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Migration Status as a constraint to the right to effective remedy for victims of sexual violence in EU Member States: Evaluating the situation of undocumented migrant women in light of the Council of Europe's human right standards

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Dr. Vladislava Stoyanova

Term: Spring 2019

Acknowledgment

First and for most I would like to thank God for granting me the wisdom, strength and patience to write this thesis. The completion of the thesis wouldn't have been possible without him.

I owe my deepest gratitude to my parents, Mr. Gidey Abrha and Mrs. Kidist Mesfin, for providing me with unfailing support and continuous inspiration throughout my life and through the process of writing this thesis.

I would also like to express my gratitude to my supervisor Dr. Vladislava Stoyanova for her guidance, follow up and insightful comments throughout the course of this thesis.

I also wish to thank my friends who had been supporting and encouraging me in my study journey.

Finally, my appreciation goes to the Lund University Faculty of Law for providing me the best human rights education and the Swedish Institute (SI) for granting me a generous scholarship to earn my LLM.

Table of content

Acknowledgment	
Abstract	
List of acronyms	
Chapter 1 – Introduction	
1.1. Back ground.....	1
1.2. Statement of the problem.....	2
1.3. Research questions.....	4
1.4. Objectives.....	4
1.5. Delimitation.....	5
1.6. Methodology	6
1.7. Organization	6
Chapter- 2_Sexual violence against undocumented migrant women in Europe	
2.1. The concept of sexual violence	8
2.2. Sexual violence against migrant women in EU member states.....	9
2.2. 1. Who are migrant women?	9
2.2.2. Sexual violence against migrant woman	10
2.2.2.1. Sexual violence in host EU member states.....	11
2.3. Sexual violence against undocumented migrant women in the EU member states.....	13
2.3.1. Who is undocumented migrant?	13
2.3.2. The vulnerability of undocumented migrant women.....	15
2.3.2.1. Sexual violence by land lords.....	15
2.3.2.2. Sexual violence by employers	16
2.4. Feminist perspective of sexual violence	17
2.4.1. Feminist routine activity theory of victimization.....	18
2.4.2. Intersectionality approach to sexual violence	19
2.4.2.1. Gender.....	20
2.4.2.2. Migration status	20
Chapter 3 – The prohibition of sexual violence, the right to effective remedy and the principle of non-discrimination	
3.1. Prohibition of sexual violence against women	22
3.1.1. Prohibition of sexual violence under the ECHR.....	22
3.1.1.1. Sexual violence as violation of Article 2 of the ECHR.....	23
3.1.1.2. Sexual violence as violation of Article 3 of the ECHR.....	25
3.1.2. Prohibition of sexual violence under the Istanbul Convention.....	27
3.2. The right to effective remedy	29

3.2.1. The meaning and nature of the right to an effective remedy	29
3.2.1.1. The right to effective remedy as a procedural right.....	31
3.2.1.2. The right to effective remedy as a substantive right.....	32
3.2.2. The right to effective remedy in international human rights instruments.....	33
3.2.3. The right to effective remedy under the Council of Europe human rights regime.....	35
3.2.3.1. The right to effective remedy under the ECHR.....	36
3.2.3.2. The right to effective remedy under the Istanbul Convention.....	37
3.2.4. The principles of non-discrimination and intersectionality under the Council of Europe human rights regime	39
Chapter 4 – Assessing a challenge to the right to effective remedy of undocumented migrant women victims of sexual violence in EU Member States	
4.1. Migration control as a challenge	42
4.1.1. The migration control laws in EU member states.....	42
4.1.1.1. Detention and deportation of undocumented migrants	42
4.1.1. 2. Criminalization of undocumented migrants	43
4.1.1.2.1. Irregular Entry and Stay.....	43
4.1.1.2.2. Assistance in irregular entry and stay.....	44
4.1.2. The challenge on the ground	45
4.2. Assessment of the challenges in light of the ECHR and Istanbul Convention.....	47
4.2.1. Nondiscrimination and the right to effective remedy	49
4.3. Assessment of the challenges from feminist perspective.....	49
4.3.1. Feminist routine activity theory and Intersectionality approach	49
4.3.1.1. Existence of likely offenders.....	49
4.3.1.2. Accessibility of Suitable targets.....	50
4.3.1.2.1. Intersectionality approach.....	50
4.3.1.3. Absence of capable Guardians.....	51
Chapter- 5 Conclusion	
Conclusion	53
Bibliography	

Abstract

Undocumented migrant women are among the vulnerable sections of the society, in which their likelihood of sexual violence is very high. Despite this, they are encountering challenges in accessing their right to effective remedy in EU Member States.

