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# Checking Gender-Based Violence

Development of Universal Norms  
vs.  
Enforcement of Regional Instruments

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# Abstract

Gender-based violence affects at least 80 million women in Europe, and consequently is a human rights scandal in urgent need of efficient response. This thesis explores the protection level of women's right to be free from gender-based violence, in terms of human rights law and its implementation, under the United Nations Convention on the Elimination of All Forms of Discrimination against Women and the European Convention for the Protection of Human Rights and Fundamental Freedoms. This serves to investigate whether universal norm development or regional human rights implementation is a better means for checking gender-based violence. The protection level under the two instruments is evaluated in terms of five dichotomies: norm creation vs. implementation; special protection vs. prevention; monitoring vs. adjudication; mainstreaming vs. new legislation and universal vs. regional operational levels. The two systems operate with different aims and methods, within the one and only international legal system. They are found to work best in a complementary and interactive manner with the most efficient protection level under the European human rights regime with its mandatory individual complaints mechanism and adjudicative power, setting standards; preventing rights violations and offering a high level of protection of women's right to be free from gender-based violence.

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# Abbreviations

|         |  |
|---------|--|
| AP      | Additional Protocol  |
| CEDAW   | Convention on the Elimination of All Forms of Discrimination against Women               |
| COs     | Concluding Observations  |
| CoE     | Council of Europe  |
| DEVAW   | Declaration on the Elimination of Violence against Women                                 |
| ECHR    | European Convention for the Protection of Human Rights and Fundamental Freedoms          |
| ECtHR   | European Court of Human Rights   |
| FLS     | Feminist Legal Studies   |
| GBV     | Gender-based violence  |
| GR      | General Recommendation   |
| IACtHR  | Inter-American Court of Human Rights   |
| ICCPR   | International Covenant on Civil and Political Rights                                     |
| ICESCR  | International Covenant on Economic, Social and Cultural Rights                           |
| ICJ     | International Court of Justice   |
| NGO     | Non-governmental organisation  |
| OP      | Optional Protocol  |
| PACE    | Parliamentary Assembly of the Council of Europe  |
| Rec.    | Recommendation   |
| Res.    | Resolution   |
| UN      | United Nations   |
| UNSRVAW | United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences |
| VAW     | Violence against women   |
| VCLT    | Vienna Convention on the Law of Treaties   |

# 1 Introduction

Gender-based violence is a human rights scandal, and there is a lack of sufficient responses in terms of human rights law. Studies show that 45 % of all women in Europe face male violence: regular beatings, rapes, degradations and ill-treatment. The violence is often ignored or even sanctioned by authorities, not offering sufficient protection. The lack of response to this widespread violence is outrageous, and cost women lives on a daily basis. But what is being done in different human rights regimes to respond to this burning issue? This thesis aims to investigate men's violence against women, with a special focus on domestic violence, and the legal treatment tackling this problem in human rights law at United Nations and European level. The thesis discusses at which level the most efficient protection of women's right to be free from gender-based violence is to be found. The benefits and drawbacks in terms of norm creation and implementation; monitoring and adjudication; prevention and special protection; mainstreaming and new legislation; and universality and regional systems will be discussed in order to find the most beneficial system to protect women from this human rights violation. More specifically, the purpose of this thesis can be expressed in this question:

*Is universal norm development a better means for checking gender-based violence than regional human rights implementation?*

## 1.1 Theoretical Outset

Human rights law claims objectivity and neutrality. These terms are the outset for human rights development and monitoring, but have unfortunately been confused with terms as male bias and gender discrimination. Many human rights instruments are broad and neutral in their formulations, to be interpreted in the light of the presence. A deficiency of the law and its implementation is however obvious when one looks at its application, restrictions and perspectives. As a starting point for this thesis, law is perceived as *per se* male, built on male norms claiming objectivity and neutrality. These claims conceal power imbalances, and whose experiences that have shaped the law. Men's societal traditional position has shaped law to respond to men's problems and interests, whereas women become "the other".<sup>1</sup> The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an exception, but formulates rights in relation to the traditional male rights on a non-discrimination basis. Women have been absent in international human rights law, through procedures and understandings, and this has led to a biased understanding and jurisprudence. However, women are not a homogeneous group, and intersectional approaches should be used in the promotion and protection of women's rights, taking into account interacting forms of oppression based on ethnicity, sexual identity and social class, besides gender. While acknowledging the differences

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<sup>1</sup> Charlesworth and Chinkin, 2000, p. 2, 48ff.

between women, there are issues that affect all women, and where women as a group is subjected to rights violations. Gender-based violence (GBV) is such an issue.

One important example of how male bias disguised as neutrality has excluded women's rights from the application of human rights law is the public/private distinction. Human rights law has a tradition of focussing on the public sphere, a sphere of men's activities, while protecting the private sphere, indirectly closing its eyes to women's rights, which often are violated in the home and the family.

The perspective of male neutrality and gender bias must be challenged to develop the efficiency of human rights law, its norm creation and implementation, to respond to women's realities. Throughout the thesis gender and power structures are acknowledged. Taking this perspective means a breach of the traditional blindness towards women's experiences and need of legal protection.<sup>2</sup> The goal of feminist legal studies (FLS) can be summarised as the reconstruction and analysis of the legal structure, content and its understanding, to better respond to women's experiences and needs in an inclusive manner.<sup>3</sup> This perspective on law aims to highlight how the legal system contributes to gender stereotyping and the maintaining of gender inequality, and show gender prejudices common in the shaping and implementation of law. As law does not operate in a vacuum there is a need to take into account the reality which it tries to regulate, thus a gender perspective on law is necessary. The aim of seeing human rights law from a feminist perspective in this thesis is to clarify and discuss its benefits, possibilities and gaps in the protection of women's right to be free from gender-based violence.

## 1.2 Methodology

In this thesis, traditional method for legal research is used. This method aims to clarify current law and interpret this through the use of sources of law as precedents, policy documents on legal matters, reports and legal doctrine. The most important source is the codified human rights law, binding and non-binding. Subsidiary sources of law; judicial decisions and legal doctrine, are used for interpretation of treaty law.<sup>4</sup> Non-binding policy documents, General recommendations (GR) and declarations of normative and political significance for legal interpretation are also used.<sup>5</sup> Mathiesen has expressed one way of understanding of sources of law, where codified law, i.e. the conventions, state what one "must", precedence "should" and doctrine "may".<sup>6</sup> This is a simple way of summarizing the development of law through its use and its interpretation, which is how human rights law adapts to societal developments. The legal instruments used are fundamental to clarify current law, its interpretation and possible treatment of GBV. Based on present legal provisions, a critical perspective is taken on possible problems of existing law. A gender perspective is applied on the law and its consequences, as a basis for the evaluation of the

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<sup>2</sup> Charlesworth, Chinkin, Wright, 1991, Charlesworth and Chinkin, 2000.

<sup>3</sup> Charlesworth and Chinkin, 2000, p. 59ff.

<sup>4</sup> ICJ statute art. 38(d).

<sup>5</sup> Evans, 2006; Boyle, s. 142f.

<sup>6</sup> ICJ Statute, art. 38, Mathiesen, 2005, s. 208ff.

adequacy of the law and documents existing today to protect women from GBV. This is in coherence with *critical legal studies* and *feminist studies*.<sup>7</sup>

The investigation of current law and the possibilities to treat GBV under relevant provisions leads to an evaluation of the protection level of the right to be free from GBV under European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and CEDAW today. The analysis of GBV inclusion under CEDAW and ECHR is discussed in terms of efficiency and sufficiency in relation to five dichotomies, evaluating the two regimes in terms of norm creation and implementation; special protection and prevention; monitoring and adjudication; mainstreaming and new legislation; and universality and regional mechanisms. This evaluation leads to conclusions on the most efficient system of the two to protect women's right to be free from GBV, and recommendations for increasing such protection are suggested.

### 1.3 Clarifications

This thesis compares the universal human rights law under CEDAW with ECHR. At United Nations (UN) level, CEDAW is the instrument that is specialised on women's human rights, and under which developments on GBV have taken place to the largest extent. Council of Europe (CoE) with ECHR and the European Court of Human Rights (ECtHR) provides a well-developed regional human rights system, with a strong treaty and judicial monitoring. Thus these two are the most relevant treaties for examination regarding protection of the right to be free from GBV.

The terms violence against women (VAW) and gender-based violence are used intermittently. Violence is perceived in a gender/power structure, and focuses on men's violence against women, with the woman's partner or relative as perpetrator, being the most frequent form of domestic violence.<sup>8</sup>

The terms are used in the sense of how the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences (UNSRVAW) has defined domestic violence: violence occurring in the private sphere, directed towards women because of their role in this sphere, or intending to directly and negatively affect women in this sphere, and that can be carried out by private and state actors.<sup>9</sup>

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<sup>7</sup> Kouvo, 2004, p. 50. Charlesworth and Chinkin, 2000.

<sup>8</sup> Charlesworth and Chinkin, 2000, p. 12f., Eliasson, 2000, p. 158ff, Agosin, 2002: Levison and Levison, p. 135f., E.CN.4/1996/53, para. 55.

<sup>9</sup> E/CN.4/1996/53, para. 28.

## 2 Gender-Based Violence

### 2.1 A Problem Requiring Special Attention

Gender-based violence takes place daily, to an extent making it one of the greatest, universal, human rights scandals of our time. Gathering all forms of violence against women (VAW), 45 % of all women in Europe have experienced men's violence. Estimations show that every fifth to every fourth woman in Europe has experienced gendered physical violence as adults, and more than one tenth of all women have suffered sexual violence as rape or other forced sexual acts.<sup>10</sup> Statistics shows that for women aged 16-44, the major cause of death and invalidity is domestic violence.<sup>11</sup> Data indicate that about 80 million women in Europe experience domestic violence.<sup>12</sup> In at least a third of cases of women's deaths caused by violence the woman's partner is the perpetrator. The study Captured Queen (Slagen Dam) shows that 46 % of women in Sweden have been subjected to male violence after their 15<sup>th</sup> birthday, mostly through domestic violence.<sup>13</sup> That is only one example of a European state, by no means exceptional in lacking protection and gender equality measures.

