the UN treaty bodies has been "still piecemeal, arbitrary at times and far from universal."[230] Gender mainstreaming strategy at the level of the UN has also been extensively analysed by Sari Kouvo, who concluded that it has been rather successfully integrated into the *language* of public policy making.[231] Gender equality mainstreaming also shows the tendency of neutralization.[232] There is a risk that the goal of substantial equality of men and women is overshadowed by the said neutralization. Integrative strategies are simplistic, inasmuch as they permit only the addition of gender aspects but do not necessarily allow them to make an actual impact on legal frameworks.

To summarize, when VAW is attached to other human rights (right to life, freedom from torture), and these rights are traditionally seen as male human rights, instead of having a performative effect, the concept of gender is only used as a token /label. VAW is addressed indirectly and declaratively. This may continuously lead to structural inequalities, because the illusion remains that the problem has now been "dealt with." Due to these essential gaps in the strategy of gender mainstreaming, the effects of gender mainstreaming should not be over-exaggerated.

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225 Convention on the Right of Persons with Disabilities, New York, 13 December 2006. United Nations, Treaty Series, vol. 2515, p. 3. There were 157 state parties of the Convention in September 2015.

226 Dianne Otto, "The exile of inclusion: reflections on gender issues in international law over the last decade," *Melbourne Journal of international law* 10, (2009): 11-26. The author criticized UN SC resolutions on VAW during war conflicts No.1325 and No. 1820 which are much celebrated but legally not binding and lacking a sufficient understanding of inequality as the core basis of VAW.

227 See, for instance, Ilona Cairns contribution, *supra* note 21.

228 Christine Chinkin, "Violence against women," p. 449.

229 Alice Edwards, *supra* note 24, 339.

230 *Ibid.*

231 Sari Kouvo, *Making just Rights? Supra* note 48, p. 318.

232 In the sense that it can be used by men and boys, as well as women. *Ibid,* "The neutralization of the strategies has resulted in a shift, whereby the integrative strategies re no longer viewed as *means to an end*, but rather as *the end in and of themselves*," p. 333 (emphasis by S. Kouvo).

1.2.3. Filling the gap under the CEDAW

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has gradually developed into the most significant global document used to tackle VAW. Adopted at the Copenhagen Conference by the UN General Assembly in 1979, it strives to prevent discrimination against women[233] in the public as well the private sphere. The CEDAW is one of the fundamental UN human rights Conventions and a global instrument for the implementation of women rights.[234] In 1981, the CEDAW entered into force: faster than any other human rights treaty before. As of January 2016, it had 189 state parties. It is asymmetric legal instrument that is aimed at elimination of discrimination of women. Thus, it serves as an acknowledgement that women are discriminated in all areas of life, and a binding commitment to strive for gradual changes. In the absence of any global treaty which explicitly forbids VAW, the CEDAW gradually developed into the most significant instrument in this area. Even the more-specific regional instruments in Europe, which *do* explicitly apply to VAW (the CoE Istanbul Convention), and which do so indirectly (the EU Victim rights Directive) provide references to the CEDAW[235] and it should be clear that regional human rights acts should not be regarded in isolation but rather in harmony with this fundamental human rights document, which has been used to develop tools tackling VAW.

The CEDAW must be seen as a dynamic instrument[236] that changes with the development of international law in the area. The CEDAW establishes a transformative, holistic and gender specific approach, where transformative aspects of the CEDAW can be linked with social and economic elements, the holistic approach - with political and civil rights, and gender specific approach - with clear frame of non-discrimination and equality paradigm.[237]

The Convention does not envisage special rules on its interpretation, thus the general rules on interpretation of public international law can be used, as included in Vienna Convention on the Law of Treaties.[238] The CEDAW Committee is entitled to consider the progress made with the aim of implementation of the said Convention (Article 17 part 1

233 The principle of non-discrimination on the basis of sex was included in the UN Charter in 1945, which means that all states adhering to it made the commitment to strive toward "equal rights of men and women." Charter of the United Nations, 24 October 1945, 1 UNTS XVI. However, the placement of this principle only in Preamble, and its gender neutrality reveals a cautious approach. The subsequent prohibition of discrimination on grounds of sex (Article 2) in the Universal Declaration of Human Rights was also gender-neutral. Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 217A (III). U.N. Doc. A/RES/3/217A.

234 The CEDAW entered into force in 1981 and currently has 99 signatories and 88 contracting parties. The United States has signed this Convention in 1980 but has not ratified it.

235 The references to the CEDAW are also included in the texts of the said documents, see recital 38 of the Victims rights Directive, and the Preamble of the Istanbul Convention. *Supra* note 17.

236 GR 28, *supra* note 102, para 2. 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, para 3.

237 Anne Hellum, Henriette Sinding Aasen, *supra* note 23, at p. 2.

238 United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Art 31-32.

of the CEDAW). It comprises of members delegated by the States Parties and who are independent experts, rather than representatives of the governments. The Committee itself is a forum which connects the governments, domestic and transnational human rights stakeholders and performs the central role[239] in striving towards substantive equality.

Article 1 of the Convention defines discrimination against women (and girls) as "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." The CEDAW definition includes the gender-based' discrimination[240] and is more specific than other definitions in domestic and international law, conceiving discrimination on grounds of sex as unjustifiably distinct treatment of men and women.[241] In 2010, the CEDAW Committee stated in its General Recommendation No. 28 that "[t]he term gender refers to socially constructed identities, attributes and roles for women and men and society´s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women."[242] Although the term "gender" might allow this, to this date the CEDAW Committee has been rather hesitant to recognize discrimination faced by transgender and intersex individuals and instead, focused only on women, understood in a more narrow sense. Even more so, the Committee seem to suggest that the Convention strives towards equality of women on the equal *basis with men,*[243]a formulation which allows the room for criticism that men are still the defining norm and women barely have to be assimilated and raised up to this norm.

The Convention establishes general obligations of the states in article 1 (Discrimination), Article 2 (policy measures), Article 3 (Guarantee of basic human rights and fundamental freedoms), Article 4 (Special measures) and Article 5 (Sex Role stereotyping and Prejudice). It also enlists more specific measures, as specified in substantive provisions of the Convention. The state parties undertake to take measures against exploitation of prostitution of women (Article 6), ensure that women are not discriminated in political and public life (Article 7), they are equally represented in governments and internationally (Article 8), and not discriminated in matters of nationality (Article 9). Moreover, in Articles 10-16, the Convention requires the state parties to take measures in order to achieve substantive equality in fields of: education, employment, health, economic and social benefits, equality before the law, marriage and family life, and to take into account particular problems that rural women are facing. Analysis of these CEDAW provisions shows that the CEDAW

239 See Andrew Byrnes, "The Committee on the Elimination of Discrimination against Women", in *Women's human rights: CEDAW in international, regional and national law*, *supra* note 23, 27-61.

240 Andrew Byrnes, "Article 1". In *The UN Convention on the Elimination of all Forms of Discrimination against Women: A commentary,* Beate Rudolf, Marsha A. Freeman., Christine Chinkin (eds.), (Oxford commentaries on international law. Oxford, New York: Oxford University Press, 2012), 59.

241 *Ibid,* Andrew Byrnes, p. 52.

242 GR 28, *supra* note 102, para 236.

243 CEDAW Committee's General Recommendation No. 21 on Equality in marriage and family relations, adopted in 13th session, 1994, para 40.

requires not only modifying and abolishing the existing laws that condone discrimination of women, but also improving the substantial equality (programs and policies need to be created) and finally, addressing stereotyping in law, societal structures and elsewhere.

The reasons why the Convention does not mention VAW are twofold: first, the time was not yet ripe[244] to recognize that discrimination also encompasses VAW. For instance and in contrast to the CEDAW, Article 4 and 5 of the UN Convention against all forms of racial discrimination[245] provides for clear reference to the right to be free from racial violence. Most of the VAW is committed privately (in the family and by private individuals), thus the latenticity of these crimes allowed them to be hidden in the shadows. On the other hand, it can also be claimed that specific provisions in substantive Articles 1-16 of the CEDAW indirectly and *systematically* address the issue of VAW. It is especially true if we think about structural VAW[246] which is not perpetrated by private individuals as such but occurs when "major institutions consistently produce disproportionately disadvantageous outcomes for the members of certain salient social groups and the production of such outcomes is unjust."[247] Thus, it can be said that women historically faced structural VAW perpetrated by the state, and the CEDAW, albeit indirectly, strived to eliminate (or rather, to decrease) these structural injustices that resulted in VAW. The CEDAW also tackled structural and systemic nature of VAW,[248] perpetrated by private individuals, indirectly by striving at substantive gender equality.

Although the creation of CEDAW was without a doubt a significant step, some authors note that it "also resulted in the marginalisation of women's rights within the 'mainstream' system for the promotion and protection of human rights."[249] For instance, Carin Benninger-Budel claims that considering that there is a special women rights Convention, other human right monitoring bodies addressed women rights violations only fragmentally, which attracted the criticism from women rights advocates.[250] The CEDAW Committee was not treated as a "full human rights treaty"[251] either, and it is only in the end of the first millennium that the situation has changed.

Alice Edwards points out the same problem of marginalization regarding VAW, i.e. although women rights are no longer ignored, when they are incorporated under the CE-

244 Christine Chinkin, "Violence against women", in *The UN Convention on the Elimination of all Forms of Discrimination against Women: A commentary, Oxford commentaries on international law,* Beate Rudolf, Marsha A. Freeman, Christine M. Chinkin (eds.), (Oxford, New York: Oxford University Press, 2012), 444-445. There were some suggestions from Belgium to mention the "attacks on the physical integrity of women" in the text (Article 7 on political and public life), but they were not followed.

245 International Convention on the Elimination of All Forms of Racial Discrimination, UN GA resolution 2106 (XX) of 21 December 1965, entered into force 4 January 1969.

246 Jonah Galtung, "Violence, peace and peace research," Journal of peace research 6, (1969): 167-191. The EIGE suggests to see this VAW as indirect violence, see http://eige.europa.eu/gender-based-violence/what-gender-based-violence/forms-gender-based-violence. Accessed July 2016.

247 *Ibid,* 170.

248 The difference between structural VAW and structural nature of VAW is that the first concept refers to VAW perpetrated by the state, and the second concept refers to global pattern of VAW.

249 *Due Diligence and Its Application to Protect Women From Violence*, *supra* note 27, p. 7.

250 *Ibid.*

251 Cees Flinterman, "CEDAW: a full human rights treaty body?", In *The women's Convention turned 30,* p. 395.

DAW and VAW is treated as a form of sexual discrimination (VAW=SD), "they do remain on the margins in terms of equality."[252] On the other hand, empirical evidence shows that ratification of the CEDAW had an effect on adoption of normative prohibition of domestic violence at domestic levels.[253] Reservations of CEDAW also had a negative impact: countries that made reservation to Article 2 of the CEDAW were less likely to adopt marital-rape protections (by 15,8 percent) and domestic violence protections (26,2 percent). In short, some empirical data shows that CEDAW matters for normative legislations, which does not however necessarily show an improved position of women.

Although it is not the aim of this thesis to go deep into the separate topic of reservations to the CEDAW,[254] it must be noted that the Convention has a very high number of reservations and the number is impermissible reservations[255] is particularly worrisome. For instance, the Committee stated that Articles 2, 16 are the core of the Convention, yet there had been many reservations to these articles, including by states with significant political influence and great progress regarding gender equality (e.g. U.K.).[256] While Article 2 refers to equality in general, Article 16 refers to marriage and family life. These two articles are absolutely central for VAW problem as well.

Some countries, like the UK, arguably presented reservations in order to protect the national sovereignty as such, while others tried to protect "traditional practices" which are seen as harmful by the CEDAW.[257] Many states expressed objections to reservations that they consider as impermissible.[258] The CEDAW Committee also criticized reservations to Article 2 and 16, and recommended to withdraw the reservations in its statements[259] and general recommendations. At the same time, it is constantly faced with the task of counter-balancing political sensitivities and the desire not to "lose" the states which already ratified the Convention, against the aim of "bridging the gap between ratification and implementation."[260] Both in the discussion on reservations to the CEDAW, as well as

252 Alice Edwards, *supra* note 24, p. 319.

253 States which ratified CEDAW, are more likely (23,4 %) to adopt normative documents on protection against domestic violence, David. L. Richards, Jillienne Haglund, *supra* note 29, 115. Although CEDAW ratification had a significant impact on domestic violence legislation, it did not have a positive impact regarding laws on rape. The authors say that this is due to the fact that countries are likely to have laws on protection against domestic violence, while they criminalise rape.

254 For that purpose, see Aistė Akstinienė, *Reservations To Human Rights Treaties Related To Gender Issues,* (Saarbrücken: LAP Lambert Academic Publishing, 2013).

255 Article 28 (2) of the CEDAW refers to the impermissibility principle, as contained in the Vienna Convention on the Law of Treaties, i.e. a reservation which is incompatible with the object and purpose of the Convention.

256 Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/SP/2006/2, 10 April 2006. Also see the updates at UN Women webpage.

257 Aistė Akstinienė, "Reservations to human rights treaties: problematic aspects related to gender issues," *Jurisprudence*, 20, 2 (2013):451–468. At 465, she says:"[t]here is a close link between the reservations made by the states based on the cultural and religion aspects and these harmful traditional practices."

258 *Ibid.* A stricter formulation of objections to reservations was advised.

259 Report of the Committee on the Elimination of Discrimination against Women, Fifty-third session of GA, 1998, Supplement No. 38 (A/53/38/Rev.1)

260 *Ibid,* opening of the session by the Chairperson of the Committee, Ms. Salma Khan (Bangladesh).

its implementation, some traps need to be avoided. For instance, the agenda focusing on "harmful traditional practices" may fall into a culturalist trap,[261] where VAW becomes associated primarily with non-Western cultures and thus marginalized. The extreme focus on FGM and so called "honour" crimes has a tendency to overshadow the structural nature of VAW and global patterns. Furthermore, the CEDAW Committee initially had added to the "created confusion"[262] by not clearly expressing and motivating its position regarding reservations, however, currently it takes a strong and motivated position.[263] It is also suggested that the Committee could further clarify its position regarding reservations that may be directly and indirectly related to VAW in upcoming update of GR 19 or in a new GR on reservations.

Finally, besides Iran, the Holy See, Niue, Palau, Somalia, Sudan, South Sudan, and Tonga, the United States of America also refrains from participation in the CEDAW.[264] This can be explained by a number of complex reasons; however, the division of public and private is probably the most significant matter.[265] It is also recalled that a ratification of the CEDAW does not necessarily lead to significant national changes and a serious committal to improved human rights standards.[266] Although empirical data shows some effect, ratification of the treaty itself does not guarantee the improved dignity of women.

1.2.3.1. Development of tools on VAW under the CEDAW

The CEDAW Committee started to work in 1982. The Committee is authorized to adopt General recommendations,[267] in order to provide the states with guidance on interpretation of the CEDAW, as well as to adopt Concluding observations to overview the state parties' reports.[268] In addition, the CEDAW committee can hear individual complaints and issue decisions, statements, and suggestions.[269]

261 The frame of harmful traditional practices, developed in 1980s at the UN level, was seen as "selective culturalisation" and criticized in particular by post-colonial feminists, who felt that VAW was seen as the problem of non-Western cultures and FGM and honour crimes were over-exploited. See Lourdes Peroni, "Violence against migrant women: the Istanbul Convention through a postcolonial feminist lens", *Feminist legal studies* 24, (2016):53-54.

262 Zoe Luca, "Reservations to the women's Convention: a Muslim problem ill addressed," In *The women's Convention turned 30*, at 433.

263 In particular, see the draft update of GR 19, *supra* note 19, which states that the Committee treats reservations under Articles 2 and 6 as impermissible, para.8.

264 The problem of VAW in the USA is also quite prevalent and state response is far from sufficient, as seen from the case of Jessica Lenahan (Gonzales) v. United States of America, *supra* note 26.

265 The USA has not ratified the UN Rights of the Child Convention, either. For an overview of USA stance regarding VAW perpetrated by private individuals, see. Valorie K. Voijdik, "Conceptualizing intimate violence and gender equality: a comparative approach." *Fordham International Law Journal* 31 (2008): 487-527.

266 It takes time for states to start tackling VAW specifically. For instance, the law on DV has been adopted only in 2015 in China, although in principle DV has been forbidden under marriage laws since 2001.

267 In the early years of the work of the Committee, it was not clear whether it can adopt General Recommendations, thus the UN Legal counsel was inquired.

268 Specific –country comments are being drafted since 1993.

269 *Supra* note 240, Christine Chinkin and Marsha A. Freeman, "Introduction", p 23.

The first General Recommendation on VAW that the CEDAW adopted was the General Recommendation No. 12 in 1989.[270] In it, the Committee responsible for monitoring the implementation of the Convention (the CEDAW Committee) required the states to include information on legislation on VAW as well as other relevant measures in their periodic reports. This was the very first step on putting the VAW on the Committee's agenda. Most significantly, in its General Recommendation No. 19 on violence against women (1992), the CEDAW Committee thoroughly explained the content of the state's duty to protect women from violence, including gender-based violence at home:

> "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."[271]

The adoption GR 19 cannot be under-estimated: its significance remains to this date, and is widely used on both global and regional levels. It was a "paradigm shift."[272] The GR 19 provides a thorough review of VAW problem and included general comments, as well as comments on specific articles of the CEDAW with more specific recommendations. Therefore it was named as the gap-filler which provided the missing link[273] of understanding VAW as a human rights violation.

What is the status of the General recommendations of the CEDAW Committee? It must be admitted that GRs are not normative instruments, although the Convention itself is. Nevertheless, it must be recalled that the legal status of such General Recommendations (of the UN treaty-interpreting bodies) must be *weighed against their source*. From the case law of International Court of Justice (ICJ), it can be inferred that the recommendations of UN Committees are more or less authoritative sources of interpretation. The ICJ stated, in particular, that it "believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled."[274] Thus, although the very title of the GRs refers to the soft-law nature, it can nevertheless be claimed that within the system of sources of international law, they must be taken very seriously.

Two aspects must be underlined regarding the formulation on prohibition of VAW under GR 19. First, violence against women under GR 19 is recognized as *a violation in itself* rather than an activity that may lead to human rights violations. This is a response to old

270 CEDAW Committee, General Recommendation No. 12, eighth session, 1989.

271 GR 19, *supra* note 5, para. 9.

272 Kate Rose-Sender, "Emerging from the Shadows: Violence against women and the Women's Convention," In The Women's Convention Turned 30, p. 464.

273 Heisoo Shin, "CEDAW and violence against women: providing the missing link," In *The circle of empowerment: Twenty-Five years of the UN committee on the Elimination of Discrimination against women,* Kofi Annan, Hanna Schopp-Schilling, Cees Flinterman (Eds) (New York: The Feminist Press, 2000) 223-233.

274 Case concerning Ahmadou Sadio Diallo, ICJ, para 66. Notably, the ICJ was referring to the UN Human Rights' Committee General Comments in this context.

general perception that if a woman had been beaten or raped but did not suffer extreme physical damage, the act of violence in itself should not considered a violation of rights. Only if the woman has suffered physical damage, lasting psychological damage or death, it was recognized that violence resulted in human rights violations. GR 19 was significant inasmuch as it established, albeit rather flexibly and in a form of a soft law instrument, VAW as a violation of human rights in itself.

Second, the CEDAW tackles the issue of VAW violence problem within the paradigm of equality.[275] Clearly, it is the only tool that the CEDAW Committee had, having the mandate to interpret in the field of discrimination against women, and they used it to say that VAW is a form of discrimination, and thus, is included under the Convention. Under the CEDAW, VAW is seen as stemming from the historically unequal positions of men and women in all areas of life, including the patriarchal attitudes with respect to their roles in the family. Domestic violence (violence within family) is also seen as one form of "widespread practice"[276] that constitutes discrimination under the Convention.

GR 19 presents the rights-based approach that views women as having the right to be free from violence, which should be ensured by the state. General Recommendation No 19 defines gender-based violence as "violence that is directed against a woman because she is a woman or that affects women disproportionately".[277] There is no definition what "disproportionality" means in this regard. It may seem to suggest that disproportional violence is the violence which is perpetrated to women much more than to men, and violence that has disparate impact on women's lives.[278]

VAW has also been addressed by other General Recommendations (GRs) since 1992. For instance, in 1999 the GR 24[279] explained that the right to be free from violence is an integral part of the right to health under Article 12 of the CEDAW, and in 2010, the GR 28[280] included intersectional discrimination under Article 2 of the CEDAW, and underlined vulnerability of certain women groups, e.g. refugee women, disabled women, lesbians, elderly women and widows, etc. GR 33, adopted in 2015,[281] addressed the issue of access to justice, including the problems of the victims of VAW while encountering alternative justice systems and plural justice systems. The issue of VAW, although not mentioned in the original text of the Convention, gradually became one of the most targeted issues under the CEDAW, both in its GRs and Concluding observations.

Furthermore, although the CEDAW itself did not mention states' "due diligence" duty to prevent VAW, the GR 19 introduced this term into the interpretative framework. The thesis

275 Joan Fitzpatrick, "The use of International Human Rights Norms to Combat Violence against Women" *In Human Rights of Women. National and International Perspectives,* Rebecca J. Cook, R.J. (ed) (Philadelphia: University of Pennsylvania Press, 1994) 532, 535.

276 GR 19, *supra* note 5, para 11.

277 *Ibid,* para 6.

278 Christine Chinkin, "Violence against women", in *The UN Convention on the Elimination of all Forms of Discrimination against Women: A commentary, supra* note 244, 452.

279 CEDAW Committee, General recommendation No. 24: Article 12 of the Convention on Women and health, twentieth session, 1999.

280 GR 28, *supra* note 102.

281 General recommendation No. 33 on women's access to justice. CEDAW/C/GC/33, 3 August 2015.

subsequently analyses the content of the said duty; here, it is important to underline that subsequently, the U.N. General Assembly also adopted the approach based on "due diligence" to VAW undertaken by private perpetrators. E.g. in its resolution No. 61/43 on violence against women, UN GA urges the states to "exercise due diligence to prevent all acts of violence against women, which may include improving the safety of public environments,"[282] as well as requires trainings of judges, health specialists, journalists, teachers and other specialists on gender equality. In the subsequent series on VAW, due diligence In its landmark Resolution 58/147,[283] the UN GA explicitly recognized DV as the most common form of VAW and called the states to take a number of specific actions.[284] The due diligence concept has been used so widely under the CEDAW since 1990s that it has been called "due diligence mania."[285]

The requirement of the states to act with due diligence while protecting against VAW was also entrenched at regional levels (conventions).[286] The contents of due diligence have also been gradually developed in jurisprudence of the CEDAW. 20 years after the adoption of the CEDAW, the UN GA adopted the Optional Protocol to the Convention.[287] Both individual complaints and inquiry procedures are available under the Protocol. In the first case, individual woman or groups of women can submit claims of violation of their rights under the Convention by the state party to the Convention, provided that domestic remedies are exhausted. In the second case, the Committee itself may initiate an inquiry into grave and systematic women rights violations. The Protocol's significant contribution can be seen precisely in cases on VAW, including domestic violence. The cases of *A.T. v Hungary*,[288] *Goecke v Austria*,[289] *Yildirim v Austria*,[290] *V.K. v. Bulgaria*,[291] and *Jallow v. Bulgaria,*[292] have been significant in establishing the due diligence standard in relation to domestic violence against women. In cases like *Vertido v Philippines*,[293] *V.P.P. v Bulgaria*,[294] and others, the CEDAW committee expressed its views on VAW perpetrated in the community. Moreover, the Committee also took up a few inquiry proceedings: on abduction, rape and murder of

282 UNCHR UN Doc A/Res/61/143 on violence against women, 16 December 2006, para 8.

283 UNGA Res. 58/147 on Elimination of domestic violence against women, UN Doc. A/RES/58/147, 19 February, 2004.

284 In addition, VAW has also been addressed in series of resolutions on "Intensification of efforts to eliminate all forms of violence against women," for instance, see Resolutions 64/137 (2009), 63/155 (2008), 62/133 (2007), and 61/143 (2006), and series of resolutions on "Elimination of all forms of violence, including crimes against women" (see Resolutions 59/167 (2004), 57/181 (2002), and 55/68 (2000), and series on "In-depth study of all forms of violence against women (see Resolutions 60/136 (2005) and 58/185 (2003).

285 Menno T. Kamminga, "Due diligence mania" in *The Women's Convention Turned 30*, 407-413.

286 E.g. Convention of of *Belém do Pará*, *supra* note 134, Article 7.

287 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, A/RES/54/4, 22 December 2000, No. 20378.

288 A.T. v Hungary (2/2003), 26 January 2005, A/60/38 (2005); 12 IHRR 998 (2005).

289 Goekce (deceased) v Austria (5/2005), 6 August 2007, CEDAW/C/39/D/5/2005.

290 Yildirim (deceased) v Austria (6/2005), 6 August 2007, CEDAW/C/39/D/6/2005.

291 V.K. v. Bulgaria, 25 July 2011, CEDAW/C/49/D/20/2008.

292 Jallow v. Bulgaria, 23 July 2012, CEDAW/C/52/D/32/2011.

293 Vertido v Philippines, 22 September 2010, CEDAW/C/46/18/2008.

294 V.P.P. v Bulgaria, 12 November 2012, CEDAW/C/53/D/31/2011.

hundreds of women in Mexico,[295] on abduction and murder of aboriginal girls in Canada, and on women's reproductive and sexual health in Philippines.[296]

In addition, in 2008 the CEDAW Committee started to develop a follow-up procedure under the Optional Protocol, to scrutinize how the governments concerned implement these decisions.[297] It subsequently adopted the Rules for procedure for the Optional Protocol, where follow-up procedure is laid down (rule 73).[298] The rule provides that in 6 months since the Committee has submitted its views on communication, the state party must submit a response, and explain what actions have been taken. If the Committee is not fully satisfied with the state's response, it may continue its persuasive pressure (in subsequent concluding observations, for instance), and appoint a rapporteur or working group for further communications. The CEDAW Committee also monitors the implementation of its concluding observations.[299] Regarding the protection of victims, besides the already analysed tools that the CEDAW Committee can use, Article 5 of the Optional Protocol[300] now allows the CEDAW Committee to propose interim measures in situations where "irreparable harm" can be caused to the victim. It must be noted that the CEDAW Committee can only request the State to take this measure into its own "urgent consideration". Therefore this request is not legally binding and depends upon the good faith of the states parties, which has been criticized as a naïve position having regard to the noncompliance of states with human rights instruments in general.[301] In a few instances related to VAW, Denmark[302] and Hungary[303] were asked to apply interim measures and failed to do that.

It must also be noted that the International Court of Justice (ICJ) has the mandate to assess the CEDAW under Article 29 (1) of the Convention, provided that the states have not submitted a reservation to this Article under 29 (2). Many countries have,[304] although some

295 Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico. CEDAW Committee, CEDAW/C/2005/OP8/Mexico (27 January 2005).

296 Please see all inquiries at: https://opcedaw.wordpress.com/inquiries/all-inquiries/ Accessed 12 September 2016.

297 Andrew Byrnes, Eleanor Bath, "Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women - Recent Developments", *Human Rights Law Review* 8, 3 (2008): 517-533.

298 Rules for procedure for the Optional Protocol, please see http://www.un.org/womenwatch/daw/cedaw/cedawreport-a5638-RulesOfProcedure.htm#part3 Accessed 3 September 2016.

299 CEDAW Committee, Methodology of the follow- up procedure. CEDAW/C/54/3. 13 March 2013.

300 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 15 October 1999, A/RES/54/4.

301 Sille Jansen, "The Optional Protocol to the Women's Convention: An Assessment of its effectiveness in Protecting Women's Rights" *In The Women's Convention turned 30, Achievements, Setbacks, and Prospects,* Ingrid Westendorp (ed.) (Cambridge-Antwer-Portland: Intersentia, 2012), 30-31.

302 M. W. v Denmark. CEDAW/C/63/D/46/2012. No. 46/2012, views adopted on 14 March 2016. See para. 5.12.

303 A.T. v Hungary (2/2003), 26 January 2005, A/60/38 (2005); 12 IHRR 998 (2005).

304 Reservations to Article 29 (1) were submitted by Algeria, Argentina, Bahamas, Bahrain, Brazil, Brunei Darussalam, China Cuba, Democratic People's Republic of Korea, Egypt, El Salvador, Ethiopia, France, India, Indonesia, Iraq, Israel, Jamaica, Kuwait, Lebanon, Mauritius, Federated states of Micronesia, Monaco, Morocco, Mianmar, Niger, Oman, Pakistan, Venezuela, Saudi Arabia, Singapore, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, Viet Nam, Yemen.

have also withdrawn[305] their reservations later. It must be noted that refusing from ICJ mandate in this matter is a legitimate reservation, which does not contradict to the object and purpose of the Convention and has not called for objections. United Arab Emirates explained the rationale behind their reservation: "this article [...] violates the general principle that matters are submitted to an arbitration panel by agreement between the parties. In addition, it might provide an opening for certain States to bring other States to trial in defence of their nationals; the case might then be referred to the committee charged with discussing the State reports required by the Convention and a decision might be handed down against the State in question for violating the provisions of the Convention."[306] The precaution expressed in the first sentence - the agreement with ICJ's mandate in an individual case - is common in other reservations as well. No case related to VAW has been submitted to ICJ so far, even though in some communications, the CEDAW has been touched upon.[307] It is suggested that the ICJ could hear the case on CEDAW, first, in cases where both states have not submitted the reservation, and also (possibly) in cases where one of them has, but in that particular situation, it thinks it is a good idea to submit the dispute for arbitration of the ICJ. Not all states submitted a reservation of such a strong language as United Arab Emirates - others said that disputes should not be submitted to ICJ "except with the consent of all the parties to the dispute."[308] The author contends that ICJ adjudicating on CEDAW could possibly clarify certain aspects of its status under international law. For instance, it could contend that VAW falls under customary international law and clarify the scope of states' positive duties regarding individual and systemic due diligence. It may help clarify the issue whether state responsibility in the field of VAW could extend to inter-state claims[309] and on which conditions. It may help clarify other remaining gaps still evident at the global level.

It was provided clearly in GR 19 that states may be held accountable "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."[310] It is possible to distinguish different kinds of obligations of state under this commentary: first, a state is obliged to prevent violations of rights with due diligence; second, it must investigate and punish acts of violence with due diligence, in case violations of rights do occur; third, a state is obliged to provide for compensation. Disregarding the usage of "or" in the formulation of CEDAW's Com-

305 In 1989, Governments of the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic recalled the reservations under Article 29. Bulgaria recalled it in 1992. Hungary recalled it in 1989, Mongolia - in 1990, Poland and Romania - in 1997.

306 Declarations, Reservations and Objections to CEDAW, United Arab Emirates, http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N58

307 Democratic Republic of the Congo v. Rwanda, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, para. 91. The ICJ said "for purposes of Article 29 of the Convention, that Article requires also that any such dispute be the subject of negotiations."

308 The Algerian reservation to the CEDAW.

309 The question whether state responsibility against its people could extend to inter state claims or whether it is lex specialis pertinent only to this area, was raised by Christine Chinkin, "A Critique of the Public/Private dimension," *supra* note 4, p. 395.

310 GR 19, s*upra* note 5, General Comments, 9.

mentary, all of those obligations are to be interpreted cumulatively - they are not alternative obligations. The usage of "or" rather points out that state has to act both to prevent violations, or, in case violations already occurred, provide for remedy, which should involve possibilities of redress under both criminal and civil law provisions.

Specific measures that are necessary to overcome VAW have been described by the CEDAW Committee, among those: (i) Criminal penalties where necessary and civil remedies; (ii) Legislation to remove the defence of honour in regard to the assault or murder; (iii) Services to ensure the safety and security of victims, including refuges, counselling and rehabilitation programmes; (iv) Rehabilitation programmes for perpetrators of VAW.[311] As to obligation to investigate and prosecute violators, in order to provide for successful investigation of domestic violence cases a "systematic data collection and research on violence against women, in particular domestic violence"[312] must be ensured. Moreover, an obligation to prosecute entails state's obligation "to ensure that violence against women is prosecuted and punished with the required seriousness and speed."[313] The specific content of adequate remedy, including investigation and punishment, varies from case to case.

There is a difference between due diligence obligation to prevent human rights violations and obligation to provide for effective remedy for the specific victims. The mechanisms implemented in order to ensure the later obligation come into play only when the first obligation failed to protect an individual. Moreover, in case of a right to subsequent remedy, a third party comes into scene, unlike in prevention of violations of human rights. Prosecution and punishment of perpetrators of VAW becomes necessary. In cases of domestic violence, prevention and punishment obligations may overlap, as noted by Special Rapporteur on VAW Rashida Manjoo,[314] considering that women need to be prevented from the future repeated violence. As to the obligation to provide a right to compensation for victims of domestic violence, implementation of right to an adequate remedy, and effective enforcement of this right is necessary. Although the CEDAW General Recommendation only demands for establishment of right to compensation, other conventions[315] prescribe the right to an effective remedy. Compensation is just one sort of adequate remedy to seek, which does not in principle preclude the right to remedy under penal law or international law.

The broad approach to state obligations that the CEDAW Committee has taken in the case law above also results in acknowledgment of multiple and intersectional discrimination of women.[316] Cases of *Jallow v. Bulgaria*, *Kell v. Canada*,[317] *Goecke v. Austria*, *Yildirim v. Austria* allowed arguing that both the statuses of a woman and

311 *Ibid*, at para 24.

312 Committee on the Elimination of Discrimination against Women, Twenty-eighth session, Consideration on Albania's report, 13-31 January 2003. Para 33.

313 *Ibid.*

314 Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo. Due diligence report, 14 May 2013, A/HRC/23/49, para 74.

315 International Covenant on Civil and Political Rights, Art 2(3) a. ECHR Art 13.

316 Julie Goldscheid, Debra Liebowitz, *supra* note 97, p. 333.

317 Kell v Canada (32/2011), CEDAW/C/51/D/19/2008. The case involved intersectional discrimination, where an aboriginal woman was faced with domestic violence and also lost access to her home.

that of a migrant / minority are significant. Women of different abilities, skin colour, ethnicity, pregnant women, and sexual minority women are affected by additional structural inequalities: these different forms of subordination often exacerbate abuse. In the presented update of the GR 19 on VAW (2016), the CEDAW Committee also acknowledges[318] that women of different groups may be affected by intersectional discriminations and this may have a stronger and adverse effect to their experiences of violence.

1.2.3.2. The concept of due diligence as the gap filler

The scope and determination of state responsibility for women rights violations in cases where, on the one hand, VAW was committed by state actors; and in the second instance, was perpetrated by non-state actors, differ in the manner of attribution of state responsibility. In the first case, a direct breach of an international obligation of the state can be found, and in the second case, the state's responsibility is less clear. Notably, the International law commission in the Draft Articles on State Responsibility for Internationally Wrongful Acts pointed out a general rule "that conduct of private persons or entities is not attributable to the state under international law."[319] However, in this particular case the concept of due diligence is the most important – the states must take all appropriate measures in order to prevent, investigate, punish and redress a human rights violation, i.e. act with due diligence. The due diligence duty is seen as an exception / extension of the general rule on attribution of state responsibility to the acts and omission of its agents.

For many years, it was considered that state responsibility only applies to cases of clear evidence of VAW by the state agents. The analysis of individual complaints and inquiries of grave and systematic violations of women rights under the CEDAW demonstrate the shift towards more expansive interpretation on due diligence obligations. Instead of the former state-centred approach, GR 19 and subsequent GRs and case-law under the CEDAW lead to understanding of the due diligence obligation as the responsibility of the state to prevent gender based violence, prosecute and punish perpetrators, and protecting and providing redress for gender based violence victims. By now it should be clearly understood that due diligence standard is high. At the same time, it has weaknesses, considering that it only requires a code of conduct/ efforts rather than a positive result.[320] States have a margin of appreciation as to the measures that they choose in response of VAW.

Special Rapporteurs on VAW also tried to clarify what that entails in particular in this area. First, Special Rapporteur on VAW Radhika Coomaraswamy in her 1999 report on domestic violence presented a check-list of the indicators for the positive obligations of the state.[321] Special Rapporteur on VAW Yakin Ertürk in 2006 devoted the report in particular

318 Update of GR 19, *supra* note 19, para 11.

319 International law commission, Draft Articles on State Responsibility for Internationally Wrongful Acts. Yearbook of the International Law Commission, 2001, vol. 2, Part Two, Commentary to Article 8, 103.

320 Menno T. Kamminga, *supra* note 285, 413.

321 Report of the Special Rapporteur on violence against women, UN Doc. E/ CN.4/1999/68, 10 March 1999, para. 25.

analysing the standard of due diligence (further - 2006 Due Diligence Report or Yakin Ertürk Due Diligence Report).[322] An updated version of the Due Diligence Report was adopted in 2013 by the Special Rapporteur on VAW Rashida Manjoo (2013 Due Diligence Report or Rashida Manjoo Due Diligence Report).[323]

The due diligence duty is seen as "a yardstick to determine whether a State has met or failed to meet its obligations in combating violence against women", as described by the Special Rapporteur on VAW in 2006. At the same time, it was admitted that the standard of due diligence lacked clarity.[324] Yakin Ertürk suggested that full compliance of states with international law must be demanded, "including an obligation to address the root causes of violence against women and to hold non-State actors accountable for their acts."[325] At the same time, the contents of what exactly must be done in order to comply with the due diligence standard were difficult to clarify: "[w]hat is required to meet the standard of due diligence will necessarily vary according to the domestic context, internal dynamics, nature of the actors concerned and the international conjuncture." Hence, the due diligence standard in the area of VAW retained flexibility and allowed to provide justifications based on local context: e.g. lack of resources.

In 2013 Due Diligence Report, the Special Rapporteur on VAW distinguished two categories of state responsibility in compliance with due diligence standard. First, the states have to act with "individual due diligence" with regards to their obligations to individual persons and groups.[326] Rashida Manjoo explained that individual due diligence must leave the room for flexibility and be exercised with paying due regard to individual needs and interests. Second, the states have "systemic due diligence" obligation to develop a "holistic and sustained model" of prevention, protection, punishment and reparation of damage.[327] The systemic due diligence demands more efforts from the states, but is less eagerly observed, because it does not involve direct state liability or liability of state agents. The language of human rights attributes states responsibility to individual human rights violations and not the lack of substantial changes. However, it must be recalled that the states do have a broad obligation to prevent systemic violence, and not only prevent repeated VAW in cases of immediate urgency.

Although the due diligence standard remains "relatively elusive,"[328] the Due Diligence Reports, and the Special Rapporteur's suggested benchmarks /indicators to assess progress on VAW[329] are highly useful to assess state positive obligations. Further elaborations can be found in the jurisprudence of the CEDAW Committee and the concluding observations on state reports.

322 Yakin Ertürk DD report, 2006.

323 Rashida Manjoo Due Diligence report, A/HRC/23/49, *supra* note 314, 2013.

324 Yakin Ertürk Due Diligence report, E/CN.4/2006/61, *supra* note 51, para 14.

325 *Ibid*, para 102.

326 Rashida Manjoo Due Diligence report, *supra* note 314, para 70.

327 *Ibid*, para 71.

328 Alice Edwards, *supra* note 24, p. 260.

329 Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Erturk. Indicators on violence against women and State response, 2008. UN Doc.A/HRC/7/6, 29 January 2008.

1.2.3.3. Guiding standards on DV under the CEDAW

According to the CEDAW Committee, "[f]amily violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes."[330] During the last decade, the Committee also had a chance to clarify its stances in several cases of domestic violence (DV). Although the jurisprudence and concluding observations of the CEDAW Committee are not legally binding, they serve as a great sources of explanation on particular scope of the due diligence standard.

In its first case on VAW, *A.T. v Hungary*,[331] The Committee criticized the lack of accessible shelter and the failure to adopt a restraining order. VAW was placed strongly as a problem of equality: DV was seen as a consequence of "traditional roles by which women are regarded as subordinate to men."[332] In cases of *Goecke v Austria*[333] and *Yildirim v Austria*,[334] which were similar to each other in factual circumstances, the applications to the CEDAW Committee were brought on behalf of the diseased victims, killed by long-term domestic violence perpetrators.[335] The CEDAW Committee found that the state infringed its due diligence obligations,[336] while analysing whether the Austrian authorities "knew or should have known" that victims were in serious danger.[337] The Committee clearly thought that arrest in such cases is not disproportionately invasive, as Austria suggested—on the contrary, the failure to arrest in this case resulted in the breach of the state obligations.[338]

It must be noted that Austria had a law addressing DV, which was in these cases not applied. Thus, it is not enough to adopt a good law—it needs to be implemented. It seems that the majority of the countries should have VAW outlawed by 2016. This is indeed their

330 GR 19, *supra* note 5, para 23.

331 This was the case of domestic violence against a woman by her common-law husband. The Committee requested the concerned state (Hungary) to take interim measures for the urgent protection of the domestic violence victim and the applicant then received legal counselling for the purposes of ongoing civil proceedings in Hungary. The CEDAW Committee later held it was inadequate, because the applicant and her children still did not receive shelter, and no restraining order has been issued. The failure to restrict the perpetrator's rights to property was also condemned. A.T. v Hungary (2/2003), see paragraphs 4.2-4.8, 9.5. The CEDAW Committee found breaches of Articles 2(a) (b) and (e).

332 *Ibid,* see para 9.4.

333 Fatma Goekce (deceased) v Austria (5/2005), 6 August 2007, CEDAW/C/39/D/5/2005.

334 Sahide Yildirim (deceased) v Austria (6/2005), 6 August 2007, CEDAW/C/39/D/6/2005.

335 In both cases, the women requested for help, but arrests were not warranted and death threats resulted in killings.

336 Fatma Yildirim (deceased) v. Austria, Communication No. 6/ 2005. UN Committee on the Elimination of Discrimination against Women, decision of 1 October 2007, para 12.1.6; Sahide Goekce (deceased) v. Austria, Communication No. 5/2005. UN Committee on the Elimination of Discrimination against Women, decision of 6 August 2007, para. 12.1.4.

337 Goecke v Austria, *op. cit.,* para. 12.1.4.

338 Yildirim v. Austria, *op. cit.,*para. 12.1.5

increasing interest: e.g. Maldives in 2012[339] and Lebanon in 2014[340] adopted laws on domestic violence, in 2015 the law on DV was adopted in China.[341] In some states, legislation on DV has been adopted years ago but that did not lead to real changes. For instance, domestic violence act was adopted in 2008 in Jordan,[342] yet David L. Richards and Jillienne Haglund rendered Jordan as having zero legal protection.[343] This can be explained by the fact that their methodology of measuring the strength of legal protections involves not only the actual legislation but also whether it is implemented, and also whether it is applied in discriminatory way.[344] Furthermore, in some countries, justifications of the so-called "honour" serve to mitigate[345] or even limit criminal liability for DV, including femicides.[346] Even if a reasonable law exists, the CEDAW Committee is often concerned by high prevalence of VAW, as well as very low number of VAW, which indicates that VAW is under-reported.

Both the cases above and recent concluding observations show an increasing concern with protection needs of the survivors of DV. State duties of "prevention" and "protection" were partially overlapping in GR 19.[347] The Committee subsequently elaborated what general prevention and protection of women actually should entail, and provided very specific (albeit not binding) instructions.

Protection orders were not mentioned in GR 19, but currently the CEDAW Committee recommends including them in the legislation[348] or granting "full access" to already pre-existing protection orders.[349] Protection orders and immediate restraining orders are necessary and especially important in DV cases, but the Committee's approach also encom-

339 Concluding observations on the combined fourth and fifth periodic reports of Maldives. CEDAW/C/MDV/CO/4-5. 11 March 2015, para 22 (a).

340 Concluding observations on the combined fourth and fifth periodic reports of Lebanon. CEDAW/C/LBN/CO/4-5. 24 November 2015, para 27.

341 See UN global database on VAW, accessed 15 September 2016, http://evaw-global-database.unwomen.org/en/countries/asia/china/2015/law-against-domestic-violence.

342 Concluding observations of the Committee on the Elimination of Discrimination against Women: Jordan. CEDAW/C/JOR/CO/5. 23 March 2012, para 25.

343 David. L. Richards, Jillienne Haglund, *supra* note 29, 103.

344 *Ibid,* p. 76.

345 Concluding observations on the combined initial and second periodic reports of Afghanistan. CEDAW/C/AFG/CO/1-2. 30 July 2013, para 24.

346 Concluding observations of the Committee on the Elimination of Discrimination against Women: Yemen. CEDAW/C/YEM/CO/6. 9 July 2008, para 18.

347 E.g. it states that "measures to provide effective protection" should include inter alia "prevention measures" (public information, education) and "protective measures" (including refuges, counselling, rehabilitation and support services), GR 19, *supra* note 5, para 24 (t). The meanings of the said concepts include both protective and preventive aspects as well as victim support.

348 Concluding observations on the fourth and fifth periodic reports of Eritrea. CEDAW/C/ERI/CO/5. 12 March 2015, para 21. Concluding observations on the combined sixth and seventh periodic reports of Ghana. CEDAW/C/GHA/CO/6-7. 14 November 2014, para 27 d. Concluding observations on the combined seventh and eighth periodic reports of Viet Nam. CEDAW/C/VNM/CO/7-8. 29 July 2015, para 19 d.

349 Concluding observations on the combined fourth and fifth periodic reports of Vanuatu. CEDAW/C/VUT/CO/4-5, para 21 a. Concluding observations on the combined seventh and eighth periodic reports of Japan. CEDAW/C/JPN/CO/7-8, 7 March 2016, para 23 d. The Committee recommended to expedite the judicial process for issuing immediate protection (existing emergency orders).

passes the needs for protection against VAW in all other cases.[350] Protection must apply to various women, both married and cohabiting.[351] The Committee can also be very specific, e.g. asking "to supplement court-ordered protection with a system of police-ordered protection and enable the issuance of police emergency protection orders,"[352] require "adopt a precautionary approach for victims of alleged domestic violence that provides for the continued implementation of protection orders during the consideration of an appeal against such an order,"[353] and "introduce criminal sanctions for non-compliance with restraining orders."[354] In most cases, these recommendations are very much in the same line with the Istanbul Convention. It must be noted, that the CEDAW Committee started to include in its communications (as well as concluding observations on state reports) the recommendation of more general nature to ratify the Istanbul Convention.[355]

The challenge of globalization and cross-border movement is visible in the jurisprudence of the CEDAW. In the case of *Ms V. K. v. Bulgaria,*[356] the CEDAW Committee said that the compliance with Articles 2 (Policy measures) and 5 (Sex Role Stereotyping and Prejudice) needs to be assessed through an analysis of how the applicant's (a migrant woman's) case was handled by the courts. It appeared that national courts were basing their refusal to provide protective order on the narrow, stereotypical and preconceived notion of domestic violence.[357] Stereotyping adversely affected women's right to fair trial and created inflexible standards. Therefore, in this case, the state failed to banish gender-related stereo-

350 Concluding observations on the combined eighth and ninth periodic reports of Ecuador. CEDAW/C/ECU/CO/8-9. 11 March 2015, para 21 c. The Committee is specific that it expects a "legislation that provides for the immediate protection of women who are victims of violence upon the first report of violence, including through the issuance of restraining orders against alleged perpetrators." Concluding observations on the combined sixth and seventh periodic reports of the Dominican Republic. CEDAW/C/DOM/CO/6-7. 30 July 2013, para 25 b. Here the Committee demanded "to provide measures to protect potential victims, including restraining orders against perpetrators."

351 Concluding observations on the combined seventh and eighth periodic reports of Hungary, adopted by the Committee at its fifty-fourth session (11 February–1 March 2013). CEDAW/C/HUN/CO/7-8. 26 March 2013, para 21 b.

352 Concluding observations on the combined fourth and fifth periodic reports of the Republic of Moldova. CEDAW/C/MDA/CO/4-5. 29 October 2013, para 20 b.

353 Concluding observations on the combined fourth and fifth periodic reports of Croatia. CEDAW/C/HRV/CO/4-5. 28 July 2015, para 19 f.

354 Concluding observations on the seventh and eighth periodic report s of Austria, adopted by the Committee at its fifty - fourth session (11 February–1 March 2013). CEDAW/C/AUT/CO/7-8. 22 March 2013, para 25 b.

355 See, for instance, para 11 (iii) of the X and Y v Georgia case, as well as Concluding observations on Lithuania's report of 2014.

356 The applicant was a Bulgarian citizen, who resided in Poland and attempted to obtain a divorce from a violent husband. After continued abuse, the applicant took the children and fled to Bulgaria, where she filed for a permanent protection order. The national courts refused. Again, the state also had the law on domestic violence, and the issue of non-implementation arose. In addition, the applicant claimed that the burden of proof was placed entirely on her. As a result, the applicant could not acquire a permanent protection order against her husband due to the lack of sufficient proof. Ms V. K. v Bulgaria, Communication No. 20/2008. UN Committee on the Elimination of Discrimination against Women, decision of 25 July 2011.

357 V. K. v. Bulgaria, para. 9.12.

types, which existed and were employed by the state agents. In the similar case of *Jallow v. Bulgaria,*[358] the CEDAW Committee upheld the applicant's (who was also a migrant) claims under Article 1 (discrimination), 2 (policy measures), 3 (Guarantee on basic human rights and fundamental freedoms), 5 (Sex Role Stereotyping and Prejudice) and Article 16 (1)(c), 16(1)(d), 16(1)(f) and 16(1)(g) (Marriage and Family life) of the CEDAW and urged Bulgaria to adopt measures protecting all women, including migrant women, against domestic violence and ensuring the effective access to justice.

The case of *V.K. v. Bulgaria*[359] concerned long-term violence, which was witnessed by children, who were also repeatedly locked or taken away by the perpetrator. The national court refused to issue a permanent protection order and, according to the Committee, relied on stereotypical and narrow understanding of domestic violence. Thus, the Committee was of the view that the State party has failed to fulfil its obligations and has thereby violated the author's rights under Article 2 (c), (d), (e) and (f), in conjunction with Article 1, and Article 5 (a), in conjunction with Article 16, paragraph 1, of the Convention, as well as GR 19. This case is significant with regards to the standard of due diligence while adopting protection orders, the necessity to provide for shelters and finally, the compensation for victims who suffer moral and pecuniary damage and prejudice.

Substantively neutral norms of law may be abused by the perpetrators. The case of *González Carreño v Spain*[360] requires particular attention. The Committee found that despite some protective orders issued against the perpetrator, he "would disregard [them] without this implying any legal consequences for him."[361] The CEDAW Committee found the state in violation of its due diligence obligation under the CEDAW, in particular violating Articles 2 (Policy measures), 5 (Sex Role Stereotyping and Prejudice) and 16 (Marriage and Family life). The legal system worked for the detriment of the rights of the mother and child, and to the advantage of the perpetrator. The protection should not just be available on paper but also in practice, and be effective and accessible. To this purpose, any assumption that domestic

358 In this case, intimate partner violence started after the applicant's move from Gambia to Bulgaria. The Bulgarian husband was forcing the wife to take part in pornographic films and was abusive also to their daughter. Although the social services knew about the situation and advised the wife to seek help, there was insufficient information on any support system, and the prosecutors discontinued investigation due to insufficient evidence. Subsequently the husband took advantage of the justice system by filing a report for emergency protection from domestic violence himself, as well as the temporary custody of their daughter. His requests were granted without any questioning of the applicant, who was forced to agree to unfavourable divorce conditions in order to regain access to her daughter. Jallow v. Bulgaria, 23 July 2012, CEDAW/C/52/D/32/2011.

359 V.K. v. Bulgaria, 25 July 2011, CEDAW/C/49/D/20/2008.

360 González Carreño v Spain (47/2012), 16 July 2014, CEDAW/C/58/D/47/2012. In this case, the CEDAW found violations of articles 2 (a-f); 5 (a); and 16, paragraph 1 (d) of the Convention, read jointly with article 1 of the Convention and the general recommendation No. 19. This case involved a domestic violence victim, who fled the abuse of her husband with her child. Despite their daughter witnessing the violence and being intimidated and traumatised by the father, and despite over 30 appeals for protection, the effective protection measures were not provided for the child nor the applicant. The father's rights to communicate with the child without supervision were given priority. During one unsupervised visitation, the father killed the seven years old daughter, and then killed himself.

361 *Ibid*, Para 9.3.

violence against women does not as such harm their children should be seen as outdated on the national and international levels.

In the case of *X and Y v Georgia*,[362] the victim and her children endured continuous abuse.[363] The CEDAW Committee found violations of Article 2 (paragraphs b-f) in conjunction with Article 1 and 5 (a) as well as GR 19. The Committee's finding of many violations could also serve as a good description of the specific duties of the states. In particular, they should entail (formatting added by the author):

> "duty to adopt appropriate legislative and other measures, including sanctions, prohibiting violence against women as a form of discrimination against women;
> to establish legal protection of women's rights on an equal basis with men and to ensure, through competent tribunals and other public institutions, the effective protection of women against discrimination;
> to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions act in conformity with that obligation;
> to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
> and to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.
> […] to take all appropriate measures to modify the social and cultural patterns of conduct of men and women,
> with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[364]

The applicants of *X and Y v Georgia* also tried to apply to the ECtHR but their case was rendered inadmissible. The CEDAW Committee allowed the case, because it found that the applications were different and did not concern the same substantive rights. While under the ECHR,[365] the applicant claimed violation of Article 3(torture, degrading and inhuman treatment), and did not claim gender-based discrimination (Article 14), the CEDAW framework treated all the VAW experienced as discrimination. Perhaps this argument of the CEDAW Committee was far-stretched because both the ECtHR and the CEDAW Committee may find gender-based discrimination in domestic violence cases, even if the

362 X and Y v Georgia, 25 August 2015, CEDAW/C/61/D/24/2009.

363 It appears the victim had married her rapist and subsequently gave birth to 5 children. Her married life was constantly marked with domestic violence against her and the children. Despite her complaints on violence towards her and physical and sexual abuse of one daughter and one son, no actions to protect her or prosecute the perpetrator were taken. The state authorities acted as mediators or took voluntary undertakings from the perpetrator not to continue the violence.

364 X and Y v Georgia, *op.cit*., para 9.7.

365 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

applicants fail to ask for it. However, it must be noted that the CEDAW tries to delimitate its field of operation from that of other international organizations. It is visible from the fact that it abstained from recognition of domestic violence as "torture" to this date, even in the most significant cases like *Goecke*.[366] The CEDAW Committee is based on a different paradigm than torture; instead, it applies the concept of discrimination, which allows delimiting the competence (from CAT or regional treaty monitoring bodies), and addressing the cases *without* the classical analysis of elements of torture.

Finally, in *M. W. v Denmark*, the CEDAW Committee also addressed a complicated case that related to domestic violence allegations, kidnapping and access to the child.[367] In the said case, the Committee found violations of Articles 2 and 1, relying on state's failure to act with due diligence and investigate VAW claims and protect the applicant, as well as discriminating against her as a foreign national. The Committee also concluded that Articles 5 on stereotyping and 16 (1) (d) on discrimination in family relations were infringed, because despite the gender neutral legislation, the Committee considered[368] that the applicant encountered discriminative treatment at court and during her encountering state authorities. In particular, the Danish authorities ignored her pleas to investigate DV, the alleged violent kidnapping of the child, and requests for appeal. The applicant was not allowed to have any access to the child nor receive information about him. The applicant in this case seems to have suffered "discrimination against her based on her sex as well as her foreign nationality,"[369] i.e. intersectional discrimination.

It can be recalled that in the previously-analysed cases against Austria, the Committee did not find sufficient proof of the breach of Article 5 (Sex Role Stereotyping and Prejudice),[370] although it had found breaches of this Article in previous and subsequent cases against other countries[371] and in the most recent case against Denmark. Thus, efforts

366 It could also be claimed that the Committee's approach is more conservative, in comparison to international and regional treaty monitoring bodies, as suggested by Alice Edwards, *supra* note 24, p. 256. However, the author of the thesis maintains that the Committee constructs its arguments in a different paradigm, i.e. primarily sees VAW as a form of sexual discrimination. That allowed, in case of X and Y v Georgia, to analyse the case despite the rejection by the ECtHR.

367 M. W. v Denmark. CEDAW/C/63/D/46/2012. No. 46/2012, views adopted on 14 March 2016. The applicant was of Austrian nationality and had a child together with the Danish man, the alleged perpetrator. The child was initially not recognized by the father, who subsequently recognized the child and asked for sole custody. Austrian and Danish courts adopted contradicting decisions, both the mother and the father kidnapped the child, and in the end, the child ended up with the father. The mother was denied access.

368 The Committee has reversed a burden of proof from the applicant to the State rather bluntly in this case, causing one member of the Committee to present a dissenting opinion and accuse it of being bias. Opinion of Committee member Patriacia Schulz (dissenting).

369 *Ibid,* para 5.2.

370 Yildirim v. Austria, para. 12.2; Goekce v. Austria, para. 12.2.

371 Ms. A.T. v. Hungary, Communication No. 2/2003. UN Committee on the Elimination of Discrimination against Women, decision of 26 January 2005; Ms V. K. v Bulgaria, Communication No. 20/2008. UN Committee on the Elimination of Discrimination against Women, decision of 25 July 2011. Meanwhile, in *Fatma Yıldırım v. Austria*, the CEDAW committee found that the state infringed the applicant's right to life and to physical and mental integrity under Article 2 (a) and (c) through (f) and Article 3 of the Convention (read in conjunction with Article 1 and general recommendation 19), but denied the request to find violations of Articles 1 and 5.

of Austria in combatting the causes of gender-based violence (prejudice, stereotyping) in these particular domestic violence cases could be seen as sufficient, which may imply that the state could not in this case be accused of "structural violence" against women.[372] In case against Denmark, the Committee seemed convinced that foreign mothers (not just all women in Denmark, but particularly foreign mothers) face prejudices, and therefore, the Committee required[373] eliminating prejudices against intersecting forms of discrimination, and provide trainings of judiciary and other state agents to this regard.

What efforts should be taken, in order to prevent VAW/ DV and to target the structural nature of violence? As a first step, the Committee requires at least a comprehensive strategy[374] or an action plan on VAW,[375] and always suggests targeting the root causes of VAW – subordinate position of women and girls in a society.[376] A contextual and holistic approach is expected, which requires having clear links with gender equality paradigm but also targets specific cultural practices.[377] This is very much in line with both other UN documents[378] and Istanbul Convention[379] and thus ensures coherence between these instruments. As previously discussed, the CEDAW Committee also expects a gender specific frame.[380] Finally, these initiatives must target eradication of cultural stereotypes, patriarchal

372 The argument does not necessarily imply that no structural VAW existed. However, it must be admitted that Article 5 in particular relates with evidence on how the state addresses shared oppression or structural violence against women. If the state fails to meet its obligations under Article 5, it certainly fosters structural VAW. As noted by Christine Chinkin, "structural nature of gender violence demands societal transformation in changing attitudes and behaviours." Marsha Freeman, Christine Chinkin, Beate Rudolf, *supra* note 244, p. 464.

373 M.W.v Denmark, para 6.

374 In the draft update of GR 19, however, the CEDAW Committee suggests adopting legislation on GBV against women, which is different from strategies or action plans, which are adopted at executive (ministerial of government) level rather than legislative (parliament), para 14 (a). *Supra* note 19.

375 Concluding observations on the combined eighth and ninth periodic reports of Ecuador. CEDAW/C/ECU/CO/8-9. 11 March 2015, para 21 (b). Concluding observations on the combined seventh and eighth periodic reports of Cuba. CEDAW/C/CUB/CO/7-8. 30 July 2013, para 25 (a) and (b).

376 Concluding observations on the combined second and third periodic reports of the United Arab Emirates. CEDAW/C/ARE/CO/2-3. 24 November 2015

377 Concluding observations of the Committee on the Elimination of Discrimination against Women: Kenya. CEDAW/C/KEN/CO/7. 5 April 2011. Concluding observations of the Committee on the Elimination of Discrimination against Women: Jamaica. CEDAW/C/JAM/CO/6-7. 06 Aug 2012. Concluding observations on the combined fourth and fifth periodic reports of Tajikistan. CEDAW/C/TJK/CO/4-5. 29 October 2013. Concluding observations on the seventh periodic report of Greece adopted by the Committee at its fifty fourth session (11 February – 1 March 2013). CEDAW/C/GRC/CO/7. 26 March 2013. Regarding Kenya, the Committee presents both recommendations on female genital mutilation and post-election VAW, and at the same time, it is concerned by the lack of holistic view on prevention of VAW. The Committee also repeatedly links stereotyping of women and girls with VAW, and requires challenging cultural norms, which discriminate women and foster VAW

378 UNGA, 1993, Declaration on VAW.

379 See the Preamble of the Convention, where it says "violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men."

380 In the draft update of the GR 19, the CEDAW Committee also notes the need to "examine gender-neutral laws and policies to ensure that they do not exacerbate existing inequalities and repeal them if they do so", *supra* note 19, para 15(k).

attitudes and structural subordination. It can be suggested that these measures should involve considerations of empowerment and agency of women.

1.2.3.4. Guiding standards on sexual VAW under the CEDAW

Notably, most of the VAW perpetrated in the community relates to sexual violence, including rape. Rape is connected with extreme impunity all around the world. For instance, the data of the UK Ministry of Justice, the Home Office and the Office for National Statistics shows convictions of 1,070 perpetrators – while about 65-95 thousand persons are raped per year and 15,670 cases are annually reported to the police.[381] Even in case of Scandinavian countries, the numbers of reported sexual VAW and case attrition (i.e. how many cases reach courts) are very low.[382] As Catharine A. MacKinnon noted in 2013, "[i]t is as if there is a tacit agreement underlying enforcement in most jurisdictions to look the other way as women and children and sometimes men are sexually violated: to minimize, trivialize, denigrate, shame, and silence the victims, to destroy their credibility legally and socially and further shatter their psyches and dignity, so these abuses can continue unaddressed and unimpeded."[383]She claims this is related to the power dynamics in the society. Gender inequality and rare (selective) use of laws on sexual violence renders them more like "window-dressing"[384] than norms regulating behaviour.

While Catharine A. MacKinnon's statements may seem very intense, various research on perceptions of the police officers, prosecutors and judges show that lack of accountability may be related to the lack of understanding of the dynamics of sexual VAW. It is often believed that false rape accusations are common, while they are not in fact more common than in other crimes, and majority of false rape allegations are usually related to unknown rapists. Moreover, the failure to prove allegations of rape are seen as confirmation that a woman has lied, while failure to prove the guilt of the accused in other criminal cases is not usually considered as "lies" about the crime itself.[385] Therefore, these stereotypical perceptions of state agents have a great impact on impunity of rape cases and silencing of those women who dare to speak up.

The CEDAW Committee's guiding standards, developed in General recommendations, jurisprudence and concluding observations, are unfortunately not legally binding as such to the states. Thus, although very clear and specific advice was given to Philippines and Bulgaria on improving the legislation and policies on sexual VAW, it had a limited effect.

381 Nigel Morris, "100 000 assaults. 1,000 rapists sentenced. Shockingly low conviction rates revealed", accessed 31 05 2016, http://www.independent.co.uk/news/uk/crime/100000-assaults-1000-rapists-sentenced-shockingly-low-conviction-rates-revealed-8446058.html

382 For instance, only 2-10 percent of cases in Finland are reported to the police, and out of these cases, only 16 percent reach the court (case attrition). In the majority cases, the victim knew the perpetrator, while minority of these cases happened in the family. *Case closed: rape and human rights in the Nordic states*, Amnesty international publications, 2010.

383 Catharine MacKinnon, *supra* 30, p. 113.

384 *Ibid,* p.116.

385 Liz Kelly, "The (In)credible Words of Women: False Allegations in European Rape Research," *Violence Against Women*, 16, 12 (2010): 1345–1355.

Furthermore, there has been relatively little room to develop the CEDAW guiding standards in cases under Optional protocol, at least so far.

The problems that surround the high threshold of evidence and narrow understanding of rape clearly emerge in the CEDAW jurisprudence. The crucial case on acquaintance rape, *Vertido v Philippines,*[386] concerned a rape of a woman who worked as an executive director of a Chamber of Commerce. The woman was allegedly raped by the President of the same Chamber. After lengthy (8 years) proceedings, the national court decided that there is insufficient evidence of the rape and the victim could have escaped if she wanted to. The CEDAW Committee considered, however, that "there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct".[387] It found violations of Articles: (2)(c) on establishing and ensuring legal protection, 2(f) on taking appropriate measures to abolish discrimination, and 5(a) on modifying social and cultural patterns under the CEDAW, and suggested the state to change the national definition of sexual violence, by linking it directly with the lack of consent.

Despite these recommendations, a few years later the CEDAW Committee was faced with another case against Philippines and the national definition of rape. *R.P.B. v Philippines*[388] concerned a rape of a disabled (deaf and mute) 17 year old girl by a neighbour. The neighbour was acquitted because the national court did not find evidence of victim's physical resistance. The CEDAW Committee noted that authorities failed to provide a free interpreter and used gender-based myths while acquitting he perpetrator and found violations of Articles 1 and 2 of the Convention. The said case is very interesting in two regards: first, it illuminates the problem of non-compliance with CEDAW Committee's communications and recommendations. They are not mandatory and thus it depends on the state how and whether the recommendations will be implemented. Second, it underlines that both the age, gender and disability of the victims should be taken into account while responding to VAW. This case is essential for the debate on intersectional forms of discrimination. It must be noted, however, that CEDAW Committee did not stress that disabled women face systematic discrimination but rather suggested courts to take into account the particular individual characteristics of the victim.[389] It must also be noted that in a few years since the CEDAW's recommendations, the law on rape in the Philippines still has not been amended[390] as to include the consent-centred approach.

The case of *V.P.P. v Bulgaria*[391] concerned sexual violence against a seven-year-old girl by the neighbour, and raised questions of compensation and protection of victims. The perpetrator reached a plea bargain with the prosecutor. Despite serious psychological damage to the victim, the national court considered that there was no material damage, and thus no

386 Vertido v Philippines, 2010, CEDAW/C/46/18/2008.

387 *Ibid,* para 8.5.

388 R.P.B. v Philippines, 12 March 2014, CEDAW/C/57/D/34/2011.

389 "States must address age and disability when combating gender discrimination under CEDAW", Human Rights Law Center, 21 February, 2014, http://hrlc.org.au/states-must-address-age-and-disability-when-combatting-gender-discrimination-under-cedaw/

390 Philippine Commission on Women. National Machinery for Gender Equality and Women's Empowerment. Amending the anti-rape law. Policy brief. No. 11. 2013.

391 V.P.P. v Bulgaria, 12 November 2012, CEDAW/C/53/D/31/2011.

compensation should be provided. Later, the girl's mother initiated private tort proceedings and a court ruling on compensation was adopted – but never enforced. The perpetrator continued to live nearby the victim's house, keeping her in constant fear. The CEDAW Committee found violations under Articles 2 on discrimination (paragraphs a, b, c, f, g), Articles 3 and 5, as well Article 12 on health and Article 15 on equality before the law and case specific recommendations were given.[392] A number of general recommendations were provided to Bulgaria, including amending the legislation to treat sexual assault against a child as a serious offence, refrain from stereotyping in sexual VAW laws, and introducing protection system.[393] Despite these recommendations, in 2012 Bulgaria was reported to have loopholes that allow rapists escape responsibility in case of marriage to victims[394] and in 2013, its legislation was reported be "far bellow" the minimum standards of protection in Europe.[395]

Finally, GBV is also "a critical health issue",[396] and yet another example reveals "real life" problems and the failure to address them. The case of *L.C. v. Peru*[397] did not concern the right to be free from violence itself, but was closely related to it. The victim, 11-year-old girl, was repeatedly raped by 34-year-old man, and as a result became pregnant. She attempted to commit suicide by jumping from a building and sustained very serious injuries. The hospital refused to terminate pregnancy, which lead to the paralysis of the victim's body from her neck down. The CEDAW found violations of Articles 1, 2 (c) and (f), 3, 5, 12 and 16 (e) of CEDAW by failing to ensure essential reproductive health services. Notably, abortion in life-threatening cases was actually legal in Peru, however, it was not ensured. The conclusion could be drawn that not only the sexual VAW should be recognized and remedy must be provided but the victims also should be provided with relevant services, including reproductive health services. Subsequently, in 2014 the Peruvian Government adopted national guidelines on safe abortion services for physicians and patients on legal abortion. However, besides this step, little has been done to adhere to the CEDAW's communication. It must be noted that Peru has some of the highest numbers of rape in the world, and the research shows that abortion bans do not actually lead to lower abortion rates.[398] It should

392 Charging the perpetrator with rape or attempted rape, and indicting him.

393 V.P.P. v Bulgaria, *op. cit.,* para 10.

394 Concluding observations of the Committee on the Elimination of Discrimination against Women: Bulgaria, para 23. CEDAW/C/BGR/CO/4-7. 07 Aug 2012, para 23

395 Barometer on Rape in Europe, *supra* note 10.

396 V.P.P. v Bulgaria, *op. cit.,* para 9.10. The Committee proclaimed: "gender-based violence is a critical health issue for women and that States parties should ensure: the enactment and effective enforcement of laws and the formulation of policies, including health-care protocols and hospital procedures to address violence against women and abuse of girl children and the provision of appropriate health services; and gender-sensitive training to enable health-care workers to detect and manage the health consequences of gender-based violence."

397 L.C. v. Peru. CEDAW/C/50/D/22/200. 25 November 2011.

398 Gilda Sedgh et al. "Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008" *The Lancet*, February 18th, 379, 9816, (2012): 625-632.

be clear that the right to health of the woman needs to be prioritized, in comparison to moral, religious or other considerations advocating for the fetus / unborn child.[399]

In its draft update of the GR 19, the CEDAW Committee reiterated its understanding of sexual VAW as a violation of women's physical and mental integrity, and personal security.[400] Basing on its case practice on sexual VAW, it suggested focusing the legislation on the notion of consent. Coercive circumstances should be taken into account, and the statute of limitations and time aspect should be interpreted in consideration of the interests of victims, especially if they are young or under-age girls.

1.2.4. Cross-border protection: HCCH as the unexpected stakeholder

It can be claimed that the Hague Conference on Private International Law (HCCH) is an unexpected venue for adopting a global instrument in the area of international cooperation in the area of protection against VAW. Notably, the HCCH is a world organization for cooperation in civil and commercial matters,[401] which recently started to investigate the possibility of adopting a convention on cross-border protection orders, regardless whether they are adopted under civil or criminal law. This part of the thesis analyses the essence of this proposed new Convention, and then focuses on possible relationship between the prospective instruments.

Increasing numbers of international couples and the possibility to move freely across borders lead to an obvious conclusion – violence does not stop at state borders. The information collected by the Permanent Bureau of the HCCH reveals that organizations and experts working in this area report many international cases.[402] On average 130 international cases per expert / organization were reported and the majority of the experts and organizations said they have seen or anticipated an increase of such cases. Moreover, violence can take forms which do not require physical movement, for example cyber-stalking and harassment through the internet. In many of these cases, legal measures are limited or practically futile – the standards of proof in criminal procedure are set high, the system is slow, or the measures are simply not available. A very significant problem is that perpetrators of DV tend to abuse the systems created for protection of interests of children. Meanwhile, victims of DV often flee home and try to come back to their state of origin. If they take the children with them, they are deemed as guilty of child abduction. The international and regional law is strict in this area: the child must be immediately returned to the place of original residence, and VAW against the mother is largely irrelevant.[403] Therefore, it has

399 In addition, pregnant women face VAW more often, and in some areas of the world, the problem of sex-selective abortions and female infanticide is prevalent.

400 Draft update of GR 19, *supra* note 19, para. 15 (l) on "prevention."

401 See the website of the organization www.hcch.net

402 Preliminary document No 4 of February 2015 for the attention of the Council of March 2015 on General Affairs and Policy of the Conference. Recognition and Enforcement of Foreign Civil Protection Orders: additional statistical and comparative information on national law. Drawn up by the Permanent Bureau. Para 13-15.

403 See Part 2 for more thorough analysis of the problem of child abduction in situations of domestic violence, and the EU legal regulation on the matter.

been convincingly argued that feminists, who address domestic violence under international law, should pay more attention to private international law issues.[404] The emergence of HCCH as the actual stakeholder in this area is in itself a challenge to the traditional divide between public and private international law.

The topic of recognition and enforcement of protection orders has been included in the agenda of the HCCH since 2011.[405] It may be explained by this issue being "ripe" for international measures – during the last decade, in many European jurisdictions, as well as in Canada and in the US, legislation has been enacted for the protection of victims of VAW and DV. All of these enactments have paved the way for the international community's interest in the topic. It has been suggested that the prospective Convention should address such specific cases: protection against DV in general; protection against DV in the context of international child abduction; protection against stalking (including cyber stalking); and protection against violence by an extended family or group.[406]

A questionnaire was circulated by the HCCH to its members, and presented to the Council in 2013.[407] In 2014, an Expert group was convened by the HCCH, and Draft Country profiles were created. The expert group met in February 2014 and adopted a set of conclusions and recommendations.[408] The discussion focused on "no-contact" or "stay away" orders, i.e. the orders on non-approaching a certain establishment (school, work, etc.) or person and do not directly affect parental or property rights. The expert group also discussed the main burdens and barriers, related to such protection orders, aimed to cross borders: the delays in execution, the required financial resources, problems with assuming jurisdiction of the foreign authority, the lack of access to information and legal expertise, the linguistic and legal culture barriers, and other problems.[409] The expert group noted that the development of an international Hague instrument in this area "would assist in addressing the safe return of the taking parent" when addressing the return of the child under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Hague Conference on Private International Law (further - 1980 Hague Convention).[410]

At the time when the Hague Conference on Private International Law (HCCH) adopted the 1980 Hague Convention, it was thought that usually the father abducts the child and

404 In particular see Merle H. Weiner, "The potential and challenges of transnational litigation for feminists concerned about domestic violence here and abroad," *American University journal of gender, social policy and law* 11, 2 (2003): 747.

405 Conclusion and Recommendation No 23 of the Council of General Affairs and Policy of the Conference (5-7 April 2011).

406 See Preliminary Document No 7 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference, Case studies provided.

407 Prel.Doc. No 4 B of March 2013 for the attention of the Council of April 2013 on General Affairs and Policy of the Conference. The document included information from 24 members, including the EU member states, which sent replies before 28 February 2013. The document, as well as subsequent replies, can be found at the HCCH page.

408 Prel.Doc. No 4 A of March 2014 for the attention of the Council of April 2014 on General Affairs and the Policy of the Conference.

409 *Ibid*, see the Report of the meeting of the experts'group on the recognition and enforcement of foreign civil protection orders, drawn up by the Permanent Bureau.

410 *Ibid*, note no.8.

takes him/her to the place of origin. Gradually it has been realized[411] that it is mostly mothers who take their children, and their escape often relates to domestic violence. Children in these situations may also be directly or indirectly exposed to such violence.[412] The taking mothers, as victims of domestic violence, not uncommonly raise the "grave risk" defence[413] under the Hague Abduction

Convention, which should be reserved to very limited cases. However, because this Convention does not explicitly provide for domestic violence defence, the said Hague Convention itself has been seen as "a substantial barrier to women's ability to escape domestic violence."[414] After the discovery that the 1980 Hague Convention may occasionally contribute to injustice against victims of domestic violence, it has been suggested that protection of the abducting parent is also necessary in order to protect the child.[415] Nevertheless, there is no clear and consistent practice in this regard. It must be noted that such possibility is not mentioned in the Convention's Explanatory Report. It has been the policy of the HCCH that the "grave risk" exception should not apply in cases, where the child is not a primary target of violence.[416] Obviously, the assumption that the child suffers no psychological harm when the mother is attacked, is outdated. It should be noted that a working group has been established, by the HCCH, to develop a guide on how to deal with defences raised under Article 13.1.b. of the Hague Abduction Convention including, but not limited to, domestic violence cases.[417] The upcoming Convention may also fill in this gap and ensure the safety of DV-fleeing mothers.

It should be recalled that there is another significant instrument which regulates child protection measures, namely the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Hague Convention).[418] All EU member states

411 Peter McEleavy also suggests that possibly there was no change as such - "the perceived stereotype of the abductor as the father and the left behind parent as the mother was simply over estimated." Peter MceLeavy, "Past and future: The Hague child abduction convention at the crossroads", in Hugues Fulchiron(ed), *Les Enlèvements d'Enfants À Travers les Frontières* (Brussels: Bruylant, 2004), 101.

412 Katarina Trimmings, *Child abduction within the EU* (Hart publishing, 2013), 151. Jeffrey L. Edleson et al, Multiple Perspectives on Battered Mothers and their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases, 2010, The Hague Domestic Violence Project.

413 Article 13 (1)(b) of the Convention provides that the court of residence has some residual discretion not to return of the child, if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

414 Merle Weiner, *supra* note 404, p. 799.

415 Permanent Bureau of the Hague Conference, Report and Conclusions of the Special Commission Concerning the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 27 September-1 October 2002, para 76.

416 "Domestic and family violence and the Article 13 'grave risk' exception in the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A reflection paper", Prel. Doc. No 9 of May 2011 for the attention of the Special Commission of June 2011, para 35.

417 Report of Part II of the Sixth meeting of the special commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (25-31 January 2012), paras 43-63.

418 Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Entered into force in 2002.

(Italy being the last one, in 2016) have ratified this Convention.[419] Described as the "sleeping giant", the Convention allows the courts of the state where child is present (Article 11) to adopt protection measures in cases of urgency. According to recent interpretations, of the 1996 Hague Convention, for instance by Nigel Lowe, necessary measures of protection of a child should also include measures aiming to protect the abducting parent.[420] The main principle, however, still remains unchanged that the "proper management of domestic violence allegations should not compromise a swift disposal of the return application."[421]

In many national responses to the HCCH questionnaire on prospective Convention on cross border protection, it has been noted that there are no legal rules on recognition and enforcement of foreign protection orders. Alternatively, a reference is made to general private international law rules on recognition and enforcement of foreign judgments.[422]

Regarding the problems of enforcement of protection orders, the CoE Secretariat identified these main issues: the lack of state resources and especially police to respond to breaches of protection orders; lack of prioritizing such breaches, which is linked with low levels of police awareness on domestic violence dynamics and the need for trainings; delayed reporting of the breaches by the victim, and situations where less violent breaches are not being reported. The response also noted that the new HCCH Convention is much awaited, and recommended that it should covered protection orders on various forms of domestic violence (including human trafficking, forced marriages, dating violence – cases when victim and perpetrator are not married and do not live together).[423]

As one possible solution for the protection of victims of VAW, the future Hague instrument should provide immediate ("on-the-spot") execution of foreign protection orders. Either the protection order itself, or the protection order and a certificate of enforcement would be enough to present to the relevant authorities. Other solutions would be the advance establishment of protection orders, under the conditions provided by the law of the forum (*lex fori)*, and the advance recognition of foreign protection orders, which should not exclude the possibilities of additional mechanisms under *lex fori*. None of these solutions should be mutually exclusive. Finally, the system of central authorities should be established, especially with the view of transmitting and receiving applications on advance establishment of protection orders and advance recognition of foreign protection orders.[424] The experts took notice of the "significant European work" in the area, meaning the adoption of the above-mentioned "Victims' package" of the EU. As the problems discussed are not only regional, the prospec-

419 Last checked 1 September, 2016.

420 Nigel Lowe, Michael Nicholls, QC, *The 1996 Hague Convention on the protection of children*, (2012, Jordans), 43.

421 Preliminary Document No 9 of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention.

422 Individual responses to the HCCH questionnaire, accessed 1 May 2016, at http://www.hcch.net/upload/wop/genaff_resp_pd04a

423 Response of the Council of Europe Secretariat to the HCCH questionnaire, accessed 1 March, 2016, http://www.hcch.net/upload/wop/genaff_resp_pd04a.html

424 Prel.Doc. No 4 A of March 2014 for the attention of the Council of April 2014 on General Affairs and the Policy of the Conference. Paras 20-27.

tive Hague instrument might usefully fill-in the lacunae remaining on the global level. It can be expected that the Protection Measures' Regulation (and the whole victims' package) will set an example of how such an instrument works in practice.

While discussing the rationales of policies for the future, the HCCH experts distinguished these main principles: victim protection and security; global deterrence; specific deterrence.[425] In particular, victims should be provided security arrangements in advance and during mobility, the general awareness of prevention measures must be raised and specific on-the-spot enforcement should be ensured to prevent violence and ensure state's compliance with its due diligence obligations.

Regarding the interrelationship with other Hague Conventions, the new HCCH convention would supplement the 1980 Hague Convention and possibly act as the missing link in cases of domestic violence, even if the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (further – the 1996 Hague Convention) might be interpreted to apply also to the recognition of measures aimed at to protect the abducting parent. Where a global convention specifically aimed at recognition of protection orders adopted, it is likely that the 1996 Hague Convention would continue to apply to the classical measures for the protection of the child, while the new Convention would focus on other types of protection orders.

Considering, however, the legal diversity within substantive law, in addition to the hybrid nature of protection measures in many countries and the non-availability of pure civil protection orders, as well as the diversity of enforcement systems, the task of adopting a new Convention may turn out to be very complex. It can be claimed that the new Hague Convention should cover various forms of violence and various protection orders. The mandate for adopting instruments that go beyond classical private international law can be traced already to the aftermath of the landmark case of the International Court of Justice in the famous "Boll" case, *The Netherlands v Sweden*[426] (1958). The decision subsequently led to adoption of international instruments (i.e., the 1961 Hague Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, the 1996 Hague Convention, and the Brussels II*a* Regulation[427]) which focus on child protection "without making any clear distinctions between the private law or the public law nature of the applicable measures."[428] Therefore it can be concluded that the HCCH in principle has the mandate to adopt instruments that go beyond classical private international law. In particular, if it had the

425 Prel.Doc. No 4 A of March 2014 for the attention of the Council of April 2014 on General Affairs and the Policy of the Conference. Report of the meeting of the experts' group on the recognition and enforcement of foreign civil protection orders, drawn up by the Permanent Bureau.

426 ICJ Judgment of 28 November 1958 in the case concerning the application of the Convention of 1902 governing the guardianship of infants. (Netherlands v Sweden), 1958, ICJ Rep., 55.

427 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (below - Brussels IIa or Brussels IIbis Regulation).

428 Katharina Boele-Woelki, Maarit Jänterä-Jareborg, "Protecting children against detrimental family environments under the 1996 Hague Convention and the Brussels II bis Regulation," In *Convergence and Divergence of Private International Law* (The Hague: Eleven International Publishing, 2010), 130.

mandate to adopt 1996 Hague Convention, which includes a variety of children protection measures (including care by public authorities), it also has the competence to adopt an instrument that contains provisions on cross-border protection of persons in situations of violence.

It is too early to evaluate the contents of the prospective HCCH instrument, because a text is not yet available. Nevertheless, some commentaries can be offered regarding the scopes of the prospective conventions (CEVAWG and HCCH Convention). First, the HCCH could be criticized for taking too much on its plate, because the mandate of the organization does not explicitly allow it to draw conventions in areas other than private international law. The considerations presented above, however, show that it might be the best stakeholder that could fill-in the gap of cross-border protection. HCCH conventions have been effectively implemented precisely because they employ the method of international cooperation without going too deep into conceptual debates. They offer clear and precise methods of cooperation and coordination.[429] Similarly, HCCH could fill in the gap for cross-border VAW and also at the same time diminish the public/private divide. This time it is public international and private international law that is at stake and not public and private spheres of human life. At the same time, it paradoxically replicates the public/private divide on the micro level. Therefore, it is concluded that HCCH is in the best position to fill in the gap in this area. Its potentiality is especially great considering the ongoing Malta process, which is informal process that involves a dialogue between contracting parties of 1980 Hague Convention and non-contracting states with the influence of Sharia law. Former deputy secretary to the HCCH, William Duncan describes it as "finding practical means of legal cooperation between states having diverse legal cultures yet sharing common problems".[430] The desired effect is not necessarily that the Hague Convention on abduction is adhered by all / many Muslim-majority states, but rather, confidence building and the prospects of some formal processes of cooperation in the future. The ongoing process shows that the HCCH has both experience and the tools necessary to reach out and connect stakeholders from different parts of the world with the view of international cooperation. The only worrisome issue may be very "light" expectations – e.g. William Duncan suggested that in the beginning the obligations between the states with Sharia law influence and the HCCH states "could be light", and involve undemanding resources.[431] It is important however not to make them too light, and especially in the area which relates to VAW. Finally, it is recommended for the work-groups of both prospective conventions (at the level of the UN, and at the level of the HCCH) to cooperate in order to further delimitate the scopes and contents of the instruments, if they are further pursued, and avoid duplication.

1.2.5. Indicators on VAW as gap-fillers: tools for transformative change?

The core term "due diligence" is not only used in law but also refers to a standard of care (of performance) that can be verified, measured and tested. In the past few decades,

429 They correspond to the desire of the more conservative ideologies in classical legal thought to see "efficiency" of law.

430 William Duncan, "Reflections on the Malta process," In *A commitment to Private International Law.* (Cambridge: Intersentia, 2013), 136.

431 *Ibid.,* p. 141

international law has witnessed the "measurement revolution"[432] with regards to fulfilment of state positive obligations to protect human rights. It also goes back to the term of "audit explosion", described by Michael Power.[433] According to him, the emergence of auditing techniques across different sectors "has much to do with articulating values, with rationalising and reinforcing public images of control."[434] In the result-oriented culture, the use of indicators has been growing in many fields: medicine, sociology, education, economics, social science, and law. It is part of the "evidence based" practice,[435] which is increasingly employed in order to understand the scope and dynamics of certain human rights violations (e.g. VAW) and to measure progress. It also reflects the turn of the legal scholarship on human rights to empirical methodology.[436] Ann Janette Rosga and Margaret L. Satterthwaite describe indicators on human rights as "an especially powerful intersection of law and social science."[437] When we consider that it is the *under-enforcement* of international law in the area of VAW that is the key issue,[438] indicators may serve as useful tools for further progress.

Human rights indicators have been defined by Maria Green as "piece[s] of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation."[439] The UN Office of the High Commissioner for Human Rights (OHCHR) said human rights indicators are "specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights"[440] In the context of VAW, indicators are said to "summarize complex data into a form that is meaningful for policy makers and the public."[441]

The indicators in the field of VAW are divided into two main categories: the indicators to measure the statistical prevalence of VAW (developed by the Commission on the Status of Women and the Statistical Commission) and the indicators on effectiveness of measures

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432 International Council on Human Rights Policy, No perfect Measure: Rethinking Evaluation and Assessment of Human Rights Work. (Geneva: January 2012), 1.

433 Ewan Ferlie, Laurence E. Lynn Jr., and Christopher Pollit (eds), "Theory of audit explosion," (Oxford: The Oxford Handbook of Public Management, 2007).

434 Michael Power, *The Audit Explosion*, (Demos, 1996), p. 5.

435 Margaret Satterhwaite, "Measuring human rights: indicators, expertise, and evidence based practice," *ASIL Annual meeting proceedings* 106, 253 (2012)" 253-256.

436 Laura A. Dickinson (ed), *International Law and Society. Empirical approaches to human rights* (Ashgate, 2007).

437 Ann Janette Rosga, Margaret L. Satterthwaite, "The trust in Indicators: measuring human rights," *Berkeley Journal of International Law* 27, 253 (2009): 253-315.

438 As noted by SR VAW in 2016, Report of the Special Rapporteur on VAW, 19 April 2016, A/HRC/32/42, and Ilona Cairns, *supra* note 21, p. 172.

439 Maria Green, "What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement," *Human Rights Quarterly 23*, (2001): 1062, 1065.

440 OHCHR, Report on Indicators for Monitoring Compliance with International Human Rights Instruments, (Report presented at the 18th meeting of chairpersons of the human rights treaty bodies and the 5th inter-committee of the human rights treaty bodies) 2006, HRI/MC/2006/7, para. 7.

441 UN Women, Indicators on violence against women. Accessed 3 June 2016. http://www.un.org/womenwatch/daw/vaw/v-issues-focus.htm

undertaken to eliminate VAW (developed by the SR on VAW). The main indicators that the SR on VAW suggested are distinguished into these categories:

- *"Structural* indicators reflect the ratification/adoption of legal instruments and existence of basic institutional mechanisms necessary for the realization of human rights
- *Process* indicators refer to policy instruments, programmes and specific interventions; actions taken by States and individuals to protect and fulfil rights
- *Outcome* indicators, directly or by proxy measures, document the realization of rights. These are often the slowest to move, due to the interdependence of human rights."[442]

The work of the EU on the indicators has been closely interconnected with the UN, i.e. the EU Council as early as 2002 established a set of indicators on DV[443] that are to used in order to monitor the follow up the Beijing Platform for Action adopted at the UN World Conference on women in 1995. Other organisations, such as EIGE[444] and WHO,[445] also drafted indicators on gender based violence. The EIGE indicators have the potential of taking into account the expertise in many areas of gender equality, thus contextualization and emphasizing the complex interconnections. The WHO indicators have the potential in their ground-ness and specificity. The EU indicators for the Beijing Platform for Action are significant for gender equality paradigm, and consistently include VAW as the core topic.[446] FRA has developed indicators aimed at evaluation of victims' rights and support in the EU,[447] as well as indicators measuring the scope of VAW.[448] Finally, even individual scholars come up with their own indicators on measuring effectiveness of legal protections against VAW.[449] The speed and quantity of developments really allows calling this phenomenon as the mania of human rights auditing.

Most of the indicators are quantitative. Although they are aimed at building trust and creating the most effective measures for prevention of VAW (and ultimately gender equality), they are also often criticized as only giving a false presumption of objectivity and reliability.

442 Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Erturk. Indicators on violence against women and State response, 2008.

443 Council of the European Union Council Conclusions of 21 October 2002 on "the Review of the implementation by the Member States and the EU institutions of the Beijing Platform for Action" and establishing a set of seven indicators concerning domestic violence against women (14578/02). A set of seven indicators was established: 1. Profile of female victims of violence; 2. Profile of male perpetrators; 3. Victim support; 4. Measures addressing the male perpetrator to end the circle of violence; 5. Training of Professionals, 6. State efforts to eliminate violence against women, and 7. Evaluation. Each of the indicators had a set of sub-indicators that need to be monitored.

444 EIGE Indicators to measure violence against women. Accessed 17 May 2016. http://eige.europa.eu/gender-based-violence/resources/international/indicators-measure-violence-against-women

445 Second WHO Discussion Paper. Global plan of action to strengthen the role of the health system in addressing interpersonal violence, in particular against women and girls, and against children. 31 August 2015.

446 Council of the European Union 2014. Council conclusions '20 year review of the implementation by the Member States and the EU institutions of the Beijing Platform for Action', Brussels, 11 December 2014.