The thesis aimed at signifying the migration status-related challenges on the right to effective remedy of undocumented migrant women victims of sexual violence in EU Member States and assess the challenges in light of the human rights standards under Council of Europe's human rights regime and the Feminist routine activities theory.

The thesis analyzed that migration control rules and practices in EU Member States concerning the member states human rights obligations under the ECHR and the Istanbul. It also evaluated the situation of undocumented migrant women victims of sexual violence from the perspective of the Feminist routine activity theory and the intersectionality approach.

The thesis established that the ECHR and the Istanbul Convention oblige EU Member States to ensure the right to effective remedy to all victims of sexual violence in their respective territory, regardless of the victims' identity and migration status. However, the thesis found that the EU Member States place greater emphasis on migration control measures, and this is at the expense of their obligation to guarantee the right to effective remedy to undocumented migrant women victims of sexual violence.

The thesis discussed the challenges confronted by undocumented migrant women victims of sexual violence, while they try to reach the institutions of justice in EU Member States. The thesis also examined how the situation of undocumented migrant women fits with the three victimization grounds employed in Feminist routine activities theory.

In conclusion, EU Member States are found to be in non-compliance with their human rights obligation towards safeguarding the right to effective remedy of undocumented migrant women victims of sexual violence.

List of acronyms

- CAT Convention against Torture
- CEAS Common European Asylum System
- CEDAW Convention on the Elimination of all Forms of Discrimination
- COE Council of Europe
- ECtHR European Court of Human Rights
- EU European Union
- FRA European Union for Fundamental Rights
- GREVIO Group of Experts on Action against Violence against Women and Domestic Violence
- ICCPR International Convention on Civil and Political Rights
- MPI Migration Policies Institute
- NGO Non Governmental Organization
- SGBV Sexual and gender based violence
- UDHR Universal Declaration of Human Rights
- UN United Nations
- UNHCR United Nations High Commissioner for Refugees

Chapter 1

Introduction

1.1. Back ground

Migration is a dramatically increasing phenomenon in the existing world order. Europe is also under ‘’ refugees and migrant crisis’’¹, with the highly rising number of migrants reaching the continent. After the 1990s, the geopolitical crisis in the Middle East and North Africa has been contributing to the mass flow of people to European States.² Every year, thousands of people reach EU Member States³, due to social, economic and political complications in their country of origin.

Migrants can be vulnerable to human rights violation, at all stages of their migration process.⁴ In this regard, sexual violence is among the prominent forms human rights violations faced by migrants. As large number of the migrants take illegal and unsafe ways of migration, there is high possibility of being subject to sexual abuse and violence. The vulnerability of migrants is not solely associated with their dangerous journeys to EU Member States, rather it follows even after their arrival at host member states. Studies revealed that a significant number of migrants has been victim of sexual violence, since their arrival in EU Member States.⁵

According to the research conducted by Keygnaert et al. on sexual violence and gender-based violence in refugees, applicants and undocumented migrants in Belgium and Netherlands,

¹ European Commission, ‘The EU and the migration crisis’. Online < <http://publications.europa.eu/webpub/com/factsheets/migration-crisis/en/> >

² Migration data Portal, ‘Migration data in Europe’, Online < <https://migrationdataportal.org/regional-data-overview/europe> >

³ Operational Portal Refugee Situations, ‘Most common nationalities of Mediterranean sea and land arrivals from January 2019’. Online < <http://data.unhcr.org/mediterranean/regional.php> >

⁴ Global Migration Group, ‘Human rights of migrants’, Online < <https://globalmigrationgroup.org/theme/human-rights-migrants> >

⁵ De Schrijver L., Vander Beken T., Krahe B., Keygnaert I., ‘Prevalence of Sexual Violence in Migrants, Applicants for International Protection, and Refugees in Europe: A Critical Interpretive Synthesis of the Evidence’ (2009), International Journal of Environment and Research and Public Health, at 5. Online < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6165364/> >

69% of the victims of sexual violence were women , and 29% were men.⁶ This signifies that the vulnerability to sexual violence is much higher for women migrants than men migrants.