GBV, where violence in the family is the dominant form, is linked to different expressions of gender inequality and gender stereotypes.<sup>14</sup> Charlesworth and Chinkin have found that the commonality of the forms of violence faced by women is their exposure to it because of their sex, linked to women's societal subordination.<sup>15</sup> The violence and its motives are universally prevalent, although with different expressions and justifications in different contexts.<sup>16</sup>

GBV can rightly be seen as one of the most extreme expressions of gender discrimination, and the shortcomings in checking GBV are unacceptable and traditionally built on a misogynist understanding of the family, gender roles, human rights norms and their implementation. Clearly, GBV is not a minor issue, but a human rights issue requiring human rights law development and protection. It takes place universally, in countries part to regional as well as universal human rights regimes, and states with better and poorer human rights records. How the protection level is formulated at regional and universal level will be investigated in chapter 4.

It is important to take account of the mechanics of GBV in order to respond properly and efficiently to it. GBV has been found to develop and show certain characteristics. It is not a matter of occasional, separate incidents of battering, burns or rapes. It is also not only physical. In the typical case, the physical acts of violence tend to interact with psychological abuse, control and dependence, and come to form the woman's entire life.<sup>17</sup>

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10 CoE, 2006, p. 7f

11 PACE Rec. 1582 (2002), para. 2

12 PACE Res. 1635 (2008), para. 1.

13 Lundgren *et al.*, 2001, p. 8ff.

14 E/CN.4/1996/53 para. 23ff, Charlesworth and Chinkin, 2000, p. 13, Lundgren, 2004, p. 83ff.

15 Charlesworth and Chinkin, 2000, p. 12f.

16 E/CN.4/1996/53, para. 55ff, E/CN.4/1999/68, para. 32.

17 Askin and Koenig 1999: Thomas, D. and Levi, p. 143, Lundgren, 2004.

Lundgren has developed a theory on this, called the process of normalisation. She describes the scenario in terms of space of living, where the woman initially enjoys this fully, and then it is gradually diminished through initial remarks on looks, control of her whereabouts and actions. Her life is further limited through degradation in words and acts, and boundaries of her actions, before the first act of physical violence. The physical violence normally worsens and becomes repetitive. Isolation leads to total dependence on the man, being totally exposed to him, and not knowing when the next hit will come. During the process, the woman's perception of the violence becomes normalised, whereas it is common that she blames herself for it as this becomes the response to something she has done or not done, requirements that always change. The control is a major element here, being a method of intimidation. It is common that the woman develops strategies to accommodate to the violence, and her boundaries are redrawn for herself.<sup>18</sup> When taking this process in account, having severe impact on her freedom and self-esteem, it becomes clear that it is not a matter of "just leaving him". Most women would do just that if violence was to take place early on. However, this is not the typical case. The violence does normally not end with a separation. The point of time where the woman leaves her partner, or reports him to the police is the time where her life is at most risk.<sup>19</sup> These facts and mechanisms should be duly taken into account in the development of protection of women's right to be free from GBV at regional and UN level, in development of new legislation, in mainstreaming and in implementation of existing law.

The clear link to gender inequality, being pervasive in society all over the world, its high prevalence, and the tremendous effects it has on women's lives, show that GBV is a societal problem, where law, policy and practise is not up to speed to protect the victims of this violence. It is a general problem showing a dysfunctional society, not protecting its residents' human rights. All these facts make it clear that GBV is a human rights issue in urgent need of response.

## 2.2 Public/Private Distinction

A very large degree of GBV, and the form focused on in this thesis, takes place in the private sphere, in the family. Human rights law is in its norms, implementation and its monitoring built on the protection of the individual from the state. The family unit has been protected from state intervention, being the fundamental unit of society, almost seen as sacrosanct.<sup>20</sup> Response to the fact that individuals also carry out actions towards other individuals, that hamper the enjoyment of their rights, has been lacking.

A distinction between public and private has been persistent in human rights law. The distinction has a gendered basis, where the public sphere has traditionally been inhabited by men and the private by women, while these two have not been seen as of equal value. This serves to justify men's domination of women and reinforces women's disadvantaged position. Traditionally has legislative intervention in the private sphere been seen as inappropriate, as this would interfere too much in the life of private individuals. This perception has neglected GBV as a

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<sup>18</sup> Lundgren, 2004, p. 24ff., 49ff., Eliasson, 2000, p. 15f.

<sup>19</sup> Eliasson, 2000, s. 14f., 121ff., CoE, 2006, p. 8.

<sup>20</sup> ICCPR, A/6316 art. 23.

human rights issue.<sup>21</sup> Through exclusion of the private sphere from earlier human rights discourse, and as not evoking state responsibility for violations in the private sphere, women's subordination and GBV became accepted as private matters.<sup>22</sup> The seclusion of the private sphere was normalised, but has in the past two decades been questioned. As the traditional hold on a strict division between public and private has gradually loosened for the perception of human rights protection and violations, GBV has grown as a human rights issue. To protect women from GBV, private sphere intervention is necessary, and the gendered public/private distinction must be questioned.

As it has become clearer that the main threat to human rights is not always coming directly from the state, human rights law has increasingly intervened in the private sphere through regulations, interpretation, monitoring and elaborations of state responsibility for acts in the private sphere.<sup>23</sup>

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21 Charlesworth and Chinkin, 2000, p. 30f., 44, Charlesworth, Chinkin, Wright, 1991, p. 626f.

22 Chinkin, 1999, p. 392f.

23 IACtHR: *Velásquez Rodríguez v. Honduras*, CEDAW GR 19, A/47/38, ECtHR: *X and Y v. The Netherlands*, app. no. 8978/80.

## 3 Obligations under Human Rights Law

### 3.1 Undertakings Required by States Parties

The treaties being comparatively evaluated in chapter 5, CEDAW and ECHR, show differences and commonalities. They work in different ways, at different levels, with the focus of ECHR being its justiciable rights and the adjudication of ECtHR monitoring implementation of the Convention, and CEDAW working in a standard-setting and norm developing manner. In the legal order are both treaties superior to national law. States undertake to implement the treaties at national level, and the instruments create a framework and set boundaries for state actions. They include provisions binding as regards the result.<sup>24</sup>

Human rights law entitles individuals rights that correspond to state obligations to respect, protect and fulfil these rights. In terms of respect are states to refrain from unjustified intervention; as regards fulfil are states to take measures of legislative, administrative, judicial and practical character to implement and promote the rights at national level. In terms of protect should states take measures to avoid rights violations, also performed by non-state actors. This term includes enforcement mechanisms.<sup>25</sup> These obligations are applicable for both CEDAW and ECHR, while monitoring takes place based on different mandates and terms of implementation requirements.

As treaties, the two Conventions constitute binding law for States Parties.<sup>26</sup> Policy documents on legal issues are non-binding but extensively used, especially in relation to CEDAW, working to develop interpretation and encourage states to implement these in national law-making. Sources as GR are gaining significance for interpretation and expectations on future actions, and are used by the CEDAW Committee and the ECtHR.<sup>27</sup> These documents are of high normative value, but of limited legal effect.

The two treaty regimes show two systems of human rights protection, operating at different levels. They provide different mechanisms: a Court with adjudicate power under ECHR and a treaty committee monitoring state reports and developing GR under CEDAW. The solutions sought are different in terms of content and method, and the instruments function in different ways but both operate under the same and only system of international law.

### 3.2 State Responsibility under CEDAW and ECHR

As the private sphere has gained focus as a place where human rights violations occur, the theory of state responsibility has developed to respond to this, as individuals are not legally responsible for violations of international human rights law. It is required that states act with due diligence and adequate consideration to efficiently prevent and hinder violations of individuals' rights also

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<sup>24</sup> See for example Nowak, 2003.

<sup>25</sup> Nowak, 2003, p. 28.

<sup>26</sup> ICJ Statute, art. 38(a), VCLT art. 34.

<sup>27</sup> ECtHR: *Benacquá and S. v. Bulgaria*, app. no. 71127/01.

in the private sphere, such as GBV, to investigate alleged rights violations properly; to punish established violations; and to provide compensation to victims of rights violations. This reasoning is applied under both the monitoring of CEDAW and the adjudication of ECtHR, which will be discussed in chapter 4.

States must take adequate measures as regards legislation, enforcement, and protection, and in general provide an environment of adequate actions to combat rights violations. This includes prevention of violations by non-state actors and responding to violations when occurring.<sup>28</sup>

When private individuals commit acts of violence, they are dealt with indirectly in terms of state responsibility to protect and ensure holders of the rights to not suffer interferences from non-state actors. National criminal legislation is the typical example. The state is responsible, if failing to take reasonable and appropriate measures of protection, including investigations, prosecutions, civil remedies, and legislation, or if failing to take sufficient measures to protect individuals from such acts, and preventing the violence. States are quite free to choose means for ensuring protection, as long as reasonable measures are taken.<sup>29</sup>

State responsibility based on due diligence is not to be raised in case of separate, occasional events of rights interferences, but rather upon a consistent pattern of state failure to take adequate measures to protect individuals from rights violations.<sup>30</sup> If a state keeps a system where GBV continuously takes place, if this is not acknowledged or targeted but rather trivialised, state responsibility should be engaged. This can be the case if legislation is lacking, if so-called honour defence is permitted or if complaints and reports of GBV are continuously ignored.<sup>31</sup>

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28 CEDAW art. 2(e); DEVAW, A/48/49, art. 4(c), CEDAW Committee: *A.T. v. Hungary*. IACtHR: *Velásquez Rodríguez v. Honduras*.