447 See the section on *Indicators and comparative data.* http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support-services.

448 See FRA survey on VAW, *supra* note 2.

449 David. L. Richards, Jillienne Haglund, *supra* note 29, see Chapter 4 on "Creating Indicators of Legal Guarantees."

Indicators nevertheless are created by their drafters, who are subjective, and they tend to produce reality (e.g. by seeing evolution or improvement, even if it does not show in numbers themselves), and simplify complicated social realities. They also most often ignore social contexts and various "background" factors which may play a vital role in the results.[450] Thus, Debra. J. Liebowitz and Susanne Zwingel advocate for the CEDAW Committee's dialogue through the form of Concluding observations, as a better alternative to quantitative measurements. They claim that the "CEDAW review process refrains from a narrow, compartmentalized view of gender equality."[451] The tailor-made approach means that dialogue brings different stakeholders (including civil society in the state), and no countries can "get of the hook" because the situation is relatively better in them, than the others. The conclusions of the CEDAW (as well as individual case practice under Optional protocol, and the individual inquiry procedure) help understand the complicated phenomena in the state. Moreover, instead of treating the categories "women" as universal, the voices of different women are heard.

It is true that even the scholars who use quantitative indicators agree that they commonly lack transparency.[452] Nevertheless, that does not mean they need to be abandoned altogether. The carriage moves on four wheels and not one. Similarly, while qualitative methods are invaluable in order to grasp complex realities and contextualize, quantitative indicators are useful for evidence-based knowledge building. Transformative change is not possible without such knowledge. Indicators on human rights and VAW can be a valuable tool for self-evaluation for states and internal stakeholders. Even though they are soft-law instruments, unlike international treaties (in the light of which they are often drafted by special rapporteurs), they can serve for those state actors, who themselves employ this business-like logic.[453]

Moreover, sub-systems of indicators, for instance, indicators on the right to health of women who are victims of VAW, can be seen as the most useful practically, because they are more specific, and thus, more "smart" (specific, measurable, attainable, relevant and time-framed). The interconnectedness of VAW and the right to health is also very clear. Different SRs (on health[454] and on VAW[455] adopted very similar indicators methodologi-

450 Debra. J. Liebowitz., Susanne Zwingel, "Gender Equality Oversimplified: using CEDAW to counter the measurement obsession," *International studies review*, 16 (2014): 364-366.

451 *Ibid*, p. 384.

452 David. L. Richards, Jillienne Haglund, *supra* note 29, p. 67.

453 Surely behavioural techniques may be useful, especially for quick improvement, but at the same time, an in-depth analysis can hardly be replaced.

454 UN Special Rapporteur of the Commission on Human Rights offered structural indicators, process indicators, and outcome indicators, with the aim of measuring progressive realization of the right to enjoyment of the highest attainable standard of physical and mental health, and the effect of assessing steps taking by the State in meeting its obligations relevant to the right to health. See the Report of the Special Rapporteur Paul Hunt on the Right to everyone to the enjoyment of the highest attainable standard of physical and mental health, 2006.

455 UN Special Rapporteur on violence against women, its causes and consequences offered institutional (structural) indicators, process indicators, and outcome indicators, with the aim of measuring protection, prevention, persecution in cases of violence against women, and the effect of establishing VAW indicators is a "human rights obligation" of the state, based on diligence principle and human rights case law. See Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Erturk. Indicators on violence against women and State response, 2008.

cally, even though their aims are different. It is self-evident that violence against women has very significant negative implications for their health. The World Health Organization (WHO) has indicated that women who suffered physical or sexual violence have experienced a "range of physical symptoms (problems with walking, pain, memory, dizziness, and vaginal discharge)".[456] Physical violence is associated with various types of injuries. Women who experience violence (and most frequently, as indicated by the WHO, this is intimate male partner violence) face significant mental health challenges and may be more susceptible to suicide. In many cases violence continues during pregnancy; in a significant number of cases it may even start during pregnancy or intensifies during this period. Victims of violence also report induced abortions or miscarriages, as well as the risk of HIV and other sexually transmitted infections. The WHO, which launched new clinical and policy guidelines in 2013 to guide the response of the health sector, sees violence against women (VAW) as "global health problem of epidemic proportions".[457] In 2014, the WHO also called for the development of a draft global plan of action "to strengthen the role of the health system within a national multisectoral response to address interpersonal violence in particular against women and girls and against children."[458] The content of this plan is currently under discussion, and it also involves a special set of indicators. The indicators of specialised organisations have the great potential but nevertheless the issue of coordination arises. It is becoming very challenging for state officials to monitor all the sets and sub-sets of indicators and making conclusions on the measures for improvement.

Unfortunately, the main definitions used for the indicators are not harmonized and they may lack substantive grounding. For instance, the most recent database on gender based violence,[459] presented by the European Institute of Gender Equality (EIGE), collects data on these forms of violence against women: sexual violence, intimate partner violence, stalking, homicide, trafficking in humans, non-sexual harassment and bullying, and harmful traditional practices. The focus on "harmful traditional practices" can be criticized as leaving room to portray non-Western cultures as intrinsically condoning violence. Another example of inaccurate use of concepts is the use of the concept of sexual violence by the World Health Organization (WHO),[460] solely through the use of *coercion.*

456 Multi-country study on women's health and domestic violence against women: initial results on prevalence, health outcomes and women's responses. Authors: Claudia García et al. WHO, 2005. http://www.who.int/gender/violence/who_multicountry_study/Chapter10-Chapter11.pdf?ua=1.

457 WHO, 2013, *supra* note 1.

458 WHO. 2014. Strengthening the role of the health system in addressing violence, in particular against women and girls, and against children. Sixty-seventh World Health Assembly. A67/A/CONF./1/Rev.1.

459 European Institute for gender equality, *Gender based violence statistics and indicators*, 2016. http://eige.europa.eu/gender-statistics/dgs/browse/ta/ta_gbv. By the types of violent act, the database distinguishes between: sexual violence (rape, other sexual assault, sexual harassment), economic violence, physical, psychological violence, stalking, female genital mutilation, and trafficking in humans. The data is also segregated to reflect on the relationship of the perpetrator and victim: intimate partner violence, violence inflicted by family members, violence inflicted in workplace, and other.

460 WHO, World report on violence and health, 2002: "any sexual act or an attempt to obtain a sexual act, unwanted sexual comments, or advances, acts to traffic or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim in any setting."

Therefore, "smart" indicators are useful instruments, which can overview the enforcement of international law. At the same time, they must be used together with more in-depth tools and analytical methods (e.g. the CEDAW) and they need to be synchronized with substantive and conceptual developments.

Finally, the typology of indicators can also be seen as partially reflecting the challenges of regulating VAW under international law. The first set of indicators (structural or institutional indicators) is useful in meeting normative/procedural challenges, the second type (process indicators) relates to policy responses, where conceptual frameworks are at stake, and outcome indicators require changes on the substantial level. The indicators are suggested for assessment of national law and are not used for evaluation of international law itself. Nevertheless, if analogy can be used for international law, structural / institutional indicators would require adoption of the basic international legal instrument for realization of human rights on VAW, process indicators would require an adequate conceptual policy response for protection and fulfilment of human rights in the area, and outcome indicators would require substantial change and realization of rights.

1.2.6. New Convention to fill the normative gap?

The idea that a specific Convention is necessary is not new, but it has been recently reintroduced by SR VAW Rashida Manjoo and key scholars in the area of VAW.[461] The work on the Draft Convention on VAW commenced in 2012 and the text was prepared by Jackie Jones and Noelle Quénivet from University of the West of England in collaboration with many women rights activists, who responded to the call of Special Rapporteur on VAW to eliminate the normative gap. The current text of the Convention is not yet finalised, and it is quite usual that it takes many years for the texts to become final. The analysis is based on its draft as presented in summer of 2015.[462] The text of the Convention has been amended a few times.

Legal norms are capable to create obligations. It is not enough that violence, in general, is forbidden. Judicial decisions regarding VAW should be seen as sources of international law as well, as provided for in Article 38 (1) of the Statute of the ICJ. However, they are only secondary source of international law. Recommendations of the CEDAW should be seen as authoritative – but again, the states can refuse to accept them. Therefore a clear normative framework without a doubt would improve implementation of women rights.

It could also solve a problem of fragmentation of international law. Notably, VAW could be seen as a potential issue under many international instruments and in many contexts. The literature on fragmentation of international law does not go deep into the issue of VAW or gender based violence, but it is a noteworthy issue to raise. The question arises first of all if de-fragmentation in itself is a goal;[463] the answer is not obvious. Clearly, it would be good

461 Both Bonita Meyersfeld, *supra* note 25, and Alice Edwards, *supra* note 24, suggested adopting a treaty that clearly condemns VAW.

462 Addendum to the Human Right Council Thematic report of the Special Rapporteur on Violence, its Causes and Consequences (A/HRC/29/27), 8-22.

463 E.g. Catharine A. MacKinnon, in the context of rape, is asking the question whether rape needs to be "de-fragmented". *Supra* note 30, pp. 118-119.

to have a clear treaty basis, but "[m]ore laws and more fora do not necessarily mean that more women are enjoying more rights."[464] The arguments add up when it is considered that women rights in least developed countries (LDCs) are especially affected by the fragmentation of law: while women in Western Europe and other developed nations are granted higher level of protection, women in LCDs continue to be "generally outlawyered"[465] and that, in its turn, continue to re-enforce the fragmentation of human rights law. The fragmentation is further re-enforced by the focus on civil and political with a certain degree of neglect of economic rights. Meanwhile, some women are particularly affected by economic inequality and it is necessary to address the issue of economic empowerment, so they could acquire the agency to assert their civil and political rights effectively.

1.2.7. Summary

The significance of global normative gap in the field of VAW perpetrated by private individuals is diminished by the gradual recognition that customary international law obliges the states to prevent systemic VAW, perpetrated by private individuals. The CEDAW Committee, i.e. the body entrusted with the interpretation of the CEDAW as the most significant legal instrument on women rights, addresses the problem of VAW in its non-binding General Recommendations. It can only tackle VAW as a form of sexual discrimination because that is the scope of the Convention which it monitors. Gradually, the CEDAW committee undertook and managed a great work on developing the due diligence standard to protect against VAW in different contexts, and SRs on VAW in their specific reports also clarified what state positive obligations should encompass. It is now widely understood that state agents should act with due diligence in protecting women against violence and prevent immediate threats of VAW perpetrated by private individuals, once they become known to them and VAW is foreseeable.

Gender mainstreaming under traditional HR documents have been used as a parallel strategy, although it has been criticized for its declarative rather than binding effect. It is not difficult to add keywords "gender" or "intersectionality" to legal language, but that should also be followed by further normative steps and implementation.

The human rights measurement indicators help monitor the efficiency of human rights' approach; however, they are also open to manipulations and need to be applied together with qualitative analysis, which can be undertaken under the CEDAW. Meanwhile, work undertaken at the HCCH level could work to diminish the public/private divide both on micro and macro levels, because it would provide a concrete system of protection across borders rather than declarative paragraphs that address VAW. It is suggested that the HCCH does have the mandate to fill in the gap of cross border movement of protection orders because previously it had already adopted documents involving measures on protection of individuals.

464 Barbara Stark, "International Law from the Bottom Up: Fragmentation and Transformation," *University of Pensylvania Journal of International law* 34, 4 (2013): 711.

465 *Ibid,* p. 729.

Finally, the new normative text on VAW has been suggested, which could possibly bring the debate on normative-procedural questions to end. However, it needs to be evaluated in detail whether this document is an adequate response to conceptual and substantive challenges in the area of VAW. Although the desire to finally see a binding treaty that explicitly condemns VAW is understandable, this is also an issue of strategy, and careful consideration of sources of international law is recommendatory. It cannot be said that such treaty would fill a lacunae, considering the developments so-far discussed. A soft law instrument, for instance, the update of GR 19, which has been envisaged by the CEDAW Committee in 2016, could also contribute to development of international standards, and is not necessarily a worse option.

1.3. The conceptual debate on VAW

1.3.1. Criticism of human rights frame

> "The concept of human rights, like all vibrant visions, is not static or the property of any one group; rather, its meaning expands as people reconceive of their needs and hopes in relation to it. In this spirit, feminists redefine human rights abuses to include the degradation and violation of women. The specific experiences of women must be added to traditional approaches to human rights in order to make women more visible and to transform the concept and practice of human rights in our culture so that it takes better account of women's lives."[466]

Charlotte Bunch said this while calling for the conceptual understanding of women rights as human rights. Back in 1995, she saw gender based violence as a particular exemplary of women-specific abuse because "the gendered aspect of such abuse is often the most clear."[467] Much has been done, since the call to transform the human rights system to make it more inclusive. Human rights approach is now widely used to claim human rights violations by VAW. At the same time, women rights researchers currently are rather critical of the HR frame.

First, some doubts are raised whether human rights treaties are worthwhile[468] drafting at all. Besides general human rights sceptics,[469] the feminist call to stop investing ourselves into the liberal human rights discourse has been ongoing for many years.[470] Major criticism also

466 Charlotte Bunch, "Women rights as Human rights; Toward a re-vision of human rights". *Human rights Quarterly* 12 (1990):486-498, at p. 487.

467 Charlotte Bunch, "Transforming Human rights from a feminist perspective" In *Women rights, human rights*, Julie Peters and Andrea Wolper (eds.) (Routledge, 1995), 15.

468 See specifically on feminist critiques of human rights discourse, Hillary Charlesworth and Christine Chinkin, *supra* note 82, pp. 208-212.

469 Eric Posner, *The Twilight of Human Rights Law*, (Oxford University Press, 2014). The author poses an overreaching argument that states ratify a high number of toothless (unenforceable) human rights treaties, which are declarative and ineffective. For general historical criticism, see Samuel Moyn, *The Last Utopia: human rights in history* (Harvard University Press, 2012).

470 Also see Wendy Brown, "The most we can hope for ...": human rights and the politics of fatalism," *The South Atlantic Quarterly* 103, 2/3, (2004): 451-63.

comes from the field of critical legal studies. For instance, Mark Tushnet argued that talking about rights actually may be "positively harmful"[471] rather than useful.

Many women rights' scholars thought that human rights discourse is not beneficial for advancement of women rights, because women experiences cannot be translated into "rights talk" so easily, and the promise of rights often fails to be fulfilled.[472] Carol Gilligan's thesis was that the entire rights' discourse represents an inherently masculine approach.[473] Feminist works on international law revealed difficulties with rights due to their alleged "illusionary effect" and contrapositioning with other rights (e.g. the right to religion).[474] For instance, the much celebrated DEVAW failed to name VAW as a human rights violation and this "failure to create a nexus between violence against women and human rights was due to a fear that this might dilute the traditional notion of human rights."[475] Some scholars have also evolved from critical approach to human rights and essentially viewing the state as intrinsically "male" to the point where enforcement of women's rights was seen as compatible with their feminist view.[476] Both treating human rights as intrinsically male or intrinsically female can be criticized because the said distinction reflects a binary approach which essencializes experiences of men and women. It seems to be a reasonable point of view to require state liability for human rights violations of women,[477] on the equal grounds with racial minorities or ethnic minorities or any human beings.

A truly just society is colour-blind and gender blind[478] but unfortunately in the current societies, these characteristics have an effect on lives. They are positively significant and also significant because of discrimination. Thus from the perspective of the author of the thesis, it is essential to demand equal treatment and equal protection under the law. The function of the state as the protector should not be seen as inherently male: women can also be protectors and even more so, capacity to protect and defend those in need has hardly anything to do with gen-

471 Mark Tushnet, "An Essay on Rights", *Texas Law Review* 62, (1984): 1386. Also for the broader context, see Duncan Keneddy, "The Critique of Rights in Critical legal studies", Wendy Brown and Janet Halley (eds), In *Left Legalism/Left Critique*, (Duke University Press, 2002), 178-227. From this text, it is clear that the left theory is actually in the exact position of the earlier right – i.e. abandoning the human rights approach. The critique centres around indeterminacy (true for all law, for critical theorists), internal disintegration (particularization of specific groups rights makes it harder to argue they are universal), and unlimited expansion of rights.

472 See Hilary Charlesworth, Christine Chinkin, *The Boundaries of international law*, *supra* note 82, 208-209.

473 Carol Gilligan, *In a Different Voice: Psychological theory and Women's development,* (Harvard, Harvard University Press, 1982). The author suggested concepts of "ethics of justice" (rational, masculine) and "ethics of care" (holistic, feminine). It must also be noted that there have been scholars who argued exactly the opposite, i.e. that human rights are actually the *feminine* side of international law, e.g. Barbara Stark, as cited by Aaron Fellmeth, *supra* note 72, p. 686.

474 Ilona CM Cairns, *supra* note 21, p. 164.

475 Hilary Charlesworth, "Feminist methods in international law," *Studies of Transnational legal policy* 36, (2004): 164. Also A. Edwards, *supra* note 24, p. 22.

476 See analysis of early and late works of Catharine MacKinnon, by Janet Halley 2004, *supra* note 100, pp. 12-13.

477 Considering that women constitute half of the population and are not statistically speaking a minority in a certain area, it is more important empower women in aspects of life rather than simply protect the women rights. Even more so, it is the best to provide the tools/ conditions for women to empower themselves, which require physical, psychological, and economic security.

478 Iris Marion Young, "Equality of whom? Social groups and judgements of injustice," *The Journal of Political Philosophy* 9, 1 (2001): 4.

der. The second aspect that the author wants to raise is that of misrecognition. "Human" rights itself is a highly charged concept and recognition under the discourse is essential for being *within* the law, being "human." Women for too long have been the outsiders of the legal systems, and it can hardly be claimed that the last decade or few has turned the tables irreversibly.

Another point of HR criticism is marginalization that comes together with "women's" human rights. It has been claimed that the more women activists try to say that VAW is specific concern and place it within the debate on discrimination, the more it becomes marginalized and women are seen as the "other" in comparison with the "standard."[479] Keeping substantial equality VAW frame as the ultimate goal means that feminists in international law are required to use the tools of differentiation, which re-enforces the "otherness" of women in comparison to men: "while both the creation of specific women-centred human rights instruments and the current emphasis on the integration of woman's human rights might be seen as necessary strategies for providing adequate attention to women as rights holders" they also underline feminist paradox or feminist dilemma.[480]

This possible marginalization is another aspect of the so-called feminist dilemma in international law and there are no good solutions to it. It must be recalled, however, that VAW exists in all cultures and is mostly committed by men, who see women as subordinate. The statistics around the world show that women suffer from an epidemic violence. There are no cultures in the world which would treat violence against men perpetrated by women as cultural heritage, whereas in some countries it is still allowed to chastise women and the so called "honour" killings can remain unpunished.[481]Therefore, it is necessary to address women human rights, even if to do that is also paradoxical.

SR on VAW claimed that "[m]ost women's rights activists agree that it is the narrow interpretation of rights within an international legal order rather than the human rights discourse itself"[482] which forms a key challenge. Even the opponents of human rights as such propose that state compliance could be assessed by very specific metrics (e.g. poverty reduction) rather than checklist of rights that are declarative. Therefore, more clarity on the right to be free from VAW and specificities of due diligence duty would prove useful and arguably would provide a response to some of the critique.

It can also be argued that in case of minorities, the rights' approach has been significant. For instance, minorities may perceive and qualitatively experience human rights differently than majority members, who may actually abstain from concluding contracts in order to build trust; meanwhile minorities are still struggling to "be recognized as a whole"[483] and

479 Diane Otto, "Lost in translation: re-scripting the sexed subjects of international human rights law," In *International law and its others,* A. Oxford (ed) (Cambridge University press, 2006) p. 321.

480 Sari Kouvo, *supra* note 48, p. 319

481 For instance, the legislation of United Arab Emirates allows chastising wives and the Federal Supreme Court has upheld this right. Concluding observations on the combined second and third periodic reports of the United Arab Emirates. CEDAW/C/ARE/CO/2-3. 24 November 2015, para 27

482 Yakin Erturk SR VAW DD report 2006, *supra* note 51, para 57.

483 Patricia J. Williams, "Minority critique of CLS: Alchemical notes. Reconstructing ideals from deconstructed rights," *Harvard Civil Rights-Civil liberties Law review* 22, (1987):408. The author compared experiences of herself and Peter Gabel, her colleague and one of the founders of critical legal studies, finding that for her it was crucial to have documented rights (e.g. a rental contract) whereas for colleague it was not necessary.

need to draw boundaries as subjects recognized by law. Thus the protection by law is particularly important to more "vulnerable groups," and their rights require recognition by law. The dominating solution is to use the arguments of human rights and keep in mind the criticisms and risks.[484] Recognition of the said vulnerability of a particular group (e.g. women) to violence does not necessarily lead to their essencialization. Vulnerability is an emerging concept[485] in law that can be used for understanding women rights violations, and in particular as a critical tool[486] that fosters substantive equality.

The ultimate goal of human rights must be kept in mind. Human rights are not the ends in themselves, they are only means that may be useful (or not) for challenging global patterns of subordination that leads to VAW. The purpose of human rights is to correct the human wrongs and challenge the patterns of domination/ subordination that continue to exist in our societies. Therefore using them as barely as a table decoration is not enough; it is necessary to constantly re-evaluate the critical edge and the usefulness of human rights discourse. At the current state of events and from the perspective of the author of the thesis, they do work as a tool for reaching individual justice and also a possible tool for addressing structural violence. An update and restructuring may be necessary, but human rights techniques are instrumental.

The due diligence standard in relation to VAW, as developed by the CEDAW, should also be criticized. The CEDAW Committee was seen as artificially connecting due diligence standard and principles of equality and non-discrimination.[487] The Committee is often the most comfortable with conservative topics and approaches to violence but is less inclined to take political, social and cultural rights very seriously. Focusing on most severe and non-Western Europe forms of VAW has been indicated as a disadvantage of women right movement for many years.[488] Even the formulation of GR 19 leaves some room for speculations on state discretion.[489] Gradually, however, the CEDAW Committee developed a standard which requires no-drop prosecution in cases of VAW. For instance, in General Recommendation 28 (GR 28) it stated: "[w]here discrimination against women also con-

484 For instance, Ilona CM Cairns explains how in feminist scholarship on international law, the critical approach to human rights is very much "watered down" and overall more advantages are seen in the current system, than disadvantages, *supra* note 21, pp. 164-166. This may be explained by the fact that women rights advocates are using international law to promote changes in national law and thus, international law is often seen as imposing the "higher standard" (which may not always reflect the reality).

485 In general see Martha Fineman, Anna Grear, *Gender in Law, Culture, and Society : Vulnerability : Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013). Martha Fineman's thesis of vulnerability basically reflects the idea that all people share it as a certain condition, which is also the underlying basis of social contract.

486 E.g., see Lourdes Peroni, Alexandra Timmer, "Vulnerable groups: the promise of an emerging concept in European Human Rights Convention law," *International Journal of Constitutional Law* 11, 4 (2013): 1056-1085.

487 Simone Cusack, Lisa Pusey, "CEDAW and the Rights to Non Discrimination and Equality," *Melbourne Journal of International law* 14, L 54 (2013): 54-93.

488 Dianne Otto, *supra* note 121, p. 124.

489 Notably, the recommendation says that GBV is "violence that is directed against a woman because she is a woman or that affects women disproportionately". The second part of the sentence may raise some speculations whether violence is permitted if it affects women proportionally. *Supra* note 5.

stitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate criminal proceedings, to bring the perpetrator(s) to trial and to impose appropriate penal sanctions."[490] These are very procedural requirements that relate to individual due diligence. The dominant approach of human rights provide limited possibilities to require the states to also exercise systemic due diligence and prevent VAW at a primary level.

Moreover, some authors argue that obligation of mandatory state intervention also carries its risks, therefore states could be granted the "discretion not to respond" or transfer the response to other actors (communities, NGOs, advocates).[491] The main arguments for limiting state accountability and lowering the standard of due diligence in cases of VAW, as provided by Julie Goldscheid and Debra Liebowitz,[492] are stemming from critical approach to state-ism. It may indeed be true that states in principle are aimed at control rather than care for the individuals, and the state's intervention is often idealized. The same argument on dangerous reliance on the state apparatus has been put forward by Wendy Brown in 1995.[493] At the same time, one can recall that states are also obliged to act in compliance with the principle of good faith,[494] as established under the Charter of the United Nations[495] and the Vienna Convention on the Law of Treaties.[496] The principle of good faith in this context means that states should not become overly intrusive and also should take responsibility for mistakes and abuses of the system. The individual due diligence requires listening to the needs of the particular individuals and contextual sensitivity.[497] Meanwhile, the systemic and structural nature of VAW requires a systemic response and failures of state agents to protect women, as any other human beings, against violence, must result in state liability.

It must be noted that overall the critical assessments do not suggest restricting state accountability and still see the state as primarily responsible for human rights violations in

490 GR 28, *supra* note 102.

491 Julie Goldscheid, Debra J Liebowitz, *supra* note 97.

492 The main argument centres around criticism of state-ism: 1. there is a risk that the state will become overly intrusive (state overreach); 2. the state is not a benign stakeholder – mistakes and abuses of the system are inevitable; 3. Members of minority groups may face repeated exposure to victimization, racism, homophobia and etc.; 4. The system does not place an appropriate weight on the victims' concerns, because it has the goal to combat VAW rather than listen to her wishes or fears; 5. If it fails to have the consent of the victim, the system is not really just, reasonable, or empowering; 6. It is unreasonable to expect the state to be responsible for preventing every act of VAW, to be the provider of social services as well as education etc.

493 Wendy Brown, *States of injury: power and freedom in late modernity* (Princeton, Princeton university press, 1995), 169. She claimed that it is dangerous to give in to institutionalized protection because it is often corrupted by masculinity.

494 2006 Due Diligence Report, Special Rapporteur on VAW, E/CN.4/2000/68; paras 51-53.

495 Article 2 (2) of the UN Charter.

496 According to Article 26 of the Vienna Convention on the Law of Treaties, every treaty must be performed in good faith. It must be interpreted in good faith.

497 See on individual due diligence: Yakin Ertürk, "The Due diligence standard: what does it entail for women rights?" In *Due Diligence and Its Application to Protect Women from Violence.* Carin Benninger-Budel (ed), *supra* note 27, pp. 27-46.

its territory. This is the common ground.[498] Therefore, states should be provided with the discretion (and actually encouraged) to delegate the response to VAW to communities and NGOs but that should not result in *delegation of accountability*. The due diligence standard should remain high. To think otherwise would mean the come-back of the old test of state responsibility, which involves only the acts that the state can control. Nevertheless, in order to avoid the overreach of state response, as well as ignorance of victim's needs, the contents and the scope of states' positive obligations should be made more precise and provide for less possibilities of abuse.

Having said that, the reasons why the due diligence duty is "well liked" by states is that it is mostly of procedural nature, and its firm positioning in human rights frame is mainly focused on individual due diligence of the state. If the state agent had failed to adopt a certain decision (e.g. on investigation), it is not difficult for the state to admit this "human error." Hence, further efforts should be made to demand state responsibility regarding systemic due diligence, which goes beyond the frame of individual human rights. These developments should not necessarily fit under the label of due diligence.[499] For instance, Article 24 of the CEDAW Convention requires states adopt "all necessary measures" that seek to ensure "full realization of the rights recognized in the present Convention." This goes beyond individual due diligence standard as such.

1.3.2. The public - private divide

Private and public dimensions have been essential for understanding of law in Western thought, and the distinction is even more so important in international law, which encompasses both private international law and public international law. However, this distinction has also condoned or tolerated violations of women rights.[500]In situations where the state did not carry any responsibility for private VAW, it could choose to "ignore the continued subordination of women."[501] Private/public divide hence has been identified by SR VAW as the key obstacle to stronger approach to due diligence standard and broader vision of human rights.[502] Although VAW has gradually been recognized as human rights issue, there is still the lack of an explicit ban at the treaty level, which arguably shows the tendency to see VAW, if not private then a "domestic" matter. Meanwhile, at a domestic level, sexual harassment to this date is more acceptable than racial harassment and more likely to go unpunished and violence on the basis of political views is seen as unaccepta-

498 The main discussion in international law focuses on political criticism of "rights discourse", i.e. the debate that system of human rights is not effective, and requires transformation. At the same time, the majority of feminist scholars see more disadvantages in employing the human rights discourse (precisely in international law) rather than drawbacks.

499 Menno T. Kamminga sees more disadvantages of this than advantages, see *supra* note 285, p. 413.

500 Christine Chinkin, "A Critique of the Public/Private dimension," *supra note* 4. See also Aaron Fellmeth, *supra* note 72, p. 669-670.

501 *Ibid,* p. 392.

502 Due diligence report 2006. Pp. 13-17. The other two key-obstacles by the SR VAW identified are cultural relativism and globalization.

ble; but violence on the basis of gender can sometimes be seen as justifiable by cultural practice or the protection of the so-called "honour."

The system has mostly focused on violence perpetrated by state agents rather than private individuals. Under the CAT, for instance, it was noted that "sexual violence against women constitutes an abuse of human rights only if it can be connected with the public realm; for example, if a woman is raped by a person holding a public position for some type of public end."[503] The states refuse to accept responsibility if a woman is raped by a private individual, and even for structural violence and repeated rapes/femicides with a clear pattern. Surely the situation has significantly improved in the last decade, and it cannot be claimed anymore that rape and DV is never seen as human rights violations.[504] Furthermore, the critique as such is not void of culturalist approach, considering that VAW can also be met at the community level in plural justice systems. The persistent focus on response from the state can also replicate the stereotyping of women.[505] Finally, international law is no longer solely concerned with states as main actors,[506] thus it could be claimed that pre-occupation with state liability in order to protect against VAW is not adequate.

A few alternatives to the suggestion of some discretion of state actions and responsibility could be presented. Joanna Bourke-Martignoni, while criticizing due diligence standard, also offers an approach where "obligations to prevent and respond to human rights violations are no longer only applied through the 'back door' of state responsibility but that they also become directly applicable to non-state actors themselves."[507] This could be a valuable suggestion in particular in situations where state does not exercise control over its territory, financial market, or patriarchal attitudes in the society.[508] On the other hand, the suggestions on direct accountability of VAW perpetrators under international law is common for many scholars, although it usually lacks clarity on what the direct accountability of non-state VAW perpetrators should entail in practice. Does it mean that the perpetrators could be sued in ICC or other international courts under human regional rights conventions after the domestic remedies have been exhausted to no avail? Notably, Catharine A. MacKinnon suggests invoking responsibility of rapists themselves under international law.[509] Similarly, Kerri Ritz argued for criminal responsibility for human rights violators.[510] Alice Edwards has more specific suggestions for further development and re-

503 Hilary Charlesworth, "Feminist Methods in International Law". *Studies of Transnational Legal Policy* 36, 159 (2004): 164.

504 As recognized in cases of Opuz, *supra* note 169, Lenahan, *supra* note 26, etc.

505 E.g. women as victims and state agents as men.

506 Aaron Fellmeth, *supra* note 72, p. 671-672.

507 Joanna Bourke-Martignoni, "The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women Against Violence", In *Due Diligence and Its Application to Protect Women from Violence, supra* note 27, p. 58.

508 The question of rule of law can be raised in such extreme lack of control. Sovereignty stems from the will of the people and not from de facto control, but rule of law is significant in describing what constitutes a state.

509 Catharina MacKinnon, *supra* note 30, p. 120-121.

510 Kerri Ritz, "Soft enforcement: inadequacies of Optional Protocol as a remedy for the CEDAW." *Suffolk Transnational law review* 25, 1 (2001): 191.

sponsibility of private actors: she suggests a vision of an international human rights court. The envisaged global human rights court would have both vertical and horizontal jurisdiction and would hear claims regarding VAW committed by states, religious organizations, private individuals, corporations, etc.[511]The said suggestions are reasonable. Considering that VAW committed by state agents and state leaders can be addressed in many foras, and universal jurisdiction is also an option (note the conviction for various crimes, including rape, of Chad's former dictator Hissene Habre in May 2016), why there are such a few venues for justice in cases of VAW perpetrated by private individuals? It must be suggested that they are also necessary, and especially in cases where for various reasons, women cannot receive access to justice within a national system.

Moreover, the author finds that private international law (PIL) deserves more attention from the feminists but it must be remembered that it has its own structure and logic that is not always clear for the outsider. In particular, it has a potential because PIL treaties are mostly enforced rather than treated as recommendatory. Precisely in this area, the argument that a decreasing number of issues remain "purely domestic," is true. The norms of a PIL instrument as a rule must be applied instead of the national rules on the same matter and not simultaneously.

Dianne Buss has argued that the feminist criticism of public-private divide should be viewed with caution, because it reinforces the commitment of international law to such divisions.[512] Indeed, women are included as a result of gender mainstreaming and other strategies – but it is not clear under what terms and into what exactly. The fundamental structure of international law is not challenged – "the structure's own violence is left intact, and we assume, rather than interrogate, the functional capacity of such a structure."[513] The current developments towards normativity and towards new conceptual strategies involve both threats and opportunities.

On the one hand, the role of the HCCH as the key global stakeholder in PIL, as discussed above, can be viewed cautiously in the sphere of VAW and the question must be asked whether there is a movement backwards. Taken together with gender neutralizing tendency, it may require a further question whether VAW is once again being pulled into the area of "private" matters. On the other hand, if the legal frameworks that come up both at the level of the HCCH and the UN are realistically grounded and sufficiently focused, then the functional capacity of the structure of international law can be effectively improved. Finally, one might claim that private and public divide is entrenched by the division between public and private international law itself. Thus tackling VAW under PIL instruments, which paradoxically, tend to be quite successful and are applied rather than treated as recommendations, may be a good method for challenging this dichotomy.

Furthermore, there is yet another way that the PIL can be instrumental to public-private divide. Karren Knop, Ralp Michaels and Annelise Riles have argued that feminist le-

511 Alice Edwards, *supra* note 24, p. 334. Alice Edwards underlined that such a court would be a fine addition to ICC and would empower women by treating them as objects rather than subjects of international law.

512 Doris Buss, "Austerlitz and International law: a Feminist Reading at the Boundaries", In *International law: modern feminist approaches*, Doris Buss, Ambreena Manji, (eds). (Oxford: Hart Publishing, 2005), 69.

513 *Ibid,* P. 99.

gal analysis could borrow from the conflict of laws style, in particular in the context of culture.[514] In particular, they suggest using such classical PIL techniques as slicing issue by issue (depecage), characterization as borrowings for feminist analysis in legal issues that relate to cultural justifications of discriminatory effect on women. Furthermore, on the basis of PIL techniques, room could be left for recognition of relativist concerns, but at the same time, the ethnical considerations could prevail in more sophisticated manner than just primacy of one's ethical values over the other.[515] In a way, this is an attempt to infect the state of idealism with pragmatism, which could work for the benefit of women and enrich the debate.

1.3.3. The challenge of "neutralising" the VAW frame

Notably, VAW is the main conceptual category currently employed under all global and regional instruments.[516] As such, it is seen as "intrinsically collective and group based, not individual."[517] The debate on VAW always involved doubts of significance of gender and sex, and the need to challenge various forms of oppression of women. However, currently the SR VAW warned about "the shift to gender neutrality, ... the shift in understanding of gendered responses."[518] Over the years, concerns ranged from superficial denials of VAW as a significant problem that disproportionally affects women – to refreshing critique of identity politics, critical acclaim of intersectionality, and the focus on women's agency. In essence, it has been suggested[519] that a (contextualized) gender-neutral frame should be adopted instead of the current gender-specific VAW frame.[520] After all, as stressed by Iris Young who analysed structural inequalities (analogy to structural VAW), a free society should aim towards "color-blindness, gender-blindness, blindness to all those ascribed characteristics that historically served as markers of inferiority and exclusion."[521]

Darren Rosenblum argued that for the purposes of fighting gender inequality, the time is ripe to re-evaluate the concept of "women" and gender-specific frame under the Convention.[522] He claims that "[u]nsexing CEDAW would flip the architecture of international women's human rights to focus on gender, with women included under that rights umbrella."[523] On the other hand, Berta Esperanca Hernandez Truyol argues in response

514 Karen Knop, Ralf Michaels, Annelise Riles, "From multiculturalism to technique: feminism, culture, and the conflict of law style", *Stanford Law Review 64* (2012): 589-656.

515 *Ibid,* p. 656.

516 CEDAW GR 19, Istanbul Convention, ECHR, Convention of of *Belém do Pará*, Maputo Protocol.

517 Catharine A. MacKinnon, *supra* note 30, p. 106.

518 Statement by Ms. Rashida Manjoo, Special Rapporteur on Violence against women, its causes and consequences. http://www.ohchr.org/Documents/Issues/Women/CSW/StatementCSW2015.pdf

519 Julie Goldscheid, "Gender Neutrality, the "Violence against women" frame, and transformative reform," *UMKC Law Review 82*, 623 (2013-2014): 623-666.

520 "Frame theory", as suggested by Erving Goffman, refers to the bases for interpretation of societal phenomena. See Erving Goffman, *Frame analysis: an essay on the organization of experience*. 1974.

521 Iris Marion Young, *supra* note 478.

522 Darren Rosenblum, "Unsex CEDAW, or what's wrong with Women's rights" *Columbian Journal of Gender & Law 20,* 98 (2011): 98-194.

523 *Ibid,* p 193.

that CEDAW should be "super-sexed", and the category of "women" should not be abandoned.[524] Instead, she suggests including wider categories of gender based discrimination under the Convention, at the same time keeping the women specific frame at its core.[525] However, it is not completely clear how it should be done, considering that the CEDAW is a gendered and asymmetric instrument. For instance, the inclusion of violence against gay men or transgender men under the Convention is not really logical nor desired, both by LGBT advocates and women rights advocates. A separate legal framework seems necessary to address the broader range of inequalities related to gender, including gender based violence in a wider sense.

It must be noted that sexing and gendering are techniques that have been recommended for use by pioneering Hilary Charlesworth and Christine Chinkin, who distinguish the notions as "[s]exing draws attention to body and nature while gendering emphasises mind and culture".[526] They suggest using both techniques simultaneously.[527] At the same time, terms "women," "sex" and "gender" are rather controversial rather than universal and obvious. Carol Lee Bacchi noted back in 1996 that using the category of "women" actually limits the transformative potential and the desired political change.[528] At the UN level, the concepts of women, gender and sex have largely been used as synonymous. However, they do have a broader meaning as well, and "gender" can be used to profit both men and women. The recent feminist analyses of the "sex/gender distinction in the context of international law resulted in the relative exclusion of the notion of "sex" from feminist discourses, and in a preference for the analytic category of "gender" within feminist discourses."[529] It seems that the issues related to body, such as trafficking in women, violence against women, right to abortion – were the main focus of second wave feminism that are currently considered as mostly solved or mostly "a success story" under international law. In short, women rights project in the West is seen as a "case closed," where feminism does not have much to do anymore.[530] From such point of view, law has done everything and there should be other ways of addressing remaining inequalities, rather than legal ways.

In particular regarding VAW, Julie Goldscheid argues that the VAW frame is outdated and currently involves more disadvantages than advantages.[531] She suggests using the notion

524 Berta Esperanca Hernandez Truyol, "Unsex CEDAW? NO! Super-sex it!" *20 Columbian Journal of Gender & Law*, 195 (2011).

525 "Rather than abandon a legitimate and useful category, we ought to center multidimensionality and include sex, gender, gender identity, and sexuality in the international narrative on equality in order to promote all human flourishing." *Ibid,* p. 223.

526 Hilary Charlesworth, Christine Chinkin, *The boundaries of international law, supra* note 82, p. 4.

527 This is also the essence of the suggestion of Berta Esperanca Hernandez Truyol. Meanwhile, Darren Rosenblum and many others seem to suggest the use of "gendering" as the main approach.

528 Carol Lee Bacchi, *The politics of affirmative action: women, equality and category politics*, (SAGE publications, 1996), 13. At the same time she did not suggest giving up the use of category of "women" which she found strategically important. The question she raised was whether this category is universal.

529 Sari Kouvo, *supra* note 48, p. 311.

530 Nikki Karalekas, "Is Law Opposed to Politics for Feminists?" The Case of the Lusty Lady", *Feminist formations* 26, 1 (2014): 27-48. Some leading commentators now tend to suggest that law should now refrain from governing VAW altogether.

531 Julie Goldscheid, "Gender Neutrality and the "Violence Against Women " *supra* note 31.

of "gender violence" instead. While admitting that gender-based stereotypes still infuse the law, she claims that VAW frame is problematic both empirically, theoretically, politically and legally, and practically. However, her approach can also be criticized inasmuch as she claims that VAW frame excludes LGBT* persons;[532] and that it has been a success (i.e. VAW frame has already been recognized). Regarding the first argument on violence against LGBT* and violence in same-sex relations, it is indeed true that little attention has been paid to it until recently. Violence against LGBT* stems from the same heteronormative ideology, where men and women have certain roles to fulfil and those who do not fit gender-boxes are seen as "unreal" humans and deserving violence.[533] Violence in same sex relationships is similar to violence in heterosexual relationships, insofar as it is connected to means of subordination of the partner to the power of another. The differences relate to additional burdens (minority stress and structural inequalities)[534] faced by victims in these situations. Recently it has been recognized that GBV frame under the CEDAW should encompass LGBT persons. For instance, Carin Benninger-Budel notes that"[g]ender-based violence is understood as encompassing violence against women, violence against men in certain circumstances as well as violence against women and men on the basis of sexual orientation or gender identity". [535] It has also been recognized by SR VAW.[536] The category of VAW as the widely spread form of GBV may not erase violence against men or children, nor experiences of violence against LGBT* persons and in same-sex relationships. Rather than abandoning VAW frame altogether, the conceptual framework that encompasses reflections from queer theory and applies to gender-based violence in all its forms should be suggested.

The criticism of the VAW frame lays on the assumption that the quest described by Charlotte Bunch in 1990 has been a "success."[537] However, the recognition of state's positive obligation in case law under CEDAW and other human rights treaties is very recent and still questioned by the governments. Despite this recognition, there are still no clear norms at international law, in contrast to violence on the basis of race, or disability. The normative framework is missing. Recommendations are not always followed; in fact, non-compliance

532 She identifies empiric, theoretic, political and practical problems, which relate to the assumption that VAW frame excludes the experiences of men and LGBT survivors. It does seem to be plausible – similarly, focus on prohibition of racial violence does not exclude experiences of white males nor children. These are different matters which all need to be addressed.

533 "If violence is done against those who are unreal, then, from the perspective of violence, it fails to injure or negate those lives, since those lives are already negated. But they have a strange way of being animated and so must be negated again (and again)." Judith Butler, *Precarious Life: The Powers of Mourning and Violence*. (New York: Verso. 2004), p. 33.

534 *Violence in same sex relationships: a knowledge and research report*. The National centre for knowledge of Men's violence against women. Uppsala University, 2009 (2).

535 *Due Diligence and Its Application to Protect Women From Violence*, *supra* note 27, p. 6.

536 Special Rapporteur on VAW Radhika Coomaraswamy, statement to the 58th session of the UN Commission on Human Rights, 10 April 2002. The former Special Rapporteur on VAW, said back in 2002: "Gender-based violence is also related to the social construct of what it means to be either male or female. When a person deviates from what is considered "normal" behaviour they are targeted for violence. This is particularly acute when combined with discrimination on the basis of sexual orientation or gender identity."

537 E.g. Janet Halley, Julie Goldshield.

is a major issue. The denial of VAW as a significant problem and human rights violation is still ongoing, at least in Eastern parts of the European Union. Therefore it cannot be claimed that one decade of growing recognition of states' due diligence obligations has been enough and we can now move-on to post-feminism.[538] A decade ago, it was claimed that "[s]ocial constructions of women as inferior, as poor, as lacking agency all contribute to vulnerability, including to harassment by State officials with whom they come into contact."[539] Julie Goldshied herself in 2015 submitted a study[540] which shows that 88 percent of violence survivors faced disbelief and blaming by the police. Thus the instability and the bias of the system is still very relevant for DV and GBV survivors, the majority of whom are women.

Although women rights, feminism, emancipation, and gender mainstreaming is used (and sometimes twisted) in the mainstream language of political actors, transnational corporations and the military,[541] it does not mean that the feminist project in international law is finished. On the contrary, it is as significant as ever, and requires revisited strategizing, in particular considering the turn towards increased "hard talk" on national security after 9/11 and the current events in Europe (migration crisis and raising extremisms), and in consideration of the criticism of one-dimensional identity politics, prioritizing women's ethnic origin over her human rights. The mass-shootings of women in 1989 in Canada[542] and 2014 in USA show that the hatred of the "female gender"[543] is still there. The murder of Mirabal sisters in 1960, the murders in 1989 (Canada) and 2014 (USA), the gang rapes in Indian buses,[544] the mass sexual harassment of young women in Sweden and Germany[545] in public events point to the relevance of keeping the gender equality discourse in the focus.[546] As the draft update of GR 19 stresses, GBV against women is "the fundamental social, political and economic mechanism by which the subordinate position of women with respect

538 Post modern feminism refers to a range of thinkers who are essentially beyond radical feminism and liberal feminism and focusing on anti-essentialism.

539 Marsha Freeman, Christine Chinkin, Beate Rudolf, *supra* note 244, p. 465.

540 *Responses from the Field: Sexual Assault, Domestic Violence, and Policing*. CUNY school of Law, University of Miami, and American Civil Liberties Union, Julie Goldscheid et al, (ACLU Foundation, 2015).

541 Sari Kouvo. "A "quick and dirty" approach to women's emancipation and human rights?" *Feminist Legal Studies*, 16 (2008) 37–46.

542 "You're women, you're going to be engineers. You're all a bunch of feminists. I hate feminists." - these were the words of Marc Lepine, at 1989 shootings in Canada, before opening fire and killing 9 women (overall 14 killed that day).

543 For instance, in 2014, the mass shooter Elliot Rogers stated: "My war on women. ... I will attack the very girls who represent everything I hate in the female gender", 2014 shootings in USA.

544 2012 Delhi gang rape involved gang-rape of Jyoti Singh, a student traveling on a bus, who subsequently died due to injuries. In 2016 March, another Indian woman was attacked on a bus and gang-raped, and her infant was killed during the attack. Kayleigh Lewis, "Mother gang-raped on bus in India as two-week baby dies in the attack." 11 March 2016. *Independent*. http://www.independent.co.uk/news/world/asia/india-gang-rape-women-violence-bus-bareilly-daughter-baby-killed-a6925371.html

545 Tim Hume, "German Justice Minister: More migrants will be deported after Cologne attacks." CNN. January 13, 2016. Accessed 25 February 2016. http://edition.cnn.com/2016/01/13/europe/germany-cologne-attacks-fallout/

546 However, they also may point to the need to review the substantive contents of the law, which may be gender neutral or gendered; the major problem is their effect on the lives of women

to men and their stereotyped roles are perpetuated."[547]It is both the empirical moment that matters – the fact that women are targets of rapes, targeted shootings, and DV – and also the constant perpetuation of the power structure by the mechanism of VAW.

Having said that, the arguments proposed by the scholars arguing for more "gendering" under international law are still vital, and they should be included into the debate on transformative change. It must be noted that generally speaking, the sphere of disagreement may in the end be narrow. The gender neutral network as such is also not necessarily a threat it itself, although there is a risk that in gender-neutral environments, which are at the same time adverse to women rights, a greater attention to cultural differences can work to jeopardise gendered phenomenon and marginalize VAW, in particular in minority groups.[548] Most of the commentators agree that the conceptual gendered analysis is necessary and only disagree on how it should be undertaken. The point of a different departure for the author of this thesis is that instead of replacing VAW category with gender-violence category, both categories could be used simultaneously. VAW is still a prevalent phenomenon which recently has raised some of its dragon-heads in new shapes in Europe.[549] Considering the widespread scope of VAW, and the power structures that underlie it, the need to keep this category is convincing, not only from the perspective of the Eastern Europe, or Middle East, or Mexico, or USA, but globally. The term "gender based violence" or "gendered violence" may be capable to address the complete vacuum of norms on violence faced by LGBT persons. At the same time, recognition of intersectional discrimination of LBT women, and the need to protect from violence queer men, should not lead to abolition of the VAW frame. Hence, these frames could be developed in parallel. The suggestion of including all gendered crimes under one umbrella is not plausible, because the normative gap in the area of violence against LGBT persons is much deeper. In fact, we can talk about two related normative gaps, and only the gap in the area of VAW currently is currently tackled by customary international law and conventions.

Julie Goldscheid herself claims that the gender-neutrality of GBV does not mean that gender-lens should be completely abandoned, i.e. the focus on social context must always be retained.[550] I.e., the conceptual gender neutrality (gendered violence frame) does not deny the fact that most of gender violence is violence against women that is perpetrated by men. It allows encompassing other forms of violence: violence in same-sex relations, violence against men, and does not base itself on binary and stereotypical view of gender. The said approach can be criticized, however. Without a clear reference to gender-sensitive approach in the normative framework, a notion which is gender neutral but in practice is applied mostly to protect women against men, gives an impression of hypocrisy and

547 Draft update of GR19, *supra* note 19, para 10.

548 Julie Stubbs, "Gendered Violence, Intersectionalities and Resisting Gender Neutrality," *Onati Socio-legal series* 5, 6 (2015), 1433-1451.

549 For instance, sexualized street violence against women in Germany, Cologne, in 2016. However, although the scale of the incidents were noteworthy, it must be underlined that VAW is not caused by the move of refugees and migrants itself. VAW occurs in every country and every day. As such, it is not a "migrant problem."

550 Julie Goldscheid, "Gender Neutrality and the "Violence Against Women " Frame, *supra* note 31, p. 323. She underlines that "gender neutral terminology need not be politically neutral", p. 310.

conspiracy. Therefore it seems that the premises for applying gendered approach should be explicitly provided for in the normative framework.

The essential threat of the mixing-up strategies – whereas VAW frame is used in parallel to gender violence frame and to some extent is entangled from SD equation – is to lose the focus on the ultimate goal of substantial equality of men and women. Notably, the UN has started from neutral strategies aimed at gender equality; subsequently it has moved to women-centred approaches; and finally, it adopted the gender mainstreaming strategy, which Sari Kouvo calls "dual strategy."[551]She argues that the "blame the strategy approach" which often comes together with arguments that a new strategy is conceptually necessary, may continue to cover persistent inequalities and hinder transformation.[552] Strategies must be grounded and contextualized,[553] and simply adding gender, sex or and mixing-up the frames does not work. However, striving towards substantive gender equality cannot be defined as the aim of gender neutrality. Political will and financial and other resources can be lacking while simply adding the keywords of "gender equality", "violence against women" or "gender based violence" is not going to work like magic. Therefore it is essential to create the legal framework that is both realistic and capable to attract the necessary political will, but at the same time is not too mild and keeps the focus on gender equality paradigm instead of washing out the "uncomfortable" edges.

It is proclaimed in many resolutions that VAW is a result of historically unequal power relations between men and women, which have led to domination over women, and which is "one of the crucial social mechanisms by which women are forced into a subordinate position compared with men."[554] Regarding prevention efforts, it is not enough to focus on isolated incidents of VAW because that does not solve "the underlying sociocultural problem".[555] It is also necessary to strive towards substantive gender equality, and not just legislative and formal equality. Notably, the principle of progressive realization of women rights has been entrenched in the CEDAW as the global convention on women rights. The new CoE Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) of 2011 in Article 6 asks the states to include a gender perspective in their policies on VAW, and the Draft UN Convention for the Elimination of Violence against women and girls (CEVAWG) also requires striving towards transformative equality (Article 4). It is significant that the newest regional document in the area of VAW and the draft global Convention stress the continuing importance of gender equality paradigm. The relation of VAW and gender equality is reciprocal. Not only VAW should be seen as stemming from inequality of men and women but also the opposite is true – VAW constitutes an obstacle to gender equality. It is difficult to talk about equality in workplace, for instance, when women are facing threats to life and health due to VAW.

551 Sari Kouvo, *supra* note 48, p. 44-47.

552 *Ibid*, p. 305.

553 *Ibid*, p. 305-307.

554 UNGA Declaration on the Elimination of Violence against Women, *supra* note 116.

555 CEDAW Committee, Report on Mexico Inquiry, CEDAW/C/2005/OP8/Mexico (27 January 2005), at 10.

1.3.4. The structural and systemic VAW

States have a duty to prevent systemic VAW under international law.[556] Attention to preventative strategies has so far been lacking. However, it is not only individual VAW but also the systemic nature of it that requires state responsibility.[557] Due diligence duty is defined broadly on the global level. It does not only encompass due diligence duty to prevent a femicide of a woman, when threats to her life become known to state agents. It also refers to the state's duty to prevent systemic VAW. For that purpose, the states need to pay the attention to structural nature of VAW and address multiple forms of discrimination.

It can be claimed that women to this date experience structural VAW.[558] This term corresponds to that of structural discrimination: "discrimination and injustice in the social, economic, cultural, civil, and political fields create the conditions under which VAW can occur."[559] The inquiries under the CEDAW into systematic and grave VAW are good examples of this structural phenomenon. In the last decade, the CEDAW Committee analysed two inquiries over systematic and grave women rights violations.[560]

The first one concerned a situation in Ciudad Juárez in Mexico,[561] where "widespread kidnappings, disappearances, rapes, mutilations and murders, especially over the past decade"[562] targeted young women working as cheap labour in factories. There was a pattern to the killings, where many women were threatened, abducted, their relatives were informed, and in a few days, the mutilated women's bodies were found. After extensive procedure, which included country visits, the Committee stated that violations of women rights were indeed grave and systematic[563] and adopted a number of both general and specific recommendations addressed to Mexico.[564] The Government responded that most of the killings of women (66 %) were "ordinary crimes" (sic) of domestic violence and 26 % were of sexual nature. However, it recognized that there murders constituted human rights

556 See Bertrand G. Ramcharan, *Preventive human rights strategies,* (New York: Routledge, 2010), p. 14-15, the author names VAW as the first problem illustrating the challenge to prevent.

557 Bonita Mayersfeld claims that states have responsibility precisely in cases of systemic intimate partner violence. Furthermore, international jurisprudence also clearly refers to due diligence duty to prevent systemic violations.

558 For more on structural violence, see Jonah Galtung, "Violence, peace and peace research," *Journal of peace research* 6, (1969): 167-191.

559 Elizabeth V. Henn, "Gender injustice, discrimination and the CEDAW: a women's life course perspective," *supra* note 21, p. 193.

560 The inquiries systematic and grave violations of women rights fall under the procedure described by Article 8 of the Optional Protocol. They usually takes a lot of time: e.g. 3-7 years, but they are absolutely essential to crystallize aspects that the CEDAW Committee finds crucial for women rights and effective response to VAW.

561 The CEDAW Committee has been informed about troublesome situation in Ciudad Juárez in Mexico in 2001-2002; it decided to take up an inquiry and subsequently released the report in 2005.

562 CEDAW Committee, Report on the inquiry concerning Mexico under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico. CEDAW Committee, CEDAW/C/2005/OP8/Mexico (27 January 2005), para 26.

563 *Ibid*, para 259.

564 The specific recommendations were focused: first, on investigation and punishment, and second, on prevention and security.

violation, "origin of which lies in entrenched cultural patterns of discrimination."[565] The level of violence in Ciudad Juárez remains critical to this date,[566] gender based violence and femicides are still rather prevalent.[567] The analysis based on gender equality paradigm is unfortunately not pursued. The usual discourse involves underlining the systemic nature of various human rights violations in Ciudad Juárez, which is faced by all people in that area, without distinguishing the important aspect of gender inequality and power relations between men and women in that area.[568]

In 2015, the CEDAW Committee issued another report on inquiry into alleged grave and systematic violations of women rights: this time, on Canada.[569] The inquiry of women rights violations in Canada concerned prevalent VAW, kidnappings and murders of aboriginal women, who were six times more likely to be murdered than non-aboriginal Canadian women. While Canada has been putting significant efforts since 2010 to improve the situation,[570] the CEDAW stated that "State party's compliance with its due diligence obligation to take appropriate and effective measures to overcome all forms of gender-based violence needs to be assessed in the light of its extensive and long-standing knowledge of patterns of vulnerability and risk for aboriginal women in its territory."[571] In other words, Canada's efforts were not seen as adequate in consideration to the gravity of violence against aboriginal women. Thus, the CEDAW Committee found grave and systematic violations of

565 Mexico inquiry, *op.cit.,* conclusions of Mexico Government, para 5.

566 Accessed 1 March 2016, https://www.osac.gov/pages/ContentReportDetails.aspx?cid=17214

567 For instance, the murder of Marisela Escobedo Ortiz in 2010, a famous social activist in Mexico, reveals the extent of the problem. The woman was murdered while demanding justice in the case of murder of her 16 y.old daughter, who was killed in 2008.

568 It must be stressed that high numbers of *overall* criminality and murders in a certain area (or for the certain ethnic group, e.g. aboriginal groups in Canada) should not lead to disappearance of gender-sensitivity in the analysis. While all persons in a discriminated national minority group and areas affected by poverty and high levels of criminality face threats of violence, women in Ciudad Juárez faced intersectional discrimination, where their gender, their social class, their poverty, their ethnicity, and their age had interconnected in such a way as to affect them "disproportionally". Furthermore, the gendered analysis may provide a better understanding of the power relation processes which lead to characteristic murders, and help create targeted protection and prevention tools. In the case of Ciudad Juárez, the problem was that women were seen as rivals for jobs by men, and on the one hand, as cheapest labour, they had been abused by employers, and on the other hand – they faced the harassment and life threats by the rival males and local criminal groups. It must also be recalled that both in Ciudad Juárez and in subsequently in specific parts of Canada, VAW and deaths of women, and the lack of real response from the state, had created a clear pattern of the femicides investigated. Similar patterns are not observed with regards to violence against men. Considering the state response to VAW was inadequate, lack of justice in cases of femicides had led to impunity.

569 CEDAW, Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 30 March 2015, CEDAW/C/OP.8/CAN.1. There was also another inquiry, which did not concern VAW, regarding Philippines, see Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. 22 April 2015. CEDAW/C/OP.8/PHL/1.

570 Nevertheless, Canada (as well as its significant neighbour, the USA) is not a party to the regional Convention on VAW, the Convention of of *Belém do Pará*.

571 CEDAW, Report on the inquiry concerning Canada, *op.cit,* para 208.

indigenous women rights.[572] Thus in the inquiry concerning Canada, the Committee reiterated the importance of *intersectional* approach to discrimination, and the significance of addressing poverty in state responses. Subsequently, the Government of Canada accepted 34 out of 38 of the Committee's recommendations and in the end of 2015, launched a National inquiry into missing and murdered indigenous women and girls.[573] However, it has also been suggested to abandon the gender sensitive discourse, considering that aboriginal men and boys also face great risks of violence and discrimination.

Especially regarding domestic violence, the CEDAW Committee recognized from the very start of including VAW into its agenda, that "[l]ack of economic independence forces many women to stay in violent relationships."[574] In 2016, it is still true that "major forms of oppression of women operate within the economic, social and cultural realms".[575] It is significant that in the inquiry regarding violence against aboriginal women, the CEDAW Committee paid significant amount of attention[576] to economic conditions of aboriginal women in Canada. The inquiry on Canada (2015)[577] resulted in Canada's accepting of absolute majority of the CEDAW Committee's recommendation.[578] Thus addressing the importance of economic rights directly may subsequently result in better implementation of civil and political rights, as well as more effective protection against VAW.

Alice Edwards, after reviewing the various feminist voices that essencialize women experience – including the ones that criticize such essencialization or choose to use it wisely and strategically – comes to conclusion that women experiences of discrimination and VAW are still rooted in "shared oppression."[579] She stresses that it is absolutely critical that

572 The violations constituted breaches of articles 1 on Discrimination, 2 (c), 2 (d), 2 (e), 2 (f) on Policy measures, 3 on Guarantee of Basic human rights, and 5 (a) on Stereotyping of the Convention, read in conjunction with articles 14 (1) on Rural women and 15 (1) on Equality before law. Under Article 2, the Committee stated that "the failure of the State party to address and remedy the disadvantaged socioeconomic conditions in which aboriginal women and girls live, compounded by the insufficient measures taken to address the prevalence of all forms of violence against aboriginal women and the difficulties for aboriginal women in accessing justice, has allowed such violence to persist in the State party." *Ibid*, Canada inquiry, para 210.

573 National Inquiry into Missing and Murdered Indigenous Women and Girls. Government of Canada. Accessed 16 April 2016. http://www.aadnc-aandc.gc.ca/eng/1448633299414/1448633350146

574 GR 19, *supra* note 5, para 23.

575 Hilary Charlesworth, Christine Chinkin and Shelley Wright, *supra* note 82, p. 635.

576 The fact that the CEDAW Committee stressed the importance of economic rights under the Convention can be seen as the landmark step. The CEDAW Committee mostly analyses individual complaints concerning VAW in countries which often have acute economic issues and problem of poverty, hence it is understandable why then it is difficult to follow the recommendations, which require change of patterns of behaviour in societies. To follow it thoroughly, funds need to be allocated.

577 Meghan Campbell, *CEDAW inquiry into grave violence against aboriginal women in Canada*, Oxford Human Rights Hub. 25 March 2015.

578 Thus the CEDAW and its monitoring body have the effect inasmuch as the states are actually capable and willing to accept this effect. Obviously, this is not very secure basis – but it does give the basis for international law instruments in this area. In the end, many international law instruments do face problems with implementation and fragmentation. A different speed of development towards the common goal is inevitable. Furthermore, the problem of fragmentation is precisely the most acute in the area of women's economic rights.

579 Alice Edwards, *supra* note 24, p. 83.

international human rights institutions continue to embrace the notion of women rights and gender equality. "Without this core, international human rights law risks being rendered irrelevant and undermined by state-driven cultural relativity agendas."[580]

The SR on VAW also noted in particular cultural relativism as the "major barrier to the implementation of international human rights standards and as a justification for violation of women's human rights."[581] The debate on cultural relativism vs universalism is ongoing for decades but it must be stressed that in violations of human rights, such as VAW, reliance on cultural constraints to justify passivity and condoning should not be seen as logical[582] nor ethical. It must also be noted that the UN High Commissioner for Human rights in its universal periodic reviews has not accepted[583] the cultural relativist arguments as justifications for violence and ignorance of the CEDAW. Harmful practices and VAW must always be condemned.

At the same time, women face VAW even in the most progressive (i.e. gender equality-wise) parts of Europe. E.g. the numbers of VAW are striking in respect of the Scandinavian countries: 32 % of women in Sweden, 37 % of women in Finland, and 55 % of women in Denmark have experienced physical and/or sexual violence or threats by previous partner since the age of 15.[584] Of course, these numbers must be viewed with caution. Low numbers in some states may be explained by the lack of awareness rather than actual insignificance. Moreover, the said survey includes a very broad definition of violence,[585] which may also have had an effect on the outcomes. The reasons of high numbers of VAW in the Nordic countries – the so called "Nordic paradox", which entails high results in gender equality and at the same time high numbers of VAW – must be studied in more detail.[586] It should not be viewed as the proof that gender equality "does not work" to reduce VAW, however. While interpreting the statistics, it is necessary to see whether multiple acts of VAW are each calculated separately (e.g. Sweden), or account for only one crime (e.g. Lithuania). In addition, the women's awareness of what is VAW and sensitivity to overstepping the limits of physical integrity, may also be important.

The instances of VAW that occurred in the Western parts of Europe after the last wave of migration could serve as illustration of the said problem of globalization and "cultural relativity", as described by SR VAW. In the beginning of 2016, discussions arose over grand-scale violence in Germany, where many women in Cologne were attacked and groped by

580 *Ibid.*

581 Due diligence report 2013, *supra* note 314, para 66.

582 Lea Brilmayer, Tian Huang, "The Illogic of cultural relativism in global human rights debate," *The Global Community Yearbook of International Law and Jurisprudence*, 1 (2014): 17-36.

583 Edward McMahon; Marta Ascherio, "A step ahead in promoting human rights? The universal periodic review of the UN Human Rights Council," *Global Governance* 4, 18, 2 (2012): 231-248.

584 FRA survey 2014, *supra* note 2, 2014.

585 The women had been asked whether they "experienced physical and/or sexual violence by current and/or previous partner, or by any other person since the age of 15", while the concept of physical violence included pushing, slapping, grabbing, etc., and the concept of sexual violence included attempts to force into sexual intercourse, consented sexual activity, where the woman was afraid of what would happen in case of refusal, and etc.

586 Enrique Gracia, Juan Merlo, "Intimate partner violence against women and the Nordic paradox," *Social science and medicine* 157, 5 (2016): 27-30.

large groups of men. The discussion ranged from suggestions by some feminists to ignore the fact that violence was perpetrated by migrants (only a few of them refugees) to suggestions on focusing on their ethnicity. In the opinion of the author, it is essential that gender equality concerns and women's right to be free from violence take priority. However, the ethnicity of perpetrators should not be used to ignore forms of VAW which are not easily written-off to the doing of "Others." The fact that VAW is pertinent in countries with less gender equality should mean that increased gender equality leads to less tolerance to VAW. The remaining problems with decreasing VAW perpetrated by ethnic minorities or against ethnic minorities may mean that intersectional forms of inequality are more difficult to tackle.

There is a danger in bluntly applying of a culturalist lens to make a generalization about a certain society or ethnic group. For instance, the empirical analysis of domestic laws on VAW concludes that "religion matters" and the majority-Muslim countries had less or weaker protections against VAW. On the other hand, the same research also found that states with the Christian majority were "slightly more likely than those with a Muslim majority to impede enforcement of gender-violence laws. Majority Christian status was also reliably associated with greater gender inequality and greater female HIV rates."[587] Therefore it is not clear why the conclusion that religion matters connects the finding with Muslim majority states, because religion seems to matter also in case of VAW in Christian majority states. The so-called honour crimes[588] are committed all over the world and they are not tied restrictively with Islam, or related to a particular ethnic group. The concept of "honour" is actually very diverse and used in different contexts but "customs and value systems governing particular cultures are often invoked to support such practices."[589] If this justification was to be accepted, it would serve as a disguise from the real problem – the subordinate view of women as objects of control, which is found across cultures and across religions. Aisha K. Gill convincingly argues that it is important to counterbalance "between failing to challenge cultural values that are in conflict with human rights and condemning cultures wholesale for specific practices."[590]On both micro and macro levels, the discourse on VAW cannot be devout of non-prejudicial analysis that involves aspects of culture.

VAW is stemming from harmful stereotyping and patriarchal attitudes to women. It is neither sexist nor racist to recognize that certain crimes (for instance, the so-called "honour" crimes) are a problem, and adopt clear legal provisions, targeted legal strategies on preven-

587 David. L. Richards, Jillienne Haglund, *supra* note 29, 125.

588 Notably, there are different perspectives of talking about the so called honour based VAW. For instance, the National centre for knowledge of men's violence against women in Sweden distinguished 3 different perspectives, i.e. cultural, gender, and intersectional perspective, noting however that all of them see VAW "as originating from patriarchal power". See *Honour based violence – a knowledge and research report*. NCK. 2010, p. 3.

589 Aisha K. Gill, "Feminist reflections on researching so-called 'honour' killings". *Feminist Legal Studies* 21 (2013): 250.

590 Aisha K. Gill. Avtar Brah, "Interrogating cultural narratives about "honour"– based violence." *European Journal of Women's Studies* 21, 1 (2014): 84.

tion.[591] On the one hand, it does not matter who committed VAW – in any case it cannot be justified by cultural reasons. They may be important, when we focus on the needs of the survivors of VAW, because it is necessary to address the political and structural inequalities faced by minority women. It has been recognized at the EU level that women in ethnic minorities face multiple forms of discrimination; e.g. they face discrimination approximately twice as often as men in the same ethnic groups.[592] Therefore, it is essential to include considerations of intersectionality within any future legal framework in this area. It is also essential to resist the attempts to use intersectionality to tone down the human rights discourse under international law.

1.3.5. Is the Draft Convention a good conceptual response?

It has been observed that the "fundamental obstacle to prevention of suffering by women and an increase in their representation at domestic and international levels has been the tendency for states and international organizations to spend their time and resources on drafting and signing new international instruments instead of enforcing the surprisingly enlightened ones that already exist."[593] Although it may be tempting to adopt the Convention which finally fills in the gaps on a normative level, the text of the Convention must be analysed carefully in order to see whether it brings added benefits conceptually, and the effect of its possible adoption must also be strategically assessed.

The text of the Draft Convention is a continuation of the UN resolutions and CEDAW recommendations inasmuch as it presents VAW "a form of sexual discrimination" (Article 2 a).[594] On a positive note, the Convention would transform the GRs into norms and would respond to the problems of the lack of normativity and public/private divide. It is also a positive sign that the Draft Convention keeps gender equality as the paradigmatic basis, because VAW is related to gender inequality and subordination. VAW can be experienced by many persons in different contexts – thus it also seems useful to retain the possibility to individualize the approach.[595] It immediately stands out that the CEVAWG remains very strongly within the frame of VAW, and uses the VAW=SD strategy. It does not accommodate all forms of gender violence in its present form. The Draft Convention includes two definitions: VAW and GBV,

591 The ignorance of problems faced by minority women in order to avoid marginalization of the issue of VAW (or marginalization of minority group) is part of *political intersectionality* that Kimberle Crenshow described back in 1994. The refusal of Los Angeles police to reveal data on violence against black women (explaining the refusal by concerns of NGOs that fight for HR on the basis of race / sex) is now mirrored in Europe. The Swedish and German police have been accused of covering up the data, in order to avoid stigmatization and anti-migrant activities. Eliza Gray. "Swedish feminists thread needle between sexism and racism in migrant controversy," 19 January 2006, http://time.com/4182186/sweden-feminists-sexual-assault-refugees/

592 *Tackling Multiple discrimination: practices, policies & Laws*. European Commission, Danish institute for Human rights. 23/11/2007. EU Midis data in focus5: Multiple discrimination. 2011 February. P.4.

593 Aaron Xavier Fellmeth, *supra* note 72, p. 727.

594 This recognition on the one hand may leads to repeated essencialization of experiences of women, and on another hand, may recognize the structural VAW that is experienced by women.

595 Alice Edwards advocates for a "contextual intersectional reasoning" which would involve more individual –tailored response rather than treating all women as homogenous group. Alice Edwards, *supra* note 24, p. 337.

which both are gender specific and formulations are copied from Istanbul Convention (which in its turn draws on CEDAW GRs). VAW includes discriminative violence against women and girls, and gender based violence is violence "that is directed against a woman because she is a woman or that affects women disproportionally." (Article 2). Thus in this regard, a question arises whether the additional benefit is solely in raising GRs to the treaty level.

In the main body of the text, the Draft Convention draws on both GRs to the CEDAW and Istanbul Convention (in many provisions, copy-pasting it). However, it is doubtfully a good idea to replace the mixed frame approach under Istanbul Convention with the gendered approach (VAW = SD) and add the parts of Istanbul Convention which would require some substantial changes. For instance, the integration of education materials on non-stereotypical gender roles (Article 14 part 1 of Istanbul Convention, Article 11 part 1 of CEVAWG) is offered. The said provisions already met some opposition in some parts of Europe, because regions impacted by Roman Catholicism feared that this will lead to teaching non stereotypical "gender ideology" in schools. It is doubtful that it would work well in Asia and the Middle East, which are currently left out, and the geographic gaps are given as the reason for normative framework. The other issue besides political strategy (i.e. is the Convention actually adoptable) is also a conceptual message that this provision gives. It can be viewed and has been viewed in Europe as an attempt to "civilize" the Other, and it can be seen as such on a global level through a post-colonial lens.[596] Thus it is doubtful whether at this precise moment of time, it is a good idea to put efforts for this direction. Hence it is suggested that soft law approach, e.g. updating the GR 19 under the CEDAW is strategically better in times of uncertainty, considering that it provides "room for compromise" and tailor made commitments.[597] The paradox of the soft law approach is that its content can also be very progressive and accommodating for both far-going and hesitant national approaches.

Although many women experience VAW, and prohibition of VAW may be seen as an international custom, the universality of women experience and human rights implementation cannot be assumed. The application of human rights standards (and the law itself, for that matter) depends on the context and experiences are not universal. The CEDAW has been used to fill the normative gap, which led to VAW being equated to sexual discrimination (SD). Alice Edwards called for a new approach, perhaps partially abandoning the VAW-SD strategy, and Dianne Otto suggested that transformative shift towards more inclusive framework is necessary: one where recognition of specific needs would be combined with common language of equity.[598] However, the current text of the CEVAWG

596 International law of 19th century was related to colonialist project, where it was employed as a tool for rationalization and justification of the unjustifiable. See Antony Anghie, *supra* note 76. It can even be argued that the dichotomy between European/civilized and non-European/backwards is persistent and these provisions could be seen as attempts of "civilizing" the East.

597 Celeste Montoya formulated it in this way: "soft law is a more flexible mode of governance that provides room for compromise. It allows states to adapt their commitments and tailor implementation to their particular situation. It more readily accommodates states with different degrees of readiness for legislation. Furthermore, it is arguably a better way of dealing with the uncertainty inherent in new and complex international issues because it offers strategies for individual and collective learning." Celeste Montoya, *From Global to Grassroots: The European Union, Transnational Advocacy, and Combating Violence against Women*, (Oxford: Oxford Studies In Gender and International Relations, 2013), 43.

598 Dianne Otto, *supra* note 121.

seems to follow the CEDAW Committee's work very closely. It comes before the CEDAW draft update of GR 19, but it is based on the same conceptual paradigm, i.e. seeing VAW as a form of discrimination and tackling it within the gender equality paradigm. Strategically, if the same conceptual approach (VAW = SD) is retained in a new normative tool (this is true in the current draft of the Convention on VAW), then it should rather be adopted in a form of a protocol to the CEDAW Convention rather than a separate document. That would ensure coherency and would abstain from weakening of the role of the CEDAW, if the new Protocol / treaty does not gain significant support. If a Convention is offered with strong statements on normative vacuum, and then it is ignored by states, the impression of vacuum may remain and the persuasive power of soft law instruments and customary law may be weakened.

VAW is a global phenomenon due to factual inequality and narrow understanding of gender roles. Unfortunately, substantial equality has not been achieved in any country of the world and VAW exists in all countries. Thus international convention or protocol, clearly prohibiting VAW, would be a useful tool. A new instrument may serve as a tool for the long-awaited transformative shift. The Draft Convention actually includes "transformative equality" as one of its key principles (Article 4 General principles). It could encompass the concerns raised by many women rights advocates, as well as address the issues put forwards by the sceptics of the human rights discourse.

The Convention attempts to explain what "gender" is, albeit in a way which is solely limited to women.[599] As previously discussed, the CEDAW defined gender in its General Recommendation No. 28.[600] Meanwhile, the definition of gender under the CEVAWG is much more limited.[601] It is also more restricted than the definition under the Istanbul Convention, which includes both social roles appropriate for women and men (Article 3 part c). The Draft Convention's attempt to describe "women" ("persons who are perceived by or self-identify themselves as women") in principle should also include some trans-women. However, by including the words "perceived by" it unnecessary underlines the element of "passing" as a woman. The concern of the cis-gendered community on "passing" stems from binary understanding of gender roles. Moreover, some trans-women may not identify as women, but precisely as transwomen. This possibly replicates stereotyping of transwomen, and also stigmatizing of feminine men, gay men and transmen, who do not identify with "women" but may be perceived as such. The protection offered to them under VAW frame would come as a misunderstanding. Thus, the CEVAWG seems to be "super-sexed" legal instrument, which tries to think about gendered violence in broader terms, and at the same time, it does not fully respond to the call of LGB, transgender and intersex individuals to address the problem of violence against them.

599 Article 2 parts b and d of draft CEVAWG, *supra* note 45.

600 GR 28, *supra* note 102, para 5. "The term "gender" refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community."

601 Under the CEVAWG, *op.cit*, it is understood only as "socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women."

The author suggests that it cannot – VAW and GBV frames should be developed in parallel, because they concern different, although related,[602] conceptual and substantial challenges.

Nevertheless, Draft Convention tries to address intersectionality. In Article 8 (1) it provides that states "recognize that women and girls who suffer violence are subject to multiple and intersecting forms of discrimination."[603] However, the provision is hardly an answer to the main problems of intersectional discrimination, e.g. many states require a comparator which is difficult to find; and hierarchy of identities is being drawn, i.e. women are being forced to choose one ground for non-discrimination.[604] The said problems could be directly or indirectly solved by treaty provisions. The current provision, which simply declares that all women are experiencing multiple/intersectional discrimination is not helpful in that regard. More efforts could be put in drafting the provisions on intersectional discrimination.

For the new treaty to be successful, it needs to adopt a broad reading of VAW. A parallel regime (another treaty or another group of provisions within the same treaty[605]) would apply to persons directly affected by gender violence and other gendered crimes.[606]

However, the Draft Convention attempts to provide a global approach in some of its articles. For instance, Article 19 part 2 says that "[i]nvestigations carried out by the authorities can take various forms, using civil, criminal, religious, indigenous or any other suitable mechanism to determine whether there has been or there is suspected to be a violation of the present Convention." It also provides that „[p]unishment can be meted out using civil, criminal, religious, indigenous or any other suitable mechanism" (Article 20 part 1).This is a very interesting and a novel approach, which tries to provide the room for alternative methods of tackling VAW rather than the legal system. Notably, this corresponds to the critique presented in particular by those commentators who analyse how VAW is tackled by the use of indigenous knowledge in Australia, New Zealand and in other parts of the world. It is truth that „[i]f the goal of the international women's movement is to avoid the tendency to be culturally imperialistic, intervening in DV needs to be appropriately understood and contextualized."[607] On the other hand, the CEDAW Committee has critisized the fact that in Kyrgyzstan, VAW is mainly tackled by the elders' (aksakals) courts,[608] and viewed community settlement mechanisms in Solomon islands with great caution.[609] In its GR 33 on women's access to justice (adopted in July of 2015),[610] the

602 The concerns are related, because women and LGBT face violence as a result of power structures of heteronormative hegemony.

603 Article 8 para 1 of the CEVAWG, *supra* note 45.

604 Laima Vaigė, "Moterų tautinėse mažumose daugialypė diskriminacija." *In* Tautinių mažumų apsauga: tarptautinės teisės aspektai. Katuoka, Saulius, et al. (Vilnius: Mykolo Romerio universitetas, 2013), 407.

605 Istanbul Convention is an example of such treaty, which has two parallel frames – VAW frame, which is based on VAW-SD strategy, and also DV frame, which applies to all DV victims, including men. *Supra* note 17.

606 Les crimes et à caractère sexiste.

607 Karen Morgaine, "Domestic Violence and Human Rights: Local Challenges to a Universal Framework." *Journal of Sociology & Social Welfare* 33, 4 (2006): 119.

608 Concluding observations on the fourth periodic report of Kyrgyzstan. CEDAW/C/KGZ/CO/4. 11 March 2015.

609 Concluding observations on the combined initial to third periodic reports of Solomon Islands. CEDAW/C/SLB/CO/1-3, 14 November 2014.

610 CEDAW, General Recommendation on women's access to justice. 23 July 2015. CEDAW/C/GC/33.

CEDAW Committee is relatively positive towards plural community justice systems, including the religious, indigenous and etc. mechanisms. However, it distinguished between alternative dispute resolution processes (mediation, reconciliation) and plural justice systems.

Regarding the alternative dispute resolution, the CEDAW Committee says that states should see that VAW cases are "under no circumstances referred to any alternative dispute resolution procedures."[611] The analysis of all concluding observations of the last five years also shows that the Committee is very sceptical regarding restorative justice, mediation and reconciliation in cases of VAW, including domestic violence. There has not been a single situation where the Committee responded to mediation and reconciliation idea positively.[612] It talks about it in relation to access to justice and criticizes it as impeding with the criminal proceedings. The Committee in particular demanded to give mediation no preference over criminal proceedings,[613] to discourage its use in DV cases,[614] to prohibit mandatory mediation[615] and to provide for legal safeguards[616] regarding mediation and reconciliation in cases of VAW. If the country still must have reconciliation and mediation, then the Committee demands at least to train[617] the mediators in order to increase their gender sensitivity and capacity to respond to VAW. The CEDAW Committee is more flexible on so-called "plural justice systems" (systems based on religious, customary, indigenous, community laws and practices and coexisting with laws and regulations). Although it observes with caution that plural justice system may indeed reinforce stereotyping, it also sees the potential to reconcile it with the Convention.[618] However, the practical problem with religious, indigenous, community settlement mechanisms may arise if they suggest reconciliation rather than access to justice, whereas victim's interests are not always represented, and retribution can be paid to the victim's family rather than the victim herself. The effectiveness of the plural justice systems globally is very varied. Moreover, the CEDAW Committee suggests ensuring equal participation of women in these plural justice systems – at least on all levels of monitoring, evaluation and reporting.[619] In reality this is easier said than done.

Furthermore, it must be noted that Article 23 (Effect on other treaties) of the CEDAW allows the application of "more conductive" provisions contained in treaties or national

611 GR 33, *supra* note 281, para 58 (c).

612 It is paradox in some aspects, because the CEDAW Committee itself can only "invite" the states to cooperate in cases where the state is suspected as gravely and systematically infringing women's rights, and "may invite" the states to inform about measures that have been taken after its country specific recommendations. Thus, the Committee itself has a mandate that resembles that of a mediator. See Optional Protocol, Articles 8-9.

613 Concluding observations on the fourth and fifth periodic reports of Eritrea. CEDAW/C/ERI/CO/5. 12 March 2015

614 Concluding observations on the combined initial to third periodic reports of Solomon Islands. CEDAW/C/SLB/CO/1-3, 14 November 2014.

615 Concluding observations on the seventh periodic report of Finland. CEDAW/C/FIN/CO/7. 10 March 2014. Para 19 d.

616 Concluding observations on the combined fourth and fifth periodic reports of the Gambia. CEDAW/C/GMB/CO/4-5, 28 July 2015.

617 Concluding observations of the Committee on the Elimination of Discrimination against Women: Jordan. CEDAW/C/JOR/CO/5. 23 March 2012. Concluding observations of the Committee on the Elimination of Discrimination against Women: Lesotho. CEDAW/C/LSO/CO/1-4. 8 November 2011.

618 GR 33, *supra* note 281, para 63.

619 *Ibid,* para 64(f).

legislation.[620] Therefore the contents of the CEVAWG should be assessed in the light of Article 23 – will the new Convention really is going to be "more conductive" than the CEDAW? Notably, VAW has developed into a central issue for the CEDAW Committee, and significant portion of its General recommendations, Concluding observations and individual inquiries is devoted to VAW. In the situation where a new Convention does not receive the necessary critical acclaim among the states, it may happen that the new Convention would actually weaken the current framework.

The Draft Convention is still at early preparation phases, thus it is difficult to claim that it is "more conductive." However, analysis of its text (here and below) shows that the Convention conceptually is rather close to the GRs and jurisprudence of the CEDAW, thus in parts it barely lifts the key strategy used by the CEDAW to treaty level. These parts do not allow claiming that it contains more conductive provisions. On the contrary, in some provisions it can be interpreted as being less conductive, as analysed in the next section of the dissertation. However, the Convention is also drawing on substantive parts of Istanbul Convention – and the parts copied from that regional Convention may be seen as "more conductive." Considering, however, that the new global Convention should attract the attention of those states that do not have any regional responses to VAW, it raises scepticism on the success of the draft text in these regions. In the likely event that the states do not ratify the Convention (if it is adopted), the CEDAW should continue to apply to them. Even if some global Convention on VAW is adopted in the next decade or so, in this current form or amended, it can be expected that the problem of VAW will not disappear from the agenda of the CEDAW Committee.

Notably, the Committee opened discussions on updating of GR 19, which shows the will to keep VAW as its central topic. The Committee has adopted "a life-cycle approach so that girls and /or older women may be included in every aspect, and the Committee has paid more attention to multiple forms of discrimination so as to be sensitive to indigenous or minority status, marital and/or maternal status, disability and/or sexual orientation and/or identity."[621] It is seen as a good opportunity for addressing the issues that have sparked a discussion among the scholars, for instance, VAW that is justified by culture or religion related reasons.[622] It cannot be said however that the CEDAW Committee has not updated its position since 1992, because in every new General Recommendation (e.g. GR 26 on migrant workers,[623] GR 34 on rural women[624]), it includes special recommendations on VAW in that particular context. It is suggested that updating the GR 19 at this moment seems to be a better conceptual response than developing a new legal framework that largely replicates the current conceptual strategy and adds substantive elements which can hardly gain acceptance by UN state parts in the areas with most

620 The Article provides: "Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained: (a) In the legislation of a State Party; or (b) In any other international convention, treaty or agreement in force for that State."

621 Yoko Hayashi, Chairperson of CEDAW Committee, Opening remarks of "From the Global to the Local : CEDAW Activism in the United States", March 14, 2016.

622 The Impact of Religious Fundamentalisms and Extreme Interpretations of Religion on Women's Human Rights. Briefing paper to the CEDAW Committee, 2015.

623 General recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R. para 26 (h,i, j).

624 General recommendation No. 34 on the rights of rural women. CEDAW/C/GC/34, 7 March 2016, para.25.

significant gaps. The current draft text of the GR 19 update, however early and still open for discussions, shows a high degree of focus on contemporary challenges to women rights vision.

For instance, the Committee recognized that "there has been erosion of legal and policy frameworks to address equality of women with men and non-discrimination on the basis of sex and gender"[625] and offered keeping the gender equality paradigm as the basis. The approach of the Committee is also increasingly intersectional, mentioning much wider groups of women, than the Draft Convention does, including transgender and intersex.[626] It also provides very specific, detailed recommendations, which go beyond the Draft Convention, in the areas of prevention of VAW, protection against it, international cooperation and data collection. For instance, it recommends the standard of gender sensitive court procedures, protection against immediate further violence, including risk assessment and protection orders, envisaging sanctions for their breach, and even providing special reparation funds for VAW victims. Due to the nature of the instrument, the Committee can be very specific and really draw the vision of women rights in great detail.

In addition, it must be recalled that the Istanbul Convention can also be accessed by non-member States to the CoE (see Article 76 of the Accession to the Convention). Perhaps the significant stakeholders without any regional treaties, such as Japan and USA, could be attracted to the existing Convention which has already gained a significant support? This is a legitimate claim, considering that they have already participated in the debates over Istanbul Convention and had been invited to adhere to it by the CoE. It is not a usual action for states from a different region to join a Convention of another region, but in principle it is possible (e.g., Italy has adhered to Inter-American Convention), and it is made available. It could be especially relevant, considering that the potential added benefit of the current CEVAWG is mostly related to the copying of more conductive Istanbul Convention's provisions. The update of the GR 19 also refers to more conductive provisions[627] and thus seems to suggest that the states are always invited to enter into regional conventions. Furthermore, if in the future a global Convention is adopted, it can also contain conductive provisions and in that case, for the states which adhere to it, these provisions would prevail.

1.3.6. Summary

Conceptual challenges relate to the necessary transformative shift of strategies under international law. These include the critique of human rights, public/private divide and the debate whether the prospective strategies should be gender neutral. The author argues that despite certain weaknesses of human rights approach, it remains a useful instrument, and in particular for improvement of the situation of minority women, who experience VAW. The state should remain accountable for its failure to prevent VAW under international law, because the turn to the opposite direction would bring back the problem of public/private divide, which leaves women in the shadows of the realm of the private matters.

625 Draft update of GR 19, para 4.

626 *Ibid,* para 11.

627 Draft update of GR 19, *supra* note 19, para 8.

The author argues that the prospective global document on VAW, which contains essentially similar or the same conceptual strategy as the CEDAW, should be presented in a form of a Protocol to the CEDAW, in order not to undermine the work of the CEDAW Committee. A prospective new convention could state clearly that VAW is a violation of human rights. In case it is chosen partially or fully move from VAW-SD frame, it should still retain clear ties with gender equality paradigm and the conceptual debate should retain gendered analysis. However, the author argues that in order to tackle the structural nature of VAW, the VAW frame should in fact be retained, and the gendered-violence frame should be developed in parallel. The violence against LGBT persons, which is often used as an argument for widening the frame, in fact constitutes a separate and deeper normative gap under international law. Although the causes of such violence are related to gendered roles, stereotyping and prejudices, just like VAW, it is clear that VAW has been much more thoroughly tackled and thus, there should be no steps back. The structural nature of VAW demands for an adequate response, which at this moment of time, cannot yet be gender neutral, because the violence is not.

The current text of the Draft Convention is based on the same general conceptual strategy as the GRs under the CEDAW and treats VAW as a form of sexual discrimination. The draft update of the GR 19 also follows the same strategy. In addition, GR 19 update does not present a threat to weaken the current framework. The soft law instrument establishes a closer coherence with regional instruments, provides room for tailor made commitments in the field of VAW, and thus is a better conceptual response at this moment of time.

1.4. Substantial challenges in the field of VAW[628]

1.4.1. Focus needed on structural responses

It may seem strange to think that international law can be substantially "gendered" because its norms may seem perfectly gender neutral[629] or even favouring women by specific asymmetric instruments, such as the CEDAW. However, neutral rules can have a gendered effect and it is manifesting itself clearly in some areas, and less so in others. For instance, gender neutral rules on sexual VAW and DV can be mild, vague, and recommendatory, and thus they are largely not effective for victims – but because most of the victims are women, they have a gendered effect. This is the reason why asymmetric instruments are necessary – in order to overcome discriminatory effect existing in the first place.

It has been claimed that regarding substantive rules, "international law is itself gendered neither in substance nor procedure but *is* gendered in its focus and lack of compliance institutions."[630] To Aaron Fellmeth, the focus of international law is gendered because the attention falls on developing a great number of economic treaties, which also are well-

628 It would be impossible to provide a comprehensive overview of all substantive challenges related to VAW. This part of the thesis barely focuses on some major key points of departure.

629 Fernando Tesón, *supra* note 108, p.655. The author gave an example of the exclusive economic zone in sea law.

630 Aaron Fellmeth, *supra* note 72, p. 726.

enforced.[631] The said focus can be somewhat shifted if VAW becomes targeted by private international law. It can also become less relevant to women if wealth is owned by more women and women increasingly participate in economics, hence economic treaties then would be increasingly important to them. Moreover, it is necessary to focus on economic rights in the context of VAW, considering that there has been so little progress so far in this area.[632] Finally, it must be recalled that currently, 1 % of the richest persons own more than the rest of the global population, the majority of them being men.[633] This goes beyond the concept of systemic discrimination,[634] because it is more than just a group of people that is affected. For any changes to happen, the grave and systemic inequalities of such proportions need to be addressed. Nancy Fraser was correct to claim: "Justice today requires *both* redistribution *and* recognition; neither alone is sufficient."[635] It is both the recognition of women as disproportionally affected by GBV that is important, as well as recognition of intersectional forms of discrimination. It is both the unfair distribution of wealth that is crucial, as well as unfair distribution of justice. Therefore, it is suggested that the substantial challenge of the feminist thought in this field is to develop argumentative tools[636] for addressing these substantial inequalities.