Though all migrant women are vulnerable to sexual violence, the vulnerability level is much higher for undocumented migrant women. ⁷ In the context of EU, the term undocumented migrant refers to migrants who enter or \and stay in an EU Member State, without fulfilling the legal conditions required for entrance and stay in the respective State. The fact that undocumented migrant women are unauthorized to reside in EU Member States, has restricted their right to benefit from the state system. This situation forces them to be dependent in the informal socio-economic sector, so as to fulfil their basic needs. Subsequently, this accelerates the vulnerability of undocumented migrant women to sexual violence perpetrated by the main actors in the informal sector, including land lords and employers.

Sexual violence is condemned under the major international and regional human rights instruments. Such instruments also guarantee the right to effective remedy to victims of human rights violation, including victims of sexual violence. However, there are many challenges in the application of the right to effective remedy to undocumented migrant women victims of sexual violence. Lack of legal knowledge, economic incapacity, social pressure, law and policy constraints are some of the challenges faced by undocumented migrant women.

This thesis will assess how migration control laws and practices in EU Member States challenge the right to effective remedy of undocumented migrant women victims of sexual violence in EU Member States, in light of Council of Europe's human rights standards. Besides, it will analyze such challenge from the perspective of intersectionality approach and the Feminist routine activity theory.

1.2. Statement of the problem

Though sexual violence is a phenomenon that can possibly happen to both men and women, multiple studies revealed that women are highly prone to sexual violence than men. Even

⁶ Keygnaert I., Vettenburg N., Temmerman M, 'Hidden violence is silent rape: sexual and gender-based violence in refugees, asylum seekers and undocumented migrants in Belgium and the Netherlands'(2012), *Culture, Health and Sexuality*, at 505–520. Online <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3379780/>>

⁷ Eve Geddie, Gender-based violence in Europe's fight against irregular migration(2014), *Heinrich-Böll-Stiftung Gunda werner institute* < <https://www.gwi-boell.de/de/node/23267> >

among women, some group of women are more vulnerable than others. The level of vulnerability among women may differ depending on their age, racial origin, nationality, and other statuses. According to studies conducted in EU Member States, migrant women are highly exposed to sexual violence, compared to the women who are nationals of the Member States.⁸ Furthermore, undocumented migrant women are more susceptible to sexual violence than documented migrants.⁹

Sexual violence against women amounts to a violation of human rights, as per international and regional human rights instruments like UDHR, ICCPR, CAT, ECHR and the Istanbul Convention. Most forms of violence against women, including sexual violence, are prohibited in all EU Member States. International and regional human right instruments, ratified by EU Members States, also recognize the right to effective remedy for victims of human rights violation. Accordingly, States have the obligation to guarantee an adequate protection of women from any violation of human rights, including sexual violence.¹⁰ Moreover, state parties shall provide adequate and effective remedies to women who have been victims of sexual violence.¹¹ In such situations, States are under the obligation to perform their duties on nondiscriminatory manner.¹²

As part of migration control, most EU Member States punish an irregular stay with fine and/or imprisonment.¹³ Besides, a return process could automatically be initiated at any time, when the State migration authorities get the information about the undocumented status migrant in any way.¹⁴ In this regard, this thesis assesses whether the migration control rules and practices in EU Member States are in line with their human rights obligations under the ECHR and Istanbul Convention.

⁸ De Schrijver, *supra* note 5, at 5.

⁹ Eve, *supra* note 7.

¹⁰ See European Convention on Human Rights (ECHR), 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), art 2(1) and 3, Council of Europe Convention on Preventing and Combating Violence against women and domestic violence Istanbul convention (Istanbul Convention), 12 April 2011, art 36

¹¹ ECHR, art 13 & Istanbul Convention, art 29.

¹² ECHR, art 14 & Istanbul Convention, art 4.

¹³ European Union Agency for Fundamental rights (FRA), Criminalisation of migrants in an irregular situation an of persons engaging with them, at 5. < https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants_en.pdf >

¹⁴ *Ibid.*

Specifically, the thesis will examine the situation in relation to the standards of the right to effective remedy and the nondiscrimination principle incorporated under the ECHR and the Istanbul convention. The thesis will also assess the situation from the perspective of intersectionality approach and the Feminist routine activity theory.