29 Evans: Steiner, 2006, p. 772f, Nowak, 2003, p. 48ff.

30 Askin and Koenig, 1999: Thomas, D. and Levi, p. 142f.

31 Charlesworth and Chinkin, 2000, p. 235.

## 4 Rules on Gender-Based Violence

In order to evaluate whether universal norm development or regional human rights implementation is a better means for checking gender-based violence, the legal treatment of GBV under CEDAW and ECHR must be clarified. This legal investigation into the inclusion and treatment of GBV under the instruments serves to establish the protection level in the two regimes and highlight the differences of these mechanisms. The dichotomies presented in chapter 1: monitoring/adjudication, creation of norms/implementation, special protection/prevention, new legislation/mainstreaming and universal/regional level, are notions of special consideration.

### 4.1 Gender-Based Violence under the Convention on the Elimination of All Forms of Discrimination against Women

CEDAW is the main instrument for women's rights operating at universal level, often referred to as a bill of rights of women. As of 7 January 2009, the Convention has 185 parties.<sup>32</sup> States of different legal, cultural and value background are gathered under CEDAW. The Convention is established in response and in terms of traditional men's rights, limiting its independence and instead constituting a pure non-discrimination treaty. Its provisions are quite general, focussed on non-discrimination and equality in relation to other rights. However, as human rights law is dynamic, interpretation is used to develop the law and its meaning. GBV is not included in the text of CEDAW, but has been included through interpretation.

Under CEDAW, private sphere intervention is directly provided for, as obligations under CEDAW include taking appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.<sup>33</sup> This should take place through preventive measures, hindrance of violations, investigation and punishment of such violations.

A major deficit of CEDAW, despite its wide ratification, is the many and broad reservations made by States Parties<sup>34</sup>, undermining the rights provided. States issue reservations of very important character, as reservations to the first five articles outlining obligations and measures for implementation of the treaty, and on art. 16 on equality in the family. Broad, open-ended reservations or declarations stating that domestic law, Shariah law, or the national Constitution prevail over CEDAW have been submitted<sup>35</sup>, despite VCLT art. 27 stating that internal law cannot be invoked to justify failure to comply with a treaty.

An infamous reservation is the one of Saudi Arabia, being short but severe: "In case of contradiction between any term of the Convention and the norms of islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention."<sup>36</sup> Here the entire

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<sup>32</sup> <http://www2.ohchr.org/english/bodies/ratification/8.htm>.

<sup>33</sup> CEDAW, A/34/46, art. 2(e).

<sup>34</sup> <http://www2.ohchr.org/english/bodies/ratification/8.htm#declarations>.

<sup>35</sup> The Maldives, Lesotho, Malaysia, Pakistan, Turkey and Tunisia.

<sup>36</sup> [http://www2.ohchr.org/english/bodies/ratification/8\\_1.htm](http://www2.ohchr.org/english/bodies/ratification/8_1.htm).

meaning of being a state party to increase the protection of women's rights is nullified. It is rare that States Parties challenge the reservations of other States Parties under CEDAW, and less than 10 % of states have made objections to these. Usually, such do not demand hindrance of the entry into force of between the states but what actually remains is sparse.<sup>37</sup> However, so general reservations should not be accepted under treaty law<sup>38</sup> and art. 28 CEDAW does not permit sweeping reservations incompatible with the object and purpose of the Convention, but still it slips by. It is unclear what non-compliance with art 28 would give.

In practise, it renders no hard consequences. As parties, states must submit reports<sup>39</sup>, where questioning of states' reservations take place. Monitoring of the implementation of CEDAW, and possibly norm development, can thus still take place. The goal of wide ratification is noble and universal ratification is desirable in terms of numbers, and also as a starting point for change and norm development. At the same time, the treaty as such is severely undermined by the broad reservations made to it. These affect the efficiency of its implementation, and has impact on actions taken under CEDAW against GBV. However, codified law against GBV exists under CEDAW, and affects its standard-setting positively in this area. This opens up for prevention of GBV and other forms of discrimination, for monitoring and for universal norm development.

#### 4.1.1 *Codified law*

In the late 1980s, more and more voices were raised for GBV as a human rights issue. As regards CEDAW, the CEDAW Committee has used the means of GR to develop the treaty provisions. Through such means, the Committee developed a GR on GBV, establishing it as a violation of art. 1 of the Convention, the general non-discrimination clause:

“For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>40</sup>

Through GR 19, VAW is included in this definition, being defined as:

“[...] violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”<sup>41</sup>

This definition is inclusive and takes account of the gender specificity in this violence: the woman being subject to it because she is a woman. However, GR are not binding law, and it is not in the Committee's mandate to create such: this is not a law-making body. But GR have an important effect on the interpretation of the treaty, its basis being the state reports<sup>42</sup>, and are used by the

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37 Charlesworth and Chinkin, 2000, p. 107.

38 VCLT art. 19.

39 CEDAW, A/34/46, art. 18.

40 CEDAW, A/34/46, art. 1.

41 CEDAW GR 19, A/47/38, para. 6.

42 CEDAW, A/34/46, art. 21.

CEDAW Committee and other bodies. A state not agreeing with the work of the Committee and its interpretations carries the burden of proof that the Committee's interpretation is faulty. The shame-factor of raising such an objection makes its occurrence unlikely, indirectly strengthening the GR. It was preceded by CEDAW GR 12, being the first document to address VAW.<sup>43</sup> GR 19 requires positive actions of States Parties to combat GBV, including protection against GBV, privately and publicly, through efficient legislative, preventive and protective measures.<sup>44</sup> These documents work to prevent GBV, to develop norms of interpretation of CEDAW at a universal level and open for monitoring of GBV under state reporting and the Optional Protocol (OP).

In the time of GR 19, the Declaration of the Elimination of Violence against Women (DEVAW) was developed and adopted by the UN in 1993, by consensus. As a starting point, VAW is seen as a violation of the human rights of women, impairing or nullifying women's human rights enjoyment. DEVAW, however non-binding, provides a clear and inclusive definition of VAW, which is widely recognised and repeated in later documents and discussions on GBV. It divides VAW in three categories of its occurrence: the family, the general community and the state, clearly including the private sphere. VAW is defined as:

“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>45</sup>

Art 2(a) defines violence in the family as:

“Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.”<sup>46</sup>

DEVAW also addresses state responsibility in terms of due diligence. States must take measures of prevention, investigation and punishment of VAW, irrespective of whether the perpetrator is a public or private actor.<sup>47</sup> DEVAW art. 4(m) calls for information on VAW to be included in states reports under human rights treaties, opening for monitoring at universal level. Together with CEDAW and its GR, these women-specific instruments form a strong basis for measures against GBV under UN treaty law. The direct links to human rights is though sparse in DEVAW, instead addressing VAW as a special issue.

Another measure taken to combat VAW, at UN level, was the creation of the mechanism of a Special Rapporteur on Violence Against Women, its Causes and Consequences.<sup>48</sup> The work of UNSRVAW addresses issues of human rights law and GBV, and is taken into account by the CEDAW Committee in its monitoring activities. Repeated commitments to work for the

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43 CEDAW GR 12, para. 1-3

44 CEDAW GR 19, A/47/38, para. 24.

45 DEVAW, A/48/49, art. 1.

46 Ibid., art. 2(a).

47 Ibid. art. 4(c).

48 E/CN.4/RES/1994/45.

elimination of GBV have been made at UN level.<sup>49</sup> All these instruments are standard-setting, norm developing and preventive regarding GBV. Through these can a wholesome monitoring procedure take place, measuring efforts taken in relation to GBV, and the instruments also serve a purpose in affecting implementation and monitoring of gender neutral treaties as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the ECHR.

#### 4.1.2 *Implementation*

Upon ratification of CEDAW, “*States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realisation of the rights recognised in the present Convention.*”<sup>50</sup> Implementation is mainly monitored through states reports, and GBV in different forms has been addressed in concluding observations (COs) to such. COs are though non-binding on states. Implementation of CEDAW has shown to be problematic and ineffective, with regard to the many reservations, the lack of legal authority of the findings of the Committee, and incomplete and self-accomplishing states reports.<sup>51</sup>

As CEDAW in 2000 was strengthened through its optional protocol (OP), its monitoring mechanisms were increased. The OP provides for an individual complaint procedure and an optional investigative mechanism. About half of the States Parties to CEDAW are parties to its OP (96 parties as of 7 January 2009).<sup>52</sup> This lower number limits its power to protect the rights of women and monitoring treaty compliance in countries not parties to the OP. This problem was envisaged early on, as no reservation to the OP is possible, and as states are likely to be unwilling to submit further to a review of its women’s rights record.<sup>53</sup>

Only a few communications have been dealt with under CEDAW OP, and implementation through the individual complaints mechanisms is sparse. One of the communications concerns GBV, a “typical” case of domestic violence: *A.T. v. Hungary*.<sup>54</sup> The author of the communication raised complaints about Hungary’s alleged insufficient protection regarding GBV, not protecting her from violence from her former husband, who had subjected her to GBV during four years. She further raised complaints concerning Hungary’s disregard of its positive obligations under CEDAW, contributing to continuance of the violence. Restraining orders were not a possibility under Hungarian law, and the legal proceedings initiated against the man were allegedly inefficient. The Committee uses GR 19 in its views, and finds state responsibility based on the requirement of due diligence as the state did not take adequate measures to protect the applicant from the violence. The Committee stated that discrimination in the sense of the Convention is not limited to actions by governments or states, and that states under general international law and human rights treaties may be responsible for actions by private actors. Hungary was seen as being in violation of CEDAW art 2(a), (b), (e) and 5(a) in conjunction with art. 16. The

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49 Vienna Declaration and Programme of Action, A/CONF.157/23, para. 38, Beijing Platform for Action, A/CONF.177/20, para. 112ff.

50 CEDAW, A/34/46, art. 24.

51 Tang, 2000, p. 68ff.

52 [http://www2.ohchr.org/english/bodies/ratification/8\\_b.htm](http://www2.ohchr.org/english/bodies/ratification/8_b.htm).

53 Tang, 2000, p. 70.

54 CEDAW/C/32/D/2/2003.

Committee underlined the superiority of women's right to life and physical and psychological integrity over rights as the right to privacy.<sup>55</sup> This case is a landmark in the understanding of GBV as a human rights violation. Establishing this is standard-setting and norm developing at universal level, clarifying the required actions against GBV under CEDAW.