International distributive justice requires addressing the global poverty and also the issues of global inequality with ethical considerations, in order to avoid the repetition of the divide between the key players in creation of international law, as well as the so-called "periphery."[637] The usefulness of the CEDAW must be noted in this regard, because the Convention has the potential on contributing to decrease of inequality, considering its provisions on social and economic rights or women. The draft update of GR 19 attempts to address the economic problems by stating that states should ensure "access to financial aid

631 *Ibid,* p. 720.

632 Neil A. Englehart, Melissa K. Miller, "The CEDAW Effect: International Law's Impact on Women's Rights." *Journal of Human Rights* 13, 1 (Jan-March 2014): 26.

633 OXFAM briefing paper No 210, summary, 18 January 2016, "Women make up the majority of the world's low-paid workers and are concentrated in the most precarious jobs", p. 6.

634 Committee on Economic, social and cultural rights, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) E/C.12/20, 2 July 2009, para 12: "systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups."

635 Nancy Fraser, " Recognition without Ethics?", *Theory, Culture & Society* 18, (2001, 2–3): 21–42, at 22.

636 It seems that human rights system has been mostly used in order to gain recognition of a certain group of persons, and also often through the use of noncritical approach of vulnerability: i.e. women are vulnerable, thus their needs should be seen and recognized. Meanwhile, the status of a human being demands more just distribution and not only recognition of needs. In accordance with the understanding of the author, distribution does not only refer to more equal distribution of property/wealth but also requires a wider analysis of distributive effects of legal systems.

637 For a broad overview of the centre/periphery divide and political economy in international law, see David Kennedy, "Law and the Political Economy of the World," *Leiden Journal of International Law,* 26 (2013): 7–48. Of course, thinking in these terms requires a critical political view at international law and is challenging for classic international lawyers. In particular, the author noted that "for international lawyers to take on the challenge of understanding and transforming the political economy of the world, they will need to turn against professional demands for an account of what international law permits and forbids or how the world is legally constituted," p. 47.

and free or low-cost legal aid, medical, psychosocial and counselling services, education, training and employment opportunities for victims/survivors of gender-based violence against women, and their family members."[638] The Committee also suggests having special reparation funds for victims of VAW, which should be offered instead of lengthy individual litigation.[639] This solution would allow protecting victims' dignity, challenge myths related to VAW, and the lack of any compensation in most of these cases. At the same time, it is a very technical/ institutional solution, which reflects the tendency of soft law HR instruments to become increasingly technical (from visionary language to bullet-point language). The document could still include further particularities, for instance regarding coordination and partnerships with the women rights NGOs. The document could also clarify that the compensation by the reparation fund does not preclude legal remedy as available under the national or international law.

Another solution has been suggested, e.g. to establish a global fund, by which wealthier states would help the rest of the world to enforce women rights and decrease large scale VAW.[640] The establishment of the UN Women (The UN Entity for Gender Equality and the Empowerment of Women) in 2010 is a significant step that the UN GA has taken to this direction. However, in consideration of the scope of the problem, this is not quite sufficient. It seems that the focus of most academic studies, even if the analyses are comprehensive and involves substantial problems, mainly falls on procedural and conceptual solutions. For instance, it has been suggested to adopt a global Convention or a protocol, to establish of international human rights court,[641] or to undertake global threat assessments for prevention of VAW.[642] The ongoing discussions on the standard of due diligence, as well as victims' rights in the EU also are very procedural in nature. With this in mind, feminist scholarship should not lose its focus by aiming only at the form but also continue its efforts to elaborate substantive solutions.

1.4.2. Substantial challenges in addressing DV

VAW perpetrated by intimate partners may be claimed as particularly related to the gendered effect in international law. In many countries, it is still considered the "private sphere" and protection is provided as an exception, and intervention to family life always need serious justifications. It is also most needed for DV victims to have resources for leaving the situation of abuse, with some prospects of physical and economic safety. Finally, it is for them that the notions of agency and empowerment becomes of crucial importance.

When prohibition of DV is discussed, it was suggested to connect the substance of the right (to be free from DV) to *systemic* violations.[643] In other words, as mentioned in the Introduction, there are situational incidents of DV, which should not trigger international

638 Draft update GR 19, *supra* note 19, "protection and redress", a-iii, footnotes omitted.

639 *Ibid,* "protection and redress," c.

640 Aaaron Fellmeth, *supra* note 72, p. 731.

641 *Ibid,* 334. Alice Edwards, *supra* note 24, underlined that such a court would be a fine addition to ICC and would empower women by treating them as objects rather than subjects of international law.

642 Bertrand G. Ramcharan, *supra* note 556, p. 126.

643 Bonita Meyersfeld, *supra* note 25, p. 108.

law, and there are cases of systematic individual violence, which can also be described as coercive control[644] or intimate terrorism.[645] Bonita Meyersfeld suggests that international law should be triggered when DV is: sufficiently severe (mental or physical), continuous, committed predominantly by men against women (GBV), women are vulnerable and cannot obtain justice, and it is systemic in the state concerned.[646] However, the author of this thesis considers that setting the list of these elements as guiding or even mandatory for proving in DV cases under international law may work for the detriment of victims.

The level of severity is needed to trigger the legal system, both at national and international levels. It may determine whether the VAW suffered can be seen as torture, ill treatment, degrading and inhuman treatment, or violation of the right to private and family right under the European Convention of Human Rights. It is also necessary for recognition of VAW as torture under relevant classic international law documents, e.g. CAT (with state agent' acquiescence). It is necessary to trigger the CEDAW Committee's competence under the Convention. Until rather recently, VAW perpetrated by the private perpetrators was not even seen as a legal issue, and only the last decade has showed significant movements in the area. There are also some "hard cases", e.g. a woman is raped by her husband, and no clear signs of physical damage can be traced. Can it be claimed that this rape constitutes a sufficient level of severity? Arguably, it would be the sufficient level of severity to trigger the CEDAW, but it could not be seen as sufficient to trigger the CAT. It can be said that tying VAW to torture has a perspective only if the concept of torture is wide enough to include experiences of rapes and DV. At the moment this is not the case, both at the global and the regional level.

The author considers that the elements of continuous harm and systemic state ignorance are also problematic. In situations of coercive violence, perpetrators' behaviour can be coercive without express signs of VAW (professional psychologist may think otherwise, but women often do not consider controlling behaviour as violence).[647] It can be impossible to prove continuous harm, if there is only one episode of violence, which alone can be harmful enough. Therefore the definition of DV as series of events (coercive control) is not always plausible,[648] and difficult to ascertain at the level of international law. It is true that in practice there is often more than one episode, however, the CEDAW Committee has never required the element of systematic conduct in its case practice, and if the international law demanded this element, it may translate badly into some national contexts. The tendency to describe DV through systemic conduct can work in states where there is more room for comity (UK, South Africa, USA)[649] but would arguably bring only detriment to victims' interests in other states.

644 Evan Stark, *supra* note 7.

645 Michael P. Johnson, *supra* note 8.

646 Bonita Meyersfeld, *op. cit.* p. 111.

647 Laima Vaigė, *Apsauga nuo smurto artimoje aplinkoje: psichinės prievartos problematika*. (Vilnius: Lietuvos zmogaus teisiu centras, 2013.)

648 *Ibid*, p.16. The author suggested that it is useful to describe psychological DV in Lithuania as a course of conduct and perhaps use the term of coercive control /behaviour. However, in case of physical DV, it would not be suitable for the international law (or national law) to demand series of incidents.

649 Bonita Meyersfeld, based in South Africa, relies on mainly common-law scholars to suggest the "series of events" approach.

Regarding the connected element of state passivity, this refers to systemic due diligence of the state to prevent VAW in the country. However, victim who suffered prejudicial treatment and stereotyping and was refused help should not be in a situation where she has to prove that state systemically acts this way to all victims. It is significant to recall that states are accountable for individual due diligence braches.[650] The author has previously argued[651] that it is necessary to distinguish between cases where the state breached only its individual due diligence, thus infringing Article 1-2 (discrimination) of the CEDAW Convention, and where the cases where the state infringed systemic due diligence, also infringing Article 5 (stereotyping and prejudices) of the Convention. Furthermore, in more pronounced cases, this may even amount to "grave and systematic violations" under Optional Protocol to the CEDAW and require individual inquiry. It would not be plausible to consider that the systemic state' failure to address VAW is a necessary element in all DV cases.

The element of group vulnerability can also bring indeterminate results. Group vulnerability of women cannot be seen as obvious but is related with a complex set of circumstances, and thus room should be left for more complex intersectional analysis. The analysis under Part 2 of the work shows that it is the particular set of identity elements (age, ethnicity, geographical region of the country) that the ECtHR takes into consideration, when establishing that the victim belongs to a vulnerable group. At the same time, the author considers that the timing is of essence. After the attack, the victim of sexual VAW or DV can indeed be seen as vulnerable, in particular in countries where VAW is treated as a "natural" part of her life. Thus, encounters with the state system and non/state support system should be gender sensitive and presume vulnerability of victims, even if a general presumption of vulnerability of women as a group should be avoided. At the same time, if the state infringes its systemic due diligence to protect women against VAW, concerns of intersectional analysis should not be used as a shield against recognition of this infringement.

It seems essential to suggest accompanying the concepts of agency[652] and empowerment[653] with substantial rights, including social and economic rights, for instance, the right to adequate housing for DV victims,[654] and the right to privacy and security for DV victims. When women escape DV, they risk becoming homeless, repeat victimization, and losing custody as a result of homelessness. Ownership of property also correlates with occurrence

650 As previously discussed, SR on VAW distinguished between individual (particular case) and systemic (state efforts in general) due diligence.

651 Laima Vaigė, "The concept of domestic violence in Lithuania and the aspect of gender from the perspective of international law." *Social sciences studies* 5, 1 (2013): 255-274.

652 It is suggested to update GR 19, stressing that measures on VAW "should be implemented considering women as subjects of rights and promoting their agency and autonomy." CEDAW Committee, Draft General Recommendation No. 19, *supra* note 19, para 15.

653 The term does not translate easily into legal language, but notably, Istanbul Convention for the first time has incorporated it into the treaty language, see Article 1.1.b of Istanbul Convention, *supra* note 17. It is suggested to use it on the global level in any soft law or normative instruments on VAW. The draft update of GR 19 also uses the term, albeit fragmentally (in the context of international cooperation). CEDAW Committee, Draft General Recommendation No. 19, *supra* note 19, para b.

654 See *Women and the right to adequate housing*, (Geneva: UN human rights office of the High Commissioner, 2012), 74-80.

of DV in the first place, and helps dealing with it when it occurs.[655] Coerced debt is yet another economic problem that DV victims are facing.[656] Thus it is important to ensure that both property laws, provisions on adequate housing and consumer loans are aligned with DV and VAW victims' interests, and interests of their dependents.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), a multilateral treaty[657] that requires implementation of economic or social rights[658] has attempted to incorporate gender mainstreaming. Since 2005, the Committee under the Covenant explained that it should be understood as requiring "*inter alia*, to provide victims of domestic violence, who are primarily female, with access to safe housing, remedies and redress of physical, mental and emotional damage."[659] The Committee also mentioned that GBV precludes women from enjoying their economic rights. The right to housing could also be addressed under the European Social Charter.[660] However, the GM efforts did not go further than declarations and the documents in this area have not been effectively used to advance VAW victims' rights in the area.

Some of the said concerns have been addressed by the CEDAW Committee in its draft update of GR 19, in particular saying that "Perpetrators or alleged perpetrators' rights or claims during and after judicial proceedings, including with respect to property, privacy, child custody, access, contact and visitation, should be determined in the light of women's and children's human rights to life and physical and mental integrity."[661] However, the author considers it far from sufficient. First, the Committee starts from the position of the *perpetrator's* right to custody, visitation and etc., when it is in fact the victim's rights that should be in the focus. Second, these are not all the concerns that the women may have, e.g. the concerns of property rights of victim, housing, coerced debts, and etc. are not being tackled yet. The drafters of the update of GR 19 should consider including these concerns.

Sexual VAW and DV against women are increasing seen as a topic of policy on health. 2013 WHO published the guidelines on intimate partner violence and sexual violence[662] and adopted the Strategy and Plan of Action on Strengthening the Health System to Address Vio-

655 *Ibid,* p. 77. One study showed that women with property reported less DV than women without property, and another showed that women with property said that it helped them deal with threatening situations.

656 This issue has been widely researched, although in USA context, by Angela Littwin. However, the same issue emerges in the context of Europe and other regions. See Angela Littwin, "Coerced debt: the role of consumer credit in domestic violence," *California Law review* 100, (2012): 951-1026.

657 Adopted by the UN GA on 16 December 1966, in force from 3 January 1976, UN Treaty series, vol. 993, p. 3.

658 UN Economic and Social Council, Committee on economic, social, and cultural rights, General Comment N. 16 (2005) on Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights. E/C.12/2005/3, 13 May 2005.

659 *Ibid,* para 27.

660 Revised European Social Charter of 1996, CETS No. 163, Strasbourg, 3.V.1996. Article 31.

661 CEDAW Committee, Draft General Recommendation No. 19, *supra* note 19, on protection and redress, para a-ii.

662 WHO, Responding to Intimate Partner Violence and Sexual Violence against Women : WHO Clinical and Policy Guidelines, 2013.

lence against Women.[663] Considering that this plan includes development of very concrete indicators to be met by 2025 and also some budget (4,900,000 US dollars), it may have a great potential for substantive realization of the women's right to highest standard of physical and mental health. The draft update of GR 19 also recommends that health sectors should provide victims of VAW trauma-healing and reproductive health services, preferably for free and until complete recovery.[664] On the other hand, when VAW is seen as an issue of public health, it is important not to lose the critical angle of analysis. VAW cannot be seen only through the lens of medical / social problem. It is first and foremost a human rights infringement.

In order to empower DV victims, it is significant that they are not viewed as weak and needy, but that their power and agency to choose appropriate legal measures is recognized.[665] At the same time, depending on the particular context, sometimes when the arguments of agency are used in context of gender inequality, they tend to reinforce the public /private divide. For instance, "agency" can be used to claim that the woman has chosen for the perpetrator to come back home: she must have known what she was doing when she said she is not going to testify and consented to his return? It can be claimed that she feels "empowered" by his resources of physical labour and money that are returned together with him. In reality of Eastern Europe, these arguments are used by those who strongly oppose legal protection against DV in the first place, and thus, women's agency is abused to ignore the fact that women have been intimidated into silence and submission. There must be other sources of economic empowerment for DV victims, than the perpetrators and the state. Agency should not strip the victim of her subject status under the law. Similarly, DV victims who chose to resort to self-defence should not be stripped from the status of the victim.[666] There is a danger in expecting the DV victim to be "ideal victim"[667] and show incapacity of defending herself. It is too often that the law views the victims who resort to violence in response to an assault as "not real victims", as if they must imitate the identity of a real victim by always being helpless, otherwise the status and the protection is lost. The defence possibilities should be provided to these victims, i.e. allowing submitting evidence on previous physical and psychological DV.

1.4.3. Substantive challenges in addressing sexual VAW

The lack of compliance and implementation of international law, when it comes to women, has been underlined by many different actors and scholars as "the real problem." However, it cannot be presumed that the substantive concept of "rape" really is sufficiently developed,

663 Strategy and Plan of Action on Strengthening the Health System to Address Violence against Women. Pan American Health organisation. World Health organization 2015.

664 CEDAW Committee, Draft General Recommendation No. 19, *op.cit.*, on protection and redress, a-iii, and c.

665 Aya Gruber, " A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform", *The Journal of Gender, Race, and Justice 15.3* (Spring 2012): 583-615.

666 Bonita Meyersfeld, *Domestic violence, supra* note 25, p. 172. She argues that when battered women murder the perpetrators, the legal systems should allow the evidence of the circumstances of continuous abuse as a defence for the murder.

667 According to various research, many people, including state agents, have the ideal image of the victim, which is weak, defenceless and innocent and has no relation to the defendent. See Magnus Lindgren, Karl-Åke Petterson, Bo Hågglund, *Victims of Crime, theory and practice*. (Stockholm: Jure Förlag, 2005): 29-32.

considering the large margin of ineffectiveness of legal provisions addressing rape. It can be rhetorically asked whether we would be satisfied with the definition of murder or burglary, if only a few percent of murderers or burglars were convicted. Rape historically was seen as crime against property, and then a crime against honour and decency.[668] There are at least five different models of understanding rape as such[669] and various legal models regarding the significance of consent in law.[670] Consent as such does not necessarily translate in a way that is favourable to women in national law. International law is capable of helping women, but it also has all the instruments needed for perpetrators to escape responsibility[671] Hence despite the consent-focused jurisprudence under the CEDAW and very strong suggestion of the CEDAW Committee to introduce legislation that connects rape with the lack of consent,[672] further elaborations on the substance are absolutely necessary.

As discussed in part 1.2.2., the definition of rape under the international criminal law gradually focused on consent rather than coercion. The concept of consent is largely inapt, when it is given to state agent with a gun by a person from a group facing genocide. The ICTY court panel held in *Kunarac*,[673] after analysis of various legal systems that "the basic underlying principle common to them was that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim."[674] The said definition was subsequently used in other tribunals related to rape perpetrated by state officials.[675]

668 Fourth Geneva Convention provides „Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault" Article 27 part 2. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

669 Beverly A. McPhail, "Feminist Framework plus: knitting feminist theories of rape etiology into a comprehensive model", *Trauma, violence and abuse* 17, 3(2016): 314-329. One school stresses that rape is about *power* rather than sex, another school of thought stresses that rape sits well with *heteronormativity*, third group studies it from the perspectives of *intersections*, the forth stresses *performative* gender /masculinities, and the fifth sees it as an attack of women's *embodied agency*.

670 One model focuses on force and coercion, another combines both consent and force/coercion requirements. There is the "Yes model" which requires to show that verbal consent was present, and "No model" which requires to show that there was no consent, thus allowing implied consent. Consent in general can be understood as attitudal (again, this relates to "No model") and performative ("Yes model"). Feminist approaches to significance of consent also vary. See Feminist perspectives to Rape, 2013, Stanford Encyclopaedia of Philosophy, accessed 1 June 2016. http://plato.stanford.edu/entries/feminism-rape/

671 The case of Jullian Assange may serve as an illustration, because at the UN level the alleged perpetrator was admitted as "unlawfully detained," while the women who were alleged victims of the sexual VAW remained at the margins of the law (national, regional and international). The status of limitations for the most serious allegation of rape expires in 2020. See Human Rights Council, Working Group on Arbitrary Detention, No. 54/2015, A/HRC/WGAD/2015. It can be presumed that if the women turned to the CEDAW Committee, the decision would be positive to the alleged victims.

672 For instance, see the latest reccomendation adressed to Sweden. Concluding observations on the eighth periodic report of Sweden. CEDAW/C/SWE/CO/8-9, 10 March 2016. Para 15 states that the state is recommended to "amend its Criminal Code to ensure that rape is defined on the basis of there being a lack of consent by the victim."

673 Prosecutor v Kunarac, Kovač and Vuković, *supra* note 193.

674 *Ibid,* para 461.

675 Sylvestre Gacumbitsi v. The Prosecutor (Appeal Judgement), ICTR-2001-64-A, International Criminal Tribunal for Rwanda (ICTR), 7 July 2006, where the accused was convicted for rape as a crime against humanity.

Some scholars, especially in the critical legal studies, argued that these feminist-inspired rules of the Rome Statute may sometimes "converge with nationalism"[676] (i.e. better death than sex with the enemy). Similarly, gender mainstreaming in UN Security Council resolutions has also been criticized for essencializing the experiences of women and treating them as victims, rather than empowering.[677] These arguments however do not change the fact that mass-scale rapes during armed conflicts required a vigilant approach and demanded tools for addressing these problems. It can be suggested that if the consent is given freely to "the enemy," it is not likely that the case will reach the court in the first place. The arguments of essencialization can also be refuted by the fact that sexual VAW against men has also been recently recognized: the ICC in accusations against Jean-Pierre Bemba considered *inter alia* male rape and heard a male witness under the specific charge of rape.[678] Thus it is not reasonable to claim that the said consent centred approach distinguishes only women and re-enforces their marginalization.

However, an argument to the opposite direction is that made by Navanethem Pillay, the former Judge at International Criminal Tribunal for Rwanda, as well as International Criminal Court in The Hague. She criticized the focus on consent rather than coercive circumstances, because proving non consent involves "the trauma of description" as the necessary *qualifying* element.[679]From point of view of Navanethem Pillay, coercive circumstances alone are enough to constitute rape, and in armed conflict, circumstances are coercive and rape can be expected. A similar approach to rape, i.e. suggestion on focusing on coercion rather than consent, has been put forward by Catharine. A. Mackinnon, who writes about rape in other circumstances than war and conflicts.

Two contrasting positions need to be discussed. In 2016, the great feminist wars on sex are still ongoing.[680] On the one hand, there is a position of Catharine A. MacKinnon, who sees rape as a crime of gender inequality and claims that consent is irrelevant; instead, the law should focus on coercion.[681] Her thesis echoes the concerns of many other feminist

676 Janet Halley, "Rape in Berlin: Reconsidering the criminalization of rape in the international law of armed conflict", *Melbourne Journal of International law* 9, 78 (2008): 78-124. The author highlights the problems of consent under coercive circumstances, which may nevertheless exist, i.e. some women may give a genuine consent to sexual relations.

677 Pamela Scully, *supra* note 81. The author also argued that rapes of men and boys are disregarded by gender specific frame and suggested using a broader frame.

678 Prosecutor v. Jean-Pierre Bemba, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 633, ICC-01/05-01/08.

679 Navanethem Pillay, "Address -Interdisciplinary Colloquium on Sexual Violence as International Crime: sexual violence: Standing by the Victim," *Law and Social Inquiry* 35, No 4 (Fall 2010): 847-853.

680 Feminist sex wars refers to the debate whether stricter approach to pornography and sexual violence is needed. The feminists who argue that sex (prostitution, pornography, etc.) should be less regulated have accused those who see it as part of subordination of women as sex-negative. See in particular the debate on sexual VAW at university campuses in USA and the division of positions at Harvard University. Emily Y. Bazelon, "The return of the Sex wars", *The New York Times Magazine*, 10 September, 2015. http://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html?_r=0

681 See Catharine A. MacKinnon, "Rape redefined", *Harvard law and policy review* 10, (2016): 431-477. In the context of international criminal law, the same has been argued by Katie O'Byrne, Beyond Consent: Conceptualising Sexual Assault in International Criminal Law, *International Criminal Law Review* 11 (2011) 495–514.

scholars who are disturbed by impunity of sexual VAW and who suggest abandoning the concept of consent or adopting a concept of consent that does not allow it to be implied (by intoxication, sleeping, or changing her mind). On the other side of the spectrum, there is a position of Janet Halley, who claims that considerations of due process and structural inequalities that minorities face require a feminist opposition to tighter statutes on rape.[682] In other words, the law should not intervene so much into sexual relations. To her, the new requirement under law of California on affirmative consent (i.e. the Yes model which does not allow consent to be implied) to sex would result in many "difficult cases."[683] The difficult cases would include drunk consent, remorse after sex with minority (race or LGBT), sex after break-ups, and rapes where the perpetrator is not really known but guessed. Nevertheless, Janet Halley's choice of highlighting the difficulties arguably builds on the most popular rape myths, for instance, victims often "change their minds" after sex, they lie and accuse the innocent men, and presumption of intimacy should be the principle for partners and former partners. This approach repeats the myths and also pushes the rape back into the field of "private matters". It is also essential to avoid saying "let them be" for ethnical minorities or certain geographical areas, which may repeat the culturalist trap. Broadly speaking, Janet Halley's suggestion is that the law should abstain from interfering into "private" sexual situations, which seems to replicate the public /private divide and on a broader sense, it questions whether law can be useful in solving "hard cases". Janet Halley seems to suggest that theoretical indeterminacy is too high in this area, but the same can be applied in many other areas and not just those that relate to VAW.

Now to evaluate Catharine A. MacKinnon's suggestion, it first needs to be reflected that legal definitions pertinent to rape and sexual VAW across the different states and time have been changing. The substantial changes relate to amendments that focus on the concept of affirmative consent. The Draft Convention on VAW also states: "Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances." (Article 25 part 2). The identical provision is provided in Istanbul Convention (Article 36 part 2). Regarding rape and sexual violence against girls, it is clear that they cannot give consent before a certain age and sexual acts with underage girls are statutory rape.[684] However, many national legislators are still reluctant to provide a general clear link of the definition of rape with the lack of affirmative consent. Meanwhile, the systems that use the requirement of coercion also face problems in application: for instance in Sweden, which does not centre its legislation on consent, the man who claimed he thought that protest screams were part of their game went unpunished,[685] as well as the man who said he was sleeping while raping his victim.[686] Thus suggestions are put forward to reform the legislation and fo-

682 Janet Halley, "The move to affirmative consent", *Signs*, 2015.

683 Janet Halley, "Trading the Megaphone for the Gavel in Title IX Enforcement," *Harvard Law review forum*, 2015.

684 This matter is regulated by introducing the age of consent, which is relevant for all countries except for those which establish that all sex must happen within marriage.

685 "Momentum grows for Swedish rape law reform," 24 January 2014, http://www.thelocal.se/20140124/momentum-grows-for-swedishrape-law-reform.

686 "How Sweden is getting to grips with sleeping rapists", 6 May 2016, http://www.thelocal.se/20160506/how-sweden-is-getting-to-grips-with-sleeping-rapists.

cus it on the concept of consent.[687] To the author of the thesis, it does not seem to be essential whether we frame the legal analysis on coercion or consent. It is of essence that the two of the requirements – both coercion and consent are not used at the same time, which is done in a number of jurisdictions, and which makes it much harder to prove the case.

Furthermore, it is also essential to ask what type of consent and what type of coercion do we have in mind? It is suggested that Catharine MacKinnon's substantive suggestion on treating any sex which is undertaken in *conditions of clear inequality* as rape are reasonable. It is easy to dismiss this with stressing that even the ever popular "Fifty shades of grey" would in that case feature sexualized rape. However, it is not so simple. The argument is well construed when she claims that consent is not needed if the sexual interaction does not involve a transgression. If persons are equal, there is no need for the unequal party to consent to it but rather, it is an activity of *common* desire. Furthermore, the turn of law towards consent was not really supported by the empirical evidence of effectiveness.[688] Thus, it is important to view rape as a result of abuse of power, a gender inequality crime, and provide both victims and prosecutors with tools that allow rebutting consent defences as non-justifications. Whether it can be done with application of a narrow concept of consent or a broad concept of coercion, should be a matter of choice in a particular legal system and its systematic coherence.

Besides the rules that directly condone rape, there are legal rules which do that less directly. The CEDAW has condemned the use of a "corroboration rule" in case of rape[689] – i.e. the rule that sets the burden of proof is high and rape needs to be witnessed. Moreover, some states are reported to provide an exception when rapist marries the victim.[690] Such laws clearly portray harmful gender stereotypes that contradict Article 5 of the CEDAW. Even when no such direct rules exists, in many states it is allowed for a wife to refuse to testify against her husband, thus prompt marriage may still "save" the rapist from the verdict. Rules that are not directly on VAW nor on criminal procedure may also have a direct impact and create a discriminatory fabric that condones VAW. For instance, if the country has laws which does not specify the legal age of marriage, and tolerates child marriage, at the same time without a clear prohibition of marital rape, this leads directly to violence against girls. The laws aimed at restriction of sexuality also lead to VAW, when non-marital consensual relations (*zina*) involve harsh punishments, including stoning and flogging.[691] VAW is also tolerated and legitimised, when rape is treated as *zina*, and victims of rape are

687 See for instance, "Germany rape law: 'No means No' law passed," *The Local* , 7 July 2016. "How researchers want to reform Swedish rape law, "*The Local*, 19 April 2016. The introduction of these proposals in Sweden and Germany also shows that a completely new turning point regarding women rights since 9/11 was marked by the migrant crisis and the terrorist threats in Europe.

688 Michal Buchhandler-Raphael, "The failure of consent: re-conceptualizing rape as sexual abuse of power" *Michigan Journal of Gender & Law* 18, 147 (2011-2012), 147-228.

689 Concluding observations on the seventh periodic report of Malawi. 24 November 2015. CEDAW/C/MWI/CO/7, para 22.

690 For instance, Bahrain, Syria, Cameroon, Indonesia, Bulgaria.

691 Concluding observations on the combined second and third periodic reports of the United Arab Emirates. CEDAW/C/ARE/CO/2-3. 24 November 2015, para 29-30.

repeatedly abused.[692] The CEDAW Committee has repeatedly said that these rules are not acceptable.[693]

It must be noted, however, that the legal systems which have cruel punishment for sex, as such, should not be used as the excuse for refraining to address the problems of VAW in Europe or USA. The examples of the EU member states which are silent on marital rape (Lithuania) or allow escaping liability if the victim marries the perpetrator (Bulgaria) show that rape is more than a cultural problem. The cross border tendency of condoning rape is unfortunately still the global issue, whether it is propagated by prohibition of non-marital sex, or sexualisation of VAW in pornography and disguising rapes as part of sexual autonomy.

1.4.4. Analysis of the Draft Convention on VAW

One could have expected that a prospective global Convention would include a list of certain rights that may be seen as "traditional" human rights: the right to life, the right to be free from torture, and the specific rights relevant to women: intimate partner violence, marital rape, female genital mutilation, female infanticide, followed by detailed obligations of the states should be provided for. However, the Convention takes a different approach.

As mentioned above, the current text of the Convention follows the contents of the Istanbul Convention closely. This can be a possible disadvantage, if the desire is to attract those states which have very little substantive protection. As mentioned above, the Draft Convention relies heavily on Istanbul Convention in its substantive parts. It gives an impression of a pitch-patched material. On the one hand, it is very progressive, technical and requires great investments in reforms at many levels: acceptance of the principle on non-discrimination on the basis of sex, gender, gender identity, sexual orientation, etc., inclusion of gender equality paradigm into the education system, reform of the substantial legal system by introduction of particular protection orders (obligation to vacate the residence and not to approach the victim). On the other hand, it also allows entrusting the issue of investigation and punishment to the local communities, and relates accountability with VAW that amounts to torture. Hence, the approach so far is contradictory.

Part V of the Draft Convention focuses on "Substantive Law", and draws heavily on Istanbul Convention, which also has Chapter V on "Substantive law". The term substantive law is in this sense has *sui generis* meaning, because both documents also include rules on jurisdiction (which can be seen as a procedural issue) – what is meant that substantial laws need to change. Istanbul Convention starts with civil rights, remedies, custody rights – the Draft Convention leaves that for later and starts with physical VAW (Article 23). The definition is identical to Article 35 of Istanbul Convention, but Draft Convention also suggests a definition of torture in its further substantive parts: "Parties shall ensure national laws criminalize

692 Concluding observations on the combined second and third periodic reports of Mauritania. CEDAW/C/MRT/CO/2-3. 24 July 2014.

693 Also in the draft update of GR 19, it is suggested to repeal all laws that indirectly discriminate women and condone VAW, e.g. child marriage laws, abortion criminalisation, and mitigating circumstances (e.g. so called honour crimes), CEDAW Committee, Draft General Recommendation No. 19, *supra* note 19, on prevention, para j.

non-State torture perpetrated by non-State actors and hold perpetrators *accountable for gender-based non-State torture crimes*" (Article 33 of the Draft Convention, emphasis added by the author). After the notion of physical VAW, the Draft Convention provides a visionary article on freedom from exploitation, violence and abuse (Article 24), which is more conceptual than substantive. It requires state efforts, at all levels, to combat VAW and to introduce gender specific legislation to this regard. Provisions on sexual VAW, forced marriages,[694] FGM, forced abortion, stalking, etc. are copied from the Istanbul Convention, and the concept of sexual harassment is copied with an addition of cyber harassment.

It is clear that the Convention tries to fill-in the remaining gaps, e.g. with the inclusion the cyber stalking, and with the inclusion of torture. Notably, neither the CEDAW nor Istanbul Convention encompasses the notion of torture; it is only CAT or ECHR that are capable addressing VAW with the use of this term. It is doubtful whether it is plausible to use this term in this context, however, without any explanations of the definition of torture, and leaving it open for interpretation. Physical VAW in principle can constitute torture, and even mild, continuous physical VAW has been seen as violation under Article 3 of the ECHR (ill treatment), but even gruesome VAW has not been seen as "torture". It is not so in Europe and the regions without CEDAW's reach are even stricter with regards to the element of severity. The Draft Convention may give an impression to states that only grave physical VAW that amounts to torture demands individual accountability, and that state's due diligence is only limited to investigation and prevention of VAW that amounts to torture (compare Articles 33 and Article 6, as well as Article 23).[695] There is a possibility to interpret the treaty in such a way as to develop the standard of due diligence, which is in principle provided in Article 6, and the interpretation of the CEDAW to include VAW shows that treaties can be interpreted rather widely. However, the legislative norms tie individual accountability to torture.

It may seem as a great achievement, if the country which is not a party to the CEDAW agrees to act with due diligence in cases of torture. However, it may be a step backwards, in consideration of the standards on VAW under the CEDAW (also OAS and CoE), which have required some degree of severity, but never explicitly required the severity that amounts to torture for triggering perpetrator's accountability. Although CAT Committee's work focuses on evaluation of harm, broader placing VAW into categories of severity is "intuitively problematic."[696] Although human rights bodies adjust, when they need to apply the test of severity, there is indeterminacy as to the results.

It should be clear, or at least the soft law instruments try to make an impression that it is clear that states must act with due diligence to prevent systemic VAW and protect women

694 The draft Convention copies only the requirement of prohibition (legislative or otherwise) and punishment for child marriage (Article 26 of the draft Convention) but does not copy the requirement for these marriages to be void or voidable. *Supra* note 45.

695 *Ibid,* Article 6 (2) provides "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 the present Convention that are perpetrated by non-State actors" and Article 33 requires states to "hold perpetrators accountable for gender-based non-State torture crimes" while Article 23 only asks to legislate, or adopt other measures, on prohibition of physical VAW.

696 Bonita Meyersfeld, *supra* note 25, p. 113. The author herself, however, suggests that international law is triggered only when the element of severity is met.

from foreseeable VAW. In addition, some VAW may amount to torture and that should fall within the scope of *jus cogens* prohibition. Thus it is suggested not to have such a clear differentiation and accountability only to torture crimes.

Instead, the Convention could have enlisted rights, forms of VAW, and then broadly connected them with state due diligence, thus ensuring wider contents of this standard. In the current text of the Draft Convention, some of the forms of VAW are captured (FGM) and others still could be included (for instance, female infanticide). Furthermore, the Convention should thoroughly and comprehensively provide obligations of the states, which should have a clear understanding of the contents of their due diligence duty.

1.4.5. Summary

While many contemporary analyses and suggestions focus on procedural and conceptual responses to VAW, substantial challenges should also be in the centre of attention, in particularly because VAW demands substantive responses. DV and sexual VAW, perpetrated by private individuals, may be claimed as particularly related to the "gendered" international law. In part it is due to the focus of the international law, which so far has not turned to women victims' needs, and in part it is because the gendered effect of norms is disregarded.

Regarding substantive responses to DV and sexual VAW, the author considers that it would not be reasonable to suggest that international law is or should only be triggered when elements of continuous harm and systemic state passivity are proven. DV under international law can invoke both individual due diligence, as well as systemic due diligence, and systemic due diligence may in turn encompass failures to decrease stereotyping or prejudice, or even amount to grave and systemic violations of women rights under the CEDAW. These are all distinct cases. Regarding rape, international law and doctrine has mostly turned its attention to consent, although both broad interpretation of coercion and narrow interpretation of consent may indeed bring similar results, and the lack of consent is often rather difficult to prove (when it is not presumed, e.g. in circumstances of genocide/war). It is essential to view rape as a result of abuse of power and a gender inequality crime, and provide both victims and prosecutors with tools that allow rebutting consent defences as non-justifications.

The current draft of the Convention on VAW suggests invoking perpetrator's accountability in the context of torture, and although it can be seen as a step forward, in comparison to alleged normative vacuum, it is a step backwards, in comparison to CEDAW practice. The said normative gap itself is somewhat overrated, because VAW is arguably prohibited under customary international law, and not only as part of prohibition of torture. It is suggested that with the view of desired substantive changes, a prospective regulation or the update to soft law instrument should include both traditional and VAW-specific rights. It should thoroughly elaborate on the right to be free from various forms of violence and due diligence duty. It may include female infanticide, which is currently not covered by any regional convention, and the right to adequate housing, which is highly relevant for DV victims. More attention should be paid to economic rights, considering that women's possibilities to become free from VAW are often related to their economic capacities and precondition the exercise of civil and political rights.

2. STATE OBLIGATIONS TO PROTECT AGAINST VAW: CONSOLIDATING THE EUROPEAN EFFORTS

This part of the thesis focuses primarily on Europe, which provides a brilliant example of a complex and innovative legal regulation on VAW. In the end of 1990s, gender mainstreaming was introduced as the general strategy aimed at gender equality both at the level of Council of Europe (CoE)[697] and the European Union (EU) levels.[698] However, it took a rather long time for the European Court of Human Rights (the ECtHR) to adopt argumentation which rendered VAW as a form of sexual discrimination and applied the standard of due diligence in cases of murder of women. A more elaborate and conceptually complex legal regulation has been developed only in the last few years in Europe, almost simultaneously at the levels of the CoE and the EU.

This part of the thesis is based on the assumption that the protection of victims' safety and prevention of further VAW are the most crucial tasks. The concerns of protection and desire to prevent further violence against themselves and their children are in fact reported as the key reasons why women seek legal interventions.[699] Therefore, in this part, the author tries to focus on prevention and protection aspects[700] in relation to VAW under the relevant European law instruments: the CoE Conventions and the EU law and critically assess them. It is claimed that the CoE Istanbul Convention is currently the most thorough and innovative legal instrument on decrease of all forms of VAW, which offers some substantive solutions, needed in the light of the key focus on procedural aspects in other instruments. The Convention is also significant for transnational approach, the basis for protection orders reform, and tackling the causes of VAW. Meanwhile, the EU is in a very good position in developing more thorough instruments on cross-border protection. It has already done that with the adoption of the so-called Victims' package, although some doubts were raised whether the said procedural and technical approach is suitable for the protection against VAW.

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697 Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices: Final Report of Activities of the Group of Specialists on Mainstreaming. EG-S-MS. Strasbourg: Council of Europe. 1998.

698 The Treaty of Amsterdam, Articles 2 and 3, 1997.

699 Holly Johnson, Natalia Ollus, Sami Nevala, *Violence against women: an international perspective* (New York: Springer, 2008): 137, 141-143, 151, 163-164.

700 From the analysis undertaken in the previous part of the thesis, it should be clear that the states have a positive obligation to take reasonable measures to prevent VAW and protect women against repeated VAW. However, "[w]hat are considered 'reasonable measures' to be taken by the state to protect and prevent women from threats to their lives, especially from non-state actors, has still not been fully articulated. Ultimately, the state has responsibility for regulating behavior by law and for preventing and protecting citizens from threats to their life." A. Edwards. pp. 301-302. The prevention, protection, and prosecution functions of the state are overlapping. When the state takes protective measures (temporary or permanent restraining orders), or when it ensures that the perpetrator is prosecuted, it also prevents further VAW.

2.1. Setting the standards on protection against VAW under the ECHR

2.1.1. Substantive rights under the ECHR

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter—the ECHR),[701] provides a set of substantive rights[702] in its main body, i.e. Articles 2-12[703] and related Protocols.[704] Articles 13-18 contain general provisions that affect substantive rights and do not have a stand-alone status. These are only the minimum standards of rights that the Convention provides, i.e. the states may provide for higher standards in their national legislation.[705]

The infringements in cases of VAW have usually concerned these Articles of the Convention: Article 2 on right to life, Article 3 on freedom from torture, inhuman and degrading treatment, Article 8 on right to respect for private and family life, home and correspondence. Sometimes a violation of these articles was found in conjunction with Article 14 on freedom from discrimination or Article 13 on right to an effective remedy. On some occasions, article 6 on right to court was invoked by the perpetrator, the deceased victim's relatives, and the women themselves. The application of Article 3 requires a sufficient element of severity, which the Court gradually started to interpret more broadly, as discussed further. Furthermore, infringement of a substantive right under Article 3 or 8 sometimes is considered involving an infringement of a procedural aspect of the right, and only occasionally an infringement of substantive aspects is found, as discussed under 2.1.3.

The application of the relevant articles of the ECHR was varied[706] and the practice is still not entirely consistent, but some principles clearly can be drawn. Due diligence duty in cases of DV is recognized under the ECHR and the standard is high. Similarly, the Court established that states have positive obligations regarding sexual violence against women. While the CEDAW treats VAW, including sexual violence in the community and domestic violence, as part of sexual discrimination, it is not necessarily so under the ECtHR. In many cases, the ECtHR refused to analyse the case under Article 14 on discrimination) which has no independent standing, or found no proof of gender based violence. It also has not acknowledged that VAW by private perpetrators can constitute torture under the Convention, and not only inhuman or degrading treatment under Article 3.

701 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950.

702 Generally see Iain Cameron, *An Introduction to the European Convention on Human rights*, 7th edition (Uppsala: iUstus, 2014): 82-156.

703 Article 2 on the right to life, Article 3 on freedom from torture, inhuman and degrading treatment, Article 4 on freedom from slavery, servitude and forced labor, Article 5 on the right to liberty and security of person, Article 6 on the right to fair trial, Article 7 on freedom from retroactive criminal law, Article 8 on the right to respect for private and family life, home and correspondence, Article 9 on freedom of thought, conscience and religion, Article 10 on freedom of expression, Article 11 on freedom of assembly and association, Article 12 on right to marry and found a family.

704 In particular, the rights under Protocol 1, Protocol 4 and Protocol 7.

705 Article 53 of the Convention.

706 E.g. in some cases (Bevacqua and S. v. Bulgaria, A. v. Croatia – cases of psychical injuries, Hajduova v. Slovakia - threats), the Court found a violation of Article 8 (private life), and in other cases, violations of Article 3 have been found.

2.1.2. Due diligence – a legal borrowing from the OAS system?

The European Court of Human Rights relies on the concept of due diligence in cases of VAW. However, it is not the first one that uses this concept, because it has been developed by another regional court, i.e. the Inter-American Court of Human Right, which monitors state obligations under American Convention on Human rights.[707] In *Velasquez Rodriguez*, its highly-regarded first judgment,[708] the Inter-American Court applied the due diligence concept to state responsibility for private persons' violence. It ruled that a single violation of a human right under the American Convention on Human rights or just one investigation with an ineffective result does not establish state's lack of diligence. Rather, it is whether state undertakes its duties seriously. The requirement encompasses the obligation both to provide and enforce adequate and effective remedies to survivors of private violence. The Inter-American Court consistently held that states have positive obligations regarding "illegal act[s] [that] violate human rights and [that are] initially not directly imputable to a State."[709] The landmark decision on VAW is *González et al. (Cotton Field) v. Mexico.*[710] In this case, three young women disappeared and later their bodies were found with clear marks of sexual abuse and inhumane treatment before murders. In the context of widespread VAW, the Court found that the state violated its duty to investigate human rights violations. The Court's decision was significant not only because it specified the contents of positive obligations of the Inter-American states regarding VAW but also because it addressed structural discrimination and provided for adequate reparations.[711] At the same time, questions regarding the implementation of the decision by Mexico can be raised, and it is noteworthy that it was only in 2009 that the Court admitted non-exemption from responsibility in case of VAW committed by private actors. In a subsequent case of *Véliz Franco et.al v. Guatemala*[712] (abduction and murder of a 15 year old girl in Guatemala), the

707 For the overview on the Inter-American Court and the procedural changes since 2010, see Jo. M. Pasqualucci, *The practice and procedure of Inter-American court*. 2nd edition, (Cambridge University press, 2014)

708 See: Velasquez Rodriguez v Honduras, Judgment of July 29, 1988, Inter-American Court of Human Rights. (Ser. C) No. 4 (1988). Paragraph 64-66. This was the very first judgment of the Inter-American Court of Human Rights, which concerned actions of state agents.

709 Velasquez-Rodriguez, Inter-Am. Ct. H.R. (ser C) No. 4, para 172, where the Court states: "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention." Also see Perozo v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 195, para 298 (Jan. 28, 2009); Ximenes Lopes v. Brazil, Merits, Inter-Am. Ct. H.R. (ser. C) No. 149, para 125 (Jul. 4, 2006); Pueblo Bello Massacer v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 140, para 113.

710 Gonzalez v. Mexico (Cotton Field), Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, 294 (Nov. 16, 2009).

711 Katrin Tiroch. "Violence against Women by Private Actors: the Inter-American Court's judgement in the case of González et al. ("Cotton Field") v. Mexico." Armin von Bogdandy and Rudiger Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, 14 (2010): 371-408.

712 Veliz Franco et al v Guatemala. Judgment of 19 May, 2014. Para 37.

Court also found violations of Inter-American Human rights Convention, as well as Convention of *Belém do Pará.* It rejected the state's objections regarding its competence, explaining that the international system of protection against VAW should be seen as a whole.

Other significant cases under the Convention of *Belém do Pará were heard b*y the Inter-American Commission of Human Rights: *Penha Maia Fernandes v. Brazil*[713] *and Jessica Lenahan (Gonzales) v. United States.*[714] The case of *Maria de Penha Maia Fernandes v. Brazil* as well as *Jessica Lenahan (Gonzales) v. United States* both concerned domestic violence cases. In *Maria de Penha* case, the Commission investigated the victim's right to fair trial and judicial remedy, and in *Lenahan,* the state' obligation to prevent violence was considered. In the case of *Maria de Penha Maia Fernandes*, the Commission found violations of Article 8 concerning the right to fair trial, and Article 25 concerning judicial protection, in relation to article l(l) of the Convention of *Belém do Pará*. In consideration of the general tolerance of DV in Brazil, the Commission held there was a violation of state obligation to "condemn all forms of violence against women" under Article 7.[715]

The European Court on Human Rights has relied[716] on Inter-American Court of Human rights' practice (in particular, the Velasquez case) explicitly in its landmark case on DV (Opuz v Turkey). Paradoxically, it developed the due diligence doctrine in the field of VAW, borrowing from the basis of the Inter-American legal system, before the Inter-American Court had a chance to do it (although after the Inter-American Commission). I.e. the landmark *Cotton field* case by the Inter-American Court came in 2009, but the ECtHR adopted its decision in *Opuz v Turkey* in 2009 and since then, it had relied on it directly for further developments.[717] It can be concluded that due diligence concept is a good example of a legal borrowing. At the same time, in no way the developments under the ECHR can be marginalized, because migration of legal transplants is one of the sources of cross-fertilization and creativity of international law.

2.1.3. ECtHR landmark jurisprudence on VAW

The jurisprudence of the Court in this area is notably limited by the general limitations of human rights, as discussed in first part of the thesis. The Court can only find violations of individual human rights where VAW perpetrated by private individual becomes known

713 Maria da Penha case, *supra* note 137.

714 Lenahan case, *supra* note 26.

715 Maria da Penha case, *op.cit.,* para 56. The Commission underlined: "Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfil the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts."

716 *References to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights. Council of Europe/European Court of Human Rights*, Research Report, CoE, 2012.

717 It must be noted, however, that the Inter-American Commission had already adopted its landmark Maria da Penha case, and the ECtHR in fact used it in Opuz v Turkey.

to the state.[718] I.e. it is possible to expect that the state will be responsible for failure to act in cases of DV but it is still not possible to demand responsibility for failure to prevent systematic gender based crimes. Even if it is a constant tendency for women to disappear, be raped and killed in a particular area, complete inaction on the part of the state is not likely to trigger the ECHR, provided that state agents put some efforts to investigate these individual cases.

Relatively early, in its decision of 1985, the Court recognized that sex life on an individual is a part of "private life" under Article 8 (on private and family life). The case *X. and Y. v the Netherlands*[719] established that rape constitutes a situation, "where fundamental values and essential aspects of private life are at stake."[720] However, the Court did not analyse the case under Article 3 nor Article 14 at that time. According to Fernando Teson, this case showed that feminist concern with general focus on acts committed in the public area (i.e. by state officials) is indeed legitimate; it also demonstrated that international law is principally capable of providing remedies for VAW of private individuals.[721] Although it may seem paradoxical to welcome the placement of concepts "rape" and "private life" in the same sentence, the Court's finding that it had been in this case infringed was the necessary first step in challenging private/public divide. The necessary second step was to recognize that it was not only infringing private life but also amounting to violation of Article 3 (on prohibition of torture, inhuman and degrading treatment). Protection of privacy concerns certainly does not encompass the level of severity that rape constitutes and Article 3 is much more suitable for addressing this issue than Article 8.

2.1.3.1. *M.C. v. Bulgaria*

It must be noted that regarding VAW perpetrated by state agents, the ECtHR in 1997 recognized[722] that rape can constitute "torture" under Article 3. Nevertheless, the recognition that VAW perpetrated by private individuals can come under Article 3, as well as the consent – centred approach to rape is rather recent, and not particularly clear. It must be noted VAW must reach a minimum level of severity for Article 3 to apply, which the Court interprets rather flexibly, taking into account all circumstances of the case, such as the age, sex, health of the victim, duration of the attack, and its consequences. The approach of the Court is "conceptual, outlining the broad purpose and scope of the provision, rather than providing an exhaustive list of modalities; thereby providing flexibility, but also

718 Christoph Grabenwarter, *European Convention on Human Rights – Commentary*, (Oxford: Hart publishing, 2014), 51-52.

719 X. and Y. v the Netherlands, No. 8978/80, 26 March 1985. The case concerned a rape of a handicapped 16 year old girl in a private mental health facility. The public prosecutor decided not to initiate proceedings, provided that the perpetrator will not commit the same offence in the next two years. The additional problem at stake was that the victim could not initiate proceedings herself due to her limited mental capacity and severe damage following the rape, while the law so required.

720 *Ibid,* paragraph 27.

721 Fernando Tesón, *supra* note 108, p. 660-661.

722 Aydin v. Turkey, No. 23178/94, 25 September 1997.

indeterminacy."[723] After the Court establishes that Article 3 is applicable, it moves analyze the level of severity that classifies the situation as torture (highest level of severity), inhuman or degrading treatment, with declining level of severity.

In the case of *M.C. v Bulgaria*,[724] rape perpetrated by private individuals was at stake, and the case of "private" sexual VAW was finally assessed in the light of Article 3.[725] The ECtHR relied[726] on *Osman* test in order to address the state's positive obligation to punish rape and to investigate rape cases under both Article 3 and 8. Notably, the *Osman* test comes from the case decided in 1998,[727] and establishes state due diligence obligations with regards to physical threats coming from private parties.[728] It was very significant that the Court underlined in *M.C. v Bulgaria*:

> "any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any *non-consensual sexual act, including in the absence of physical resistance by the victim*."[729] (emphasis added by the author)

The Court thus stressed that Bulgaria failed to fulfil "requirements inherent in the States' positive obligations – viewed in light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse."[730] This case is important inasmuch as it: first, established a *(non)consent-based* approach to rape and found violation of substantive rights under Article 3, second, recognized that personal sex life is a part of private life under Article 8, and third, recognized sexual VAW as violation of the freedom to be free from inhuman and

723 Clare McGlynn, "Rape, Torture and the European Convention on Human Rights," *International and Comparative Law Quarterly* 58, 3 (2009): 570.

724 M.C. v Bulgaria, app.no. 39272/98, 4 December 2003.

725 In this case, a teenage girl was raped by two men, and following the complaint of the mother of the girl, a criminal investigation was started. It was soon closed, however, because it could not be established beyond a reasonable doubt that the alleged perpetrators used threats or violence.

726 M. C. V Bulgaria, *op.cit.*, para 152-153.

727 Osman v. the United Kingdom, 28 October 1998, § 116, Reports 1998-VIII. The case concerned fatal shootings of Mr. Osman and another person, as well as injuries of other persons. The police had been previously warned about the possible threat, including by the murderer himself. The Court did not find violation of Articles 2, but developed the test which applies for deliberation on due diligence duty.

728 The test had been criticized as unpredictable by some UK scholars, because the effect that the judgment had on the UK system of negligence has been tremendous. Some of them saw it as a direct attack of the UK system and an attempt to make it more French. See Conor A. Gearty, "Unravelling Osman," *Modern Law Review*, Vol. 64, Issue 2 (March 2001), pp. 159-190. Giorgio Monti, "Osman v. UK-Transforming English Negligence Law into French Administrative Law," *International and Comparative Law Quarterly*, Vol. 48, Issue 4 (October 1999), pp. 757-778. However, from the point of view of developed state responsibility under international law, Osman test was a very timely development.

729 M. C. v Bulgaria, *op.cit.,* para 166.

730 *Ibid,* para 185.

degrading treatment. However, it did not clearly recognize that rape can also be seen as torture, or that state's inactivity can in this case constitute discrimination. That means that the Court differentiates rapes, according to the fact whether they are committed by private or public actors. If the rape is committed by public actor, it can amount to torture, but a rape of private perpetrators has not been recognized as torture. This deserves criticism, because the crucial element should arguably be the nature of the rape rather than the status of the perpetrator. The said differentiation deepens the public/private dichotomy.

Furthermore, different countries' (Ireland, Denmark, USA, Australia, South Africa, Canada, UK, and Belgium) legal systems were reflected upon in the case *M.C. v Bulgaria*, while stressing that consent was the essential element of these systems.[731] Therefore the Court found that "while in practice it may sometimes be difficult to prove lack of consent in the absence of "direct" proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent."[732] Hence, *M.C. v. Bulgaria* related both to procedural and substantive aspects under Article 3 and 8 - procedural inasmuch as the case showed significant delays in investigation and refusal to prosecute, and substantive - inasmuch as the legal system was based on the search for active physical resistance rather than non-consent.[733] Subsequently, the CoE recommended to "penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance."[734] This is a significant substantive development.

The Court also noted the particular vulnerability of the underage girls and reiterated that their "effective protection against rape and sexual abuse requires measures of a criminal law nature."[735] However, it never said that rape reaches the level of severity under Article 3 which amounts it to torture. It refused to analyse the case under Article 14, i.e. did not see that such violations could constitute also gender based discrimination. Instead of suggesting a "gender-sensitive approach" to sexual VAW (including rape), it offered a "context-sensitive approach."[736] The concept of context sensitivity lacks critical edge and perhaps, where gender discrimination is claimed and addressed, it should be clearly stated that gender-sensitivity is fact needed. So far, the Court recognized the importance of gender discrimination in some of its DV cases, but not in cases of rape. It can be argued that in these cases, the court does not even provide the ties with gender equality, while in cases of DV, at least some ties with formal gender equality are provided.

The analysis of the landmark decision allows arguing that rape should be seen as reaching the level of severity to trigger Article 3. It also allows claiming that legal rules, which require the proof of physical force or threats, are no longer acceptable under the ECHR. Neverthe-

731 *Ibid,* para 129-147.

732 *Ibid,* para 181.

733 The relevant provision provided that need for the use of "force or threats."

734 Recommendation Rec(2005) of the Committee of the Ministers of the Council of Europe on the protection of women against violence.

735 M.C. v Bulgaria, *supra* note 724, para 186.

736 *Ibid,* para 177.

less, it depends on the situation whether it can reach the level of severity of harm that is seen as torture; in this case, it was not seen as such, differently from the practice of ICTY,[737] where rape *per se* could be seen as torture. Some authors have argued that *if* the level of severity is reached, all rapes should be seen as satisfying the element of purposefulness[738] of torture, which the ECtHR interpreted very narrowly so far, i.e. it found the prohibited purpose, when the rape was found to be aimed to extract information and confession (*Aydin v Turkey*). The purpose of rape is arguably to intimidate and humiliate the victim. The further substantial developments could include recognition that rape can also be torture under Article 3, and that rape can also demonstrate the systemic failure of the state to protect women against sexual VAW due to lack of coherent legislative and other measures.

2.1.3.2. *Opuz v. Turkey*

In *Opuz v Turkey*,[739] the landmark decision on DV,[740] the ECtHR recognized that there had been a violation of Article 14 (prohibition of discrimination) read in conjunction with Articles 2 (right to life) and 3 (prohibition of torture, as well as inhuman and degrading treatment) of the Convention. With regard to state obligation under Article 2, the Court noted that: "[f]or a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."[741] The ECtHR reminded of the eight officially known incidents, which revealed escalating violence, and said that the authorities could have foreseen the attack on the mother. Regarding the argument that the victim and the mother would always withdraw their complaints and thus the state authorities could no longer take any actions, it seems that the state is expected to reasonably counterbalance different interests under Article 2 and Article 8. The Court found that the authorities did not consider the motives

737 Prosecutor v. Kunarac, Kovač and Vuković, *supra* note 193, para 150.

738 Clare McGlynn, "Rape, Torture and the European Convention on Human Rights," *International and Comparative Law Quarterly* 58, 3 (2009): 565-595.

739 Opuz v. Turkey, *supra* note 169.

740 The applicant, her mother and other family members suffered long-term abuse by her violent husband, who finally also shot her mother. The applicant repeatedly tried to submit complaints and requests to initiate criminal proceedings after physical assaults (ranging from mild to dangerous to life), numerous knife assaults, attempt to kill with a car, death threats, and etc. – but would withdraw them due to pressure from the husband. The perpetrator was convicted for stabbing the applicant 7 times; in the end, the perpetrator had to pay a small fine (about 250 euros) in 8 instalments. In the meantime, the Family protection act was in force in Turkey, but it did not sufficiently protect the applicant from repeated violence. Even after the conviction for killing the mother, the Turkish court decided to mitigate the sentence because of alleged "provocation," and also released the perpetrator, as the appeal was pending. The ECtHR analysed the development of international law in the field of VAW and domestic violence against women, including global and regional developments, comparative law materials, and NGO statements.

741 Opuz v. Turkey, *op.cit.*, para.129.

for withdrawing the complaints (death threats, as explained by applicant). They were very eager, however, to avoid interfering into "family matter." [742]

The Court thought that the legislative requirement to be unfit to work for at least 10 days for public prosecution "fell short of the requirements" of the state under its positive obligations. The applicant notably, even after life-threatening knife assaults, was capable to work after 7 days or so. The Court came to conclusion that the criminal system did not have the necessary effect to prevent domestic violence. Once the violence becomes known, the further actions should not depend solely on the victim: "national authorities cannot rely on the victim's attitude for their failure to take adequate measures." [743] The Court's application of Article 3 in this case is clearly very important. Placing the protection responsibility on the victim herself has been a tradition in the European countries, and this was the very first occasion, where the Court ruled that state has the responsibility to protect the life and physical integrity of the victims. However, the Court still did not find that infringements of Article 3 amounted to "torture," despite the fact that VAW was constant and some physical assaults were life threatening.

The Court did not really re-define or re-interpret the state obligations under Article 2 of the Convention in *Opuz v Turkey*. Basically what it did is apply the so-called *Osman* test to the situation of domestic violence: once the authorities are aware of real threat, they must adopt adequate measures to prevent violence. In that part of the legal reasoning, it was not landmark but simply followed *stare decisis*.[744] Even after the Osman judgment, the UK courts continued to adopt it restrictively in domestic violence cases.[745] Therefore, even though *Opuz v Turkey* case did not bring great novelties regarding the analysis of Article 2, the re-iteration of the Osman test, and underlining that it also applied in cases of domestic violence, was significant.

Regarding Article 3,[746] the Court in *Opuz v Turkey* considered that the applicant was falling within the category of "vulnerable victims."[747]It could not be claimed that state authorities remained completely passive – the victims were questioned and taken to medical examinations. However (by reference *inter alia* to *Maria de Penha* case) the Court thought that these actions did not amount to acting with due diligence.[748] Again, states have discretion in choosing the responses under Article 2 and 3: the due diligence test is somewhat permissive, and the states are safe from liability, as long as it is shows that they have taken "reasonable steps."[749] The real significance is attached to practice rather than legislation.

742 *Ibid,* para 146.

743 *Ibid,* para 153.

744 The legal techniques employed in human rights cases include either following stare decisis to expand a certain right, precisely what happened in this particular part of *Opuz v Turkey*, or to develop landmark decision on the basis of overall policy considerations, which happened in the part of the decision where it was established that DV constituted a breach of Article 14, combined with Article 2 and 3.

745 Mandy Burton, "Failing to Protect: Victim's Rights and Police Liability," *The Modern Law Review* 283, (2009) 72, 283-295.

746 Article 3 provides "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." It is an absolute prohibition, which necessitates both negative and positive obligations of the state.

747 Opuz v Turkey, *supra* note 169, para 160. The Court considered both the individual situation as well as applicant's "social background, namely the vulnerable situation of women in south-east Turkey."

748 *Ibid*, para 169.

749 Mandy Burton, "The human rights of victims of domestic violence: Opuz v Turkey. (comments)." *Child and Family Law Quarterly*, Vol. 22, Issue 1 (2010), pp. 131-140. At 135.

The real breakthrough and paradigm shift emerged in the Court's analysis under Article 14 (prohibition of discrimination),[750] in conjunction of Articles 2 and 3. Notably, this Article in the system of ECHR is "parasitic", i.e. it does not have autonomous standing and can only be invoked in conjunction with other articles. Protocol 12 to the ECHR (came into force in 2005)[751] provides for a possibility of individual standing and general / broad concept of discrimination and equality, but it has been ratified by 19 contracting states so far. Unfortunately, some commentators observe that there is a "great reluctance" and "fear of adopting a clause of general protection of equality."[752] It is thus not very easy to apply Article 14, and sometimes even if it seems that discrimination is rather obvious, the Court denies the necessity to include an analysis of violation of this Article, because it says that no separate issue arises.

In the case of *Opuz v Turkey*, the Court first recognized that anybody may become a survivor of DV: "the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse [...] is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly."[753] However, regarding the violation of Article 14 in conjunction with Articles 2 and 3, the Court noted: "the applicant has been able to show, supported by unchallenged statistical information, the existence of a *prima facie* indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence."[754]

The Court considered that the effect of the (unintentional) judicial passivity on women revealed "gender-based violence which is a form of discrimination against women."[755] Despite the reforms carried out by the Turkish Government, the overall unresponsiveness of the system proven in this case indicated that there was insufficient commitment to take appropriate action to address domestic violence.[756] Thus, the case of *Opuz v. Turkey* did not merely concern the failure to protect a domestic violence victim, but revealed the phenomenon of state tolerated gender-based violence. Despite the lack of active involvement of the state actors, the state is considered responsible in cases of repeated domestic violence. *Opuz v. Turkey* was the first domestic violence case the Court found a violation of Article 2 (life – the applicant's mother was murdered) and Article 3 (torture and inhuman or degrading treatment) and of Article 14 (non-discrimination) in conjunction with both Articles 2 and 3. That means it was the very first time that the Court recognized domestic violence as a significant violation of

750 Article 14 provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured by 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."

751 Protocol No. 12 to the Convention for the Protection of Human rights and Fundamental Freedoms, CETS no. 177. Adopted in Rome, 04 November 2000.

752 Loucis G. Loucaides, *The European Convention on human rights* (Brill, 2007), p. 57.

753 Opuz v Turkey, *supra* note 169, para 132.

754 *Ibid*, para. 198.

755 *Ibid*, para. 200.

756 *Ibid*.

human rights and gendered phenomenon. Although it is a very positive development, it is also noteworthy that the Court somewhat lagged behind – at the global level, the realisations have been made decades ago (GRs by the CEDAW - were adopted in the beginning of 1990s).

From the wording of the *Opuz v Turkey*, it seems that the Court is expecting to see both the general tolerance of violence against women in the country concerned, as well as passivity in the individual case, in order to admit violation of Article 14. On the one hand, it can be criticized because the countries often lack reliable data on VAW and the data segregation on the basis of gender and relationship of victim and perpetrator. On the other hand, the collective approach of the Court rather than individual can also be criticized. Theoretically, even a very clear gender bias in an individual case may not lead to finding of violation of Article 14. It can be suggested that low numbers of gender based violence in the society should be disregarded if there was an extreme gender-bias in an individual case.

In addition, looking at the same issue from a different perspective, *Opuz v Turkey* may have been a very suited ice-breaker, however, it needs to be considered whether the Osman test should continue to evolve in cases of VAW. *Osman* test in general applies to all persons, all victims of crimes, while due diligence duty in cases of DV, where women are disproportionally affected, and arguably needs a higher due diligence standard. In particular in certain societies in Europe, women face disproportionate VAW and reluctance of state agents to intervene. Therefore state agents‘ omissions should be considered as violations of the Convention, because state agents could be presumed to know that failure to protect, in these societies, is very likely to result in further violence. Therefore, the Court's further development on the scope of due diligence standard is needed, arguably with less stress on causality of foreseeability and more rigorous approach to due diligence. It must be noted that in subsequent cases, which consistently held that DV is a human rights violation, the Court nevertheless abstained[757] from clearly stating that private prosecutor claims in cases of DV are not acceptable, or that a stricter text needs to be applied than the *Osman* test.

Some other aspects need to be underlined: i.e. the burden of proof and the comparator are usually essential in human rights law. In cases such as *Opuz* and *Eremia*, discussed further, the Court does not focus on finding the comparator (in contrast, the comparator seems important in some other cases, e.g. related to discrimination on the basis of sexual orientation[758]). That is a reasonable position. Although in many cases, the ECtHR uses the comparator, even if it is purely hypothetical comparator, it is not, strictly speaking, necessary. In cases of VAW, although women do experience violence at home and sexual violence in the community to an epidemic and disproportionate extent, it should not mean that women's and men's pain should be compared and weighted against. Such technical approach and direct comparison would not be ethical.[759] Although no comparator is necessary, regarding the burden of proof under Article 14, from the

757 See Ronagh McQuigg, "The European Court of Human Rights and Domestic Violence: Valiuliene v.Lithuania," *The International Journal of Human Rights 18,* (2014, 7/8): 756-773.

758 X and others v. Austria, app. no. 19010/07, 19 February 2013. In this area, both the Court and the Governments are analysing whether heterosexual and homosexual couples are in "comparable" situations.

759 Having said that, the author is aware that the generalised comparison if of course there - e.g. Istanbul Convention provides "women and girls are exposed to a *higher* risk of gender-based violence than men" in its preamble, *supra* note 17, emphasis added by the author. It can also be argued that because this general acknowledgement exists, comparators in individual cases are not necessary.

analysis it seems that the ECtHR places it on the applicant: noted the formulation "the applicant has been able to show" in *Opuz v Turkey*.[760] It is doubtful whether indeed the burden of proof should be placed entirely on the victim of violence. Why cannot the powerful Governments with all the resources available be burdened with the task of proving that the victim was not discriminated against? In the opinion of the author, the burden of proof of infringement under Article 14 must be at least shared or shifted to the side of the state.

2.1.4. Conceptual challenge of VAW as discrimination under ECHR

2.1.4.1. DV as gender based violence

The case of *Opuz v Turkey* was significant because it recognized, for the first time, that DV can be seen as discrimination under the Convention and states must ensure a proactive approach to protection of this "vulnerable" group.[761] It can be claimed that since *Opuz*, the ECtHR's practice shows a very slow but rather certain conceptual shift from the state-centred approach to the victim-centred approach and stricter due diligence standard. It is now clear that the states have a positive obligation to prevent violence against battered women: however, it still needs to be proven *on exceptional basis* that it has anything to do with gender based discrimination. Although the global framework (CEDAW) treats DV as one form of GBV, at the regional level this practice is different.

For some time since the adoption of the above-discussed decision, the *Opuz* case seemed as the only deviation from the consistent case practice which found, most usually, a violation of Article 8 (right to respect for private and family life),[762] or Article 3, and Article 8.[763] The prohibition of discrimination under Article 14 (i.e. recognition that VAW was also gender based) has generally not been found in cases heard by the ECtHR. For instance, in the previous case of *Bevacqua and S. v. Bulgaria,*[764] the Court noted that the state is not directly responsible for actions of the perpetrator but found violations of state authorities to ensure protection of private and family life.[765] In this sense, *Bevacqua and S. v. Bulgaria* was really significant, because it re-affirmed the applicability of *Osman* test to domestic violence cases, and required protection orders as part of due diligence standards. Furthermore, the Court relied on Inter-American Court's practice (*Cotton Field* and *Velasquez* cases), and it also noted the "particular vulnerability" of DV victims. However, the Court failed to find a violation of Article 14 – despite the fact that Bulgarian

760 Opuz v. Turkey, *supra* note 169, para. 198.

761 Patricia Londono, "Developing Human rights principles in cases of gender-based violence: Opuz v Turkey in the European Court of Human rights", *Human Rights Law Review* 9, 4 (2009): 657-667.

762 A.V. v. Croatia, app.no. 55164/08, 14 October 2010; Hajduová v. Slovakia, app.no. 2660/03, 30 November 2010; Kalucza v. Hungary, app.no. 57693/10, 24 April 2012.

763 E.S. and Others v. Slovakia, app. No. 8227/04, 15 September 2009.

764 The alleged perpetrator of domestic violence claimed abduction of the child, has taken the child himself, and manipulated child protection provisions in custody and divorce proceedings. Cumulative effects of the failure of courts to grant interim custody, and the lack of any actions by law enforcement authorities resulted in violation of the state's positive obligation. Bevacqua and S. v Bulgaria, no. 71127/01, 12 June 2008, para 84.

765 *Ibid,* para 97.

Criminal Code made an exception particularly to domestic violence cases, which had to be initiated by private prosecution, while other cases of minor injuries could be initiated by prosecutor. Lee Hasselbacher thus correctly notes that the practical effect therefore was discriminatory.[766] Furthermore, in the post-Opuz case of *B.V. v Moldova*[767] the Court thought that allowing the violent husband "to live in the same apartment as his victim rendered ineffective other measures in the protection order and exposed her to the risk of further ill-treatment,"[768] and thus found violation of Article 3. Moreover, the Court also found that the state "failed to balance the rights involved and effectively forced the first applicant to continue risking being subjected to violence or to leave home,"[769] thus infringing Article 8 of the Convention.

The case of *A. v Croatia*[770] was significant because the Court recognized that both physical and moral integrity of an individual is covered by the concept of private life under Article 8 of the Convention: a rare substantive response. The applicant also argued violation of Article 14 (discrimination), however, the Court distinguished itself from the case of *Opuz v Turkey*, by saying that this case *does not show a general passivity and acceptance* of domestic violence: "[t]here is not sufficient statistical or other information disclosing an appearance of discriminatory treatment of women who are victims of domestic violence on the part of the Croatian authorities."[771] The Court did not think that it was its task to evaluate the national criminal policy framework and did not find the evidence of gender discrimination in state authorities' actions and their failure to act.

In the case of *Rumor v Italy*[772] the Court also has found no violations of Article 3 and Article 3 in conjunction with Article 14. The Court found that the violence itself amounted to ill treatment under Article 3, but the state was relatively free to choose the appropriate measures, Hence the national court's decision to replace imprisonment with house arrest was seen as reasonable. Ronagh McQuigg analysed this case as an example that there are limits to the doctrine of positive obligations,[773] which is not surprising, considering that DV concerns VAW in private sphere were not seen as a legal issue for a long time.

766 Lee Hasselbacher, "State obligations regarding domestic violence: the European Court of Human Rights, due diligence, and International legal minimums of protection," *Nothwestern Journal of International Human Rights*. Vol 8, Issue 2 (spring 2010): 190-215.

767 B.V. v Moldova, app. no 61382/09, 16 July 2013. The case concerned domestic violence suffered by a woman from her former husband, who was living in the same apartment. Even though the applicant asked for eviction, the national courts rejected her request, while violence continued. The applicant obtained a protection order, but her request for eviction of the perpetrator was never granted.

768 Ibid, para 57-61.

769 *Ibid*, para 75.

770 A. v. Croatia, app. no. 55164/08, 14 October 2010. The case concerned verbal and physical domestic violence in front of the child, as well as violent physical assaults of both the mother and the child. Despite numerous witnesses, state court could not reach a decision, partly because of the perpetrator's mental condition. Some measures prescribed (detention, fines, psycho-social treatment and a prison term) have not been enforced.

771 *Ibid*, para 97.

772 Rumor v Italy, app. No. 72964/10, 27 May 2014. The case concerned domestic violence, for which the perpetrator was prosecuted and received imprisonment sentence. However, the sentence was subsequently replaced by house arrest, without informing the applicant, who later found out that the perpetrator lived only 15 km. from her home.

773 Ronagh McQuigg, "Domestic Violence as Human Rights issue: Rumor v Italy," *The European Journal of International law* 26 (2015, 4): 1016.

The Court found a violation of Article 3 in *Valiulienė v. Lithuania*,[774] but did not analyse whether a gender-sensitive approach was required and did not elaborate on DV victims as a vulnerable group. This position was criticized in the concurring opinion by Judge Pinto de Albuquerque,[775] whose opinion is clearly influenced by feminist jurisprudence. The Judge claimed that: "Domestic violence is basically violence against women,"[776] yet at the same time, he opened his concurring opinion (arguing for a stronger conceptual stance of the ECtHR) with the statement that violence can occur in various contexts and to different people, including same-sex relations. Meanwhile, Judge Danutė Jočienė dissented, saying that the injuries lacked severity: "injuries sustained by the applicant were without any lasting consequences and did not result in her being unfit to work."[777] The element of severity under Article 3 needs to be analysed, yet it is not solely connected with the duration of the suffering or capacity to work; instead, all circumstances must be taken into account: the duration of suffering, its physical and mental effects, sex, age and state of health of the victim (e.g. disability) and other contextual circumstances. DV, consisting of slapping, biting, punching, and/or psychological violence and threats, may show sufficient degree of severity. In this case, the harm was continuous and police reported a number of calls of the applicant.

The attitude of the state, which can also be seen as expressed in the reply of the Government, stating the injuries were "merely trivial" may have also had the impact to the Court's decision.[778] The Lithuanian Government acknowledged violation of Article 3 in the second pending DV case against the state,[779] which involved severe damage to the applicant and her children over a long period of time.

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774 The case concerned repeated DV against the applicant, perpetrated by her Belgian partner. Despited frequent calls to the police, e.g. five incidents were reported in more than a month, the perpetrator was not punished. Notably, at that time, the Lithuanian law required the applicant to undertake much more active role.

775 Valiulienė v Lithuania, the Concurring opinion of Judge Pinto de Albuquerque. He saw it as a missed opportunity to set a precedent based on a principled reasoning and to manage the disparate jurisprudence under the Convention. Although neither the applicant, nor the concurring judge claimed a violation of Article 14 in conjunction with Article 3, the Court still could have elaborated on its emerging doctrine of vulnerability / vulnerable groups.

776 Concurring opinion of judge Pinto de Albuquerque in European Court of Human Rights case Valiulienė v Lithuania, 2013, application no. 33234/07. He continues: "All the available data shows worldwide that domestic violence is in the vast majority of cases violence perpetrated by men against women, and violence by women against men accounts for a very small percentage of domestic violence. Ever since General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women, it has been widely acknowledged that violence between intimates affects women disproportionately, demarcating women as a group in need of proactive State protection."

777 *Ibid*, dissenting opinion of Judge Jočienė in Valiulienė v Lithuania.

778 See Ronagh McQuigg, "The European Court of Human Rights and Domestic Violence", *supra* note 757, p. 768.

779 D.P. v Lithuania, app. no. 27920/08, 22 October 2013. The case involved domestic violence. The Government first suggested acknowledging the violation of Article 8, but after Valiulienė, *supra* note 89, it acknowledged that Article 3 was infringed. This case involved even more severe VAW and psychological damage to children, which resulted in suicide of one son. Arguably, the said case could be seen also as violation Article 14. Both statistical information on wide-spread VAW and judicial passivity was available, and the individual case also showed some prejudicial treatment.

Nevertheless, the Court subsequently found breaches of state obligations to protect from gender based violence in other cases. For instance, in case of *Eremia and Others v. Moldova*,[780] it found violation of Article 3 and Article 3 and 14 in conjunction (first applicant), as well as Article 8 (second and third applicants), and the breach of Article 3 in conjunction with Article 14 in the case of *T.M. and C.M. v. Moldova,*[781] *Mudric v. The Republic of Moldova,*[782] and *M.G. v. Turkey*.[783]

In case of *Eremia and Others v. Moldova*[784] the Court analysed, in turn: whether the state has set up a legislative framework to tackle private violence (yes), whether the authorities were aware or ought to have been aware of the violence (yes). The Court noted particular vulnerability of the victim and her children,[785] especially considering that the perpetrator (her husband) was a police officer. Although the state was not completely passive, and some administrative and disciplinary measures were adopted, no decisive actions have been taken. The Court considered that suspension of criminal investigation had the effect of shielding the perpetrator from liability and thus found a violation of Article 3 (inhuman treatment). The Court also found a violation of Article 14 in conjunction with Article 3, because the actions of all state authorities (police, social assistance services, courts and etc.) *were passive despite the fact that they all knew* about the violence. This passivity was not accidental and needs not to be intentional, as found under *Opuz*. Under the ECHR, the actions of the state in this case "amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman."[786] The findings of the UN Special Rapporteur on Moldova were also significant in supporting the conclusion that state failed to realise "extent of the problem of domestic violence in Moldova and its discriminatory effect on women."[787]

In a later case, the case of *T.M. and C.M. v. Moldova,*[788] the perpetrator was violent towards his wife and child (the applicants). The Court ruled that "it was the duty of the police to investigate of their own motion the need for action in order to prevent domestic violence, considering how vulnerable victims of domestic abuse usually are" and found that the failure to act for a few months resulted in violation of Article 3 of the Convention.[789]

780 Eremia and Others v. Moldova, app. no 3564/11, 28 May 2013.

781 T.M. and C.M. v. Moldova, app. no 26608/11, 28 May 2014.

782 Mudric v. The Republic of Moldova, app. no. 74839/10, 16 July 2013.

783 M.G. v. Turkey, app. no. 646/10, 22 March 2016.

784 Eremia and Others v. Moldova, *supra* note 780. The case concerned repeated domestic violence by violent (police officer) husband towards the wife in front of their children, as well as some abuse of children. The police pressured the applicant to withdraw her application for criminal case, and the social worker's and court's attitudes were also dismissive. Criminal investigation against the husband has been suspended.

785 The ECtHR analysed the application of the children under Article 8 instead of 3, like initially submitted. Children in the case were verbally abused and also witnessed physical assaults of the mother. Underlining that their psychological well-being has been adversely affected by repeated witnessing of domestic violence against the mother, and that the state authorities were well-aware of the violations, the Court found that the children's right to private and family life (Article 8) has been breached.

786 Eremia and Others v. Moldova, *op.cit.*, para 89.

787 *Ibid.*

788 T.M. and C.M. v. Moldova, *op.cit.*

789 *Ibid,* para 46.

Moreover, the Court noted a statistical prevalence of VAW and the passivity of state authorities (the police, prosecutor and courts) in the present case, thus finding a violation of Article 14, in conjunction with Article 3.

The case of *Mudric v. the Republic of Moldova*[790] also featured ignorant behaviour of the state agents, who refused to look into the case because according to them, it was a private matter. For a year, the perpetrator continued living in the victim's home and beating her. The Court found that "authorities' actions were not a simple failure or delay in dealing with violence against the applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards her as a woman."[791] Thus, a violation of Article 14 in conjunction of Article 3 was found.

In *Civek v Turkey*,[792] police officers were informed of genuine threat to life which was subsequently fulfilled.[793] The ECtHR found violation of Article 2, and did not consider it necessary to adjudicate on the alleged breach of Article 14 of the Convention. The right to life in this case seems to "outweigh" the issue of discrimination under Article 14. In the similar case of *Opuz v Turkey*, the Court found both the breach of Article 2 and 14, whereas in this case, it did not even analyse whether the actions of police officers involved gender bias. It is unfortunate that the Court did not go deeper into the issue of whether the current case did not constitute discrimination, because the case practice under Article 14 is not entirely consistent and in this case, the Court could have provided a clarification. At the same time, it portrays the impression that under the ECHR, the arguments of "right to life" are stronger and more convenient to use than the language of "discrimination." It must also be noted that the Government asked for a referral of the case to the Grand Chamber.

Nevertheless, in the case of *M.G. v. Turkey,*[794] which was adjudicated shortly after *Civek v Turkey*, the Court *did* find the violation of Article 14. In this case, the victim did not receive protection for herself and her children since 2006. While she managed to divorce the perpetrator, this rendered her incapable to receive a protection order, which for some time was not available for former spouses (until 2012). The criminal proceedings were in fact opened only in 2012, five years and six months after the initial report on VAW, and were still pending at the time of the decision. The Court found violation of Article 3 and also Article 14, in conjunction with Article 3. The Court repeated its previous findings regarding condoning of VAW by judicial passivity in Turkey, recognized in *Opuz v. Turkey* but forgotten in *Civek v. Turkey.*

790 Mudric v. Moldova, *op.cit*. The woman was repeatedly beaten up by her former husband who also broke into her home and continued to live there. Despite her complaints and recognition that the events indeed happened (the perpetrator also suffered from paranoid schizophrenia), no protection was provided.

791 *Ibid,* para 63.

792 Civek v Turkey, app. no. 55354/11, 23 February 2016.

793 The applicants' mother was subsequently murdered. Although the state's obligation to investigate and prosecute was fulfilled, the state's obligation to take protective measures in the event of clear threat to life was breached. The perpetrator was ordered not to approach the victim but then breached the protective order. The police ex officio ought to have taken actions, for instance arrest the perpetrator for failing to comply with court orders – but all they did is register a complaint. The perpetrator remained free and proceeded to murder the victim.

794 M.G. v. Turkey, *supra* note 783.

It can be summarized that although the landmark case of *Opuz v Turkey* gave the basis for argumentation that the Court recognized VAW as "an issue of inequality",[795] the practice is not completely predictable. The larger and systemic problem of inequality, which condones DV, is not always recognized under the ECtHR practice. Consistency is still desired in the future judgements, because at the moment, it seems that only every second judgment of the Court acknowledged that DV can constitute GBV.

2.1.4.2. Sexual VAW in the community is not related to gender?

Unfortunately, the Court so far fails to see that sexual VAW case may also constitute an issue under Article 14 (in conjunction with other articles). The failure to see *M.C. v Bulgaria* as involving discriminatory element has already been discussed above – yet it is striking to see that in 2016, the Court, flooded many cases of rapes of women, still does not see how sexual VAW may disproportionally affect women. For instance, in the case of rape of a girl with slight intellectual disability, *I.C. v. Romania*[796] the Court unanimously found violation of Article 3 due to failure to investigate and employ a "context-sensitive approach".[797] The Court did not see the necessity to analyse the case under Article 14, although it could have been seen as a case of intersectional discrimination (gender/disability/age). It also relied on *B. v Romania*,[798] where a procedural violation of Article 3 was found due to lack of investigation by national institutions.

The findings of similar, i.e. purely procedural violations due to non-investigation or extreme delays in investigation have been rather common.[799] In the long line of procedural violations, it would be important to investigate whether state agents lack more than just contextual sensitivity. Approximately 1 in 5 women is raped, whereas it is 1 out of 71 men.[800] It is indeed striking that such widely shared experiences of women are not yet recognized as relating to gender by the Court. While drawing the analogy with *Opuz v Turkey*, domestic remedies certainly cannot be considered as satisfactory, considering that in Europe (including Scandinavian states)[801]conviction rates in cases of rape are basically less than 10 percent. The key question remains, how can sexual VAW not be seen as gender based violence under these circumstances.

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795 E.g. see Patricia Londono, "Developing human rights…", *supra* note 761, p. 667.

796 I.C. v. Romania, application no. 36934/08, 24 May 2016.

797 *Ibid*, para 54.

798 B. v Romania. app.no 42390/07, 10 January 2012. The case concerned a woman suffering paranoid schizophrenia. The woman was allegedly raped and despite some material evidence, and a partial admittance of the facts by the rapist, the case was not duly investigated.

799 P.M. v. Bulgaria, app. no. 49669/07, 24 January 2012. The case concerned a group rape of 13 year old girl and 15 years of investigations, despite all facts and identities known. I.G. v. the Republic of Moldova, no. 53519/07, 15 May 2012. The case concerned non-investigation of acquaintance rape. W. v. Slovenia, application no. 24125/06, 23 January 2014, also concerned a group rape that was not duly investigated. M.A. v. Slovenia, app. no. 3400/07, and N.D. v. Slovenia, app. no. 16605/09, 15 January 2015, were related to delayed investigations of 9-26 years.

800 Beverly A. McPhail, *supra* note 669, p. 317. The author also cites research that reveal one third of male college students said they would rape, provided that they could get away with it, p.318.

801 *Case closed: rape and human rights in the Nordic states*, Amnesty international publications, 2010.

There are also examples where the Court demonstrated extreme gender neutrality. The decision of ECtHR (Grand Chamber) in the case of *O'Keeffe v Ireland*[802] has changed the understanding of the positive state obligations in the field of (sexual) violence against children perpetrated in school environment.[803] The decision is included in Court factsheet on VAW as a landmark case, yet nowhere in the decision has the Court taken into consideration gender aspects. These main principles can be extracted from the *O'Keeffe v Ireland* decision. First, a state has an inherent obligation to ensure protection of children "from ill-treatment, especially in a primary education context, through the adoption, as necessary, of special measures and safeguards" (para. 146).[804] Second, at least criminal provisions / effective law enforcement machinery are necessary (para 148). Third, "[f]ailure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State" (para 149). Moreover, "State cannot absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals" (para 150). Finally, a state should be aware that if no protection mechanism is available, this constitutes potential risk to children's safety (para 162).[805] Following this argumentation,[806] the Court found the protection was not sufficient and the state was found to have violated Article 3 of the Convention.[807] Considering that the Court found a narrow margin of appreciation in such cases, violations would emerge in cases of VAW in schools, (both perpetrated by teachers and students), where no specific protection safeguards are available, or they are not considered sufficient, or they are not effectively applied in practice.

802 O'Keeffe v Ireland, app.no. 35810/09, 28 January 2014.

803 The facts of the case were the following. The applicant was sexually abused by a teacher in 1973, when she was 9 years old. She came to realize the extent and the cause of her ongoing psychological problems in 1996-1998, in the process of the ongoing criminal trial of the same teacher, which involved charges with 386 criminal charges of sexual abuse of 21 pupils. The school was a so-called "national school" – a denomination religious school that was financed by the state. The majority of primary schools in Ireland were such schools, and subsequent reports found that sexual abuse as well as cover-up was rather common. The teacher was convicted, and the compensation was awarded to the applicant from the perpetrator – subsequently, however, only 10 percent of the awarded sum was retrieved. Moreover, her civil action for damages against the government had been dismissed, because the Supreme Court did not consider the state vicariously liable for actions of the national school's teacher. The applicant applied to the ECtHR on the basis of infringements of Articles 3 (torture, inhuman, degrading treatment), 8 (private and family life), 13 (effective remedy), 14 (discrimination), and Article 2 of Protocol No. 1 (education).

804 Notably, the Court considered that this positive obligation existed since 1970s.

805 O'Keeffe v Ireland, *supra* note 802.

806 There were a few dissenting and one concurring opinion of ECtHR judges, mostly focusing on the issue of retroactive application of the high-standard state responsibility. While some judges claimed it would be Kafka-esque to ask Ireland be responsible up to the standard that has evolved with time, Judge Ziemele concurred and said that actually, the Court in its argumentation should have also relied on the evolving / living international human rights law. It must be noted that reports on the great scale of sexual abuse in Irish schools were available to the state since 1930s.

807 The ECtHR also found the violation of Article 13 (effective remedy) and did not examine other provisions, because they were not seen as raising separate issues under the Convention. Significantly, the Court underlined: "when relinquishing control of the education of the vast majority of young children to non-State actors, the State should also have been aware, given its inherent obligation to protect children in this context, of potential risks to their safety if there was no appropriate framework of protection." (para 162)

Unfortunately, in *O'Keeffe,* the ECtHR refused to reflect on the gender dimension of VAW in community and the applicant also did not raise this issue.[808] It must be recalled that the Special Representative of the UN Secretary General on Violence against Children[809] recommends giving particular attention to gender issues in school environment, i.e. ensuring that teaching promotes gender equality, introducing a gender dimension into life-skills lessons, and training school staff to address gender discrimination and gender-based violence.[810] WHO also noted that "for many young women, the most common place where sexual coercion and harassment are experienced is in school."[811] Attention should also be paid to special risks faced by girls living in poverty that may lead to sexual abuse by adults, including those entrusted with their care.

There is a reason to believe that these instances of sexual VAW and rapes should be seen as gender based violence, similarly as DV was seen as such violence in cases of *Opuz*, *Eremia* and others. Just like DV, rape in the community can indeed happen to anybody (including men) but it disproportionately affects women and girls. Furthermore, data of the cases reveal that victims of rape are treated in prejudiced manner by state agents: previous sexual conduct is taken into account, post-traumatic stress is rarely considered, and the focus falls on proving the use of force, rather than essential concept of consent. It is absolutely necessary to acknowledge that the necessary context sensitivity in these cases is often gender sensitivity.

Thus, it can be concluded from these examples that the Court still fails to see rape as an issue related to gender. Hence, the sexual VAW is even more "private" form of VAW than violence perpetrated in the privacy of the home/family. If it is not recognized that women and girls are facing gender-specific threats in such cases, that most of them are harassed and abducted, raped and drugged because they are women, then such experiences are marginalized and pushed to the private sphere.

2.1.5. The focus on procedural aspects

The Court distinguishes between two types of positive obligations under the ECHR - procedural and substantive. The procedural obligations refer to situations where the states generally have good laws and policies, however, in that particular case, the states failed to fulfil their due diligence duty to respond to VAW. Substantive obligations refer to situations where some substantive changes are necessarily, e.g. widening of the concept of rape, providing protection measures for divorced women, and etc. It can already be visible from the analysis above that the Court focuses on procedural positive duties of the states. However, it *could* provide a twofold analysis and also contribute to discussion on substantial obligations under Article 3 or Article 8 ,and other central to VAW Articles of the Convention.

808 The applicant seems to have raised the issue of discrimination claiming that the state recognized its responsibility and compensated those children abused in reformatory or industrial schools but not those who had been abused in national schools. *Ibid,* para 193.

809 Tackling Violence in Schools: A global perspective on Bridging the gap between standards and practice. Office of the Special Representative of the Secretary General on Violence against Children, 2012.

810 *Ibid,* p. 41.

811 For instance, see *World report on Violence and Health.* WHO. Geneva. 2002. p. 155.

It must be noted that the ECtHR only in the last decade or so started to focus on the procedural limb of Article 3. Previously, the focus was clearly on substantive aspects. As noted by Ana Salado Osuna, procedural aspects are usually found if "there is no evidence to declare a substantive violation of the right as well as in cases where substantive violation has already been declared."[812] Perhaps in many cases it is really true that states have great legislation but implementation is lacking. However, the fact that this happens quite systematically should lead to conclusion that it is also necessary to look into substantive obligations of the states.