1.1. Research questions

- What standards does the right to effective remedy under Council of Europe law impose?
- How are these standards applied to undocumented migrant women in the EU Member States?
- What challenges arise in the application of the standards to undocumented migrant women in the EU Member States?
- How can these challenges be assessed in light of the intersectionality approach and Feminist routine activity theory?

1.2. Objectives

General objective

The main objective of the thesis is to assess the challenges on the right to effective remedy of undocumented migrant women victims of sexual violence in EU Member States and assess the situation in light of the Council of Europe human rights standards and feminist theory.

Specific objectives

- Identifying the standards imposed by the right to effective remedy under Council of Europe laws;
- Identifying the standards applied to undocumented migrant women in the EU Member States;

- Examining the challenges which arise in the application of the standards to migrant women in the EU Member States;
- Analyzing challenges in light of the intersectionality approach and feminist routine activity theory.

1.3. Delimitation

This thesis doesn't cover all migrant women victims of sexual violence, rather it specifically concerns with undocumented migrant women. accordingly, the thesis considers all undocumented migrant women victims of violence, regardless of the reason for their irregularity.

As to the geographic scope, the thesis will only focus in EU Members States, and the situation in other Council of Europe Member States is not covered. As migrant women are vulnerable to sexual violence at every stage of their migration, victimization to sexual violence may happen in home country, during journey or/and in host European States. The thesis is limited to assessing the accessibility of legal remedies in relation to sexual violence occurred after their arrival in EU Member States. In assessing the victimization of undocumented migrant women in EU Member States, the thesis will only look at the sexual violence perpetrated by employers and land lords.

The thesis will assess how a migration status affects the right to remedy of women victims of sexual violence. Even though, there are multiple challenges that affect the right to effective remedy to undocumented migrant women. The thesis is limited to examining the migration control rules and practices in EU Member States, as major challenges to the right to effective remedy of undocumented migrant women. The challenge to the right to effective remedy will be analyzed in light of Council of Europe human rights standards. As to Council of Europe human rights standards, only the ECHR and the Istanbul convention will be considered for the purpose of this study.

1.4. Methodology

The thesis uses doctrinal legal research, as it analyzes the migration Control rules and practices in EU Member States in relation to their obligations under the ECHR and Istanbul convention. Besides the effect of the migration control rules on access to effective remedy to undocumented migrant women victims of sexual violence will be assessed in light of nondiscrimination and intersectionality principle. Furthermore, the challenge as to the right to effective remedy will be approached from the perspective of Feminist routine activity.

Accordingly, relevant national and international laws, court decisions, International organization reports, books and articles will be employed. The main human right instruments employed for analyzing the challenges are the ECHR and the Istanbul convention. The ECtHR decisions will serve as the main sources for interpreting the above-mentioned conventions.

1.5. Organization

This introductory chapter clarifies the main problem and research questions to be addressed on this thesis. It also points the objectives as well as the scope of limitation on this thesis. Finally, it briefly illustrates the methods to be employed on the research.

The second chapter presents the situations on how and where migrant women are facing a sexual violence. Besides, this chapter tries to demonstrate how the undocumented status intensifies the vulnerability of migrant women to sexual violence. The chapter also deals with the intersectionality approach, in assessing the effect of multiple discrimination grounds in increasing the vulnerability of undocumented migrant women. In the last part of the chapter, the vulnerability of undocumented migrant women is approached from the perspective of the Feminist routine activity theory on victimization.

The third chapter deals with the prohibition of sexual violence, the right to effective remedy and the principle of nondiscrimination under the Council of Europe's human rights regime, particularly the ECHR and the Istanbul Convention. This chapter pinpoints and discuss the most relevant provisions that prohibit sexual violence against women. Consequently, it identifies the standards for evaluating the responsibility of states towards ensuring the right to effective

remedy for victims of sexual violence. lastly, the chapter deals with the obligation of states in relation to the principles of equality and nondiscrimination under the ECHR and the Istanbul convention.

The fourth chapter discusses the actual challenges faced by undocumented migrant women victims of sexual violence in accessing their right to effective remedy. Accordingly, the migration control rules and practices in EU Member States will particularly be discussed as the main challenges. Subsequently, the chapter will analyze the challenges as per the standards under the ECHR and the Istanbul Convention, regarding to the right to effective remedy of victims of violence. The challenges will also be analyzed in light of the intersectionality approach, jointly with the principles of equality and non-discrimination under the Council of Europe human rights regime. The last part of this chapter will assess the challenges from the perspective of Feminist routine activity theory of victimization.