#### 4.1.3 *Monitoring*

The CEDAW Committee, consisting of 23 independent experts, monitors state compliance with the Convention mainly through state reports. The Committee may make GR based on the examination of reports and information received from the States Parties.<sup>56</sup> This is interpreted broadly, and GR are basically used to establish the Committee's interpretation of CEDAW.

The monitoring of CEDAW is based on a "name and shame" mechanism, focussing on mandatory state reporting, dialogue and recommendations in COs.<sup>57</sup> The state reporting is due to take place every 4<sup>th</sup> year for each state party, meaning that 185 states have their women's rights record and their implementation of CEDAW regularly inspected at universal level. The reporting examination is based on dialogue with state representatives at its examination. This method of reporting aims to give a wholesome picture of the situation for human rights of women in the respective country. Shadow reports by NGOs are common. For real effect is it necessary that the report and the views of the Committee are disseminated at national level, then being able to be used for advocacy and political pressure. The state reporting procedures have led to setting of legal standards.<sup>58</sup>

With the OP of 2000, individuals are given the opportunity to bring complaints of rights violations to the CEDAW Committee, which thus gains a quasi-judicial role. The OP does not allow any reservations to the individual complaints mechanism. Once a state ratifies the OP can it face complaints about violations of all substantial articles under CEDAW despite reservations made to that treaty.<sup>59</sup> This can be one of the reasons why there are approximately 100 fewer States Parties to the OP than to the Convention, and why states with extensive reservations to CEDAW have not ratified the OP. That not all States Parties acknowledge this mechanism is a major short fall in the protection devised under CEDAW.

In terms of monitoring under CEDAW, much softer language is used than under ECHR. CEDAW talks about communications, views and recommendations rather than complaints and judgments, to highlight the communicative form of the monitoring. The cases are dealt with in private, and are based on written information.<sup>60</sup> The case, state party and outcome are published. The views of UN treaty bodies are not binding as precedents in national law. The Committee must not be mistaken with a court, and is clearly lacking mandate for enforcement. There is no possibility for the Committee to ascertain the complainant with redress or compensation.

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55 *A.T. v. Hungary*, CEDAW/C/32/D/2/2003, para. 9.3-9.6 II.

56 CEDAW, A/34/46, art. 21.

57 CEDAW, A/34/46, art. 18, 20, 21.

58 Nowak, 2003, p. 87.

59 Tomuschat, 2008, p. 205.

60 CEDAW OP, A/54/49, art. 7.

Where violations are found, the Committee can follow up on this in state reporting, and it is expected under the OP that the respondent state take actions to rectify the situation.<sup>61</sup> But enforcement is lacking, and substituted by recommendations relying on the principle *pacta sunt servanda*: expecting the respondent state to take action to ensure protection under CEDAW. However, the outcomes clarify the obligations under CEDAW, its interpretation and implementation, and if publicly known they create a basis for pressures from NGOs and others for changes of law and practise. This procedure under CEDAW is not used (yet) in a significant degree. The main power here is the "name and shame" mechanism of finding a state in violation of CEDAW. Compared to traditional judicial remedies, this is just not a sufficient mechanism to ensure justice for individuals having suffered rights violations.

So far, it has been found that CEDAW, documents for its interpretation, precedents and COs of the CEDAW Committee together create quite a strong protection for women victims of GBV at UN level. The instruments and proceedings are gender-specific, very aware of the mechanisms of GBV and its relation to gender inequality, and set a clear universal legal and normative standard on GBV. Under CEDAW, with its general provisions and political work, its high ratification level but with its many reservations, the main goals are promotional standard-setting, and the development and maintaining of norms to create a climate where women's rights to non-discrimination and equality in rights enjoyment are realised. Combating sex discrimination, and including GBV in this concept, CEDAW focuses on prevention of GBV: working for gender inclusion in law and policy and a sound climate for human rights protection and realisation at state level. There are important drawbacks in terms of reservations, implementation, monitoring and lack of binding outcomes.

## 4.2 Gender-Based Violence under the European Convention for the Protection of Human Rights and Fundamental Freedoms

Regional human rights protection is provided for under ECHR. CoE was founded in 1949 by 10 Western European states, still in chock after World War II and its atrocities, seeking to avoid its reoccurrence. Every member of CoE must accept the principles of rule of law and enjoyment of all persons in their jurisdiction of human rights and fundamental freedoms. Violations lead to suspension from rights of representation and also render a request to withdraw.<sup>62</sup>

With the enlargement procedure of the mid90s, and subsequent additional members, the CoE now has 47 member states - with various human rights records and democratic history. This has led to an increase of applications to the ECtHR. Art. 1 obliges the Contracting Parties to respect the human rights of the Convention, and domestic law must ensure effective implementation of the ECHR provisions.<sup>63</sup> CoE is the first organisation to have a human rights court with an individual judicial complaint procedure. The adjudication is subsidiary to national courts. The judicial activity provided for is a major strength of ECHR and the European human

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61 CEDAW OP, A/54/49, art. 7.4f.

62 CoE Statute, art. 3, 8.

63 ECHR art. 52.

rights regime. ECtHR monitors implementation of ECHR and delivers binding case law, setting standards for interpretation of ECHR and human rights protection in 47 states.

Under ECHR, reservations are not as problematic as under CEDAW, as the reservations possibility in art. 57, and the interpretation of this, is much narrower than under CEDAW.<sup>64</sup>

The CoE has lately focussed more on GBV. It has set up a Task Force to Combat Violence against Women, including Domestic Violence, and led a campaign against VAW in 2006-2008.<sup>65</sup> A number of recommendations and resolutions by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe (PACE) have been made,<sup>66</sup> and a convention on preventing and combating VAW is in the makings. Its scope is unclear, and no text is yet available. The *ad hoc Committee on preventing and combating violence against women and domestic violence* is appointed by the Committee of Ministers to prepare this instrument on domestic violence including specific forms of violence against women and other forms of violence against women, having regard to the definition of Rec(2002)5 and to CEDAW. It is called to design a comprehensive framework for the protection and assistance of victims and witnesses, paying attention to gender equality aspects, to include prevention, intervention, investigation, prosecution, and to define a monitoring mechanism.<sup>67</sup> New legislation is thus seen as a beneficial tool to protect women's right to be free from GBV.

#### 4.2.1 *Codified law*

ECHR includes provisions on torture, liberty and security of person, privacy, and non-discrimination; all possible grounds for inclusion of GBV. In treaty law, no reference to GBV can be found. When looking into how GBV is dealt with under the ECHR, two provisions are under consideration: art. 3 on the prohibition of torture, an absolute right, and art. 8 on the right to respect for private life, allowing some state limitations.

Positive obligations affect state responsibility. If a state has not fulfilled its obligations as providing adequate protection through law to ensure rights and effective remedies, it can be responsible for a violation resulting from the acts of an individual. This is determined in relation to each right of the ECHR, and depends on the terms of the article in question.<sup>68</sup>

The right to be free from torture is found in art. 3 of the ECHR:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The ECtHR has mainly dealt with issues of women's integrity and right to be free from violence under art. 8, focussing on the right to privacy.

“1 Everyone has the right to respect for his private and family life, his home and his correspondence.

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64 Ovey and White, 2006, p. 451ff., ECtHR: *Belilos v. Switzerland*, app. no. 10328/83, para. 51ff.

65 CoE, 2008.

66 Committee of Ministers Rec (2002)5, PACE Rec. 1450 (2000); Rec. 1582 (2002); Res. 1582 (2007), Res. 1635 (2008), Rec. 1847 (2008).

67 Committee of Ministers, 1044th meeting - 10 December 2008, Appendix 6, (Item 4.4), Terms of reference of the Ad hoc Committee on preventing and combating violence against women and domestic violence.

68 Ovey and White, 2006, p. 31f.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

In addition to ECHR, The Committee of Ministers Recommendation Rec (2002)5 *on the protection of women against violence* exist. It covers all forms of GBV, and urges governments to inform the CoE on developments at regular intervals. The Rec. reaffirms the position of VAW as a gender equality and human rights issue, and a violation of women’s physical, psychological and/or sexual integrity. It recommends member states to undertake a review of their legislation, aiming to guarantee women their human rights; recognise the obligation to exercise due diligence as regards VAW; to recognise the structural and societal dimension of VAW; and to adopt a national plan of action to combat VAW.<sup>69</sup> The appendix provides a broad definition of VAW, built on the DEVAW definition:

1. ... “violence against women” is to be understood as any act of gender-based violence, which 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 private life. This includes, but is not limited to, the following:

a. violence occurring in the family or domestic unit, including, inter alia, physical and mental aggression, emotional and psychological abuse, rape and sexual abuse, incest, rape between spouses, regular or occasional partners and cohabitants, crimes committed in the name of honour, female genital and sexual mutilation and other traditional practices harmful to women, such as forced marriages.<sup>70</sup>

Here, explicit and detailed recommendations to combat GBV and improve national policies are stated, focussing on protection of victims; empowerment; legal adjustments; prevention; and institutional adjustments to implement measures combating VAW. To comply with the Rec., states should criminalise acts of violence against a person, in particular physical or sexual violence, including rape between partners and sexual acts committed against non-consenting persons, also when not showing signs of resistance, and ensure appropriate measures and sanctions to take effective action against perpetrators and to ensure redress.<sup>71</sup> Specific measures are expressed with regard to violence within the family. States are urged to criminalise this; provide adequate penalties for deliberate assault and battery committed within the family; envisage measures as restraining orders and measures to enable the police to legally enter the residence of a person in danger of such violence.<sup>72</sup>

This Rec. constitutes a very well-made instrument, covering diverse forms of GBV, taking a clear stand on GBV as a human rights violation and an issue of gender inequality. It is comprehensive and clear. If the coming convention is as comprehensive and women’s rights-oriented as this Rec., this instrument will have a large significance in the work to eliminate GBV.