Regarding sexual VAW, in the case of *I.P. v Moldova*,[813] the ECtHR analysed the case of physical assault and rape perpetrated by a former partner of the applicant. Although the applicant immediately reported rape and medical examinations confirmed it, the prosecutor initially refused to initiate proceedings, and later they were dismissed. The Court found that "the investigation of the applicant's case fell short of the requirements inherent in the State's positive obligations to effectively investigate and punish rape and sexual abuse" under Article 3.[814] The ECtHR also found violation of Article 13 (remedy) because any civil proceedings could only be unsuccessful after the dismissal. In this case the Court again focused on procedural rather than substantial issues like consent. It refused to analyse violation of Article 8, even though sexuality should also be seen as part of individual's private life and that point could have been consistently upheld. The Court did analyse Article 3 and Article 8 (yet again, not Article 14) in the later cases of *D.J. V Croatia*,[815] and *Y. v Slovenia*[816] and once again, it only found violations of procedural rights.[817] There is still the need to elaborate on the substantial definition of rape. First, it needs to be clarified whether some rapes can constitute torture under Article 3; second, it also needs to be evaluated whether the rape can reveal a more systemic failure[818] of the state to protect women against sexual VAW.

812 Ana Salado Osuna, "Treatment prescribed under Article 3 of the European Convention of Human Rights," In *Europe of Rights: A compendium of the European Convention of Human rights*, Javier Garcia Roca, Pablo Machetti Santolaya (eds), (Brill, 2012): 72.

813 I. P. v Moldova, app.no. 33708/12, 28 April 2015.

814 *Ibid,* para 36.

815 D.J. v. Croatia, application no. 42418/10, 24 July 2012. The case concerned alleged rape and failure to investigate. Although the police officers were later reprimanded and fined for non-investigation, the Court nevertheless found the violations.

816 Y. v. Slovenia, application no. 41107/10, 28 May 2015. The case concerned alleged sexual assaults of 14 year old girl, originally coming from Ukraine, by a family friend. Expert opinions were contradictory: while psychologist thought she showed signs of sexual abuse, an orthopedics expert claimed that would not be possible, because the defendant was partially disabled, i.e. could not control one arm. At the trial, the girl was confronted by cross-examination from the alleged perpetrator, who was later acquitted. The application under Article 3 concerned the length of the proceedings (7 years) and prejudice on the basis of Ukrainian origin. The Court recognized violation of procedural rights under Article 3. The Court also thought that extensive questioning of the victim and lack of "particularly sensitive" approach to underage victim resulted in a violation of Article 8. Judge Yudkivska disagreed in her partly dissenting opinion, stressing that the proceedings took place when the applicant was already an adult. She also relied on EU Victims' Directive, claiming that the rights of victims in court proceedings need to be counterbalanced with the rights of defence, and it was allegedly done so in this case.

817 So far, the ECtHR would mainly limit itself to finding procedural violations under Article 3 in cases of rape. See cases I. G. v.Moldova, *supra* note 799, I.C. v.Romania, *supra* note 796, etc.

818 The recognition of violation of Article 3 that amounts to torture and particularly in combination with Article 14 could be a significant and timely substantial development under the ECHR.

Regarding DV, in case of *Durmaz v Turkey*, the Court also found violation of procedural aspects of Article 2;[819] here, the daughter has died and the father claimed she killed herself, whereas the mother and other relatives suspected that he had murdered her. The Court has found violation of procedural obligation to carry out investigation. The applicant in this case claimed that the procedural duties of investigation would have been carried out if that was not for "continuing tolerance towards domestic violence against women."[820]Unfortunately, the ECtHR does not have similar tools as the CEDAW Committee, where analysis can be undertaken under Article 5 (stereotyping) as well as Article 1 and Article 2 on prohibition of discrimination and specific policy measures. However, the Court could apply international law, jurisprudence under the CEDAW, as well as comparative law examples from the Inter-American jurisdictions. Article 14 was not even relied upon by the applicant in this case (she relied on Article 6 and 13) but her reference to it as to "the real problem" speaks for itself.

Articles 13 and 6, although providing a reference to procedural obligations, must not necessarily treated as purely procedural. The cases under these articles may potentially involve substantial questions of legislation on the right to remedy or fair trial. For instance, in case of *Kontrova v. Slovakia*, [821] the applicant was assaulted repeatedly by her husband, and the police was informed about the perpetrator's threats to kill the children. After the perpetrator was released and the children were indeed killed,[822] criminal proceedings regarding the misconduct of police officers was initiated. The applicant was treated as witness in the said proceedings (similarly to *Lenahan*, where children were also killed and the applicant was treated as not having locus standi). The woman tried to apply to courts demanding her own right to legal remedy, including - twice – to the Constitutional Court – but her applications were not successful. In the ECtHR opinion, the applicant had to be ensured with the right to compensation for the damage sustained, thus Article 13 (right to remedy) and Article 2 (right to life) have been breached. The Court found it unnecessary to examine alleged violations of Article 6 and Article 8, and the violation of Article 14 has not been alleged. In the future, it can be expected that there will be more DV cases under Article 6, because at least a few of them are currently pending under the ECtHR.

In the majority of the cases of VAW, including DV, under the ECHR, as analysed in this thesis, the Court found procedural violations rather than substantial. On the one hand, this is absolutely logical, because in most cases, it is a matter of failure by the state in one particular case (e.g. non-investigation of the alleged violence, although there are legislative provisions on investigation). In addition, it is sometimes difficult to distinguish the procedural and substantive "limbs" under certain articles, and they are closely interconnected. It does not mean that procedural aspects are not important, because they certainly are. It is absolutely essential that states effectively initiate investigation into allegations of DV and sexual VAW, which leads to judicial action, during which protection must be provided to victims, and remedy / compensation should be ensured. However, that is not enough. It is

819 Durmaz v Turkey, application no. 3621/07, 13 November 2014.

820 *Ibid,* para 44.

821 Kontrova v. Slovakia, app. no. 7510/04, 24 September 2007.

822 Also see Branko Tomašic and Others v. Croatia, app. no. 46598/06, 15 January 2009. The victim accused the perpetrator with death threats towards her and their small daughter. Upon release from custody, he proceeded to murder the wife and daughter and kill himself.

also essential that remaining substantial gaps are addressed, for instance, the level of severity under Article 3 (can DV alone or rape alone constitute torture), concepts of stalking, marital rape, forced marriage, female genital mutilation, and availability of protection for non-married couples, and persons in same-sex relations.

Furthermore, it is also suggested to use Chapter V (Substantive law) of the Istanbul Convention. In consideration that both the EU legislative package (the Victims' package, as discussed above) and the ECtHR focuses on procedural aspects of protection, this section of the new CoE Convention becomes particularly important. In addition, the section, the Explanatory report, and upcoming GREVIO reports can be used as the guidelines by the ECtHR, while looking into substantive law issues. It has been claimed that the use of Istanbul Convention may require a certain "judicial creativity" from the ECtHR[823] but considering that the ECHR provides much more general duties than Istanbul Convention, and the ECtHR case practice still lacks the necessary substantive consistency, it is very much reccomended.

As mentioned above, it is clearly visible that a focus on substantial elements, such as consent (*M.C. v. Bulgaria*) is indeed very rare in Court's jurisprudence on VAW and rape in the community. Besides the cases already discussed, the Court also found procedural violations of Article 3 in the following cases of rapes: in case of *P. M. v Bulgaria*,[824] *M. and others v Italy and Bulgaria*,[825] *W. v Slovenia*,[826] *M.A. v Slovenia*,[827] *N.D. v.Slovenia*,[828] *S.Z. v Bulgaria*.[829] It was mostly related to ineffective and very slow investigations, which sometimes lasted 10 or even 26 years and were closed due to statute of limitations. Notably, in *S.Z. v Bulgaria,*[830] the ECtHR also stressed that the amount of very similar cases against Bulgaria and found a violation of Article 46 (binding force and execution of judgments). Together with the CoE, Bulgaria should decide on the measures which would improve the situation. It is suggested that if the country systematically fails to provide effective investigations, perhaps it is time to offer some substantial changes. It must be noted that European Barometer for Rape[831] evaluated situation in Bulgaria as worrisome, because marital rape was not outlawed; furthermore, it was reported in 2012[832] that an exception when rapist marries the victim is rather common.

823 Ronagh McQuigg, "Domestic Violence as a Human rights issue", *supra* note 757, p. 1024.

824 P.M. v. Bulgaria, application No. 49669/07, 24 January 2012. The rape of 13 y. old girl took place in 1992 by known offenders; in 2003 the prosecutor terminated the proceedings due to statute of limitations.

825 M. and others v.Italy and Bulgaria, application no. 40020/03, 31 July 2012. In this case, applicants of Roma and Bulgarian nationality claimed that their daughter (a minor) was repeatedly raped and beaten by another family in the village. They also claimed a violation of Article 4 (slavery and forced labour) but the ECtHR found the claim inadmissible.

826 W. v. Slovenia, application no. 24125/06 23 January 2014. The applicant was raped by a group of men when she was 18 (back in 1990) but the criminal proceedings took unreasonably long and the civil damage was not sufficient.

827 M.A. v. Slovenia, application No. 3400/07, 15 January 2015. Criminal proceedings took about 26 years.

828 N.D. v. Slovenia, application No. 16605/09, 15 January 2015. It took authorities more than 9 years to look into the case of alleged rape by an uncle of a 19 year old.

829 S.Z. v Bulgaria, application no. 29263/12, 3 March 2015.

830 *Ibid.*

831 Barometer on rape, *supra* note 10.

832 Concluding observations of the Committee on the Elimination of Discrimination against Women: para 23. CEDAW/C/BGR/CO/4-7. 07 Aug 2012, para 23

Therefore it could have been essential, both in cases against Bulgaria but also in other cases which may raise more complex substantive issues (in particular case *I.C. v. Romania*[833]) if the Court did finally recognized that at least in some situations, *substantive* positive obligations are also infringed. The Court's guidance on necessary substantial changes could involve: recognition of rape as GBV, recognition of rape as torture, further clarification on the concepts of "consent", "sexual autonomy" and "equality" in the context of sexual autonomy. The recognition of rape as torture and GBV would be a timely development under the Convention. The lack of further substantial developments on the concept of consent, as well as sexual autonomy, marital rape, recognition of GBV and torture in cases of rape is also pressing. It would be necessary to know whether the Court considers that private prosecutions in cases of VAW are allowed under the Convention, because this issue has also never been clearly explained. It is essential that the ECtHR continues developing its jurisprudence also on the substance of human rights in the area of VAW.

2.1.6. The need to focus on protection / prevention of victims

Regarding date rape and sexual VAW in the community, it is noticeable that the Court practice does not really show a serious approach to protection and prevention aspects. Protection orders are often not available in case of date rapes and date violence. One has to be a DV victim in order to receive a protection order. Only recently this approach has started to change. Protection orders against strangers who stalk and sexually harass women and girls are also not available in most European jurisdictions. In this situation, it is not surprising that there is not much of the ECtHR case practice is on these aspects. However, in the future it is suggested that the EU Victim's package (its aspects on cross border protection orders), as well as Articles 52 (emergency barring orders) and 53 (restraining or protection orders) of the Istanbul Convention could be the instigation for further developments, also at the level of the ECtHR. Protection is also vital if the woman or girl is raped by a neighbour or boyfriend, and not only by a spouse or partner.

The analysis of ECtHR decisions reveals that protection concerns of DV victims are rather inconsistent and rarely take a central role in the argumentation of the Court, although the recent Court practice is more promising. In the case of *Branko Tomašic and Others v. Croatia*,[834] which was decided shortly before *Opuz v Turkey,* which concerned the violation of Article 2 in DV situation,[835] Judge Nicolaou presented a concurring opinion, and underlined that protection measures of the mother and the child were necessary upon the release (the perpetrator's mandatory psychiatric treatment could be considered

833 I.C. v. Romania, *supra* note 796.

834 Branko Tomašic and Others v. Croatia, app. no. 46598/06, 15 January 2009.

835 The applicants were relatives of a deceased victim of domestic violence. The perpetrator was convicted for constant threats to kill his former partner and their common child. He was sentenced a few months imprisonment as well as mandatory psychiatric treatment due to mental health problems. Upon his release from prison, the perpetrator did kill his former partner, their child and killed himself. The Court constituted a violation of state's positive obligations under Article 2, in consideration that perpetrator did not undergo an individual programme, psychiatric treatment, nor any search of his car or premises was made in order to see whether he caused a continuous threat.

as security rather than protective measure).[836] Second, he also raised the issue of individual responsibility of state agents. Both of these points are very reasonable and have also been pointed out by Special Rapporteur on VAW and different scholars.

In the case of Opuz, (by applying the *Osman* test) the Court underlined that the state is under an obligation to provide protection for victims of domestic violence from any repetition of VAW. At the same time, the focus fell on the punishment of the perpetrator rather than preventive / protective measures as such (of course, the focus on punishment was also adequate, considering that the perpetrator had murdered the applicant's mother and remained completely free to continue the abuse). However, in the further discussed cases of mentally unstable perpetrators, the Court clearly focused on punishment of the perpetrator or punitive aspects rather than protection of the victim.

For instance, in case of *Hajduova v. Slovakia*[837], the perpetrator's conviction for physical violence of the applicant was not enforced, i.e. he was not detained for treatment in psychiatric hospital, which allowed continuous threats to kill the applicant and other persons. The ECtHR noted that in consideration of previous history, the applicant had a "well-founded" fear that the threats could become reality. The Court considered that due to the failure of the national court \ to ensure the detention in psychiatric hospital for treatment resulted in breach of positive obligations of the state under Article 8. In this decision the Court was once again more focused on the failure to enforce the punitive measures against the perpetrator, rather than protective measures aimed at the victim.

A good focus on protection, although its procedural aspects, was seen in the case of E.*M. v. Romania*[838] and *Civek v. Turkey*. The case of *E.M. v. Romania* concerned DV in front of the child, which were dismissed for the lack of proof. The ECtHR found that there was a procedural violation of Article 3 due to the fact that applicant had not been afforded "effective protection."

The case of *Civek v Turkey*[839] can be seen as a contribution to the jurisprudence on state obligation to protect women against VAW. As previously mentioned, the state was held responsible for violation of due diligence duty under Article 2 (breach of protection order and subsequent murder). The case is also comparable to *Jessica Lenahan (Gonzales) v. United States,* as decided by the Inter American Commission, where the applicant also had a restraining order, which did not help to protect her children from murder. It is significant that the regional human rights monitoring institutions found that protection/ restraining order itself is not enough. In the words of Jessica Lenahan - "if restraining orders are not enforced, then they are not worth the paper they are written on."[840] Mainstreaming POs in Europe only has a purpose if they are more than declarations. Protection orders or restraining orders are increasingly introduced in COE states but their "value depends on how effectively they are enforced, as well as on the successful linkage to prompt and qualified support for the victim during the

836 On the other hand, the Court *inter alia* said that states have a positive obligation "to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual", para 50. Thus it cannot be claimed that protection aspects were completely ignored. The same point was repeated in *Opuz v Turkey*, *supra* note 169, see para 148.

837 Hajduova v. Slovakia, *supra* note 762.

838 E.M. v Romania, app. no. 43994/05, 30 October 2012.

839 Civek v Turkey, *supra* note 792.

840 See the interview at https://www.youtube.com/watch?v=UvPtMCrl4J4, accessed 15 March 2016.

period of relative safety that they provide."[841] The state obligation on protection in recent few years is very much connected with the obligation to adopt and implement protection orders and react to their breaches seriously. Therefore, it is useful that the case was referred to the Grand Chamber of the ECtHR, which may clarify some key aspects of protection.

In *Mudric*,[842] protection order in the beginning was not adopted, choosing instead the measure of voluntary undertaking (promise) not to leave the town. Afterwards, protection orders were adopted but enforcement was lagging. The Court recognized that "the manner in which the authorities had handled the case, notably the long and unexplained delays in enforcing the court protection orders and in subjecting [the perpetrator] to mandatory medical treatment, amounted to a failure to comply with their positive obligations under Article 3 of the Convention."[843] Furthermore, in *M.G. v Turkey*,[844] the Court underlined that divorcees were for some time outside of the sphere of protection and recognized violation of Article 3. This is significant, because it goes beyond procedural violation. The argumentation of the Court also relied heavily on the text of Istanbul Convention. Notably, Turkey has ratified it in 2012. The use of Istanbul Convention in its decision-making is a good practice, because it does fill in certain gaps, and particularly regarding substantial concepts in the area of protection against VAW. Arguably the further reception of international law by the ECtHR could help increase the concerns for real protection of the victims.

Furthermore, vulnerability has been the crucial concept for recognition of special protection needs under the ECHR. The Court's exploration of vulnerability[845] has been a conceptual edge for determining the scope of positive obligations and the margin of appreciation. The recognition that DV victims can be seen as vulnerable group in *Opuz v Turkey* is significant, however, the reference to that particular geographic area and social background of the applicant implies that not all the DV victims would be automatically seen as vulnerable victims. It would very much depend on the context. In subsequent cases, the Court seems to suggest that DV victims are a vulnerable groups as such, not just women DV victims. Therefore, seems that the Court tries to avoid essencializing women and describing them as vulnerable. At the same time, this lack of gender mainstreaming in case practice is disturbing, because in all of the cases, these were women applicants, who suffered DV. Similarly, the Court noted that "young persons" are vulnerable to sexual VAW in *M.C. in Bulgaria*,[846] but that did not allow it to make a further step and require gender contextualization. In *Sandru v Romania* case, the Court admitted that victims of sexual vio-

841 Carol Hagemann-White, *Analytical study of the results of the 4th round of monitoring the implementation of Recommendation Rec(2002)5 on the protection of women against violence in Council of Europe member states* (CoE, Gender equality Commission, 2014), P.22

842 Mudric v. Moldova, *supra* note 782.

843 *Ibid,* para. 55.

844 M.G. v. Turkey, *supra* note 783.

845 Martha Fineman's vulnerability thesis, as mentioned above, refers to vulnerability as a shared basis for social contract. She would object to distinguishing particular groups, while the Court does just that, i.e. it distinguishes particularities. See. Lourdes Peroni and Alexandra Timmer, *supra* note 486, pp.1058-1061. The authors further develop Martha Fineman's thesis and claim that the concept of vulnerability is actually capable to capture both the universal and the particular.

846 M.C. v Bulgaria, *supra* note 724, para 183.

lence are vulnerable,[847] without reference to gender. Furthermore, the Court's case practice is not entirely consistent, because DV victims are seen as vulnerable group only in some cases (*Opuz v Turkey*), and others are silent about it (*Valiulienė v Lithuania*, *A.V. v Croatia*).

Nevertheless, vulnerability can be seen as a tool to provide a stronger standard of protection.[848] The Court noted in *Hajduová v Slovakia* that precisely due to DV victims "particular vulnerability… domestic authorities should have exercised an even *greater degree of vigilance*"[849] (emphasis by the author). It further noted in *T.M. and C.M. v Moldavia* that state authorities should have at least provided information on protection measures[850] to vulnerable DV victims, suggesting that the requirement for formal request of protection is not reasonable. Whether the Court continues to apply the concept of vulnerability to make it more generalized (e.g. all victims of crimes are vulnerable), or whether it uses it for more particularization (e.g. young women in particular state are vulnerable to sexual VAW), vulnerability is an important construct. In the area of VAW, it allows to argue for increased level of vigilance of protection and increased standard of care.

2.1.7. Counterbalancing of rights and interests

In cases of DV in particular, women's human rights must be weighed against the rights of the perpetrator (e.g. his right to property, custody and access to children) as well as the interests of their common children and possibly even the interests of third persons (e.g. doctors' who refuse perform abortion). It can be said that the ECtHR, like the CEDAW committee, consistently holds that the perpetrator's rights cannot substantiate the refusal to protect women's human rights in domestic violence cases. The right to life and right to be free from torture are absolute rights. Of course, even in relation to these rights, the state has some (strictly defined) margin of appreciation and proportionality test may be relevant: for instance, use of police force in direct conflict with armed offenders. It must be noted that the right to property as such is often attributed to "weaker" rights, because there may be a broad range of interests which may require limitations.[851] In case of VAW, however, the infringements of Article 2 and Article 3 were sometimes ignored by the states, while weighting in comparison with the perpetrator's rights. It is a rather new tendency for many states in Europe that the perpetrator's right to property or privacy cannot really outweigh the victim's right to physical integrity.

There had been many cases where infringements of state obligations under the ECHR are recognized, but very rarely there had been cases where the perpetrator's rights have been infringed by state's efforts to exercise its due diligence duty. In the context of defence of perpetrators, there have been a few cases brought directly by rapists to ECtHR. In 1995 the Court found

847 Sandru v. Romania, app.no.33882/05, 15 October 2013, para 61.

848 Overall on positive ways that the concept may develop under the ECHR, see Alexandra Timmer, "A quiet revolution: Vulnerability in the European Court of human rights," In Martha Albertson Fineman, Anna Grear (eds), *Gender in Law, Culture, and Society : Vulnerability : Reflections on a New Ethical Foundation for Law and Politics*, (Ashgate, 2013, Routledge, 2016): 147-170.

849 Hajduova v Slovakia, *supra* note 762, para 50.

850 T.M. and C.M. v Moldavia, *supra* note 781, para 46.

851 Andrew Legg, *The Margin of appreciation in International Human Rights Law* (Oxford, Oxford University Press, 2012): 215.

that marital immunity in cases of rape is not allowed (case *S.W. v United Kingdom*).[852] The perpetrator claimed a breach of Article 7 (no punishment without law) and said that immunity should have been applied. The Court disagreed: "the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom."

In the case of *Gani v Spain*,[853] a convicted perpetrator was the applicant, complaining he was convicted only on victim's account and was not allowed to cross-examine her at the hearing, because it was interrupted due to post-traumatic stress of the victim. This case also concerned a case of rape of a former partner. ECtHR did not find a violation of Art. 6. This is a significant achievement, considering it is the first time that the Court recognized the effect of post-traumatic stress disorder (often faced by VAW victims) so explicitly.[854]

The case *Sandru v. Romania*[855] differed from *Gani*, because here the state was found to breach the rights of the perpetrator (Article 5 part 4 and Article 6 part 1 and part 3), who was involved in the group rape of a minor. He argued that he did not receive a possibility to participate in court hearings, his lawyer was also not present, and he could never confront the victim's statements (although there had been no evidence of the post-traumatic stress, differently from Gani). Therefore it is important to find the balance between due diligence duty and "counterbalancing factors, including measures allowing a fair and proper assessment of the reliability of the victims' statements."[856] Judge Lopez Querra dissented, saying that he disagreed regarding the confronting of under-age victim, considering that the balance was properly undertaken. Considering that she had been questioned before and her witnessing was recorded, reading the statements and opening for a possibility to question them, could have been sufficient.

Unlawful detention of the perpetrator should also be avoided. However, the Court did not find a violation of Article 5 (liberty and security of person) in the case,[857] which concerned a man detained in a psychiatric hospital since 1983 (following attempted rape case), with some episodes of release, during which new sexual VAW crimes were committed.

It is clear that in consideration of the principle of the best interests of the child, the protection of the child is of utmost importance. The child can even be taken from violent environments and given up for adoption.[858] The case of *M. and M. v. Croatia*[859] shines some light to counterbalancing of rights in the context of domestic violence and custody proceedings. In this case, the Court refused to analyse the case under Article 6 and Article 13, finding the claims inadmissible *ratione materiae*, and underlining that the applicants did not have "a right to have criminal proceedings instituted against third persons or to have such persons convicted."[860]Despite pending criminal charges regarding violence against his daughter, and

852 S.W. v United Kingdom, app. no. 20166/92, 22 November 1995.

853 Gani v. Spain, app. no. 61800/08, 19 February 2013.

854 *Ibid*, para 45.

855 Sandru v. Romania, *supra* note 847.

856 *Ibid,* para 67.

857 Klinkenbuss v.Germany, application no. 53157/11, 25 February 2016.

858 As demonstrated by the case of Y.C. v. the United Kingdom (no. 4547/10) 13 March 2012.

859 M. and M. v. Croatia, No. 10161/13, 03 September 2015.

860 *Ibid,* para 191.

clear wish of the daughter to stay with the mother, the father's custody was never compromised (custody proceedings were ongoing for 4,5 years). Both parents had various psychological problems and were equally (un)fit to take care of the child but the child wanted to live with the mother and not the father who was abusive to her. The Court recognized only the violation of procedural violation of Article 3 due to non-investigation of the claims of violence, but not the substantive violation under the same Article regarding prevention of further damage (the child stayed with the father all those 4,5 years). Moreover, the Court found a violation of Article 8 considering the mother's and daughter's unheard wishes to live together.

In the case of *P. and S v. Poland,*[861] the underage girl was raped and could not receive an abortion, similarly to *L.C. v. Peru*[862] analysed by the CEDAW Committee. Here the Court found violations of Article 8 (both regarding disclosure of personal data and the right to lawful abortion), and a violation of Article 5(1) on right to liberty and security, as well as a violation of Article 3 (prohibition of inhuman and degrading treatment) with the respect of the girl. Despite the political debates on the issue, the applicant had the right to objective medical advice, which she had not received. Instead, criminal investigation was opened against the teenager on charges of "unlawful intercourse," although it was rather obvious that she was the victim of sexual abuse[863] and should in fact had been treated as especially vulnerable. The doctors' right to refuse abortion should not outweigh the victim's rights in such case.

In addition, it is startling to see that even at the level of the ECtHR, the repeated violence against the woman is valued less than the man's rights. For instance, as compensation, Valiulienė received 5000 euros (violation of Article 3), and in the case of *Manic v Lithuania*[864] (concerning a Moldovan/Romanian father, who was denied his rights to see the child residing in Lithuania), the father received 7000 euros for non-pecuniary damage (violation of Article 8) at the ECtHR. The victim of VAW did not receive any compensation of legal expenses, while he received additional 5000 euros for legal expenses. The Chairman of the Supreme Court of Lithuania called for urgent change of approach of the Lithuanian courts after the *Manic* case.[865] The case of *Valiulienė* never received a similarly serious response of the national judiciary. Once again, it shows that women rights "project" is definitely still very relevant and not *en passe*. The traces of androcentric approach could perhaps be noticed even at the level of international (regional) courts.

2.1.8. Summary

The necessity of response to acute problem of VAW has gradually been recognized in Europe. First, the ECtHR attempted to close the gap with some of its landmark decisions under the European Convention. *Opuz v Turkey* case marks a new era of recognition that DV can be

861 P. and S. V. Poland, app.no. 57375/08, 30 October 2012.

862 L.C. v. Peru. CEDAW/C/50/D/22/200. 25 November 2011.

863 P. and S. V. Poland, para 165. Apparently, the perpetrator was also under-age.

864 Manic v. Lithuania, app. no. 46600/11, 13 January 2015.

865 Rimvydas Norkus, "Strasburo pamokas vaiko globos byloje turime ismokti visi," *Delfi*, 14 January 2015, http://www.delfi.lt/news/daily/law/r-norkus-strasburo-pamokas-vaiko-globos-byloje-turime-ismokti-visi.d?id=66904594

a violation of Article 3, and gender based violence, and *M.C. v. Bulgaria* marks the new era of understanding that sexual violence in the community should centre around the wider concept of (non)-consent. However, in subsequent cases, the Court focused on procedural rather than substantial positive obligations of the states, and generally refrained from recognition of gender discrimination or intersectional discrimination. The Court also failed to recognize VAW as torture. The author claims that it not enough to focus on procedural limb of Article 3. The Court's guidance on substantive positive obligations is still necessary, both with regards to DV ad sexual VAW in the community. The Court's clarification around concepts of stalking, marital rape, forced marriage, availability of protection for non-married couples, divorcees, and LGBT persons in same-sex relations would help the national systems in Europe to develop. In the light of the heavy regional focus on procedural state duties, it is suggested that the Court should look into the Istanbul Convention and apply its provisions on substantive law at least as a source of inspiration on the further necessary guidance. It is suggested that in particular, the further interpretation of consent and sexual autonomy is necessary. In addition, all victims of VAW should receive the possibility of effective protection measures rather than declarative protection orders. Finally, rape could also be seen as GBV, and the burden of proof in establishing violations of Article 14 (in conjunction with other articles) should not be placed entirely on the vulnerable applicant but instead -on the Government which is in better position to substantiate the absence of a prejudicial treatment.

2.2. Legal regulation of VAW under Istanbul Convention

2.2.1. The conceptual basis: novelties and re-enforcements

In 2011 the Council of Europe (the CoE) opened for signature the Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). Currently it has been signed by 26 CoE states; the Istanbul Convention entered into force after 10th ratification, in 2014.[866] Istanbul Convention is a new crucial CoE instrument, specifically designed for the combatting and preventing violence against women and domestic violence. The instrument takes into account both the cases analysed by the CEDAW Committee and the case-practice under the ECtHR, mentioned above. It has been prepared by a special ad hoc Committee formed under the CoE, which included Christine Chinkin.[867] The Convention applies a holistic approach and tackles various types of VAW.[868] Differently from Inter-American convention, it explicitly mentions domestic violence (DV), which is not necessarily seen as sex discrimination: VAW and DV are separated both in the title and the text of the Convention. At

866 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, opened for signature on 5 May 2011 in Istanbul, in July 2016 was signed by 23 states and ratified by 13. The Convention entered into force on 1 August 2014.

867 Ad Hoc Committee on preventing and combatting violence against women and domestic violence (CAHVIO).

868 I.e. physical and psychological violence, sexual violence, rape, sexual harassment and stalking. It applies to VAW in peace and during armed conflict. It does not apply to trafficking in humans because this issue falls under the scope of a different CoE convention.

the same time, a clear synergy exists between the CEDAW and the Istanbul Convention.[869] It raises the strategy used by the CEDAW in the area of VAW to a treaty level, but also introduces a separate strategy to decrease DV, which is much more flexible and broad.

The Convention states at the start that "women and girls are exposed to a higher risk of gender-based violence than men" but at the same time it provides that "domestic violence affects women disproportionately, and that men may also be victims of domestic violence."(Preamble) By these two statements, the Istanbul Convention provides a step away from essencialization by implying that men can also be victims of gender based violence (although to a much lower risk) and even suggesting that domestic violence is principally gender-neutral. That has called for some feminists' concerns, which see this as a dangerous step backwards, i.e. abandoning the position that requires seeing it as a principally gendered phenomenon. It is true that it can be seen as having two purposes: to fight VAW, which is still seen as a form of SD, and to combat DV, thus facing threats of "implying that domestic violence is unrelated to the structural issues of violence against women."[870] Domestic violence is repeatedly separated from VAW and GBV, both in the title and in the text of the Convention. Article 2 (Scope of the Convention) proclaims an invitation to apply it to "all victims of domestic violence". This means that the states can extend the application also to men and children victims of domestic violence.[871]

Nevertheless, the Convention retains a very strong gender analysis discourse[872] and clearly retains the conceptual ties with the CEDAW.[873] Article 2 (2) underlines that states "shall pay particular attention to women victims of gender-based violence in implementing provisions of this Convention." Thus there are more advantages than disadvantages in having of the two-fold purpose. Most of DV victims are women, but it can affect men as well. Moreover, it is conceptually difficult to claim that DV in same-sex relations is a form of discrimination. The Convention is aimed at prevention of *all* DV, no matter who committed it and who is the victim. As put by Ronagh McQuigg, such approach to VAW/ DV is indeed "striking", – and at

869 Dubravka Šimonovic, "Global and Regional standards on Violence against Women: the Evolution and Synergy of the CEDAW and Istanbul Conventions", *Human Rights Quarterly* 36 (2014): 590-606.

870 Ronagh McQuigg, "A Contextual analysis of the Council of Europe's Convention on Preventing and Combating Violence against women," *International Human Rights Law Review* (2012): 370.

871 Explanatory report on the CoE Convention on preventing and combating violence against women and domestic violence. 2011. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383a. Comment on Article 2.

872 For instance, Dubravka Šimonovic praises the Istanbul Convention as an extension to the CEDAW, which lifts the strategy on VAW under the CEDAW to the level of the regional Convention, in addition contributing to the protection against domestic violence, *supra* note 869.

873 The definition of gender-based violence in Istanbul Convention is copied from the CEDAW General Recommendation No. 19: "gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately" (Article 3(4). The Explanatory memorandum to the Convention states that the term "gender-based violence against women" should be seen as equivalent to "gender-based violence" used in these documents: the CEDAW Committee General Recommendation No. 19 on violence against women (1992), the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993) and Recommendation Rec (2002)5 of the Committee of Ministers of the Council of Europe to member states on the protection of women against violence (2002). Explanatory report on the CoE Convention on preventing and combating violence against women and domestic violence, *op.cit*., paragraph 43.

the same time "more sophisticated"[874] than any other instruments before. The approach is well construed because it entails both recognizing that DV can happen and does happen to everybody, and also that women are particularly affected by the phenomenon, and DV is often GBV.

It can even be claimed that the Convention uses the approach that includes three frames, the third frame (besides VAW and DV frames) being the GBV frame that ensures protection also for LGBTI persons. Considering that the Istanbul Convention entrenches the principle of fundamental rights, equality and non-discrimination (Article 4), including explicit mentioning of sexual orientation and gender identity (Article 4 part 3), it must apply to DV in same sex relationships. It should also apply to gender based violence against transgender women.[875] The Convention includes them without uncomfortable explanation of what "a woman" should mean. However, it must be recognized that the prohibition of discrimination under Article 4 (3) is "much more limited"[876] than previous paragraphs, because it only requires to *refrain* from discrimination while protecting persons against violence or providing certain support/services. Meanwhile, 4(2) requires states to "condemn" discrimination against women and "take necessary measures" to decrease it. It can also be said that the text of the Convention creates a hierarchy of protected identities, placing women at the very top, where it reiterates[877] that "particular attention" should be paid to women victims of GBV. Considering that it focuses on GBV against women, it also allows providing services to gay men or transmen only in situations of DV, however does not address GBV that is addressed to them in the community.[878]

The drafters of the Istanbul Convention recognize that gender-based violence[879] and domestic violence can be understood differently on structural and on individual level: these are "complex phenomena and it is necessary to use a variety of approaches in combination with each other in order to understand them."[880] Thus it could be claimed that Istanbul Convention is more comprehensive in this regard than the legal regulation under CEDAW. It allows addressing all forms of violence, including violence against men and boys, situational and non-gender based domestic violence, violence in same sex relationships and violence against transwomen but at the same time places the focus on violence as a result largely stemming of gender inequality.

The Convention even goes a step further to require *empowering* women[881] with the view of a broad goal of substantial equality. This is the first time that concept of "empowering"

874 Ronagh McQuigg, "A Contextual analysis,", *op. cit*., p. 371.

875 Explanatory report, *supra* note 871, para 53. Besides LGBT persons, the report also refers to "other groups of persons that do not correspond to what society has established as belonging to "male" or "female" categories."

876 Ibid, para 54.

877 *Supra* note 17, Article 2 part 2.

878 This possible hierarchy should be gradually corrected by interpretation, because it would seem to be discriminatory if the Convention applied to transwomen who are victims of GBV in the community and did not apply to transmen in the same situations.

879 What is gender-based violence? EIGE website. Accessed on 21 of November 2016. <http://www.eige.europa.eu/content/what-is-genderbased-violence>. The European Institute for Gender Equality (hereinafter—EIGE) underlined: "gender-based violence cannot be understood outside the social structures, gender norms and roles that support and justify it as normal or tolerable."

880 Explanatory report, *supra* note 871, point 25.

881 Article 1.1.b of Istanbul Convention. Also see Article 6. *Supra* note 17.

has been used in a treaty. Within the scope of the Istanbul Convention, the aim is eradicating practices that are based on the idea of the "inferiority of women" and stereotypes that may add to tolerance of violence,[882] rather than eliminating all gender-specific behaviour (choice of clothes, toys, etc.). Furthermore, it has been claimed to have avoided most of "culturalist" traps, because it does not focus on harmful cultural practices frame and does not suggest that certain cultures as such condone VAW.[883] This means that the ways of empowering may vary. The focus is shifting from state as the powerful protector and women as vulnerable objects of protection, to aiding women as they "actively rebuild their lives."[884] It recognizes vulnerability but is capable of using it as a critical tool.

The due diligence obligations are clearly defined (Article 5), again for the very first time in a text of an international Convention.[885] There is no novelty in the contents: the same due diligence standard (to prevent, to protect, to prosecute, and to provide redress) can be found under the CEDAW and ECtHR case law. Moreover, the wording of the text is very similar to the obligations enlisted under Inter-American Convention.[886] The significance lays in the fact that this time, the standard is entrenched at the level of an international convention and that the concept of "due diligence" is explicitly mentioned and described.

Importantly, the parties are required to include a gender perspective in their policies (Article 6). The Convention should not be seen as moving away from the VAW frame, and becoming weaker due to tackling both VAW and (any kind of) domestic violence. Placing the article on gender sensitive policies right at the beginning, and also including a separate chapter on policies (chapter 2) and prevention (chapter 3) denies these doubts expressed by some women rights activists. The convention specifies the ways of tackling the primary prevention and includes a very comprehensive set of state obligations in this area.

The Convention establishes a monitoring system. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) was created in the end of 2014 and will draw periodic reports on state compliance with the convention.[887] The GREVIO is composed of 10 members and will subsequently be enlarged to 15. Besides GREVIO, the Committee of the Parties, which includes representatives of the state parties to the Istanbul Convention, was established. GREVIO may also adopt thematic reports or general recommendations, similarly to the CEDAW. Moreover, it will accept shadow reports from civil society groups, in addition to the key reports produced by the states. It will also be

882 Explanatory report, *op.cit*., point 43, Article 12 (1) of the Istanbul Convention.

883 See Lourdes Peroni, "Violence against migrant women: the Istanbul Convention through a postcolonial feminist lens", *Feminist legal studies* 24, (2016): 49-67. The author concludes that the only possible trap is encoded in the use of so called honour justifications, in particularly because the Explanatory report interprets it in a rather culturalist way.

884 Explanatory report, *op.cit*., para 315, in the context of support services for asylum seeking women.

885 To this regard, the explanatory report underlines that "[p]arties are required to organize their response to all forms of violence covered by the scope of this Convention in a way that allows relevant authorities to diligently prevent, investigate, punish and provide reparation for such acts of violence. Failure to do so incurs state responsibility for an act otherwise solely attributed to a non-state actor." Explanatory report to the Convention, *supra* note 871, point 49

886 Compare Article 5 of Istanbul Convention, *supra* note 17, and Article 7 of Inter-American Convention.

887 Resolution CM/Res(2014)43 on rules of the election procedure of the members of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 19 November 2014.

able to investigate urgent inquiries (Article 68 part 13), similarly as the inquiries of grave and systematic women rights violations under the CEDAW. Differently from the CEDAW, it cannot hear individual complaints. There are both advantages and disadvantages in the approach that does not allow individual applications. A key essential advantage is that the EU is more likely to sign the Convention which does not have a monitoring body that could have competence to rule on its responsibility.[888] Another possible advantage is that the ECtHR is also likely to use the GREVIO reports in development of its case practice, and this could potentially fill-in the gaps that exist on the regional level. It could already be seen that in some cases (e.g. *M.G. v. Turkey*[889]) it has already relied on the Istanbul Convention. One possible disadvantages of this approach are that no prospective of remedy /justice are available at individual level, if the state fails to implement the Convention. There are fewer possibilities for development of dynamic interpretation of the instrument, even though this interpretation can still be provided by GREVIO by other means. The current approach is more oriented to self-assessment and is rather "soft". However, individual petition possibility can still be introduced in the future or it can be partially realized at the level of ECtHR.

In addition, Article 68 (3) provides that "GREVIO shall select the specific provisions on which the evaluation procedure shall be based and send out a questionnaire". This can be underlined as an efficient and advantageous approach, which allows focusing on specific issues under Convention rather than always examining the state compliance as a whole. The CEDAW and SR VAW provide similar thematic reports that analyse one particular aspect in the area of VAW.

Finally, the Convention should be praised for its approach regarding reservations. Notably, the CEDAW is the Convention which had the highest number of reservations among all global treaties. Meanwhile, the approach of the Istanbul Convention is not to allow reservations to its key provisions (Article 78). On the other hand, while looking at the reservations that have been allowed,[890] many countries have used their rights to make a reservation. While many of these reservations do not relate to substantive law, there are also some substantial ones, e.g. Denmark reserved the right to apply non-criminal sanctions for stalking.

2.2.2. Adoption of Istanbul Convention: the critical voices

The history of adoption of Istanbul Convention can serve as an example of mis-understanding of VAW. At an early stage, the UK suggested to amend Article 3 (Definitions), changing the reference to violence against women as a violation of human rights and replacing it with the formulation "[v]iolence against women constitutes a serious obstacle for women's enjoyment of human rights." Although no explanation has been provided for the suggestion, it partially reflects the language of the Beijing Declaration and Platform for Action (1995), which states that "violence against women both violates and impairs or nul-

888 See the part of the thesis on the EU possible accession to the Istanbul Convention.

889 M.G. v. Turkey, *supra* note 783.

890 See reservations to the Convention, as constantly updated on webpage of Istanbul Convention. Accessed 15 August 2016. http://www.coe.int/en/web/istanbul-convention/home.

lifies the enjoyment by women of their human rights and fundamental freedoms."[891] However, the documents adopted at Beijing have been criticized for the failure of recognizing violence against women as violations of human rights themselves, rather than impairing women's *enjoyment* of human rights.[892] The right to be free from violence should be clearly defined as a right in itself, rather than an additional obstacle to implementation of human rights. If there was some (legal) ground to doubt it in 1995, there certainly should not be any in 2016. It could even be claimed that Beijing Conference did not realize a potential to recognize a women's human right to be free from violence as such, the potential that the Vienna Declaration gave basis to by proclaiming that women's rights are human rights.[893] Meanwhile, the UK's suggestion would have led to an ever softer formulation than the mild expression under the Beijing Declaration and Platform for Action and would have weakened the legal basis significantly. The proposal was rightfully rejected.[894]

The adoption of the Istanbul Convention also illustrates the new/old difficulties related to the move towards gender neutrality and the use of political arguments against inclusion. In particular, the growing importance of the concept of gender and recognition of gender based crimes (the crimes mainly faced by women and minority groups) were not welcomed by the Roman Catholic Church and Russia. For Vatican, this line of argument is not new: the Holy See, which has observer's status in the CoE, has consistently held opposition to "gender agenda for law."[895] Meanwhile, the President of Russia Vladimir Putin also called for the defence of Christian values in 2013.[896] One can observe the increase of the importance of religious beliefs and the role of church in previously atheist Russia,[897] and the ripples of similar developments in Europe, e.g. in Lithuania, Hungary, Poland.[898] Regarding the growing significance of gender paradigm, both Russia and Vatican are important stakeholders at international arena and their political opposition to the Istanbul Convention is most unfortunate, because it leads to opposition on national levels, especially in countries that are influenced by both Russia and the Holly See' politics.

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891 The Beijing Platform for Action, adopted in Fourth World Conference of Women, September 1995, Strategic Objective D.1. Violence against women. <http://www.un.org/womenwatch/daw/beijing/platform/violence.htm>, paragraph 112.

892 Diane Otto, "A Post-Beijing Reflection on the Limitation and Potential of Human Rights Discourse for Women." p. 131–132.

893 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, A/CONF.157/23, 12 July 1993. <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument>.

894 UK signed the Convention in 2012 but ratification has not yet taken place (in June 2016). It must also be mentioned that the UK objected, during the negotiations, to the "due diligence" concept itself.

895 Mary Anne Case, "After Gender the Destruction of Man - The Vatican's Nightmare Vision of the Gender Agenda for Law." *Pace Law Review* 31, 3 (2011): 802-817.

896 Address of Vladimir Putin of 19 September 2013 (Valdai Forum). Also see the address of Vladimir Putin of March 18, 2014 and the commentary by Molly K. McKew and Gregory A. Maniatis. "Putin's global ambitions could destabilize Europe." *The Washington Post*. March 18, 2014.

897 According to the survey of 2010 by the Russian Public Opinion Research Center (VTSIOM), around 77 percent of Russian inhabitants are Christian – a rather startling number for the state, which recently was atheist.

898 Jonathan Luxmoore, "Polish bishops rap Europe norms against violence to women as interference." *Christian Century* 129, 16 (2012): 18.

The suggestion to Istanbul Convention that was put forward by the Holy See and Russia concerned Article 4 (Fundamental rights, equality and non-discrimination) of the Convention, offering to delete "sexual orientation and gender identity" as prohibited grounds of discrimination (Art 4(3). This would mean that lesbian, bisexual and transgender women would be outside of the scope of protection of the Istanbul Convention and the state agencies could refuse support/services on the basis of their identities. Amnesty International and other international human rights organizations criticized this suggestion[899] and it was not observed. The principle of non-discrimination under international law perhaps is not as broad as to ensure right to same-sex couples to marriage, but the ripe is certainly ripe to provide protection against violence, without discrimination. Neither the Holy See nor the Russian Federation joined the Convention.

Moreover, in Eastern parts of Europe, which were both influenced by Russia and the Holy See (Poland, Lithuania, Latvia), the Convention was also met with opposition. Poland and Latvia both signed and ratified the Convention, and Lithuania only signed it. All of these states added a verbal note, which said that the Convention will be applied in conformity with national Constitutions.[900]The verbal noted of Poland resulted in objections from other countries. Sweden,[901] Austria,[902] The Netherlands,[903] and Finland[904] considered the Polish declaration amounted to reservation, which was contrary to the object and the purpose of the Convention. The declaration made by Latvia in May 2016[905] was also identical to Lithuanian and Polish declarations and it can be expected that other states will also consider it as a reservation contrary to the object and purpose of the Convention. Subsequently, the change of political powers in Poland sparked new discussions of denouncement of the Convention; in Lithuania, it has never been submitted to Parliament for ratification. It must be noted that Poland and Lithuania[906] have also opposed to various

899 Amnesty International opposes amendments that will weaken the Council of Europe treaty on violence against women. Accessed on 10 July 2015. <http://www.amnesty.org/en/library/asset/IOR61/004/2011/en/6c1d23c1-f37e-41f1-aded-3e7b25ce7861/ior610042011en.html>.

900 CoE. 2013. Declaration contained in a Note Verbale from the Ministry of Foreign affairs from Lithuania, dated 6 June 2013, handed over the Secretary General at the time of signature of the Instruments, on 7 June 2013.

901 Objection to declaration of Poland to Istanbul Convention, contained in a Note Verbale from the Ministry for Foreign Affairs of Sweden, dated 15 February 2016, registered at the Secretariat General on 3 March 2016.

902 Objection contained in a Note Verbale from the Permanent Representation of Austria, dated 11 April 2016, registered at the Secretariat General on 13 April 2016.

903 Objection contained in a Note Verbale from the Permanent Representation of the Netherlands, dated 28 April 2016, registered at the Secretariat General on 29 April 2016.

904 Objection contained in a Note Verbale from the Permanent Representation of Finland, dated 26 April 2016, registered at the Secretariat General on 29 April 2016.

905 Declaration contained in a Declaration from the Prime Minister of Latvia, dated 17 May 2016, handed over to the Deputy Secretary General at the time of signature of the instrument on 18 May 2016.

906 It must also be kept in mind that they are the EU member states, and the EU Charter on Fundamental Rights has a relatively wide principle of non-discrimination, which includes sexual orientation, see Article 21 of the Charter. It must be said that Poland adhered to the so called British Protocol to the Charter, which attempts to limit the social economic rights and the authority of the ECJ, but due to its broadness, arguably does not exempt it from the Charter obligations.

proposals for instruments at the EU level which would be related to gender paradigm: e.g. suggestions to place sexual minorities' rights at the same level as heterosexuals, or suggestions to adopt positive measures (including quotas) regarding discrimination of women. The political context is complex, whereas both Russia and the Holy See still have a rather significant impact in Lithuanian and Polish politics. However, from the legal point of view, as correctly observed in the objection of Sweden in 2016, "general references to national or religious law may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law."[907] Thus the declarations should not benefit Poland nor Latvia (the same can be said about Lithuania, once the Convention is ratified). The Convention should continue to apply in relationships between the CoE Contracting states which have ratified it.

Besides the critical voices from the side of conservative ideologies, the Istanbul Convention was seen as threatening the progress achieved by some women rights advocates. It is a view that is not documented in articles or books but the precaution of "mixing up" frames has been vocally expressed in various conferences, seminars and HR blogs.[908] This can be associated with the SR VAW warning about policies turning to gender neutrality.[909] Istanbul Convention arguably has made a half-obvious step towards postmodernism, when it allowed a gender neutral frame on DV. Furthermore, it has been made clear that in order to implement the Convention, the states can resort to gender neutral criminal law provisions.[910] Some women rights advocates feel that this is "losing the battle," which required much efforts and which has not been won yet. However, as explained above, the conceptual basis of the Convention nevertheless is strongly embedded in gender equality paradigm. Although the attempt to face both the VAW and DV (also including men) is based on different techniques, i.e. DV against men is not seen as SD, and some focus may admittedly be lost by wide application, the Convention is certainly not threatening to the progress. On contra, it should be seen as providing the possibilities of protection and justice to more groups of persons, which the majority of the CoE states are arguably ready to do.

2.2.3. Protection against VAW under Istanbul Convention

Besides the focus on gender equality, the traditionalist opponents' concerns with the Convention are centred on the strong protection regime, which supposedly overly-limits the rights of perpetrators, and very detailed provisions on prevention, which limit attempt-

907 Objection to declaration of Poland to Istanbul Convention, contained in a Note Verbale from the Ministry for Foreign Affairs of Sweden, dated 15 February 2016, registered at the Secretariat General on 3 March 2016.

908 For instance, in Fleur van Leeuwen commentary, Istanbul Convention's provisions on DV as possibly applying to men are refered as "worrisome wording" and "contentious provisions", see Back on track! Court acknowledges gendered nature of domestic violence in M.G. v. Turkey, 14 April 2016, https://strasbourgobservers.com/2016/04/14/back-on-track-court-acknowledges-gendered-nature-of-domestic-violence-in-m-g-v-turkey/#_ftn1

909 Statement by Ms. Rashida Manjoo, Special Rapporteur on Violence against women, its causes and consequences, 2015. http://www.ohchr.org/Documents/Issues/Women/CSW/StatementCSW2015.pdf

910 Explanatory report, *supra* note 871, para 153.

ed justifications for VAW on the basis of religion and culture. Istanbul Convention uses a rather concrete and technical language in its provisions on protection measures. Civil law protection orders also perfectly incorporate under the Convention. The states should also cooperate with the view of international protection. The reservations that are allowed with respect to Convention do not jeopardize the goal of victims' safety, because they are not allowed in this area.

The functions of support and protection are covered by Chapter IV. Article 18 (part 1 and 2) entrenches the general duty of protection of all persons from violence, in particular requiring all state agents, local organisations and NGOs to cooperate in protecting and supporting victims. It explicitly requires basing the measures on integrated approach and gendered understanding of VAW and DV, to focus on victims' safety, and address specific needs of vulnerable victims, including children (part 3). Moreover, it is required that all measures are taken with the aim of avoiding repeated victimisation and ensuring economic independence of the woman.[911] The Convention provides that "provision of services" should not rely on the victim's willingness to testify against the perpetrator. This relates to specialist and general support services and not protection. Ensuring of protection, of course, should not be made dependent on victim's willingness to testify either.

Protective measures (alternatively sometimes called "preventive" due to their effect to prevent further damage) come under Chapter VI on "Investigation, prosecution, procedural law and protective measures". Article 50 requires immediate response, prevention and protection of a victim in a situation, where state agents become aware of the risk of VAW. In particular, Article 50 part 2 provides that law enforcement agencies must "engage promptly and appropriately in the prevention and protection against all forms of violence covered by the scope of this Convention, including the employment of preventive operational measures and the collection of evidence."[912] In this respect, prevention and protection duties basically overlap. The Explanatory report to Istanbul Convention explains that "Effective measures should be taken to prevent the most blatant forms of violence which are murder or attempted murder. Each such case should be carefully analysed in order to identify any possible failure of protection in view of improving and developing further preventive measures."[913] This means that the Convention applies the approach where the state agents are at the doors of the perpetrator: his movement, his right to use his property may be legitimately restricted. This contradicts to the approach used previously, and still applicable in some extreme cases, where the key response was to remove the victim from the situation of VAW.

The provisions of Istanbul Convention relating to protection orders for victims should ignite a legal reform in ratifying countries, because they require: introducing a regime of emergency barring orders for immediate protection (Article 52), and; introducing a regime of restraining or protection orders for all victims of any type of violence under the Istanbul Convention (Article 53). The Convention does not specify the type of issuing authority for protection orders to be available in all of the contracting parties, nor the legal regime under which such orders should be issued. Therefore, the protection orders under the relevant

911 Explanatory report, *supra* note 871, para 118.

912 Article 50 part 2 of Istanbul Convention. *Supra* note 17.

913 Explanatory report, *op.cit.* para 259.

Articles can be based both on civil law, civil procedure law, administrative law, criminal law. The breach of such protection order, however, should be followed with sanctions under criminal law or other field of law, as long as they are effective, proportionate and dissuasive.[914] The peculiar thing for some states and commentators may be that protection orders do not have to be necessarily related to any procedure, e.g. criminal case or divorce proceedings. The EU Victims' rights directive and EPO directive, which are discussed in next chapter, does only that, i.e. restrict them to procedure, but Istanbul Convention does not have this limitation at all. In providing that "available irrespective of, or in addition to, other legal proceedings,"[915] the Convention allows to argue that the "immediate threat" of VAW is more significant than whether the case has been initiated.[916] The Explanatory report refers[917] to empirical research which shows that the DV victims abstain from asking protection when it leads to criminal prosecution of the perpetrator. Therefore it is essential that the protection needs are placed first under the Convention.

Protection orders do not automatically lead to safety in all situations. Istanbul Conventions continues to require providing shelters (Article 23) in situations where it is necessary. Such shelters must be easily accessible, pro-active, and available geographically. Shelters should be seen as part of the support system rather than prevention of risk of VAW or protection from it (Chapter IV on Protection and support). They also have a supplementary protective function, i.e. law enforcement agencies still continue to be responsible for the prevention from VAW. At no point can the state duty of due diligence be delegated to an organisation specialising in victim support. However, if it is appropriate, protection and support can be provided at the same premises (Article 18 part 3). Thus, one-stop services are encouraged.

It is essential that the Convention provides a possibility for victims to choose between a shelter /refuge and also demands the substantial reform of protection measures. The drafters of the Convention really considered[918] the safety of the victim and her dependents as the priority. Regarding the accessibility of shelters, the CoE had previously recommended that there should be one family place for DV victims,[919] per 10 000 of residents and depending on the actual need. The Explanatory report reiterates[920] this approach both for DV victims and victims of other types of VAW. The actual need may be higher and lower for certain groups of women and in certain areas. The Convention and Explanatory report does not mention this, but considering that intersectional discrimination is mentioned and LGB, migrant and refugee women, women with disabilities, ethnic minorities, women with HIV/AIDS are mentioned, this should be taken into account while implementing the Convention.

The Convention also provides for international co-operation with the view of the enforcement of protection orders between the contracting states (Article 62). It is expected that the

914 *Ibid,* para. 275.

915 Article 53 part 2 indent 4. *Supra* note 17.

916 *Ibid,* Article 51 of the Convention also guides the states on risk assessment in cases of VAW, inter alia naming possession of arms as one of the features to take into account.

917 Explanatory report, *op.cit.,* para 273.

918 Christine Chinkin, *Typology of protection for women victims of violence,* (Strasbourg: CAHVIO, 2009), 2.

919 CoE task force to combat violence against women, including domestic violence, EG-TFV (2008)6.

920 Explanatory report, *op.cit.,* recitals 133-135.

parties legislate on "enforcing relevant civil and criminal judgments issued by the judicial authorities of Parties, including protection orders."[921] Article 62 (3) allows the country which makes mutual assistance in criminal matters conditional on the existence of a treaty, to consider the Istanbul Convention as such a legal basis. While this is not relevant for the CoE countries and even less so for the EU member states, the commentary claims that this might provide a possibility for third states, who also can become the parties to this Convention.[922]

With the view of victims' safety, the Convention also provides a strict rule with regards to victim's right to be informed about the release of the offender. The ECtHR in *Rumor v Italy*[923] has recently held that there was no violation in case where victim of VAW was not informed about the change of imprisonment to house arrest. The Court said that the ECHR "may not be interpreted as imposing a general obligation on States to inform the victim of ill-treatment about the criminal proceedings against the perpetrator, including about possible release on parole from prison or transfer to house arrest."[924] However, under the Istanbul Convention, it would have been a violation, because it requires states to take measures of protection, *inter alia* by "ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively."[925] The same requirement applies under the Victims' rights Directive.

The Convention's focus on economic independence and empowering of women while ensuring protection is truly innovatory. The main concerns of the women in DV situations is safety of her own and her dependents and being capable to make economic decisions. At the same time the approach that the Convention employs is not over-patronizing. Although it requires protection for victims of VAW and providing them with services, it is also stressed that they should not be stigmatized, simply labelled as vulnerable "and perceived only in terms of their perceived vulnerabilities and needs."[926] Economic and social rights are already entrenched under the ICESC, and the drafters of the Istanbul Convention are providing the fresh initiative for the states to follow their (relatively neglected) obligations in this area.

2.2.4. Prevention of VAW under Istanbul Convention

Istanbul Convention devotes a whole chapter (Chapter III) for prevention of VAW. First, it establishes general obligations of the states regarding prevention (article 12), and then it provides special articles on raising awareness (Article 13), education (article 14), training of professionals (Article 15), preventative intervention and treatment programs (Article 16), and participation in the private sector and the media (Article 17). The Convention has been drafted very thoughtfully, because even though it is suggested to apply the Convention to victims of all domestic violence, at the same time prevention chapter is very much aimed at the main causes of VAW: gender stereotyping in the society, media and state insti-

921 Istanbul Convention, Article 62 (1)(d). *Supra* note 17

922 Paragraph 331 of the Explanatory Report to the Istanbul Convention.

923 Rumor v Italy, *supra* note 772.

924 Rumor v Italy, *supra* note 772, para 72.

925 Article 56 part 1 b of the Istanbul Convention. *Supra* note 17

926 Christine Chinkin, *Typology of protection, supra* note 918.

tutions. This means that it applies both to situational (mutual) violence as well as forms of violence aimed at men[927] / children, and it also attempts to solve structural and systematic problem of VAW.

First, the parties are required to challenge gender stereotypes (Article 12 part 1), which requires legislative and policy reforms (Article 12 part 2). Prejudices, customs, traditions and all other practices are often based on the idea of the inferiority of women and stereotypical gender roles. Moreover, specific needs of vulnerable groups need to be addressed (Article 12 part 3). Men and boys should also be involved in transforming inequality and challenging resistance to change (Article 12 part 4). Article 12 part 5 is very important, because it reiterates the idea that VAW cannot be justified by any reason: "[p]arties 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." Finally, Article 12 part 6 places empowerment of women in the central position of preventing VAW. Moreover, states need to organize organisation of awareness raising campaigns, cooperation with media organizations, and working with the sector of education should be fostered.

Considering that prevention of VAW is seen as the "core element of a co-ordinated and strategic response", the CoE also prepared a specialized report on Article 12, which provides recommendations on comprehensive preventive measures to eliminate VAW.[928] The said document provides examples of good practices which have worked in different states and explain what is expected from the states. Prevention can be both general and specific. General prevention, as discussed above, refers to societal changes. If the state fails to adopt and apply the legislation for prevention of VAW, violation of Article 12 can be claimed.

In many countries, education systems are the ones where the religious institutions have the remaining power to determine values and teaching materials. Most notably, Article 14 of the Istanbul Convention requires the member states to include into education materials also the materials on gender equality and "non-stereotyped gender roles". The said formulation and the attempt to prevent VAW, GBV and DV through involvement of education sector contains great potentiality of the Istanbul Convention, but also draws significant criticism by the proponents of traditional gender roles within the family and society. The eradication of stereotypes and discrimination, with active participation of men and boys, is highly encouraged.[929] Article 14 is both necessary and instrumental for prevention of VAW, in consideration that stereotyping start at early age. Prevention tools provided by the Istanbul Convention should also decrease bullying and violence against children.

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927 It must be noted, however, that the Convention establishes only a recommendation and not an obligation to apply the Convention to men. Article 2 part 2.

928 *Preventing violence against women: Article 12 of the Istanbul Convention.* A collection of papers on the Council of Europe Convention on preventing and combating violence against women and domestic violence. Prepared by Marianne Hester, Sarah-Jane Lilley. CoE, September 2014. P.5.

929 Also see Committee on the Rights of the Child under the UN Convention on the Rights of the Child, General Comment No. 13 on the Right of the child to freedom from all forms of violence, 18 April 2011. Para 72, "Elements to be mainstreamed into national coordinating frameworks". The Committee claims that states "should ensure that policies and measures take into account the different risks facing girls and boys in respect of various forms of violence in various settings. States should address all forms of gender discrimination as part of a comprehensive violence-prevention strategy."

2.2.5. Istanbul Convention as a key response to substantive challenges

The adoption of Istanbul Convention can be praised for a number of reasons. First, it fills in the normative gap for the European region, second, it provides a clear prohibition of VAW and lifts core concepts, such "due diligence" and "gender" to the treaty level, and third, it provides for very specific substantive duties for compliance with due diligence standard. The Convention is appropriate and timely response to the key challenges in the context of VAW. On the other hand, for the substantive law part, it keeps a lot of flexibility. The Explanatory report to the Convention proclaims "substantive law provisions form an essential part of the instruments. It is clear from research on national legislation currently in force on violence against women and domestic violence that many gaps remain."[930] It must be noted that the Convention's section on "substantive law" (Chapter V) includes a number of very useful provisions on the concepts of particular types of VAW but also provisions on criminal procedure, jurisdiction, and recognition of judgments. The latter would not always be understood as substantive but more often as procedural law. The meaning of the section is to give an impression that it seeks the states to change their substantive laws and not just policies. However, the Explanatory report also admits that the chapters seek to "guide Parties in putting into place effective policies to rein in violence against women and domestic violence"[931] and the provisions of the Conventions are not very specific and often do leave a broad discretion for the states. This part of the thesis thus only reflects on the key substantive developments and not all implications to key concept and procedural law.[932]

First, the variety of forms of DV under the Convention has been seen as a substantial improvement.[933] Sexual and physical violence has been recognized as forms of VAW, both at home and in the family. Besides recognition that domestic violence (and any VAW) can be psychological, the Convention also includes "economic violence". The Convention allows providing a non-criminal sanction with regards to psychological VAW and stalking (Article 78 para 3) but this has to be clearly declared at the time of accession. Moreover, the chapter on substantive law of the Convention itself starts with the civil law measures and compensations. This can be seen as an extremely useful approach, because it takes into consideration the often neglected economic side of victims of DV situation. Arguably, economic security can help empower the victims and not only.

Regarding sexual violence, Istanbul Convention focuses on the concept of consent, which is to be "given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances" (Article 36 part 2). As discussed in the first part of this text, the author of the thesis does not see consent-model as the only correct method for addressing the problem. It really depends what type of consent we are talking about (Yes model, No model, performative or attitudal) and what type of coercion model we are talking about (use of force or ignorance of refusal to have sex); the model based on coercion

930 Explanatory report, *Supra* note 871, para 149.

931 *Ibid,* para 152.

932 In other words, the Convention uses *sui generis* definition of substantive law and "substantive challenges", and the one used in this thesis is not synonymous to it.

933 Bonita C. Meyersfeld, *supra* note 25, p. 108.

can be actually better, if coercion is understood broadly enough. The provisions of the Convention allow both Yes model and No model, both performative and attitudal consent. Arguably, some states may also interpret the provision as allowing the consent to be implied and presumed. It is for the states to decide what "intentional"[934] and "voluntary" mean in particular and whether certain conditions (e.g. intoxication or sleep) are incompatible with free consent. The Explanatory report also relies on *M.C.v Bulgaria* to cite this part:

> "Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms ("coercion", "violence", "duress", "threat", "ruse", "surprise" or others) and through a context-sensitive assessment of the evidence".[935]

Thus, the Convention does not go very far regarding sexual VAW,[936] but it creates a coherence with the ECtHR and is useful for speculating in detail what acts should be criminalized, i.e. all sexualized violence acts including forced sex with a third person. Of course, an EU legal regulation or a directive could have gone much further, however, the EU has little competence in substantive criminal law, and this may be the only aspect that could play against the EU accession to the Istanbul Convention.

The Convention includes a substantive response to cross-border and asylum issues. It applies an "innovative" transnational approach to VAW and takes into consideration the needs of migrant women.[937] For instance, in case of forced marriages, the Convention provides that parties "take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or state other than the one she or he resides in with a purpose of forcing this adult or child to enter into a marriage is criminalized" (Article 37 part 2). Moreover, it also requires that immigrant women should receive independent residence permit, even though their resident status initially relied on the status of their spouses or partners (Article 59). Finally, the Convention has some rather detailed provisions on asylum procedures in case of gender-based VAW (Article 60). States are expected to recognize gender-based violence as a form of persecution and the principle of non-refoulement (non-return to the country of possible harm) is established (Article 61 part 2). It must also be stressed that the Convention does not allow entering reservation. On the one hand, it can be seen as a possible set-off for some states that are currently facing many asylum claims. On the other hand, the states with the highest numbers of refugees have already ratified the Convention. It can be agreed that this is a reasonable approach, which "opens a space for asylum seekers who experience severe gender-based violence, without triggering fears of opening a floodgate of asylum claims."[938] On the other hand, it must be recalled that mem-

934 See Explanatory report to the Convention, *supra* note 871, para 189-193.

935 M.C. v Bulgaria, *supra* note 724, para. 161

936 It can be problematic, inasmuch as the Explanatory report says that it is expected that national legislation "*encompasses* the notion of lack of freely given consent to any of the sexual acts", because that means that coercion requirements could be topped with consent requirements rather than replaced by it.

937 Bonita C. Meyersfeld, "Introductory note to the Council of Europe Convention on preventing and Combating Violence against women and domestic violence", 51 *International Legal Materials* 106 (2012): 106-132.

938 *Ibid,* p. 108.

ber states are obliged under the EU qualification Directive to consider asylum applications of gender based violence.[939] Thus the Convention's key benefit is once again, the creation of cohesion, as well as elaboration of a comprehensive framework for migrant victims of VAW.

2.2.6. Summary

In 2011, the CoE adopted the most thorough instrument that should ignite a revolution in the area of protection and prevention against VAW – the Istanbul Convention. In many ways, the Istanbul Convention is a very innovative instrument. It mixes up the strategies used so far in the area of VAW, both disentangling DV from the concept of SD and at the same time, keeping clear links with gender equality paradigm. For its step towards third wave feminism, it is sometimes viewed with caution both by traditionalists (due to its broad concept on GBV and gender equality paradigm as the basis for law-drafting) and some feminists (due to a degree of gender neutrality). However, it can be argued that the conceptual framework that the Convention provides is rather thoughtful, because it accommodates both the concerns for intersectionality and violence against different groups of persons (men, same sex persons), but also retains the critical aim of substantive gender equality.

It can be praised for timely dealing with the issues of globalization and addressing the needs of asylum seekers and cross-border victims. It also requires a reform of protection system and focuses on wide/general, as well as case-specific prevention measures, and establishes a number of substantive law provisions. Overall, it can be claimed that it operates mostly through guiding the states on formulating policies on VAW, and it does not require the states to adopt gender specific legislation. At the same time, it offers some important exceptions that require paradigmatic shift in some countries, for instance, focusing on protection that is not necessarily tied to any (criminal or civil) procedure, establishing new definitions (FGM, stalking). It also allows to make reservations, and the practice in these two years since the coming into force shows that both permissible (e.g. regarding exclusion of stalking) and impermissible reservations of general nature (Poland, Latvia, Lithuania) have been put forward.

Finally, the Convention's focus on economic independence and empowering of women while ensuring protection is truly innovator. It refrains from patronizing and still provides the necessary involvement of social and economic rights.

2.3. The EU law relevant to VAW

2.3.1. Inclusion of VAW into agenda

Slowly but surely, VAW was also included into the agenda of the EU. The Declaration no. 19 on Article 8 of the Treaty on the Functioning of the European Union[940] stated that "[i]

939 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. OJ L 304, 30.9.2004, p. 12–23.

940 Declaration on Article 8 of the Treaty on European Union, annexed to the final act of intergovernmental conference, which adopted the Treaty of Lisbon, signed on 13 December 2007.

n its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence. The Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims." At the same time, Stockholm Programme provided:

> "[t]hose who are most vulnerable or who find themselves in particularly exposed situations, such as persons subjected to repeated violence in close relationships [and] victims of gender-based violence, … are in need of special support and legal protection."[941]:

The next year (2011) marked adoption of the resolution on a roadmap for strengthening the rights and protection of victims in criminal proceedings (the Budapest Roadmap). It was recognized in the Budapest Roadmap that the Framework decision is outdated and a new approach to victims protection is needed. The EU also undertook[942] to promote and protect the rights of women in third states. Furthermore, various recommendatory conclusions on VAW, for instance, the Conclusions on preventing of VAW, have been adopted by the Council of the EU.[943] Although all these instruments are not legally binding, they did have an effect of political commitment to start filling the gaps in this area.

Regarding the binding legal framework, the Treaty of European Union places the principle of gender equality and non-discrimination at a very high level (Article 2). The Charter of Fundamental Rights also guarantees the right to dignity and equality (Title I and III of the Charter). There have been a number of Directives adopted in the area of equal treatment and non-discrimination and human trafficking. For the purposes of the object of this thesis, the most important legislative package came in the form of the so-called Victims' package, at the centre of which is the Victims' rights Directive.[944]The Directive provides for harmonization of standards on victim protection in the EU member states. It is a secondary EU legislation and needs to be transposed into national law. Furthermore, Victims package includes two documents that are important to cross border protection of victims.[945] European Protection Order (EPO) Directive aims at providing cross-border protection to crime victims who have been granted protection orders; and the Protection Measures' Regulation which introduced unified rules on the mutual recognition of protective orders in civil matters. The Regulation is directly applicable and does not need to be transposed.

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941 The Stockholm Programme - An open and secure Europe serving and protecting citizens (section 2.3.4), (OJ C 115, 4.5.2010, p 1).

942 EU guidelines on Violence against women, 2008. http://www.consilium.europa.eu/uedocs/cmsUpload/16173cor.en08.pdf

943 Council conclusions - "Preventing and combating all forms of violence against women and girls, including female genital mutilation". Justice and Home affairs, Council of the European Union, Luxembourg, 5 -6 June 2014.

944 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. OJ L 315/57. The Directive had to be implemented into national law by 16 November *2015*.

945 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order. OJ L 338/2. The Directive had to be implemented into national law by January of 2015. Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters. OJ L 181/4.

It must be underlined that there are many other EU documents that are related with VAW indirectly. They concern the questions of probation,[946] custodial sentences,[947] European arrest warrant,[948] European Investigation order[949] and others. However, this thesis focuses on the aspects or protection of victims and prevention of repeated victimization, rather than aspects of law enforcement in criminal proceedings. It must be noted that most of the documents related to the said issues do not even mention victims of crimes, nor victims of VAW in particular. Framework Decision on the supervision of probation measures does mention victims' protection among its key objectives, but that does not translate into any concrete rights.[950] Although protection is one of the key concerns in all stages of criminal proceedings, instruments aimed primarily at law enforcement have the objective of victim protection as a very far-removed objective. Suzan van der Aa in the context of custody and probation states that victims needs for protection "cannot be transposed into rights within the framework of a mutually recognition procedure."[951] In the said context, victims' rights remain at the margins, whereas the EU Victims' package attempts to fill these gaps.

Furthermore, it must be clearly understood that the EU legislative package should not be viewed in isolation. All of the EU member states are state parties to ECHR, and many of them ratified Istanbul Convention. The EU also participates in the UN normative policy on this issue.[952] That means that the legislative package for victims' rights, and soft-law instruments adopted on the EU level, are interrelated with the global and regional law.

The thesis analyses the instruments which relate closely to the principle of mutual recognition – both in criminal and civil matters. The principle of mutual recognition in criminal matters has gone quite far,[953] although not as far as the mutual recognition in civil matters. Since the conclusions in Tampere[954] that mutual recognition has to become a cornerstone of judicial cooperation in criminal matters, it has been entrenched under Article 82(1) of

946 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

947 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

948 Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision.

949 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. The Directive comes into force in 2017.

950 Suzan van der Aa, "Post Trial Victims' rights in the EU: Do law enforcement motives still reign supreme," *European Law Journal* 21, 2 (2015): 244.

951 *Ibid,* p. 247.

952 Antonyia Parvanova (Rapporteur), Combating violence against women. European added value assessment accompanying the European Parliament's legislative own-initiative Report. European Parliamentary Research Service. EAVA 3/2013. See in particular the Beijing indicators, as developed by the Council of the EU, and subsequent documents.

953 For a thorough analysis of the development of mutual recognition principle, see the book of Christine Janssen, *The Principle of Mutual recognition in EU law* (Oxford: Oxford University press, 2013).

954 Presidency conclusion of the Tampere European Council of 15-16 October 1999, 200/1/99. See paras 33-37.

the TFEU.[955] The mutual recognition in civil matters goes as far as elimination of *exequatur* (the procedure for recognition and enforcement of court decisions) with very limited discretion left for the state authorities of implementation.

2.3.2. The EU and human rights

The Roadmap for the EU accession to Istanbul Convention, which is currently envisaged,[956] recognizes that the EU accession to this Convention would be reasonable. The Istanbul Convention is the first convention that thoroughly regulates protection of women and prevention of violence against women. The Convention provides very specific obligations to the state parties and should ignite a transformative reform regarding protection and prevention of VAW. However, the questions of the EU mandate to sign the Convention and the effect of the Convention in the EU legal system need to be raised. First of all, a broader context of the development of human rights in the EU and the human rights coherence within Europe needs to be explained.

Although the European Union was created with clear aim of economic integration, very early on it became clear that it is also concerned with the development of human rights. In *Defrenne* III, the Court stated that "respect for fundamental personal human rights is one of the general principles of Community law."[957] It is rather obvious that prior the Lisbon treaty, the CJEU in its practice and then the EU legislator in primary law[958] gave the prominent rule to the ECHR, which was seen as the source of the general principles of the EU – notably, it was also the only basis for relying on the EU fundamental rights at that time. The accession of the EU to the ECHR would have strengthened its position in the EU and would have provided the possibility for individuals to bring the EU directly before the ECtHR for failure to observe the Convention. Meanwhile, the Lisbon Treaty raised the EUCFR to the level of primary law. This was one crucial step of the development of human rights system within the EU.

The second step was the accession of the EU to the ECHR, which also was envisaged in the TEU.[959] However, some tension between the pan-European courts i.e. that of Strasbourg (ECtHR) and Luxembourg (CJEU) has been building up at least since 2009. In the end of 2015, it culminated in the Opinion 2/13 of the CJEU, which ruled that the accession of the

955 Article 82(1) provides that mutual recognition of judicial decisions and judgments is the basis for judicial cooperation in criminal matters.

956 Roadmap on (a possible) EU accession to the Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention). October 2015. 2015/JUST/010.

957 Case 149/77 Defrenne v. Sabena III [1978] ECR 1365.

958 Article 6(3) TEU provided that "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... shall constitute general principles of the Union's law."

959 Article 6 (2) provides in the first sentence the obligation of the EU to accede to the ECHR, at the same time providing in the second sentence that "accession shall not affect the Union's competences as defined in the Treaties". Also see Protocol No. 8 of the TEU and the TFEU, and declaration on Article 6(2) of the TEU.

EU to the ECHR on the basis of the current Draft Accession Agreement (DAA) would not be compatible with the EU primary law.[960] The said pressure manifested in very subtle ways: for instance, the differing outcomes in some cases heard both by the ECtHR and CJEU, e.g. in the area of the principle of mutual trust in asylum-seekers' cases.[961] Moreover, in the area of cross-border abductions of children, which also often involve alleged domestic violence, the European courts took slightly different stances with regards to protection of human rights.

Notably, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (below - Brussels IIa or Brussels IIbis Regulation) establishes a strict regime of return in cases of abduction for the member states of the EU.[962] Although the Regulation includes references to the 1980 Hague Convention on child abduction, it also provides that national courts cannot refuse to return a child on the basis of grave risk (e.g. violence) if it is established that "adequate arrangements" have been made to secure protection for the child upon return (Article 11(4)). Article 11(8), furthermore establishes a by-pass of decision of non-return under the "grave risk" exception in the Hague Convention, by providing that notwithstanding the non-return judgment under this Convention, the judgment which requires the return of the child under Brussels II bis Regulation is enforceable.

The ECtHR in some cases has ruled[963] that it was disproportionate to require the return without an analysis of the individual circumstances – which often involved DV as the "grave risk" – and that such an omission constituted undue interference of Article 8 (right to family life) under the ECHR. This stance has been criticized because the return procedure under the 1980 Hague Convention is intended to be a summary proceeding and it should not involve the review of the merits and should not resemble custody proceedings.[964] The case law of the ECtHR has been described as "contradictory", as the Court has also ruled on the infringement of the rights of left-behind fathers, considering it a viola-

960 Opinion 2/13 of 18 December 2014.

961 E.g. in the case of *MSS v Belgium and Greece*, 30696/09, 21 January 2011, the ECtHR sad that Belgium violated the principle of non-refoulment by sending the asylum seeker to Greece, where detention and living conditions of asylum seekers were poor and his prospect of receiving the status of a refugee were not clear. In the case of *Tarakhel v Switzerland*, 29217/12, 2 November 2014, the ECtHR said that the presumption that the receiving state will comply with Article 3 of the ECHR – also mirrored by Article 4 of the EUCFR- is rebutted if there are "substantial grounds" to prove that the person is going to be treated in the way which is contrary to that provision, see. para 104.

962 In matters falling within its scope, Brussels II bis takes precedence over multilateral conventions, see Article 60.

963 Neulinger and Shuruk v. Switzerland, app. no. 41615/07, 6 July 2010. X v Latvia, app. no. 27853/09, 26 November 2013. Šneersone and Kampanella v. Italy, appl. no. 14737/09, 7 Dec 2011.

964 Paul Beaumont, Lara Walker, "Post *Neulinger* case law of the European Court of Human Rights on the Hague Child Abduction Convention", In *A Commitment to Private International Law. Essays in honour of Hans van Loon.* (The Hague: Intersentia. 2013), p. 18. Also see: Lara Walker, Paul Beaumont, "Shifting the balance achieved by the Abduction Convention: the Contrasting approaches of the European Court of Human Rights and the European Court of Justice," *Journal of Private International Law,* (2011) Vol. 7 No. 2, pp. 231-249.

tion of his family rights, and insisted that applications must be dealt with expeditiously.[965] Meanwhile, in cases of *Rinau*,[966] *Povse*,[967] *Zarraga*[968] the CJEU confirmed that the enforcement procedure of return judgement is basically automatic in the cases of child abduction or non-return of the child. In short, the practice of courts was seen as contradictory, at the very least indirectly. This was seen[969] as one of the challenges to accession.

However, it came as a surprise to many that despite the Advocate General's suggestion of qualified approval of the DAA, in its Opinion 2/13 the CJEU held that the EU accession to the ECHR raises both specific procedural questions[970] and substantive broader issues[971] related to the autonomy of the EU law.

The CJEU relied on the previous case-law,[972] and on the principle of mutual trust - which it elevated "to the core of Union's legal structure alongside EU fundamental rights and key, familiar principles such as primacy and direct effect"[973] – in order to entrench the autonomous EU approach to fundamental rights. The said "autonomous approach" to human rights raises some concerns about coherence of the European fundamental rights, as such. The EU prospective accession to the ECHR was seen both as a chance to create more coherence in the face of fragmentation of human rights, but also as a problematic endeavour.[974]

Qualitative analysis of Louise Halleskov Storgaard reveals that since the Lisbon Treaty, the CJEU still relies on ECHR,[975] although in implicit and non-transparent manner: "the CJEU's formal façade of fundamental rights self-sufficiency can camouflage that its fundamental rights reasoning in substantive terms in fact is aligned with the Strasbourg standard." [976] Seemingly, the EU law has converged with the European human rights standards as developed by the ECtHR and simply "does not need" the ECtHR anymore. The president

965 Paul Beaumont, Lara Walker, *op.cit*, p. 28-29.

966 C-195/08 PPU Rinau [2008] ECR I 5271.

967 C-211/10 PPU Povse [2010] ECR I-6673.

968 C-491/10 PPU Aguirre Zarraga [2010] ECR I-14247.

969 Johan Callewaert, *The accession of the European Union to the European Convention on Human rights.* (Paris: Council of Europe, 2014): 90.

970 I.e., regarding the co-respondent mechanism and prior involvement procedure.

971 I.e. regarding the autonomy of the EU law, Article 53 of ECHR, Protocol 16 of the ECHR, the EU principle of mutual trust, and the judicial review of the common foreign and security policy matters.

972 C-399/11, Melloni, 26 February 2013. Para 60 - higher national standards could be invoked but only if "primacy, unity and effectiveness" of the EU law is preserved. The CJEU thus drew parallel with the ECHR standards and EU law.

973 Louise Halleskov Storgaard, "EU Law Autonomy versus European Fundamental Rights Protection—On Opinion 2/13 on EU Accession to the ECHR," *Human Rights Law Review*, 2015 P.23-24.

974 Johan Callewaert, *The accession of the European Union to the European Convention on Human rights.* (Paris: Council of Europe, 2014):, p. 90-91.

975 Contra, see G. de Burca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human rights adjudicator" (2013) 11 *Maastricht Journal of European and Comparative Law*, p. 168-184.

976 Louise Halleskov Storgaard, "EU Law Autonomy versus European Fundamental Rights Protection—On Opinion 2/13 on EU Accession to the ECHR," at p. 31. For instance, she relies on *Kadi II* judgments, which dealt with the same issues as *Kadi I* but relied on only one ECtHR decision, while in comparison *Kadi I* gave a prominent role to ECHR.

to CJEU Koen Lenaerts in the context of Brussels II bis regulation[977] also claimed that the CJEU always relies on the principle of best interests of the child and implicitly applies the same level of care for human rights as the ECtHR. This seems to suggest that the EUCFR itself is the example of convergence of human rights standards in Europe. However, it is doubtfully so simple. The attempt to protect the autonomy in any cases involving the EU, and at the same time, the growing competence of the EU – result in overlapping, as well as the lack in transparency and coherence.

2.3.3. The EU prospective accession to Istanbul Convention

2.3.3.1. Competence and effects of accession

Having this analysis in mind, the question arises whether the EU has a basis for accession to another CoE Convention, namely the Istanbul Convention, considering that it did not see a convincing reason to participate in the ECHR. While addressing the question whether the EU can accede to Istanbul Convention, it must be stressed that the Istanbul Convention explicitly allows the EU to accede to it by providing in Article 75 (1): "This Convention shall be open for signature by the member States of the Council of Europe, the non-member States which have participated in its elaboration and the European Union." The EU has the desire to do it, as well, considering that the European Commission has proposed[978] to sign and ratify the Convention.

Second, the EU certainly has the competence to do it, considering that Article 216 of TFEU provides that it can sign treaties "likely to affect common rules or alter their scope." The EU already adopted the Victims' package, thus it would arguably have this effect. Basing on the Opinions of the CJEU regarding Lugano Convention[979] and Hague Convention,[980] which concerned the CJEU ruling that the EU has exclusive external competence in the matters of shared competence, provided that it has already legislated in the area, it can even be discussed whether the EU may have an exclusive competence to accede to the Convention. In the opinion of the author, the EU does not have an exclusive competence to accede to the Istanbul Convention but only has a competence shared with the member states. This is because the scopes of the Victims' Directive and Istanbul Directive do not exactly overlap. It does

977 Koen Lenaerts, "The best interests of the child always come first: the Brussels II bis Regulation and the European Court of Justice," *Jurisprudence* 2013, 20 (4), p. 1302-1328. K. Lenaerts concludes that principle of mutual trust is the "cornerstone" of the Regulation but at the same time argues that CJEU "always takes into account the best interests of the child", p. 1325.

978 Proposal for a Council decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, COM(2016) 111 final. Proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence. COM(2016) 109 final.

979 CJEU Opinion 1/03 of 7.2.2006. External relations – Exclusive or shared powers of the Community – New Lugano Convention.

980 CJEU Opinion 1/2013 of 14.10.2014, in which the CJEU ruled that exclusive competence of the EU includes the acceptance of the accession of a third state to the 1980 Hague Convention.

not seem obvious that the accession to Istanbul Convention may affect the rules of Victims' Directive. Finally, it must be considered that with the adoption of the Lisbon Treaty, the EU primary law now more clearly defines[981] the exclusive external competence in this area, and it is not obvious that Istanbul Convention falls within the scope of Article 216 (1) of the Treaty.

If the parties and the EU share the competence (Article 4 of the Treaty) to accede to a convention, that convention is called a "mixed agreement." The EU has already acceded to the UN Convention on the rights of persons with disabilities, which can also be seen as such a mixed agreement. The international agreements that are binding may have a very important effect within the EU: most significantly, they would have primacy[982] over inconsistent secondary law and inconsistent member state laws.

The question on the effect of Istanbul Convention in the EU arises, provided that it is ratified by the EU. As the CJEU ruled previously, the UN Disabilities Convention does not have a direct effect for the EU member states and a relevant EU Directive should not be assessed under it – only "in a matter that is consistent with the Convention." [983] Considering that the Directive concerned did not include the specific definition of disability,[984] the CJEU thought that the UN Convention in principle could be relied on in order to fill in this gap. However, the Court observed that it is "for the States Parties to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in that Convention."[985] Thus, the CJEU agreed with the Advocate General that the Convention is only "programmatic" and the requirements of sufficient preciseness and unconditionally were not fulfilled. The author of the thesis acknowledges that it may very well be that the same would be said about the CEDAW Convention or the Istanbul Convention, if the doctrine of direct effect is applied. As explained above, the CEDAW has been seen as a Convention that does not require implementation in France and other EU states; its principle of gradual realization is also noteworthy. The Istanbul Convention's provisions in many instances retain flexibility.

Similar conclusions were made in the study of legal implications of the EU access,[986] which was ordered by the EC and released in August 2016 on the Internet, shortly before

981 Article 216 (1) of the TFEU states, in particular: "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."

982 See Szilárd Gáspár-Szilágyi. 'The "Primacy" and "Direct Effect" of EU International Agreements'. *European Public Law* 21, no. 2 (2015): 343–370.

983 Judgment of the Court (Grand Chamber) of 18 March 2014. Z. v A Government department and The Board of management of a community school.

984 The said case, *Z. v A Government department and The Board of management of a community school,* was related to surrogacy. The applicant could not have the child due to her condition (lack of uterus) and thus surrogacy arrangement was made in USA, California. When the dispute arose regarding the right of the mother, who did not carry the child, to social benefits, the Irish court referred six questions to the CJEU.

985 *Ibid*, para 87.

986 Kevät Nousiaainen and Christine Chinkin, *Legal implications of the EU accession to the Istanbul Convention. European network of legal experts in gender equality and non-discrimination.* (Luxembourg: Publications office of the EU, 2016.)

the submission of the thesis. The authors Kevät Nousiaainen and Christine Chinkin also suggested that the EU should sign the Istanbul Convention and that the main added value "could be expected from the use of the Convention as a standard by which to interpret EU law."[987] This should be particularly relevant for these areas, where the EU mandate is limited, e.g. substantive criminal law.

This line of argumentation should not lead to ideas that international law from the EU law perspective is seen as a legal system with a limited and purely political effect. Neither the CJEU's decision in this particular case, nor other cases in the area[988] are necessarily a commentary on dualism and monism, even though the early discussions were linked with this differentiation. Notably, in states with a dualist approach to international law (UK, Finland), treaties do not automatically become part of national law, but need to be incorporated, whereas in monism, international convention is treated as a part on national law. In monist states, the international treaty can be used in court – thus the role of private cases and of national courts actually is quite significant. However, the CJEU evaluates whether a certain convention allows private persons to rely on it or only creates obligations between the states; in doing so, it focuses on the nature of the Convention and the structure of the norms. Thus the discussion has moved on from the monist/dualist distinction to content analysis of the treaty.

The CJEU in the case of *Z. v A Government department and The Board of management* was faced with the issue of interrelationship of the EU Directive and the UN Convention, thus it was within the said scope that it ruled: "[t]he validity of that directive cannot be assessed in the light of the United Nations Convention on the Rights of Persons with Disabilities, but that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention."[989] Thus, even if it is considered, in the analogous way, that the Istanbul Convention does not have a direct effect in the EU system, it still would be the standard for interpretation. Therefore, the doctrine of direct effect is not the only one that can be used to explain the role of international agreements in the EU. The concepts such as primacy, state liability, and consistent interpretation, have also been used as sources for explaining these effects.

Many human rights treaties lack sufficient preciseness and un-conditionality, if they are compared with the concept of "direct effect."[990] The key human rights conventions contain formulations that require changes of domestic laws for the compliance with international law. Conventions on human rights, also in the area of women rights, strive towards

987 *Ibid*, p.13.

988 See, for instance, Christina Eckes' analysis of Van Parys, Mox Plant, Kadi, and Intertanko cases, where she concludes that despite the impression of CJEU recent "unfriendliness" to international law, these decisions should be seen as contextual and actually using the international law, without much references. Christina Eckes, *International law as law of the EU: The role of the Court of Justice*. Centre for the EU external relations. The Hague: TM.S. Asser Institute. CLEER papers, 2010/6. http://www.asser.nl/media/1622/clee10-6web.pdf.

989 Z. v A Government department and The Board of management of a community school, para 92 (2).

990 Already in the famous *Van Gend en Loos* case, which actually explained the concept of direct effect, the difference between the international law in general and the sui generis EU law has been noted. *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62.

substantive equality which is the goal to be fulfilled by gradual realization.[991] At the same time, human rights conventions provide positive obligations for the states. As discussed previously, VAW can be recognized as violation of the due diligence duty to investigate and punish acts of VAW, and prevent them from happening in the future. The EU is also bound by international agreements that it accedes to, both on the basis of principle of *pacta sunt servanda* under international law and the EU constitutional principle of supremacy of international law over secondary legislation.[992] Besides flexibility in some parts, the Istanbul Convention provides precise obligations to contracting parties in other areas. For instance, it forbids compulsory mediation; it requires a protection orders' reform, and etc. Therefore it cannot be said that the whole text of the Convention is only programmatic/ purely conceptual.