Chapter 2

Sexual violence against undocumented migrant women in EU Member States

2.1. The concept of sexual violence

There is no single definition for sexual violence, it is rather possible to find multiple definitions in different legal and scholarly instruments. As per the definition provided under the World Report on Violence and Health, sexual violence refers to:

*‘‘any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.’’*¹⁵

Sexual violence entails to the actual occurrence or attempt to engage in sexual acts including ‘‘ vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object’’¹⁶ without the consent of a person of any age, sex, race, nationality and other factors. The presence of coercion in sexual violence could include the use of actual physical force or psychological pressure against the will of a person.¹⁷ Sexual violence could be perpetrated by an intimate partner, close relatives, neighbors, land lords, employers, colleagues, traffickers and other persons who are in any way contacted with the victim.

Sexual violence has a devastating effect on victims physical, mental and social wellbeing. Physically, the occurrence of forced sexual intercourse can cause different types and levels of reproductive health complications on survivors. Sexual violence can also lead to a serious mental problem like ‘‘post-traumatic stress disorder (PTSD)’’¹⁸. Furthermore, survivors of

¹⁵ Chapter 6. Sexual violence , Word Health Organization, at 149. Online (pdf) <https://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf >

¹⁶ Istanbul convention, art 36(1)(a).

¹⁷ Chapter 6. Sexual violence , Word Health Organization, at 149. Online(pdf) ,<https://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf >

¹⁸ Institut national de santé Publique du Québec , ‘Trouss Media Kit on Sexual Assault. Online < <https://www.inspq.qc.ca/en/sexual-assault/understanding-sexual-assault/consequences> >

sexual violence could be subjected to social ostracism and stigma, as some societies perceive the victimization as something personal to the victim, rather than considering it as an incident that could possibly happen to anyone. Such social perception can also have a negative impact on the future sexual and family relations of the survivors of sexual violence.

Studies disclosed that the prevalence of sexual violence is much greater for women than for men, as up to 50% of the women in the world have been subjected to sexual violence at some point in their life, either by their intimate partners or any other man.¹⁹ As to the survey conducted by FRA, 11% of women in EU Member States has suffered of sexual violence at some point in their life after the age 15.²⁰ Among those, 5% of the women in EU Member States, about 9 million, has been victims of rape.²¹ The other 6% of women has been subject of attempted rape at least once or even more times, after the age of 15.²² The above stated data entails the victim-perpetrator relationship between women and men, respectively.

2.2. Sexual violence against migrant women in EU Member States

2.2. 1. Who are Migrant women?

As per the definition provided by IOM, migrant denotes to:

‘any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.’²³

In the context of EU Member States, migrant women can refer to nationals of third country, who enter in to the territory of EU Member States for any cause. Some women could willingly migrate to the EU Member States in search of better life, while others flee to Europe due to life threatening situations in their home country. Such women can still be considered as migrants,

¹⁹ Refugee Council, The Vulnerable Women’s Project, at 4. Online(pdf) <https://www.refugeecouncil.org.uk/assets/0001/7039/RC_VWP-report-web.pdf >

²⁰ European Union Agency For Fundamental rights (FRA), Violence against women: an EU- wide survey main results, at 41. Online (pdf) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf

²¹ Ibid.

²² Ibid.

²³ International organization for migration, who is migrant? Online <<https://www.iom.int/who-is-a-migrant> >

irrespective of their entrance to the EU Member States being legal or illegal. The European Commission on Migration also noted that the ‘migrant’ category can consist of “emigrants, returning migrants, immigrants, refugees, displaced persons and persons of immigrant background and/or members of ethnic minority populations that have been created through immigration”²⁴ Therefore, the migrant status is a broad category that consists of a wide range of women with different alien statuses.