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69 CoE Rec. (2002)5, I-VIII

70 CoE Rec. (2002)5, appendix, para. 1(a).

71 Ibid., para. 35ff.

72 Ibid., para. 55ff.

It will develop norms in Europe and beyond, affect implementation requirements of ECHR, adjudication of ECtHR and serve to prevent GBV and protect women from it.

#### 4.2.2 *Implementation*

As the gender-neutral text of ECHR is sparse on GBV, is it necessary to investigate ECtHR case law to find inclusion of GBV under ECHR in its implementation. ECtHR interprets ECHR as a living document, and has reached significant judgments on inter-personal violence. The Court has for example tried cases of violence against children under art. 3 and has found positive obligations to protect persons from such violence, carried out by private actors, and when possible to prevent it.<sup>73</sup> Through case law it is clear that ECtHR takes GBV seriously, and includes it under the ECHR, mainly arts. 3 and 8.<sup>74</sup>

As regards the right to respect for privacy under art. 8, states have an obligation to promote and protect individuals' private life through legal and other measures. Positive obligations under art. 8 to provide protection from interferences with a person's private life are established in serious cases. Such include obligations to protect an individual from interference from another individual, such as violence.<sup>75</sup>

Usually, ECtHR uses a broad margin of appreciation on how states provide protection for individuals' privacy, and the obligations depend on the aspect of privacy *in casu*. In cases where "*a particularly important facet of an individual's existence or identity is in issue under art. 8*", the margin of appreciation will be narrowed.<sup>76</sup> There are examples of states' positive obligations to respect and promote the right to privacy in cases of GBV. One case is *X and Y v. the Netherlands*, concerning a mentally disabled girl who had suffered serious sexual assaults. Because of her disability, she lacked capacity to initiate a criminal legal procedure. Here the Court found a violation of the ECHR. The case expresses women's right under art. 8 "private life" to physical and moral integrity, including sexual life, and the freedom from sexual assaults as fundamental values and central aspects of privacy. The Court found positive obligations for states to efficiently provide for the right to privacy, including inter-personal relationships. It underlined the need for efficient deterrents in relation to such violence. The state's margin of appreciation on how to do this was diminished, as GBV was seen as seriously interfering with women's privacy, requiring efficient criminal law.<sup>77</sup>

The case *Bevacqua and S. v. Bulgaria* concerns domestic violence and child custody. The Court re-stated that private life includes physical and psychological integrity. The vulnerability of victims of domestic violence was underlined and their protection called for. Positive obligations are stated to include "*a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.*"<sup>78</sup> The Court found no requirement under ECHR for prosecution of the violent partner. However, real possibilities for the applicant to start

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73 ECtHR: *A. v. the United Kingdom*, app. no. 25599/94, *Z and others v. the United Kingdom*, app. no. 29392/95.

74 ECtHR: *X and Y v. the Netherlands*; app. no. 8978/80, *M.C. v. Bulgaria*, app. no. 39272/98.

75 Ovey and White, 2006, p. 243.

76 *Ibid.*, p. 234.

77 ECtHR: *X and Y v. the Netherlands*, para. 22ff.

78 ECtHR: *Bevacqua and S. v. Bulgaria*, para. 65.

a private prosecution procedure (the only possibility then for cases of domestic violence) were insufficient, especially with the risk of further violence. The national court's lack of sufficient measures in responding to the violence by the applicant's former husband amounted to a failure to assist her, and was in compliance with art. 8.<sup>79</sup> The Court treated GBV as secondary to child custody, but the case shows the right to access to measures to be free from domestic violence. In its assessment, ECtHR used a policy sources developed under the CoE and the UN: CoE Rec (2002)5, DEVAW, and the case *A.T. v. Hungary*.

In the case *M.C. v. Bulgaria* did ECtHR find rape to be a violation of both the right to respect for privacy and the right to be free from torture (arts. 3 and 8). The complainant addressed the inefficient protection against rape and abuse in Bulgaria, only opening for prosecution in cases where the victim had resisted actively. The Court clarified the positive obligations under these provisions as obligations for states to adopt legislation efficiently punishing rape, and to use this law properly through investigation and prosecution.<sup>80</sup> This case has been an important factor in revisions of criminal law on sexual crimes in Europe.

Also art. 2, the right to life, includes positive obligations to take reasonable preventive measures to protect an individual whose life is at risk from the criminal acts of another individual. This comes into effect if the police knew or ought to have known that the life of an individual is at real and immediate risk.<sup>81</sup> Art. 2 have been raised in relation to GBV. The case *Danini v. Italy* is about a woman who had been murdered by her former boyfriend. States' positive obligations to take measures to protect the life of private individuals do not include the prevention of all possible incidents of violence. The Court found that it would not have been possible to foresee the murder carried out by the ex-boyfriend, whereas no violation of art. 2 was found.<sup>82</sup> This was despite regard to threats by the man to his former partner before the murder, and ECtHR here fails to take the mechanisms of GBV and the gendered nature of this violence into account.

At present, a landmark judgment is expected by ECtHR in a case of domestic violence: *Opuz v. Turkey*. The applicant has suffered domestic violence at the hands of her husband during a number of years, as had her mother, resulting in the death of her mother. The violence was reported to the authorities, at different times, and many of the reports were later withdrawn due to threats of additional violence. Claims of violations of art. 2, 3, 13 (effective remedy) and art. 14 (freedom from discrimination) are made in the case.<sup>83</sup> The case is pending, and the outcome will be significant for domestic violence, positive obligations to protect women from this, its link to discrimination, and the general human rights protection under ECHR.

As the case law under ECHR shows GBV is clearly understood as a violation of ECHR. These cases have increased in numbers in the recent years. Positive obligations for states to protect and promote the right to respect for privacy and to be free from torture are clear in the precedents, and ECHR, with a special focus on art. 8, followed by art. 3, has been used to protect women's right to be free from GBV. However, case law focuses on sexual violence, whereas in

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79 ECtHR: *Bevacqua and S. v. Bulgaria*, para. 82ff.

80 ECtHR: *M.C. v. Bulgaria*, para. 148ff.

81 ECtHR *Osman v. United Kingdom*, app. no. 23452/94, para. 115ff.

82 ECHR: *Danini v. Italy*, app. no. 22998/93.

83 ECHR: *Opuz v. Turkey*, app. no. 33401/02.

the *Danini* case, regard was not taken to the mechanisms of GBV preceding the murder of the woman by her former partner. The outcome of the *Opuz* case will be significant to see how ECtHR takes these mechanisms into account in its adjudication.

On the whole is it obvious that ECtHR takes GBV seriously, especially with regard to the meagre text it has to rely on in this respect, in comparison to the CEDAW Committee which has CEDAW with its GR to rely on. I find it clear that efficient protection against GBV exist under ECHR through the focus on implementation, the development of interpretation of ECHR, and the adjudicate power of ECtHR.

#### 4.2.3 *Monitoring*

Monitoring of ECHR implementation takes place by the ECtHR, delivering binding judgments, which the parties to the case have undertaken to abide by.<sup>84</sup> Any person, NGO or group of individuals can make applications to the Court, in accordance with traditional requirements for such.<sup>85</sup> Following Additional Protocol (AP) 11, ECtHR consists of full-time judges, one per member state. These are trained judges, elected by PACE.<sup>86</sup> The composition of the Court aims to be gender balanced, geography balanced and balanced as regards different legal systems.<sup>87</sup> A judge being a national of the respondent state is always a member of the Chamber in cases against the state.<sup>88</sup> This questions independence, but increases knowledge of the national legal situation *in casu*. Proceedings before the Court are usually public.<sup>89</sup>

The major strength is the mandatory individual complaints procedure before an independent international court with adjudicative power. The Court does not try substantial matters already examined by it<sup>90</sup>, indirectly declaring the nature of binding precedence of its judgments. The outcome is a binding judgment, but the Court has limited competence and cannot award legal redress. It can never act as a fourth instance, and the judgments thus don't oblige states to repeal laws or judgments etc. The state though has a legal obligation to end the breach and take remedies.<sup>91</sup> If ECtHR finds a violation, it can afford just satisfaction to the complainant, if necessary and lacking in internal law.<sup>92</sup> For implementation of the decisions, the concerned state has sovereign competence and margin of discretion is applied.<sup>93</sup>

Monitoring of enforcement takes place by the Committee of Ministers, the highest political organ of the CoE, but this is limited to the Court's competence as regarding whether the victim has received compensation.<sup>94</sup> Following AP 11, the Committee of Ministers left the decision-making procedure, in favour of judicial independence of ECtHR.

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84 ECHR art. 46(1).

85 ECHR art. 34f.

86 ECHR art. 20, 22.

87 Ovey and White, 2006, p. 474.

88 ECHR art. 27(2).

89 ECHR art. 40.

90 ECHR art. 35(2)(b).

91 ECHR art. 46.

92 ECHR art. 41.

93 Tomuschat, 2008, p. 253, Ovey and White, 2006, p. 491.

94 ECHR art. 46.

A high number of applications creates a backlog for the Court, not being able to deal with cases without delay. The AP 14 is not final, but opens for further efficiency of the Court.

Although compliance isn't absolute, legal and procedural reforms according to outcomes of the Court are common. Thus is norm development as well as progressive implementation of ECHR taking place, as the jurisprudence of ECtHR provides common European standards for human rights protection. The body of jurisprudence is standard-setting for implementation of the Convention, and works to prevent rights violations. The adjudicative power of ECtHR renders stronger enforcement than CEDAW monitoring.

The ECtHR focuses on protection of rights, which also has a preventive effect. The Court provides far-reaching judicial activity and is in a strong position to protect rights and develop standards of human rights law implementation taken up on by states in Europe and beyond.