On the negative side of this argument, the rules of the Convention that require some harmonization of substantive law are actually the weak points in the EU accession, because it does not really have the competence to harmonize/ approximate substantive criminal law. Moreover, the Istanbul Convention itself is very flexible regarding implementation. For instance, it does not allow evidence of previous sexual conduct in cases of sexual VAW (unless necessary), but legislative changes are not expected and contracting states may simply adopt a soft law instrument to this aim. Therefore, for the most part,[993] after accession, the Convention could be seen as a guiding policy instrument rather than a strict human rights standard within the EU.

Furthermore, the decision of the CoE to avoid establishing an individual inquiry/ application procedure is also to be evaluated positively from the point of view of the EU's probable accession. In this way, the clashes of competence with the CJEU are to be avoided, which caused a significant and hardly solvable concern regarding the ECtHR. It does, however, raise some issues of procedural nature, considering that the CJEU is not really specialized in dealing with women's human rights issues. The said issues may be resolved by more equal participation of women judges in the Court, a special division that specialises in human rights cases, or gradual widening of the GREVIO competence.

2.3.3.2. The alternative: a bundle of Directives?

The alternative to the EU accession has been suggested in some of the studies ordered by the EU institutions. For instance, in the study on *European Added value on a Directive on combatting violence against women,* the authors agree that there are "major gaps between actions in the EU (both EU-level and Member State-level) and those itemised in the Istan-

991 The lack of political will to accept the CEDAW as imposing *direct obligations* must be noted. In particular see. Sandra Fredman, "The CEDAW in the UK", p. 513 and Helene Ruiz Fabri and Andrea Hamann, "Domestication of the CEDAW in France: from paradoxes to ambivalences and back again", p. 539., in *Women's Human Rights*, Anne Hellum and Henriette Sinding Aasen (eds), *supra* note 23.

992 See Francesca Martines, "Direct effect of International agreements of the European Union," *The European Journal of International law* 25, 1 (2014): 129-147.

993 See Kevät Nousiaainen and Christine Chinkin, who analyse the Istanbul Convention by chapter, and conclude that the accession would help introducing "more coherent soft-law guidelines" (Chapter V on protective measures), supra note 68, p. 12.

bul Convention",[994] but then go on to argue that the EU has a competence to legislate in the area and the previous analysis under Feasibility study[995] was "flawed" to find that it lacks competence.[996] Authors consider that previous research "underestimates the significance of the need for legal clarity in cross-border judicial matters; it underestimates the significance of the cross-border dimension for crimes of violence against women; it underestimates the extent to which parallel legal authorities (the ECtHR) have already created an effectively harmonized field of crimes of violence against women in Europe." The EU is suggested to use Articles 82 and 83 of the TFEU. However, it is not clear at all why the legal certainty cannot be increased by accession to Istanbul Convention.

The same idea is developed in the study of 2016 on the *Issue of Violence against Women in the European Union* undertaken under the European Parliament.[997] In this study, the authors agree that Istanbul Convention "fills the important gap in the international law on violence against women"[998] but then continue to suggest the EU adopting a number of Directives in the area of VAW, for instance:

- A Directive on the eradication of rape
- A Directive on preventing female genital mutilation
- A Directive against Domestic violence
- A general Violence against Women Directive.[999]

It does not seem a plausible step to adopt a number of directives, which would arguably have very little added value, except for "additional pressure on Member States to take action."[1000] The demand for cross border element, which both studies recognize, means that the instrument on rape, for instance, would only tackle rape perpetrated in cross-border scenario, e.g. the victim is raped while staying in a country that is different from her residence state. The competence in this area may exist, but the suggestion to establish a separate standard for rape in cross border settings seems to lead to even more fragmentation of substantive definitions. Furthermore, it is not plausible to expect all member states to agree to this legislative jungle.

It is clearly more advisable that the EU should sign and ratify the Istanbul Convention.[1001] First, it has the competence to do so, and has already signed other human rights treaties: e.g. UN Disabilities Convention. There do not seem to be threats to coherence or jeopardising competence of the EU court, as happened with the accession to ECHR.

994 Sylvia Walby, Phillipa Olive, *European Added Value of a Directive on combatting violence against women, Annex II: Economic aspects and legal perspectives for action on EU level.* (Brussels: European Parliament, 2013): 51.

995 *Feasibility Study to Assess the Possibilities, Opportunities and Needs to Standardise National Legislation on Violence Against Women, Violence Against Children and Sexual Orientation Violence*. Brussels: European Commission D-G Justice.

996 *Ibid,* Annex II, p. 62.

997 Anne Bonewit, Emmanuella de Santis, *Issue of Violence against Women in the European Union*, (Brussels: European Parliament, 2016).

998 *Ibid,* p. 32.

999 *Ibid,* pp. 42-43.

1000 *Ibid,* p. 43.

1001 Laima Vaige, "Violence against Women: Time for consolidation of European efforts?" *Právní Rozpravy*, 6 (2016): 120-128.

Second, the legislation at the EU level does not provide a comprehensive response to the objective of preventing violence against women and supporting and protecting the particularly vulnerable victims. Instead of developing parallel legal regimes in Europe, it would be the best to consolidate the efforts. Developing a parallel strategy (e.g. a directive on VAW) would largely draw on the Istanbul Convention, and would simply repeat the legal rules, presumably with some significant omissions, i.e. as to substantive criminal law, because the EU mandate does not allow this, and further gender neutralization.

The accession of the EU to Istanbul Convention would also be an important political statement that would increase the impetus of the CoE's work, would show the support of the EU in the area internationally and send a strong signal to all non-member states, encouraging them to make a commitment in this area. Finally, the EU-wide report on attitudes to VAW in Europe (2015) shows widespread victim blaming and tolerance.[1002] High numbers of people still consider that women's clothing or behaviour is to blame for the violence. VAW is also indicated as one of the main reasons behind gender-gap of the well-being of European residents[1003] and considering these pressing concerns, the EU should make it a priority to address it. The EU at the moment does not have any primary prevention measures of VAW. After the accession to the Convention, it would be capable of further involvement in primary prevention of VAW, as well as institutional participation in the GREVIO.

2.3.4. The impact of Victims directive for VAW

The Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (the Framework Decision) provided some minimum standards for the protection of rights of crime victims, including survivors of VAW. However, the Framework decision due its legal form[1004] could basically provide the level of protection that is already established in member states' jurisdiction. Most common national measures of implementation of the Framework decision were of soft-law nature. Thus the Victims' rights directive was adopted with the view of improvement of rights of all victims of crimes. The said directive mainly deals with procedural rights of the victims of crimes.[1005]

1002 Enrique Gracia, Marisol Lila, *Attitudes towards violence against women in the EU*, (University of Valencia. Publication Office of the European Union, 2015). The report analyses various surveys on attitudes to VAW, and reveals that to this date, attitudes are often based on stereotypes and prejudices: "a common factor mentioned in a substantial number of surveys as an explanation or justification of violence against women is the way women behave."p.62.

1003 Claudia Senik, *Gender-gap in subjective well-being*, (Research report. Publication Office of the European Union, 2015).

1004 Framework decisions do not have a direct effect and although they require pursuing certain result, the member states cannot be held liable for failure to transpose them into national system. Lisbon Treaty enlarged the EU competence in criminal justice matters, allowing it to adopt directives and regulations rather than framework decisions. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.

1005 It must be noted that Article 31(1)(1) of TEU, now Article 83 of TFEU, only allows harmonization of substantive criminal law, but the EU nevertheless adopted an instrument with clear impact on rights during criminal procedure – the Framework Decision. Currently the EU has the competence to adopt legislation affecting procedural rights under Article 82 (2) of the TFEU.

The victim-sensitive approach entrenched in the Directive is in itself significant. The term 'offender' under Recital 12 of the Preamble "also refers to a suspected or accused person before acknowledgment of guilt or conviction" and the term 'victim' as explained under Recital 19 applies without prejudice to national procedures "required to establish that a person is a victim." This is significant both for the questions of status (of victim) and also for the conceptual paradigm under criminal justice matters, which so-far kept victims at the margins. The conceptual approach to definitions of "victim" and "offender" signifies a transformative shift towards focusing on the rights of the victims of crimes as a matter of absolute priority. At the same time, this un-debatable approach to definitions can be viewed with some caution. In reality there are many situations where the lines between who is an offender and who is a victim can be unclear, e.g. situational violence between intimate partners or mutual combat between persons not previously familiar with each other. It must be praised that the victim's status is without prejudice to her right to reside in a certain territory.[1006] In reality however, the national substantive and procedural laws will have an impact in establishing the legal status of the victim. It seems that throughout the Directive, the image of a "victim" is a person who clearly suffered damage and actively participates in criminal proceedings.

The term "victim" under Article 2 also includes family members and the national law will also be significant to establish who is a "family member" of victims who are deceased. The Framework Decision only applied to family members who suffered damage as a direct consequence to the crime. Notably, the Directive distinguishes between the family members by victims who died and those who survived violence. In the case where the victim died and her family member suffered harm, the Directive applies and the said family member may take use of victim support services. However, the Directive allows the member states to adopt procedures limiting the number of the said family members or establish their priority line.[1007] The states are thus free to adopt a restrictive approach to assistance.

Moreover, Victims Directive is a Directive that establishes only *minimum standards,* and as an instrument of minimum harmonization, it only provides minimum thresholds. In parts of the text of the Directive, the rights of the offender are also put as the priority of the rights of the victim. The Directive does not go as far as the Istanbul Convention does regarding protection of victims, it arguably lacks cross-border approach and leaves very wide discretion for the member states. It has a better prognosis of implementation, however, partly due to the minimum-intervention strategy and partly due to the legal form of this instrument.

2.3.4.1. Conceptual response

Regarding conceptual paradigm, the EU Victims directive can be seen as a document that tackles VAW, DV and GBV simultaneously. VAW is not, however, directly mentioned in the Directive but some provisions may be particularly relevant to VAW. Notably, the

1006 However, the Directive grants certain rights only to victims who live in another member state than the member state where criminal offense was committed, to make a complaint to the local competent authorities (see Article 17 part 2 of the Directive).

1007 Article 2 part 2.

European Parliament in pre-legislative stage wished to include the term "gender based violence" in the operative part of the Directive. However, due to strong opposition of member states, a compromise was found. The definition of GBV is currently provided in Recital 18 of the Preamble: "gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honour crimes'." It is also mentioned in Article 9 on victim support services, Article 22 on individual assessment to identify specific protection needs and 26 on cooperation and coordination of services.

The gender-neutral approach is rather novel and has both advantages and disadvantages. On the one hand, it can be praised for including a very broad approach and thus applicable to wide range of categories of victims. In particular, violent acts against LGBT persons "virtually always" constitute gender based violence, as correctly noted by Catharine MacKinnon.[1008] On the other hand, the gender-neutral definition of GBV under the Directive may also be interpreted as applicable to men, who are quite often victims of other men, as a challenge to masculinity. For instance, being raped in male prison in order to humiliate may also be seen as gender-based violence. Being called into fight to prove that "you are a man" is also clearly connected to one's gender and may be classified as gender based violence. It can be admitted for a fact that culture of machismo is often dangerous to men's health and life as well. However, women are *disproportionally* affected by violence in such cultures – and that is actually common for all cultures. The directive tries to keep its focus by recognition that "women victims of gender-based violence and their children often require special support and protection" (Recital 17). Furthermore, it also recognizes that women are disproportionally affected by violence committed in close relationships (Recital 18) and also stresses the significance of economic and social independence. The said recognition is noteworthy. However, the gender-neutral definition of gender based violence, intentionally or not, seems to open the debate on the issue of whether cis-gender men can also be victims of GBV.

The decision to treat victim as in a manner that would be equivalent to that of the party[1009] to the proceedings rather than an object used for the purposes of criminal justice is a conceptual novelty. It must be noted that the concept of a "victim" of crimes is not universal in the EU. In some countries, the person could only gain the status of a victim when the decision to prosecute was adopted. However, the Victims' rights directive provides an autonomous meaning of this concept, which means that support services and protection should not only be restricted by the national system. Furthermore, the decision to focus on the victim is also innovatory. The Directive has been accused of certain "victim bias"[1010] and

1008 Catharine MacKinnon, "Creating International law: gender as leading edge."*Supra* note 30, p. 110.

1009 Victims did have the procedural right to be heard under the Framework Decision, however in joined cases of *Magatte Gueye* (C-483/09), *X, and Valentín Salmerón Sánchez* (C-1/10), and the CJEU also explained that their opinion regarding protection orders did not have to be heard.

1010 Andre Klip, "On Victim's rights and its impact on the rights of the Accused", *European Journal of crime, criminal law and criminal justice* 23, (2015): 187.

the lack of proportionate balancing between the rights of the accused and the rights of the victim. The accused or anybody else for that matter cannot challenge the decision to recognize the person as the victim. The increased significance of the role of the victim "raises some more existential questions"[1011] as to the goal and the means, according to Andre Klip. His argumentation could be in particularly relevant to victims of VAW in one respect. The international jurisprudence discussed above shows that perpetrators are skilful in abusing the legal loopholes in law. They use them in custodial battles and in DV claims. It is thus possible that the system will provide them with new instrumental tools for that respect.

2.3.4.2. General rules of protection under EU Victims Directive

General rule that victims should be protected from secondary victimisation, intimidation and retaliation is provided for under Article 18 of the Directive. The Guideline document on transposition of the Directive claims the Article presents a holistic approach[1012] to protection of victims. There was a similar provision in the Framework decision and unfortunately, the Directive does not go very far from it – the standard of protection it offers is lower than standards provided for under the Istanbul Convention. The European Institute of Gender Equality (EIGE), which analysed the Victims Directive from the gender perspective, notes that Article 18 is construed broadly: it is "very general and does not clearly specify the obligations of Member states."[1013] The article refers to situations of questioning and testifying, but not all victims are witnesses and in case of VAW, it is very important that the case is not based on victim's testimony solely. Under the Directive, the victim seems to be expected to actively participate in criminal proceedings, e.g. by testifying. Other situations are not mentioned in the Article, although non-binding Guidelines on transposition also refer to protection "at the victim's residence and in public."[1014]The Article refers to physical protection, which under Recital 55 of the Preamble should include protection orders / interim injunctions available to victims and their family members. The standard of application of protection orders is rather low, because the Directive places offender's right to defence first, and does not provide for conditions of their applicability, instead relying on the national law. Meanwhile, adoption of protection orders is necessary in some situations, as ruled by the ECtHR, and established under Istanbul Convention. The Victims' Directive is lagging behind in comparison to other regional developments, because it simply notes that protection is afforded "when necessary."

Finally, the sanctions for breach of protection orders are not mentioned in the Directive, which resulted in EIGE's conclusion that Article 18 may be used inconsistently and even found it "very unfavourable to victims, in that it does not provide them with specific guar-

1011 *Ibid,* p. 189.

1012 DG Justice Guidance document, related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.

1013 European Institute for Gender Equality (2015). *An analysis of the Victims' Rights Directive from a gender perspective, supra* note 20, p. 39.

1014 DG Justice Guidance document, *op.cit*, p. 40.

antees of security and protection by isolating the offender."[1015] The Article actually opens with the phrase "[w]ithout prejudice to the rights of the defence", which can be interpreted as giving the priority to the defendants' procedural rights.[1016] The scope and the conditions of such protection orders could be left for the member states – but the necessity of them is pressing. It is easy for the member states to conclude now that these measures are only the recommendatory vision of the EU and thus the question arises whether this vision had to be adopted in the form of the Directive and not soft law instrument.

Furthermore, Article 19 provides the right to avoid contact between victim and offender, in particular by ensuring that actual premises (at court or police) allow this. This is particularly important for victims of GBV, including sexual violence. It does not, however, include health care, forensic medical services nor hospital premises, as pointed out by the EIGE analysis.[1017] Article 19 only applies at the stage of court proceedings, even though it could have easily been formulated to include also post-trial stage.[1018] Another important limitation to this right is that it can be restricted if "the criminal proceedings require such contact." Once again, it can be criticized that the formulation is very broad and flexible and leaves room for manipulations.

Article 20 on right to protection of victims during criminal investigation requires to conduct interviews with victims in timely manner, keep them to the minimum, ensure that victim is accompanied by a person of their choice and require keeping medical examinations to the minimum. This article is also criticized as very broad and allowing wide discretion for member states. The EIGE analysis suggests that Article 20 actually "lists ideas and not specific solutions."[1019] Of course, this criticism is rather sharp, considering that the Article 20 (and other articles on victims protection) actually apply to all victims of crimes, but precisely because its scope is broad, the GBV victims gain limited effect of the provisions. The main solution of the Directive is to provide a broad provision, with wide discretion for member states and broad possibilities to restrict victims' rights.

The Directive does not directly require all member states to provide protection orders, even though it can be presumed that movement of civil and criminal protection orders under the other two documents of Victims' rights package (the EPO Directive and Protection Measures Regulation) will encourage domestic reforms. Moreover, it is not clear under the Directive what happens if protection orders are breached and whether victims' consent to breach of protection order is relevant. Some guidance can be found under the Court of Justice of the EU (the CJEU) practice. E.g., in joined cases of *Magatte Gueye* (C-483/09), *X, and Valentín Salmerón Sánchez* (C-1/10), it was established that the Spanish victims in both cases were living with the perpetrators despite restrictive injunctions. The women declared that they had themselves, consciously and voluntarily, decided to resume cohabitation with the offenders. Thus the question arose whether the victim of domestic violence should have her word in the choice of penalties for the perpetrator. The Court responded nega-

1015 EIGE analysis, *supra* note 20, 41.

1016 *Ibid*, p. 40.

1017 EIGE analysis, *supra* note 20, p. 41.

1018 Suzan van der Aa, "Post trial victims' rights in the EU," *supra* note 950, p. 248.

1019 EIGE analysis, *op. cit.,* p. 42.

tively. Although the victims do have the procedural right to be heard under the Framework Decision, it does not mean they have the rights in respect of the choice of penalties to be imposed, or their level. The CJEU relied on the interests of protection of the victims and also "more general interests of society" to conclude that the mandatory penalties imposed in Spain are compatible with the Framework Decision. This aspect of the said decision is in line with the developments under the ECHR and CEDAW. Although woman's agency is important, it is also crucial to protect her from repeated violence.[1020] The opposite view, i.e. making protection dependent on the victim's consent would result in regress to the days where protection was mainly responsibility of the victim.

The last article that applies to protection of all victims is Article 21, which entrenches the right to protection of privacy. The article invites to adopt a "proportionality test"[1021] to information on victim and her/his family: "only information about the victim and his/her personal circumstances that is strictly relevant for the case should be disclosed to the accused." Protection of private data also constitutes a measure to prevent secondary victimisation. However, Article 21 again provides just a broad declaration and does not give a list or example of measures that member states should take. In addition, the Article suggests that media should adopt "self regulatory" measures – a very soft and flexible provision which depends "solely on the good will of the media."[1022] At the current stage of development of international regulation on privacy, it could have been expected that the Directive provides a higher standard for the protection of victims' data.

The problem of limited applicability of the Directive had already been briefly discussed above – i.e. the Directive seems to apply solely to "active victims" who participate in criminal proceedings. Moreover, it must be mentioned that the Directive seems to exclude the questions of victims' protection at the post-trial stage. The mentions of the post-trial stage are very limited. For instance, in the preamble it is provided that victim support should be made available even after criminal proceedings – "for an appropriate time" (Recital 37). There is also a requirement of the victims' right to information when the convicted person is released or escapes prison (Article 6 part 5). However, in the same Article, the restriction is imposed – "unless there is an identified risk of harm to the offender which would result from the notification" (Article 6 part 6). This seems to prioritize the rights of the offender over the rights of victim. On the other hand, it may also work in complex situations, e.g. where the "offender" is the teenage son who resorts to violence against his father who had abused the mother, or a woman who resorted to exorbitant use of violence in response to initial sexual attack. In many cases, the position of the official "victim" is not necessarily that of the person who needs protection against the offender.

Suzan van der Aa criticized the failure to include the right to know that the perpetrator is moved to another prison or another state,[1023] which can be the state of residence of the

1020 On the other hand, the case could also be criticized due to the aspect of not recognizing victims as "parties" in criminal proceedings. See Ruth Lamont, "Joined Cases C-483/09 and C-1/10, Gueye and Salmeron Sanchez, Judgement of the Court of Justice," *Common Market Law Review* 49, No.4 (2012), 1443-1455.

1021 Guidelines on transposition, *supra* note 1012, para 69.

1022 EIGE analysis, *supra* note 20, p. 43.

1023 Suzan van der Aa, "Post-Trial Victims' rights," *supra* note 950, p. 249.

victim. Her thorough analysis shows that indeed there is an imbalance of victims' rights during the proceedings and after trial. Considering that member states provide very different level of protection and that victims' rights during post-trial stage seems to be developing at a slower pace, minimum harmonization at the EU level could be extremely helpful. The lack of such protection causes to think that the EU legislator's approach still centres around law-enforcement goals rather than victims' protection: "it is exactly the post-trial phase where the criminal justice system no longer stands to profit from the victim's cooperation, but rather has to make investments to satisfy their needs."[1024] The pre-occupation only with pre-trial and trial stage allows suggesting that this is not yet the case.

The directive does not concern shelters as significant measure of protection. However, it must be noted that the Preamble of the Directive on Goods and Services[1025] in principle allows single-sex shelters, because they are justified by a "legitimate aim." Shelters, as well as emergency hotlines and other services would be seen as a part of victims support scheme under the EU level system, which falls under the soft-law legislative efforts.[1026] When and if the EU ratifies the Istanbul Convention, it would have a possibility to argue more strongly for the system of adequate and accessible shelters.

2.3.4.3. Protection of VAW victims as particularly vulnerable victims

Victims' directive mentions DV and GBV victims among the victims, who need particular attention and are provided with extra rights during criminal investigations and during court proceedings (under Article 23). The extra rights during investigations should include: the possibility to hold interviews in special premises, trained professionals who carry out the interviews, the same interviewer during all interviews, and same gender of the interviewer in case of GBV and DV, if victim so requests (Article 23 (2)(d) of the Directive). Moreover, during court proceedings the particularly vulnerable victims should be prevented from meeting the offenders or unnecessary questioning, and measures should allow the hearing to take place without the presence of the public or the victim may be heard without being present. Although in many countries, "special measures" can be used during the court proceedings, the Directive provides a more thorough basis for harmonization within the EU. In comparison to the previous Framework Decision, the Directive should be praised for the removal of a great deal of the discretionary language that had afforded the Member States "too many opportunities to avoid their obligations."[1027] The extra rights that particularly vulnerable victims are provided are the most relevant to victims of VAW: for instance, it is very much in the interests of sexual violence victim to avoid meeting the

1024 *Ibid,* p. 254.

1025 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37–43.

1026 In particular, the EU adopted indicators under the Beijing platform, and in 2012, the EIGE presented a Review of the Implementation of the Beijing Platform for Action in the EU Member States: Violence against Women – Victim Support. (Luxembourg: Publications Office of the European Union, 2012).

1027 Louise Taylore, Jo Ann Boylan-Kemp, "Establishing Minimum Standards on the Rights, support and Protection For Crime Victims With Specific Protection Needs," *Nottingham Law Journal* 23, 66 (2014), at 72.

offender and be free from unnecessary questioning. Thus inclusion of mentioning of GBV, sexual violence and violence in close relationships must be evaluated very positively.

Article 22 provides that "particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable". Further, the Article explicitly says that victims of sexual violence, GBV and DV (violence in close relations) will be "dully considered". The individual assessment depends on the member state officials. In some countries DV may be wider than others, e.g. former partners or same-sex partners may be excluded or requirement that partners have a common household may be applicable. Moreover, some actions are not defined as criminal offences (e.g. stalking) in some countries, and in others, some crimes are not explicitly mentioned in the legislation (e.g. female genital mutilation). Thus the Directive only provides broad guidelines rather than a set of hard rules. Under Articles 22-24, it sets thresholds that member states should meet but does so at a minimal level and allows much flexibility.

The Directive provides a presumption of "vulnerability" only with respect to children (Article 22 part 4). In the absence of indicative list, national police officers will have to assess vulnerability on case-to-case basis. It is doubtful that it was a good idea to leave the issue of individual assessment solely at member states agents' discretion. Notably, the EIGE research concludes that provisions on individual assessment of VAW, DV, GBV victims gives too much discretion for the member states and thus should be negatively assessed from the point of view of SWOT (strengths-weaknesses-opportunities-threats) analysis.[1028] Neither the methods nor conditions are provided under the Directive. Other commentators also noted that the Directive is "overly generous"[1029] to member states which may desire to limit the said measures of protection. Under Article 23 the member states may restrict them on the bases of prejudice of the defence rights, judicial discretion, operational or practical constraints, or for reasons of good administration of proceedings. Strong opposition by the member states delegates and the European Parliament[1030] prevented the adoption of clear list of persons who are considered "vulnerable victims" and as a result receive some extra rights. The solution would have been more reasonable than leaving it for the discretion of member states.

The individual assessment of the situation of the victims of gender-based violence should be gender-sensitive and "particularly thorough."[1031] Victims are more likely to address the health sector (hospitals, doctors, healthcare institutions) than the police, social workers or crisis centres. EU Fundamental Rights Agency thus recommended that individual assessments should be carried out by the victim's first point of contact, "typically the

1028 EIGE, *An analysis of the Victims' Rights Directive from a gender perspective, supra* note 20, p.45.

1029 Louise Taylore, Jo Ann Boylan-Kemp, *op.cit*.

1030 Slawomir R. Buczma, "An overview of the law concerning protection of victims of crime in the view of the adoption of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union," *ERA Forum* (2013) 14: 243-244.

1031 EIGE, *An analysis of the Victims' Rights Directive from a gender perspective*, *supra* note 20, Page 44.

police or a victim support organisation."[1032] The problem arising for victims of VAW is that although they are victims with specific protection needs, the practice of the police in many member states is to refer such victims to generic support services, which then need to make this individual assessment. It must also be noted that in some countries, victim-specific services do not exist. It is not clear who should carry out the individual assessment and on which time limits, only that it should be done in accordance with national provisions. This can potentially create obstacles for victims because it is not obvious of mandatory to assess them in most favorable way.

2.3.4.4. Concerns of protection in cases of restorative justice

The Victim's Directive is the first EU document that provides legal regulation on restorative justice. The concept is defined as following: "[r]estorative justice is any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party."[1033] The Istanbul Convention leaves more limited room for restorative justice, whereas compulsory mediation is clearly forbidden under Article 48. The UN Handbook on Legislation on Violence against Women is the example of the strictest approach, underlining that legislation should "explicitly prohibit mediation in all cases of violence against women, both before and during legal proceedings."[1034] The status of the Handbook and other documents that suggest prohibition of mediation[1035] is only recommendatory. Meanwhile, Victims' Directive allows restorative justice in various cases including VAW, which could be undertaken in the form of victim-offender mediation, family group conferencing and sentencing circles.[1036]

The relatively positive approach to mediation in cases of VAW could already be traced in the Court of Justice of the European Union (CJEU) case practice. In joined cases of *Magatte Gueye* (C-483/09), *X, and Valentín Salmerón Sánchez* (C-1/10), the CJEU found that mediation in criminal proceedings is not against the Framework Decision. It is up for the member states to choose the particular means of implementation of victims' rights under this document. Nevertheless, their discretion may be restricted by the obligation to use objective criteria in order to determine the types of offences for which they consider mediation not to be suitable.[1037] A question arises whether the court-appointed mediation would fulfil the criteria of "free consent" to mediation. While previously it was not quite clear, Article 12 provides that victim's free, clear and informed consent is absolutely necessary.

The EIGE analysis underlines that "victims of gender-based violence should be offered restorative justice services with a large dose of prudence."[1038] Restorative justice cannot work

1032 FRA survey, *supra* note 2, p. 15.

1033 Article 2 part 1 (d) of the Victims Directive.

1034 UN Handbook 2010, *supra* note 16.

1035 UN women, 2013 Commission on the status of women. Agreed conclusions on Elimination and prevention of all forms of violence against women and girls. See A-g.

1036 Guidelines on Transposition, *supra* note 1012, p. 32.

1037 *Gueye and Salmerón Sánchez*, CJEU Joined cases C-483/09 and C-1/10.

1038 EIGE analysis, *supra* note 20, p. 36.

in situations with clear power imbalance. For instance, one of the parties had suffered serious psychological and physical damage, e.g. had been raped, beaten, possibly disabled, family member had been killed or committed suicide as a result of long-term violence, and the other party avoided consequences, even after such violence became known to state authorities. These are the facts of cases analysed by the European Court of Human Rights or by the CEDAW Committee: e.g. *Opuz v Turkey* (2009), *Jallow v. Bulgaria* (2012), and many others. Restorative justice can only work in situations of mutual violence, short-term violence, minor perpetrators, and violence which does not involve coercive control of the partner.

If restorative justice is resorted to, it must be done under clear criteria and following safeguards must also be followed. The Directive treats restorative justice both as "alternative" and as "complimentary" to court proceedings and can be applied both prior criminal court takes a decision and afterwards.[1039] Victims' Directive in its preamble proclaims that "[r]estorative justice systems […] can be of great benefit to the victim, but require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation." Article 12 of the Directive provides for conditions and safeguards for the use of restorative justice. In all situations, the states must ensure that victims' safety comes first. States should provide training of professionals under Article 25. The conditions under Article 12 ensure that restorative justice only takes place, if: the victim gives a free and informed consent, the offender accepts the facts of the case, any agreement between the parties is voluntary, and the process itself is confidential. The victim must be provided with "full and unbiased information about that process and the potential outcomes."[1040]

In addition, it can be observed that restorative justice systems are more developed in some legal systems than others. For instance, the so-called undertakings – voluntary promises of the perpetrator – have been employed in particular in common law systems as a remedy or supplement to available measures in cases of domestic violence. However, they do not seem to work well for instance in Georgia, as shown by case of *X and Y v Georgia* (2015), analysed by the CEDAW Committee, where police officers took undertakings from the perpetrator and acted as mediators.[1041]

Considering that it was all that they did, violence continued and impunity was fostered. The aspects of victim's protection and prevention of repetition of violence should remain as of primary importance. Therefore the conclusion of the EIGE that very close monitoring of implementation is necessary should be taken into consideration. In addition, the Victims' Directive should not in fact be seen as encouraging adoption of restorative justice provisions in all cases.[1042] The careful reading of Article 1, Article 12 and the Preamble reveals that the Directive leaves the discretion for member states whether to entrench restorative justice. The safeguards provided under Article 12 are not "luxury entitlements" but rather "minimum

1039 Theo Gavrielides, "The Victims' Directive and what Victims want from Restorative justice," In *Victims & Offenders* (Routlegde, 2015), p. 3.

1040 Article 12 part 1 of the Victims Directive.

1041 Of course, this behavior by the police officers only in very limited cases falls under the definition of restorative justice. Usually state officers do not act as official mediators / reconciliators but there is a parallel system to that of criminal proceedings.

1042 *Contra,* see S.R. Buczma, p. 248, who claims Article 12 actually means that "all sorts of restorative justice should be promoted."

guarantees" for victims' human rights.[1043] However, in order for them to be dully respected, the cultural change needs to take place.[1044] It is therefore not reasonable and perhaps even detrimental to the interests of victims of VAW that the Victims Directive is promoted as ensuring restorative justice for everyone and as much as possible. Precisely VAW cases are the cases where it should be carefully monitored and safeguards must be cautiously used.

2.3.4.5. Lack of cross-border protection measures?

Richard Lang provides a general criticism of the Victims Directive on not going far enough with regards to victims' rights in cross-border settings, and going too far with regards to situations without cross-border element.[1045] Notably, the EU should only adopt Directives in the area where member states' cannot achieve the same result on their own. However, the said Directive in principle seems to improve victims' rights in purely internal situations.[1046] On the other hand, Suzan van der Aa claims that the EU established its competence with regards to victims' protection, by convincingly providing the link to key objectives of the TEU and showing that these objectives cannot be better achieved by member states alone.[1047] According to the author of this thesis, the link with free movement is a bit far-stretched, considering that the lack of guarantees may prevent *potential* movement of victims. However, in consideration of foreign victims of crime, the said potentiality is very probable and thus, there was the need for the Directive. In order not to create two different levels of protection, the Directive applies also to *national* victims. This should not come as a surprise – precisely the same logic was already followed under the Framework decision which the Directive has now replaced.

At the same time, the Directive does not provide a very thorough response to cross-border crimes. It does not refer directly to the principle of mutual recognition, but it can be presumed that individual assessment carried out in one state should be recognized in another country.[1048] For instance, perpetrator could be stalking the victim on Internet, writing her threatening emails, calling her co-workers, boss, parents, neighbours, the police, and otherwise constantly threatening her. He might also occasionally arrive to her place of residence and then after infliction of physical / psychological damage, flee back to his place of residence. The Directive does not provide for a clear answer which country's officers should carry-out vulnerability assessment in such cases. The principle of recognition does not help in establishing the initial jurisdiction. It can be presumed that the "first come, first served" principle will be established in practice.

1043 Theo Gavrielides, *supra* note 1039, p. 19.

1044 *Ibid,* p. 20.

1045 Richard Lang, "The EU's new Victim's Rights Directive: can minimum harmonization work for a concept of vulnerability?" *Notthingam Law Journal* 22, (2013) 1, 93.

1046 As Richard Lang argues, it is based on proposition that "free movement rights include the right to stay where you are.", p 91. Thus, even a *hypothetical* movement is enough.

1047 Suzan van der Aa, "Post – trial Victims' rights in the EU", at p. 251.

1048 However, that is not obvious either. The principle of mutual recognition works for the benefit of court decisions and does not yet encompasses administrative acts.

Regarding cyberstalking, Richard Lang notes that "there is doubt as to the *locus delicti* of a cybercrime"[1049] – he wonders whether it should be the place of server of the place of the perpetrator. It can also be recalled that applicant's centre of interests has been established as the key forum with regards to Internet delicts in civil matters.[1050] In some countries, stalking is a criminal offence and in others, it would fall under civil or administrative law. Very different scenarios may unfold and the rules on international cooperation might have been instrumental. The situation where victims may end up having to travel for the purposes of criminal proceedings in another country, and without the protection that could have been provided under the status of vulnerable victims, is highly undesirable. However, the Victims' Directive does not address these issues, thus "transnational victimhood effectively remaining unlegislated"[1051] and it cannot be expected that police and courts will be more cautious to fill in the gap that the EU legislator has left.

Two cases of CJEU in the area of freedom of movement also are significant for state responses to VAW in cross-border settings. The case of *Land Baden-Württemberg v Metin Bozkurt*,[1052] concerned a Turkish citizen who was convicted for domestic violence. Thus, the issue of his expulsion from Germany has arisen under the Decision No 1/80 of the Association Council[1053] of 19 September 1980 on the development of the Association between the EEC and Turkey. The CJEU held that in the situation of divorce, the convicted perpetrator does not lose his rights relating to legal status. Regarding the abuse of rights, the Court noted that the marriage was not a sham and the Turkish perpetrator was only legally using his rights, thus it cannot be seen as abuse of rights. Concerning public policy exception, the CJEU thought it was for the member state's court to decide whether the perpetrator caused a genuine and sufficiently serious threat to a fundamental interest of society. Thus, Decision No 1/80 in principle was not considered an obstacle for the convicted perpetrator of DV to stay in the country, but it also did not rule-out expulsion, provided that he is causing a threat.

The CJEU also considered a case *P.I. v Oberbürgermeisterin der Stadt Remscheid* concerning the expulsion of an Italian man from Germany after his conviction for sexual violence against his former partner's daughter.[1054] Notably, the Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within

1049 Richard Lang, *op.cit*., p. 93.

1050 Joined Cases C-509/09 and C-161/10, eDate Advertising GmbH, v X and Olivier Martinez and Robert Martinez v MGN Limited, CJEU 25 October 2011.

1051 Richard Lang, *supra* note 1045, p. 94.

1052 C-303/08, Land Baden-Württemberg v Metin Bozkurt, intervener Vertreter des Bundesinteresses beim Bundesverwaltungsgericht, 22 December 2010.

1053 Association Council was created by the Agreement establishing an Association between the European Economic Community and Turkey which was signed in Ankara on 12 September 1963 by the Republic of Turkey on the one hand and the Member States of the EEC and the Community on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1).

1054 C-348/09, P.I. v Oberbürgermeisterin der Stadt Remscheid, 22 May 2012. The case concerned sentencing of the perpetrator with 7,5 years of imprisonment for forcing his former partner's daughter, who was 8 years old at the time, to perform various sexual acts including sexual intercourse, while threatening to kill the mother and other siblings.

the territory of the Member States[1055] (Free movement Directive) establishes that expulsion of the EU citizens as well as their family members is a very restricted measure, which can seriously harm individuals. The German court considered that the perpetrator continued to be a threat to public security, thus he was ordered to leave or face deportation. The CJEU ruled that it was within the discretion of member states to decide whether the crime was causing a serious threat to the fundamental interests of the society, which comes under the concept of "imperative grounds of public security." The CJEU also stressed that the threat for such behaviour in the future must be genuine. It is thus concluded that member states have a rather wide set of measures to react to cross border VAW, even to the point of expulsion of the EU citizen, if he/she poses a genuine threat. Arguably these decisions of the CJEU fill-in some aspects of cross border protection, which are not covered by the Victims Directive. However, there are few possibilities to ensure that the perpetrator does not travel through the member states'open borders, and continue causing a threat.

In order to provide the necessary cross-border protection, the Victims' Rights Directive is supplemented by two other documents that together make the EU Victims' package: the EPO Directive and the EU Protection Measures Regulation. These two instruments are aimed particularly at cross-border protection orders, whether they are adopted under civil or criminal law.

2.3.5. The EU Directive of cross-border protection in criminal matters

Since the proposal for the EPO Directive was registered, the new instrument was largely criticized by scholars.[1056] The EPO Directive is not directly related to VAW and mentions it only to state that it protects "not only the victims of gender violence" (Recital 9). The Directive applies to all persons in all cases of cross border protection in criminal matters. The EPO Directive does not mention gender based violence victims or intimate partner violence victims among "particularly vulnerable persons."[1057] Nevertheless, the initial idea for adoption of the EPO Directive itself was very much inspired by concerns for domestic violence and VAW in general.[1058]

Although it is clear that the Protection Measures' Regulation applies only to protection orders in civil matters, while the EPO Directive applies to criminal matters,[1059] the demarcation of the scope of these instruments remains uncertain to some extent. Article 3 (1) of the Regu-

1055 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34).

1056 Susan Van der Aa, Jannemieke Ouwerkerk, "The European Protection Order: No time to Waste or a Waste of Time?" European Journal of Crime, Criminal Law and Criminal Justice 19 (2011) 267-287, at. 271. However, this article was written when only Proposal of the Directive was pending and subsequently some significant changes were introduced.

1057 Only minors and persons with disabilities are mentioned as an example, see Recital 15.

1058 Explanatory Memorandum on EPO, Council Document 5677/10 of 22 January 2010, p.4.

1059 Recital 9 of the Preamble of the Regulation.

lation defines protection measures under it to include prohibition of entry into certain places, prohibition to contact, prohibition to approach. Article 5 of the Directive includes very similar measures to those that fall under the Regulation. The Regulation provides that "civil matters" should be interpreted autonomously and with due regards to the EU law principles. It is not the nature of the authority taking the protective measure which constitutes the decisive criteria[1060] – but the nature of the legal act it applies and the character of the proceedings concerned. It appears to be an over-simplification to say that the EPO Directive applies to criminal measures and the Protection Measures' Regulation to civil protection orders. Considering that in some member states protection orders are of a hybrid nature (Scandinavian states in particular) and difficult to classify, it is probable that in practice member states' courts will face dilemmas of whether to apply the Protection Measures' Regulation or EPO Directive[1061]. Moreover, in some member states, civil protection orders simply do not exist. As the EU legal instruments do not provide any clear guidance on how to proceed, each state needs to adopt adequate procedural rules, in order to be able to give the full effect to the system envisaged under the EPO Directive and the Protection Measures' Regulation.

Considering the opposition during the legislative process,[1062] the EPO Directive and Protection Measures Regulation were drafted as two different documents. The Directive is grounded on the idea that the criminal protective order should also follow the protected person and the protection should not be lost while moving across the borders. The person should ask for the EPO, which can then prevent the perpetrator from entering certain areas, approaching the protected person and contacting him/her (Article 5).[1063] The EPO relies heavily on the national law of the executing state.

The national court may adopt a measure available under its (criminal, civil, administrative) law and corresponding to the measure issued in another member state. Therefore, EPO is "not a harmonized EU order" as such and there is no EU single standard.[1064] The effect of a protective order is simply extended territorially, provided that the victim uses her right to free movement.

With the view of smoother and faster cooperation, the system of central authority is created under the Directive (Article 4). The Directive establishes a principle that EPO is recognized "with the same priority" as any national measure, taking into consideration the

1060 Recital 10 of the Preamble of the Regulation.

1061 The same problem was identified by the Poems project final report, 2015. Mapping the legislation and assessing the impact of Protection Orders in the European Member States, Suzan van der Aa, Johanna Niemi, Lorena Sosa, Ana Ferreira, Anna Baldry. http://poems-project.com/wp-content/uploads/2015/04/Intervict-Poems-digi-1.pdf

1062 In particular, Slovakia and Sweden doubted the inclusion of administrative and civil protection measures under the same instrument as criminal protection orders, was indeed a good idea. See: Suzan van der Aa and Jannemieke Ouwerkerk. The European Protection Order: No time to Waste or a Waste of Time? *European Journal of Crime, Criminal Law and Criminal Justice* 19 (2011): 271.

1063 There are some slight differences in the texts of the EPO Directive and Protection Measures Regulation: i.e. the Regulation talks about the prohibition to enter the places of residence, work, regular visit and stay (Article 3 part 1 a). The EPO directive talks only about places where the person resides or visits (Article 5 a).

1064 Ruth Lamont, "Beating domestic violence? Assessing the EU's contribution to tackling violence against women", *Common Market Law Review* 50, 6 (2013): 1791.

relevant circumstances and risk assessment in case of protected person (Article 15) – unfortunately, only "where possible." The Directive thus leaves a rather wide scope of discretion for member states and the degree of protection may vary significantly.

Differently from the Protection measures regulation, it is not an instrument of automatic recognition – instead, it functions on the principle that the original measure of the issuing state must be replaced by a similar measure in the executing member state. Thus, the protection is mirror-like rather than automatic, and it requires an additional step, i.e. the adoption of a national measure. As the Explanatory Memorandum explains, "the executing State is not required to apply measures which go beyond its own legal system but to choose, from among those established under its legal order, those best adapted to the measures adopted by the issuing state in each individual case, specifically the measures which it would have adopted under its legislation in a similar case."[1065] Thus, it is clear that measures do not have to be the same but only similar in their contents.

Differently from Protection Measures Regulation, the EPO Directive includes provisions on governing law and competence of the executing state (Article 11), and delimitates it from the competence of the issuing state (Article 13). The issuing state retains the competence to withdraw or modify the EPO order. It also has the exclusive competence to issue custodial decision if the original decision was part of probation or supervision decision.[1066] The competent authorities[1067] have wide discretion in adapting protecting orders or refusing to recognize them, if no such criminal offence exists in their respective country. That may cause some problems with regards to EPO in respect of stalking, because it has not been criminalised in all EU member states.

Moreover, the delimitation of the jurisdictions of issuing and executing states may cause problems in practical implementation, because criminal protection orders usually cannot be imposed outside the context of criminal proceedings.[1068] They are not as such autonomous, differently from civil protection orders, although this is not true in all states, (e.g. in Lithuania the civil protection orders are tied with divorce proceedings). For instance, a protection order may apply as condition for probation or release from pre-trial detention. In that case, what is the basis for the executing state's court to adopt a "mirror-like" decision, if they cannot rely on their own criminal procedure provisions? The simplest solution would be adoption of an *autonomous* protection orders, but not all member states are ready for the changes or see the necessity for them, before actual problems arise.

Furthermore, the issuing authorities have the discretion to consider the length of stay – which may possibly lead to refusal on adopting EPO,[1069]if the person only travels to another

1065 Explanatory Memorandum on EPO, *supra* note 1058, p. 17.

1066 Article 13(1) of the EPO directive.

1067 The Directive refers to executing State and issuing State – but obviously, competent authorities are determined for issuing and execution of EPO in each member state. See Article 3 on designation of competent authorities.

1068 Poems project final report, *supra* note 1061, p. 223-224. However, there are different types of POs within the legal system, e.g. in Germany, civil POs, administrative POs, and criminal law POs exist simultaneously. Heinz Schöch, national report on protection orders, 2015, http://poems-project.com/wp-content/uploads/2015/02/Germany.pdf

1069 Poems project final report, *supra* note 1061, p. 218.

state for a short visit. The problem of "splitting the protection order" between the issuing state and the executing state has also been raised:

> "Think, for instance, of the situation in which the original protection order not only prohibited the offender to enter the street where the victim lives, but also the street of her parents' place of residence. The victim who moves to another Member State may prefer an EPO covering her new address in the executing State, while, at the same time, retaining the prohibition in relation to her parent's place in the issuing State."[1070]

The answer regarding a possible splitting of the EPO order is not clear. It is suggested that most likely, the courts would adopt separate orders in this event, but it also depends on the flexibility of the said national court.

Moreover, besides the requirement for double – assessment of the criminality of the offence, the Directive involves a procedure of an assessment of the seriousness of the need for protection, which can be evaluated as a "double burden."[1071] Notably, the special needs of the victim are already thoroughly assessed by the issuing state, and then the competent authorities of the executing state can do it repeatedly, within their own limits of discretion.

The grounds of refusal of the recognition are wide and it is perfectly justifiable to refuse recognition if under the national law, there is "no available measure" (Article 11 part 3). Obviously, that may cause some problems in victims' protection, even though in most of the states the prohibitions to enter victim's place of residence are available.[1072] However, the researchers in the area of protection orders in Europe also warned that some states may misinterpret the said provision and re-evaluate if victim could get it, in the first place: some states have "restricted the range of protected persons to a narrowly defined category of victims" and they may consider that under Article 11 part 3, they "are not obliged to provide an alternative measure if the foreign victim does not qualify for protection under national laws either."[1073] Member states may refrain from such a restrictive interpretation of the Directive but it is within their discretion to determine the scope of protection.

The Directive does not provide for much guidance on DV cases related to children. For instance, it is not quite clear how to apply contact orders, if a mother is protected against the abusing father, but his access rights to the child are not restricted, or when they *are* provisionally restricted, or when only a supervised contact is allowed. The EPO Directive does not seem to give a legal basis for inclusion of child protection measure into the original EPO order. Provided that the information on the child protection needs is included, the executing authorities could ensure that they are met. However, they are not required to do that.

The positive feature of the Directive is that it allows imposing criminal penalties for the breach of the measures taken in order to implement the EPO. On the other hand, criminal sanctions apply only if the law of the executing state provides for this (Article 11 part 2 (a). The executing authority may also adopt urgent and provisional measures, which could mirror protection to a certain extent. The Directive insists on monitoring the EPO even in case

1070 *Ibid,* p. 219.

1071 Poems project final report, *op. cit.,* p. 214.

1072 In some countries, they are only available during short-term period and before the court decision.

1073 Poems project, *op. cit.,* p. 220.

there is no available measure in executing state to implement it – in that case, the executing authority should report to the issuing state's authority of breaches.

2.3.6. The EU Regulation of cross-border protection in civil matters

Issues of globalization and movement across the borders have been identified as one of the biggest challenges to women's human rights by the SR on VAW, and regionally, the EU is entitled to address the matters with cross-border element, owing to the competence and the tools it possesses. Moreover, the EU arguably may also participate in decreasing of the public-private divide, both on macro and micro levels: by combining private and criminal law instruments and by challenging the old ways of viewing of VAW as private matter.

The EU Protection Measures' Regulation which entered into force on 11 January of 2015 in all the EU member states, except Denmark,[1074] is a private international law instrument, aimed at solving a problem of violation of human rights and as such, it is the document aimed directly at challenging private – public dichotomy. On the other hand, it faces the risk of being lost in translation by human rights lawyers – who are not specialised in private international law, and also private international lawyers – who are not interested in VAW. The Regulation applies directly, whereas the EPO Directive had to be transposed into national law. The EPO directive ensures that criminal protection orders circulate in the EU. However, the circulation of criminal procedure orders is not entirely as free and flexible as civil protection orders. The Directive is not an instrument of automatic recognition. The question thus arises whether this is a signal of a partial return to "private" matters? A great part of the answer lays in implementation of the legal instruments and whether member states' authorities manage to evaluate the actual needs of VAW survivors.

Protection measures can be of an administrative, civil, or criminal law nature and they can be adopted in respect of various crimes and offences. Considering the legal diversity of available protection orders, it is essential to safeguard that these orders can effectively follow the persons at risk. The application of civil POs in general provides a weaker protection, if due diligence standard is considered, because the victim often remains responsible for asking for this protection and reporting breaches. However, it can be suitable for some instances.

The reasons why victims of VAW may seek a civil protection order rather than one of criminal law (or besides a criminal order) can vary. On the one hand, the process for obtaining a civil order is usually faster, simpler, more efficient and less stigmatizing. The burden of proof is also less strict in comparison to what applies in the criminal procedure. On the other hand, its enforcement may be more difficult to achieve in other countries, considering that enforcement systems vary among states, and not all competent authorities are familiar with the dynamics of

1074 Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters. OJ L 181/4. Notably, Denmark has a special position in the field of the civil law cooperation, whereby a specific instrument applies to Denmark only after a special agreement is negotiated to this effect between the EU and Denmark. With respect to UK and Ireland, it is enough to inform about the decision to participate in an instrument in three months after its adoption. Contrary to Denmark, these states have a so-called "opt in" option regarding participation in EU's civil law cooperation. See Article 69 of the Treaty of Amsterdam amending the Treaty on European Union, 1999.

domestic violence. The Regulation does not provide for sanctions in case of an infringement of the ordered measure. Unfortunately, the lack of provision of some guidance on sanctions may be seen as a lack of adequate response both to private-public divide and to cross border issues. It will not be obvious for all member states' authorities that sanctions are necessary.

2.3.6.1. Private international law measure – application in cases of VAW

The Protection Measures' Regulation is the first legal instrument of the EU to focus in particular on recognition. The principle of mutual recognition is the cornerstone of judicial cooperation in the EU in civil matters,[1075] ant it goes much further than in the area of cross-border criminal matters. The Regulations on civil matters provide for automatic recognition of judgments, requiring no specific recognition proceedings in the member state of enforcement.[1076] The final text of the Protection Measures' Regulation does not include rules on jurisdiction or conflicts of laws, although such rules had been suggested at the initial stages of the legislative process. The proposal of 2011[1077] included a provision (Article 3) according to which the competent authorities "where the person's physical and /or psychological integrity or liberty is at risk" were to have jurisdiction to adopt the appropriate measures. Notably, national jurisdictional rules most often require physical presence of the person requiring protection or of the defendant to assume jurisdiction.[1078] Some states require future physical presence of the person seeking protection.

The Regulation applies in cases where recognition of a protection measure is sought in another member state than the one where it was ordered.[1079] Situations of domestic violence are mostly internal which can be seen as the reason why the Regulation does not provide for grounds of jurisdiction or rules on the applicable law.[1080] However, it can happen that VAW is inflicted in cross-border settings, or the situation subsequently acquires cross-border elements: e.g. after incidents of violence, when victims are fleeing abroad or returning to the member state of last common residence.

Member states have very different approaches to civil POs in their national law[1081] and the Protection Measures' Regulation accommodates only the most common ones. In particular, it covers prohibition or regulations on "entering the place where the protected per-

1075 Burkhard Hess, "Mutual recognition in the European law of civil procedure", *ZVglRWiss* 111, 2012, pp. 21-37.

1076 For instance, Regulation No 805/2004 (Article 5 and 20), Regulation 1896/2006 (Article 19), Regulation 861/2007 (Article 20), Regulation 4/2009 (Article 17), Regulation 1215/2012 (Article 36).

1077 Proposal for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters. COM/2011/0276 final.

1078 Preliminary document No 4 of February 2015 for the attention of the Council of March 2015 on General Affairs and Policy of the Conference. Para 42.

1079 Article 2(2) of the Regulation.

1080 Eva de Götzen, "Protection orders across Europe: first remarks on Regulation No 606/2013", in *Family Law and Culture in Europe. Developments, challenges and opportunities*, Katharina Boele –Woelki, Nina Dethloff, and Werner Gephart (eds), (The Hague: Intersentia, 2014), p. 282.

1081 For the overview of different protection orders within the EU, see Suzan van der Aa, "Protection orders in the European Member states: where do we stand and where do we go from here?" *European Journal of Criminal Policy and Research* (2012) 18: 183-204.

son resides, works, or regularly visits or stays"[1082]; of "contact, in any form, with the protected person, including by telephone, electronic or ordinary mail, fax or any other means"[1083]; on "approaching the protected person closer than a prescribed distance" [1084]. I.e. it applies only to place, contact and approaching restrictions. Any additional protection measures, for example, mandatory counselling, prohibition to study in the same educational institution as the victim, and etc. are outside of the scope of the Regulation.

The title of the Regulation refers to "civil matters", which is a term to be interpreted autonomously and in accordance with the principles of the EU law and referring to legal relations of private persons.[1085] The autonomous character of this term means that its interpretation can be different from that under national law and the sui generis explanation in the context of the EU law prevails. The concept of "civil matters" has been interpreted by the CJEU in matters related to the family. This Regulation is adopted on the basis of Article 81 of TFEU, and it can be said to work with the public /private divide, because it aims to protect a public interest, i.e., the positive obligation of the state to protect its subjects from domestic violence through private international law measures. On the one hand, the Regulation is currently little known by experts on gender equality or on private international law. The discussion around this Regulation is so far limited to a few introductory articles by private international law scholars.[1086] Nevertheless, a private international law measure can be quite adequate to the target goal because the instruments in this area are highly efficient. The mutual recognition principle has gone much further in the area of "civil matters" than in criminal matters.[1087] The global and regional private international law measures are often very effective in concrete cases, in comparison to instruments in the area of public international law. The significance of public-private law divide in the area of child protection has been abandoned already for quite some time.[1088] Thus EU Protection Measures' Regulation is well in line with these developments.

The structure of the Regulation is rather simple: this is the first document in the EU that is limited to recognition. The Regulation establishes a system of recognition based on an issued certificate. For example, a woman who needs cross-border protection may apply for it in the place of her previous residence or in the place where she moves. She would have to request a court to issue a multilingual standard-form certificate, in accordance with the Regulation's requirements. When the protection measure is adopted and certified in one member state, it should be automatically recognized in all other member states, and enforced without any special declaration of enforceability.[1089]

1082 Article 3 (1)(a) of the Regulation.

1083 Article 3 (1)(b) of the Regulation.

1084 Article 3(1)(c) of the Regulation.

1085 Burkhard Hess, Feasibility study, *The European protection order and European law of civil procedure,* 2011, Para 4.

1086 Dorothea van Iterson, "Recognition and Enforcement of Foreign Civil Protection Orders – a Topic for the Hague Conference?", in *A Commitment to Private International Law*, Essays in honour of Hans van Loon, The Permanent Bureau of the Hague Conference of Private International Law, Intersentia, 2013. Eva de Götzen, *supra* note 1080.

1087 Burkhard Hess, *Feasibility study*, *op.cit.*, paras 22-23.

1088 See a thorough review by Katharina Boele-Woelki and Maarit Jänterä-Jareborg, *supra* note 428.

1089 Article 4(1) of the Regulation.

The grounds for non-recognition are limited consisting of public policy (*ordre public)* and irreconcilability of judgments.[1090] Rectification and withdrawal is only possible in the member state of origin, whereas in the member state of recognition and enforcement,[1091] only the factual elements of the measure (e.g. the address of a person) can be "adjusted".[1092] The forms of the certificates are provided for under the Commission Implementing Regulation (EU) No 939/2014 of 2 September 2014 establishing the certificates referred to in Articles 5 and 14 of Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters.[1093]

The Regulation applies to various forms of violence and VAW would fall into its material scope. It refers to protection measures adopted where there are "serious grounds for considering that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk." [1094] Besides physical and sexual violence and harassment, it also refers to stalking, intimidation and other forms of indirect coercion. The Regulation applies to protection against any private (natural) persons, i.e., women, children and men, who face risks are covered by it. In comparison to other international documents, and even Victims Directive, it lacks a focus on recognition that gender based violence is significant or that women experience violence disproportionally. The Regulation mentions gender-based violence only in Recital 6, saying that it can be employed "for example as to prevent any form of gender-based violence or violence in close relationships… It is important to underline that this regulation applies to all victims, regardless of whether they are victims of gender-based violence." The Regulation instead relies on very neutral and technical approach: there is a civil protection order and needs to be applied throughout the EU.

The Regulation should also apply to vertical and/or horizontal relations involving same-sex couples. The application of the Regulation does not allow for extensive analysis of the family status of the victim and the perpetrator. Even though the application initially may depend on such classification (initially, many domestic violence situations will not have the cross-border element) and some protection measures under national systems are reserved only to spouses, this question is irrelevant *after* the issuance of the certificate. Notably, refusal of the recognition is not allowed on discriminatory bases.[1095]

2.3.6.2. Protection Measures Regulation as a solution for child abduction in cases of DV?

It has already been discussed how the 1980 Hague Convention provides very limited possibilities for mothers in domestic violence situations to leave the perpetrator in safety

1090 Article 13 of the Regulation.

1091 Article 9 of the Regulation.

1092 Article 11 of the Regulation.

1093 Commission Implementing Regulation (EU) No 939/2014 of 2 September 2014 establishing the certificates referred to in Articles 5 and 14 of Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters. OJ L 263/10, 3.9.2014.

1094 Recital 6 of Protection Measures' Regulation.

1095 Recital 32 of the Regulation.

with their children. The Brussels IIa Regulation[1096] establishes an even stricter regime of return in cases of abduction for the member states of the EU. Return orders must be enforced automatically and expeditiously, provided that adequate arrangements are made with respect to mothers and children fleeing DV.

However, many aspects relating to the requirement of "adequate arrangements" under Article 11(4) of the Brussels IIa Regulation remain unclear and raise questions: for example who has to prove that they have or have not been made? Should the central authorities guarantee the safe return of the returning child and also the safety of the returning parent? Should the court analyse the availability of protection measures (in theory or in specific circumstances)? In my opinion, there is a reason to emphasize the advantages of the Protection Measures' Regulation as a method of ensuring these adequate arrangements. If the certificate for the protection of the taking mother is issued under this Regulation, it can serve as proof of such arrangements. It can be expected that the Protection Measures' Regulation will help with meeting the needs of mothers escaping domestic violence.[1097]

Having regard to the lack of protection for the taking parent (and possibly the child), so-called undertakings – voluntary promises of the applicant – have been employed in particular in common law systems as a remedy or supplement to available measures. The undertakings have been endorsed under the 1980 Hague Convention[1098] and approved under the 1996 Hague Convention and Brussels II*a* Regulation. However, their ineffectiveness has been subject to repeated criticism.[1099] Notably, the compliance with undertakings depends upon the perpetrator himself. In the cross-border context, it has been suggested to adopt safe-harbour orders or mirror-orders (or safe return orders) in the state of enforcement. Katarina Trimmings, who analysed undertakings in the context of international abduction, noted that this practice has been developed mainly in the United States, it is not known in continental Europe and in addition, it is a lengthy process.[1100] The Protection Measures' Regulation does not provide for mirror-orders, and only focuses on the above mentioned three types of prohibitions referring to place, contact, and distance.

However, delimitation of the Regulation from other documents (e.g. Brussels IIa) is not entirely clear in the area of protection against DV. For example, the European Commission[1101] and Eva de G*ö*tzen[1102] note that protection measures taken in the course of divorce should be governed by Brussels II*a* Regulation and Protection Measures' Regulation should be reserved to violence among neighbours, cohabitees and same-sex partners.

1096 Notably, consultation procedure on amendment of the said regulation is ongoing and it can be expected that the provisions on abduction will be changed.

1097 Dorothea van Iterson, *supra* note 1086.

1098 Conclusions and Recommendations of the 5th meeting of the Special Commission (October-November 2006), para 1.8.1 note that court orders involving undertakings are "in keeping with the spirit of the 1980 Convention."

1099 Carol C. Bruch, "The unmet needs of domestic violence victims and their children in Hague Child abduction convention cases," *Family law quarterly*, p. 541, Katarina Trimmings, *Child abduction within the EU*, *supra* note 412, p. 155-161.

1100 *Ibid,* Katarina Trimmings, p. 159.

1101 Proposal for the Regulation. Comment on Article 1 (Scope).

1102 Eva de Götzen, *supra* note 1080, p. 286.

Burkhard Hess[1103] and Dorothea van Iterson[1104] suggest that Protection Measures' Regulation should also apply in the course of divorce proceedings. The author of the thesis suggests that the measures aimed at protecting the spouse against domestic violence should be seen as excluded from the scope of Brussels II*a* Regulation and the Protection Measures' Regulation should apply. First, a clear conceptual line must be drawn: violence should not be seen as a "matrimonial matter."[1105] This goes back to the necessity of recognizing that domestic violence is not a private matter of the family. Moreover, separating between the types of victims stresses the importance of family status, because Brussels II *bis* applies only to spouses. Finally, the Protection Measures' Regulation is better suited for the aims of protecting against violence, including spousal violence, in comparison to Brussels II*a* Regulation. It is suggested that court decisions taken under the Brussels II*a* Regulation should continue to be recognised and enforced under that Regulation, and protection orders against spousal violence, inter alia other types of violence, should be recognized under Protection Measures' Regulation.

How the line should be drawn between the two interacting Regulations should be more clearly specified in the ongoing review of Brussels II*a* Regulation. Moreover, if the said Regulation is chosen as the one applicable for recognition of child protection measures (and not the Protection Measures' Regulation), then it should be stated very clearly that the central authorities must ensure the safe return of the child. At the moment such an obligation is not provided under Article 11(4) of the Brussels II*a* Regulation, which provides that "[a] court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."[1106] It is also doubtful whether the by-pass of court decisions on non-return under Article 11(8)[1107] should continue to apply, especially in the cases of domestic violence. On the one hand, in general it does not support the principle of mutual trust. On the other hand, in this author's opinion, it should never be used in the context of domestic violence. In addition, recalling the "sleeping giant" on protection of children across border, if the provisions of Brussels II*a* Regulation do not cover the urgent measures aimed to protect the taking parents from violence of the left-behind parent, then the 1996 Hague Convention should apply to such urgent measures.

Finally, it must be stressed that enforcement, the procedure of implementation of protection measures, and sanctions upon infringement are left for the national laws of the member states.[1108] The cross-border enforcement of protection orders has been the "unresolved issue" and even a possible limitation of mutual recognition principle. As mentioned

1103 Burkhard Hess, *Feasibility Study*, *supra* note 1085, para 58.

1104 Dorothea van Iterson, *supra* note 1086, p 618.

1105 Recital 8 of Brussels II *a* Regulation provides that it applies to dissolution of matrimonial ties and does not apply to any ancillary matters.

1106 Article 11 (4) of Brussels II *a*.

1107 Article 11 (8) of Brussels II *a* provides: "Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child."

1108 Recital 18 of the Regulation.

above, the Protection Measures' Regulation does not require adaptation of the measure that is not known in that legal system. As a result, the principle of mutual recognition produces the effect where national systems, including both substantive law and enforcement systems, are considered to be *functionally equivalent*. It remains to be seen whether this assumption holds in practice. Spontaneous convergence would be the best outcome for the remaining differences but development in very different paces may also occur.

2.3.7. The need for substantive developments

Although the EU has no general competence to adopt measures of substantive law, Article 83 TFEU provides some room of approximation of definition of criminal offences, provided that they are particularly serious and have a cross-border element (the so-called "Euro crimes"). For instance, human trafficking, organized crime, as well as terrorism, money laundering and counterfeit fall into this definition. The list is not closed, and the Council, with the agreement of European Parliament, may adopt a decision that specifies other areas of crime and then ordinary or special legislative procedure can be used to adopt a directive that establishes minimum rules of approximation (Article 83 part 2 of TFEU). The question arises whether the list should extend to forced marriages, FMG, so-called honour crimes, which often do have a cross border element. This possibility exists, and it would be legally justifiable. On the other hand, it could create an effect where the EU would disproportionally focus on forms of VAW that are seen as non-Western. Thus, it could come with the risk of marginalizing the problem and ignoring other forms of VAW, although they are more prominent in the EU.

In practice, VAW often crosses borders and women are stalked on the Internet or harassed by surprise visits by their perpetrators. However, it could be argued that the most essential aspects needed (cross border protection) are regulated by the Victims package. It is unfortunate, because in some areas, the approximation of substantive definitions would be needed. For instance, a feasibility study on standardisation of national legislation on VAW within the EU also established the general need for this process – but at the same time admitted that "there is still a limited legal basis for harmonization for many of the legislative measures we propose."[1109] The EIGE Study to identify and map existing data and resources on sexual violence against women in the EU[1110] showed the diversity of responses within the member states.

1109 *Feasibility study to assess the possibilities, opportunities, and needs to standardise national legislation on violence against women, violence against children, and sexual orientation violence*. Daphne. European Commission, 2010, p. 151.

1110 *The study to identify and map existing data and resources on sexual violence against women in the EU*. Luxembourg: Publications Office of the European Union, 2013. The main findings of the study were: "Few Member States have systematic professional training and protocols on sexual violence for the key actors who will be confronted with sexual violence, such as police officers, prosecutors, judges, health practitioners and social workers. There are significant differences between Member States in terms of providing materials for victims of sexual violence, and materials for professionals dealing with victims, perpetrators and incidents. While some Member States have several actors and resources working on and addressing sexual violence, others are lacking in this regard. There is a lack of research studies focusing specifically on sexual violence or covering various target groups affected by sexual violence."

Article 84 allows adopting a Directive aimed at crime prevention, without the effect of harmonization of MS laws. The EU added value assessment of 2013 also suggested using this article to adopt a Directive on prevention of VAW,[1111] while underlining that it is significant to act in the area of criminal law, "in view of the gaps in the EU framework … and the necessity to improve women's protection against gender-based violence in the EU."[1112] However, if no harmonization is envisaged, there is no added benefit of such a directive, and the same goals could be achieved with soft law measures.

If minimum standards of approximation are envisaged, the questions of proportionality and subsidiarity arise and it can be rather difficult to justify[1113] that the directive is "adoptable." Prevention of GBV is precisely the area which requires much debates and some compromises. Instead of introducing a new secondary legislative act, (or a bundle of acts, as discussed under 2.3.3), the EU efforts perhaps should focus on the proposed horizontal treatment directive,[1114] which would implement a principle of equal treatment of persons. Ultimately, it is based on the same paradigm as prevention of VAW. As to the substantive gaps in this area, the author proposes to ratify Istanbul Convention instead of working in parallel on directives on VAW, rape, or FGM. The said work is arguably not going to bring any more added value than further fragmentation.

2.3.8. Summary

The EU partly has responded to the problems of VAW by adopting the Victims' package, but its legislation has been limited to procedural developments. The Victims' rights package also applies a range of novel strategies that may be used by the VAW advocates. However, the Victims Directive provides a very wide discretion to the member states. Although the Directive was intended to address gender based violence as well as intimate partner violence, there is not clear framework on doing that and the directive provides only a minimum level of protection. The conceptual decision that introduced gender neutral definition of GBV should be further monitored because its' effects may be wide in some member states.

The Directive is supplemented by two cross-border documents which fill-in some gaps. International instruments on child abduction so far have given very little consideration to the needs of women who flee from domestic violence with their children to a new country. Meanwhile, apparently the majority of international abduction cases reveal that it is often the mothers that abduct their children, and often DV is in the background. Thus, the introduction of EPO Directive and the Protection measures' Regulation may be seen as a positive step, because it should ensure that criminal protection travels with the victim and that civil protection measures apply together with the requirement to return the child to

1111 EAVA 3/2013, p. 29.

1112 *Ibid,* p. 17.

1113 This particularly relates to member states of Eastern Europe, which refrained from ratification of Istanbul Convention (Lithuania) or have not yet changed their laws to comply with it (Poland).

1114 Implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. Ex-Ante Impact Assessment Unit, Milieu Ltd, European Parliament, 2014.

the state of origin. The Protection Measures' Regulation, in addition, is an instrument for challenging public-private divide. At the same time, considering the great legal diversity between the national legal systems, it needs to be "translated" into the enforcement systems of the EU member states. The EPO directive, meanwhile, is left mostly at the discretion of the competent authorities of the executing state. The EU Victim's package is based on the expectation that member states legal systems should be (or rather, should become) functionally equivalent. The ratification of Istanbul Convention by the EU would help to improve that goal and would fill the most prominent gaps that the EU currently faces. Thus, it is suggested that the EU should accede to the Convention instead of replicating the same work and devaluating the Convention. Only as a much less desirable alternative, the EU could adopt a Directive on prevention of VAW and should refrain from adopting a bundle of Directives in order to provide a parallel regulation to Istanbul Convention.

3. KEY PROBLEMS OF THE LITHUANIAN REGULATION ON PREVENTION AND PROTECTION AGAINST VAW

The relevance of the analysis in the area of domestic violence against women in Lithuania is tremendous. According to the specialised Eurobarometer report, 48 per cent of the respondents in Lithuania said they knew a female victim of domestic violence within their circle of friends or family.[1115] Currently this constitutes the highest number in the European Union (hereinafter—the EU). It can only be guessed how much it costs for the state: e.g. it was calculated that in in the EU, the costs of gender based violence are 256 billion euros annually.[1116] The research completed in Lithuania showed that the state annually loses at least 935 million litas (271 million euros) due to domestic violence.[1117] Notably, this number was estimated without indirect losses due to failure to come to work or lost productivity. Violence against women outside of domestic environment has also been left outside the scope of the data. It can be estimated that costs of VAW are significant for the small country, and decreasing them is essential.

The results of European survey on violence against women showed that in Lithuania only a minority of women seek for help.[1118] There is a deep mistrust in institutions, shame and unwillingness to make VAW "public".[1119] Some victims do search for help but fail to receive it, as demonstrated by the cases against Lithuania before the European Court of Human Rights (*Valiuliene v Lithuania*, *D.P. v Lithuania*). The significance of the problem in Lithuania has been noted by various human rights monitoring bodies and noted by the CEDAW Committee as the priority issue that needs particular follow up.[1120] Hence, this section of the thesis focuses on Lithuanian legal regulation from the perspective of its compliance with the international law.[1121] It is considered that example may be useful for Lithuanian practitioners and legislator, and necessary to undertake, considering that the thesis is defended in Lithuania. It can be useful for other legal systems as well, because the key problems replicate those faced in some other countries. At the same time, the local context is taken into account, and thus practical examples and case practice of national courts are analysed. Finally, it can be useful for those interested in international law and its developments. The analysis of legislation and selected cases may help in seeing the essential gaps that remain and that could be better addressed by the international law.

1115 European Commission. Special Eurobarometer 344. *Domestic violence against women* (Brussels: 2010), http://ec.europa.eu/public_opinion/archives/ebs/ebs_344_en.pdf.

1116 *Estimating the costs of gender-based violence in the European Union*, *supra* note 3.

1117 Vanda Lisauskaitė, "Lyčių diskriminacijos kaina," In *Mes neprašome, mes reikalaujame: konferencija Jungtinių Tautų tarptautinės Kairo konferencijos veiksmų programai 15 metų*, Compiled by Marija A. Pavilionienė, (Vilnius: Valstybės žinios, 2010), 53–70.

1118 Fra survey, 2014, *supra* note 2. The survey found that only 1 % of victims searched for help in social services and 2 % in crises centres, 24 % in police

1119 *Ibid.* 21 % in Lithuania said they distrust institutions, the average in the EU – 9 %, 25 % said they experience shame, average in the EU – 12 %, and 22 % in Lithuania named unwillingness to make their case public as the reason for not seeking help (average in the EU – 12 %).

1120 CEDAW Concluding Observations, CEDAW/C/LTU/CO/5, 24 July 2014, para 46, where the Committee requires the state to submit written information on two issues, one of them being VAW.

1121 The CEDAW Recommendations to Lithuania, contained in its Conclusive observations of 2008 and 2014, are considered, as well as ECtHR decisions addressed to Lithuania. Moreover, the compliance with the EU legislation and Istanbul Convention is also considered.

3.1. Gradual development of legal regulation on VAW in Lithuania

3.1.1. The position of international law on VAW in Lithuania

The CEDAW can be both visible and invisible on the national level, as illustrated by situation in Lithuania. The CEDAW was ratified in 1995 without any reservations;[1122] and the Optional Protocol to the CEDAW, allowing individual petition, was ratified in 2004.[1123] It was considered that the Convention applies directly and there is no need to adopt any implementing laws.[1124] Unfortunately, in 20 years the Supreme Court relied on the CEDAW only once, in 2014.[1125] Moreover, the mentioning[1126] of the Convention had absolutely no effect on the essence of the case or the argumentation of the Court.[1127] Since the said case, it has not been used in court practice. In particular, the CEDAW has never been used in criminal justice cases. Despite ratification of the Optional Protocol to the CEDAW in 2004, the system of individual complaints has never been utilized either. At the same time, although the CEDAW is invisible by the courts, it is widely used by the non-governmental organisations in their work with women, lobbying attempts at parliamentary and municipal levels.

It can be suggested that ratification of Istanbul Convention would also strengthen the visibility and significance of other international law instruments in the area of VAW: and

1122 Convention on the Elimination of All Forms of Discrimination Against Women, ratified by Lithuania in 1995, *Valstybės žinios*, 1995-09-15, No. 76-1764.

1123 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, ratified in 2004. *Valstybės žinios*. 2004, No. 122-4460.

1124 However, it must be noted that in countries with monist or coordinative (mixed) approach to international law, the decisions of the courts are very important. Considering that the treaty is directly evocable, it is the task of the national Supreme Court to rely on it, and form the consistent court practice. See the resolution of the Constitutional Court of 28 March 2006 on the role of the Supreme court and court precedent as a source of law. Valstybės žinios, 2006, Nr. 36-1292. Coordinative approach is used to explain the inter-relation between international and national law from the perspective of coordination and coherence, without focusing on supremacy or hierarchy. Lyra Jakulevičienė, *Tarptautinių sutarčių teisė,* (Vilnius: Registrų centras, 2011), 392.

1125 Supreme Court of Lithuania, 11 April 2014, case 3K-3-199/2014. The case concerned alleged intersectional discrimination on the basis of sex and disability in the area of employment, where the respondent was the Romanian embassy. The said case, even though involving the case against a state, fell into the area of private international law, because it concerned unlawful dismissal of a woman with disability immediately after the applicant informed the employer of her pregnancy. In such situations states act as private persons and are treated as legal persons. The Court, however, did not even go into the issue of private international law and went directly to application of the Lithuanian Labour Code.

1126 To say that the Supreme Court "applied" the CEDAW in the said case is perhaps too strong of a statement. The court declared that the said Convention "must be mentioned" and then overviewed Article 2 in one sentence. The Supreme Court did not rely on General Recommendations, including the GR 28 relevant to intersectional discrimination, nor the jurisprudence under the CEDAW.

1127 The Supreme Court found that there was discrimination on the basis of sex but did not find proof of intersectional discrimination. It seems that the CEDAW had to be mentioned mainly because the periodic review of Lithuania's report under the CEDAW was due in 2 months since the Supreme Court decision. One of the issues raised by the CEDAW Committee was non-visibility of the CEDAW in Lithuania and non-reliance on it by national courts. The same recommendation was adopted in its Concluding observations on the fifth periodic report of Lithuania. Concluding observations of 2014, para 8.

in particular, the CEDAW and the ECtHR, because it provides that state parties "shall ensure that victims have information on and access to applicable regional and international individual / collective complaints mechanisms" (Article 21). However, as previously mentioned, Lithuania signed Istanbul Convention in 2011 with a verbal declaration, informing that "it will apply the Convention in conformity with the principles and the provisions of the Constitution of the Republic of Lithuania." What is the status of this "declaration"?

The author is of the opinion that it is much more than a simple clarifying declaration or a political statement.[1128] It must be recalled that the purpose of a reservation is amending, changing or displaying certain norms of the Convention, while clarifying declarations – such declarations are rather popular in human rights area – are attempts to make a clarification. Finally, political statements do not really have a legal effect on treaties and only are expressions of opinions on political questions. On the one hand, it could be claimed that the said verbal note has played the role of re-assurance of the Lithuanian society that the Convention is not going to shake the Lithuanian value system from its feet. On the other hand, the broad formulation of the statement raises legitimate questions whether this declaration is a reservation of general nature, which contradicts the purpose and object of the Convention.

The identical declaration submitted by Poland was evaluated as reservation, contradictory to the purpose and object of the Convention by Sweden,[1129] Austria,[1130] The Netherlands,[1131] and Finland.[1132] The same applies to Latvian and Lithuanian declarations, although they have not yet[1133] been officially met with objections, partially due to timing: Latvia has ratified the Convention in the end of May 2016, and Lithuania has not yet ratified it. The author concludes that such declaration should be treated as a reservation of general nature, which contradicts the Convention and should not be accepted or benefit the country that submits it. After all, the Convention was created in order to make changes to the national systems and values which condone VAW. These general reservations should be immediately withdrawn.

In the society of Lithuania (as well as in Poland), the Istanbul Convention is misrepresented as the Convention which legalises same-sex marriage and gender reassignment.[1134] The said misrepresentation could be explained as part of the informational war with Russia, which uses the image of "Gay Europe" in contradiction to its alleged stance behind

1128 For explanation on differences between the declarations, reservations and political statements, see Lyra Jakulevičienė, *supra* note 1124, 192-195.

1129 Objection to declaration of Poland to Istanbul Convention, contained in a Note Verbale from the Ministry for Foreign Affairs of Sweden, dated 15 February 2016, registered at the Secretariat General on 3 March 2016.

1130 Objection contained in a Note Verbale from the Permanent Representation of Austria, dated 11 April 2016, registered at the Secretariat General on 13 April 2016.

1131 Objection contained in a Note Verbale from the Permanent Representation of the Netherlands, dated 28 April 2016, registered at the Secretariat General on 29 April 2016.

1132 Objection contained in a Note Verbale from the Permanent Representation of Finland, dated 26 April 2016, registered at the Secretariat General on 29 April 2016.

1133 Last time checked in June 2016.

1134 "Lyties keitimą įteisininati Stambulo Konvencija arimiausiu metu nebus teikiama Seimui." 11 October 2013. Bernardinai. http://www.bernardinai.lt/straipsnis/2013-10-11-lyties-keitima-iteisinanti-stambulo-konvencija-artimiausiu-metu-nebus-teikiama-seimui/108578

traditional values. Notably, both Russia and the Holly See opposed the Convention because of its application to all women, including lesbian, bisexual, transgender women who suffer VAW (principle of non-discrimination on the basis of gender and sexual identity, Article 4). However, the mis-representation of the treaty also reveals a genuine lack of understanding of gender equality paradigm and the significance of the aim of gender equality. Moreover, another "threat" of the Convention, i.e. norms that require significant changes, is seen in the provisions on prevention of VAW. The section involves both embracing gender equality and actually teaching it in schools (Article 14).[1135] This was translated as a threat on "gender-ideology" indoctrination.

The ECHR is seen as one of the sources of the Lithuania legal system and can apply directly in the same way as the Lithuanian laws.[1136] It must be noted that national courts, eve first instance courts, do apply the ECHR. Thus Lithuanian courts theoretically could eliminate the necessity to apply to the ECtHR regarding violations of human rights in cases involving VAW. For instance, if the due diligence duty has indeed been breached, national courts can apply individual criminal responsibility of police officers and also compensate the damage attributable to the state. It must be noted that it is not enough to award civil damages to the victim, which should be paid by the perpetrator. In case of *D.P. v Lithuania*, the Supreme Court of Lithuania had in 2012 (before the ECtHR) adopted a decision to compensate civil damages to the victim.[1137] The Court noted that the perpetrator had been violent since 1997, and children suffered post-traumatic stress disorder and one of them killed himself, as a result of father's violence, and awarded non-material damage to the applicants (D.P and her daughter). However it was not really sufficient, and in 2013,[1138] the Government admitted the violation of Article 3 of the ECHR, and agreed to pay just satisfaction[1139] under the Convention as well. Namely, the state has the responsibility for failure to protect against VAW and prevent damage. Prosecution and awarding damages to be paid by incarcerated perpetrator is not enough, and the state must be held responsible solidarily (jointly), like the *Osman v UK* and subsequent cases have shown.

Lithuania had a problem with implementation of some of the ECtHR decisions addressed to it.[1140] Moreover, the national approach to the ECtHR decisions on DV was relatively weak, in comparison to other cases. As previously mentioned, after the *Manic v Lithuania*[1141] case, which concerned a Moldovan/Romanian father, who was denied his rights to see the child

1135 Vyrautas Malinauskas, "Kodėl neratifikuoti Stambulo Konvencijos". Laisvos visuomenės institutas, Accessed 15 June 2016, http://laisvavisuomene.lt/kodel-neratifikuoti-stambulo-konvencijos/

1136 Constitutional Court of the Republic of Lithuania, ruling of 24 January 1995 'Regarding compatibility of Articles 4, 5, 9, 14 of the European Convention on human rights and fundamental freedoms and Article 2 of its 4th protocol with the Constitution of the Republic of Lithuania'.

1137 Supreme Court of Lithuania, 8 June 2012, no. 3K-3-281/2012.

1138 Application no. 27920/08.

1139 The sum was only 6 000 euros, but notably, the Supreme Court of Lithuania had already awarded civil damages to be paid by the perpetrator and this concerned only the damages to be paid by the state for the violation of the Convention.

1140 In particular, especially regarding conditions in prisons, an impeached former President's right to participate in elections, and transgender rights.

1141 Manic v. Lithuania, ECHR, no. 46600/11. 13 January 2015.

residing in Lithuania, the Chairman of the Supreme Court of Lithuania called[1142] for urgent change of approach of the Lithuanian courts. The cases of *Valiulienė v Lithuania* and *D.P. v Lithuania* have not received similarly serious response of the national judiciary, even though recognition of violation of Article 3 in two domestic violence cases against Lithuania was a very significant development. Furthermore, the further analysis of case practice of Lithuanian courts shows that while relying of the ECtHR practice in VAW cases, they do not apply the ECtHR practice, or even choose those decisions, which allow adopting a high threshold of evidence.[1143] E.g. in alleged rape case of an under-age girl, the court relied on the practice of the ECtHR[1144] to underline that any doubtful circumstances must be explained to the favour of the accused, although the cases that the national court relied upon have absolutely nothing to do with rape or VAW.[1145] Had the national court relied on standards developed in cases on VAW, the results of the case, or at least the argumentation would had been different. It can be claimed that national judiciary sometimes applies a rather indeterminate approach to international law and it may lead to the lack of justice for VAW victims.

3.1.2. Addressing domestic violence

3.1.2.1. Recognition of DV as a crime of public importance

In its Concluding observations on Lithuania of 2008, the CEDAW Committee recommended that the state introduced a specific law on domestic violence against women that provides for redress and protection.[1146] Lithuanian Government itself acknowledged in 2003 that the legal bases for isolating a perpetrator from family were lacking, bases for initiating criminal proceedings were inadequate, and the enforcement of the existent bases was unsatisfactory.[1147] Thus the adoption of the Law for the Protection against Domestic Violence[1148] in 2011 must be evaluated as a positive and timely development. It corresponded with identical developments in other countries in Europe and globally.

The most important novelty of the law is that it recognized DV as "attributable to the acts of public importance" (Article 1), which means that victims of domestic violence do not have to pursue private prosecution and necessarily submit complaints, take a very active role in their cases. Of course, very serious DV and femicide could had been deemed as "acts of pub-

1142 Rimvydas Norkus, "Strasbūro pamokas…"

1143 For instance, see a case discussed bellow, Šiauliai regional court, 10 November 2015, criminal case No. 1-91-309/2015.

1144 Barbera, Messegué and Jabardo v. Spain, app.no. 10590/83 6 December 1988; Telfner v. Austria, no. 33501/9620, 20 March 2001.

1145 The court could have relied on M. C. v Bulgaria, which was more similar to the case at hand, and which determined that the state must act with due diligence even concerning those sexual VAW claims, where victims did not show signs of active resistance.

1146 Concluding observations of the Committee on the Elimination of Discrimination against Women: Lithuania. CEDAW/C/LTU/CO/4 8 July 2008, para 74 and 75.

1147 Resolution of Lithuanian Government on the affirmation program for equal opportunities for men and women (3 June 2003, came into force 7 June 2003). Para 47.

1148 Law for the Protection against Domestic Violence, No. XI-1425, 26 May 2011.

lic importance" and criminal cases had been initiated by public prosecutors also prior to the Law. However, under the previous legal regulation[1149] the decision whether concrete DV case is of public importance fell entirely within discretion of the prosecutor. At the same time, the state agents were not encouraged to view DV seriously, and without a clear definition that it is an act of *public* importance, they treated it largely as a *private* act. This is clear while looking at the statistics on DV prior to the law and after the adoption of the law: although the numbers of the calls were quite similar, the actual cases were rare. After the law, in 2014 DV constituted 10 percent of all crimes.[1150] Approximately 80 percent of victims are women, and around 90 percent of perpetrators are men. Furthermore, every year, more DV cases are registered.

Although the Law on protection against DV was adopted in 2011, the amendments necessary for its alignment with the Criminal Code and Criminal Procedure Code were only adopted in 2013.[1151] The amendments ensured that in all cases of DV, pre-trial investigation is launched regardless of whether the victim submits a complaint. This very young law has been amended even six times[1152] until 2016 October. Some of the amendments were rather only specifications that needed to be adopted with the view of practical problems, others changed the legal framework more significantly. In particular, this could be said of the last amendment of 12 October 2016, which comes into force in 2017.

3.1.2.2. Lack of comprehensive conceptual response

A conceptual response to GBV is lacking. In 2014, the CEDAW Committee recommended adopting a "comprehensive strategy" on decrease of VAW.[1153] It is also one of the recommendations that are to be implemented urgently.[1154] In particular, the Committee stated that it "regrets that the State party has not adopted a comprehensive strategy aimed at eliminating sex- and gender-based violence against women in all its forms in public and private life. Without any strategy on VAW, which would follow other cases than DV, a clear gap can be identified. The Committee was also concerned about the insufficient information on the evaluation of the implementation of the National Strategy for Combating Violence against Women 2010-2012, which indicates inadequate monitoring of the implementation of policies and measures and evaluation of results achieved."[1155] It must be underlined that adoption of a new strategy, as well as assessing of the effectiveness of the

1149 Criminal Procedure Code, 14 March 2002. No. IX-785, Article 167.

1150 State Audit Office, 2015. Apsaugos nuo smurto artimoje aplinkoje organizavimas (Managing protection against domestic violence). National audit report. Published 5 May 2015. No. VA-P-40-1-8. P. 8.

1151 Law amending Articles 167, 409 of the Criminal Procedure Code, 2 July 2013, No. XII-502, Valstybės žinios, 2013-07-13, Nr. 75-3773; Law amending and supplementing Articles 140, 145, 148, 149, 150, 151, 165 of the Criminal Code. 2 July 2013, No. XII-501, Valstybės žinios, 2013-07-13, Nr. 75-3772.

1152 Law on amendment of Article 4, no XII-474 2013-07-02, Law on amendment of Articles 5, 7, 8, 9, no XII-815 2014-04-10, Law on amendment of Article 5, No XII-1678 2015-05-07, Law on amendment of Article 5, No XII-1717 2015-05-14, Law on amendment of Article 10, No XII-2339 2016-05-12, Law on amendment of Articles 1, 2, 4, 5, 7, 8, 9 and repeal of Article 6, 2016-10-12, No. XII-2680.

1153 2014 Concluding observations, para 23 (b)

1154 2014 Concluding observations, para 46.

1155 *Ibid*, para 22.

previous strategy is relatively easy and does not require a Parliamentary voting or Governmental cooperation. The Social security ministry could undertake this task.

The Committee was "concerned at the gender neutrality of the legislation and relevant policies" in the area of domestic violence. Notably, gender based VAW can also occur in the family, as recognized by GR 19. The Committee considered that gender neutrality in Lithuanian DV regulation has an impact on "effective implementation, the inadequate provision of services, the limited monitoring and enforcement of protection orders imposed on perpetrators and the low number of prosecutions and sentences in domestic violence cases."[1156] Therefore, although in practice many countries do have gender neutral or partially gender-neutral provisions on DV, and Istanbul Convention also allows this gender neutrality (only in the area of DV and still keeping the ties with gender equality paradigm), under the CEDAW Convention this is not acceptable.

The Committee also recommended ratifying the Istanbul Convention. Implementing the approach provided in this regional Convention would be plausible from the conceptual point of view, because it would mean that the state in principle can retain its gender-neutral stance on DV. The necessary steps would involve filling-in the gap in the area of VAW which is perpetrated by strangers and acquaintances, and implementing the Law on protection against domestic violence "in a gender-sensitive manner,"[1157] as suggested by the CEDAW Committee.

The Law is gender-neutral and does not contain the definition of gender-based violence or VAW. This corresponds to most legislations of the member states in the EU, with some exceptions.[1158] "Close environment" under the Law covers a wide range of persons, and is not connected to gender. That should not necessarily be considered a problem under the CEDAW or relevant international law instruments, if the concept of GBV and / or VAW was defined at least in post-legislative acts (i.e. strategies, programs, national action plans).[1159] This is currently missing. The national strategy on decrease of VAW was abandoned in 2014.[1160] In addition, domestic violence under the Lithuanian law is also not related with equality paradigm. The asymmetric nature of the crimes is ignored. This clearly differs from the CEDAW, which sees VAW as a form of sex discrimination, and DV as one form of such discriminative violence. It is necessary to at least include the aspect of gender in the Lithuanian legal system in order to comply with the CEDAW and with the ECHR. The strategies for such inclusion could be varied: separate law on VAW, which would include a broad definition of GBV; inclusion of the definition of gender based violence within the Law on DV (that would still fail to address other types of VAW, which are not committed in domestic environment); temporary measures could include adoption of a programme on VAW or renewal of the strategy on decrease of VAW.

1156 2014 Concluding observations, para 24.

1157 2014 Concluding observations, para 25 (b).

1158 For instance, Spain has a gender-specific legislation on VAW, at the same time also giving protection for men.

1159 The regional Istanbul Convention does not require implementation in gender-asymmetric terms, but it does require soft law (program-level) conceptualization of GBV as stemming from unequal power relations.

1160 Resolution of Lithuanian Government on national strategy for decreasing violence against women and its action plan 2007-2009. 22 December 2006. Relevant from 2007-10-14 to 2014-06-03.