2.2.2. Sexual violence against migrant woman

As people are massively moving to the EU Member States, Europe fails under a migration crisis. According to the report revealed by the UNHCR, among the 141,472 migrants who arrived to Europe in 2019, about 20% of them are women.²⁵ Even though, the number of men migrants outnumber women migrants arriving to Europe, the number of women is increasing in the past years.²⁶ Every year, a significant number of women leave their country of origin due to different problems, and they enter in to the EU Member States in need of secured and better life. However, many migrant women take a dangerous journey to Europe and more than half of them face sexual violence on their way.²⁷

Sexual violence against a migrant woman could take place in the form of rape, human trafficking and forced prostitution.²⁸ A migrant woman could be subjected to sexual abuse by an intimate partner or close relatives at home as well as by other perpetrators in different situations. Migrant women could experience a sexual violence at all stages of migration, while

²⁴ Council of Europe Portal, Compass: manual for Human Rights education with Young people. Online < <https://www.coe.int/en/web/compass/migration> >

²⁵ Operational Portal Refugee Situations, Most common nationalities of Mediterranean sea and land arrivals from January 2019. Online < <http://data.unhcr.org/mediterranean/regional.php> >

²⁶ Jane Freedman, Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis"(2016) , An international journal on sexual and reproductive health and right , at 18. Online <<https://www.tandfonline.com/doi/pdf/10.1016/j.rhm.2016.05.003> >

²⁷ Anja Parish, Gender-Based Violence against Women: Both Cause for Migration and Risk along the Journey (September 7, 2017). Online < <https://www.migrationpolicy.org/article/gender-based-violence-against-women-both-cause-migration-and-risk-along-journey> >

²⁸ Carlo Cattaneo Institute, ASVARW Addressing Sexual Violence against Refugee Women. Online(pdf) <<http://www.cattaneo.org/wp-content/uploads/2017/03/asvarw-project.pdf> >

attempting to leave their country of origin, during their journey and even after their arrival at the host countries.

As per the report from the UN migration agency office in Italy, there is a significant increase in the number of migrant women who has been victimized of sex trafficking on their way from their home country to the Italy.²⁹ Reports from different international organizations and NGOs exposed that migrant women in a journey are forced to pay for their travel expenses by engaging in a sexual relation with traffickers and smugglers.³⁰ In other instances, migrant women may need to enter in to unwanted marriage for the sake of getting protection throughout the long and dangerous journey to Europe.³¹ Despite the great vulnerability of migrant women, they didn't get an adequate attention by the EU Member States, due to the deficiency of information and lack of coordination with NGO's involved on such area.³² Apparently, a meaningful work to avert the risk of sexual violence against migrant women on a journey hasn't been done, rather the risk and intensity of violence is becoming much higher.

Migrant women's victimization to sexual violence continues even after their arrival to host EU Member States. In such cases, the susceptibility to sexual violence could just start at the reception centers and lasts through the entire migration period. The migrant women's vulnerability to sexual violence at host EU Member States will be briefly discussed below.

2.2.2.1. Sexual violence in host EU Member States

As to the study conducted on the situation of migrants in Belgium and the Netherlands in 2012, more than half of the participants have faced a different form of sexual violence since their arrival to the host States.³³ Among the migrant populations who has been victimized of sexual

²⁹ UN Refugees and Migrants, UN report reveals shocking abuse African migrant women face on their journey to Europe (21 July 2017) Online < <https://refugeesmigrants.un.org/un-report-reveals-shocking-abuse-african-migrant-women-face-their-journey-europe> >

³⁰World Health Organization, 'Sexual violence against refugee women on the move to and with in Europe'. Online < http://www.euro.who.int/_data/assets/pdf_file/0018/319311/9-Sexual-violence-refugee-women.pdf?ua=1 >

³¹ Ibid.

³² Ibid.

³³ De Schrijver L., Vander Beken T., Krahe B., Keynaert I., 'Prevalence of Sexual Violence in Migrants, Applicants for International Protection, and Refugees in Europe: A Critical Interpretive Synthesis of the Evidence '(2009), International Journal of Environment and Research and Public Health, at 5. Online <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6165364/> >

violence, 69% of them are women.³⁴ On the other hand, around 72.6% of the perpetrators of the sexual violence against migrant women were found to be men.³⁵ This signifies the fact that sexual violence is a gender based violence, as the highest vulnerability lays on women and the violence mostly emanates from an opposite sex.

FRA also came up with a survey which revealed that a migrant women are more likely to be victimized of sexual violence than a non-migrant women who are nationals of an EU Member States.³⁶ This shows the linkage between migration status and the level of vulnerability to sexual violence in one or in another way.