### 4.3 Summary

Positive obligations to protect women from GBV exist under both treaties. Protection under CEDAW is stronger in wording in codified law, although to a large degree in non-binding instruments. Its greatest benefits are norm development at universal level, and promotion of women's rights, preventing GBV. Implementation is problematic. The sparse jurisprudence is non-binding, but includes a significant and standard-setting case of domestic violence, clearly stating this as a violation of CEDAW. ECHR has not so clear codified law, but a good inclusion of GBV in its case law, finding violations of treaty provisions, thus developing implementation of ECHR. Its Rec (2002)<sup>5</sup> is comprehensive and clear, providing a broad but detailed basis for states to work against GBV. If the coming CoE Convention comes near the substantive content of the Rec., it will be a thorough and strong instrument, providing the ECtHR with a new, specific document on GBV to use in its assessments of applications. The major strengths of ECHR are the focus on implementation, the adjudicative power of ECtHR and the stronger enforcement working in a preventive and protective manner.

In the next chapter, the two regimes are compared and the protection provided evaluated in relation to the dichotomies presented in chapter 1.

## 5 Universal Norms and Regional Instruments

GBV is a deeply rooted human rights violation, and its victims need sufficient protection. CEDAW and ECHR operating under two different regimes and at different levels share some commonalities and also open for discussion on their differences. The instruments serve, to one degree, different purposes, but both can be actively used to protect women's right to be free from GBV. Which one is serving this purpose to the best? The sufficiency, benefits and drawbacks of the two instruments will be analysed in terms of different opposing terms: monitoring vs. adjudication; special protection vs. prevention; norm creation vs. implementation; mainstreaming vs. new legislation; and universality vs. regional particularism.

### 5.1 Norm Creation/Implementation

Both CEDAW and ECHR have impact in terms of norm creation and implementation, in different ways and to different extent. Implementation includes monitoring, where ECtHR offers stronger measures than CEDAW. CEDAW and the GR for its interpretation, presented in chapter 4.1.1, are gender-specific and far-reaching. Especially the policy documents on legal issues are strong in normativity, and the gender perspective is clear. Despite a lack of binding effect are these documents of significance for law-making at national level, for human rights bodies as the CEDAW Committee and the ECtHR, and for NGOs to pressure for state actions. They serve a much needed purpose to increase visibility of GBV, and are able to include stronger wording as non-binding documents; states are willing to say more articulate things when not having to transform it into national law.

DEVAW and GR 19 give broad and inclusive definitions of VAW, including psychological, physical and sexual violence. CoE Rec(2002)5 is although the most explicit and comprehensive document, having significance in norm creation at both European and universal level. From a gender perspective all these instruments are beneficial, understanding GBV as an expression of gender inequality. The instruments highlight the importance of gender inclusion in law-making, something that has been radically missing in general human rights law.<sup>95</sup> Despite general non-discrimination clauses, including sex as an illegitimate basis for discrimination, is the failure to include women in mainstream human rights law and its implementation consistent.

Under CEDAW, with its general provisions and political work, its broad ratification but with its many reservations, the main goal is the development and maintaining of norms to create a climate where women's rights to non-discrimination and equality in rights enjoyment are realised. The process to reach this is slow, and the text is used as a basis for change. In terms of standard-setting, CEDAW is clearly ahead of the ECHR. A CoE convention on VAW would improve its standard-setting, but CEDAW with its broader spectra and non-discrimination context is still ahead in promoting women's human rights and working towards an environment of non-discrimination, taking due account of the universal, societal discrimination of women in

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<sup>95</sup> ICCPR, ICESCR, ECHR.

diverse areas of life. CEDAW art. 3 and 5 call for general changes in society, as the modification of social and cultural patterns of conduct to eliminate prejudices and practises based on the idea of the inferiority of either sex or on stereotyped roles of either sex, something that if realised would create a good environment to address GBV efficiently. Such provisions are means to change perceptions of rights and equality, rather than strict duties. Through CEDAW and its Committee's effort to develop its interpretation, a high level of gender expertise has been translated into General Recommendations and some jurisprudence, leading interpretation of the treaty in a way that benefits its implementation.

For implementation, rule of law and willingness to comply with the treaty and develop human rights is a prerequisite. This is not the situation regarding all States Parties to CEDAW, but is more likely under ECHR. Upon ratification of CEDAW, violations of provisions are likely, but ratification is still beneficial and a first step in advancement of human rights at national and international level. Although creating an opening for change, it has also been argued that ratification makes no difference or even worsens human rights respect, in non-democratic states and in states where civil society is absent and no pressure for respect and adherence are made at national level. With a more developed democracy and stronger civil society, ratification is beneficial to increase respect for human rights.<sup>96</sup>

CEDAW carries norm creation with it. As stated by Steiner can the text of a treaty itself “*serve to empower a population, spur demands for reform, and heighten the pressure on a state.*”<sup>97</sup> At UN level, through CEDAW, are human rights developed normatively, targeting state actions and inactions in terms of legislation, policy, proactive measures and government commitment. Follow-up of implementation is lacking, but the norms *per se* open for NGO action and advocacy. Human rights treaties have further impact than enforcement of the provisions, giving a basis for a discourse of rights. As shown in chapter 4 has CEDAW been severely undermined through the reservations made to it, limiting its universality as regards implementation. Implementation is further problematic due to its weak language.<sup>98</sup>

For the ECHR, the text of the Convention is completely gender neutral, but implementation and interpretation by the Court have rendered a still developing jurisprudence on GBV.<sup>99</sup> The Convention and the judgments are binding. All 47 CoE members are Contracting Parties to ECHR, thus meaning that Europe in a broad term of speaking is guided and bound by the Convention and its jurisprudence. ECHR has been incorporated into national law in European states, which increases the level of implementation.<sup>100</sup> The specific inclusion of GBV under CEDAW is a strength of this instrument, but the inclusion of GBV in jurisprudence under ECHR strengthens implementation and adherence. Recent developments as the coming convention are likely to further advance the status of GBV under ECHR.

The major strengths of the ECHR are the justiciability of the rights therein and the Court's innovative interpretation and its status, but at present one is bound to reliance on the judicial

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96 Neumayer, 2005, p. 950.

97 Evans: Steiner, 2006, p. 756.

98 Charlesworth and Chinkin, 2000, p. 220.

99 ECtHR: *X and Y v. the Netherlands, M.C. v. Hungary, Bevacqua and S. v. Bulgaria.*

100 UK: Human Rights Act, 1998, Sweden: Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

activity of the ECtHR to interpret the Convention to include GBV. Implementation under ECHR to actively address GBV and demanding efficient deterrents and protection for women victims has developed over the last years, and the outcome of the Opuz case will be a benchmark of how well ECtHR responds to women's right to be free from GBV, and how it considers the characteristics of this violence.

CEDAW is superior to ECHR as regards promotion, prevention, advocacy and awareness raising, together with GR and DEVAW gaining the standard-setting and advancement of human rights. As shown in chapter 4, both instruments create norms at European and universal level, and norm creation is necessary for implementation. Implementation though gives more clarity and strength. It explicitly gives rights, is efficient and converts talk to action. It is of importance that individuals perceive the problem of GBV as a human rights issue and a human rights violation: a self-definition of a rights-bearer. Implementation is fundamental for such consciousness.<sup>101</sup> Women are more likely to take on rights through their implementation than through norm creation only: implementation increases chances of adoption of rights talk. Calling on the legal system increases visibility of GBV and hopefully the protection of women's right to be free from it. This is only possible if there is a law to call on, whereas implementation is necessary. Implementation is stronger under ECHR than CEDAW, but norm creation and implementation work best in a complementary manner. This is closely linked to the issue of special protection vs. prevention of GBV.

## 5.2 Special Protection/Prevention

Under CEDAW, combating sex discrimination and including GBV in this concept, the focus is prevention of GBV: taking actions to develop a sound climate for human rights protection and realisation at state level, seemingly based on the state preconditions.

The inclusion of GBV in the discrimination prohibition is beneficial, and comes naturally under CEDAW.<sup>102</sup> This acknowledges its gender specificities and direct link to gender inequality and women's right to non-discrimination and equal protection of the law, setting a strong foundation for its prevention. The placement of GBV in the context of non-discrimination is stronger under UN documents on interpretation of CEDAW, with its broad and inclusive definition of GBV. In the case law of ECtHR, the focus has been on protection of women from GBV, addressing the positive obligations under the right to be free from torture and the right to respect for privacy. But in the CoE political context, and in Rec (2002)5, GBV is clearly linked to discrimination and gender inequality.

With regard to chapter 2, showing the prevalence, mechanisms and gender inequality context for GBV, it is unlikely that an equal treatment approach to GBV is sufficient. Although being beneficial is it uncertain that it will encompass all needed aspects of domestic violence.<sup>103</sup>

Thorough human rights protection, supported by rule of law and proper implementation would decrease GBV and other forms of discrimination. This is more likely to take place in a

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101 Engle Merry, 2003, p. 381.

102 CEDAW, A/34/46, art. 1, CEDAW GR 19, A/47/38.

103 Cook, 1994: Fitzpatrick, p. 539.

climate where women are not battered or raped without severe consequences. As shown in chapter 1.1, gender awareness in law-making and its implementation is absolutely necessary to protect and promote women's rights. To this day, such awareness is greater under CEDAW than ECHR. Under CEDAW, prevention of violations of women's rights is expected, and under both instruments do States Parties have positive obligations to hinder rights violations. In a way is ECHR also working preventively: the main goal is of course not to have as many cases as possible before ECtHR, but to create a protection level where this would not be necessary. Binding case-law serves as prevention, for example has the case *M.C. v. Bulgaria*, clearly stating that non-consensual sexual relations constitute rape, been of significant importance in national law-making.<sup>104</sup> Prevention is needed under both instruments, but further underlined in CEDAW, which focuses more on promotion and norm development than protection.

Preventive measures can also be a part of the special protection, and rather than being dichotomies can these terms be understood as interdependent. Prevention should not out-rule special protection, something that ECHR focuses more on, and will do even more with the coming CoE convention on VAW. Special protection and prevention should take place simultaneously, hoping that prevention brings real change, whereas special protection is needed to deter actions of GBV, target state inaction to protect women from it, and to ensure women's protection in a situation when GBV still takes place to an outrageous degree. Attempts to combat sex discrimination through general, gender-neutral, human rights law has failed to date. As long as society is unequal, with GBV as an extreme expression of this inequality, special protection for women's rights, including the right to be free from GBV, is needed.<sup>105</sup> When/if law will be implemented and interpreted to take due account of women's realities, experiences and needs, such special models will be superfluous. This is not the current reality, hence is special protection needed. This is recognised by the CoE, now developing a convention on violence against women.