3.1.2.3. Traditional gender roles in DV situations

After the adoption of the Law on protection against domestic violence, the Supreme Court was in a position to claim (in 2014) that domestic violence may be recognized as a crime not only in cases of extreme physical violence but also when minor physical pain is inflicted and health is only slightly impeded.[1161] This is a significant development, because that leads to conclusion that even if no traces can be found on the victim's body, it does not mean that VAW did not occur. I.e., it can be proven by other evidence, such as witness statements, including the victim herself, phone records to the police, the neighbours and etc.

However, in some lower-instances court decisions, violence is alarmingly treated as behaviour that is acceptable in the society.[1162] The Supreme Court also repeatedly suggested evaluating the testimonies of women undergoing divorce very carefully and thinking about their motives.[1163] This can be seen as discouragement in believing the victims' testimony and looking for her hidden gain. On the one hand, it is true that persons are undergoing a sensitive period during divorce and separation. Nevertheless, the traditional approach to gender roles is also at stake. In the traditional Lithuanian tales, women are often seen as deceitful and masterful in lies, and the said stereotyping may have an effect for state agents, as well as ordinary members of the society. It must also be recalled that the Government itself argued that the injuries in case of Valiulienė v Lithuania were of "merely trivial nature,"[1164] before the ECtHR found the violation of Article 3. This arguably shows marginalisation of damage of DV within the state.

In a case of systemic psychological violence, threats and harassment, against under-age daughters,[1165] the Supreme Court of Lithuania upheld the application of the perpetrator and returned the case to first instance, because some of the actions were considered as part of "his duties as a father."[1166] Later however, the Supreme Court also recognized that the perpetrator indeed tried to create an atmosphere of fear and anxiety, which was more than "conflicts in the context of divorce," and recognized the perpetrator's behaviour was indeed threatening.[1167] In other cases, the sceptical view of the victim's testimony prevailed, e.g. in a case where the victim complained her husband does not allow her to leave the apartment, and later also admitted he raped her, the courts omitted the accusations of sexual violence and the Supreme Court upheld this position.[1168]

Although the Law can be praised for distinguishing various forms of DV, the lack of explicit targeting of intimate partner rape and subsequently, the lack of taking it into account, is very alarming. The author sees it as a substantial gap of the Lithuanian regulation. The concept of

1161 Supreme Court of Lithuania, , 15 April 2014, case No. 2K-162/2014.

1162 Human Rights Monitoring Institute, 2014. *Nusikaltimų aukų teisių direktyva: naujas požiūris į artimųjų smurto aukas*, p. 14. https://www.hrmi.lt/uploaded/Apzvalgos/Tyrimas_auku-teisiu-direkt.pdf

1163 Supreme Court of Lithuania, 2 January 2011, case No. 2K-71/2012, Supreme Court of Lithuania, 4 June 2013, case No. 2K-299/2013.

1164 Valiulienė, *supra* note 89, para 55.

1165 Supreme Court of Lithuania, 4 June 2013, case no. 2k-299/2013

1166 The particular actions were: screaming at daughters for disorder in apartment, bullying regarding their cloths, following and filming everything with his mobile phone, grabbing a computer, and etc.

1167 Supreme Court of Lithuania, 1 July 2014, case. 2K–347/2014.

1168 Supreme Court of Lithuania,1 July 2014, case No. 2K-323/2014

marital rape or speaking more broadly, intimate partner sexual violence, still needs to be explicitly prohibited. Sexual violence at home is quite prevalent in the country but it is also very latent.

For example, an anonymous survey of 300 women (who are married or have lived with partners) conducted in Vilnius Maternity Hospital revealed that 80% of respondents said they did not know the difference between consensual sex in marriage and marital rape; 60% had experienced sexual harassment and 30% per cent said they had been forced into having sex with their husbands against their will.[1169] Although the Law mentions sexual violence as one of the forms of domestic violence, the specific definition of marital / intimate partner rape is not provided for in the Lithuanian legislation. In theory, there is no basis for claiming that a spouse is exempted from liability due to his status, and there is no good reason for it to be allowed in practice.

However, in practice these cases are rare: e.g. the empirical research presented by Vilnius judge shows there were no cases of sexual violence in the families in 2013.[1170] Considering that there were almost 300 cases analysed, and some of them involved serious physical violence, it is very highly unlikely that perpetrators *never* resorted to sexual violence. On the contrary, the data could be lacking because sexual VAW is not treated seriously by the legislator, and victims also lack necessary awareness. The legislation which does not include any specific provisions on intimate partner sexual violence was seen as a failure to fulfil the Council of Europe's minimum standards.[1171] It must be noted that Lithuania is not yet a full party to the Istanbul Convention – and precisely this Convention was used by European Women's Lobby as encompassing these minimum CoE standards. However, the CEDAW Committee in 2014 also clearly recommended criminalizing marital rape in a more explicit manner.[1172] Thus, there is a ground to claim that it should be done, both from the international law perspective, and from comparative law perspective and internal necessity.

The application of the Law in cases of former partners and partners without common household is not consistent. There is a lack of data of applying it to same-sex partners. The application Law on Protection against domestic violence is not tied with the notion of family – instead, the concept of "close environment" is provided, and it includes current and former spouses and partners. However, in case of violence against former partner with whom the perpetrator had a common child, the regional court of Panevėžys held that the case did not fell into the category of domestic violence. Notably, despite the said common child, the former partners did not have a common household and the victim lived with another person.[1173] This raises questions whether in all instances where the perpetrator does not have a common household and marriage ties with the victim, the Law is not applicable. For instance, the victim may be a lover of the perpetrator who is also married and leads a common household with his spouse. Moreover, does immediate moving-out of the partner or spouse lead to non-application of the Law? It must be recalled that the ECtHR

1169 Barometer on rape, *supra* note 10.

1170 Alenas Piesliakas, *Vilniaus miesto apylinkės teismas. 2013 metais Vilniaus miesto apylinkės teisme išnagrinėtų bylų dėl smurto artimoje aplinkoje tyrimas*, (Vilnius, 2014).

1171 Barometer on rape, *op.cit.*

1172 2014 Concluding observations, para 25 (e).

1173 Panevėžys regional court, 2014, case no. 1A-436-581/2014.

recently decided in case *M.G. v. Turkey*[1174] that Turkey had violated Article 3 (as well as Article 14 in conjunction with Article 3) because it has not applied the protection regime to divorced women for a period of time. It is suggested that Lithuania should abstain from making the same mistake. It is also underlined that EU package also applies to provision of protection for all victims of crimes, despite the family status. Thus in order to coordinate the Lithuanian law with the international standards, it is offered to extend protection to former partners and partners who do not live together.

A question may also arise whether the case practice of the ECtHR on the concept of family should be used in the Lithuanian context. Should protection be tied with "family" status at all? Notably, the Court has ruled that family ties are not pre-defined and it is the emotional connection between the persons that matters.[1175] Even in cases of same-sex partners who do not share a common household, the notion of family life may be applicable.[1176] However, in the opinion of the author, the application of the Law on Protection against domestic violence should not be tied with the concept of the family under the ECHR. The formulations of the Law are wider and should be interpreted broadly. It does not have to correspond to the notion of "family members" under the Criminal Procedure Code (Article 38)[1177] or the concept of "close relatives" or "family members" under the Criminal Code (Article 248).[1178] The scopes of the legal acts are different. It is recommended to keep the approach which separates the Law on Protection from the concept of the family and whatever the political debates that may follow. The protection should apply to the widest range of persons as possible, including the following situations:

- Partners who do not live together with the perpetrator,
- Former cohabitants,
- Lovers and partners of perpetrators who are married or have households with third persons,
- Same-sex partners, and transgender partners, even if they do not live together with the perpetrator.

The reason for such wide application - which currently is possible under the Law,[1179] if it is interpreted in such a way - is to protect as many people from DV as possible. Sexual

1174 M.G. v. Turkey, no. 646/10, ECHR, 22 March 2016.

1175 Keegan v. Ireland, app.no. 16969/90, 26 May 1994.

1176 Vallianatos and others v Greece, app. nos. 29381/09 and 32684/09, 7 November 2013.

1177 Article 38 of the Criminal Procedure Code provides that family members are: cohabiting parents, children, brothers, sisters and their spouses, as well as the person's spouse or cohabitant, the spouse's parents and former spouses. Persons who are engaged to get marry, as well as persons who are adopted are also considered family members for the purposes of criminal procedure in Lithuania.

1178 Article 248 part 1 provides that close relatives are the parents (adopting parents) and children (adopted children), brothers, sisters, grandparents and grandchildren. Article 248 part 2 says that the perpetrator's family members are cohabiting parents (adoptive parents), children (adopted children), brothers, sisters and their spouses, as well unregistered cohabiting partner or a spouse of the perpetrator, and parents of the spouse.

1179 However, the last amendment of the Law provides that the family member of a person whose death is "directly related" to DV is: a spouse, a person who lived with the deceased together, had a common household and was connected by personal intimate commitments, and direct conginuity relative, brother, sister, or dependent. Article 2 part 2 of the new version of the Law on DV.

orientation, gender identity, family or marriage status should not be the reason for refusal to apply protection against violence. This corresponds with the CEDAW Committee's Concluding observations, where the need to protect LGBT women and non-married women has been stressed repeatedly. It is also in compliance with Article 18 (protection of victims and their relatives) of the Victims rights directive.[1180] It must be noted that discussions are currently ongoing whether to extent specialized support to victims' relatives, with the exception of the perpetrator. However, this goes beyond the issue of support. The very first need of the victims and their dependents is security. Thus available consultations at specialized centres (NGOs that provide psychologist, lawyer services) can hardly meet this need and is not likely to transpose the requirements of the Directive.

The last amendment of the Law (12 October 2016) provides that the family member of a person whose death is "directly related" to DV is: a spouse, a person who lived with the deceased together, had a common household and was connected by personal intimate commitments, and a direct-line relative, a brother, a sister, or a dependent.[1181] This provision does not allow to apply it to partners who are not cohabiting, or persons who had gaps in cohabitation or seized living together. It allows speculations as to whether the Law is applicable to same sex partners. The author is of the opinion, as explained above, that the protection should be applied to all persons, including same sex partners.

3.1.2.4. Lack of broader conceptual approach

Some other conceptual definitions are currently lacking in the legislation, even though they have not been mentioned by the CEDAW Committee nor are they directly addressed by CEDAW. First, female genital mutilation is not yet defined as a crime, although recently a proposal to include it was submitted by one member of the Parliament;[1182] it was subsequently rejected by the Government as irrelevant to Lithuania. Second, stalking and cyber-stalking is also not defined in the legislation as an offence. It is only treated as a crime of "terrorizing" if victim manages to prove that she has faced a serious threat to life and/or health.[1183] Moreover, bullying in schools is also not strictly defined, and violence against children is not explicitly criminalised in separate provisions.[1184] Finally, the concept of multiple / intersectional discrimination is also not included in the legal system of Lithuania.

1180 Lyra Jakulevičienė, Vladimiras Siniovas, *Protecting Victims' Rights in the EU: the theory and practice of diversity of treatment during the criminal trial*. National Report: Lithuania, p. 28

1181 Article 2 part 2 of the new version of the Law on DV.

1182 Presentation of the member of the Parliament Giedrė Purvaneckienė, "Moterų lytinių organų žalojimas – jau seniai aktualus Lietuvoje". 5 February 2016, Parliament of the Republic of Lithuania. On the other hand, this focus on FGM seems to be following the pattern of culturalism that postcolonial feminists are warning about. There are many unsolved problems of VAW that is more relevant to Lithuania at the moment, and the focus should clearly fall on them.

1183 Criminal Code of the Republic of Lithuania. 26 September 2000, No. VIII-1968, Valstybės žinios, 2000-10-25, Nr. 89-2741, Article 145.

1184 In 2013, the amendment of the Child protection framework law for explicit prohibition of violence against children was submitted to the Lithuanian parliament, however, it was later set aside. In August of 2016, the Ministry of Education proposed to include norms prohibiting bullying and violence in Lithuanian schools and educational institutions. The proposals are still in very early stages.

The CEDAW has also suggested including it,[1185] even though this recommendation is not seen as urgent. It must be noted that it does not seem to be sufficient to include the definition of multiple discrimination into the Law on Equal Treatment.[1186] The scope of operation of this law is restricted (see Article 3 of the Law), whereas intersecting inequalities must be recognized at all areas, including also religious schools. Adequate protection and victim support services must be provided to victims of all forms of VAW.

3.1.3. Substantive gaps relating to sexual VAW

3.1.3.1. Differentiation between rape and other crimes

Besides the suggested conceptualization of VAW frame in the Lithuanian legal system, there are some crucial notions that are currently missing in the legislation or must be critically assessed. Criminal Code provides for different sanctions in case of rape, when the "sexual intercourse" against person's will and using coercion is undertaken (Article 149), and sexual assault, when "sexual desire is satisfied" against person's will and using coercion (Article 150). Rape under the Lithuanian Criminal Code[1187] (Article 149) was in 2004 by Resolution no. 49 interpreted narrowly by the Supreme Court, i.e. only as vaginal-penis penetration.[1188] In essence, a moral judgement is thus projected, first by the legislature and subsequently by courts, on what should be considered "sexual intercourse" and what is considered only a "satisfaction of sexual desire."

The guidance on interpreting the scope of rape is provided in this resolution of the Supreme Court on 2004, which overviews court practice in Lithuania particularly in the area of sexual violence. The said overview is not in itself a precedent, but these resolutions are used by the national courts, and considering that Supreme court is responsible for guiding national courts and shaping consistent practice,[1189] they have a very real effect. The Supreme Court explained that rape can be applied only to heterosexual intercourse, whereas sexual assault by the person of the same sex, and heterosexual assault which does not involve vaginal penetration by penis should fall not fall under Article 149. For instance, in the case of 2012, the Court of Appeals of Lithuania relied on the said Resolution no. 49 of the Supreme Court in order to conclude that the female perpetrator cannot be accused under charges of "rape" of an underage girl but only of "sexual assault."[1190] Oral or anal sexual VAW, as well as same-sex sexual assault is subsequently prosecuted as "sexual assault" rather than rape, i.e. under article 150 of the Criminal Code, and these acts involve lighter sanctions. This deviates from international standard, i.e. the classic case of *Furundžija*, which described oral penetration as rape, and the subsequent *Kunarac* decision. In addition, the ECtHR relied

1185 Concluding observations 2014, paras 10-11.

1186 Law on Equal Treatment, 18 November 2003. No. IX – 1826.

1187 Criminal Code, Article 149.

1188 Resolution No. 49 of the Supreme Court of 30 December 2004 on court practice in criminal cases of rapes and sexual abuse. *Teismų praktika* Nr. 22, 2004, para 2.

1189 Constitutional Court of the Republic of Lithuania, ruling of 24 October 2007, On court precedents.

1190 Court of Appeals of Lithuania, 2 April 2012, case No. 1A-158/2012.

on the *Furundžija* / *Kunarac* definition in *M.C. v Bulgaria* case, and Istanbul Convention also provides that intentional "engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object" (Article 36 part 1 (a) must be criminalised. Thus, it must be underlined that the international law standards are differentiating between any penetration, which is considered rape, and other types of sexualised violence, but not between different types of penetration.

Furthermore, the Lithuanian Criminal Code also differentiates between rape and "forcing to have sexual intercourse", which is captured under Article 151 and provides even lighter sentencing, i.e. arrest or imprisonment up to three years. The essential difference between rape under Article 149 and forced sexual intercourse under Article 151 is that "rape" must involve explicit threats to use *physical* violence, thus intercourse following *mental* violence and all sorts of psychological intimidation (e.g. promising to fire, blackmailing into sex etc.) would not be seen as rape but would fall under Article 151. It must be recalled that Istanbul Convention allows to differentiate between sexual VAW by penetration and "engaging in other non-consensual acts of a sexual nature with a person" Article 36 part 1 (b), which still has to be criminalized.

The said differentiations do not seem reasonable, and contrasts with the interpretation of rape under international law, which sees "rape" as any intrusion into person's body, whether it is oral, anal, or vaginal.[1191]First, it provides a moral judgement on what "real sex" is, whereas oral and anal sex is described by law as "the way of touching" (*Lith.* sąlyčio būdas). It seems to be based on the assumption that traditional intercourse causes more damage. The moral guidance also seems to be based on an assumption that rapes need to be categorized on the basis of sexual orientation. There are no logical reasons why physical intrusion into a person's body should be differentiated (both in different articles and in lighter sanctioning) as less damaging, if it is done anally or orally. Same sex assault cannot be categorized as rape but only as sexual assault under the Lithuanian Criminal Code; it is a step forward, because the previous regulation would not even criminalize female perpetrators. [1192] Male rape by males was seen as distinct crime up to 2003, and the said distinction is somewhat kept. A further step needs to be done and consider all penetrative intrusions into physical integrity as rapes. From the perspective of international law, the definition of rape includes *any penetration* which was done without the consent of the person. Finally, it makes the victims go through the "trauma of description"[1193] of the physical intrusion. Although it is clear that some description is inevitable in order to prove guilt of the perpetrator, the categorization of these precise descriptions of intrusion throughout court procedure is not plausible.

1191 Prosecutor v. Kunarac, Kovač and Vuković, *supra* note 193, para 460. Crime of rape is described as any penetration, however slight, by a body part or any object used by the perpetrator.

1192 Criminal Code of 1961, Vyriausybės žinios, 1961-01-01, Nr. 18-148. Not valid since 2003. The difference between current legislation is that the previous Criminal Code applied only to male assaults on males, and prior 1993, consensual male sex was also criminalized.

1193 Term used by Navanethem Pillay, "Address -Interdisciplinary Colloquium on Sexual Violence as International Crime: sexual violence: Standing by the Victim," *Law and Social Inquiry* 35, No 4 (Fall 2010): 847-853.

3.1.3.2. Court practice

The Lithuanian courts apply a high standard of proof for cases of rape. Instead of choosing an element of coercion or that of consent, the system requires the presence of both, which makes it harder for victims to prove. Under Articles 149 and 150, the perpetrator must commit rape or sexual assault against the person's will, and "while using physical violence or threatening to use it." Furthermore, both of these articles also provide that criminal responsibility is only applicable if the victim complains, or the prosecutor so requires, or it is perpetrated in domestic environment.[1194] This means that the approach to sexual VAW in the community, is very similar to the approach to DV before 2011, when DV was not yet seen as a "crime of public significance." That means that theoretically, sexual violence in domestic environment could be treated differently, because the Law on DV provides that victim's complaint is not necessary and DV could also be sexual.

There is not logic in applying different standards, depending on whether the woman was raped by a stranger, acquaintance, or someone in her family. Despite the fact that prosecutor can decide to open the case on his/her own initiative, in practice the victim's complaint is required. The Supreme Court also explained that these particular crimes can only be committed with direct intent.[1195] This means that the person must fully understand that he is perpetrating this crime, foresee the harm, and aim at causing it. All of these elements must be proven.

For the purposes of how this translates to practice, a number of illustrative recent court cases have been selected. In some instances it seemed that the victims of rape are actually the ones being accused. For instance, in the case of alleged rape of the girl under 14 y. of age by her uncle, the Šiauliai regional court[1196] in 2015 examined the character of the victim, noted many times that she "liked boys", escaped from the orphanage, and drank alcohol. A similar scrutiny did not apply to her alleged perpetrator's character at all. The facts barely mentioned were that he was an unemployed man, whose wife was appointed as the legal guardian of his own niece. These scarce facts by themselves raise some questions of the alleged perpetrator's character. The disbelief and mistrust in the victim's claim is evident from the testimony of the orphanage's social worker. When the child told about the event to her friend, who encouraged talking to orphanage workers, "she was told to *decide* whether it *really* happened, because a *human being can be accused*. She *decided* that she had been raped"[1197](emphasis by the author). The humanity of the perpetrator seems to be of higher importance to the social worker than the under-age victim's humanity. The dis-belief and discouragement of the victim is rather obvious from the material. The forensic expertise and conclusions of psychologists did not help the judge to understand the victims' tendency to suppress the details of the rape, emotions related to it, nor her decision to talk about it more than a year after the event. The accused was found not guilty. It is not for the author to

1194 Article 149 part 5, Article 150 part 5.

1195 Supreme Court, Resolution of 2004-12-30, para. 19.

1196 Šiauliai regional court, 10 November 2015, criminal case No. 1-91-309/2015.

1197 *Ibid.*

argue otherwise – the argument is that the treatment of the victim has been unfavourable, and arguably prejudicial.

In the said case, the court relied on the practice of the ECtHR[1198] to underline that any doubtful circumstances must be explained to the favour of the accused. The cases that the national court relied upon have absolutely nothing to do with rape or VAW. It is regrettable that the court has not relied on the ECtHR practice on VAW and on rape in particular, nor applied a higher standard of care in case of a child victim. The deadline for transposition of the Victims Rights Directive was pending in the same month as this decision was adopted. However, even with the said directive, it is the substantive approach that needs to change and not only the procedural approach to victims.

In another case, the victim was in her last grade in school, when she was raped and beaten by a group of men. The perpetrator subsequently escaped Lithuania and spent 12 years in hiding abroad under a false name. He was found and prosecuted for rape. Two mitigating circumstances were found to soften his punishment: the fact that he was "sorry", and the fact that he covered damage (3,9 percent of it). The Supreme Court, however, reversed the decision of Pavevėžys regional Court and did not see these facts as mitigating circumstances. On the one hand, it is very good that the Supreme court reversed the previous decision, and recognized that a person in hiding cannot be *automatically* rendered as "regretting his actions" and 3,9 percent is not sufficient damage compensation. Still, this case is illustrative of the flawed tendencies in the national system. It must be noted that case file also shows that the victim has changed her statements a few times, under the pressure of the perpetrators of the crime, and has been consequently prosecuted for false witnessing.[1199] It is regrettable that criminal responsibility applies to victims who change their stance and decide to withdraw the complaints, if the facts by that time are established. The victims always face psychological pressure and "moral prosecution," and sometimes they are also prosecuted legally. This has been much discussed in Lithuania,[1200] yet the discussions were dominated by distrust and condemnation of the victims.

In a much-discussed case,[1201] which involved concepts of consent and sexual autonomy, a minor girl engaged in a group sex, while the perpetrators (27 y. man and 19 y. old woman) claimed they did not know that she was 13. Although it was established that the girl told the woman her age while chatting on the Internet, and also showed her pupil's ID to both of them, the appeal court agreed with the perpetrators. Apparently, they could not see her birth date on the ID, and claimed that some time has passed from the initial chatting, thus assumption could be made that she had already turned 14. Thus, the court qualified the case as offence to minor's sexual autonomy under Article 151[1] which applies when no elements of rape, sexual abuse or coercion to have sex can be found. However, the author

1198 Barbera, Messegué and Jabardo v. Spain, *supra* note 1144; Telfner v. Austria, *supra* note 1144.

1199 Supreme Court of Lithuania, 24 February 2011, criminal case 2K-127/2011.

1200 One much discussed case is that of two elite basketball players (twin brothers), who raped and robbed a minor victim in 1998. She was also talked into marriage with one of the brothers, and later prosecuted for false witnessing. After sentencing, the brothers continued their careers in basketball and became popular media celebrities.

1201 Court of Appeals of Lithuania, 2 April 2012, case No. 1A-158/2012

does not find the reasoning convincing, insofar as it focused on age as the main element.[1202] The girl was 13, and at least one of them knew it. The character of the victim, her physical appearance and her previous sexual conduct was much discussed in the case. The same cannot be said about the perpetrators. It is only briefly mentioned in the file that the 19 y. old woman was lovers with the much older man since she was 16 y., and that she was told that if she wants to remain his girlfriend, she must supply girls for group sex. The question emerges whether *his* character and tendency to groom under-age girls for group sex should not have been at scrutiny, rather than the under-age victims' character? This was seen as a case of sexual autonomy to engage into group sex in Lithuania, while it could also be seen as a case of a sexual predator and subordination.

The case file shows that the perpetrators delayed the girl until no transport to home was available, and she had to stay in a motel with them; they bought her alcohol, and pressured her "to try" various sexual acts despite her feeble objections. She stated in her initial testimony that she did not like it and "felt used" by having to engage into different sexual acts. While comparing the *M.G. v.Bulgaria* (which involved an older teenager, who also did not resist), this case is particularly striking because the Lithuanian victim did not receive any support from her mother. In *M.C. v.Bulgaria* as well as other rape cases under the ECHR, it was parents who demanded justice. In this case, the victim's mother in fact apologized to perpetrators and tried to refuse compensation of damage. The perpetrators have not apologized to the victim, despite her being psychologically harmed (as recognized in the file by experts) from the events. The case was not only about the possible subordination and predatory behaviour, but also about the grey areas of consent. It shows that under the Lithuanian system, two elements taken together – coercion and consent – make it difficult to prove the case of rape or sexual assault. As mentioned above, the court found that this was an offence to minor's sexual autonomy under Article 151[1] which applies when elements of the rape of the minor (up to 16 y. of age) cannot be proven.

The case was also appealed by the female perpetrator, and the Supreme Court partially upheld the request to soften criminal liability, insofar as it applied the so called "continuous intent" doctrine. The doctrine means that different episodes of rape, sexual assault, or infringement of minor's sexual autonomy, can be treated as concurrence of crimes, despite these actions being removed by days, months, or a year.[1203] This doctrine has been repeatedly applied by the Supreme Court in cases of rapes of minor girls.[1204] The Supreme Court

1202 The author is not convinced by the court reasoning that the minor was only a "couple months" short of 14 y. age, or "couple of years" younger than the perpetrator. First, it is not the "passing" as an adult that should count and be flexibly arranged by courts, but the actual age of the child. Second, it was in fact full 4 months before 14, and good 5-6 years difference with the younger perpetrator, and 14-15 y. with the older one. The author considers that in cases involving adults' sex with minors, and doubts of consent, the age limits should be treated rigidly rather than flexibly. The only acceptable flexible treatment could be justified by sexual relationships between children of the same or very similar age. On the other hand, the Court of appeals did not agree with the request to excuse from liability.

1203 Supreme Court of Lithuania, 13 November 2012, case no. 2K-547/2012.

1204 See, for instance, Supreme Court of Lithuania, 12 December 2012, case No. 2K-651/2010, Supreme Court of Lithuania, 13 March 2012, case No. 2K-53/2012.

also used it cases of threats and terrorizing DV victims,[1205] and explained how concurrence of crimes can have an impact on qualification and sanctioning for crimes.[1206] This thesis does not aim to analyse the aspects of punishment, however, this allows suggesting that future research could focus on investigation whether punishment is really deterrent in these cases.

It can be seen that sexual VAW and femicides in the community are not addressed in any Law or strategy in Lithuania, and any links with equality paradigm are missing. The approach of state officials and courts adequately lacks any gender sensitivity and sometimes even a humane approach. The lack of tying the problem with gender equality paradigm also manifests itself in the context of femicides, which follow after sexual VAW. During the last few years, there had been a number of cases of sexual VAW with very similar dynamics, where a young girl or a woman was attacked, for instance, while jogging, waiting for a bus, sharing car-expenses, or going on a first date (some of the court decisions are discussed further). All these women and girls were violently abducted, raped and murdered. Considering that there is a certain pattern to these murders, and considering that VAW repeats itself through generations, it is necessary to have a comprehensive strategy on decrease of VAW in the community as well. It should address sexual violence and femicides in particular. The concept of rape in the legislation should be tied with consent or coercion, and not both, it should be interpreted more broadly, and in accordance with the ECtHR practice.

3.1.3.3. New substantive definition of sexual assault

From the comparative law perspective, state laws on rape have developed in three waves: the first (1970s-1980s) related to expanding the definition of rape to include all sorts of penetration and made some evidential rules milder (e.g. resistance requirement), the second related to criminalization of marital rape and rape of males, and the third relates largely to focusing on consent rather than coercion and force, defining it in law, and "including all sexual violence (to comply with the CoE standard) under a single paragraph in the penal code."[1207] However, the Lithuanian substantive law has not been in line with these developments, as analysed above.

Based on the perspective of international law, the author suggests basing the concept of rape in Lithuanian law on consent. It must be considered that consent is offered as the basis of legislation in the area under practice under the ECHR, the CEDAW Commit-

1205 Supreme Court of Lithuania, 14 January, case no. Nr. 2K-116/2014. The case concerned a perpetrator constantly terrorizing his former wife (driving her into bushes, threatening to kill, etc.), setting her car on fire, setting her friend's car on fire, and a physical assault. The criminal activities were seen as concurrence of crimes and the perpetrator received 1,6 y. sentence, which was postponed. He appealed, asking to consider that all these actions were part of terrorizing, but the Supreme Court rejected the appeal and upheld the decision that it was concurrence of 4 different crimes.

1206 Resolution of the Supreme Court of 28 April 2016 on court practice in criminal cases that analyze complex single criminal activities and concurrence of criminal activities. *Teismų praktika* Nr. 44, 2016.

1207 See "Mapping legal measures and comparative analysis," In *Feasibility study to assess the possibilities, opportunities, and needs to standardise national legislation on violence against women, violence against children, and sexual orientation violence*. Daphne. European Commission, 2010, p. 50.

tee's jurisprudence, and Istanbul Convention. Thus, focusing on consent would ensure the highest degree of coherence with the global and regional developments at this moment of time. Furthermore, it is suggested to use only one definition of rape, in order to stop differentiating between vaginal, anal or oral rape. It creates a false dichotomy between "heterosexual" (Article 149) and "homosexual" (Article 150) acts, and "real" (Article 149 – sexual relations) and "not quite real" sex (Article 150 – satisfaction of sexual desires), "real rape" that involves physical violence (Article 149) and "not quite real," which involves "only" psychological intimidation (Article 151). From the perspective of international law, the said dichotomies are outdated.

Regarding the Lithuanian terminology, the author suggests that word "iššaginimas" would not be used in the legal language anymore. The legal semantics is of crucial importance, both from the perspective of victimology and for the legal reasoning. The word stems from "spreading, stretching"[1208] and it has a degrading and humiliating connotation. The prefix "iš" also shows finality, i.e. something which is done in a determinative way. In spoken language, even lawyers often resort to "išprievartavimas" (connotations to violating, using force, also with the element of finality) and employ the term of "iššaginimas" with certain un-easiness. It can only be imagined how the victims feel, having to face the term throughout the court proceedings. The un-desirable identity of the victim of "spreading" can contribute to pushing this crime even deeper into shadows. It is therefore suggested to apply more sensitive terms and use sexual violence, sexual assault, or a similar term. For instance, in Lithuanian it could be "seksualinis prievartavimas" (sexual assault/violence), as one term for all sexual conduct without consent, whether it is oral, anal, or vaginal and whether the threats were physical or mental. It must be recalled that in the case of *M. C. v Bulgaria*, the threats were certainly not physical and in fact, there were *no threats at all*, only the lack of consent.

Article 149, Article 150 and Article 151 could be contracted into one article, which includes all acts of sexual violence, and all types of penetration. The crucial notions of consent and sexual assault should be explained in a separate article in the end of this section (XXI). As a legal technique, the Code repeatedly includes Articles on "Explanation of the terms" in various sections (Article 269, Article 330, etc.). Sexual assault should be explained as to include vaginal, anal, oral, or any other penetration by any bodily part or object, and consent must be explained as given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances. It should also be clearly provided that marriage, partnership, or another family or intimate relationship do not relieve nor mitigate from liability, considering that the said crime is very latent in intimate relations.

Article 150 and Article 151 would then be deleted, because they would be abundant, when all types of sexual assaults would be merged under one article.[1209] It is also suggested to keep one sanction for all sexual acts (vaginal, anal or oral sex) because harm cannot be categorized

1208 Lietuvių kalbos institutas, Dabartinės lietuvių kalbos žodynas, 2008, see „žaginti": 1. *išplėsti, išskėsti:* Iššagyta šaka Sg. 2. Š, BŽ184, Šlč, ŠT149,334, NdŽ, KŽ, DŽ[1], Krk *jėga priversti turėti lytinių santykių, išprievartauti, išniekinti.*

1209 It can be also discussed whether Article 151 should be deleted, because it further differentiates between rape and forced sex with third person. However, the thesis did not aim at analysis of forced sex with third persons, thus this recommendation is not put forward and would require a separate analysis.

on these occasions. The sanctions would still be within a certain range and are arguably not too high, considering the comparative law perspective[1210] and also considering the high degree of harm and culpability,[1211] as well as latency and impunity for this crime. However, the author is most concerned with the need to change the substantive definition and the dignified[1212] protection of victims; whereas sanctions and punishment of the perpetrators is the issue of secondary importance for this thesis, which requires a separate analysis.

The author also suggests deleting the provision that requires the victim to submit a complaint to initiate proceedings, with the exception of sexual DV.[1213] Of course, even now the prosecutor still has discretion[1214] to initiate them in extreme cases, such as abduction-rape-femicide. However, in everyday rape cases this practice can be varied. In a similar way, DV was only initiated in very limited and extreme cases prior its' clear naming as a "public" matter. Therefore victims are often discouraged, because they need to take a very active role in these cases, while at the same time fighting pain, shame, shock, haziness and other effects that are not so clearly pronounced with other crimes.

From the comparative law perspective, this is a very unusual requirement for the victim to be so active in sexual VAW case, and among the EU countries, it was reported to be the unique requirement.[1215] The state continues to send a clear message to victims and to international community that sexual VAW in Lithuania is considered as "private matters". The message suits in cases where privacy is infringed, but does not suit in cases of extreme physical and mental violation of human integrity, such as sexual VAW. Because rape usually happens in closed and latent scenes, it is suggested that the workload of prosecutors would not dramatically change, if they would be required to initiate proceedings in cases of rapes that become known to them.

Another aspect that is not touched upon in the suggested formulation is that of the intent of the perpetrator. The Istanbul Convention simply provides that the sexual violence acts are intentional and then goes on to the defection of consent. The Explanatory report of the Istanbul Convention says that interpretation of the intent is within the limits of domestic law, "but the requirement for intentional conduct relates to all the elements of the

1210 See "Mapping legal measures and comparative analysis," In *Feasibility study to assess the possibilities, opportunities, and needs to standardise national legislation on violence against women, violence against children, and sexual orientation violence*. Daphne. European Commission, 2010. Also see the last part of the report by Kevät Nousiaainen and Christine Chinkin, supra note 986, which also compares EU MS legislations in the area.

1211 See Andrew von Hirsch, Nils Jareborg, " Gauging Criminal Harm: A Living-Standard Analysis", *Oxford Journal of Legal Studies* 11, 1 (Spring, 1991): 1-38. The authors offer an elaborate, insightful, timeless methodology for determining harm, in consideration of crime seriousness and for the purposes of, *inter alia,* sentencing law.

1212 Arguably this dignified protection or "procedural justice" would require not allowing evidence as to the sexual history of the child victim. It is absolutely unacceptable for the court to consider whether a minor "liked boys" before her alleged rape, and Article 54 of the Istanbul Convention, as a general rule, would permit sexual history only in exceptional cases. *Supra* note 17, Article 54.

1213 Article 149 part 5 of the current Criminal Code.

1214 See the Constitutional Court resolution "On the powers of the prosecutor to institute pre-trial investigation," which confirmed the constitutionality of provisions requiring active participation of VAW victims. 2006. No. 68-2514

1215 Lithuanian and Italian laws as a rule require private complaint, however, in Italy, once the complaint is made, public prosecution rules apply. See "Mapping legal measures and comparative analysis", p. 53.

offence."[1216] In Lithuania, this crime can only be done by direct intent, as explained by the Supreme Court. Nevertheless, if the article is adequately amended, a new interpretation seems to be necessary. The time is ripe to establish that this crime can be perpetrated by direct and also by indirect intent, i.e. when person understands she/he commits the crime and the damage that can be caused, and although he/she does not want it, allows the damage to arise (Article 15 part 3 of the Criminal Code).

3.1.4. Infringements of state's positive duties in selected VAW cases

This section of the thesis uses the case-study method in order to investigate how human rights approach, primarily under the ECHR, could possibly benefit the women rights in Lithuania. It examines two selected cases of VAW in a community and DV in Lithuania, where it could be argued that the state infringed its right to protect women against violence. Both of them concern gruesome femicides that happened in 2013. It is argued that in both cases, the state positive duties under the ECHR have been infringed. This part of the thesis also interconnects with the first Part of the thesis, which analyses the critique of human rights approach. It seems essential for the author of the thesis to demonstrate that the HR approach can be instrumental for changes. In particular, these cases could help establish that the state is jointly liable for murders of women and it could be illustrative to the need to systemic approach to sexual VAW.

The author of the thesis is aware that the choice of these examples is not very sophisticated in a sense that it falls perfectly within the understanding of "real violence" and "real rape" by the state agents, i.e. DV which ends in gruesome torture and murder, and rape where the attackers are not previously known to the woman and extreme coercion had been used. In such cases, we cannot talk about grey areas of psychological violence or consent. These are not "hard cases", in that respect. However, the step that the author sees as necessary – state joint liability for VAW – has not yet been taken on the national level. Yet another step – recognition that sexual VAW in Lithuania is a problem that requires primary prevention measures and legislative changes – also has not been taken. That is why, in this particular region (Lithuania), it seems strategically reasonable to start with the relatively easy cases. Furthermore, these cases are only easy regarding the type of VAW that was employed but they are not easy or completely obvious regarding the analysis of legal sources. Finally, the analysis of the said cases can be useful not only at the national level, but also to show the problems that were discussed in Part 2 of the thesis – in particular, the author considers that these two cases allow to claim that VAW can sometimes be seen as torture, and a form of discrimination under the ECHR.

3.1.4.1. Murder of L. V. in Dituva

The victim had been repeatedly beaten by her husband, who was admitted guilty on two accounts of violence (2010-09-23 and 2012-06-26). Moreover, a protection order was adopted to oblige the perpetrator not to approach the victim. On 11 February 2013, the perpetrator

1216 Explanatory report to Istanbul Convention, *supra* note 871, para 189.

infringed the protection order and came back home. The victim was scared and called the police a few times. She reported the situation fully, mentioning the protection order, her fear, the fact that the perpetrator was drunk, and the presence of (four) small children. The said call was classified as C category, i.e. insignificant. The police received the call for help at 18:46 and the victim was tortured during the period of at 21-23 in the evening, and subsequently murdered. In six hours since the call for help, the brother of the victim called the police to inform that he found his sister's body. The husband admitted murdering her. Although he later changed his testimony and claimed not guilty, the perpetrator was sentenced to 15 years of imprisonment.[1217] The call, as well as child testimony, was used as evidence.

It could be claimed that the situation raises the issue of violation of Article 2 and Article 3 of the ECHR. There is also some ground to claim that Article 3 and possibly Article 14 in conjunction with Article 3 of the ECHR have been infringed. The similar ECtHR cases of infringement of due diligence duty and failure to protect a person from murder under the ECHR also occasionally involved infringement of Article 6 (1) on right to court (Osman v.UK) or Article 13 on right to remedy (Kontrova v Slovakia).

First, regarding Article 2, the *Osman* test requires the element of knowledge from the part of the state agents about the real threat of violence. The requirement of foreseeability of damage applies. Finally, the causal link needs to be established.

The said elements are undoubtedly present. The police officers, who were on duty that evening, were also prosecuted and received fines of 3900 Litas (1130 Euros) each. The police officers denied their responsibility, claiming that they did not receive sufficient information from the universal service centre. Information on victim being "scared" was lacking, and only other elements of information (breach of protection order, presence of children, being drunk) reached the police. The appeal court substantiated the responsibility of the police officers on three elements: foreseeability, great damage caused, and causal link. Notably, the officer responsible for monitoring the station's work that evening had previously worked on other calls regarding this perpetrator.[1218] It was well known to the police that the man was dangerous.

According to the regulations applicable to the work of Lithuanian Police,[1219] the calls are usually distinguished between A, B, and C categories. The police officers try to arrive in 12 minutes after the A category call, in 20 minutes to the B category call and in 1 hour to the C category call. However, it also often happens that due to lack of resources and mis-calculations of the risk, the police officers never show up or come many hours later. In 2012, there was a discussion on providing for police discretion to refuse C category calls. The Commissioner General of the time admitted that time limits are not observed in practice: "they come in six hours, in eight hours, or do not come at all."[1220] Thus, it was suggested to legally abandon these calls, if the police officer so decides. The suggestion was not approved, but it

1217 Court of Appeals of Lithuania, 5 June 2014, Case no. 1A-409/2014.

1218 Klaipėda regional court, decision of 18 June 2015, analysed by the Court of Appeals of Lithuania, 5 June 2014, Case no. 1A-409/2014.

1219 Order of Prosecutor General of 2007-12-28 No. 5-V-850 (edited version on 2009-06-30, No. 5-V-464) on the rules of registry data on events registered by the police, para 3.

1220 Baltic News Service, "Policija nori atsisakyti kai kurių funkcijų," 17 August 2012.

shows how insignificant the C category calls are within the police call-registry system, and the call of the victim in this case was classified as C category call.

The court, finding the police officers responsibility, has ordered them to pay the fine to the state. The *Osman* test requires recognition of state responsibility for the breach of due diligence duty and not only the responsibility of police officer on duty. In this situation, the state accountability to the victim (i.e. her family members) has not been acknowledged. In fact, Klaipėda regional court actually claimed it was *state* which suffered great damage by the police officers' inactivity. Thus, the victims (children and relatives of the diseased) to this date have not received just satisfaction under Article 2 of the Convention. The case of *Civek v Turkey*[1221] should also be recalled, where victim was killed as a consequence of breached protection order and subsequently, a violation of Article 2 was found. The said case suggests that instead of registering the complaint or the call for help, state agents must immediately proceed to actions that protect, e.g. arrest the perpetrator. Thus, the national courts could apply the ECHR directly and find violation of Article 2.

Notably, strict liability of judicial authorities, judges, prosecutors and pre-trial investigative institutions (which include the police) is provided under the Civil Code.[1222] However, the Supreme Court of Lithuania has not seen liability cases against the police for failure to exercise their due diligence duty. Furthermore, the Article only provides that state fully compensates the damage done by *actions* of state agents, such as "unlawful conviction, or unlawful arrest, as a measure of suppression, as well as from unlawful detention, or application of unlawful procedural measures of enforcement, or unlawful infliction of administrative penalty – arrest." If the actions of state agents are committed with intent, state has the right to redress. The question arises whether the damage which resulted by *omissions* of state authorities are also covered by strict liability? The answer is not entirely clear, because such cases have not been adjudicated and the legal provision clearly covers only actions, and the said article is more relevant to violations of perpetrator's rights rather than victim's. In addition, the Law on compensation of damage infringed by violent crimes also provides a possibility to receive a small financial compensation,[1223] i.e. 3800 euros in case of violent murder. However, the said Law clearly says that it does not apply to damage compensation from persons responsible. Most importantly, under the ECtHR practice, state response and liability is not precluded by a system of compensation.[1224] Reprimanding and fining of the individual state officers has also been found insufficient (e.g. in the case of *D.J. v. Croatia*).

If the legal provisions will be interpreted to exclude the right to remedy of the victims (relatives of the deceased) to apply to court to claim liability of the police officers/state, *Osman* case should be recalled once more. Notably, in the said case, the ECtHR has not found the breach of due diligence duty under Article 2 – it only explained the test of due diligence and what elements it entails.[1225] However, it unanimously found the violation of Article 6

1221 Civek v Turkey, *supra* note 792.

1222 Art. 6.272 of the Civil Code. Civil Code, 18 July 2000. *Žin. 2000, Nr. 74-2262, No.* VIII-1864

1223 Law on compensation of damage infringed by violent crimes, Valstybės žinios, 2005-07-14, Nr. 85-3140.

1224 M.C. v. Bulgaria, *supra* note 724. D.P. v Lithuania, *supra* note 779.

1225 The Court decided by seventeen votes to three that there has been no violation of Article 2 of the Convention.

part 1 of the ECHR. If the relatives of Dituva victim are not provided legal remedy due to the clear breach of due diligence duty, which has already been recognized by the national court decision (only leaving the victims aside), the prospects of winning the case at ECHR level (at the very least, under Article 6), are very likely.

Second, an infringement of Article 3 could also be claimed, possibly in combination with Article 14. The elements of infringement of Article 3, and even torture under Article 3 of the ECHR are interpreted more flexibly than those under CAT.[1226] First, severity of mental and psychical suffering needs to be established. It can be claimed that the threshold may be seen as met in the Dituva case, because the deceased victim has suffered extremely, when the perpetrator repeatedly stayed free. Two court sentences did not provide her any safety, because the perpetrator could proceed with violent attacks, and finally could murder her without the state's real intervention. The extreme level of severity is proven by the fact that she has been tortured in the presence of her small children, and failing to receive any help from the police, despite her calls for help. The children, being the applicants in the application for state responsibility, could also claim the infringement of their rights under Article 3, because being forced to watch the mother's torture and murder arguably reaches the level of severity under Article 3. Second, the element of intent or purpose has to be proven. The ECtHR only demands that the sequence of events show that the actions were intentional. However, that does not mean that the intent of state agents to cause death has to be proven in order to find a violation of Article 2 or 3 (e.g. this is shown in *Opuz v Turkey*). Clearly the murder was intentional and the perpetrator has been prosecuted for it. But can it be claimed that the police intended the victim to be killed? They could certainly foresee it, even if it can be said that they did not aim at it. They intended the perpetrator to stay free, knowingly that he will keep beating the victim, because it was, accordance to the cultural norms of the policemen, a private matter. The link of foreseeability was acknowledged by the national court.

At the moment when the murder took place, the general approach of the police towards the implementation of the Law was rather sceptical. The dissatisfaction with overload of work, and perception of the work in DV area as futile, was often expressed by the police. According to empiric research on perceptions of the police officers, one third of the police officers and future police officers had doubts whether they should intervene into DV, which they saw as "private life."[1227] Negative perceptions and unwillingness to intervene was particularly common among the male police officers. It must be noted that most of the DV in Lithuania is perpetrated against women. However, at the conference organized by the police, the official statistics was presented with the police representative's remark "Thus I conclude, boys don't cry." He implied that DV is exaggerated and violence against men is symmetrical in scope, only the men do not "whine" about it. Assigning the "C" (insignificant) category to the call of the victim, as well as failure to show up in the Dituva murder case, also reveals that the police thought that DV against women is insignificant and symmetric family dispute.

The risk assessment guidelines under the Law against DV should be adopted until 31 December 2016. The lack of such guidelines is yet another proof of the state's ignorance of the

1226 The elements of severity of suffering, intention and purpose and the special status of perpetrator.

1227 Laima Ruibytė, Vilius Velička, *supra* note 35.

protection needs of the victims. One of the well-known risk factor is the process of dissolving the relationship,[1228] thus the police officers should keep in mind that the highest risk occurs when the victim attempts to break out from the cycle of VAW. In the past research, these risk factors have been considered as the most significant: past physical abuse, escalation of abuse, weapons, unemployment, alcohol and/or drug abuse, pregnancy, psychological abuse, separation, threats, sexual abuse, and suicidal thoughts.[1229] The breach of protection order should also be seen as a very high risk factor. It must be ensured that domestic violence calls are never placed into the "insignificant" category, classified as category C in the police system. In most usual cases, the DV call should be seen as B category call. However, it is argued that in cases where there is a protection order available, and the victim is scared, plus alcohol is involved and children are present, it should always be qualified as A category call.

It must be noted that VAW in Lithuania is prevalent and throughout 1990s especially, women faced great risk of kidnapping, human trafficking, rape, DV, and femicide. The situation has improved with the accession to the EU, and partial migration of organized crime groups. However, sexual VAW and DV remain at high levels. Eurobarometer showed that Lithuania is on the top of all countries in Europe, regarding prevalence of DV.[1230] Almost half of the respondents (48 %) knew a woman who suffers DV. The CEDAW Committee found that VAW is a matter of urgent priority in Lithuania, and the ECtHR found the state responsible for violations in two cases of DV. Meanwhile, Lithuania refrains from enshrining the goal to fight gender-based violence (or even the principle of non-discrimination and equality) in its legislation on violence, and it has eliminated the national strategy on decrease of VAW. At the present moment, it is very difficult to pin-point any state action that would aim at targeting the key causes of DV, i.e. the subordinate view of women, which is manifested to the extreme in cases of femicide.

It could even be claimed that there is a pattern of the femicides: for instance, in 2013, the women rights' NGOs reported of 7 cases of DV femicides in two months.[1231] This is great number of femicides for 2,8 million population. The cases where woman is killed, although protection order had been adopted, seem to be common, although no data is collected on their frequency. The question can even arise whether it is possible to invoke "grave and systematic" abuse of women rights in Lithuania under the CEDAW.[1232] Even if no such systematic neglect of the state is proven, the state certainly does not take into account the CEDAW recommendations under Article 5 (stereotyping) of the CEDAW. Thus, the prospect of such case under the CEDAW Committee is also reasonable.

1228 Jacquelyn Campbell, *Assessing Dangerousness: Violence by Sexual Offenders, Batterers, and Child Abusers*. (London: Thousand Oaks, CA: Sage Publications, 1995).

1229 Amanda L Robinson, "Reducing high risk victimisation among high rick victims of domestic violence," *Violence against women* 12, (2006, 8): 761-788, at 768.

1230 European barometer on DV, September 2010. http://ec.europa.eu/public_opinion/archives/ebs/ebs_344_en.pdf

1231 Sigita Purytė, Visuomenininkai niršta: moterys namuose užmušamos dėl valstybės vangumo. Lietuvos rytas. 25 March 2013. Accessed 5 June 2016. http://lietuvosdiena.lrytas.lt/aktualijos/visuomenininkai-nirsta-moterys-namuose-uzmusamos-del-valstybes-vangumo.htm

1232 As discussed in Part 1 of this dissertation, Mexico and Canada have been found responsible for grave and systematic abuse of women's rights in case of VAW.

3.1.4.2. Murder of E.D. in Dembava

Early in the morning of 21 September 2013, the 17 y. old E.D. was waiting for the bus, when she was approached by a car, pulled into it by force by the perpetrators, taken to a remote place and raped. The perpetrators threw the girl into the car boot and drove off, looking for the place to kill her. They did not know that she had a second phone, which she used to call the single European emergency number 112 (the universal service). She told the perpetrators had raped her and threatened to drawn her. The location of the call could not be traced. The car was soon set on fire in a remote forest area, and the victim died. The perpetrators were captured and subsequently received life imprisonment sentences.[1233] The perpetrators were also ordered to pay material damage (6471.70 euros) and non-material damage (overall about 100 thousand euros) to victims' relatives.

The CJEU[1234] had previously ruled that Lithuania failed to transpose the Universal service directive[1235] by not ensuring that the caller information is available. Subsequently, the member state assured the Commission that caller information had been made available and thus it closed legal action against Lithuania in 2009.[1236] However, when E.D. called, her location could not be determined, thus she could not be found, and as a result was murdered. One of the possible explanations was that the phone she used did not have a SIM card. Although the operators should ensure that location is established in all situations, often they fail to do that in such instances. This is a deficiency that shows deficiency in implementation of Universal service directive. It was foreseeable for the state that failure to transpose the directive properly will lead to deaths, sooner or later. It could be claimed that the situation raises the issue of violation of Article 2, and possibly of Article 3 of the ECHR.

The award of civil damages to be paid by incarcerated perpetrators is declarative and not enforceable. The state should be recognized as jointly responsible for the murder of E.D. in Dituva. The victim's relatives do not have any chance to retrieve the compensation from incarcerated perpetrators who do not have any property. Thus recalling the case of *Osman* and *D.P. v Lithuania*, which both involved civil damage awards,[1237]prior the finding of the violation under the ECHR, it must be concluded that state must be held jointly responsible for damage. The declarative award of civil damages from the perpetrators, and a symbolic compensation of 3800 euros, cannot replace the right to require state accountability in cases where the state is accountable.

1233 Court of Appeals of Lithuania, 20 November 2015, Case no. 1A-343-148/2015.

1234 C-274-07. Commission v Lithuania, *European Court Reports 2008 I-07117*.

1235 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ('Universal Service' Directive) (OJ 2002 L 108, p. 51) (the 'Universal Service Directive').

1236 European Commission, Press release, Brussels, 20 November 2009, http://europa.eu/rapid/press-release_IP-09-1784_en.htm?locale=en

1237 In these cases, the perpetrators were also ordered to pay civil damage at the national level. The ECtHR recognized that recognition of perpetrators' responsibility was insiffucient – the state was also responsible for failing at the performance of due diligence duty to protect individuals against the harm, when it is foreseeable.

The amount of time between the knowledge of the real risk to life and the actual murder was short. It could be claimed that the police could not do much, when the call was untraceable. In *Osman v UK*, the Court stated: "bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."[1238] In the author's opinion, the obligation of the state to provide its agents with the possibility to trace the call was neither impossible nor disproportionate. On the contrary – many millions of euros have been invested into the system, which does not seem to fully function to this date.[1239] Under the EU law, the state had the obligation to trace the call, and that is technologically possible. It was impossible due to the loophole that the state left open. Thus it cannot be said that the state (represented by the police) could not possibly respond to the call for help. Nevertheless, due to the lack of care, it did not have the tools to respond to it. Thus it could be claimed that the high standard of due diligence duty has been infringed and Article 2 has been violated.

The elements of torture under Article 3 require severity of violence, and the element of intentional breach of the duty of care. The threshold of severity arguably is met. Notably, the victim was raped repeatedly; she had also been raped after the call to emergency number and immediately before murder. During these few hours, she had suffered torture and knew that she will be killed. In the landmark case of *M.C. v Bulgaria*, the Court admitted that rape can constitute violation of Article 3. It is clear that this case is much more severe than the said landmark case and could arguably reach the severity level needed to recognize the rape as torture, considering the circumstances. Group rapes are evaluated as the most serious and most damaging rapes. This situation was a group rape of an under-age victim, who knew that she will be murdered, and who called for help but could not receive it.

Although the perpetrators were punished, the state failed to protect the victim against the rape, which followed after the emergency call, and against the subsequent murder. Again, it cannot be claimed that the state did not have the tools to do that, because it ought to have them. It was not a case of genuine mistake or mere malfunctioning of the devices; all calls from phones without SIM cards were not traceable in 2013, and it was known to competent authorities.

Finally, in this case, the author of the thesis suggests that perhaps it would be a ripe time to go beyond the classical human rights technique of following stare decisis and establish a landmark case. It seems that there is a ground to argue that Article 14 in combination 2 or with Article 3 could be invoked, because cases of abducting of girls, subsequent rapes and femicides are highly prevalent in Lithuania. There is a pattern to this crime: for instance, a 13 y. old girl was raped and killed on her first date with the perpetrator, a student was raped and killed by the person whom she made an agreement to share the petrol expenses,

1238 Osman v UK, *supra* note 727, para 116.

1239 For instance, in April of 2015, the Universal call service allegedly could not locate the caller's location in case of fire. The woman called but lost consciousness before telling the location. The woman and her 3 children died as the result of fire. Pre-trial investigation is ongoing. http://www.15min.lt/naujiena/aktualu/nusikaltimaiirnelaimes/ministras-ir-bpc-vadovas-del-manciunu-kaimo-tragedijos-kaltina-112-tarnybos-operatoriu-59-501227, 5 May 2015.

a woman who was jogging in the morning was abducted, raped and killed, and these are just a few cases of the last few years. In some cases, the victim was only abducted, beaten and raped, when she called for help. In other cases, the women did not manage to call and were abducted, raped and killed. However, it is clear that the risk of abduction (in a bus stop, during a morning jogging, during a date), then sexual violence, and sometimes subsequently murder in order to cover up the rape, is much higher for women than it is for men in Lithuania. It is especially prominent for young women and teenage girls. Therefore, not addressing the situation in any legislative or policy measures allows suggesting that the state has breached Article 3, taken together with Article 14 of the Convention.

It would be a matter for advocates in this particular case to argue that in Lithuania, repetitive rapes and the lack of any measures to address this type of VAW show state's tolerance of the rape culture and thus, constitute a systemic discrimination of women. The statistical data and empirical research could be employed for that purpose. This would require a much more demanding legal reasoning, i.e. analysis of the global and regional standards and also an argument that right (to be free from sexual violence which is discriminatory) should exist, it should be adopted as a rule. As explained in Part 1 and Part 2, rape can be seen as sexual discrimination on a global level (international soft law), and it has not yet been clearly admitted under the ECHR.

3.1.5. Still "private" matters?

3.1.5.1. Owning the problem

After the collapse of the Soviet Union and regaining independence in the beginning of 1990s, the state has changed its approach to the family. Jolanta Reingardienė analysed how "the celebration of the country's national revival and its independence brought about a flourishing of traditional values."[1240] The Catholic ideology has contributed to "reinforcing a patriarchal ideology in society" which offered to leave VAW as private matters. The new millennium was also marked by Lithuania and Poland adopting a vision on close cooperation of the state and the church in the area of the family.[1241] It should not be a surprise that the National framework on the family, VAW is not mentioned but the concept "family that suffered violence" (*Lith.* smurtą patyrusi šeima)[1242] is introduced. Thus DV is considered a private matter of the family that has suffered it together, rather than a problem of infringement of the individual right to health or life of a victim.

1240 Jolanta Reingardienė, "Dilemmas in private/public discourse: contexts for gender-based violence against women in Lithuania." *Journal of Baltic Studies* 34, 3 (2003): 354-368, at p. 366.

1241 The treaties with the Holy See in this area came into force in 1998 in Poland and 2000 in Lithuania. The treaty (concordat) with Poland is more ideological because the state undertakes to protect the institution of marriage whereas the Lithuanian treaty only talks about cooperation in the area of family, and recognition of canonical marriages. Agreement between the Holy See and the Republic of Lithuania concerning juridical aspects of the relations between the Catholic Church and the State, 2000.

1242 Paragraph 1.5.5. The concept is described as an example of "family in crisis." Resolution of the Parliament of the Republic of Lithuania on national framework on the family, 3 June 2008, No. X-1569.

Recognition that VAW is also a national problem, "owning it" in order to solve it,[1243] has been especially problematic in Lithuania. The argument against such recognition is often the "national reputation." The argument of national reputation of families has been used in the Lithuanian parliament in 2008, when the first conceptual framework on DV was suggested (and rejected) and in the debates over the current Law on DV.[1244] It was also used in the UK very recently, when the ratification of Istanbul Convention was discussed.[1245] This time, however, it was used to claim the opposite – that the failure to ratify the Convention and tackle VAW would ruin the UK reputation. This is a more accurate observation – reputation of the country depends on its capacity to tackle the problem rather than on its creativity in hiding it.

From the perspective of the legal system, justice was served in the cases of femicides analysed above. If there was a mistake made, it was seen as a "human error" and /or a responsibility of individual police officers. The state was not seen as responsible. However, the police officers were acting under their own rules of conduct and in their own field of perceptions, which allowed them to classify the call of DV victim as "insignificant." The "normality" of domestic violence is embedded in unwritten normative structures[1246] within which they operate. As mentioned above, according to empiric research on perceptions of the police officers, one third of them had doubts whether they should intervene into domestic violence, which they saw as "private life".[1247] It can be seen by the fact that the police officers tried to explain that it was a *usual domestic conflict* and one of them knew the family from prior calls. The perpetrator also explained that he was previously aggressive to the wife's stepfather (the testimony was used to describe the perpetrator's character), because his wife was allegedly raped by the said stepfather. Thus, from this angle of analysis, the case shows how physical and sexual violence is seen as a common part of a woman's life in Lithuania, which remains in the shadow of the "private life", before it goes a step too far, and results in femicide. The Government's attempt to explain that DV in case of *Valiulienė* was "merely trivial" also shows the tendency to see DV as a trivial matter.

The tendency not to see VAW as a matter of public importance is also revealed by the legislation. For instance, the provision on sexual VAW (Article 149 part 5 of the Criminal Code) requires victims to be active in submitting the complaint. Furthermore, the Code also provides that a Lithuanian national or a person who has a habitual residence in Lithuania is liable for crimes committed abroad, even if the foreign country does not provide the criminal responsibility (Article 8 part 3). However, this applies only to child rape and not to other instances of rape. This also shows that VAW is not seen as a crime of public importance. For instance, if a woman travels to Abu Dhabi (UAE), and is raped by her trav-

1243 For primary prevention of femicide, the "politics of naming" is crucial. Consuelo Corradi, Chaime Marcuello-Servos, Santiago Boira, Shalva Weill. "Theories of Femicide and their Significance for Social Research". *Current Sociology* 2, (2016) 1-21.

1244 Laima Vaigė, "The concept of domestic violence in Lithuania and the aspect of gender from the perspective of international law." *Social sciences studies* 5, 1 (2013): 267.

1245 Kevät Nousiaainen and Christine Chinkin, supra note 986, p. 93.

1246 In this context, the word "normative" is used in a broader sense and does not refer to legislative norms but ethical value system.

1247 Laima Ruibytė, Vilius Velička, *supra* note 35, 2012.

elling companions, refrains from reporting the crime fearing the *zina* laws, but reports to Lithuanian authorities as soon as they are back, the prospect of punishment of the rapists in Lithuania is bleak.

The said "norm" of domestic violence as a part of private family life, and seeing rape as "private matters" can only be challenged through instruments, which recognize that violence disproportionally affects women, and allow the police to employ gender-sensitivity and contextualization. Thus, the normative language needs to change, in order to allow state agents' to understand VAW as gendered phenomenon which affects women disproportionally. The naming of the underlying problem has not taken place, and thus VAW is still condoned. Considering that the state has not responded to this need of addressing the gendered nature of systemic violence against women, it should be held responsible for the failure to protect against femicides.

3.1.5.2. False agency

The concerns for agency of women to decide upon their sexual autonomy and private family choices are very important. However, in the contexts which are adverse to women, manipulative reliance on the consent of women to deny protection results in tolerance of violence. For instance, the arguments of agency (understood as the woman's choice to decide) were widely discussed in 2013. Member of the Parliament Remigijus Žemaitaitis suggested amending the law on DV to include a possibility not to apply protection measures, if the perpetrator has unfinished works and duties at home and the victim agrees with his immediate return. It was argued that victims suffer, because they cannot choose to have the perpetrator at home, and benefit from his aid in the household. The amendments never reached the Parliament. The arguments of agency, in order to limit protection, have been used by different actors in Lithuania, in particular by state agents and politicians.

The similar approach also appears in court cases. In the case of murder of J. M. in Visaginas, the perpetrator ignored a protection order, i.e. visited his mother in the hospital, and returned to live with her. The mother was clearly affected, because she started to change her testimony after his visit, and said she was afraid to be released from the hospital. Nevertheless, the regional Panevėžys Court adopted a decision[1248](final in that case) to reject the prosecutor's application regarding the breach of protection order, although it found the son guilty in the main action regarding violence. As to the breach of protection order, the court considered that the fact that the mother *consented* (i.e. did not object) to his return home *denied the gravity of his actions*, which meant that a breach of protection order was not of criminal nature, and thus was not punishable. In other words, the court relied on the agency of the victim to consent to the perpetrator's return.

In a few weeks after the said decision, the son murdered his mother. Again, the legal system was satisfied with the service of justice, as seen from press commentaries of Panevėžys court to the media after the murder. Judges operated under their own rules, which allowed them to conclude that protection has to be solely dependent on consent / activeness of the

1248 Panevėžys regional court, 4 January 2016, case no. 1A-24-581/2016.

victim, ignoring her mental state of intimidation. On the level of national law and policies, courts have no tools for gender sensitive contextualization and thus, the system is thoroughly gendered in practice. The effect that violence and subsequent intimidation has on women is ignored and victims are treated as they have full agency to decide whether they do not need the protection against the violent men who threaten to kill them, if they decide otherwise. Ignorance of the dynamics of VAW creates an illusion of false agency.

The use of a word "false" while discussing agency may seem patronizing. However, it must be clearly distinguished between the genuine agency of victims, and the one that is used as a disguise for state passivity. False agency is the "agency" that does not look into the substance of what the victim really wants (always different things, but staying alive is the human interest which the law should protect), the agency without the basis or substance. This is the agency that lacks the active agent / subject.

From the legal point of view, there is also no clear ground for courts to start treating the breaches of protection orders seriously. Although the Criminal Code does not say it directly, a protection order's breach should be treated as a criminal offence,[1249] because the PO is a court order and infringement of court order is an offence. The Supreme Court recognized that this logic should apply, but in the same case, responsibility for the breach of PO was mended into other sanctions and did not bring about serious consequences.[1250]Therefore, in accordance with this practice, the courts do not yet feel the obligation to treat POs and their breaches seriously. It must be underlined that this partially disregarding tendency is only true for this particular type of court orders, which shows that the effect of the gender-neutral system may actually be gendered in practice, because it is primarily women that need these POs.

The more positive shift in the Supreme Court practice could be occurring. The decision of Regional Panevėžys Court, which was analysed above, had been appealed in cassation. On 27 September 2016, the Supreme Court adopted a decision, where they set aside the acquitting decision of that court. The Supreme Court said that infringement of the protection measures under the Law on DV should in principle fall under Article 245 of the Criminal Code, and denied the previous decision that victim determines, whether it was a dangerous infringement of the court decision. The rule still stands that in each case, it must be established whether the PO infringement is dangerous, otherwise it would not involve criminal responsibility. Thus, if the perpetrator returns home and continues his household duties, without any apparent threat to the victim, the infringement of the PO would not be found dangerous / punishable.

Further in the reasoning, the Supreme Court also relied on CJEU case practice (the case of *Gueye and Salmeron Sanchez*) to say that she "*was not free to decide* whether [he] should live with her,"[1251]emphasis added by the author. At the same time, they noted that coercive measures were also applied (same contents as protective measures, but distinctive in nature), and these measures were also infringed. The prosecutor's attempted to replace the

1249 Article 245 of the Criminal Code provides responsibility in case of infringement of court decision, which is not related to sanction.

1250 Supreme Court of Lithuania, decision of 2 February 2016, case no. 2K-19-296-2016.

1251 Supreme Court of Lithuania, decision of 27 September 2016. Criminal case no. 2K-285-222/2016.

coercive measure with a stricter one, i.e. arrest, but the request was rejected by courts. The Supreme Court's decision comes as a positive development, because it denies the illusion of false agency of the victim of consent with the breach of protection measure. At the same time, the Court seems to deny the concerns of agency altogether, placing the state interests and functions first.

The courts still need to start thinking in terms of the real agency and empowerment from the perspective of victims. The decision in the ECJ case of *Gueye and Salmeron Sanchez*, which was relied upon in this case, is a decision where the state is at the centre, and the victim is only an instrument for the state to serve justice. She is expected to provide testimony and not to intervene with justice-making; otherwise she can also be punished. The decisions of the ECtHR on fundamental rights of the victim, e.g. *Opuz v Turkey*, or *Civek v.Turkey* that focused particularly in breach of PO and subsequent murder, could have provided a slightly different approach and perhaps a better legal reasoning, from the perspective of the victim's real need – protection, rather than focusing on her lack of freedom to decide on the measure of protection.[1252] Although the ECtHR practice is also not particularly tentative to the concerns of genuine agency, the decisions which focus on VAW can nevertheless provide a deeper level of understanding this dynamics. The author suggests continuing shifting the paradigm[1253] in order to start focusing on the victims' rights, interests and the need for protection rather than the state's interests.

3.1.6. Summary

The CEDAW has had a limited effect in Lithuania, and the country has so far refrained from ratification of the Istanbul Convention. The analysis of the Note Verbale made at the moment of signing the Convention reveals that it should be treated as impermissible reservation of general nature. The ECtHR practice has been used to the detriment of victims of VAW rather than their interests by the national courts, but the analysis of two real-life cases of VAW shows that human rights discourse could also work to broaden the scope of state responsibility and understand the need for changes. Of course, state responsibility under the ECHR and CEDAW can only be assessed in specific individual cases, but in these two cases (Dembava and Dituva murders), it is suggested that the state should undertake joint liability for VAW, and that violations of individual HRs could be argued under ECtHR or the CEDAW. It is also recommended to acknowledge that legal regulation on sexual VAW in Lithuania contains significant gaps, which require primary prevention measures and legislative changes. First, it is suggested that the regulation on rape should focus on the notion of consent and not require both elements of the lack of consent and coercion, second, it should not differentiate between vaginal and other type of penetration, third, marital

1252 Notably, the victims also have the right to be heard under the Victims Directive (Article 10), although it is limited to expressing it during court proceedings, e.g. in providing explanations, statements, evidence and etc.

1253 There are different ways of approaching the legal question. One way is to ask "what did she really want?" (here the answer is clearly "to stay alive") and another way is to say "it does not matter what she wants." The HR approach arguably provides a better means to ask the genuine agency questions.

rape cannot be justified. Finally, sexual VAW should not be made dependent on victim's complaint and it should be clear that sexual VAW is an act of public importance. It is a paradox that currently, a rape perpetrated in private environment (DV), is an act of public importance, while other types of rape are not (acquaintance rape, date rape, etc).

Lithuania's efforts to fight DV must be praised, because the country adopted the Law on protection against DV and has put great efforts to this regard. It is suggested to supplement the legal regulation to include the conceptual VAW as a form of SD (GBV) in the Lithuanian legal system in order to comply with the CEDAW. The strategies for such inclusion could be varied, e.g. it can be incorporated under the law or at least a strategy.[1254] Due to the lack of explicit naming of the goal to decrease VAW, as a structural tool of gender inequality, the private/public divide is not fully challenged. Arguably, the normative language needs to change in order to address unwritten conventions, and to foster state agents' understanding DV as gendered phenomenon which affects women disproportionally, and which is not a "normal" everyday life. At the same time, normative language should also address the problem of viewing the sexual VAW though the accusatory approach to victim rather than the perpetrator.

3.2. Addressing the gaps in protection against VAW

The current part of the thesis does not attempt to provide a thorough analysis of all gaps in the Lithuanian criminal procedure and criminal law but only to focus on the most prominent (largely procedural) gaps related to VAW, from the perspective of international law standards. [1255] While sexual / psychical VAW/ femicides in the community are more complex and difficult to prevent, if it is a one-time or spontaneous episode, prevention of repeated VAW is possible (e.g. in cases of stalking). It is even more possible –and necessary – when the VAW occurs in a domestic setting the victim and the perpetrator are living together, and possibly have common children. The central thing is ensuring the safety of the victims. Thus it is important to counterbalance between the rights of the perpetrator and the victim in order not to give her a false sense of security. Protection measures applied in specific cases must be accessible, real, free of charge, and infringement of them must be deterred.

This dissertation focuses on key problems (gaps) of protection of victims, as can be identified under the CEDAW and other international law documents, in particular regarding legal protection of victims. Thus, the protection provided by the change of infrastructure, e.g. the

1254 Draft update of GR 19 suggests that VAW should be adressed on a legislative basis, but content analysis of Concluding observations of last 5 years revealed that the CEDAW Committee has been (so far) satisfied with a strategy or an action plan and not necessarily the gender-specific law.

1255 For a comprehensive report on protection of victims of crimes at criminal trial, see Lyra Jakulevičienė, Vladimiras Siniovas, *Protecting Victims' Rights in the EU: the theory and practice of diversity of treatment during the criminal trial: Lithuania*. 2014. http://www.victimsprotection.eu/index.php/2014-05-01-19-31-19/jd/finish/18-lt-lithuania/145-lt-national-report. For the overview of protection orders, see Rita Žukauskienė, *Mapping the legislation and assessing the impact of protection orders in the European member states* (POEMS). National Report on Lithuania. 2015. http://poems-project.com/wp-content/uploads/2015/02/Lithuania.pdf

issues of the lack of shelters, the provision of victims with safety-alert devices, or the issue of separation of premises at courts, are not discussed. It must be noted, however, that the CEDAW Committee underlined that shelters, walk-in and crises centres are needed In Lithuania.[1256] This constitutes an important part of protection of victims of VAW and the necessity of shelters is underlined. However, this gap does not raise complex legal problems (instead, it is a question of infrastructure and resources) and therefore it is not addressed in detail.

The most recent amendment of the law on protection against DV, which has been adopted 12 October 2016, and comes into force in 2017, has brought about some essential changes of the role of special protection measures under the Law, as further discussed. Although it was adopted with the vie of implementing of the Victims' Directive, the reform undertaken is much wider. The author has attempted to overview the said amendments inasmuch as possible, considering that by that time, the thesis has already been submitted for the defense.

3.2.1. Variety and scope of protection measures

3.2.1.1. Main measures relevant for protection

Both the CoE standards under Istanbul Convention and the CEDAW Committee in its Concluding observations suggest providing for at least few types of protection orders. The substantive law of the state should provide for emergency barring orders (Istanbul Convention Article 52) and restraining or protection orders (Article 53). The CEDAW Committee, as noted above, suggests that the emergency orders should be provided by the police, and in addition to longer-term protection orders, issued by courts. It is argued that the state should have at least: 1. Emergency barring orders (or restraining orders) 2. Protection orders under criminal procedure 3. Civil protection orders that apply widely.

There are two protective measures specific to the Lithuanian Law on protection from domestic violence: the obligation to move out of the home shared with the victim, and the obligation not to approach the victim (Article 5 of the Law on DV). In both of these cases, they are based on the idea that the victim should stay at home and the perpetrator should be kept at a distance. Moreover, under Criminal Procedural Code, coercive measures of criminal procedure are entrenched, including the obligation to live separately from the victim and not to approach him/her at a certain distance.[1257] It must be noted that although these measures are very similar but the Supreme Court has stressed that protective measures under the Law on protection against DV are not the same as "coercive" (*Lith*. kardomosios*)* measures, provided under Criminal Procedure Code.[1258] Instead, the Court thought they are more similar to the measures of "criminal or educating effect" (*Lith.* baudžiamojo ar auklėjamojo poveikio) provided under Article 72[1] of the Criminal Code.[1259] Namely, this Article also provides for the obligation to live separately from the victim and not to ap-

1256 Concluding observations 2014, para 23 (d) and (e).

1257 Article 120 of the Criminal Procedure Code.

1258 Supreme Court of Lithuania, decision of 2 February 2016, case no. 2K-19-296-2016.

1259 The last version of the article, as amended by the law of 2015. Law amending 42, 67, 72-1 Articles of the Criminal Code and its Annex. 7 May 2015, No. XII-1676. *Teisės aktų registras*, 2015-05-18, Nr. 7563.

proach her/him at a certain distance. Thus, three very similar sets of obligations exist under these related legal acts.[1260] In addition, the Civil Code also provides provisional protection measures, which include *inter alia* the obligation to live separately.[1261] However, these civil orders are very restricted and apply only in the course of pending divorce proceedings.[1262] The reasons why victims of domestic violence or VAW may want to seek a civil protection order rather than one of criminal law (or besides a criminal order), are various. On the one hand, the process for obtaining a civil order may be faster, simpler, more efficient and less stigmatizing. The burden of proof is also less strict in comparison to what applies in the criminal procedure. On the other hand, its enforcement may be more difficult to achieve, considering that not all competent authorities are familiar with the dynamics of domestic violence, and bailiffs in Lithuania certainly are not included in training programmes. It is recommended to broaden the types of civil protection orders and the person groups who may obtain them. They could be especially useful in situations of stalking and sexual violence of harassment which is outside of the DV.

Under the EU Victims package, at least three types of obligations are distinguished: obligation not to approach, obligation not to contact, and prohibition to enter certain places (e.g. victims' workplace, residence or another specified place). That does not mean that the member states have to provide them in their substantive law but only that these protection orders (whether they are of criminal[1263] or civil[1264]) have to be recognized and enforced in Lithuania. Lithuanian law distinguishes only two types of obligations, but the minimum standards that the EU provides are met by the national law. There are many other types of protection orders in other member states which do not fall under the EU legislation on cross-border protection.

3.2.1.2. Protective, coercive, punitive measures – delimitation

What are the main similarities and differences between the protection measures under the Law on protection against DV (Article 5), Criminal Procedure Code (Article 120), and the Criminal Code (Article 72[1])? Their contents are functionally equivalent: the obligation to move out and the obligation not to live together; the obligation not to approach and the obligation not to seek contact. The differences are in the nature of the measures. The measure under the Criminal Code[1265] is aimed at aiding the criminal sanction, in order to avoid any hindrances. It is not aimed at protecting the victim at all, and protection of the victim is

1260 Moreover, in case of threat to life, witnesses, victims, experts, specialists and defenders (representatives) can seek for protection under Law on the Protection from Criminal Influence of the Participants in Criminal Proceedings and Clandestine Activities, Law Enforcement Officers and Members of the Judiciary, Valstybės žinios, 1996-03-06, Nr. 20-520, doc. No. I-1202.

1261 Article 3.65 of the Civil Code.

1262 Depending on the circumstances, the victim may also ask for removal of the perpetrator from her property (flat or house), if it is owned individually. Under the prosecutor's order, the removal may take place in 7 days, in accordance with Article 768 of the Civil Procedure Code.

1263 Article 5 of the EPO Directive.

1264 Article 3 (1)(a)-(c) of the Regulation on Protection Measures.

1265 Notably, it is provided under 67 (2) (8) and the structure of the article seems to suggest that it is treated as one obligation (to live separately and/or not to approach the victim).

only a "side effect." Therefore its nature is punitive rather than coercive (pre-trial). The coercive measures under Criminal Procedure Code apply to an adult who is either excused from criminal responsibility or from punishment, or is on probation. Moreover, Criminal Code also provides that the court may oblige the person to participate in programme on changing violent behaviour (perpetrators' program), to confiscate his property, to prohibit him from using special rights, to pay a certain sum into victim's fund, and etc. Measures under the Law on DV are applied on request of pre-trial officer.[1266] The coercive measure under Criminal Procedure Code can only be adopted on the request of the prosecutor. In most of the cases, the promise not leave the country is applied (almost in 70 % of all suspects in 2015).

Furthermore, there used to be one more very important difference between these measures: the protection measures under the Law on DV had to be *always* be adopted if no coercive measures (detention or obligation to live separately) are adopted under Criminal Procedure Code.[1267] However, the analysis of the State Audit Office, which was based on random choice of 4 police offices for that purpose, showed that in 90 % of cases, only the coercive measure of written promise not to leave was applied.[1268] Obviously, victim's safety is not ensured by that promise and this practice deviates from the Law. Finally, the measures adopted under Criminal Procedure Code are more difficult to apply because they are adopted on the condition that the defendant may run, hide from court proceedings, impede the criminal procedure, and commit new crimes (Article 122 part 1). Meanwhile, if no coercive measures are applicable under the Criminal Procedure Code, the protection measures under the Law on DV had to be applied, as the rule, and the need to prove some threats was not required. Currently, it will depend on the victim's activeness whether she will receive protection, because she has to know about the possibility to request it, and she must provide a written request. In addition, the police may do this, if they see that the risk of further violence is high, but they (and prosecutors) are not obliged by the Law to ask for PO anymore.

With the last amendments, two more qualifications have been added, for application of protective measures under the special law. Article 5(1) now provides that these measures "may be provided" if there is no sufficient data that allows to start investigation immediately. Therefore, it seems that the differentiation between coercive measures and protective measures is now more thoroughly grounded. Protective measures can be applied (not must be, as previously), if there is not data – then the procedure for their application is triggered. In 24 hours, the police officer must evaluate the risk and if he / she finds the risk, *or* in case of written request by the victim, he should apply to the pre-trial court. Then the court, in 24 hours adopts the decision on protective measures, which are only valid until the decision on pre-trial investigation. The said decision may be appealed, but protection orders can meanwhile be applied. Although the procedure is now much more thorough and clear, it also allows some

1266 The new version of Article 5 part 2 provides that in situations where there is insufficient data in order to start pre trial investigation immediately, the police officers must evaluate the risk in 24 hours and provided that there is a risk, or the victim requests protection in writing, as soon as possible adress the district court with the request to adopt protection measures. Previously, the Law did not provide, who should adress the court with the request for PO, only stating that it *may be* requested by the police officers, and often in practice it was done by prosecutors.

1267 Article 5 part 2 of the Law on DV.

1268 State Audit Office, *supra* note 1150, p. 14.

loopholes for the police. In many cases, a police officer can now decide that "circumstances are not clear" and then in 24 hours (or more, considering the workload) decide that the risk is not too high. The application of the protection measure then becomes solely dependent on the written request of the victim. Thus, the Law now provides for more difficult procedure on applying protection under this special procedure, and clearly limits its scope, providing that they are applicable: 1. If circumstances are not clear; 2. If there is risk or victim insists in writing; 3. Only till the decision on starting (or refusing to start) pre-trial investigation. Previously, the measures were applicable to the end of the court proceedings, and in all cases[1269] of DV, not only upon insisting of the victim or risk. Furthermore, the new version does not require for protection measures to apply, if coercive measures are not applied. This provides for better delimitation between coercive and protective measures but again, it can result in some situations, the victims will end up without any measures.

Furthermore, the law also delimitates the protection and punitive measures better. The law used to provide that the punitive measures must be applied together with the sanction, except for cases of arrest or detention. Now this provision is deleted. The idea is again to apply punitive measures (of the same contents) at the post-trial stage, together with the sanction. This is a good development, from the perspective of legal technique. But is it a good development for victims? Once again, if the court does not apply a punitive measure (e.g. not to contact the victim), she stays without such protection, while in previous version of the law, it had to be provided under the protective measure.

3.2.1.3. Need for immediate protection

There is yet another section – Section XII – in the Criminal Procedure Code which provides for "other procedural measures of coercion."[1270] For instance, police officers, prosecutors, as well as any other persons can temporarily detain a person who was caught in crime scene under Article 140. Notably, the police officers under the Law on protection against DV do not have the competence to *adopt* the emergency protection orders. They can only ask for them and they have the clear obligation to "take actions to ensure protection of the victim" (Article 7 part 1). The police officer is also responsible for managing the provision of services and thus must transfer the data on the incident to specialized assistance centres. However, because the police officers are not allowed to issue the obligation to move out immediately, they often detain the perpetrator on spot. The perpetrator can be detained up to 48 hours, and during this time, the protective order can be obtained – or not. The State Audit office revealed that this seems to be a rather common practice.[1271] The situations when perpetrator is *not detained* are these: when he escapes, or when DV occurred in previous day. That means that the police loosely interpret the discretion of detaining someone on the scene of the crime.

The situation can be criticized, because detention of a person restricts his human rights much more than the obligation to move out and not to contact the victim. Thus it is sug-

1269 Of course, some evidence had to be present, as the law provided that these measures apply in case of DV. But the law also said that these measures must be applied, if no coercive measures are applied.

1270 Criminal Procedure Code, section XII.

1271 State Audit Office, *supra* note 1150, p. 12.

gested to consider whether the police officers should also be given the right to issue the emergency restraining orders under the Law on protection against DV. It seems like a plausible solution both for the purpose of protection of victim, but also to avoid unnecessary detentions. They would need to choose – whether to detain the perpetrator, if he obviously is involved in crime, or issue an obligation to move out / not to approach or contact the victim. It will not always be the best solution, but it may prove useful in some instances. It is regretful to see, however, that in many cases the prosecutor or pre-trial officer avoid applying to the court with request to apply special protection measure under the Law on DV, even though no coercive measures were applied under the Criminal procedure Code. That has never happened, in deviation of the Law and rules of the Police General.[1272]

For the purposes of Istanbul Convention, "immediate restraining orders" under Article 52 ensure immediate short term (e.g. 10 days-4 weeks) protection, and "protection orders" under Article 53 should work for a longer time. Precisely regarding the first type of protection, it is suggested to consider whether this job could be entrusted to the police. Before the adoption of the Law on DV Darius Urbonas wrote that in cases of DV, police officers are often "incapable of ensuring safety of the victims at least for some period of time, while separating the perpetrator from the victim."[1273] It was expected that this situation will significantly improve with the adoption of the Law. However, there is still not much that the police officers can do (themselves) for the safety of the victim, because they cannot adopt the protection orders themselves. The need for granting immediate restraining orders is now even more acute, when the new amendments of the Law on protection against DV were adopted. There is very little room for applying protection immediately now, and it can be expected that it would come in a few days, at earliest. Besides, considering that it can only be applied for a relatively short time – until the police decides whether to investigate – in many cases, there hardly is any rationale for the victim to insist on this order.

From the comparative law perspective, entrusting the authority to adopt immediate protection measure to the police is not a very common solution,[1274] but it is possible. One the one hand, it should be evaluated carefully: the issue of over-use of the granted discretion may arise. For instance, police officers may decide to apply immediate protection measure and refrain from arresting the perpetrator, which involves much more workload and greater restrictions of his freedom. It may be suitable in some situations, and may not be suitable in others. It would be unfortunate if the police refrained from detaining the perpetrator, even if he is dangerous for the life of the victim and dependents. On the other hand, it is an efficient procedure and would save courts from workload, and perpetrators from more serious interference of human rights (detention),[1275] where it is not needed.

1272 Order of the Police General of the Republic of Lithuania on adoption of procedure for moving out of the perpetrator. 14 December 2011, No. 5-V-1115.

1273 Darius Urbonas, *supra* note 42, p. 236.

1274 Available only in Austria, see Security Police Act, paragraph 38a. The police has authority to order the person leave the premises (despite property rights) or to bar him from returning home. In case of breach, restraining and administrative fines (5000 eur) can be applied. See Kevät Nousiaainen, Christine Chinkin, supra note 986, p. 115.

1275 As mentioned above, State Audit Office found that detention is often used as a measure of precaution, prior issuing the PO, *supra* note 1150, p. 12.

The argument against the idea to grant police with the authority perpetrator's right to property or his right to fair trial can also be raised. However, it must be recalled that the international courts and HR monitoring committees have never found violation of the perpetrator's rights due to over protection of a DV victim. On the contrary, the cases where the victim has been under-protected are countless. In practice, what matters is that immediate protection measure must really be immediate and it should provide a possibility of an appeal. The author considers that infringement of the perpetrator's rights under the Convention is possible, but not in cases where the perpetrator is ordered not to approach the victim, but in cases of unlawful arrest and unlawful detention after serving the punishment. In particular, the institute of the so called *safe custody* after the perpetrator has served his sentence should be mentioned, which is available in a number of European countries (Germany, Switzerland, UK, France, Austria and Denmark) and currently envisaged in Spain.[1276] In cases of safe custody, a sexual offender and repeated offender may be detained "up to 10 years in prison, after serving his sentence."[1277] The author considers that it may be problematic from the perspective of Article 6 and Article 7 of the ECHR. It can be argued that the likelihood of infringement of perpetrators' rights is reduced (i.e. arguably may lead to less arrests) by application of immediate protection measures by the police.

Regarding the longer protection orders, it is clear that they can be established under special procedure or irrespective of procedure, and arguably mutual protection orders should not be applied under Istanbul Convention Article 53.[1278] The special procedure may be provided for in special legislation, for instance in Lithuania it is not provided in Law in DV, although tied with initiation of a criminal case.

3.2.2. Detaching protection from legal proceedings

Analysis of international standards in the area leads to a recommendation to detach protection against VAW from criminal or civil proceedings. The essence of the suggestion is that there would be no need to initiate a criminal case or civil claim for divorce, in order to receive protection. The said proposition has actually been put forward by Lithuanian scholars,[1279] although there were also doubts whether the said system would not infringe the perpetrator's rights, including his right to fair trial under Article 6 of the ECHR.[1280]

The author is aware that it may seem as too-intervening with the rights of the perpetrators because the perpetrator would face a protection order, without actually having the benefit of safeguards and rights that apply in criminal procedure. However, he would also not have the negative outcomes that relate to criminal proceedings. Furthermore, it would

1276 See Maria Asunción Chazarra, "New alternatives in punishment: "Safe custody" in the Spanish criminal law", presentation at the Stockholm criminology symposium, 14 June 2016.

1277 *Ibid,* see the abstract of the presentation: http://www.criminologysymposium.com/download/18.25f91bdc15453b49d0f549a1/1463394754899/SCS_Final+Program2016.pdf.

1278 Kevät Nousiaainen, Christine Chinkin, supra note 986, p. 119.

1279 Salomėja Zaksaitė, *supra* note 40, p. 68.

1280 Salomėja Zaksaitė, "Protection from domestic violence: essential human right or the "fight" against masculinity?" forthcoming in *Kriminologijos studijos*.

be difficult to rely on infringement of Article 6 (fair trial) of the ECHR to claim that protection should not apply against perpetrator, unless the PO is severely abused, and no remedy is provided.[1281] On the contrary, there have been many ECtHR decisions, where victims' rights were found to be infringed, when protection was not applied or PO was not observed and the state failed to intervene in timely manner. In particular, the case of *Kalucza v Hungary* could be recalled, where the applicant kept asking for a restraining or civil protection order, but the national authorities did not want to interfere with the perpetrator's right to ownership. When she changed the locks to their common apartment, she was charged for trespassing. The ECtHR found that the state had a positive application to protect the women against attacks by her former partner, despite the fact that she was also occasionally violent to him (para 61) and found a violation of Article 8.

If we look at the actual contents of obligations that are connected to the classic types of POs, which are provided for in the Lithuanian system, it is arguably not very demanding of the perpetrator to require him not to approach a victim, or not to try to enter her home. The said obligation is mostly about the victim and creating a "safety bubble" for her, and not about the perpetrator. For instance, in a hypothetical situation, a woman obtains a protection order that requires her former partner not to approach her for one year. Even if a sceptical approach is taken, and it is claimed that she is over-reacting or abusing the system, it does not seem legally difficult[1282] for a person in good faith to stay away from the contact with another person who does not want to see him. Unwanted visitations to victim's workplace or home should not be seen as part of the perpetrators right to privacy, either. Counterbalancing these rights should not be seen as a very hard case, especially if safeguards are provided. In most cases, a reasonable person can very easily abstain from bursting this type of safety bubble (i.e. the obligation not to approach and/or seek contact).

The ECtHR stated in *Kalucza v. Hungary*: "in respect of a measure of restraint ordered against an individual, the interest of the protection of a person's physical integrity conflicts with the other person's right to liberty" (para. 63). However, not adopting a restraining order, civil or criminal, would lead to a possibile violation under the Convention. Depending on the circumstances, the rights that can be counterbalanced are also the perpetrator's right to family, right to property, and right to fair and impartial trial of the perpetrator, versus the victim's right to privacy, the right to property, and the right to family. There is indeterminacy to the final result of this balancing. It can very well be that in certain situations, it would be considered disproportionate to order the perpetrator not to enter a certain place, if it happens to be his workplace or place of study, or not to approach the victim, if she is the one who ensures the access to common children. The time period of protection, and the outcome of the counterbalancing process, depends on the need to protect the victim and the children.

From the international law perspective, the grounds for this suggestion cannot be found under the EU law, which is barely a procedural legislative package, but it would be possible if

1281 For instance, see Sandru v. Romania, *supra* note 847, where the accused in the case of group rape was not provided a possibility of defence. For broader review, *Effective Criminal Defence in Eastern Europe*, Ed Cape, Zaza Namoradze (eds), Legal aid reformers network, (Moldova: Soros foundation, 2012).