Migrants who cross the boundary of an EU Member States are likely to stay in reception centers. Accordingly, assessing the situation in such centers seems to be relevant in determining the risk level of sexual violence in host States. EU Member States, under the Common European Asylum System (CEAS) directives, are obliged to give a due consideration of gender issues in the whole process of handling migrants, starting from the time of reception. However, they practically fail in guaranteeing an adequate protection of migrant women from sexual violence.³⁷ As to the study conducted in Netherland and Belgium's reception centers, around one fifth of the women respondents have been victimized of rape by one person or group rapes, multiple times.³⁸ in such cases, the sexual violence was perpetrated by male partners or close friends and relatives, residents and employees at the reception centers, police and gourdes.³⁹

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Jane Freedman, Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis"(2016), An international journal on sexual and reproductive health and right, at 20. Online <<https://www.tandfonline.com/doi/pdf/10.1016/j.rhm.2016.05.003>>

³⁸ Keygnaert I., Vettenburg N., Temmerman M, 'Hidden violence is silent rape: sexual and gender-based violence in refugees, asylum seekers and undocumented migrants in Belgium and the Netherlands'(2012), *Culture, Health and Sexuality*, at 505–520. Online <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3379780/>>

³⁹ Ibid.

The Executive Director of the Women's Refugee Commission, Sarah Costa stated,

*“Because the reception facilities in Europe were not set up to prevent or respond to SGBV, women and girls are not getting the protection they need and deserve from this humanitarian response.”*⁴⁰

In this regard, it has been found that most reception centers even lack a gender separate sleeping areas and bathrooms.⁴¹ This accelerates the likelihood of sexual violence against women migrants by their fellow men migrants and employees of the centers. Accordingly, much coordinated work among states, EU institutions and humanitarian organizations is demanded to grantee a violence free shelters.⁴² Besides, an adequate medical and legal remedies should be accessible to victims of sexual violence.

2.3. Sexual violence against undocumented migrant women in EU Member States

2.3.1. Who is undocumented migrant?

There is no universally accepted definition of the term undocumented migrant. Undocumented migrant may refer to a person who doesn't fulfill the legal requirements to enter or/and stay in host country.⁴³ There has been a debate on the use of the terms 'undocumented', 'irregular' and 'illegal' migrant interchangeably. Accordingly, the 'undocumented' and 'irregular' are widely under the international system. On the other hand, the term illegal used to be applicable in the EU system, but recently founded as 'inaccurate, discriminatory and oppressive' term.⁴⁴

⁴⁰United Nations Population Fund(UNFPA), 'Report warns refugee women on the move in Europe are at risk of sexual and gender-based violence', (Press release, 20 january 2016). Online <<https://www.unfpa.org/press/report-warns-refugee-women-move-europe-are-risk-sexual-and-gender-based-violence>>

⁴¹ Ibid.

⁴² Ibid.

⁴³ European Commission Migration and Home Affairs, 'Irregular migrant'. Online < https://ec.europa.eu/home-affairs/content/irregular-migrant-0_en >

⁴⁴ United Nations High Commissioner for Refugees , why 'undocumented' or 'irregular'? Online <https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/09/TerminologyLeaflet_EN_PICUM.pdf >

Under the EU legal system, undocumented migrant is:

“ a third-country national *present on the territory of a Schengen State who does not fulfil, or no longer fulfils, the conditions of entry as set out in the Regulation (EU) 2016/399 (Schengen Borders Code) or other conditions for entry, stay or residence in that EU Member State.*”⁴⁵

The Migration Policies Institute (MPI) has also pointed eight reasons that lead a migrant be undocumented: ⁴⁶

“• *Illegal entry (illegal border crossing);*

• *Entry using false documents ;*

• *Entry using legal documents but providing false information in those documents;*

• *Overstaying visa free travel period or temporary residence permit;*

• *Loss of status because of nonrenewal of permit for failing to meet residence requirements or breaching conditions of residence;*

• *Being born into irregularity;*

• *Absconding during the asylum procedure of failing to leave a host state after a negative decision;*

• *A State’s failure to enforce a return decision for legal or practical reasons (toleration).*”⁴⁷

In all EU Member States, staying without necessary immigrant documents is unlawful. Accordingly, EU Member States can initiate a return procedure as per article 6 (1) of the return directive, once an undocumented migrant come into the attention of State authorities.⁴⁸ Furthermore, illegal stay is criminalized and punishable with fine or/and imprisonment in all Member States, except in France, Portugal and Malta.⁴⁹ Due to such risks, undocumented migrants mostly hide themselves from the state system by avoiding any possible contact with state authorities.