### 5.3 Monitoring/Adjudication

For some human rights violations, official condemnations and sanctions by other states are raised. Such are unlikely in case of GBV, as it would be considered intrusive beyond diplomatic courtesy, and second: GBV is a human rights scandal in all states, no exceptions. Monitoring of the implementation of the two instruments takes place through the CEDAW Committee and ECtHR.<sup>106</sup> The CEDAW Committee supervises the implementation of the substantial content of CEDAW at national level, indicates problems, evaluates progress and makes recommendations. Monitoring takes place in quite diplomatic terms. As noted in chapter 4 have only close to half of the States Parties to CEDAW ratified the OP, limiting the possibility of women to bring individual complaints. The CEDAW Committee's mandate of monitoring is limited, as are its effects in terms of law, with lacking follow-up and no enforcement mechanism.

Monitoring and recommendations are the main tools under CEDAW, focussing on dialogue with the state party. History shows the difficulties of this, as reports to the Committee

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<sup>104</sup> For example Sweden: Prop. 2004/05:45.

<sup>105</sup> Cook, 1994, p. 20.

<sup>106</sup> CEDAW, A/34/46, art. 17ff., CEDAW OP, A/54/49, ECHR art. 19.

are if not lacking, often delayed. It is important to note the visibility of the country during examinations of state reports, as the international community scrutinises the women's rights situation in the country. No equivalent procedure is mandatory under ECHR, and thus is there a lack of information on the human rights standards under the CoE. The monitoring of CEDAW shows the gender expertise of the Committee and the comparable good knowledge on GBV. It directs criticism to the States Parties in COs, but this is much weaker than the finding of a rights violation by the ECtHR. The CEDAW Committee's form of monitoring allows a certain level of pluralism. NGO contributions have a natural place in this mechanism, whereas third-party intervention before the ECtHR is rare. The Committee submits COs, but has no power to take binding decisions for the state in question. Recommendations can of course be effective, as many states wish to "do good" on the human rights front. In a country where rule of law is in place, the likelihood of compliance is larger. Publication of reports and the COs is needed, which demands that the state has a belief in the good of doing so. Through the state reporting examinations, the Committee can be said to formulate a women's rights policy. Mechanisms to ensure compliance are though desperately needed.

For many states the reporting procedure is the farthest they'll accept an external body to examine their human rights record. The acceptance of ECtHR with its mandatory complaint mechanism would probably not have been as far reaching should it have been established today and not directly following the atrocities of World War II. It is also doubtful that the number of parties, allowing such an intrusion in state affairs, would be as high should CoE membership and compliance with the ECHR not be a prerequisite for membership of the European Union.<sup>107</sup>

Many of the articles of CEDAW are too general to be appropriate for complaints under an individual complaints procedure, for example provisions as "*ensure full development and advancement of women...guaranteeing them the exercise and enjoyment of human rights.*"<sup>108</sup> Such provisions are though needed and important as a plan of action for human rights law development. Provisions under ECHR are more apt for court assessments, and follow-up is stronger. Despite the limitations of the procedure under CEDAW OP, and its outcome not being binding, it is what exists in terms of developing jurisprudence of human rights under CEDAW. It provides individuals with an opportunity to air a human rights violation at international level, and creates political pressure on the state in question. The outcomes also serve a purpose of norm development. The OP procedure is yet not much in use<sup>109</sup>, which is in contrast to the ECtHR being overwhelmed by applications, impairing its efficiency. The non-binding views of the CEDAW Committee are significant, but a bit toothless.

The *A.T. v. Hungary* case sets a standard of interpretation of CEDAW in cases of GBV, the outcomes can be used by NGOs for pressure, and a state abiding to rule of law should take due account of the outcome. This case goes beyond what the ECtHR has so far reached on domestic violence, in terms of gender awareness and acknowledgement of the specificities and mechanisms of domestic violence described in chapter 2.

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107 Treaty on European Union, art. 49.

108 CEDAW art. 3.

109 <http://www2.ohchr.org/english/law/jurisprudence.htm>.

While acknowledging the impact and standard-setting through state reporting, policy-making and visibility of women's rights, substantive human rights protection needs a proper judicial mechanism to see to its implementation. An individual complaints procedure underlines human rights as legal rights.<sup>110</sup> A treaty is more effective when individuals have the possibility to make claims as regards the rights in it. All CoE member states recognise the jurisdiction of the ECtHR and its mandate. This implies acceptance of interpretations of ECHR provisions, the binding nature of its case law, and activity for effects. Any person allegedly suffering a human rights violation, directly or indirectly by a state assuming having responsibility, can bring human rights interferences to a Court, without the authorisation of that state.<sup>111</sup> This challenges state sovereignty. Making the individual complaints system mandatory for all States Parties allows the protection of human rights at national level be reviewed by an external body, which can be said to ensure credibility of the ECHR.<sup>112</sup> The major strengths of ECHR are its justiciable rights and its human rights court. The Court is more effective than the CEDAW Committee in terms of protection: it provides stronger measures for relief, as states have recognised the adjudicate power of ECtHR, and agreed to comply with its decisions.

The follow-up under ECHR is usually good, however with some deficits. Interpretation of the treaty is developed through case law which often leads to changes of law and practise at national level, thus serving also a preventive purpose.<sup>113</sup> The largest deficit is the duration of cases because of the heavy caseload. It must be noted that it has not been easy to take GBV cases to ECtHR, looking at its history of substantial case law, not focussing on women's rights at all and being late to intervene in the private sphere. Instead it focused on civil and political rights in a traditional meaning, from a gender biased perspective, mistaking this for neutrality. Women's rights, as the right to be free from GBV, are now winning entrance to ECtHR. This progress has taken place during a time of rights notions' development, and a time having seen more women serving as judges in ECtHR.

Complaints mechanisms serve a purpose of assessing violations occurred from the perspective of human rights law. Too often, this is too little too late. Enforcement is a means of effectiveness, and the human rights regime's main challenge: a problem greater under UN than CoE. It is normal that the result would be to conform national law to comply with the decisions, but this is not given. Adherence to the ECtHR is stronger than to the CEDAW Committee.

External control can serve to ensure a division of powers: it should not be the state, the potential and most likely violator of the right, to decide upon whether a rights violation has occurred. Here, although the experts of the CEDAW Committee are to act independently, and although judges of ECtHR are nominated by their state, the two mechanisms function to support such a division, with the adjudicative power of ECtHR as the strongest mechanism. Judicial mechanisms as ECtHR mediate legally well-established regional relations in terms of human rights, and such mechanisms are needed as long as legislative or executive bodies are weak or

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110 Nowak, 2003, p. 160.

111 ECHR art. 34.

112 Wildhaber, 2007, p. 222.

113 Nowak, 2003, p. 171, Jacobson and Ruffer, 2003, p. 89, Donnelly, 2007, p. 95ff.

absent at regional and universal level.<sup>114</sup> Thus, as long as UN only offers weak mechanisms, regional judicial activism is of great importance.

When entrusting an external body with adjudicative power is unlikely, CEDAW is through its monitoring more likely to improve women's rights as regards GBV than ECHR. But ECHR functioning as well as it does, giving legal effects and binding jurisprudence which usually is followed by the Contracting Parties in their national law-making, is the strongest mechanism to protect the right to be free from GBV. The procedures under CEDAW as well as ECHR should be used further to increase visibility, support law and policy development, and open the eyes of international mechanisms to the issue: creating jurisprudence through the use of legal discourse and judicial mechanisms. Both procedures increase human rights protection and visibility.

The visibility is obviously higher under CEDAW, as is the publicity, but the outcome needs to be brought back home. Individuals must be able to invoke international human rights law in case of violations and inadequate protection at national level. Judicial protection strengthens human rights enjoyment, giving that adjudication is the most beneficial for protection of women's right to be free from GBV, and to affect law and procedures at national level. Binding measures carry greater power, and render greater adherence.

## 5.4 New Legislation vs. Mainstreaming

CEDAW, UN policy documents and CoE Rec (2002)<sup>5</sup> provide a set of woman-specific law, clearly including a prohibition of GBV as a violation of women's rights. Neutral law as the ECHR is not gender-neutral, but built on a male norm and tends to be biased. However, gender mainstreaming activities and inclusive interpretations are being developed. But mainstreaming in terms of adding women and mixing<sup>115</sup> is insufficient in a gender structured legal system. Neither is new legislation necessarily beneficial *per se*.

But, some reconstructions must take place to better respond to women's realities, while not contributing to or maintaining gender discrimination. As argued in chapter 1.1 is there an urgent need for gender awareness in human rights law. Gender awareness in law interpretation develops gender inclusion in the law and its implementation. This is more likely to develop through working with what exists, especially as the ratification level of a new instrument is uncertain.

A gender perspective on law means opening one's eyes to the difference women and men face in human rights enjoyment and violations, and acknowledge the gender-relatedness in many violations that women experience. Current law can be used to efficiently protect women's rights, if one highlights the injustices women have faced which have been excluded in human rights law tradition, and is willing to expand the boundaries to include women's experiences.<sup>116</sup> Law has a significant role to play in human rights protection and promotion, and in challenging and adjusting inequalities. But international law cannot grant immediate changes in terms of GBV and non-discrimination: the effect develops over time, and mainstreaming is a tool for such change.

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<sup>114</sup> Jacobson and Ruffer, 2003, p. 92.

<sup>115</sup> Charlesworth and Chinkin, 2000, p. 50.

<sup>116</sup> Ibid., p. 21.

Gender mainstreaming in existing neutral law does not hinder the development and adoption of women-specific instruments to target specific issues needing to be especially highlighted. GBV is one of those issues, where general law has not provided sufficient protection. At UN level, the documents are quite sufficient, as the CEDAW Committee implements GR 19 efficiently, practically as binding law. As long as this is accepted, the protection level is high. At CoE level, the lack of a women-specific instrument is remarkable, as this exists in the universal and other regional human rights systems: *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003) and the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (1994).