1282 Arguments that the law would intervene too much into private relationships and women would abuse the system can be seen as relating to stereotyping (women cannot be trusted) and private/public divide (it is a private matter) that allows VAW to remain of epidemic proportions.

Istanbul Convention is ratified, because the Convention explicitly does not tie protection to proceedings: protection orders should be "available irrespective of, or in addition to, other legal proceedings."[1283]Furthermore, both the ECHR and in particular the CEDAW do not require protection to be tied to the proceedings, because they simply look at state efforts to protect the victim.[1284] Once the VAW becomes known and further VAW is foreseeable to state agents, protection must be provided. In Lithuania, such situations will lead necessarily to criminal procedure, if it is DV situation. However, arguably un-tangling protection from the requirement of proceedings would help to reduce the work load of the courts, and would protect perpetrators from common detentions (in most of current situations, the police detains a DV perpetrator before they get the court order on protection measure). It would help the state to abstain from infringements of due diligence duty and frustration of state agents, who would want to help the victim, but do not possess the legal tools to do that. It is especially frustrating, if the case does not fall under the scope of the Law against DV. Even after the amendments of October 2016, which provided the possibility to apply special protection measures prior decision on investigation, the measures are still very much centre around the initiation of criminal procedure.

From the comparative law perspective, the protection can also be provided under the civil law or administrative law, which is arguably more efficient, and its procedure does not require a high threshold of evidence. In Estonia, civil courts may provide protection up to 3 years on a request of the applicant, and if a criminal case is initiated, the prosecutor may ask for a restraining order (until the end of proceedings) or for the civil protection order that lasts up to 3 years.[1285] The current legal regulation in Lithuania, which connects civil protection orders (barely ever applied) to divorce proceedings, does not correspond with the Istanbul Convention. Thus, detaching the protection orders from criminal proceedings and divorce proceedings is recommended, in consideration of the CEDAW Committee's recommendations, and Istanbul Convention.

If this path is chosen, it is suggested to analyse the comparative law data of different countries and thoroughly reform the Lithuanian system of protection/ restraining orders. In particular, the legislator may consider establishing a special procedure, or incorporate protection orders under administrative law provisions, considering that "civil or administrative protection orders have proven to be a critically important tool in stopping violence and/or preventing its reoccurrence. They should be available, free of charge, whenever repetition is a potential danger."[1286] This conclusion should be taken into account.

If the Civil Code is amended, it is suggested to incorporate a general article on protection measures in the Second Book on Persons of the Code. The precise contents of the article(s) may vary, depending on the agreed variety of protection measures. For instance,

1283 Art 53 of Istanbul Convention, *supra* note 17.

1284 The ECtHR jurisprudence, as discussed above, focuses on violations of procedural limbs of Article 3 or Article 2 of the Convention but the procedure that they insist upon is that of due diligence under the human rights system, and although human rights technique necessarily requires balancing, in situations of VAW, the rights under Article 2 or 3 of the women could arguably be sufficiently significant.

1285 *Ibid*, p. 120.

1286 *Feasibility study to assess the possibilities, opportunities, and needs to standardise national legislation on violence against women, violence against children, and sexual orientation violence*. Daphne. European Commission, 2010, p. 201.

it seems logical to suggest that it should encompass at least the classical types of prohibitions: not to contact, not to approach, and not to visit certain place. It can also be wider, for instance not to study in the same school/university as the applicant in a case of rape. Regarding the current Article 3.65 on protective measures of family members, it can either be taken out from Third Book on Family Law, or amended to ensure that it is not applied only in relation to divorce proceedings.

It must also be noted that detaching protection orders from the demand for criminal / divorce proceedings does not mean that there would be no procedure of appeal. However, during the appeal and before the appeal decision becomes *res judicata*, the necessary protection should continue to apply to the victim.[1287] In addition, both the prohibition to approach the victim and the prohibition to live with her are not very restrictive. There should also be a possibility to apply for an *ex parte* order, provided that the defendant has been duly informed of the hearing, and had a possibility to defend himself.

3.2.3. Protection in case of breach of protection order

The state was recommended by the CEDAW Committee to "effectively enforce and monitor compliance with protection orders imposed on perpetrators of domestic violence."[1288] It can be claimed that this is one of the key problems of the national legal regulation and its implementation. The debate still continues as to whether amendments of the Criminal Procedure Code are necessary to harmonize the procedure on applying the protection orders and in order to ensure that breaches are treated seriously. Theoretically, the breach of a protection order should be treated as a breach of any other court order – which under Article 245 of the Criminal Code is seen as a criminal offence. Although the Article does not provide this, the Supreme Court consistently held that criminal responsibility only applies provided that this breach is "dangerous." Meanwhile, if the coercive measure is breached under Criminal Procedure Code 131 (1), it can be replaced by a stricter coercive measure, and if measure of penal effect is breached, it is a criminal offence under Article 243 of the Criminal Code.

At the moment this is not clearly provided that breach of PO is an offence in itself, and thus practice is not entirely consistent. I.e. the breach of a protection order often is not treated as a criminal offence. Instead, Article 132[1] part 3 of the Criminal Procedure Code is used, which ensures that the perpetrator is warned that if he disregards coercive protection measure, another measure may be applied (for instance, detention). This results in much lighter treatment of coercive protection orders under Criminal Procedure Code than other court orders in the criminal justice system. Thus it is suggested to ensure that the breach of coercive protection order under Criminal Procedure Code is treated as criminal offence.

Furthermore, the infringement of special protection order under the Law on protection against DV is also not treated seriously, as discussed in 3.1.4 and 3.1.5 of the dissertation. The illustrative case must be recalled, in which Panevėžys court[1289] acquitted the perpetrator for breach or PO, because the said breach was not seen as "dangerous" by the court, and

1287 This procedural recommendation was suggested by the Poems project, *supra* note 1061.

1288 CEDAW Concluding observations 2014, para. 25 b.

1289 Panevėžys regional court, 5 January 2016, case no. 1A-24-581/2016.

the perpetrator then killed the victim. According to ECtHR practice, once the act of violence (or even threats) becomes known to state authorities, they must ensure that victims' right to life is protected (e.g. *Opuz v. Turkey*, *Civek v. Turkey*). The Supreme Court in cassation appeals decided that this acquittal must be set aside.[1290] However, it would be difficult to imagine a different decision, once the dangerous nature of the perpetrator's actions has been proven by the actual murder. The decision still leaves the room to ponder whether a particular breach of PO is a criminal offence or not. However, there is really no time to ponder when the health and life of victims is at stake. The author thus suggests adopting an explicit provision of Criminal Procedure Code which states that infringement of a protection order is a criminal offense.

3.2.4. Implementation of the EU Victims' package

The EU legal acts relating to cross border protection of victims should be implemented: as discussed above, the so-called "Victims' Package" includes Regulation No. 606/2013 on mutual recognition of protection measures in civil matters and two specific Directives. The Regulation applies directly, while the Directives must be transposed into national law.

The EPO Directive was transposed in 2015.[1291] The Victims' Directive was transposed by amendments which came into force in March of 2016,[1292] and are coming into force in 2017.[1293] The said amendments have changed the definition of the victim and perpetrator, have established new terms, such as "special protection needs" (Article 36^2 of the CPC), and transposed other essential features of the Directive into the Lithuanian legislation. For the evaluation of special protection needs (Article 22 of the Victims' Directive), the most important change was amendment of the CPC to elaborate on the assessment of special protection needs.[1294]

It must be distinguished between the notion of risk assessment under the Law on DV (Article 5) and the notion of individual assessment of special protection needs (Article 36^2 of the CPC). The notion of risk assessment is not regulated by the Victims Directive. It is the national competence matter, whereas the notion of individual assessment is regulated

1290 Supreme Court of Lithuania, decision of 27 September 2016. Criminal case no. 2K-285-222/2016.

1291 Law on mutual recognition and enforcement of the European Union member states orders in criminal matters, as amended by Law Nr. XII-1322 on amendment of Articles 1, 2, 40 and Annex and supplementing with Chapters VIII and IX. 7 May 2015. Nr. XII-1675. *Teisės aktų registras*, 2015-05-15, Nr. 7408. It must be stressed that these are only the most important national implementing measures (NIM) that are addressed in this section. Overall, Lithuania identified even 28 NIMs to implement the EPO Directive See http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32011L0099 Accessed 9 September 2016.

1292 Law amending articles 8, 9, 28, 43, 44, 128, 185, 186, 188, 214, 239, 272, 275, 276, 280, 283, 308of the Criminal Procedure Code, the Annex, and supplementing the Code with 27-1, 36-2, 56-1, 186-1 Articles. *Teisės aktų registras,* 2015-12-30, No. 2015-20993. Lithuania reported that there are 55 NIMs to implement the Victim's rights directive. http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32012L0029 Accessed 9 September 2016.

1293 Law on amendment of Articles 1, 2, 5, 7, 8, 9 and repeal of Article 6 Of the Law on Protection against domestic Violence, 2016-10-12, No. XII-2680, doc. No. XII-2194.

1294 Article 36^2 and Article 186^1 of the CPC.

by the Directive. At the moment, the Lithuanian legislation provides for a complex entanglement of these two assessments. I.e. under the new version of the Law on DV (which comes into force in 2017), it is provided[1295] that the police officer must evaluate the risk and ask for protection measures, provided that the risk is high or the victim asks for it in written form. The procedures for the risk assessment, as well as the criteria for risk assessment, are to be established by the institution, authorized by the Government. Meanwhile, the individual assessment of special protection needs is undertaken by prosecutors or officers under Article 186[1] of the CPC, if necessary, with the help of a psychologist or "other persons with special knowledge or skills."[1296] The procedure for the individual assessment has been detailed in the Prosecutor General's Recommendations on special needs of victims (Prosecutor's Recommendations).[1297]

The article of the CPC that provides the basis for individual assessment can be criticized. First, it provides that special protection needs are assessed in order to protect the victim against "psychological trauma, criminal effect or other negative consequences"(Article 36[2]), whereas the Directive does not mention avoiding of psychological trauma as the purpose of the assessment. Instead, the purpose of the individual assessment is to "determine whether a victim is particularly vulnerable to secondary and repeat victimisation, to intimidation and to retaliation during criminal proceedings."[1298] The Human Rights Monitoring Institute has raised the question whether this formulation actually foresees a psychological evaluation of the victim, which was not the Directive's intention.[1299] The CPC or CC does not provide for the definition of psychological trauma, and the terms of victimization, intimidation and retaliation are arguably much better understandable to criminal justice authorities, then psychological trauma. Furthermore, the Lithuanian provisions seem to suggest that the special protection needs are related to damage, i.e. trauma or negative consequences. Meanwhile, the Directive does not talk about psychological or negative consequences, which are rather difficult to evaluate and forecast. Finally, the provisions do not mention the particular groups of victims who are particularly in need of individual assessment, which include victims of GBV, domestic violence and sexual violence. The Directive does not provide for a hierarchy of victims[1300] or vulnerabilities, instead, all victims'special needs have to be assessed. At the same time, it is difficult to expect that the Lithuanian criminal justice officers will intuitively know that GBV victims are particularly in need of special protection.

The General Recommendations that further specify the procedure also raises doubts on the prospects of individual assessment in Lithuania. The form of "recommendations" of General Prosecutor reduces the significance of the individual assessment and special protection measures. It is doubtful that adoption of the post-legislative (regulatory) legal

1295 Article 5 part 2 of the Law on DV.

1296 Article 186[1] part 2 of the CPC.

1297 Order of Prosecutor General on adoption of recommendations on evaluation of special needs of victims. 29 February 2016, No. I-63.

1298 DG Justice Guidance document, *supra* note 1012, p. 44.

1299 Human Rights Monitoring Institute, a letter to the Government of the Republic of Lithuania On transposition and implementation of directive 2012/29/EU, 5 August 2015, No. IS-X-29.

1300 DG Justice Guidance document, *supra* note 1012, p. 44.

act is sufficient. It has even been claimed that the tendency to regulate such an important area by Prosecutors' recommendations lacks constitutional legality.[1301] Similarly, the risk assessment criteria, if adopted by the Police General's Order, will also have a significantly lower status than provisions in the Law. Notably, post-legislative legal acts (i.e. recommendations or regulations) should not create new norms and only provide details on how the criminal procedure norms must be implemented. The idea of the Directive was to provide some minimal standards of victims' protection and not to recommend luxury treatment, if possible with the resources available. As analysed above, the explicit norms of the laws itself often have *not* been applied in cases of DV, and some of these cases had devastating consequences. It is very doubtful whether recommendations will be taken seriously in situations where resources are limited and time is pressing, considering that these groups of victims are not clearly mentioned in the Code.

The form on the victim's characteristics does not give the room for appreciation whether the person was a victim of gender based violence, intimate partner violence, trafficking in human beings, or sexual violence. Only the annexed notebook on special needs' measures does provide links with these vulnerable groups. However, in absolute majority of cases, it is added that the status of this suggestion for special measure is only "recommendatory." Even though the Directive only provides for minimum harmonization, the basic standards must be transposed to the national law. The express underlining that it is only recommendatory treatment does not fulfil that purpose. It can also be claimed that the annex incorrectly transposes the Directive, because it lumps together the ordinary rights of victims in criminal procedure, e.g. participation of translator, and individual assessment of special protection needs. This creates a technical jungle, which is difficult to figure out. Clearly the special protection measures cannot all be "recommendatory" just the same as they cannot all be "mandatory." A certain measure needs to be chosen, and it should not give an impression to the state agents that it is purely within his/her discretion, whether special protection needs are to be addressed at all.

Victims may be over-burdened by two assessments, i.e. that of a risk assessment under Law on DV (Article 5 part 2, which comes into force in 2017) and subsequent regulation that needs to be adopted, and the individual assessment of protection needs under CPC and Prosecutor's recommendations. In addition, the CPC also mentions a posibility of repeated assesment of individual needs, both during pre-trial and during the trial. The author considers that this assessment could be undertaken in one interview, with the use of one document / form, and under one set of clear rules. Repeated interviews with the victim, first by the police officer to assess the risk in pre-investigative stage, then by the prosecutor, possible by a psychologist or psychiatrist, to assess individual needs during investigation and trial, and then possibly, repeated interview to re-assess the special protection needs, may actually cause traumatisation.

Furthermore, the amendments of October 2016 also transpose some aspects of Victims Directive into the Law on DV. In particular, they included more detailed provisions on vic-

1301 Remigijus Merkevičius, "Lietuvos Respublikos generalinio prokuroro rekomendacijų kaip baudžiamojo proceso teisės šaltinių problematika" *Teisė* 88, (2013): 73-93, where the author critisizes the tendency to regulate by prosecutors' recommendations as problematic.

tims' support, and amended the concept of the person who suffered violence.[1302] However, it has not became more clear whether former divorcees, partners who do not live together, or partners of men who have wives can obtain the necessary protection under the law.

The EPO Directive and Protection Measures Regulation also need to be discussed. These instruments have only recently came into force, and the number of the affected persons (who may need cross-border protection) is presumably not very large, it is not yet possible to conduct an analysis on implementation in Lithuania. However, some situations may be modelled.

For instance, a woman of Lithuanian nationality and a man of Danish nationality live in the United Kingdom.[1303] Due to repeated abuse of the woman by her partner, the UK court issues a non-molestation order.[1304] Meanwhile, the woman travels to Lithuania, where she knows that her family and friends provide her with social support. In the said situation, Protection Measures regulation would apply. The Protection Measures' Regulation is applicable to all member states of the EU, except for Denmark (however, nationality is not relevant in this regard).[1305] The Lithuanian woman would need to request a UK court to issue a multilingual standard-form certificate.[1306] The UK should assist (upon her request) the woman with the information as to which competent authority to address in the member state where protection is needed.[1307] In case of Lithuania, bailiffs are designated for this purpose.[1308] The victim needs to present the bailiff, working in the territory of residence, a copy of the order for the protection measure, multilingual certificate and translation, if needed. Moreover, if necessary, the bailiffs in Lithuania are allowed to adjust factual elements of the protection order, such as addresses or the distance of approaching, but they cannot change the type of the measure, suggest addressing the police, or suspend/withdraw a protection measure. The UK courts would notify the perpetrator about the issued civil protection order, including the notification address of the victim,[1309] which could be criticized. In addition, bailiffs need to be trained to understand the dynamics of VAW.

Regarding the EPO directive, a similar situation can be analyzed, where a woman with Lithuanian nationality and a man of Danish nationality are living in the UK, and they

1302 Articles 8 and 2 of the Law on DV.

1303 The situation is modelled prior the UK referendum of 2016, by which it was voted for leaving the EU in a few years period.

1304 Civil non-molestation orders are provided for under Family Law Act of 1996 (England and Wales), Part IV, as amended by the Domestic Violence, Crime and Victims Act of 2004 (England and Wales and Northern Ireland). Moreover, civil protection measures are available for other persons than family members (broadly defined) under Protection from Harassment Act 1997.

1305 Recital 41 of the Regulation. Nationality of the perpetrator is irrelevant, whereas the habitual residence matters. The UK courts would be able to issue the necessary certificate, while the Danish courts would not.

1306 Cross-border element may not be there in the first place, when the protection measure is adopted. It may appear when the person at risk needs protection abroad (new habitual residence, study or other limited-period visit).

1307 Article 10 of the Regulation.

1308 Law no XII-1412 on supplementing the Law No X-1809 on implementation of European Union and international law acts on civil procedure with ninth (4) section and amendment of the Annex to the law. Adopted on 11 December 2014 by the Parliament of Lithuania. *Teisės aktų registras*, 2014-12-23, No. 2014-20541.

1309 Article 7 (d) of the Regulation.

have a common child. The UK court investigates the domestic violence call and adopts a restraining order under Section 12 of the Domestic Violence, Crime and Victims Act 2004.[1310] Notably, the UK court can even adopt such restraining order in case of acquittal of the defendant – but in that case, it would not be able to adopt the EPO certificate, which does not deal with post-trial protection; the Lithuanian law also does not provide possibility to ensure protection in case of acquittal[1311] of the perpetrator. Let us say that the UK court adopts an EPO certificate, because the woman travels to Lithuania. If the woman has a domicile in Lithuania, or she agrees to come back to Lithuania, the local Lithuanian prosecutor must recognize the EPO order on coercive protection order in 20 days since receiving of the order.[1312] The Law provides that the prosecutor may choose one or few protection measures "except detention, intensive monitoring, house arrest and obligation to live separately from the victim and / or not to approach the victim closer than the prescribed distance." The remaining coercive measures are lighter: the bail, promise to register at the police regularly and written obligation not to leave. In cases of recognition of EPO in other cases, a pre-trial judge or a judge has the competency to recognize the EPO,[1313] even if the victim is visiting the state.

The good thing is that the law does not prescribe the necessary time-period for recognition of the EPO. The decision to entrust the recognition to local prosecution in certain cases is also positive. The disadvantage is that the protection is completely tied to criminal procedure, i.e. either the stage of trial or pre-trial. The access rights to children are also not regulated. The reference of the Law on DV is provided only in the description of the key-terms ("protection measure") but it is considered that the court may decide to apply it, when the woman addresses the court. It is thus recommended to issue practical guidelines of monitoring access rights to children in cross-border situation,[1314] when the EPO applies against the perpetrator.

3.2.5. Protection concerns in restorative justice

Restorative justice in cases of DV and possibly sexual VAW could theoretically take place, including victim-offender mediation. The model of mediation in Lithuanian criminal justice system is currently under development. It is suggested to start from an experimental model and then carefully observe whether it is effective and in which cases.[1315] At the same time, the institute of reconciliation under Article 38 of the Criminal Code is used widely. Article 38 should apply in case of 4 conditions: a. confession of the perpetrator; b.

1310 Marsha Scott, National report on UK. http://poems-project.com/wp-content/uploads/2015/02/United-Kingdom.pdf

1311 See Article 46 part 6 and Article 67 part 2.

1312 Article 40 part 1 of the Law on mutual recognition and enforcement of the European Union member states orders in criminal matters.

1313 *Ibid*, Article 45.

1314 Notably, Brussels II *bis* regulation and the Hague convention on child protection measures also comes into play, as explained in more detail in Section II of the thesis.

1315 Ilona Michailovič, "Atkuriamojo teisingumo galimybės baudžiamojoje justicijoje" In *Globalizacijos iššūkiai baudžiamajai justicijai* (Vilnius: Registrų centras, 2014), p. 88. The informal information, stated at conferences in Lithuania, is that the majority of these experimental cases actually deal with DV.

voluntary compensation of damage; c. reconciliation with the victim; d. the basis to believe that new crimes will not be committed. Unfortunately, in DV and VAW cases this institute is abused by the officials, who act as mediators under this article: "[i]n practice, this form of settlement is very much encouraged and considered to be a useful way of addressing certain situations, in particular when a crime is caused by emotions/is a result of private dispute."[1316] For instance, the qualitative research undertaken shows that all interviewed victims have been suggested reconciliation during the pre-trial stage and at court.[1317] Thus, the predominant use of reconciliation raises doubts whether in practice, this is functionally equivalent to mandatory mediation.

As noted above, under the CEDAW and other international law instruments, protection of the victim must be ensured during mediation as well, and mediation should not be made mandatory. The UN Handbook on Legislation on Violence against Women states that legislation should "explicitly prohibit mediation in all cases of violence against women, both before and during legal proceedings."[1318] All CEDAW concluding observations mention mediation and reconciliation in cases of VAW as bad practice. The EU standards allow for mediation but this is restricted by the obligation to use objective criteria in order to determine the types of offences for which the Member States consider mediation to be unsuitable.[1319] It is doubtful whether serious domestic violence can be effectively met with mediation, but it might be useful in cases involving some psychological and economic VAW and minor (under-age) perpetrators.[1320]

Thus it is suggested that the Lithuanian legislator should refrain from involving mediation for VAW and DV cases for the time being. Mediation can only work in the context where great efforts are being put to prevent VAW and ensure gender equality. In the state where no gender contextualization is provided, mediation is likely to work against the interests of the victim. It can also be considered whether mediation can be used when crimes are committed with direct intent, and perhaps it could be limited to situations where the person did not understand the extent of damage he is causing and did not want it. Only in cases where the person genuinely regrets his actions, and where the balance of powers is not very different, the "culture of apology"[1321] that restorative justice supporters suggest as the more suitable for DV cases, can actually work.

Mediation can be useful if the specialists are well-aware of the dynamics of VAW, who understand victims' interests, and when there is the genuine consent to mediation.[1322] In this case, mediation by professional and compassionate specialist may provide a better

1316 Protecting Victims' Rights in the EU: the theory and practice of diversity of treatment during the criminal trial, p. 23.

1317 Human Rights Monitoring Institute, 2014, *supra* note 1162.

1318 UN Handbook for Legislation on Violence against Women, *supra* note 16.

1319 Gueye and Salmerón Sánchez, para 75.

1320 Laima Vaigė, "The concept of domestic violence in Lithuania and the aspect of gender from the perspective of international law" *Socialinių mokslų studijos/Societal Studies 5,* 1 (2013): 255–274.

1321 John Braithwaite, *Restorative justice and responsive regulation* (Oxford: Oxford University Press, 2002): 152.

1322 Ilona Michailovič, "Проблематика медиации в случаях домашнего насилия", *Criminology Journal of Baikal National University of Economics and Law* 10, (2, 2016): 280–288.

space for restoring justice. The mediator should not try to establish that both parties have been partially responsible for the events, but rather, provide a space for apology.

Moreover, the author of this thesis believes that restorative justice could be useful to address shared vulnerabilities. Notably, some groups in the society are under-privileged and the cycles of VAW continue from generation to generation. For instance, in the data on court case of a 13 y. old girl raped and killed by an under-age perpetrator,[1323] the mother of the rapist claimed that she had been raped and beaten[1324] by the boy's father herself. In the case of murder of a wife in front of small children,[1325] the perpetrator claimed he had been previously aggressive towards the wife's stepfather[1326] because the wife said she had been raped by him. These allegations have not been addressed and legally, they cannot be addressed at courts, considering the circumstances. These gruesome cases of femicides, of course, in no way could be solved by ADR. However, these narratives are also important to lawyers, because they show the traumas underlying VAW. Witnessing VAW traumatizes children who later grow up with emotions that are difficult to express. They also show the drama of these men who grow in hegemonic masculinity.[1327] Initially, they may even want to protect but they become the aggressors. Suppressed emotions sometimes are transposed into actions and behaviours which had previously traumatized them in the first place. Therefore it is crucial to address VAW seriously from the very beginning: first, through primary prevention, and second, in early stages of VAW, which also feature shared vulnerabilities. In such circumstances (obviously in early stages), a carefully monitored restorative justice could be used. It must be undertaken by professional and trained mediator instead of the pre-trial officer or a judge. In addition to being trained on conducting mediation professionally, the mediators must be trained on the dynamics of VAW. The use of gender equality paradigm and challenging stereotypes which result in view of women as subordinates, and challenging stereotypes that keep men in cages of hegemonic masculinity, is essential.

Safety of victims and their children should remain at the very centre of alternative justice methods. It can never be compromised. The ADR should also refrain from family therapy techniques, where responsibility is shared between the parties.[1328] At the same time, admitting and seeing each parties' vulnerabilities is essential for resistance to the culture of violence. There is no point in placing the men, who place women into cages, in the same situation – justice must not be the cage but instead, provide a possibility of healing. In cases of small-scale violence, young age of the offender, and shared vulnerabilities, victim/offender mediation may be useful, provided that safeguards are adequately applied. However,

1323 The teenagers have met on Facebook and that was supposed to be the first date. Vilnius regional court, 18 April 2013, case no. N1-67-318/2013.

1324 She felt she tried really hard to educate her son to be better than his father, and yet she has to pay for the civil damages that her under-age son caused by murdering the girl. The father, meanwhile, also tried to refuse the payment of civil damages, saying that he did not participate in the son's upbringing and thus, is not responsible for his actions.

1325 Court of Appeals of Lithuania, 5 June 2014, Case no. 1A-409/2014.

1326 The stepfathers witness' testimony was used to describe the perpetrator's character.

1327 See for instance, Raewyn Connell, *Masculinities.* Second Edition. (Berkeley, CA: University of California Press, 2005). The term has been rather influential to understand male VAW.

1328 Ilona Michailovič, Проблематика, *op. cit*., p. 283.

considering that contextualization in Lithuania is lacking and even the law on DV does not provide non-discrimination principle (among 16 other principles), it is doubtful whether the mediation can work in addressing cases of GBV.

3.2.6. Protection concerns in cases of presence of children

Although the child is considered a victim of DV, even if she/he has not directly witnessed the incident (Article 2 part 4), the Law on DV does not provide for protection measures for the child. It is suggested to amend the Law in order to include the child into protection order, or include a possibility to adopt a separate protection order for the child. The principle of protection of the child with the view of his/her best interests should be treated as the general principle. The case of *González Carreño v Spain*[1329] should be recalled. Despite the daughter witnessing the violence and being intimidated and traumatised by the father, and despite over 30 appeals for protection, the effective protection measures were not provided for the child nor the applicant. During one unsupervised visitation, the father killed the daughter, who was seven years old, and then killed himself. This case reveals the weakest links in the protection system: the protection of children in context of VAW.[1330] The legal system worked for the detriment of the rights of the mother and child, and to the advantage of the perpetrator. In another case, *Jessica Lenahan (Gonzales) v. United States,* the applicant had divorced with her violent husband. Despite a restraining order, the husband subsequently abducted and killed their 3 daughters; the US Supreme Court found that the police had no specific duty on enforcing the restraining order and arrest of the suspected abducting father. Obviously the Inter-American Commission did not agree.[1331] In Lithuania, this issue emerged rather recently: in January of 2016, an abusive father threw two of his children (2 y. old and 4 months old) into a well and murdered them. Subsequently the killer was found psychologically unsound[1332] and not fit to stand the court. The numbers of children murdered by violent fathers in Lithuania are not clear, but the CEDAW Committee noted that in case of Spain, there had been 20 children murdered by the abusive fathers during 6 years.[1333] The statistical data of children who are not murdered but constantly face VAW or also suffer violence against themselves is not clear. It can only be traced from qualitative and quantitative research, which is currently lacking.

Notably, the child protection officers must contact the child if he is a victim or a witness of DV.[1334] The State Audit Office found that child protection agencies are not always very prompt

1329 González Carreño v Spain (47/2012), 16 July 2014, CEDAW/C/58/D/47/2012. In this case, the CEDAW found violations of articles 2 (a-f); 5 (a); and 16, paragraph 1 (d) of the Convention, read jointly with article 1 of the Convention and the general recommendation No. 19.

1330 *Ibid,* para 9.3.

1331 Lenahan case, *supra* note 26.

1332 Vygantas Trainys, "Vaikus į šulinį sumetęs vyras – nepakaltinamas." 24 June 2016. *Lietuvos rytas*. http://lietuvosdiena.lrytas.lt/kriminalai/vaikus-i-sulini-imetes-vyras-nepakaltinamas.htm

1333 Concluding observations on the combined seventh and eighth periodic reports of Spain CEDAW/C/ESP/CO/7-8. 29 July 2015. Para 20.

1334 Resolution of the Government of the Republic of Lithuania No. 1983 adopted on 2002-12-17 on general regulations of the child protection departments (version of 2009-12-02, Resolution No. 1593), 7.27 p.

in providing assistance to children who are witnesses of DV.[1335] Not only the promptness but also the content of the assistance is important. It must be remembered that all around the world, abusers tend to be violent against and even kill their children, especially in situations where violence becomes known. The protection should not just be available on paper but also in practice, and be effective and accessible. In this context, any assumption that domestic violence against women does not as such harm their children should be seen as outdated on the national and international levels.

There may also be certain exceptions accommodating the right of the father to communicate with the child. It is nevertheless argued that even in such cases, the security of the child should prevail. Provided that the threat to child has been posed, communications with the child during the trial proceedings should involve supervised meetings.

The issue of possible taking of the children into state care (care home or care family) is also significant. It is argued that double standards would apply, if the child is immediately taken away from the mother who cannot bring herself to leave the abusive perpetrator, while violence against children has not been explicitly forbidden to this date. First, violence against children must be clearly forbidden in all circumstances, and second, children's security and wellbeing should be the highest priority. Only when violence against children is *explicitly* forbidden in the Lithuanian legislation (this is not the case in mid-2016), it can be insisted that the mother's decision to stay with the abuser is socially destructive behaviour which requires state intervention. Moreover, the best interests of the child should be taken into account, including his/her right to family.

In addition, shelters are particularly important in such situations, where the father is rather violent and his behaviour is not predictable. Clearly a civil protection order would not be sufficient and even the one that is adopted during the criminal procedure may not be. In shelters, mothers have a chance to rethink their decisions and gain their strength back. It is recommended that the state should provide shelters that are suitable for staying with children, even if they are fully or partially disabled[1336] or have special needs. Finally, when staying with children, even such a seemingly insignificant issue as house-pets becomes important, and considering that perpetrators are often violent against family pets,[1337] it is recommended that children would be able to take the pets together with them to the place of temporary refuge.

3.2.7. Summary

Lithuanian legislation provides for various protection orders for DV victims, yet from the perspective of international standards, the rights of the persons to apply for protection order should not be limited by marital status, and civil protection orders should not be

1335 State Audit Office, *supra* note 1150, p. 29-30.

1336 In A.T. v Hungary (2/2003), the CEDAW Committee criticized the lack of shelter accessible to mothers with fully disabled children.

1337 The said violence or threat of violence is sometimes keeping the victims, and especially children, hostage in violent environments. This realization, backed by sociological data, led to various campaigns (e.g. Animal welfare institute, safe havens for DV victims' pets. https://awionline.org/safe-havens). Meanwhile, the crisis centre for Mother and Child in Vilnius, which provides the most comprehensive shelter in the country, does not have a possibility to keep the pets for the moment (last checked in 2015).

tied with divorce proceedings. In fact, the author suggests considering whether protection should not detached from criminal or civil proceedings altogether. Istanbul Convention and the CEDAW allow this, and comparative law also gives the ground to argue that protection orders should apply irrespective of proceedings or in addition to them. The Lithuanian legislature should also consider establishing immediate protection orders. Currently both coercive and special protection measures are not really immediate.

Lithuania had to transpose the EU Victims package by 2016, and it has adopted a number of amendments. However, some gaps further remain, especially considering that most of the measures of transposition are recommendatory and actually stress their flexible status. Implementation of orders under Protection measures regulation is entrusted to bailiffs, which means that they need to be trained regarding the application of the Regulation and VAW dynamics. The transposition of EPO directive shows the remaining gaps of the directive itself, because it is tied with criminal proceedings and does not deal with related matters, e.g. child protection rights. It is recommended to issue national guidelines of monitoring access rights to children in cross-border situation, when the EPO applies against the perpetrator. In consideration of international standards, mothers with children should be provided with shelters (even if children are fully disabled), their access rights must be ensured and protection guaranteed.

Considering discussions for the use of mediation and reconciliation techniques in VAW cases, the safety of victims and their children should remain uncompromised. In cases of shared vulnerabilities, restorative justice methods, including victim-perpetrator mediation, may be useful, provided that safeguards are adequately applied. However, Lithuanian legislature at the moment is not recommended to establish mediation in cases of VAW. Mediation is useful for victims in cases where the state at the same time provides contextualized and targeted measures of prevention and protection. Meanwhile, the law on DV and other relevant laws do not entrench principles of non-discrimination and gender equality, and thus application of mediation in such context would raise serious doubts on protection and other interests of victims. While the problem remains gendered and no efforts are put to challenge it, which makes the system gendered as well, the balance of powers between the parties and the general context is not quite suitable for mediation.

3.3. Addressing the policy gaps on VAW

3.3.1. Addressing the gaps in primary prevention of VAW

Article 4 of the Law on protection against domestic violence provides measures of primary prevention. In the first and second part of the article, the procedure of implementation and funding is provided. Prevention measures are implemented by state and municipal institutions, agencies and non-governmental organisations, in accordance with programmes drafted by the Government and other institutions on its behalf. It is important that the law ensures that municipal institutions should adopt prevention measures on DV in their strategic development or strategic action plans. Moreover, the Government is to finance the preventative activities of the NGOs, and funds should be provided by the state

budget, municipality budget, and international programs to civil society organizations that are closest to them. However, the financing of NGO activities has been sporadic. For instance, twenty-eight NGOs received funding aimed at "decreasing violence against women" in 2013,[1338] with the view of providing prevention and continuing support services. The sums allocated ranged from LTL 3,600 (EUR 1,042) to LTL 42,500 (EUR 12,308). The results came in the middle of October and the funds arrived in November, which actually left just two months for project implementation.[1339]

The National strategy on decrease of VAW[1340] was only valid until 2014, it was subsequently "replaced" by the national programme on domestic violence. Clearly the replacement is only partial, because DV is only one form of VAW. The previous strategy had clear links with international law obligations and the CEDAW in particular. The strategy recognised that "stereotypical approach to interrelations of women and men and inadequate understanding of the causes of all forms of violence against women in family, the possibilities of preventing violence and its effects, and the rights of victims of domestic violence impedes the fight against domestic violence"[1341] The priority aim of the strategy was "improvement of the legal framework on decrease of violence against women", as well as other aims related to domestic violence. The strategic objectives of the strategy were nevertheless connected solely with domestic violence against women. A thorough conceptual approach and adequate funding were lacking. Thus contents-wise, a comprehensive strategy on VAW never existed in Lithuania.

On 28 May of 2014 the Government approved the National programme on prevention and support of victims of domestic violence 2014-2020.[1342] The strategic purpose of the programme is to decrease domestic violence and thus the programme is drafted in a gender neutral and technical way. The problem is not seen as a problem of human rights but rather, as a problem of social exclusion. No links with international law are provided. Thus it is recommended to adopt a new strategy on elimination on all forms of VAW, as recommended by the CEDAW to many states, including Lithuania in 2014. While drafting the program, it is recommended to focus on the forms of VAW that are not DV – in particular, VAW in a community, sexual violence, and femicides. The CEDAW and ECtHR practice should be relied upon in order to draft a clear framework that addresses the concept of due diligence duty of the states, and primary prevention measures that are related to clear understanding of gender inequality. It is suggested to establish a femicide watch, in order to investigate how prevalent is the abduction-rape-murder scheme, which seems widespread, but needs further investigation. Similar femicide watches exist in other countries and have been suggested by SR VAW.

1338 Ministry of Social security and labour. Results of the contest of projects on implementation of National strategy for reducing violence against women, 15 October 2013.

1339 Center for Equality Advancement (CEA) (Lygių galimybių plėtros centras), Communication with NGO, 29 October 2013, 25 November 2013, 19 December 2013.

1340 Resolution of Lithuanian Government on national strategy for decreasing violence against women and its action plan 2007-2009. Nr. 1330. 22 December 2006. Relevant from 2007-10-14 to 2014-06-03.

1341 *Ibid,* para 53.

1342 Resolution of Lithuanian Government on national program on prevention and support to victims of domestic violence 2014-2020. No. 485, 28 May 2014. Valstybės žinios, 2006-12-30, Nr. 144-5474

On 21 September 2016, the Parliament also adopted a Resolution on ensuring protection against domestic violence.[1343] The resolution involves a number of good ideas (e.g. investigating a possibility for reform of POs) and also intensively focuses on the children. However, it does not mention the aspect of gender nor tackles DV as related to inequality and subordination. The approach is technical and related to control and monitoring of effectiveness.

The said objectivity of legislative and policy measures can be criticized. DV clearly relates with gender, as seen from the statistical data itself, which shows that mostly women suffer this type of violence and mostly men are the perpetrators. The current legal regulation does not even provide gender equality or non-discrimination as one of the principles, although it lists over a dozen of principles on application of the Law.[1344] Thus, the failure to even mention the women victims, in the resolution or any instrument at stake, is not objective but rather ignorant.

Regarding specific prevention measures, the Law simply ensures that the state and municipalities take a number of preventive measures, focused on "zero tolerance of violence" or "teaching the ways of peaceful resolution of domestic conflicts."[1345] It is obvious that the measures suggested are very vague and general. They are aimed at crime prevention in general and lack the necessary critical edge of gendered analysis, i.e. they are not targeted at the causes of DV. Because the Law on domestic violence is quite restricted and does not include a concept of GBV, nor the principle of gender quality and non-discrimination, there is no basis for special prevention measures, e.g. training programmes, to involve an aspect of gender sensitivity. It must be recognized that in practice, the embarrassing "other" measures can also involve a necessary critical gender analysis. For instance, the webpage of the Ministry of the Interior "Let us live without violence" (Gyvenkime be smurto) [1346] could be compared with "Men for women" (Vyrai už moteris) [1347] undertaken by an Ombudsperson on Equal opportunities, NGO, and municipal crisis centre. In the first project, general violence and criminality is targeted, and Lithuania's residents are suggested to be friendly

1343 Resolution of the Lithuanian Parliament on ensuring protection against domestic violence, 21 September 2016, No. XII-2629.

1344 Article 3 of the law, which provides 16 different principles but does not mention equality. The closest principles are "humanity" and "protection of person's rights and freedoms."

1345 Law on protection against domestic violence, article 5(3): 1) organise public education and awareness campaigns promoting zero tolerance of violence; 2) organise training and in-service training courses for judges, prosecutors, police officers, specialists and other persons working in the field of prevention of domestic violence and assistance under the programmes developed by the Government and institutions authorised by it as well as municipalities and financed from the state budget and municipal budgets and funds of international programmes; 3) organise legal education of the public concerning the acts considered as domestic violence, the legal consequences of these acts and inevitability of liability for commission thereof; 4) organise research, collection of statistical data on domestic violence and analysis of these data; 5) organise courses teaching the ways of peaceful resolution of domestic conflicts; 6) refuse to issue an authorisation to keep (carry) a weapon or annul the authorisations currently held; 7) take other prevention measures."

1346 Police department under the Ministry of the Interior. Gyvenkime be smurto. Accessed 2016-03-31. <http://www.policija.lt/index.php?id=14172>.

1347 E.g. see the project on Men for women, "Vyrai už moteris." Center for Equality Advancement, Equal opportunities ombudsperson and Vilnius crisis center. Accessed 2016-04-01. <http://www.vyraiuzmoteris.lt/>.

and refrain from conflicts. That is a very general approach. In the second case, the campaign targets all forms of VAW against women, and tries to address men and make them partners in coalition against VAW. This corresponds with the Istanbul Convention (Article 12 part 4). There are many good practice examples which show what works in particular contexts.[1348] It is recommendatory to use them, while adopting a comprehensive strategy on VAW, because the state should be equally interested in primary prevention and not only prevention of murders in particular cases.

While drafting a comprehensive National strategy on VAW, it is also suggested to use the UN Women's Framework to underpin action to prevent VAW (the UN Prevention Framework).[1349] It uses an ecological model[1350] for grasping VAW, which is in fact employed by many scholars, the EIGE, and the WHO to tackle prevention of VAW. It propagates the use of the "theory of change" approach, which aims at finding solutions for complex social issues and clearly defines the underlying theory of the policy, as opposed to "logic model" which neutrally defines "specific tactics of achieving a desired outcome."[1351] The advantage of the theory of change approach is that it explicitly states its goals and premises.

In case of VAW, a program that corresponds with the theory of change model would explicitly state that decreasing gender inequality which is the root cause of VAW, is the ultimate goal. The program would also be clear that it is based on the premise that gender stereotyping is related to VAW. At the moment both the Law and the National Program on DV in Lithuania are gender-neutral but at the same time, they are applied most often for the benefit of women victims, because most of the DV victims are women. The neutrality, however, may give a false expectation that the Law should be applied proportionately to men and women, and a sense of "conspiracy" against men and mistrust in the legal system. The logic approach lacks transparency, the underlying (unstated) goal of addressing the root causes of VAW is not clear. It depends entirely on the implementing actors whether they actually see it as a goal. Instead, the contents of the new programme or strategy on VAW should have the clear goal of tackling the root causes, relate it to gender equality paradigm, and ensure that it is tackled at individual, relationship, community, and society levels.

The threat of losing the focus can be clearly demonstrated by the analysis of the NGO project funding conditions, as announced by the Ministry of Social Security. Besides the call for telephone assistance,[1352] the main two calls for funding of *preventative* programs

1348 EIGE. Gender based violence: good practices. <http://eige.europa.eu/gender-based-violence/good-practices>. Also see the Lithuanian compilation of good practice manual, printed by the Ministry of the Interior, Vadovas specialistams, vykdantiems smurto artimoje aplinkoje prevenciją: Geroji 2013 m. Europos nusikaltimų prevencijos apdovanojimų konkurso praktika. (Vilnius: LR Vidaus reikalų ministerija, 2014.)

1349 Framework to Underpin action to prevent violence against women, 2015 UN women.

1350 "The ecological framework is based on evidence that no single factor can explain why some people or groups are at higher risk of interpersonal violence, while others are more protected from it." http://www.who.int/violenceprevention/approach/ecology/en/

1351 Framework to Underpin action to prevent violence against women, 2015 UN women.

1352 Order of the Ministry of social affairs and labour No. A1-804, 2015-12-28 on regulations on the call for projects on emotional telephone support 2016–2018 and creation of the commission for evaluation and selection of the projects on emotional telephone support.

in 2015 were aimed at: 1. perpetrators' programmes, [1353] which constituted a longer time funding, and 2. the funding-call for 16 days on VAW, [1354] which provided only a short-term events' funding. Therefore, the ministry focused on outcomes such as "the registered number of perpetrators who want to change violent behaviour and assistance provided", as well as number of events and participants. However, the effectiveness of perpetrators' programmes is not approved by research (the data varies), and the CEDAW Committee does not include it in its recommendations. Instead of focusing on assistance for perpetrators of VAW, the Social security ministry could focus on victim-centred prevention programs, education and awareness raising campaigns, and early primary prevention, which involves all men and boys. It is also doubtful whether the numerical approach of measuring success is enough. A much more qualitative approach is needed.

Furthermore, the UN Prevention Framework underlines that women often experience VAW in late adolescence and young adulthood, and the research in Lithuania shows that bullying in schools and education institutions is highly prevalent, with young women as common targets.[1355] Gender inequality and homosexuality were listed as two most marginalized topics in Lithuanian schools, while LGBT students faced gender-based bullying. Notably, education sector is seen as essential by the CEDAW Committee, draft CEVAWG, as well as the Istanbul Convention. The states also have a positive duty to protect children against violence and bullying in school under the ECtHR (*O'Keeffe v Ireland* decision). Thus it is recommended that the National strategy or program on decrease of VAW should include some specific provisions on VAW in young adulthood and late adolescence, in all areas, including school. Moreover, the National program on DV included one action which has been entrusted to Ministry of education – training of 800 teachers and pedagogues annually.[1356] The said trainings should improve the competencies of educators in prevention and assistance to victims of DV. However, so far there have not been any updates whether the said action is realized. No assignations[1357] to these trainings have been allocated, although trainings of police officers are financed. It is clear that budget planning is necessary also for teachers and pedagogues.

Finally, the health sector must be involved in the prevention efforts of VAW. Victims tend to turn to the health sector even more often than the police: in case of physical violence, 15 % turned to a doctor, health centre, or other healthcare institution, 11 % went to a hospital, and only 14 % went to the police. In case of sexual violence, the tendency to turn

1353 Order of the Ministry of social affairs and labour No. A1-176, 2015-04-02 on the call for projects of non governmental organizations that work with perpetrators 2015, and creation of the commission for evaluation and selection of the projects.

1354 Order of the Ministry of social affairs and labour No. A1-596 2015-10-20 on projects on campaign "16 days on activism against violence" (25 November 2015 -10 December 2015), adoption of regulations on the call and creation of the commission for evaluation of the projects.

1355 *Įvairialypė diskriminacija aukštojo mokslo institucijose,* (Vilnius: Lietuvos studentų sąjunga, 2011).

1356 Resolution of Lithuanian Government on national program on prevention and support to victims of domestic violence 2014-2020. No. 485, 28 May 2014. Valstybės žinios, 2006-12-30, Nr. 144-5474, Annex, para 1.2

1357 Action plan under the National program on DV. Order No. A1- 462 of the Ministry of Social security and labour. Action plan for implementation of the National Programme for the Prevention of Domestic Violence and Provision of Assistance to Victims 2014-2016. Adopted on 24 September 2014.

to medical sector is even more prevalent: 22% turned to a doctor, health centre, or other healthcare institution, 12% went to a hospital, and 15% went to the police[1358]. In Lithuania the duty of mandatory reporting of violence is provided under the ministerial Order of 2002[1359] and is not widely known. It can be claimed that these kinds of obligations should be provided at the level of general legislation, rather than ministerial orders. This has resulted in a situation whereby hospitals report possible incidents of violence, but other health practitioners (family doctors, gynaecologists etc.) do not. The health care institutions could cooperate with specialized assistance centres under the current DV programme and the specialized assistance centres programme.[1360] The National Program on DV also provides that some health care specialists should be trained on prevention and assistance to victims of DV – 10 practitioners in 2014, and 40 of them annually since 2015. The monitoring of training is entrusted to the Health ministry. The problem that arises is that no Government funding is allocated for the said trainings. The budget planning is necessary.

There are other efforts at a national level that ought to be recognised in this regard. In November 2013 a representative of the Ministry of Health of Lithuania acknowledged that "health sector can provide a vital role in domestic violence" and after reviewing the available framework, recognized that "this is not enough."[1361] She suggested that the health sector should prioritize and do more in this area, especially concerning prevention. Another important effort was made with the meeting at the Ministry of Health in April 2014, at which health practitioners and policy makers discussed the methods for identifying and preventing domestic violence.[1362] It was suggested that violence against pregnant women should be monitored and documented in an adequate form (No. 111). The issue of training was also discussed. The approval of the procedure for monitoring any possible violence against pregnant women is a very tangible outcome. However, such monitoring should be extended also to women who are not pregnant. It is not suggested to have a wide-spread screening of all women who encounter the health sector, but the (funded) trainings could help identify the signs of risk and then offer adequate assistance.

To summarize, it is suggested to adopt a comprehensive strategy on VAW, which would provide an ecological model (based on the theory of change) on prevention of VAW. UN Prevention Framework could be used as a model framework. The said policy document should envisage involvement of education and health sectors. The state should be equally interested in primary prevention and not only prevention of murders in particular cases.

1358 FRA survey on VAW, *supra* note 2.

1359 Order of the Minister of health protection, and Minister of the Interior, and the Prosecutor General on provision of information on persons with bodily injuries that may be related to crimes. 28 January 2002. No. 55/42/16.

1360 Order of the Minister of social affairs and labour, Minister of health protection, and Minister of the Interior of 19 December 2011 No. A1-534/V-1072/1V-931 on the programme on specialised assistance centres. Teisės aktų registras, 2015-11-19, Nr. 2015-18382. Amended on 17 November 2015 by Order No. A1-665/V-1306/1V-904.

1361 Audronė Astrauskienė, "Eliminating violence against women in Europe. Health sector," Ministry of Health of the Republic of Lithuania, presentation at conference on 26 May 2013.

1362 Ministry of Health. 2014. Press release. Tartasi kaip medicinos darbuotojai galėtų prisidėti mažinant smurto prieš nėščiąsias grėsmes. (Discussion on assistance of medical workers to decrease the risks of violence against pregnant women). Available at sam.lrv.lt . Last accessed 2016-01-20.

Obviously, the infringement in cases of due diligence duty result in state liability, while passivity in the field of primary prevention does not – and it is clearly connected with greater investments and substantial societal changes. However, this is necessary for the welfare of all members of the society. In consideration that Law on DV provides very broad and weak measures of prevention, it is suggested to ratify Istanbul Convention, which provides a very elaborate Chapter on Prevention and thus could fill-in the gaps on the national level.

3.3.2. Lack of transparent data on VAW

Another urgent issue that the CEDAW Committee pin-pointed regarding Lithuania is that a thorough data on VAW is missing: thus it recommended "to regularly collect, analyse and publish data on cases of all forms of violence against women and girls that have been reported, investigated and prosecuted."[1363] The duty to collect statistical data has been established in the action plan of 2014 by the Ministry of Social Security and Labour.[1364] However, the statistical data only measures VAW committed by a spouse, partner, or cohabitant of the victim. Though it is important data to collect, other types of VAW should also be addressed. They must be collected in a segregated manner and not as an aggregated data, which lumps together different data items. In that regard, it is suggested that the administrative data collectors within the national criminal justice system should follow the global statistical indicators on violence against women, as adopted in 2010.[1365] Moreover, the health sector should be involved in collection of the data on VAW, because the data from the health sector tends to be reliable and first-hand.

In order to evaluate the efforts of the state, it is necessary to collect the data on the convictions of perpetrators per year, the average length of sentences, and importantly, case attrition – the percentage of cases that do not reach the court (dropped cases) or fail to receive any sanction. As noted by the Special Rapporteur on VAW, case attrition "offers a powerful indicator across a number of dimensions: the reporting rate shows whether women increasingly believe States are effective in addressing violence; the proportion of cases that are prosecuted and which result in convictions measures whether policy changes have had an impact."[1366] It is clear that the numbers of reported offences, prosecution and convictions in Lithuania initially have increased since the adoption of the Law on DV. For instance, in 2010 there were 334 reported female victims of domestic violence, and in 2013 this figure had increased to 5635 women.[1367] The numbers of domestic violence calls increased in two years (18268 in 2012 and 29339 in 2014), but the attrition actually

1363 Concluding observations, para 23.

1364 Action plan for implementation of the National Programme for the Prevention of Domestic Violence and Provision of Assistance to Victims 2014-2016, Government resolution No. 485.

1365 UN Statistical Commission and Statistics Division, Statistical Indicators on Violence against Women, 2010.

1366 Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Erturk. Indicators on violence against women and State response, 2008.

1367 Department of Informatics of the Ministry of the Interior, 2014. Available at: http://www.ird.lt/ Last accessed 2016-01-12.

decreased – only in 35,4 percent of cases, a pre-trial investigation was initiated.[1368] During the year of 2015, it was reported that less than 30 percent of complaints resulted in pre/trial investigations and "even less so were concluded with an indictment and moved to the trial hearing."[1369] Thus, the decrease of the indicator of case attrition is alarming. It may show the tendency of victims to become less trusting of the system, and raise doubts about the impact of the current system, in particular as protection concerns are involved.

Furthermore, regarding the data on VAW outside of the field of DV, data is missing. It is even more reason to suggest that the state should consider establishing a "femicide watch" system. It seems that the tendency of abducting, raping and murdering women is traceable in Lithuania, but only empirical data can tell the exact scope of it, and then it would be possible to suggest prevention measures. Notably, SR on VAW in her latest report of 2016 also called for the establishment of femicide watch, [1370] which would look into ethnicity and sex of the victims. Moreover, the update of the GR 19 suggests even looking into intersectional discrimination grounds[1371] with relation to data collection. In the same femicide watch, the information on children murdered by abusive fathers, could be collected, in order to further analyse the dynamics of these cases.

Some data is not completely clear and some data is missing. For instance, the data on same-sex partner domestic violence is not collected. Data on frequency of adopting special protection orders under the Law on DV, as well as punitive (post-trial) protection orders would be essential for any further research. Collection of data on cross-border EPO orders is entrusted to National court administration. Data on mutual violence and possible cases of battered women's syndrome[1372] is missing. The problem is that the action plan on DV does not specify which statistical data needs to be collected, and the indicator of case attrition is not highlighted anywhere in the reports. It is a very important process indicator in the field of justice and reporting, because it measures whether these have ultimately policies had an impact, thus it is recommended to include it.

It would also be interesting to investigate the frequency on victim's liability for false allegations of DV or rape. In some cases that the author came across, the victim's prosecution for a false call is mentioned among the other facts. Notably, both the Criminal Procedure Code on false allegations can be applied in case of victim who "covers-up" the perpetrator, and also the Law on DV may apply for liability on false allegation on DV and abuse of the rights of the person who suffered violence.[1373] Such empirical research would allow to study

1368 *Ibid*, Statistika ir tendencijos.

1369 Human Rights Monitoring Institute, SOS Children's Villages Lithuania and Centre for Ewuality Advancement, Joint UPR submission, March 2016. The submission refers to information compiled by the Lithuanian police department, para 5.

1370 See Report of the Special Rapporteur on VAW, 19 April 2016, A/HRC/32/42, para 45.

1371 CEDAW Committee, Draft General Recommendation No. 19, *supra* note 19, see paragraph on "data collection and monitoring."

1372 Long-term violence sometimes causes the so-called battered woman's / or battered person's syndrome, where the person believes that he/she is going to be killed and thus kills the perpetrator in excessive self-defence, or while he is sleeping. Such defence is not accepted in Lithuania but it would be interesting to see how many women who murder their husbands have experienced long-term violence.

1373 Law on DV, Article 13.

the position of the victim in criminal justice system and also to realise the power structures of the system.[1374] The said power structures also could be analysed in relation to prosecution of women for violent response to DV, as mentioned previously.

The General Prosecutor's forms, which assess the special needs of victims, are also raising some questions regarding collected data.[1375] Notably, the collected data must be important for two main reasons: to prevent the repetition of violence and to protect the victim. Thus, it is not completely clear why there is so little information collected on the perpetrator, and actually much more – on the victim. On the one hand, it is clear that in order to assess the victim's needs, we need to know a lot about the victim. On the other hand, to prevent further violence and conduct a successful criminological research, we need to know a lot about the perpetrators as well. For instance, it may be necessary to know whether the perpetrator is unemployed and whether he is a substance abuser. Meanwhile, the only data collected on the perpetrator is whether he is aggressive and whether he had been previously convicted.

Besides the lack of statistical data, the state ordered research data is also often hidden in Lithuania, if for some reason it is considered as "uncomfortable." For instance, the Social affairs ministry has undertaken an extensive analysis of the possibility to import the Istanbul Convention in the Lithuanian system. The Institute of Law analysed perceptions of judges, prosecutors and police officers in cases of domestic violence. The Prosecutor General's office analysed the frequency of adoption of protection orders in different regions of Lithuania. All of these research materials are not officially distributed and were only available to the author on the condition that they cannot be cited. Furthermore, even the translation of the text of Istanbul convention into Lithuanian language, although ordered by the Social affairs ministry and existing since 2011, is not distributed to the society, which raises many concerns and speculations about its content.

It must be recalled that the ECtHR held[1376] that a person cannot rely on his negative right to self-expression and withhold the right to give research information, neither under Article 10 nor under Article 8. The same applies much stronger in relation to state institutions. There is hardly any point in collecting the data or performing research, if it remains hidden.

3.3.3. Use of HR measuring techniques on VAW in Lithuania

Notably, State audit office is becoming more active in human rights' evaluation[1377] and the methods of auditing have been occasionally used in the context of VAW in Lithuania.

1374 The underlying questions to investigate could be - how eager is the system to punish the victim for non-cooperation? How strong are the perceptions that she must be lying? What is the statistical chance of the DV victim to face liability herself?

1375 Order of Prosecutor General on adoption of recommendations on evaluation of special needs of victims. 29 February 2016, No. I-63.

1376 Gillberg v. Sweden, application No. 41723/06, 11 April 2011. Notably, the case concerned sensitive information on psychiatric research, and nevertheless, the professor who refused to allow giving access to research materials was convicted in a criminal case. The ECtHR did not find any violations of the Convention.

1377 Press release of State Audit Office. Valstybės kontrolė sieks suaktyvinti valstybės vaidmenį ginant žmogaus teises. 7 January 2014. https://www.vkontrole.lt/pranesimas_spaudai.aspx?id=17872

For instance, State Audit Office has analysed the organization of assistance to victims in Lithuania, focusing on the work of the police, specialized assistance centres and children protection services. After the case of femicide in Dembava, internal auditing of the universal service was ordered. However, while both of these initiatives must be praised, it is recommended to use them at least in these additional areas.

First, monitoring of national programmes and action plans is crucial. It can be noticed that the monitoring of the national programmes is entrusted to the Ministry responsible for their implementation.[1378] The Ministry of Social security and Labour is both the key institution that adopts the program, supervises its implementation, and it also monitors its implementation criteria. In other words, the managing body is responsible for auditing itself. While the author of the thesis does not doubt that there must be internal auditors in the Ministry of Social security, who are highly specialized in this particular area, it is nevertheless suggested: 1. Periodically employ external auditing for the implementation of national programs on DV and (if adopted) VAW. 2. In subsequent national programmes, it is suggested to include the section which overviews the implementation of the previous programme. 3. Undertake a SWOT (strengths, weaknesses, opportunities and threats) analysis or another structured planning method.

Second, the State Audit Office's skills could be used in more thorough ways. It could be involved in the internal (i.e. state-level) monitoring on transposition of the EU package and CEDAW Conclusive observations. In addition, it could take into consideration the indicators on VAW, as developed by various international stakeholders (the EIGE, the UN SR on VAW, the WHO, and etc.).

Furthermore, internal auditing techniques could arguably be used by the main stakeholders on regulation of VAW, e.g. the Social affairs ministry, the General Prosecutor's office, and etc. It has already been done to some extent, e.g. empirical research by Vilnius district court must be mentioned, and the internal research of protection orders by the General Prosecutor's office. It is recommended to continue using of these techniques for self-monitoring purposes.

Analysis of indicators can also be undertaken by individual scholars. The author has analysed the implementation of the right to health from the perspective of human rights indicators (on health and on VAW).[1379] Human rights measurement tools, being specific and technical, are the most useful for the analysis of a specific right but not for the broad analysis framework. The framework of structural, process and outcome indicators of the right to enjoyment of the highest attainable standard of physical and mental health offers a promise towards developing a coherent system for the domestic implementation of relevant international legal obligations related to all forms of VAW.

1378 Order of the Minister of social affairs and labour, Minister of health protection, and Minister of the Interior of 19 December 2011 No. A1-534/V-1072/1V-931 on the programme on specialised assistance centres. Teisės aktų registras, 2015-11-19, Nr. 2015-18382. Amended on 17 November 2015 by Order No. A1-665/V-1306/1V-904..

1379 Laima Vaigė, "The international right to highest attainable standard of physical and mental health: evaluating obligations of Lithuania in cases of violence against women," *European scientific Journal* 23, 12 (2016): 34-61.

In consideration of unfulfilled or partially fulfilled *structural indicators*,[1380] the following recommendations could be drawn. First, all forms of VAW must be criminalized, including explicit definitions of marital/intimate partner rape, gender-based violence, harmful practices and stalking. The Istanbul Convention must be ratified as soon as possible, and the minimum EU standards regarding victims' rights must be transposed. The recommendations of the CEDAW regarding VAW and strengthening of the institutional gender equality mechanism should be implemented as a matter of priority. The national action plan should address all forms of VAW and not simply domestic violence. The duty of health practitioners to report violence cases should be established at a higher legislative level. Finally, proportional and timely state funding must be ensured.

In consideration of *process indicators*,[1381] these overall recommendations could be drawn. First, a State-funded national programme should be provided, which would include working with the police, judiciary, and the health care sector to develop greater awareness of and sensitivity to domestic violence and gender-based violence. State-funded shelters, drop-in centres and a sufficient number of specialized assistance centres must be available, in order to provide quality services, which would also be available to ethnic minority women and women from socially-economically marginalized groups and regions and women in same-sex relations. A State-funded prevention programme, which focuses on the elimination of prejudice and gender stereotyping, is needed (with due regard that acts of domestic violence are often based on "traditional attitudes by which women are regarded as subordinate to men.)"[1382] A comprehensive system of coordination, monitoring and evaluating of health-sector initiatives to combat domestic violence and gender-based violence must be adopted (WAVE 2012). In so doing, particular regard must be given to the recommendations of the Special Rapporteur on VAW: for instance, the use of a routine enquiry to identify violence at an early stage should be discussed and female-survivors of domestic violence must have access to mental health and reproductive/sexual health services.

1380 "*Structural indicators* address whether or not key structures and mechanisms that are necessary for, or conducive to, the realization of the right to health, are in place. They are often (but not always) framed as a question generating a yes/no answer. For example, they may address: the ratification of international treaties that include the right to health; the adoption of national laws and policies that expressly promote and protect the right to health; or the existence of basic institutional mechanisms that facilitate the realization of the right to health, including regulatory agencies." (SR on health, 2006). Meanwhile, SR on VAW describes the same indicators in near-identical way, but uses the term "institutional" with a view towards avoiding "confusion with the more common socio-economic usages" of the word "structural (UN Special Rapporteur on violence against women, 2007). However, in essence the same is required: the adoption of legal acts and ratification of international instruments.

1381 Process indicators are created to "measure programmes, activities and interventions. They measure, as it were, State effort." (UN Special Rapporteur of the Commission on Human Rights, 2006). In other words, they "refer to policy instruments, programmes and specific interventions; actions taken by States and individuals to protect and fulfil rights." (UN Special Rapporteur on violence against women, 2007). The process indicators on access to justice and reporting, victim protection, prevention, and training on VAW are the most crucial (UN Special Rapporteur on violence against women, 2007).

1382 GR 19, CEDAW.

In consideration of *outcome indicators*,[1383] these recommendations could be drawn: the progress made and the lessons learned should be monitored, i.e. statistical changes of the numbers of arrests of perpetrators per year; average length of sentences; numbers of trained police/ prosecutors, judges, and health practitioners. For the purposes of monitoring the instances of grave violence, the data must be collected on the proportion of females who have experienced grave violence in the past 12 months, the proportion of females who have ever experienced grave violence, femicide index and trends in femicide deaths. Finally, the social tolerance indicator must be monitored. Asking questions: "is there willingness by state actors, the medical sector and the society as a whole to intervene?" and "what are the evidence of decreased tolerance of violence against women and domestic violence?" could be useful. Considering that health care centres, other health institutions, and hospitals are the first institutions that victims contact after incidents of violence, efforts should be made to ensure that they are not the last.

These recommendations are rather specific and could help improve the national regulation. The very first step towards improving this field has been taken in the Parliamentary Resolution in autumn of 2016, which says that the Ministry of Health should be suggested to create the criteria for recognition of violence to health care specialists and recommendations of actions when reasonable suspicions arise.[1384] At the same time, it must be noted that auditing techniques are not a panacea. They do not suit for all instances and human rights cannot transfer into bullet points. A comprehensive strategy or programme on VAW could not be replaced by auditing techniques. These techniques could be used to locate the gaps in very specific areas (e.g. the right to health) and then formulate specific recommendations under the international law and indicators specially designed for that area, in order to fill these gaps. However, they cannot replace qualitative analysis and must only be used to accompany it.

3.3.4. Summary

Considering the lack of addressing other forms of VAW than DV, a comprehensive strategy on VAW is needed in Lithuania. It is suggested that it should provide an ecological model (based on the theory of change) on prevention of VAW and be based on the UN Prevention Framework as a model framework. The state should be equally interested in primary prevention and not only prevention of murders in particular cases. Thus, in consideration that Law on DV is relatively weak on measures of prevention of DV, and prevention of VAW is not envisaged in other areas, it is suggested to ratify Istanbul Convention.

1383 Outcome indicators are created to "measure the impact of programmes, activities and interventions on health status and related issues." (UN Special Rapporteur of the Commission on Human Rights, 2006). They "document the realization of rights", and are therefore the most difficult to measure considering that human rights are interconnected (UN Special Rapporteur on violence against women, 2007). The SR on VAW proposes three outcome indicators: measuring VAW, which also requires measuring grave incidents of VAW, the rates of femicide, and the indicator of social tolerance (of VAW).

1384 Resolution of the Lithuanian Parliament on ensuring protection against domestic violence, 21 September 2016, No. XII-2629, Article 5.

Its elaborate Chapter on Prevention could be instrumental in filling-in the gaps on the national level.

The author is also concerned with the lack of transparency of data on VAW. Data on frequency of adopting special POs under the Law on DV, as well as punitive (post-trial) protection measures would be essential for any further research. Research ordered by state agencies and ministries remains largely inaccessible and even the translation of Istanbul Convention is not available to the population. In consideration of country-specific CEDAW Committee recommendations, it is advised to regularly monitor and publish data on cases of all forms of VAW: not only the numbers of cases, but also case attrition, victim's liability, mutual protection orders, and etc. A creation of the national femicide watch is recommended.

HR measurement tools can be useful for self-evaluation, provided that they are sufficiently specific. The State Audit office has already undertaken some auditing in this area and could be entrusted with continuation of this work. At the same time, HRs measurement does not suit for all instances and HRs cannot be translated into bullet points. A comprehensive strategy or programme on VAW could not be replaced by auditing techniques. These techniques could be used to locate the gaps in very specific areas (e.g. the right to health) and then formulate specific recommendations, in particular considering the international indicators specially designed for that area. However, they cannot replace qualitative analysis and must only be used to accompany it.

CONCLUSIONS

The analysis undertaken in the thesis allows concluding that the statements of the Doctoral dissertation have been substantiated.

Regarding the first statement of the thesis "The alleged normative gap of international law in the area of VAW, which is attributed to the fact that the current regulatory framework is mainly created by soft-law instruments and international case law, does not in itself necessitate the adoption of a new UN Convention, unless it would bring additional benefits in addressing the conceptual and substantial challenges in the area":

1. Protection of women against violence (VAW) is not regulated by a global treaty, but the significance of global normative gap in the area of VAW is diminished by development of regional treaties, gradual recognition of prohibition of VAW under customary international law, jurisprudence of treaty monitoring bodies, and widely accepted soft-law instruments. The analysis revealed that challenges of different nature can be distinguished in this area, and adoption of a treaty by itself may solve the procedural problem of the lack of norms, but does automatically solve conceptual or substantial challenges.
2. The analysis has shown that the Draft Convention for the Elimination of Violence against Women and Girls (CEVAWG), proposed by the SR on VAW in 2015, arguably brings little added benefits, if it is restricted to lifting essentially the same conceptual strategy, viewing VAW as sexual discrimination, from soft-law level to the treaty level. On the contrary, if States refuse to adhere to the offered treaty and choose the "gap", this may result in weakening of the significance of international law developments. The author suggests that prohibition of VAW should instead remain at the centre of the CEDAW Committee's agenda, and any prospective document that contains the same conceptual response should be presented as a protocol to the CEDAW.
3. The analysis of the scientific discussion on VAW frame under international law allows concluding that the frame should be retained, and the gendered-violence frame could be developed in parallel, considering that prohibition of GBV on the basis of gender identity and sexual orientation constitutes a distinct and much deeper normative gap under international law, than the gap in the area of VAW. General recommendations of the CEDAW Committee are well suited instruments for further addressing intersectionality concerns in this area, due to the flexibility and specificity of these instruments.
4. The private / public divide in the area of VAW could be tackled by novel approaches, which bring a greater level of efficiency, e.g. the prospective HCCH work in the field of cross border protection challenges the very limits of private and public international law, and human rights measuring tools provide added benefits due to their capacity to boost efficiency of human rights discourse and gender mainstreaming efforts. The thesis concludes that the state should remain accountable for the failure to prevent VAW under international law, and abandoning the human

rights approach could bring back the problem of public/private divide, which leaves VAW in the shadows of private matters.

5. The analysis of substantial challenges at the global level revealed that the current draft CEVAWG links accountability for VAW that amounts to torture, and although it can be seen as a step forwards, if normative gap is seen as *de facto* vacuum, the author argues that it is a step backwards, in comparison to the CEDAW Committee's practice, which recognizes accountability that does not require to reach the level of severity of torture. GR 19 and its draft update provides for more adjustable standard at the moment, and the due diligence duty to protect women against VAW of private perpetrators may apply to countries which have not ratified the CEDAW (the USA).
6. The analysis of CEDAW Committee's jurisprudence on VAW, the Special Rapporteurs' on VAW reports, and legal literature on the substance of rights allows concluding that in cases of DV, international law should be seen as triggering both individual due diligence, as well as systemic due diligence. Individual due diligence concerns responsibility towards particular individuals, and systemic due diligence may in turn address the failures to decrease stereotyping or prejudice, and even grave and systemic violations of women rights. Regarding the substantive definition of rape, analysis shows that international law has turned its attention to narrowing down the possibilities of using consent as a justification, but the states should have discretion to choose a narrow definition of consent, and/ or a broad definition of coercion in cases of sexual VAW perpetrated by private individuals. Rape is understood as sexual penetration of any kind that is perpetrated without the consent of the person, and this definition has been gradually adopted both at the global level and at the level of Council of Europe.

Regarding the second statement of the thesis "Regional organisations (the EU and the CoE) have crucial roles in prevention of and protection from VAW in Europe and these forces should be consolidated through the greater effort of the EU":

7. The thesis reveals that the ECtHR played a crucial role in developing substantial rights in the area of VAW in its landmark decisions: particularly *Opuz v Turkey* and *M.C. v. Bulgaria* marked the new era of recognition that DV can be considered a violation of Article 3 of the ECHR (torture, inhuman, and degrading treatment, and discrimination (Article 14 of the ECHR), and sexual violence should focus on the concept of non-consent and can be seen as violation of Article 3. However, the analysis reveals that subsequently, the Court focused on procedural rather than substantial positive obligations and refrained from recognition of discrimination or torture in DV and sexual VAW cases. The substantial guidance of the Court is still needed in order to increase consistency of cases on DV as SD, and in order to clarify the position on whether DV can be seen as torture, and whether rape can be seen as torture and SD.

8. Istanbul Convention provides a conceptually novel approach, tackling DV and VAW frame in parallel, and providing thorough responses to substantial challenges. It accommodates both the concerns for intersectionality and violence against different groups of persons (in case of DV – men, same sex partners), but also retains the critical aim of substantive gender equality. The thesis reveals that the Convention operates mostly through guiding the states on formulating policies on VAW, and most of its provisions within the EU legal system can be used as the general standard policy. Reservations made to Istanbul Convention by Poland, Lithuania, Latvia, which suggest that the Convention shall be applied in accordance with their Constitutions, should be treated as impermissible reservations of general nature.
9. The analysis shows that the EU focuses on procedural responses to VAW due to the lack of mandate in harmonization of substantive law, and thus its envisaged accession to Istanbul Convention could fill in certain gaps in the area of substantive response and prevention. In the light of the heavy regional focus on procedural state duties, it is suggested that the ECtHR and the EU should rely on the CoE Istanbul Convention: the Court should apply its provisions on substantive law at least as a source of inspiration on the further necessary guidance, and the EU should make further steps for ratification of Istanbul Convention.
10. The EU Victims' rights package uses a range of novel strategies that may be used by the VAW advocates; however, it provides wide discretion to the member states and only a minimum level of protection. The effects of the gender neutral definition of GBV should be further monitored, considering that arguably the Victims' package lacks wider contextualization. At the same time, adopting a new Directive or a number of Directives on VAW would increase inconsistency and competition with the Istanbul Convention.
11. The EPO Directive and Protection measures' Regulation partially solve the problem of cross-border protection, which is acute, in particular in situations of international abduction in DV settings. However, the EU legislator relies heavily on the functional equivalence or spontaneous convergence of the substantive laws of member states and the capacity to translate the secondary legislation into own enforcement systems, which leaves much flexibility for the member states.

Regarding the third statement of the thesis "In accordance with its obligations under the international law, the Lithuanian legal regulation on protection against VAW features procedural, conceptual and substantive gaps, which should be the main focus of the further improvement":

12. The normative gap on addressing VAW in Lithuania has been partially filled by the adoption of law on DV in 2011, however, other forms of VAW are still not addressed by legislation. From the perspective of international standards, the application of protection order should not be limited by family status, and civil protection orders should not be tied with divorce proceedings. The author suggests considering whether protection should not be detached from criminal or civil proceedings

altogether, which is allowed under the Istanbul Convention and the CEDAW. The Lithuanian legislature should also consider establishing immediate protection orders, considering that both coercive and special protection measures do not provide immediate protection.

13. The analysis revealed that the EU Victims' package has been transposed to Lithuanian law by a number of amendments. The individual assessment of special protection needs of victims of crimes was established, which differs from risk assessment that was envisaged in October 2016 under the Law on DV. The implementation of the legislative provisions and regulatory acts that transposed the Victims' package needs to be further monitored, because the provided measures can be adopted flexibly, and in many cases, they are only reccomendatory. It is particularly the cases of VAW need contextualization, but the guideliness on special protection needs are not well suited to application in cases of VAW.
14. Although international law in this area has had a limited positive effect in Lithuania so far, the author maintains that human rights discourse could be used for broadening the scope of state responsibility, and recognizing the need for substantive legislative changes. The analysis of two resonant cases of VAW under the ECHR and other related international documents allows suggesting the areas that need improvement, i.e. state liability in VAW cases, where due diligence duty has been infringed, and the need to improve the provisions on sexual violence.
15. The thesis confirmed that the lack of explicit conceptualization of VAW, as a structural tool of gender inequality, is not in compliance with the conceptual strategy chosen by the CEDAW Committee and Istanbul Convention. Refraining from tackling gender-based violence, stereotyping and prejudice may increase the chances for the future cases against the state under the ECtHR to be seen as violations of Article 14, in combination with other articles, or the prospects of finding violation of Article 5 of the CEDAW Convention under the Optional Protocol, in combination with other articles. Thus it is suggested to improve the legal framework in order to target GBV and provide ties with gender equality paradigm.
16. Regarding substantive regulation on VAW, the author concludes that from the perspective of international law, the regulation on rape should be improved, so it would focus on the notion of consent and not require both elements of the lack of consent and coercion, second, it should not differentiate between vaginal and other types of penetration, and finally intimate partner or marital rape should be clearly stated as unjustifiable. The author also considers that sexual violence should not be made dependent on victim's complaint and it should be clear that sexual violence is an act of public importance.

RECOMMENDATIONS

On the basis of the analysis and the conclusions, the thesis offers recommendations to the Lithuanian legislator, the executive branch, and the judiciary.

Recommendations to the Lithuanian legislator:

1. It is recommended to amend the definition of sexual violence in accordance with Istanbul Convention, and jurisprudence under the ECHR and the CEDAW, thus formulating it in the following way:

Article 149 and Article 150 should be contracted into one article, which includes all acts of sexual violence, and all types of penetration. The crucial notions of consent and sexual assault should be explained in a separate article in the end of the section XXI. The notion of sexual assault (sexual violence) should include vaginal, anal, oral, or any other penetration by any bodily part or object, and consent must be understood as to be given voluntarily and as the result of the person's free will, assessed in the context of the surrounding circumstances. It should also be clearly provided that marriage, partnership, or another family or intimate relationship does not relieve nor mitigate from liability.

2.1. Consider detaching protection from criminal and civil proceedings, in accordance with the explicit provisions of Istanbul Convention, and implied suggestion in the context of due diligence duty under CEDAW and ECHR.
2.2. Consider including a separate article on temporary measures of protection in the Civil Code, Book 2 on Persons, which would not be tied with civil claim as such and would provide at least the classical minimal measures, such as prohibition of contact and approaching the victim.
2.3. Breach of protection measures (coercive protection measures, special protection measures under Law on DV, and punitive protection measures) should be clearly provided as a criminal offence.
2.4. Principles of gender equality and non-discrimination should be included among the other principles on protection against DV in Article 3 of the Law on DV.
2.5. Protection measures under the Law on DV should be applied to wider range of persons, inter alia, former spouses or partners, and partners who do not live together.

3. At the moment it is not recommended to establish mediation in cases of VAW, considering that mediation is useful for victims in cases where the state at the same time provides contextualized and targeted measures of prevention and protection. Meanwhile, the law on DV and others do not entrench principles of non-discrimination and gender equality, and thus application of mediation in such context would raise serious doubts on protection and other interests of victims.
4. It is recommended for Parliament to ratify Istanbul Convention, and to recall impermissible reservation of a general nature, submitted by *Note Verbale* during its signing.

Recommendations to the executive branch:

1. Adopt a comprehensive strategy on prevention / decrease of VAW, in consideration of country specific recommendations of the CEDAW Committee. The strategy should:
   1.1. Be based on gender equality paradigm and address stereotyping and subordinate view of girls and women;
   1.2. Include the concept of GBV;
   1.3. Include the concept of intersectional discrimination and be aimed at addressing structural inequalities;
   1.4. Include the references to international law that the national competent authorities should rely upon (GR 19, 28, 33, practice of treaty monitoring bodies in the field of VAW);
   1.5. Include overview of the results of the previous national strategy on VAW;
   1.6. Focus on targeted and contextualized primary prevention measures, rather than "peaceful conflict resolution";
2. Monitor the assessment guidelines on individual needs for special protection, which are adopted with the view of transposition of Victims' directive, in order to assess their effectiveness in cases of VAW;
3. Establish a registry of protection orders;
4. Establish "femicide watch" database;
5. Collect data on application of protection orders and their breaches, and ensure transparency of the existing research data.
6. Ensure that all research data on VAW, and the translations of the main documents are widely available.
7. Entrust the State Audit office with monitoring the national compliance with international indicators in the area of VAW, which are developed by international stakeholders (e.g. Special Rapporteur on VAW) precisely for this task.

Recommendations to the judiciary:

1. A more consistent application of punitive protection orders, and in particular, the obligation to move out and the obligation not to approach the victim under 72[1] of the Criminal Code, is recommended.
2. Consider the recommendation that the opposite obligation (e.g. obligation not to change residence place and to stay at home, e.g. from 23.00 to 6.00) should not be applied in case of convictions for DV under Article 48 of the Criminal Code, if the victim lives in the same residence, as the perpetrator.
3. It is recommended not to consider the evidence of sexual history of the victim, in particular where the said victim is a minor, and / or holding to the principle that such evidence is permissible only in exceptional cases, where it is necessary.

4. It is recommended to treat breaches of protection measures under law on DV seriously, i.e. the liability should not be mended into other sentences to give no practical effect for the breach, and the risk should not be assessed in consideration of the consent of the victim with the breach.
5. It is recommended to avoid stereotyping of VAW victims and prejudicial myths on rape and DV.
6. It is recommended to refrain from suggesting reconciliation under Article 38 of the Criminal Code.

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MYKOLAS ROMERIS UNIVERSITY

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VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL LAW: FILLING THE GAPS AT INTERNATIONAL, REGIONAL AND NATIONAL LEVELS

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Laima Vaigė

VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL LAW: FILLING THE GAPS AT INTERNATIONAL, REGIONAL AND NATIONAL LEVELS

SUMMARY

The relevance of the problematics. It is difficult to admit that in the 21st century, violence against women remains the global problem of epidemic proportions.[1385] It is not a problem only relevant to some parts of the world but also widespread in Europe. According to the survey presented by the European Union's (EU) Fundamental Rights Agency (FRA) on the scope of violence against women in 28 EU member states, 62 million women are victims of violence against women (VAW).[1386] Furthermore, the cost of violence against women is enormous: according to the calculations of the European Institute for Gender Equality (EIGE), it amounts to billions of euros annually.[1387] It is clear that the problem is not only pertinent to separate states, and thus, it requires a global solution under international law.

Historically, VAW committed in domestic environments was treated as falling outside the field of the obligation of the state and into exclusively private matters between individuals.[1388] It was gradually established that states have a positive obligation to act with *due diligence* to prevent violence against women, and to provide for the right to remedy once violations take place.[1389] Due to various developments in the last decade, it can also be argued that prohibition of VAW is now established as part of customary international law. Nevertheless, at the global level, the debate continues as the guiding regulatory framework tackles VAW as a form of discrimination, or declares it as a part of their classical human rights agenda. The problem is addressed by the use of different methods at the regional and national level, where the techniques employed are not necessarily asymmetric, and often are highly technical and procedural. The discussion is ongoing on the conceptual (relating to conceptual strategies), procedural (relating to the certain way off doing something) and substantive (relating to the substance of the law) challenges of addressing women rights under international law.

The thesis focuses on VAW perpetrated by private individuals, in particular domestic violence and sexual violence in the community. It has been recognized at the international

1385 The World Health Organisation (WHO) describes violence against women as a "global health problem of epidemic proportions." See *Global and regional estimates of violence against women.* Clinical and policy guidelines (Geneva: WHO, 2013).

1386 *Violence against women: an EU wide survey* (Vienna: European Union Agency for Fundamental Rights, 2014).

1387 *Estimating the costs of gender-based violence in the European Union*, European Institute for Gender Equality (Luxembourg: Publications Office of the European Union, 2014). http://eige.europa.eu/sites/default/files/documents/MH0414745EN2.pdf.

1388 Christine Chinkin, "A Critique of the Public/Private dimension," *European Journal of International Law* 10, 2 (1999): 387-395.

1389 CEDAW Committee's General Recommendation No 19 on Violence against women, UN Doc. A/47/38, eleventh session, 1992, General Comments, para. 11.

level that the most common form of VAW around the world is physical violence inflicted by an intimate partner (domestic violence).[1390] It is significant to distinguish between incidents of violence which may be situational, and the type of violence which has a pattern and the tendency to increase with time. The second type of systematic individual violence has been described as "coercive control"[1391] or "intimate terrorism."[1392] Violence which is not situational but has a pattern is more dangerous: empirical data shows that homicide is more likely in cases of coercive psychological control than previous physical violence,[1393] and it is also directly related with subordination of the partner and thus is most likely to affect women. Although anybody can experience DV, including men and same sex partners, the global spread of DV against women and sometimes even legal justifications for this type of VAW reveals that it is a systemic problem on a macro level, and is not pertinent only to specific cultures. Sexual violence perpetrated in the community is very common both globally and in Europe, whereas gender-stereotyping contributes to general atmosphere that tolerates rape.[1394] Only a minority of the EU member states have established adequate legal rules on rape in the legislation[1395] which requires pondering the question whether national law translates the global and regional standards into adequate legal system, or the core message is actually "lost in translation."

The problems posed by DV and sexual VAW in the community are particularly relevant to Lithuania, which is a small state (2, 8 million persons) and a member of the EU. It adopted the Law on Protection Against Domestic Violence (further—the Law on DV) in 2011,[1396] and during the first year of coming into the force of this Law, almost 50,000 calls on "conflicts in the family" have been reported to the police.[1397] The high number of calls has not been triggered by the Law itself, because in 2010 the police also received a very similar amount of calls. The key difference is in that the police and other institutions now have the instruments that enable and require them to react. According to the data presented by the Police Department at the end of the first year of implementation of the Law on DV (eleven months of

1390 United Nations Department of Public Information, U.N. Secretary-General's Campaign, *Unite to End Violence, Factsheet*, DPI/2498 (Feb. 2008), available at http://www.un.org/en/women/endviolence/pdf/VAW.pdf.

1391 Evan Stark, *Coercive control, How Men Entrap Women in Personal Life* (Oxford University press, 2009).

1392 Michael P. Johnson, "Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women." *Journal of marriage and family*, 57, 2 (1995): 83 – 129.

1393 Jacquelyn Campbell et al, "Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study", *American Journal of Public Health*, 93, 7 (2003): 1089–1097. Connie J.A. Beck, Chitra Raghavan. "Intimate partner abuse screening in custody mediation: the importance of assessing coercive control," *Family court review*, 48, 3 (2010): 555 – 565.

1394 *Barometer of rape in the EU*, European Women's Lobby (June, 2013), 11. Available at http://www.womenlobby.org/2013-EWL-Barometer-on-Rape-Report?lang=en.

1395 *Ibid.* Lithuania and few other countries were seen as the countries with non-corresponding legislation on rape, whereas only UK and the Netherlands were found to have legislation which established better standards than the minimum.

1396 Law for the Protection against Domestic Violence, No. XI-1425, 26 May 2011.

1397 Data on domestic violence for 2011, Police department under the Ministry of the Interior, http://www.bukstipri.lt/uploads/Policijos%20statistika%202011.pdf. Subsequently 18 268 of them were registered as domestic violence instances.

2012), 7,856 pre-trial investigations were initiated by the police. 83 % of victims were women (9%—men, 8%—children), and in 95.6 % of instances suspects were men (4%—women).[1398] The data of 2014 remains rather similar, where the majority of victims are women and the majority of perpetrators are men.[1399] Thus it could be seen immediately from statistics that the aspect of gender seems to play a role in domestic violence cases. However, Lithuania, as many other countries, has chosen to apply the gender-neutral model of protection against violence.[1400] There are no legislative measures or strategic responses to sexual violence against women in the community, despite repeated rapes and femicides that shake the society and are used for political speculations on the return of the death penalty. Despite high numbers of VAW, Lithuania has not yet ratified the CoE Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)[1401] and signed it with a broad declaration[1402] of arguable effect. The EU Victim Rights' legislative package (two Directives[1403] and a Regulation[1404]) are also applicable to Lithuania, as the member of the EU. Thus it seems worthwhile to analyse Lithuania as an example, considering that it demonstrates the tensions arising in reception international law standards and internal concerns.

Review of the previous scientific research. At the international level, the issue of protection against gender-based violence and domestic violence has been most recently addressed in *Women's Human rights and the Elimination of Discrimination*, edited by Maarit Jänterä Jareborg and Hélène Tigroudja (2016).[1405] Including the author's contribution, the book reveals the most current picture of women's human rights globally, and also focuses on conceptual and specific VAW issues. *Comparative Perspectives on Gender Violence: Lessons From Efforts Worldwide*[1406] (2015) looks into national contexts, and *Women's human rights: CEDAW in in-*

1398 Conference organized by the Police Department of the Republic of Lithuania. *Apsaugos nuo smurto artimoje aplinkoje įstatymas: tendencijos ir įgyvendinimo problemos.* Statistics presented by Tomas Babravičius. 17 December 2012.

1399 Data on domestic violence for 2011, Police department under the Ministry of the Interior, years 2012-2014, accessed 03 June 2015. http://www.bukstipri.lt/lt/statistika.

1400 This legislative approach is in principle allowed, although not recommended at the international level, see *Handbook for Legislation on Violence against Women*, UN Division for the Advancement of women, ST/ESA/329. (New York: United Nations publication, 2010).

1401 Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, 11 May 2011. CETS No.210.

1402 Declaration contained in a *Note Verbale* from the Ministry of Foreign affairs from Lithuania, dated 6 June 2013, handed over the Secretary General at the time of signature of the Instruments, on 7 June 2013.

1403 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. OJ L 315/57. Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order. OJ L 338/2. The Directive had to be implemented into national law by January of 2015.

1404 Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters. OJ L 181/4.

1405 Maarit Jänterä Jareborg, Hélène Tigroudja, *Women's Human rights and the Elimination of Discrimination* (The Hague: Brill/Hague Academy of International Law, 2016).

1406 Rashmi Goel, Leigh Goodmark (eds), *Comparative perspectives on gender violence: lessons from efforts worldwide* (Oxford: Oxford University press, 2015).

ternational, regional and national law,[1407] edited by Anne Hellum and Henriette Sinding Aasen (2013), focuses on the impact of the Women's Convention on different levels. VAW under international law has been analysed by Alice Edwards in her book *Violence against Women under International Human rights law* (2011),[1408] largely based on her Doctoral thesis from 2008. This Doctoral thesis is limited only to VAW perpetrated by private individuals: DV, sexual GBV and femicides, and addresses the legal gaps in protecting women against VAW, rather than global governance strategies. The problem of DV under international law has been analysed by Bonita Meyersfeld in *Domestic violence and international law* (2010),[1409] who investigated whether there is a customary international law norm on DV and what is the extent of due diligence obligation of the states to prevent further VAW in intimate relationships. It must be noted that since the release of the book, there have been some major developments relevant to customary international law and also the normative regional regulation.[1410] Similarly, *Due Diligence and Its Application to Protect Women From Violence* (2008),[1411] edited by Carin Benninger-Budel, comprises contributions from various scholars and former special Rapporteurs on VAW. Finally, the works of scholars of political science (Neil A. Englehart,[1412] David. L. Richards, Jillienne Haglund)[1413] must be mentioned, because they offer a useful empirical approach and analyse quantitative data on state compliance with international law.

VAW has also been addressed by a large volume of scholarly papers: e.g. paradigmatic changes to sexualised gender crimes under international law have been analysed by Catharine A. MacKinnon,[1414] gender-neutrality debate in regulating VAW was addressed by Julie Goldscheid,[1415] who also analysed the scope of due diligence obligation to protect against GBV under international law.[1416] Different scholarly articles analysed various aspects of problems underlined above: e.g. protection orders, the due diligence obligation

1407 Anne Hellum, Henriette Sinding Aasen (eds), *Women's human rights: CEDAW in international, regional and national law* (Cambridge: Cambridge University press, 2013).

1408 Alice Edwards, *Violence Against Women under International Human Rights Law* (Cambridge: Cambridge University Press. 2011. 3rd printing in 2012).

1409 Bonita Meyersfeld, *Domestic violence and international law* (Oxford: Hart publishing, 2010, reprinted in 2012.)

1410 The case of Lenahan v USA, as discussed further, in 2011 established that states have a duty protect women against VAW, despite the fact that USA was not a party to a regional convention on the matter. Istanbul Convention and the EU legislative package were also adopted on the matter. Most significantly, different methodologies and different conclusions are being made in this thesis. Jessica Lenahan (Gonzales) v. United States of America. Inter-American Commission. Report No. 80/11. July 21, 2011.