Specialised law on women may lead to marginalisation of women's rights, as CEDAW in a way has, justifying non-inclusion in general instruments.<sup>117</sup> However, mainstream documents do not sufficiently consider protection of women's rights. New legislation can be used to spell out new standards, encourage States Parties to reach these, and allows new guidelines and objectives to gain strength. A CoE VAW convention would increase focus on VAW, be standard-setting, and is likely to be included under the ECtHR in its assessments of cases concerning GBV. Rec. (2002)5 is a comprehensive instrument, and if a Convention gets near that, protection of women's right to be free from GBV under the European human rights regime would significantly improve, both regarding implementation of the ECHR and in terms of prevention, awareness and visibility. Its efficiency will depend on the number of ratifications and the consequences of incompliance. Such an instrument is needed to spell out the seriousness of the issue and its inclusion in the European human rights regime. So far, we have relied on ECtHR to interpret GBV into the provisions of ECHR, which has taken place, and the Opuz case will be of great importance. Also, as the ECHR is the strongest of CoE documents, it is beneficial to include GBV here to open for Court assessment.

Mainstreaming and special legislation should complement each other to strengthen women's rights. As we cannot wait for mainstream law to change focus and include women efficiently, legislation on GBV may reasonably have as a function to correct general law, increase the protection of women's right to be free from GBV more rapidly, and lead to mainstreaming.

## 5.5 Universal Level /Regional Level

As underlined at the Vienna World Conference on Human Rights, human rights protection and promotion is a matter for all states, and human rights are universal, indivisible, interdependent and interrelated.<sup>118</sup> This does not mean that universal level protection outperforms protection at regional level. ECHR is by its existence an instrument promoting regional human rights protection. In a way it challenges the universal system, implying its insufficiency for human rights protection at regional level.

Regional human rights documents are thus not necessarily good. However, regional human rights protection under ECHR has come to be a success, although with remaining challenges as efficiency of ECtHR. Regional systems are often more efficient and beneficial for persons: they

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<sup>117</sup> Charlesworth and Chinkin, 2000, p. 218.

<sup>118</sup> Vienna declaration, A/CONF.157/23, para. 4f.

are accessible and the context is well-known. For ECHR the Court carries power and its decisions are usually enforced. Regional regimes enable closer cooperation, with human rights protection to be more explicit and adjusted to regional traditions and values. However, regional values should not challenge the fundamental values of human rights. In the UN, it is harder to take regard of regional disparities, but in the composition of the CEDAW Committee is consideration given to geographical distribution.<sup>119</sup>

The universality of UN treaties is obviously significant and beneficial for human rights development, especially in terms of promotion and norm development. CEDAW is a well developed treaty, as is the documents for its interpretation, with a clear and explicit focus on women's rights. There is a large number of political and ideological differences as regards CEDAW compliance and implementation. Universality can limit efficiency, having too many parties being unable to agree, risking the implementation of the rights to be watered down, and compliance is unfortunately limited. The many and broad reservations are hindrances to the universality and efficiency under CEDAW, in practise undermining the object and purpose of it.

CEDAW gives a broad and comprehensive instrument on fulfilment of rights to combat discrimination against women. It has effects on legislation, policy, proactive measures and government commitments all over the world. It is common that States Parties to CEDAW actually are in violation of it, but the fact that so many states are parties gives the treaty committee the important and challenging task and opportunity to use this position to work for progress on women's rights in 185 states. Monitoring of CEDAW takes place through the work of the CEDAW Committee whose COs and views are not legally binding, but hoping on compliance and a standing to the principle of *pacta sunt servanda*, while risking being toothless.

There is no universal human rights court, and thus no justiciability of rights at universal level. Enforcement through an international Court means interfering with domestic sovereignty. This is not always accepted, especially not universally, and many states oppose to mandatory adjudication outside of the state. Under ECHR is there acceptance for intervention in the state with human rights enforcement, and the judicial approach is given. The UN indeed provides a forum for universal human rights protection, although not being able to advance judicial activity, instead in practise working on prevention and promotion. There are developments of important instruments, and the political bodies of the UN of course carry greater power than CoE.

There are certain basic values that have been acknowledged as necessary for true human rights enjoyment, such as democracy, rule of law, transparency, and independent judicial activity. These elements are needed to combat sex discrimination and to take efficient action against GBV. However, the existence of these elements is no guarantee for a state without GBV, but are elements facilitating such a progress. As regards ECHR, a majority of its Contracting Parties are democracies abiding by the rule of law. This cannot be said regarding CEDAW. The CoE Statute refers to a common moral and spiritual heritage of the people; individual freedom, rule of law, political liberty, forming a true democracy.<sup>120</sup> ECHR has 47 States Parties, states that have played a significant role in human rights developments, where a familiarity with an environment of human rights (at least in theory) is present. Quite likely has the fact that CoE was founded by

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119 CEDAW, A/34/46, art. 17.

120 CoE Statute, preamble.

Western democracies, the developments of states in the region to democracies, the pluralism and rule of law as elements to fulfil human rights contributed to the success of ECHR. Neumayer has explored the effects of ratification of human rights treaties, and has found that ratification of the ECHR often has conditional effects on human rights, sometimes associated with an increase of rights violations upon ratification in countries without a strong civil society, and/or in pure autocracies. At the same time does ratification become more beneficial in terms of respect for rights as democracy or civil society impact is strengthened.<sup>121</sup>

ECHR operates in a smaller setting than CEDAW, with quite homogenous States Parties, although now gathering more diverse states than at the beginning. The decisions of ECtHR often have impact on national legal and political reforms in the region.<sup>122</sup> It offers a strong procedure in a region with a strong human rights tradition, where human rights are well developed but not necessarily fulfilled. A set of European norms are developed through adjudication.

Obviously do the universal system and the European system interact. International law is the foundation for ECHR. International human rights law, as CEDAW, and ECHR can be said to be in a 'mutual relationship', building on each other and checking each other. The ECHR should operate in relation to international instruments and the two systems can be converged and hinder the development of a closed human rights regime. ECHR contributes to evolution of international human rights law.<sup>123</sup> The universal documents can provide a baseline which is further developed by ECHR, and often a higher level of protection in ECHR States Parties is reached.<sup>124</sup> There is no self-fulfilling goal in competition, rather is the goal to protect human rights. CoE members are also States Parties to CEDAW, implying conflicts between the two, and ECtHR is taking on many cases in its region, challenging the universal system. So far, conflict between ECHR and global documents have been avoided, as ECHR provides more explicit rights than these, and provides for well-developed implementation and monitoring through adjudication.

The two systems should interact, be standard-setting in relation to each other and draw upon each others jurisprudence to create a higher level of human rights protection globally. This is achieved through efficient regional human rights protection, taking some of the workload of the UN, and being in a position to develop law through judicial activity and detailed provisions. The universal system is not necessarily better, and the regional is in this case much more efficient. Regional human rights regimes provide opportunities for close cooperation, for development of law and for greater adherence to the instruments and jurisprudence, in this case offering greater protection of women's right to be free from gender-based violence than the universal human rights regime.

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121 Neumayer, 2005, p. 946.

122 Nowak, 2003, p. 171, Jacobson and Ruffer, 2003, p. 89, on the impact of ECtHR in the UK, Donnelly, 2007, p. 95ff.

123 Wildhaber, 2007, p. 230f.

124 Ovey and White, 2006, p. 513.

## 6 Conclusions and Recommendations

CEDAW and ECHR both work to check GBV and to protect women's rights. Both instruments develop norms necessary for implementation. Implementation is found to give more efficient protection of women's right to be free from GBV and is together with accountability stronger under ECHR than CEDAW, but norm creation and implementation complement each other.

In terms of special protection/prevention, these should take place simultaneously, with prevention as part of the special protection. As long as GBV takes place to the horrific degree as it does, and as long as general human rights law doesn't respond sufficiently to this scandal, special protection is needed to protect women from GBV.

To make rights real, individuals must be able to invoke human rights law in an international judicial procedure, when adequate protection is lacking at national level. Justiciable rights, met with an efficient judiciary, guarantee and protect women's rights, prevent GBV through the creation of deterrents, and are standard-setting regionally and nationally. Judicial protection strengthens human rights enjoyment, and thus is adjudication under ECHR most beneficial.

When it comes to mainstreaming/special legislation, it has been found that women's rights are strengthened through the complementary existence of these two. As current law has not created sufficient protection from women's right to be free from GBV, new specific legislation can function to correct the existing law and increase protection of women's right to be free from GBV. Such law should be of binding character, which is now under development in the CoE. If its Convention comes close to the approach of Rec (2002)5, making the rights binding and hopefully justiciable, a new level of protection is reached.

For the dichotomy universal/regional, it has been found that the regional human rights regime of CoE with ECHR is much more efficient for the protection of women's right to be free from GBV than CEDAW. CEDAW is important to create a climate on non-discrimination and is promotional of women's rights and equality. It contributes significantly to protection of the right, and is standard-setting and affects the gender equality environment in all states, including ECHR parties. ECHR offers the greatest protection, being focused on implementation of ECHR, the mandatory individual complaints mechanism, the strong adjudication which serves a preventative and protective purpose, greater enforcement and a new convention to increase visibility of GBV. The regional system is in this case much more efficient than the universal.

The findings of this thesis indicate, although finding ECHR and the regional human rights enforcement to be superior to universal norm creation under CEDAW, that the two systems are interdependent. The two systems should interact, be standard-setting in relation to each other and draw upon each others jurisprudence. The success of ECHR and its Court in its actions against GBV can be inspirational for other regional human rights regimes, and also CEDAW benefits from drawing upon these. ECHR stands better together with CEDAW than alone, with CEDAW being a front-runner for a change of climate and gender equality development. The instruments can work to strengthen each other, creating a stronger jurisprudence and develop a legal climate better protecting women's right to be free from gender-based violence.

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