1411 Carin Benninger-Budel, ed., *Due Diligence and Its Application to Protect Women From Violence (*Nijhoff Law series, Brill. 2008).

1412 Neil A. Englehart, "CEDAW and gender violence: an empirical assessment", *Michigan state law review,* 265 (2014): 265-280.

1413 David. L. Richards, Jillienne Haglund, *Violence against women and the Law* (London: Paradigm / Routledge, 2015).

1414 Catharine A. MacKinnon, "Creating international law: gender as leading edge," 36 *Harvard Journal of Law and Gender* 105 (2013): 105-121.

1415 Julie Goldscheid, "Gender Neutrality and the "Violence Against Women " Frame," *University of Miami Race and Social Justice Law review,* 307 (2015).

1416 Julie Goldscheid, Debra Liebowitz, "Due diligence and Gender Violence: Parsing its Power and its Perils", Cornell International Law Journal, 48, 2 (2015): 301-345.

under the CEDAW, ECHR or other regional Conventions, prevention of VAW, protection against VAW and compensation for VAW. However, none of the books or articles analyse the most recent developments: Draft Convention on VAW suggested at the global level, the CEDAW GR 19 update, the EU Victims package and etc. Some problems analysed in this thesis have been noticed and discussed in conferences and working groups, but have not been thoroughly researched. The author also takes a very different stance from the previous authors, who have offered adoption of a global Convention, by finding that filling the gap with the global Draft Convention is not plausible at the moment.

The Lithuanian research in this area has been scarce. Some problems have been analysed by scholars in the field of psychology (Alfredas Laurinavičius, Rita Žukauskienė)[1417] and other researchers of social sciences and the humanities (Giedrė Purvaneckienė,[1418] Laima Ruibytė and Vilius Velička,[1419] Marytė Gustainienė,[1420] and others). From the point of national criminal law and criminology, the issue of domestic violence has been analysed by Brigita Palavinskienė and Saulė Vidrinskaitė,[1421] Jolita Šukytė, Renata Marcinauskaitė[1422] and more recently and significantly– Ilona Michailovič[1423] and Salomėja Zaksaitė.[1424] Karolis Jovaišas[1425] attempted to analyse the causes of violence. Prior to adoption of the Law on Protection against Domestic Violence in 2011, Darius Urbonas wrote a paper on the right of the police officers to detain a person in domestic violence situations in Lithuania.[1426] The Ministry of the Interior administers a website with relevant legal information,[1427] and a

1417 Alfredas Laurinavičius; Rita Žukauskienė, "Pakartotinio smurto prieš sutuoktinę/partnerę rizikos įvertinimo galimybės taikant b-safer metodiką." *Socialinis darbas : mokslo darbai*, 8, 1 (2009): 103-111.

1418 Giedrė Purvaneckienė, *Smurtas prieš moteris. Lietuvos moterų pažanga:iššūkiai ir realybė 1990 –2005*, (Vilnius: UAB Mokslo aidai, 2005).

1419 Laima Ruibytė, Vilius Velička, "Dirbančių ir būsimų policijos pareigūnų nuostatos į smurtą artimoje aplinkoje," *Public security and Public Order*, 7 (2012): 166-180.

1420 Marytė Gustainienė, "Smurto prieš moteris priežastys ir prevencija," *Sociologija. Mintis ir veiksmas,* 1 (2005): 110-121.

1421 Birutė Palavinskienė, Saulė Vidrinskaitė, "Smurtas prieš moteris," *Feminizmas, visuomenė, kultūra*. 4 (2002): 67-77.

1422 Jolita Šukytė, Renata Marcinauskaitė, "Kai kurie psichinės prievartos doktrinos probleminiai aspektai," *Socialinių mokslų studijos*, 4, 2 (2012): 685–695.

1423 Ilona Michailovič, "Kai kurie smurto šeimoje problematikos aspektai," *Teisė*, 82 (2012): 26-40. Ilona Michailovič. "Kai kurie smurto artimoje aplinkoje aspektai socialinės kultūrinės lyties požiūriu," *Kriminologijos studijos*, 2 (2014): 155-172.

1424 Salomėja Zaksaitė, "Apsauga nuo smurto artimoje aplinkoje" In *Aktualiausios žmogaus teisių užtikrinimo Lietuvoje 2008–2013 m. problemos: teisinis tyrimas*. Lina Beliūnienė, Kristina Ambrazevičiūtė, Mindaugas Lankauskas et al. (Vilnius: Lietuvos teisės institutas, 2014), pp. 55-69.

1425 Karolis Jovaišas, *Smurto šeimoje prevencija: iliuzijų anatomija*, (Vilnius: Eugrimas, 2009). This book, however, has been criticized as justifying domestic violence as an "eternal" phenomenon that is caused by inclination of human beings to aggressiveness, and for the suggestion that women are often provoking or inventing violence. Marija Aušrinė Pavilionienė, Presentation at a conference "Lyčių lygybė: dabartis ir perspektyvos." Lygios galimybės, kurios pakeitė pasaulį. *Social Sciences Studies*, 1, 5 (2010): 365–370.

1426 Darius Urbonas, "Policijos pareigūnų teisė sulaikyti ir pristatyti asmenį į policijos įstaigą smurto privačioje erdvėje kontekste," *Public security and public order*, 5 (2011): 220–240.

1427 Ministry of the Interior of the Republic of Lithuania. Information site on violence against women, accessed on 16 July 2015, www.bukstipri.lt

group of specialists presented a number of methodological recommendations for police officers.[1428] Nevertheless, the research from the point of view of adherence to the standards of international law is lacking. It is necessary, considering that the discussion on the efficiency of the national efforts, and the state's obligations under the international law is on-going in conferences and ministerial debates.

Structure of the thesis and its added benefits. The first part of the thesis focuses on the objective of analysing the legal regulation of VAW and the recent shifts towards more normativity and gender neutrality under international law. The second part of the thesis aims at analysing the legal regulation on protection and prevention of VAW at the level of the CoE and EU law. The last part analyses the domestic compliance with international law, and the thesis is finished with conclusions and recommendations. The structure of the thesis has not been instigated by sources of law (i.e. global, regional and domestic) but rather, by the very different sets of problems that exist at these levels.

The first part of the thesis is useful and novel because it focuses immediately on the problems – the normative, conceptual and substantive gaps under the global international law on VAW and the most recent global developments. The potentiality of the draft CEVAWG is assessed in the light of these problems and the key challenges to the vision of women rights under international law. The second part's added benefit is shown both by the novelty of the documents that it analyses (the Istanbul Convention came into force in 2014, and the relevant EU documents – in 2015) and by the victim-centred approach. Instead of the focus in previous literature on the focus on punishment and prosecution of the perpetrator, prevention of VAW and protection of the victim are chosen as the focus points of this Doctoral thesis. Finally, the third part of the work uses the victim-centred approach to assess the domestic law's compliance in the area of prevention and protection against VAW with the international law. Such analysis has not been undertaken before, and considering the scale of VAW and the priority of the problem in Lithuania, it is long overdue.

The object of the thesis and its delimitation. The object of the thesis is protection and prevention of violence against women under international law. It must be noted that it would not be possible to analyse the issue of violence against women under all international law documents, and ponder into all aspects of it. Therefore it is important to delimitate the object of the thesis, adequately providing the limits for analysis.

First, the thesis will not focus on typology of violence against women, in the attempt to avoid being descriptive and also on perpetuating extensive research already done both on national and international levels. For instance, David L Richards and Jillienne Haglund devote a chapter on "Forms of Violence against Women,"[1429] the types of violence against women are described by Rokas Uscila[1430] and others. Some examples of specific types of

1428 Rokas Uscila; Neringa Grigutytė; Evaldas Karmaza, *Metodinės rekomendacijos policijos pareigūnams, sprendžiantiems konfliktų šeimoje atvejus.* (Vilnius: Policijos Departamentas prie Vidaus reikalų ministerijos, 2008).

1429 David. L. Richards, Jillienne Haglund, *supra* note 29, pp. 1-21.

1430 Rokas Uscila, *Viktimologijos pagrindai* (Vilnius: Mokslo aidai, 2005).

violence are of course, inevitable. The thesis mainly focuses on violence perpetrated by private persons, and in particular DV, i.e. mostly intimate partner physical violence, and sexual VAW in the community, excluding harassment.

Second, the thesis may seem as tailored to include only certain issues of VAW and not the others: e.g. the key focus falls on protection and prevention of the victim but not prosecution and punishment of the offender. In the recent UN developments, a so-called "5 P" system is being distinguished: it encompasses prevention, protection, prosecution, punishment, and providing redress. [1431] In the recent European developments, even "6 Ps" are mentioned: prevention, protection, prosecution, policy, provision and partnership may be distinguished.[1432] Of course, all "Ps" need to be balanced in order to tackle VAW. Furthermore, the "Ps" are partly overlapping – policy often interconnects and overlaps with prevention, and obligations in the areas of protection, prevention and punishment may also overlap. The recent debate on due diligence obligation involves convincing critical analysis on over-emphasis on criminal justice responses[1433] (prosecution and punishment) both in state responses and scholarship. Therefore, it seems necessary to delimitate the scope of the thesis by targeting the most relevant and problematic aspects: to the author these were the aspects of prevention and protection against VAW.[1434] As the title says, the Doctoral thesis is aimed at filling in the gaps, which necessitates choosing a part of the big picture.

The purpose and the objectives of the thesis. The **purpose** of this thesis is to critically assess the gaps of legal regulation on protection and prevention of VAW, focusing on procedural, conceptual and substantive challenges that arise at international, regional and national levels.

For that purpose, the thesis sets the following **objectives:**

1. To analyse the issue of normative gap and conceptual, as well as substantial problems of the legal regulation on VAW at the level of international law, and critically assess the suggested draft UN Convention on Violence against women. Would the Draft Convention bring an added value to international law at the global level?
2. To analyse the regional legal regulation on VAW, focusing on the aspects of protection and prevention in order to evaluate the extent of states' due diligence obligations in these areas and critically assess the remaining gaps. How could the complex regional system of European law provide comprehensive protection against VAW?

1431 Yakin Ertürk, Special Rapporteur on VAW, *The Due diligence standard as a tool for elimination of Violence against women,* E/CN.4/2006/61 (2006).

1432 Report No. A7-0075/2014 with recommendations to the Commission on combating Violence Against Women (2013/2004(INL)) Committee on Women`s Rights and Gender Equality Rapporteur: Antonyia Parvanova, p. 18.

1433 Julie Goldscheid, Debra Liebowitz, "Due diligence and Gender Violence: Parsing its Power and its Perils", Cornell International Law Journal, 48, 2 (2015): 301-345. See in general: Leigh Goodmark, A troubled marriage: domestic violence and the legal system (New York: New York University Press, 2011).

1434 Similarly, the CEDAW Committee in its draft update of GR 19 also distinguished prevention, protection and redress, and then data monitoring and international cooperation, as the key areas for specific recommendations. *Supra* note 19. It seems that in the light of contemporary problems of VAW, prevention and protection are in fact the key concerns.

3. To analyse domestic compliance with international law, by focusing on the key problems in protection and prevention of VAW and evaluating the compliance of Lithuanian legal regulation on VAW against the international standards. What key changes are necessary in Lithuanian legislation to protect against VAW?

The defended statements of the dissertation are:

1. The alleged normative gap of international law in the area of VAW, which is attributed to the fact that the current regulatory framework is mainly created by soft-law instruments and international case law, does not in itself necessitate the adoption of a new UN Convention, unless it would bring additional benefits in addressing the conceptual and substantial challenges in the area.
2. Regional organisations (the EU and the CoE) have crucial roles in prevention of and protection from VAW in Europe and these forces should be consolidated through the greater effort of the EU.
3. In accordance with its obligations under the international law, the Lithuanian legal regulation on protection against VAW features procedural, conceptual and substantive gaps, which should be the main focus of the further improvement.

The methodology. The dogmatic legal method has been widely used in the Lithuanian legal doctrine and doctoral dissertations. This method means that the hierarchy of legal sources is carefully observed and a formalistic logic is largely applied.[1435] Doctoral dissertations in Lithuania also imply the argumentative logic, i.e. the statements to be defended are asserted, followed by the qualitative analysis of legal instruments and jurisprudence, aimed at defending the asserted statements. In this dissertation, the author analyses legally binding treaties and the contents of customary international law, the jurisprudence of courts and treaty monitoring bodies. Furthermore, international law research in this area also necessarily involves the analysis of soft law instruments and contextualization, which is in deviation from classic methodology in law.

The dissertation relies on feminist methodology that brings along the use of policy documents, empirical data, and narratives.[1436] The author uses the feminist research methodology[1437] in the sense that the questions on the experiences of women and the effect of the law on the women are always at the forefront of the thesis. Asking these questions are inevitable when writing this type of thesis, considering that feminist perspectives had the major effect

1435 Audrius Gintalas, "Metodologijos ir metodo samprata", *Socialinių mokslų studijos* 3, (2011): 992.

1436 Narratives are understood as reportable data / stories / cases / situations. The use of personal narratives has been used widely in feminist writings but this thesis does not employ personal narratives. Instead, narratives appear through analysis of cases, and sometimes through media reports and hypotheticals, which reflect the so called "hard cases" in this area. In general, on hard cases and the possibility to fill in the gaps through their analysis, see Ronald Dworkin, "Hard cases", *Harvard Law Review* 88, 6 (1975): 1057-1109.

1437 See Maggie Sumner, "Feminist research" In *SAGE dictionary of social research methods*, Victor Jupp (ed) (SAGE publications online, 2011 SAGE Publications Ltd doi: 10.4135/9780857020116): 117-119.

on the international law[1438] in this area. There are many types of feminisms, as well as legal feminisms, but researchers tend to agree that various problems arise from a subordinate approach to women. Thus, a legal scholar in this area should think what problems the law does not yet solve, and what practical challenges work for the detriment to women.

It must also be explained at the beginning that the thesis analyses the problems of VAW regulation through categories of procedural /normative, conceptual, and substantive challenges. This categorization has been employed by some scholars who analysed feminist challenges in contemporary international law. Besides occasional naming of a certain challenge as "conceptual" or "substantive", the model that coherently distinguished between procedural, conceptual and substantive challenges of women rights in international law was suggested by Aaron Xavier Fellmeth in 2000.[1439] The author of this thesis uses his model but also classifies challenges differently and retains a different focus. The different approach was needed, considering that: 1. A. Fellmeth's article reflects a broad approach to feminist challenges under international law, and this thesis focuses only on VAW; 2. Many changes occurred during the 16 years since publishing of A. Fellmeth's paper, and 3. It would be artificial to have a very rigid categorization, considering that the critique challenges categorical divisions (e.g. public/private) because their effect has been detrimental of women. The consistency of this categorization is kept as much as possible; however, it must be clear in advance that the "procedural" in the sense of international /global[1440] law is understood very differently from the meaning of "procedural" in national law. Hence, it seemed logical to analyse these different sets of problems in separate parts of the work. The same solution was mainly employed by various scholars[1441] who had written on this topic.

Novelty and practical significance of the thesis. The analysis undertaken in previous scientific research mainly focused on the period prior 2013. Many important things have happened afterwards, for instance, the draft UN Convention for the Elimination of Violence against Women and Girls (CEVAWG) was opened for discussions in the summer of 2015[1442] and the draft update for General Recommendation on VAW was only suggested in

1438 See Dianne Otto, Feminist Approaches to International Law, *Oxford bibliographies,* 2012, http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0055.xml

1439 Aaron Xavier Fellmeth, "Feminism and International law: theory, methodology, and substantive reform", *Human Rights Quarterly* 22, (2000): 658-733

1440 The thesis refrains from the use of "universal" in the title, because one of the main critiques under international law is that it was not universal, but had been applied in a gendered way. Furthermore, the CEDAW is not universal but rather is an asymmetric (gendered) document. Finally, it is also argued that from sociological perspective, women's experiences are also not universal but contextual. Hence, the author used the distinction between "international, regional and national" law, even though regional law is also international. The same solution was also reached by other scholars, see Anne Hellum, Henriette Sinding Aasen, eds, *Women's human rights: CEDAW in international, regional and national law* (Cambridge: Cambridge University press, 2013).

1441 *Ibid.* Also see Bonita Meyersfeld, *supra* note 25, who argues that "it is important that we do not compare international law to domestic law", p. 255. International law is special and thus the challenges that arise at the level of international law are also different from those that arise at domestic level.

1442 Addendum to the Human Right Council Thematic report of the Special Rapporteur on Violence, its Causes and Consequences (A/HRC/29/27)pp. 8-22, draft of Convention for the Elimination of Violence against Women and Girls (CEVAWG).

summer of 2016.[1443] Significant changes also happened at the European level: the adoption and coming into force of the Istanbul Convention in 2014, the coming into force of the EU legislative package ensuring the rights of victims (in 2015), with particular references to violence against women, domestic violence and gender based violence. All of these changes require a thorough scientific analysis.

The thesis may be considered as a contribution to the ongoing global and European debate on what the prospective international instruments should entail and which way the international law on VAW should develop. Feminist legal scholarship in the area of international law has been largely created by Western thinkers and the perspective of someone from the post-soviet environment may present a valuable addition and a different angle. International law has been seen as largely created by the "centre" and imposed on the "periphery"[1444] but the classical dichotomies, such as centre/periphery, as well as private/public, need to be challenged. The author's analysis, as someone coming from the state, which rather recently (1991) broke free from occupation and which then joined the EU (in 2004), can be important for building bridges of understanding between the Western European and Eastern European legal scholars. Lithuania can be a good example of a country at crossroads of influence: the EU, Russia, and the Holy See being some of the most important geo-political centres of impact. Thus, the analysis of the Lithuanian legal system, from the perspective of international law, can also be interesting for the international stakeholders.

Furthermore, the thesis could be important for the Lithuanian legal system, which needs to be in compliance with the international standards. The work addresses the most current and most significant legal developments and legal issues arising in the field of violence against women. Thus it could serve as a guidebook for the state officials, who are entrusted with the task of solving the problems addressed in this thesis, while drafting legislative amendments on elimination of VAW or implementing programs and strategies. In addition, it may be useful for students of public international law, private international law, and human rights law, as well as women rights NGOs and advocates.

The conclusions

The analysis undertaken in the thesis allowed concluding that the statements of the Doctoral dissertation have been substantiated.

Regarding the first statement of the thesis "The alleged normative gap of international law in the area of VAW, which is attributed to the fact that the current regulatory framework is mainly created by soft-law instruments and international case law, does not in itself necessitate the adoption of a new UN Convention, unless it would bring additional benefits in addressing the conceptual and substantial challenges in the area":

1443 CEDAW Committee, Draft General Recommendation No. 19, *supra* note 19. In case of any future changes, the author states that the version available in August 2016 has been used.

1444 Anthony Anghie, "Finding the peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", *Harvard International Law Journal*, Vol.40 (1999), 1-80. From the perspective of post-colonial critique, the centre used international law for justifying the unjustifiable: colonialism, oppression, and inequality in international treaty law.

1. Protection of women against violence (VAW) is not regulated by a global treaty, but the significance of global normative gap in the area of VAW is diminished by development of regional treaties, gradual recognition of prohibition of VAW under customary international law, jurisprudence of treaty monitoring bodies, and widely accepted soft-law instruments. The analysis revealed that challenges of different nature can be distinguished in this area, and adoption of a treaty by itself may solve the procedural problem of the lack of norms, but does automatically solve conceptual or substantial challenges.
2. The analysis has showed that the Draft Convention for the Elimination of Violence against Women and Girls (CEVAWG), proposed by the SR on VAW in 2015, arguably brings little added benefits, if it is restricted to lifting essentially the same conceptual strategy, viewing VAW as sexual discrimination, from soft-law level to the treaty level. On the contrary, if States refuse to adhere to the offered treaty and choose the "gap", this may result in weakening of the significance of international law developments. The author suggests that prohibition of VAW for the time being should instead remain at the centre of the CEDAW Committee's agenda, and any prospective document that contains the same conceptual response should be presented as a protocol to the CEDAW.
3. The analysis of the scientific discussion on VAW frame under international law allows concluding that the frame should be retained, and the gendered-violence frame could be developed in parallel, considering that prohibition of GBV on the basis of gender identity and sexual orientation constitutes a distinct and much deeper normative gap under international law, than the gap in the area of VAW. General recommendations of the CEDAW Committee are well suited instruments for further adressing intersectionality concerns in this area, due to the flexibility and specificity of these instruments.
4. The private / public divide in the area of VAW could be tackled by novel approaches, which bring a greater level of efficiency, e.g. the prospective HCCH work in the field of cross border protection challenges the very limits of private and public international law, and human rights measuring tools provide added benefits due to their capacity to boost the efficiency of human rights discourse and gender mainstreaming efforts. The analysis suggests that the state should remain accountable for the failure to prevent VAW under international law, and abandoning the human rights approach could bring back the problem of public/private divide, which leaves VAW in the shadows of private matters.
5. The analysis of substantial challenges at the global level revealed that the current draft CEVAWG suggests invoking accountability in the context of torture by private perpetrators, and although it can be seen as a step forwards, if normative gap is seen as *de facto* vacuum, the author argues that it is a step backwards, in comparison to the CEDAW Committee's practice, which recognizes accountability that does not require to reach the level of severity of torture. GR 19 and its draft update provides for more adjustable standard at the moment, and the due diligence duty to protect

women against VAW of private perpetrators may apply to countries which have not ratified the CEDAW (the USA).

6. The analysis of CEDAW Committee's jurisprudence on VAW, Special Rapporteur's on VAW reports, and legal literature on the substance of rights allows concluding that in cases of DV, international law should be seen as triggering both individual due diligence, as well as systemic due diligence. Individual due diligence concerns responsibility towards particular individuals, and systemic due diligence may in turn address the failures to decrease stereotyping or prejudice, and even grave and systemic violations of women rights. Regarding the substantive definition of rape, analysis shows that international law has turned its attention to narrowing down the possibilities of using consent as a justification, but the states should have discretion to choose a narrow definition of consent, and/ or a broad definition of coercion in cases of sexual VAW perpetrated by private individuals. Rape is understood as sexual(ized) penetration of any kind that is perpetrated without the consent of the person, and this definition has been gradually adopted both at the global level, and at the level of Council of Europe.

Regarding the second statement of the thesis "Regional organisations (the EU and the CoE) have crucial roles in prevention of and protection from VAW in Europe and these forces should be consolidated through the greater effort of the EU":

7. The thesis reveals that the ECtHR played a crucial role in developing substantial definitions of VAW in its landmark decisions: particularly *Opuz v Turkey* and *M.C. v. Bulgaria* marked the new era of recognition that DV can be considered a violation of Article 3 of the ECHR (torture, inhuman, and degrading treatment, and discrimination (Article 14 of the ECHR), and sexual violence should focus on the concept of non-consent and can be seen as violation of Article 3. However, the analysis reveals that subsequently, the Court focused on procedural rather than substantial positive obligations and refrained from recognition of discrimination or torture in DV and sexual VAW cases. The substantial guidance of the Court is still needed in order to increase consistency of cases on DV as SD, and in order to clarify the position on whether DV can be seen as torture, and whether rape can be seen as torture and SD.
8. Istanbul Convention provides a conceptually novel approach, tackling DV and VAW frame in parallel, and providing thorough responses to substantial challenges. It accommodates both the concerns for intersectionality and violence against different groups of persons (men, same sex persons), but also retains the critical aim of substantive gender equality. The thesis reveals that the Convention operates mostly through guiding the states on formulating policies on VAW, and most of its provisions within the EU legal system can be used as the general standard policy. Reservations made to Istanbul Convention by Poland, Lithuania, Latvia, which suggest that the Convention shall be applied in accordance with their Constitutions, should be treated as impermissible reservations of general nature.

9. The analysis shows that the EU focuses on procedural responses to VAW due to the lack of mandate in harmonization of substantive law, and thus its envisaged accession to Istanbul Convention could help filling in certain gaps in the area of substantive response and prevention. In the light of the heavy regional focus on procedural state duties, it is suggested that the ECtHR and the EU should rely on the CoE Istanbul Convention: the Court should apply its provisions on substantive law at least as a source of inspiration on the further necessary guidance, and the EU should make further steps for ratification of Istanbul Convention.
10. The EU Victims' rights package uses a range of novel strategies that may be used by the VAW advocates; however, it provides very wide discretion to the member states and only a minimum level of protection. The effects of the gender neutral definition of GBV should be further monitored, considering that arguably the Victims' package lacks wider contextualization. At the same time, adopting a new Directive or a number of Directives on VAW would increase inconsistency and competition with the Istanbul Convention.
11. The EPO Directive and Protection measures' Regulation partially solve the problem of cross-border protection, which is acute in general, and in particular in situations of international abduction in DV settings. However, the EU legislator relies heavily on the functional equivalence or spontaneous convergence of the substantive laws of member states and the capacity to translate the secondary legislation into own enforcement systems, which leaves much flexibility for the member states.

Regarding the third statement of the thesis "In accordance with its obligations under the international law, the Lithuanian legal regulation on protection against VAW features procedural, conceptual and substantive gaps, which should be the main focus of the further improvement":

12. The normative gap on addressing VAW in Lithuania has been partially filled by the adoption of law on DV in 2011, however, other forms of VAW are not addressed by any legislation. From the perspective of international standards, the application of protection order should not be limited by family status, and civil protection orders should not be tied with divorce proceedings. The author suggests considering whether protection should not be detached from criminal or civil proceedings altogether, which is allowed under the Istanbul Convention and the CEDAW. The Lithuanian legislature should also consider establishing immediate protection orders, considering that both coercive and special protection measures do not provide immediate protection.
13. The analysis revealed that the EU Victims' package has been transposed to Lithuanian law by a number of amendments. In particular, the individual assessment of special protection needs of victims of crimes was established, which differs from risk assessment that was envisaged in October 2016 under the Law on DV. The implementation of the legislative provisions and regulatory acts that transposed the Victims' package needs to be further monitored, because the provided meas-

ures can be adopted flexibly, and in many cases, they are only reccomendatory. It is particularly the cases of VAW need contextualization, but the guideliness on special protection needs are not well suited to application in cases of VAW.

14. Although international law in this area has had a limited positive effect in Lithuania so far, the author maintains that human rights discourse could be used for broadening the scope of state responsibility, and recognizing the need for substantive legislative changes. The analysis of two resonant cases of VAW under the ECHR and other related international documents allows suggesting the areas that need improvement, i.e. state liability in VAW cases, where due diligence duty has been infringed, and the need to improve the provisions on sexual violence.
15. The thesis confirmed that the lack of explicit conceptualization of VAW, as a structural tool of gender inequality, is not in compliance with the conceptual strategy chosen by the CEDAW Committee and Istanbul Convention. Refraining from tackling gender-based violence, stereotyping and prejudice may increase the chances for the future cases against the state under the ECtHR to be seen as violations of Article 14, in combination with other articles, or the prospects of finding violation of Article 5 of the CEDAW Convention under the Optional Protocol, in combination with other articles. Thus it is suggested to improve the legal framework in order to target GBV and provide ties with gender equality paradigm.
16. Regarding substantive regulation on VAW, the author concludes that from the perspective of international law, the regulation on rape should be improved, so it would focus on the notion of consent and not require both elements of the lack of consent and coercion, second, it should not differentiate between vaginal and other types of penetration, and finally intimate partner or marital rape should be clearly stated as unjustifiable. The author also considers that sexual violence should not be made dependent on victim's complaint and it should be clear that sexual violence is an act of public importance.

On the basis of the analysis and the conclusions, the thesis offers recommendations to the Lithuanian legislator, executive branch and judiciary.

Recommendations to the Lithuanian legislator:

1. It is recommended to amend the definition of sexual violence in accordance with Istanbul Convention, and jurisprudence under the ECHR and the CEDAW, thus formulating it in the following way:

Article 149 and Article 150 should be contracted into one article, which includes all acts of sexual violence, and all types of penetration. The crucial notions of consent and sexual assault should be explained in a separate article in the end of the section XXI. The notion of sexual assault (sexual violence) should include vaginal, anal, oral, or any other penetration by any bodily part or object, and consent must be understood as to be given voluntarily and as the result of the person's free will, assessed in the context of the surrounding circum-

stances. It should also be clearly provided that marriage, partnership, or another family or intimate relationship does not relieve nor mitigate from liability.

2. A reform of protective measures is recommended, *inter alia*:

    2.1. Consider detaching protection from criminal and civil proceedings, in accordance with the explicit provisions of Istanbul Convention, and implied suggestion in the context of due diligence duty under CEDAW and ECHR.
    2.2. Consider including a separate article on temporary measures of protection in the Civil Code, Book 2 on Persons, which would not be tied with civil claim as such and would provide at least the classical minimal measures, such as prohibition of contact and approaching the victim.
    2.3. Breach of protection measures (coercive protection measures, special protection measures under Law on DV, and punitive protection measures) should be clearly provided as a criminal offence.
    2.4. Principles of gender equality and non-discrimination should be included among the other principles on protection against DV in Article 3 of the Law on DV.
    2.5. Protection measures under the Law on DV should be applied to wider range of persons, *inter alia*, former spouses or partners, and partners who do not live together.

3. At the moment it is not recommended to establish mediation in cases of VAW, considering that mediation is useful for victims in cases where the state at the same time provides contextualized and targeted measures of prevention and protection. Meanwhile, the law on DV and others do not entrench principles of non-discrimination and gender equality, and thus application of mediation in such context would raise serious doubts on protection and other interests of victims.
4. It is recommended for Parliament to ratify Istanbul Convention, and to recall impermissible reservation of a general nature, submitted by *Note Verbale* during its signing.

Recommendations to the executive branch:

1. Adopt a comprehensive strategy on prevention / decrease of VAW, in consideration of country specific recommendations of the CEDAW Committee. The strategy should:
    1.1. Be based on gender equality paradigm and address stereotyping and subordinate view of girls and women;
    1.2. Include the concept of GBV;
    1.3. Include the concept of intersectional discrimination and be aimed at addressing structural inequalities;

1.4. Include the references to international law that the national competent authorities should rely upon (GR 19, 28, 33, practice of treaty monitoring bodies in the field of VAW);
1.5. Include overview of the results of the previous national strategy on VAW;
1.6. Focus on targeted and contextualized primary prevention measures, rather than "peaceful conflict resolution";

2. Monitor the assessment guidelines on individual needs for special protection, which are adopted with the view of transposition of Victims' directive, in order to assess their effectiveness in cases of VAW;
3. Establish a registry of protection orders;
4. Establish "femicide watch" database;
5. Collect data on application of protection orders and their breaches, and ensure transparency of the existing research data.
6. Ensure that all research data on VAW, and the translations of the main documents are widely available.
7. Entrust the State Audit office with monitoring the national compliance with international indicators in the area of VAW, which are developed by international stakeholders (e.g. Special Rapporteur on VAW) precisely for this task.

Recommendations to the judiciary:

1. A more consistent application of punitive protection orders, and in particular, the obligation to move out and the obligation not to approach the victim under 72[1] of the Criminal Code, is recommended.
2. Consider the recommendation that the opposite obligation (e.g. obligation not to change residence place and to stay at home, e.g. from 23.00 to 6.00) should not be applied in case of convictions for DV under Article 48 of the Criminal Code, if the victim lives in the same residence, as the perpetrator.
3. It is recommended not to consider the evidence of sexual history of the victim, in particular where the said victim is a minor, and / or holding to the principle that such evidence is permissible only in exceptional cases, where it is necessary.
4. It is recommended to treat breaches of protection measures under law on DV seriously, i.e. the liability should not be mended into other sentences to give no practical effect for the breach, and the risk should not be assessed in consideration of the consent of the victim with the breach.
5. It is recommended to avoid stereotyping of VAW victims and prejudicial myths on rape and DV.
6. It is recommended to refrain from suggesting reconciliation under Article 38 of the Criminal Code.

Scientific publications of the author on this topic:

1. Vaigė, Laima. The concept of domestic violence in Lithuania and the aspect of gender from the perspective of international law // Socialinių mokslų studijos : mokslo darbai = Social sciences studies : research papers / Mykolo Romerio universitetas. Vilnius: Mykolo Romerio universitetas. ISSN 2029-2236. 2013, Nr. 5(1), p. 255-274. [IndexCopernicus; SocINDEX with Full Text] [M.kr. 01S]
2. Vaigė, Laima. Violence against women: time for consolidation of European efforts? // Pravni Rozpravy: International scientific conference on law and law studies " Theory, evolution, practices of law" February 22 - 26, 2016: reviewed proceedings of the international scientific conference. Hradec Králové: Magnanimitas, 2016, ISBN 9788087952139. 2016, vol. 6, P. 120-127. [M.kr. 01S]
3. Vaigė, Laima. The international right to highest attainable standard of physical and mental health: evaluating obligations of Lithuania in cases of violence against women // European scientific journal. Kočani: European Scientific Institute. ISSN 1857-7881. Vol. 12, no. 23, 2016, p. 34-61. [Academic OneFile; Academic Search Research and Development (EBSCO); DOAJ] [M.kr. 01S]

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2010-2014 Lithuanian Social Research Centre, Drafter of reports for the European Union Fundamental rights agency, theme "Protection of victims".
2014-2015, Human Rights Monitoring Institute, drafter or reviews of human rights situation, themes "Reproductive health and the right to abortion;" and "Violence against women and domestic violence."
2014, Centre for Equality Advancement, Shadow report on Convention on the Elimination of All Forms of Discrimination Against Women. Representation of Lithuanian NGOs in Geneva, July 2014.
2013-2015, Network of Experts on Social Aspects of Education and Training (NESET), Country report on social equity and justice in the education system of Lithuania, Legal report on European regulation on bullying in schools.
2013, Human Rights Centre Lithuania, author of legal study on psychological violence against women in the family.
2012, House of Diversity and Education, founder.
2009-2010, New Generation Women's Initiatives, project manager (EU funded project on women rights).
2008-2009, Law firm L.Siksniute & Partners, lawyer.
2004-2008, Translation, Documentation and Information Centre, lawyer linguist.

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PhD studies, 2012-2016, Mykolas Romeris University;
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MYKOLO ROMERIO UNIVERSITETAS

Laima Vaigė

SMURTAS PRIEŠ MOTERIS PAGAL TARPTAUTINĘ TEISĘ: SPRAGŲ PILDYMAS TARPTAUTINIU, REGIONINIU IR NACIONALINIU LYGIU

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SMURTAS PRIEŠ MOTERIS PAGAL TARPTAUTINĘ TEISĘ: SPRAGŲ PILDYMAS TARPTAUTINIU, REGIONINIU IR NACIONALINIU LYGIU

SANTRAUKA

Temos aktualumas ir problematika. Smurtas prieš moteris išlieka viena aktualiausių problemų tiek tarptautiniu, tiek regioniniu, tiek nacionaliniu lygmeniu. Pasaulio sveikatos organizacija smurtą prieš moteris įvardija kaip epideminio masto problemą.[1445] Europos Sąjungos Pagrindinių teisių agentūros 2014 m. tyrimo duomenimis, 62 milijonai moterų Europos Sąjungoje (ES) yra patyrusios smurtą.[1446] Kiekvieną dieną 12 moterų ES nužudomos smurtaujant dėl lyties. Be to, smurto prieš moteris kaina yra didžiulė: remiantis Europos Lyčių Lygybės Instituto (EIGE) skaičiavimais, suma siekia miliardus eurų[1447] Problema nėra būdinga tik atskiroms valstybėms, ar tik tam tikroms kultūroms, ir todėl reikalingi pasaulinio lygio sprendimai.

Tarptautine teise galima būdavo remtis tik ginant asmenų teises nuo valstybės atstovų pažeidimų, o smurtas prieš moteris privačiose aplinkose istoriškai buvo traktuojamas kaip nesusijęs su pozityviomis valstybės pareigomis ir priklausantis „privačiai" gyvenimo sričiai. Palaipsniui buvo pripažinta, kad valstybės turi pozityvią pareigą su deramu stropumu (angl. due diligence) užkirsti kelią privačių asmenų smurtui. Taip pat galbūt jau galima teigti, kad smurto prieš moteris draudimas šiuo metu yra tarptautinės paprotinės teisės dalimi.

Tačiau tarptautiniu lygmeniu vis dar tęsiasi diskusijos, nes Jungtinių Tautų lygmeniu (JT), teisinis reguliavimas remiasi negriežtosios teisės instrumentais, t.y. rekomendacijomis ir rezoliucijomis. Taigi, smurtas prieš moteris laikomas diskriminacijos forma pagal Konvenciją dėl visų formų diskriminacijos panaikinimo moterims, arba jį bandoma įtraukti į klasikinių žmogaus teisių dokumentų sritį (*angl.* gender mainstreaming). Diskusijos vyksta tiek dėl konceptualių iššūkių (susijusių su konceptualia strategija, siekiant kovoti su šiuo smurtu), procesinių iššūkių (susijusių su būdu, kuriuo veikiama) ir materialinių (susijusių su teisės esme, materialiuoju turiniu), kurie kyla siekiant apsaugoti moteris pagal tarptautinę teisę.

Smurto prieš moteris Lietuvoje mastai ir kaštai valstybei yra didžiuliai. Tą suvokdama, valstybė stengiasi efektyviau kovoti su smurtu. Lietuva yra Konvencijos dėl visų formų diskriminacijos panaikinimo moterims[1448] (CEDAW) ir Europos Žmogaus Teisių Konvenci-

1445 Pasaulio Sveikatos organizacija (WHO) apibūdina smurtą kaip epideminio lygio pasaulinę problemą. Global and regional estimates of violence against women. Clinical and policy guidelines (Geneva: WHO, 2013).

1446 European Union Agency for Fundamental Rights (FRA), Violence against women: an EU wide survey (Vienna: FRA, 2014).

1447 Estimating the costs of gender-based violence in the European Union, European Institute for Gender Equality (Luxembourg: Publications Office of the European Union, 2014). http://eige.europa. eu/sites/default/files/documents/MH0414745EN2.pdf.

1448 Jungtinių Tautų konvencija dėl visų formų diskriminacijos panaikinimo moterims. Valstybės žinios, 1996-03-08, Nr. 21-549. Lietuvai taip pat galioja Konvencijos dėl visų formų diskriminacijos panaikinimo moterims Fakultatyvinis protokolas. Valstybės žinios, 2004-08-05, Nr. 122-4464.

jos (EŽTK) narė,[1449] jai galioja ES nusikaltimų aukų teisių paketas.[1450] Pasirašyta, tačiau iki šiol neratifikuota Europos Tarybos konvencija dėl smurto prieš moteris ir smurto artimoje aplinkoje prevencijos ir šalinimo, kuri įsigaliojo 2014 m. (Stambulo Konvencija). Ši Konvencija užpildo norminę tarptautinės teisės spragą Europos regione ir yra pirmasis toks išsamus dokumentas, skirtas kovoti su smurtu prieš moteris ir smurtu artimoje aplinkoje. Konvencijos dėl visų formų diskriminacijos panaikinimo moterims komitetas (JT moterų diskriminacijos panaikinimo komitetas) rekomendavo ratifikuoti Stambulo Konvenciją, o smurtą prieš moteris Lietuvoje išskyrė[1451] kaip prioritetinį klausimą, dėl kurio reikia atsiskaityti nelaukiant periodinio pranešimo pabaigos. Tačiau net ir priėmus Apsaugos nuo smurto artimoje aplinkoje įstatymą (ANSAAĮ),[1452] Lietuvoje vyksta diskusijos dėl tarptautinės teisės šioje srityje reikšmės ir naudos.

Tarptautinė teisė yra svarbi nacionalinei teisei – ne tik todėl, kad minėtos ratifikuotos konvencijos suteikia galimybę jomis tiesiogiai remtis teismuose, tačiau ir dėl to, kad tarptautinė teisė daro įtaką, priimant nacionalinius įstatymus, materialines teisės normas, nors tiesiogiai jų priimti nėra reikalaujama. Tai atskleidžia ir disertacijoje aptariami empiriniai tyrimai šioje srityje. Taigi, yra naudinga vertinti, ar nacionalinė teisė atitinka tarptautinę teisę, ir kaip galėtų geriau ją atitikti, siekiant užtikrinti žmogaus teisių apsaugą nacionaliniu lygmeniu ir išvengti naujų neigiamų Lietuvai tarptautinių teismų sprendimų dėl smurto prieš moteris.

Šioje disertacijoje nagrinėjamas smurtas prieš moteris apima tik smurtą, patiriamą iš privačių asmenų, o tai šios disertacijos tikslais reiškia fizinį ir seksualinį smurtą artimoje aplinkoje ir seksualinį smurtą bendruomenėje. Reikia atskirti smurtą, kuris yra tik trumpalaikis ir situacinis, ir kontroliuojantį, sistemingą (privačių asmenų lygiu) smurtinį elgesį, apie kurį kalbama šioje disertacijoje. Smurtas, kuris nėra tik situacinis, turi tendenciją su laiku smarkėti ir tapti vis pavojingesniu, ir jis taip pat dažniau paveikia moteris, kaip rodo pasaulinė ir nacionalinės statistikos. Nors bet koks asmuo gali patirti smurtą artimoje aplinkoje, įskaitant vyrus, vaikus, giminaičius, ir tos pačios lyties partnerius, pasaulinis smurto prieš moteris paplitimas, o kartais net ir teisinės nuostatos, darančios jį teisėtu ar švelninančios atsakomybę, parodo, kad tai yra sisteminė problema ne tik mikro lygmeniu (t.y. individualus sisteminis smurtas), bet ir makro lygmeniu (plačiai paplitęs, sisteminis smurtas prieš moteris).

1449 Europos Žmogaus teisių ir pagrindinių laisvių apsaugos konvencija, Valstybės žinios, 1995-05-16, Nr. 40-987.

1450 Aukų paketas apima dvi Direktyvas ir Reglamentą. ES Direktyvos turi būti perkeliamos į nacionalinę teisę, o Reglamentai galioja tiesiogiai. Žr. Europos Parlamento ir Tarybos direktyva 2012/29/ES 2012 m. spalio 25 d. kuria nustatomi būtiniausi nusikaltimų aukų teisių, paramos joms ir jų apsaugos standartai ir kuria pakeičiamas Tarybos pamatinis sprendimas 2001/220/TVR. Europos Parlamento ir Tarybos direktyva 2011/99/ES 2011 m. gruodžio 13 d. dėl Europos apsaugos orderio. Europos Parlamento ir Tarybos Reglamentas Nr. 606/2013 2013 m. birželio 12 d. dėl apsaugos priemonių tarpusavio pripažinimo civilinėse bylose.

1451 Baigiamieji pastebėjimai dėl penktojo Lietuvos periodinio pranešimo pagal Jungtinių Tautų konvenciją dėl visų formų diskriminacijos panaikinimo moterims. CEDAW/C/LTU/CO/5. 2014 m. liepos 18 d.

1452 Apsaugos nuo smurto artimoje aplinkoje įstatymas, 2011 m. gegužės 26 d. Nr. XI-1425. Valstybės žinios, 2011-06-14, Nr. 72-3475.

Tyrimų šioje srityje apžvalga. Užsienio literatūroje ši tema išsamiai nagrinėjama. Ypač paminėtinos Alice Edwards,[1453] Bonita Meyersfeld[1454] monografijos apie smurtą prieš moteris pagal tarptautinę teisę, taip pat Carin Benninger-Budel[1455] redaguota knyga apie deramo stropumo pareigą (*ang.* due diligence) užkirsti smurtą, empiriniai tyrimai šioje srityje (Neil A. Englehart,[1456] David. L. Richards, Jilliene Haglund[1457]), Catharine A. MacKinnon[1458] ir Julie Goldscheid[1459] straipsniai, ir daugelis kitų. Tačiau nei viena monografija nenagrinėjo pastarųjų pokyčių šioje srityje – naujai priimtų teismų sprendimų, kurie leidžia argumentuoti, kad smurtas prieš moteris draudžiamas pagal tarptautinę paprotinę teisę, naujų ES ir ET dokumentų, JT konvencijos ir Generalinės rekomendacijos pataisų pasiūlymų. Reikia pabrėžti, kad šiuo metu pateikti pasiūlymai yra pirmieji tokie reikšmingi per paskutinius 25 metus, nuo Generalinės rekomendacijos Nr. 19 priėmimo. Taip pat reikia pažymėti, kad autorės ginamieji teiginiai labai skiriasi nuo daugelio ankstesnių autorių, kurios siūlė priimti naują konvenciją ir šitaip užpildyti norminę spragą, ir rekomendavo daryti strategijas neutralesnėmis. Autorė taip pat mažiau dėmesio skiria feministinių strategijų aptarimui.

Nors ši problema labai svarbi Lietuvai, kol kas tyrimų šioje srityje atlikta nedaug. Kai kurias atskiras problemas nagrinėjo psichologai (Alfredas Laurinavičius, Rita Žukauskienė)[1460], kiti socialinių ir humanitarinių mokslų atstovai (Giedrė Purvaneckienė,[1461] Laima Ruibytė and Vilius Velička,[1462] Marytė Gustainienė,[1463]). Nacionalinės teisės požiūriu, smurtą artimo-

1453 Alice Edwards, Violence Against Women under International Human Rights Law (Cambridge: Cambridge University Press. 2011. 3rd printing in 2012.

1454 Bonita Meyersfeld, Domestic violence and international law, (Oxford:Hart publishing, 2010, reprinted in 2012.

1455 Carin Benninger-Budel, ed., Due Diligence and Its Application to Protect Women From Violence. (Nijhoff Law series, Brill. 2008).

1456 Neil A. Englehart, „CEDAW and gender violence: an empirical assessment", Michigan state law review, 265 (2014): 265-280.

1457 David. L. Richards, Jilliene Haglund, Violence against women and the Law (London: Paradigm / Routledge, 2015).

1458 Catharine A. MacKinnon, „Creating international law: gender as leading edge." 36 Harvard Journal of law and Gender 105 (2013): 105-121. Catharine A. MacKinnon. "Creating international law: Gender as new Paradigm." In Non-State Actors, Soft Law and Protective Regimes. Cecilia M. Bailliet(ed), 17-31, Cambridge University Press, 2013. Catharine A. MacKinnon. „Rape redefined", Harvard law and policy review 10, (2016): 431-477.

1459 Julie Goldscheid, „Gender Neutrality and the "Violence Against Women Frame," University of Miami Race and Social Justice law review 5, (2015): 307-324. Julie Goldscheid, „Gender Neutrality, the "Violence against women" frame, and transformative reform." UMKC Law Review. 623, 82 (2013-2014): 623-666. Julie Goldscheid; Debra Liebowitz, „Due diligence and Gender Violence: Parsing its Power and its Perils." Cornell International Law Journal 48, 2, (Spring 2015): 301-345.

1460 Alfredas Laurinavičius; Rita Žukauskienė, „Pakartotinio smurto prieš sutuoktinę/partnerę rizikos įvertinimo galimybės taikant b-safer metodiką." Socialinis darbas : mokslo darbai, 8, 1 (2009): 103-111

1461 Giedrė Purvaneckienė, *Smurtas prieš moteris.* Lietuvos moterų pažanga:iššūkiai ir realybė 1990 –2005 (Vilnius: UAB Mokslo aidai, 2005).

1462 Laima Ruibytė, Vilius Velička, „Dirbančių ir būsimų policijos pareigūnų nuostatos į smurtą artimoje aplinkoje," Public security and Public Order, 7 (2012): 166-180.

1463 Marytė Gustainienė, "Smurto prieš moteris priežastys ir prevencija," Sociologija. Mintis ir veiksmas, 1 (2005): 110-121.

je aplinkoje nagrinėjo Brigita Palavinskienė ir Saulė Vidrinskaitė,[1464] Jolita Šukytė, Renata Marcinauskaitė,[1465] Ilona Michailovič,[1466] Salomėja Zaksaitė.[1467] ir kiti. Tačiau trūksta analizės, kuri įvertintų nacionalinės teisės atitiktį tarptautinei teisei. Ji yra reikalinga, siekiant įvertinti valstybės pozityvias pareigas ir išvengti naujų nepalankių tarptautinių teismų sprendimų.

Disertacijos naujumas ir struktūra. Tyrimas, atliktas Alice Edwards disertacijoje ir knygoje (Violence against women under international human rights law, 2011) yra arčiausiai autorės temos, o taip pat Bonita Meyersfeld knyga (Domestic violence against International law, 2010) apima dalį minėtų problemų, tačiau šiuose leidiniuose naudota metodologija, darbo objektas ir šaltiniai gerokai skiriasi. Pirma, autorės rėmėsi šaltiniais iki 2011 m., o situacija per paskutinius penkerius metus labai smarkiai keitėsi. Ne tik dėl šaltinių naujumo, bet ir dėl naujų regioninių strategijų inovatyvumo yra būtina skirti daugiau dėmesio Europos regionui ir nebegalima nagrinėti tik teisės JT lygmeniu. Antra, Alice Edwards knyga apėmė taip pat ir smurtą ginkluotų konfliktų metu ir valstybės atstovų smurtą, todėl daugelis pavyzdžių buvo pateikiami iš šios srities, ir jos disertacijos ir monografijos tikslas buvo analizuoti globalias feministines strategijas šiuo klausimu. Tuo tarpu ši disertacija turi kitą tikslą – ne nagrinėti feministines strategijas pasaulinio valdymo (*angl.*global governance) kontekste, tačiau turint omenyje aukos apsaugą kaip esminę prerogatyvą, atrasti esmines teisės reguliavimo spragas ir pasiūlyti sprendimus. Ši disertacija taip pat siekia tolesnių tikslų, nei Bonita Meyersfeld knygoje, kurioje norėta įrodyti, kad tarptautinėje teisėje *formuojasi* nauja paprotinė norma, ir ši įpareigoja valstybes užkirsti kelią sisteminiam partnerių smurtui prieš moteris. Šiuo metu jau tikrai gana pagrįstai galima sakyti, kad tokia tarptautinės paprotinės teisės norma egzistuoja. Autorė taip pat siūlo kitokius sprendimus, nei anksčiau šia tema rašiusios autorės. Kalbant apie disertacijos antrąjį ir trečiąjį skyrių, kol kas panašaus išsamaus tyrimo (t.y. smurto prieš moteris analizės ES, ET ir Lietuvos lygmeniu) nėra atlikę nei mokslininkai Lietuvoje, nei Europos Sąjungoje, todėl tai galėtų būti pirmasis žingsnis, pradedant diskusijas šia tema.

Disertacijos pridėtinė vertė gali būti atskleista ir per struktūrą. Pirmoji disertacijos dalis analizuoja smurto prieš moteris reguliavimą globaliu lygiu ir čia iškylančius procesinius, konceptualius ir materialius iššūkius. Šiame skyriuje taip pat analizuojami naujai pasiūlyti instrumentai– JT Konvencijos dėl smurto prieš moteris ir mergaites panaikinimo (CEVAWG) projekto, kurį 2015 m. pasiūlė JT Specialioji Pranešėja,[1468] bei Bendrosios

1464 Birutė Palavinskienė, Saulė Vidrinskaitė, „Smurtas prieš moteris," Feminizmas, visuomenė, kultūra. 4 (2002): 67-77.

1465 Jolita Šukytė, Renata Marcinauskaitė, „Kai kurie psichinės prievartos doktrinos probleminiai aspektai," Socialinių mokslų studijos, 4, 2 (2012): 685–695.

1466 Ilona Michailovič, „Kai kurie smurto šeimoje problematikos aspektai," *Teisė*, 82 (2012):26-40. Ilona Michailovič. „Kai kurie smurto artimoje aplinkoje aspektai socialinės kultūrinės lyties požiūriu," *Kriminologijos studijos*, 2 (2014): 155-172.

1467 Salomėja Zaksaitė, „Apsauga nuo smurto artimoje aplinkoje" In *Aktualiausios žmogaus teisių užtikrinimo Lietuvoje 2008–2013 m. problemos: teisinis tyrimas.* Lina Beliūnienė, Kristina Ambrazevičiūtė, Mindaugas Lankauskas et al.(red) (Vilnius: Lietuvos teisės institutas, 2014), pp. 55-69.

1468 Addendum to the Human Right Council Thematic report of the Special Rapporteur on Violence, its Causes and Consequences, 16 June 2015, A/HRC/29/27/Add.4. Draft of Convention for the Elimination of Violence against Women and Girls (CEVAWG).

Rekomendacijos dėl smurto prieš moteris Nr. 19 (GR 19) nauja redakcija,[1469] kurią 2016 m. pasiūlė JT Komitetas, prižiūrintis Konvencijos dėl visų formų diskriminacijos moterims panaikinimo įgyvendinimą. Antrame skyriuje nagrinėjama Stambulo Konvencija, įsigaliojusi 2014 m. ir 2015 m. įsigalioję ES dokumentai, bei aktuali EŽTT praktika šiuo klausimu. Ankstesnėje literatūroje daugiau dėmesio skirta baudžiamiesiems aspektams ir procesiniams klausimams, o šioje disertacijoje pagrindinis dėmesys skiriamas visų pirma aukos apsaugos ir smurto prevencijos aspektams. Trečioji dalis taip pat naudoja į nusikaltimo aukas sutelktą požiūrį, siekiant įvertinti nacionalinės teisės atitiktį tarptautinei teisei. Tokios analizės iki šiol nebuvo atlikta, išskyrus kelis autorės straipsnius Lietuvos ir užsienio žurnaluose, ir tokios analizės labai reikia.

Disertacijos objektas ir jo apribojimas. Darbo objektas yra apsauga nuo smurto prieš moteris ir tokio smurto prevencija pagal tarptautinę teisę. Reikia pažymėti, kad būtų neįmanoma analizuoti smurto prieš moteris problemą visuose tarptautiniuose teisės dokumentuose, ir apmąstyti absoliučiai visus įmanomus aspektus. Todėl apribojamas darbo objektas, atitinkamai nubrėžiant šiame darbe pateikiamos analizės ribas.

Darbe pagrindinis dėmesys skiriamas privačių asmenų smurtui, ir visų pirma smurtui artimoje aplinkoje ir seksualiniam smurtui bendruomenėje. Nėra nagrinėjamas priekabiavimas ir smurtas darbovietėse, o pateikiami smurto prieš mergaites pavyzdžiai nagrinėjami ne smurto prieš vaikus kontekste, bet teisės aktų, skirtų smurtui prieš moteris, kontekste, atsižvelgiant į aptariamose bylose nagrinėjamą temą. Be to, disertacijoje pagrindinis dėmesys skiriamas apsaugos ir prevencijos aspektams, o ne baudžiamojo persekiojimo, baudžiamiesiems aspektams. Pagal JT sistemą, šioje srityje taikoma sistema, kuri apima prevenciją, apsaugą, baudžiamąjį persekiojimą, bausmę ir žalos atlyginimą (5P sistema). Žinoma, visi šie aspektai turi būti subalansuoti, siekiant spręsti smurto prieš moteris problemas. Be to, kai kurie aspektai iš dalies persidengia – pvz., prevencija ir apsauga, apsauga ir bausmė, ir tt. Tačiau pastaruoju metu nemažai dėmesio buvo skirta baudžiamojo persekiojimo klausimams, bausmės aspektams, ir todėl atrodo, kad būtina apriboti disertacijos sritį, orientuojantis į autorės nuomone aktualiausius ir dar nepakankamai nagrinėtus probleminius aspektus, t.y. į prevencijos ir apsaugos nuo smurto aspektus.

Disertacijos tikslas ir uždaviniai. Disertacija siekiama įvertinti apsaugos nuo smurto prieš moteris teisinio reguliavimo spragas, nagrinėjant procesinius, konceptualius ir materialius iššūkius, kurie iškyla tarptautiniu, regioniniu ir nacionaliniu lygiais.

Šiuo tikslu, keliami tokie **uždaviniai:**

1. Analizuoti pasaulinę norminę spragą smurto prieš moteris srityje ir konceptualias bei materialias problemas, bei kritiškai įvertinti JT Konvencijos dėl smurto prieš moteris pasiūlymą. Ar Konvencija turi pridėtinę vertę, vertinant tarptautinės teisės spragas?

1469 Draft General Recommendation No. 19 (1992): accelerating elimination of gender-based violence against women, Addendum of 28 July 2016. CEDAW/C/GC/19/Add.1.

2. Analizuoti regioninį teisinį reguliavimą, pagrindinį dėmesį skiriant apsaugos ir prevencijos aspektams, siekiant įvertinti valstybių deramo stropumo (*ang.* due diligence) pareigos apimtį šioje srityje ir išliekančias spragas. Kaip Europos teisė galėtų suteikti visapusišką apsaugą nuo smurto prieš moteris?
3. Išanalizuoti vidaus teisės atitiktį tarptautinei teisei, sutelkiant dėmesį į pagrindines problemas apsaugos ir prevencijos srityje ir įvertinti Lietuvos teisinį reguliavimą tarptautinių standartų kontekste. Kokie svarbiausi pokyčiai yra būtini, siekiant suteikti geresnę apsaugą nuo smurto prieš moteris?

Disertacijos ginamieji teiginiai:

1. Tarptautinės teisės norminė spraga smurto prieš moteris srityje savaime nereiškia, kad yra būtina priimti naują JT konvenciją, nebent tai suteiktų papildomos vertės, sprendžiant konceptualias ir materialines problemas šioje srityje.
2. Regioninės organizacijos (ES ir ET) daro esminę įtaką prevencijos ir apsaugos nuo smurto prieš moteris srityje Europoje, ir ES turėtų dėti pastangas, siekiant užpildyti liekančias spragas.
3. Atsižvelgiant į pareigas pagal tarptautinę teisę, Lietuvos teisiniame reguliavime dėl apsaugos nuo smurto prieš moteris vis dar išlieka procesinių, konceptualių ir materialių sprangų, kurių pildymui ateityje turėtų būti skiriamas pagrindinis dėmesys.

Metodologija. Lietuvos teisės doktrinoje ir disertacijose dažnai naudojamas dogmatinis teisinis metodas, kuris reiškia, kad atsižvelgiama į teisinių šaltinių hierarchiją ir taikoma formalistinė logika.[1470] Disertacijose suformulavus ginamuosius teiginius, atliekama kokybinė teisės aktų ir jurisprudencijos analizė, siekiant apginti ir įrodyti ginamuosius teiginius. Šioje disertacijoje autorė taip pat laikosi minėtos metodikos, pateikdama ginamuosius teiginius ir sistemiškai analizuodama teisines sutartis, teismų jurisprudenciją, sutarčių taikymą prižiūrinčių įstaigų praktiką.

Tačiau tyrimai tarptautinės teisės srityje neišvengiamai susiję ir su negriežtosios teisės (soft law) reguliavimo analize, jiems būdingas kontekstualizavimas, taip iš dalies nukrypstant nuo tradicinio dogmatinio teisinio metodo. Be to, teorinis diskursas yra glaudžiai susijęs su praktika, kurioje kyla taip vadinami sudėtingi atvejai (ar sudėtingos bylos),[1471] o šių analizė sudaro galimybę pildyti teisės spragas. Sisteminis analizės metodas pasitelkiamas, siekiant atskleisti pozityvias valstybių pareigas smurto prieš moteris srityje, kai smurtauja privatūs asmenys. Tarptautinė teisė čia yra laikoma nustatanti standartus, kurie daro poveikį nacionalinėms sistemoms. Darbe nėra siekiama įvertinti nacionalinės teisės įtaką tarptautinei teisei. Taip pat nesiekiama palyginti Lietuvos sistemą su kitomis nacionalinėmis sistemomis šioje srityje, nes tai jau yra atliekama mokslininkų grupių Europos Sąjungoje. Autorė siekia įdėmiau pažvelgti į vieną nacionalinę sistemą, kurios teisinio reguliavimo analizė leidžia geriau suprasti ir tarptautinės teisės veikimą nacionaliniu lygmeniu.

1470 Audrius Gintalas, „Metodologijos ir metodo samprata“, Socialinių mokslų studijos 3, (2011): 992.
1471 Ronald Dworkin, „Hard cases“, *Harvard Law Review* 88, 6 (1975): 1057-1109.

Autorė naudoja feministinę tyrimų metodologiją,[1472] o tai reiškia, kad tarptautinės teisės analizėje iškeliamas lyties klausimas ir nagrinėjama, kokį poveikį teisė daro moterims. Reikia pabrėžti, kad rašant disertaciją apie smurtą prieš moteris, lyties klausimas yra neišvengiamas; XXI a. teisinė feministinė doktrina turėjo esminį poveikį tarptautinei teisei šioje srityje.[1473] Teisinėje feministinėje doktrinoje, kad ir kokia įvairi ji būtų, dažnai naudojami empiriniai duomenys ir naratyvai savo ginamiesiems teiginiams pagrįsti. Šias metodikas naudoja ir autorė savo disertacijoje, pasitelkdama moterų smurtinių patirčių pavyzdžius iš viso pasaulio ir modeliuodama hipotetinius sudėtingus atvejus.

Disertacijoje naudojamas skirstymas į procesinius, konceptualius ir materialinius iššūkius jau buvo panaudotas mokslininkų, nagrinėjančių moterų teises pagal tarptautinę teisę, pvz. Aaron Xavier Fellmeth,[1474] Ilona Cairns.[1475] Tačiau kartu yra svarbu nelaikyti šių sąvokų pernelyg griežtomis kategorijomis, nes būtent skirstymas į kategorijas yra kritikuojamas feministinėje teisinėje doktrinoje. Skirstymas į kategorijas „vieša“ ir „privatu“ žalingas moterims, nes smurtas artimoje aplinkoje istoriškai patekdavo į privačią sritį. Be to, skirtingais teisės lygmenimis, skiriasi ir šių sąvokų reikšmė, pvz. „procesinis“ klausimas turi skirtingas reikšmes tarptautiniu, regioniniu ir nacionaliniu lygmeniu. Galiausiai, regioninė teisė (ES, ET) taip pat yra tarptautinė teisė, tačiau dėl šių problemų savitumo, jas reikia nagrinėti atskiruose skyriuose ir taip pat išskirti pavadinime. Tokį patį sprendimą anksčiau naudojo ir kiti mokslininkai šioje srityje, pvz. Anne Hellum, Henriette Sinding Aasen[1476] ir kt. Tarptautinės teisės, kuri nėra regioninė, jos taip pat nevadino „universalia.“ Tam yra kelios priežastys. Pavyzdžiui, feministinė kritika dažnai remiasi teiginiu, kad tarptautinė teisė yra neobjektyvi lyties aspektu (*ang.* gendered system) ir tai reiškia, kad abejojama jos universalumu. Be to, nemažai nagrinėjamų teisės aktų šioje srityje yra ne universalūs, o asimetriški, t.y. skirti tik moterų teisėms, siekiant užpildyti istorinę spragą, kuri nulėmė smurto prieš moteris priskyrimą privačiai sričiai.

Disertacijos praktinė reikšmė. Šia disertacija siekiama prisidėti prie diskusijos, kuri vyksta tarptautiniu lygmeniu ir apima skirtingus pasiūlymus dėl ateities strategijų ir galimų teisės aktų. Reikia pasakyti, kad feministinė teisinė doktrina šiuo klausimu daugiausiai sukurta Vakarų Europos ir JAV mokslininkių. Tačiau autorės disertacija galėtų būti naudinga, siekiant nutiesti tarpusavio supratimo tiltus tarp skirtingų Europos dalių, ir skirtingų tradicijų mokslininkų. Šiuo tikslu disertacija rašoma anglų kalba.

Be to, atsižvelgiant į plačiai paplitusį smurtą prieš moteris Lietuvoje, disertacija taip pat reikšminga, norint toliau vystyti Lietuvos teisinį reguliavimą šiuo klausimu. Atsižvelgiant

1472 Maggie Sumner, „Feminist research“ In Victor Jupp (ed) SAGE dictionary of social research methods (SAGE publications online, 2011 SAGE Publications Ltd doi: 10.4135/9780857020116): 117-119.

1473 Dianne Otto, Feminist Approaches to International Law, Oxford bibliographies, 2012, http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0055.xml

1474 Aaron Xavier Fellmeth, „Feminism and International law: theory, methodology, and substantive reform", Human Rights Quarterly 22, (2000): 658-733.

1475 Ilona Cm. Cairns, „The costs of (partial) inclusion: the evolution, limits and biases of the principal feminist challenges to international law.“ In Women's Human rights and the Elimination of Discrimination (The Hague: Brill, 2016), p. 153-181.

1476 Anne Hellum, Henriette Sinding Aasen, eds, Women's human rights: CEDAW in international, regional and national law (Cambridge: Cambridge University press, 2013).

į tai, kad Lietuvos teisė turėtų atitikti tarptautinę teisę ir valstybė turi laikytis pozityviųjų pareigų, šioje disertacijoje nagrinėjama tarptautinė teisė ir teismų praktika yra naudinga tiek Lietuvos įstatymų leidėjui, tiek vykdomosios valdžios atstovams ir teismams. Galiausiai, ji gali būti įdomi ir tarptautinės viešosios bei tarptautinės privatinės teisės studentams, o taip pat nevyriausybinių organizacijų atstovams bei žmogaus teisių advokatams.

Pagrindinės tyrimo išvados

Darbe atlikta analizė leidžia teigti, kad daktaro disertacijoje suformuluoti ginamieji teiginiai buvo pagrįsti.

Dėl pirmojo disertacijos ginamojo teiginio: „Tarptautinės teisės norminė spraga smurto prieš moteris srityje savaime nereiškia, kad būtina priimti naują JT konvenciją, nebent tai suteiktų papildomos naudos sprendžiant konceptualias ir materialines problemas šioje srityje."

1. Apsauga nuo smurto prieš moteris nėra reguliuojama specialios tarptautinės konvencijos, tačiau globalios norminės spragos poveikį mažina vystomos regioninės konvencijos, laipsniškas smurto prieš moteris draudimo tarptautinėje paprotinėje teisėje pripažinimas, negriežtoji teisė ir valstybių pozityvias pareigas nustatanti jurisprudencija. Analizėje atskleidžiama, kad šioje srityje galima išskirti skirtingo pobūdžio problemas, ir tarptautinės sutarties priėmimas pats savaime sprendžia tik procesinę problemą – normų trūkumą, tačiau automatiškai neišsprendžia konceptualių ir materialių problemų.
2. Taip pat analizėje atskleidžiama, kad dabartinis Konvencijos, skirtos smurto prieš moteris mažinimui (CEVAWG), pasiūlymas iš esmės išlaiko tą pačią konceptualią strategiją, t.y. smurtas prieš moteris suvokiamas kaip diskriminacijos forma, o ši koncepcija jau taikoma negriežtosios teisės lygmeniu (GR 19). Dėl to abejotina, ar naujos konvencijos priėmimas konceptualiai turi esminę pridėtinę vertę, kadangi pripažinta konceptuali strategija būtų tiesiog pakelta iki tarptautinės sutarties lygmens. Priešingai, jei valstybės rinktųsi neprisijungti prie šios konvencijos, kuri užpildo tariamą norminę spragą, galėtų būti sumenkintas Konvencijos dėl visų formų diskriminacijos panaikinimo moterims priežiūros komiteto darbas ir tarptautinės paprotinės teisės reikšmė. Smurtas prieš moteris turėti išlikti prioritetine JT Konvencijos dėl visų formų diskriminacijos panaikinimo moterims priežiūros komiteto (CEDAW komiteto) darbo sritimi, ir bet koks kitas JT dokumentas, kuris išlaiko tokią pačią konceptualią strategiją, kaip ir ši Konvencija, galėtų būti pasiūlytas nebent kaip šios Konvencijos Protokolas.
3. Mokslinės literatūros, nagrinėjančios smurto prieš moteris draudimo reguliavimą tarptautinėje teisėje, analizė leidžia daryti išvadą, kad dabartinį reguliavimą reikėtų išlaikyti, o platesnį smurto dėl lyties draudimo reguliavimą, kuris apimtų ir smurtą dėl seksualinės orientacijos ar lytinės tapatybės, galima būtų vystyti paraleliai. CEDAW komiteto bendrosios rekomendacijos yra tinkamiausi instrumentai, kurie šiuo metu galėtų spręsti sąveikų teorijos išryškinamą daugialypės diskriminacijos problemą, nes šios rekomendacijos yra pakankamai konkrečios, bei išlaiko lankstumą ir savalaikiškumą.

4. Dichotomija tarp „vieša“ ir „privatu“ galėtų būti keičiama, pasitelkiant naujas teisines technikas ir tarptautinės teisės instrumentus, kuriems būdingas didesnis veiksmingumas. Autorė argumentuoja, kad Hagos Konferencijos Tarptautinės privatinės teisės klausimais darbas šioje srityje yra inovatyvus, nes iniciatyva priimti apsaugos priemonių Konvenciją mažina takoskyrą ne tik tarp „vieša“ ir „privatu“, bet ir tarp tarptautinės viešosios ir privatinės teisės. Žmogaus teisių indikatoriai ir kitos žmogaus teisių „matavimo“ priemonės taip pat turi pridėtinės vertės dėl suteikiamų galimybių paskatinti žmogaus teisių diskurso ir lyties aspekto integravimo veiksmingumą. Analizė taip pat leidžia teigti, kad valstybės, neapsaugojusios moterų nuo smurto, turėtų išlikti atsakingos pagal tarptautinę teisę, o žmogaus teisių požiūrio atsisakymas galėtų sugrąžinti minėtą dichotomiją, dėl kurios smurtas prieš moteris istoriškai likdavo marginalizuojamas.
5. Materialinių tarptautinės teisės reguliavimo iššūkių analizė parodė, kad dabartinis CEVAWG Konvencijos projektas sieja atsakomybę su kankinimais, ir nors tai yra žingsnis į priekį, jei norminę spragą laikysime *de facto* spraga, autorė daro išvadą, kad tai gali būti laikoma ir žingsniu atgal, jei lyginsime su CEDAW komiteto praktika, kurioje nereikalaujama, kad smurtas prieš moterį būtų pasiekęs kankinimų lygį. GR 19 ir nauja šios rekomendacijos versija nustato lankstesnį standartą, o deramo stropumo pareiga apsaugoti moteris nuo smurto gali būti pritaikoma ir valstybėms, kurios neratifikavo CEDAW Konvencijos (JAV).
6. CEDAW komiteto praktikos, Specialiųjų pranešėjų dėl smurto prieš moteris ataskaitų, ir teisinės literatūros analizė leidžia daryti išvadą, kad kalbant apie smurtą artimoje aplinkoje, valstybės turi tiek individualią, tiek sisteminę deramo stropumo pareigą. Individuali deramo stropumo pareiga susijusi su atsakomybe apsaugoti konkretų asmenį nuo smurto, o sisteminė deramo stropumo pareiga yra susijusi su pareiga mažinti smurtą prieš moteris apskritai. Dėl materialinio seksualinės prievartos (iššaginimo) apibrėžimo, analizė parodė, kad tarptautinėje teisėje ši sąvoka siejama su nesutikimu su lytiniu santykiu, nors valstybės turėtų išlaikyti diskreciją pasirinkti platų nesutikimo apibrėžimą arba siaurą prievartos apibrėžimą. Iššaginimo suvokimas kaip bet kokio pobūdžio seksualinis įsiskverbimas be asmens sutikimo palaipsniui įsitvirtina tiek regioniniu (ET), tiek tarptautiniu lygmeniu.

Dėl antrojo ginamojo teiginio: “Regioninės organizacijos (ES ir ET) daro esminę įtaką prevencijos ir apsaugos nuo smurto prieš moteris srityje Europoje ir ES turėtų dėti pastangas, siekiant apjungti šias pastangas.”

7. Disertacija atskleidė, kad EŽTK praktika turėjo esminį poveikį, plėtojant materialias teises smurto prieš moteris draudimo srityje. Bylos *Opuz v Turkey* ir *M.C. v Bulgaria* pažymi naują etapą, kuriame smurtas artimoje aplinkoje gali būti traktuojamas kaip Konvencijos 3 straipsnio (kankinimai, nežmoniškas ir žeminantis elgesys) ir 14 (diskriminavimas) pažeidimai, o seksualinio smurto apibrėžimas turėtų sietis su nesutikimo su lytiniu santykiu sąvoka. Tačiau analizė taip pat parodė, kad vėliau Teismas koncentravosi ties procedūrinio, o ne materialinio pobūdžio valstybės par-

eigomis ir kol kas vengė pripažinti smurtą diskriminuojant dėl lyties ar daugialypę diskriminaciją seksualinio smurto bylose.

8. Stambulo Konvencija siūlo inovatyvią koncepciją, nes ja siekiama kovoti su smurtu artimoje aplinkoje ir smurtu prieš moteris paraleliai tame pačiame dokumente, ir taip pat reikalaujama materialios teisės pokyčių. Konvencijoje atsižvelgiama į sąvokų teorijos keliamas problemas, ir ji gali būti taikoma įvairiems asmenims, patiriantiems smurtą artimoje aplinkoje. Analizė taip pat atskleidė, kad Konvencija veikia daugiausia per gairių nustatymą ir ES teisės sistemoje, didžioji dalis jos nuostatų gali būti panaudotos kaip bendrieji vedantys standartai. Lietuvos, Lenkijos, Latvijos išlygos Stambulo Konvencijai, kuriomis sakoma, kad šią reikėtų taikyti atsižvelgiant į jų Konstitucijas, turėtų būti laikomos neleistinomis bendrojo pobūdžio išlygomis.
9. Analizė atskleidė, kad trūkstant kompetencijos materialinės teisės srityje, ES telkia dėmesį į procedūrinius smurto prieš moteris problemos sprendimus, ir numatytas prisijungimas prie Stambulo Konvencijos galėtų padėti pildyti materialiąsias spragas apsaugos ir smurto prevencijos srityse. Atsižvelgiant į tai, kad regione daugiausiai dėmesio skiriama procedūrinėms valstybių pareigoms, siūloma, kad EŽTT ir ES turėtų remtis Stambulo Konvencija: Teismas turėtų taikyti Konvencijos nuostatas bent jau kaip gaires, o ES turėtų daryti tolesnius žingsnius dėl Stambulo Konvencijos pasirašymo ir ratifikavimo.
10. ES nusikaltimų aukų teisių paketas naudoja įvairias naujas strategijas, kuriomis galės pasinaudoti ir smurto prieš moteris advokatai, tačiau taip pat nustato didelę veikimo laisvę valstybėms narėms ir tik minimalų apsaugos lygį. Rekomenduotina toliau stebėti lyčiai neutralaus smurto dėl lyties apibrėžimo poveikį, atsižvelgiant į tai, kad ES teisei šioje srityje kol kas trūksta platesnio kontekstualizavimo. Tuo pat metu, Direktyvos ar keleto direktyvų priėmimas kurtų konkurenciją su Stambulo Konvencija ir didintų nenuoseklumą.
11. Europos apsaugos orderio direktyva ir Apsaugos priemonių pripažinimo reglamentas iš dalies sprendžia tarpvalstybinės apsaugos nuo smurto problemas, kurios ypač sudėtingos, kai smurto artimoje aplinkoje aukos su savo vaikais pabėga į kitą valstybę ir yra apkaltinamos vaiko grobimu. Tačiau analizė leidžia teigti, kad ES įstatymų leidėjas turi funkcionalios atitikties tarp nacionalinių sistemų lūkesčių, kol kas paliekant nemažai lankstumo valstybėms narėms. Galima laukti, kad nacionalinės teisės sistemos šioje srityje palaipsniui artės viena prie kitos, ir valstybės narės sugebės „išsiversti" antrinę ES teisę į savo sprendimų vykdymo sistemas.

Dėl trečiojo ginamojo teiginio: "Atsižvelgiant į pareigas pagal tarptautinę teisę, Lietuvos teisinis reguliavimas dėl apsaugos nuo smurto prieš moteris vis dar turi procesinių, konceptualių ir materialių sprangų, kurių pildymui ateityje turėtų būti skiriamas pagrindinis dėmesys."

12. Norminė smurto prieš moteris spraga Lietuvoje buvo iš dalies užpildyta, 2011 m. priėmus ANSAAĮ, tačiau kitos smurto prieš moteris formos nepatenka į specialių nuostatų taikymo sritį. Atsižvelgiant į tarptautinę teisę, apsaugos priemonių tai-

kymas neturėtų būti ribojimas dėl šeimos statuso, o civilinės apsaugos priemonės neturėtų būti susietos su santuokos nutraukimo procesu. Atsižvelgdama į Stambulo Konvenciją ir CEDAW komiteto praktiką, autorė siūlo, kad apsauga nebūtinai turi būti siejama su baudžiamuoju ar civiliniu procesu. Lietuvos įstatymų leidėjas taip pat galėtų numatyti neatidėliotino veikimo apsaugos priemones, atsižvelgiant į tai, kad tiek kardomosios priemonės, tiek specialios apsaugos priemonės nėra neatidėliotino veikimo.

13. Disertacijoje buvo atskleista, kad ES nusikaltimo aukų paketas į nacionalinę teisę perkeltas keliais įstatymų pakeitimais, visų pirma numatant asmeninį įvertinimą, siekiant nustatyti specialiuosius apsaugos poreikius, kuris skiriasi nuo rizikos įvertinimo, įtvirtinto 2016 m. Apsaugos nuo smurto artimoje aplinkoje įstatymo pakeitimais. Įstatymų ir poįstatyminių teisės aktų nuostatų įgyvendinimą vertėtų toliau stebėti, nes nustatytos priemonės yra lanksčios ir dažnai tik rekomendacinio pobūdžio. Smurto prieš moteris atvejams ypač svarbus kontekstualizavimas, tačiau šiuo metu numatytos specialiųjų apsaugos poreikių įvertinimo gairės nėra gerai pritaikytos šiems atvejams.
14. Nors tarptautinė teisė Lietuvoje turėjo ribotą teigiamą poveikį, disertacija atskleidžia, kad žmogaus teisių diskursą galima panaudoti, siekiant platesnio požiūrio į valstybės atsakomybę, ir pripažįstant materialinių pokyčių būtinybę. Dviejų rezonansinių smurto prieš moteris bylų analizė pagal tarptautinės teisės aktus leido nustatyti sritis, kurias reikia tobulinti, t.y. valstybės atsakomybės pripažinimas, kai pažeidžiama deramo stropumo pareiga, ir teisės normų dėl seksualinio smurto tobulinimas.
15. Disertacija patvirtino, kad pagrįstos ir išsamios konceptualizacijos, kuri apibrėžtų smurtą prieš moteris kaip struktūrinės nelygybės problemą, nebuvimas prieštarauja Konvencijos dėl visų formų diskriminacijos panaikinimo moterims komiteto strategijai ir Stambulo konvencijoje pasirinktam konceptualių problemų sprendimui. Koncepcijos dėl smurto dėl lyties, stereotipizavimo ir išankstinių nuostatų mažinimo nebuvimas gali nulemti EŽTK 14 straipsnio (kartu su kitais straipsniais) pažeidimą arba CEDAW 5 straipsnio ir kitų straipsnių pažeidimus. Taigi siūloma patobulinti teisės sistemą, kad būtų inter alia kovojama su smurtu dėl lyties, ir įtvirtinamas konceptualus ryšys su lyčių lygybės paradigma.
16. Materialus seksualinio smurto apibrėžimas turėtų būti patobulintas, atsižvelgiant į tarptautinę teisę ir susiejant seksualinio smurto apibrėžimą su nesutikimu. Autorė siūlo atsisakyti tiek nesutikimo, tiek prievartos reikalavimo, įtraukti aiškią nuostatą dėl seksualinio smurto prieš sutuoktinę ar partnerę, ir neskirstyti nusikaltimų pagal seksualinio įsiskverbimo būdus. Taip pat rekomenduojama numatyti, kad seksualinis smurtas yra priskiriamas prie visuomeninę reikšmę turinčių veikų.

Atsižvelgiant į disertacijoje pateikiamą analizę ir išvadas, toliau pateikiamos rekomendacijos LR įstatymų leidėjui, vykdomajai valdžiai ir teismams.

Rekomendacijos Lietuvos Respublikos įstatymų leidėjui:

1. Rekomenduojama pataisyti seksualinio smurto (dabar – iššaginimas ir išprievartavimas) sąvoką atsižvelgiant į Stambulo Konvenciją, EŽTT praktiką ir Konvencijos dėl visų formų diskriminacijos panaikinimo moterims komiteto praktiką.

Baudžiamojo Kodekso 149 ir 151 straipsnius rekomenduojama sutraukti į vieną straipsnį, kuris būtų taikomas įvairių rūšių seksualiniam smurtui, apimančiam bet kokį seksualinio pobūdžio įsiskverbimą. Esminės sąvokos, kaip (ne)sutikimas ir seksualinis smurtas turėtų būti paaiškintos atskirame straipsnyje atitinkamo skyriaus (XXI) pabaigoje. Seksualinis smurtas galėtų būti apibrėžtas kaip vaginalinis, analinis, oralinis ar bet koks kitas įsiskverbimas su bet kuria kūno dalimi ar daiktu, o sutikimas turi būti suvokiamas kaip duodamas savanoriškai ir asmens laisva valia, atsižvelgiant į visas susijusias aplinkybes. Taip pat rekomenduojama aiškiai nurodyti, kad santuoka, partnerystė, ir kitoks šeimos ar intymus santykis nuo atsakomybės neatleidžia ir jos nepalengvina.

2. Taip pat rekomenduojama apsaugos priemonių reforma.
   2.1. Visų pirma, siūloma svarstyti pasiūlymą nebesieti apsaugos su civiliniu ar baudžiamuoju procesu, atsižvelgiant į Stambulo Konvencijos nuostatas, ir į deramo stropumo pareigą pagal Konvencijos dėl visų formų diskriminacijos panaikinimo moterims komiteto ir EŽTT praktiką.
   2.2. Be to, siūloma įtraukti atskirą straipsnį dėl laikinųjų asmens apsaugos priemonių Civiliniame Kodekse, Antrojoje knygoje (Asmenys), kuris nesietų apsaugos su civiliniu ieškiniu ar skyrybų procesu, ir nustatytų klasikines priemones tokias kaip draudimas susisiekti ar artintis prie nukentėjusiosios.
   2.3. Taip pat siūloma aiškiai numatyti, kad apsaugos priemonės pažeidimas (tiek kardomųjų priemonių, tiek specialiųjų apsaugos priemonių bei baudžiamojo ar auklėjamojo poveikio priemonės) yra traktuojamas kaip baudžiamasis nusižengimas ir sukelia baudžiamąją atsakomybę.
   2.4. Lyčių lygybės ir nediskriminavimo principus rekomenduojama įtraukti į ANSAAĮ 3 straipsnyje numatytus apsaugos nuo smurto artimoje aplinkoje principus.
   2.5. Apsaugos nuo smurto įstatymo nuostatas siūloma taikyti platesnei asmenų grupei, įskaitant buvusius sutuoktinius ar partnerius, ir partnerius, kurie kartu negyvena.

3. Šiuo metu Lietuvos įstatymų leidėjui nerekomenduojama smurto prieš moteris bylose įtvirtinti mediacijos instituto. Mediacija ir alternatyvus ginčų sprendimas gali būti naudingi aukoms tik tokiu atveju, kai valstybė siekia lyčių lygybės, numato kontekstualizuotas ir tikslines prevencijos bei apsaugos priemones. Tuo tarpu LR įstatymuose (ANSAAĮ ir kiti) lyčių lygybės ir nediskriminavimo principai nėra įtvirtinti, nesuformuluotos ir konkrečios priemonės, kuriomis būtų siekiama išly-

ginti faktinę nelygybę. Taigi, mediacijos taikymas tokiame kontekste sukeltų rimtų abejonių dėl aukos apsaugos ir kitų interesų užtikrinimo.
4. Rekomenduotina ratifikuoti Stambulo Konvenciją ir atšaukti neleistiną bendrojo pobūdžio išlygą, padarytą ją pasirašant.

Rekomendacijos Lietuvos Respublikos vykdomajai valdžiai:

1. Atsižvelgiant į Konvencijos dėl visų formų diskriminacijos panaikinimo moterims komiteto rekomendaciją, patvirtinti išsamią smurto prieš moteris mažinimo strategiją, kuri:
   1.1. būtų pagrįsta lyčių lygybės paradigma ir siektų panaikinti stereotipus bei subordinacinį požiūrį į moteris ir mergaites;
   1.2. įtrauktų smurto dėl lyties sąvoką, suformuluotą pagal tarptautinės teisės standartus;
   1.3. įtrauktų daugialypės diskriminacijos sąvoką ir siektų naikinti struktūrinę nelygybę;
   1.4. įtrauktų nuorodas į tarptautinę teisę, kuria turėtų remtis nacionalinės institucijos (GR 19, 28, 33, tarptautinių sutarčių įgyvendinimą prižiūrinčių institucijų praktika);
   1.5. įtrauktų ankstesnės nacionalinės strategijos dėl smurto prieš moteris rezultatų apžvalgą;
   1.6. sutelktų dėmesį į tikslines ir kontekstualizuotas pirminės prevencijos priemones, o ne bendrąsias priemones, tokias kaip "taikus ginčų sprendimas".
2. Taip pat rekomenduojama: stebėti asmeninio įvertinimo, siekiant nustatyti specialiuosius apsaugos poreikius, gairių, priimtų atsižvelgiant į Aukų direktyvą, įgyvendinimą, siekiant įvertinti jų veiksmingumą smurto prieš moteris atvejais.
3. Įkurti apsaugos priemonių registrą;
4. Įkurti femicidų stebėsenos duomenų bazę;
5. Rinkti duomenis apie apsaugos priemonių pritaikymą ir pažeidimus;
6. Užtikrinti, kad visi tyrimų apie smurtą prieš moteris duomenys ir pagrindinių teisės aktų (kaip Stambulo Konvencija) nuostatos, būtų laisvai prieinami;
7. Patikėti Valstybės kontrolei stebėti tarptautinius indikatorius smurto prieš moteris srityje, kuriuos patvirtino Specialieji pranešėjai, EIGE būtent šiais užduočiai.

Rekomendacijos Lietuvos Respublikos teismams:

1. Smurto artimoje aplinkoje bylose rekomenduojama nuosekliau taikyti specialias baudžiamojo poveikio priemones, kaip įpareigojimą išsikelti ir nesiartinti prie nukentėjusiosios (BK 72[1]straipsnis);
2. Rekomenduojama laikytis nuostatos, kad priešingas įpareigojimas, kaip įpareigojimas nekeisti gyvenamosios vietos arba likti namuose nuo 23.00 iki 6.00, nebūtų taikomas pagal 48 BK straipsnį, jeigu nukentėjusioji gyvena tuose pačiuose namuose su smurtautoju;

3. Rekomenduojama kritiškai vertinti nukentėjusiosios seksualinę praeitį kaip gynybos įrodymų, ypač jeigu ši yra nepilnametė, ir priimti šiuos įrodymus tik tuomet, jei tai būtina ir susiję su byla;
4. Rekomenduojama laikytis nuostatos, kad apsaugos priemonių pagal ANSAAĮ pažeidimų atveju būtų taikoma baudžiamoji atsakomybė, nesiremiant aukos sutikimu su pažeidimu, kaip įrodančiu jo nepavojingumą;
5. Rekomenduojama susilaikyti nuo stereotipizavimo ir mitų apie seksualinį smurtą ir smurtą artimoje aplinkoje;
6. Rekomenduojama laikytis nuostatos nesiūlyti smurto artimoje aplinkoje ir seksualinio smurto aukoms susitaikymo instituto pagal 38 BK straipsnį.

Autorės publikacijos disertacijos tema:

1. Vaigė, Laima. The concept of domestic violence in Lithuania and the aspect of gender from the perspective of international law // Socialinių mokslų studijos : mokslo darbai = Social sciences studies : research papers / Mykolo Romerio universitetas. Vilnius: Mykolo Romerio universitetas. ISSN 2029-2236. 2013, Nr. 5(1), p. 255-274. [IndexCopernicus; SocINDEX with Full Text] [M.kr. 01S]
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2014, Lygių galimybių plėtros centras, šešėlinės ataskaitos pagal Konvencijos dėl visų formų diskriminacijos panaikinimo moterims rengimas. Lietuvos NVO atstovavimas Ženevoje 2014 m. liepos mėn.
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Laima Vaigė
VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL LAW: FILLING THE GAPS AT INTERNATIONAL, REGIONAL AND NATIONAL LEVELS: daktaro disertacija. – Vilnius: Mykolo Romerio universitetas, 2016. 344 p.

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Disertacija „Smurtas prieš moteris pagal tarptautinę teisę: spragų pildymas tarptautiniu, regioniniu ir nacionaliniu lygiu“ siekiama įvertinti apsaugos nuo smurto prieš moteris teisinio reguliavimo spragas, nagrinėjant procesinius, konceptualius ir materialius iššūkius. Pirma, nagrinėjama tarptautinės teisės normatyvinė spraga smurto prieš moteris srityje, ir konceptualios bei materialios problemos globaliu lygiu, bei siekiama kritiškai įvertinti 2015 m. JT Konvencijos dėl smurto prieš moteris pasiūlymą. Autorė daro išvadą, kad dabartinis Konvencijos teksto pasiūlymas turi mažai pridėtinės vertės, ir neužpildo globalių tarptautinės teisės spragų. Antroje disertacijos dalyje autorė analizuoja regioninį teisinį reguliavimą, pagrindinį dėmesį skirdama apsaugos ir prevencijos aspektams. Įvertinusi valstybių deramo stropumo pareigos apimtį šioje srityje ir išliekančias spragas, autorė pateikia įžvalgas, kaip Europos teisė galėtų suteikti geresnę ir išsamesnę apsaugą nuo smurto prieš moteris. Galiausiai, autorė nagrinėja nacionalinės teisės atitiktį tarptautinei teisei, sutelkdama dėmesį į pagrindines problemas apsaugos nuo smurto ir jo prevencijos srityje. Įvertinusi Lietuvos teisinį reguliavimą, atsižvelgdama į tarptautinius standartus, autorė pateikia rekomendacijas dėl tolesnio Lietuvos teisinio reguliavimo tobulinimo.

The thesis "Violence against Women under International law: Filling the gaps at international, regional and national levels" aims at assessment of the gaps of legal regulation on protection and prevention of violence against women, focusing on procedural, conceptual and substantive challenges that arise at international, regional and national levels. First, the thesis focuses on the alleged normative gap of international law, and conceptual, as well as substantial problems of the legal regulation on protection against violence at the level of international law, and critically assesses the suggested draft UN Convention on violence against women (2015). The author suggests that the current text of the Convention does not sufficiently address the existing gaps. In the second part of the thesis, the author analyses the regional legal regulation on VAW, focusing on the aspects of protection and prevention in order to evaluate the extent of states' due diligence obligations in these areas and critically assess the remaining gaps. The author provides insights on the ways that the complex regional system of European law could provide more comprehensive protection against VAW.

Finally, the author analyses domestic compliance with international law, by focusing on the key problems in protection and prevention of VAW and evaluating the compliance of Lithuanian legal regulation on VAW against the international standards. The author provides recommendations on further development of the Lithuanian law, to ensure better protection of women against violence.

Laima Vaigė
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