⁴⁵ European Commission, *supra* note 43.

⁴⁶ *Ibid.*

⁴⁷ Opcit Research, Katie McCracken, Kate Cook and Khatidja Chantle, ‘Access to shelters of undocumented migrant women fleeing domestic violence: the legal and practical situation in the Member States’, at 15. Online (pdf) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493027/IPOL-FEMM_ET\(2013\)493027_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493027/IPOL-FEMM_ET(2013)493027_EN.pdf)>

⁴⁸ FRA, *supra* note 13, at 6.

⁴⁹ *Ibid* at 5.

2.3.2. The Vulnerability of undocumented migrant women

2.3.2.1 Sexual violence by land lords

As discussed in the above sections, migrant women could be victims of sexual violence on their way to EU Member States as well as after their arrival to host states. Furthermore, the undocumented status could also accelerate the suitability of migrant women to sexual violence.⁵⁰In this regard, undocumented migrant women could be subjects of sexual abuse at their place of residence by their intimate partners, family members, land lords, neighbors or other men.

Even though, the right to housing is a basic human right recognized in the European and international human rights instruments, the migration control rules systematically deny the right to housing for undocumented migrants. Since irregular stay is illegal and punishable in most EU Member States, there is no possibility for undocumented migrant women to benefit from a state recognized housing system. The possible way of getting a house is through an informal and unregulated rental deal with private land lords that would possibly exploit the vulnerability of undocumented migrant women.⁵¹ In this sense, the undocumented status of a migrant women could also be a source of sexual violence by land lords. Undocumented migrant women could also be subjects of sexual abuse in exchange for accommodation.⁵² In such cases, undocumented migrant women will be left with the choice of either tolerating sexual violence by landlords or being homeless. In both scenarios, the right of undocumented migrant women is at risk.

In most Member States, landlords could be punished for renting houses to undocumented migrants, as it amounts to facilitating irregular stay of a migrants.⁵³This will further worsen the situation of undocumented migrant women, since it leaves them with the possibility of getting access to house neither from the State nor from private land lords. This opens for homelessness that will in turn intensify the risk of sexual violence against undocumented migrant women.

⁵⁰ Eve, *supra* note 7.

⁵¹ *Ibid* at 13.

⁵² *Ibid*.

⁵³ *Ibid*.

Furthermore, undocumented migrant women who are victims of sexual violence don't even have the right to get homeless and emergency centers in most EU Member States, since such shelters are granted only to legally residing migrants.⁵⁴ This will indirectly promote the extension of victimization to sexual violence. This forces undocumented migrant women to continue living with abusive partners/relatives or landlords. Otherwise, they become homeless, which possibly leads to accelerated vulnerability to sexual violence.

2.3.2.2. Sexual violence by employers

Undocumented migrant women are not authorized to live and work in EU Member States, irregular stay is even punishable in most member states.⁵⁵ Accordingly, undocumented migrant women are forced to engage in an informal sector of employment, which are not visible in the formal labour system. Such situation creates a difficulty in the protection of both labour rights and human rights of undocumented migrant women.

Documented women, who can legally engage in any job, are recognized and protected under state systems. On the other hand, undocumented migrant women don't have a free access to the labour market. Accordingly, undocumented migrants face a difficulty in getting job⁵⁶ and supporting their livelihood. The need to economic survival forces undocumented migrant women to stick with a certain job, despite their victimization to sexual violence.⁵⁷ This hardship will higher the bargaining power of employers over undocumented migrants, which can possibly open a wide room for sexual violence. Studies exposed that undocumented migrant women are highly vulnerable to sexual violence at work places, as compared to documented women.⁵⁸ The fact that undocumented migrants have a restricted chance for a job makes them to be dependent on the will of their employers. This encourages potential perpetrators of sexual

⁵⁴ Platform for International Cooperation on Undocumented Migrants (PCCUM), 'Housing and Homelessness of Undocumented Migrants in Europe: Developing Strategies and Good Practices to Ensure Access to Housing and Shelter '(2014), at 14. Online(pdf) <http://picum.org/Documents/Publi/2014/Annual_Conference_2013_report_HOUSING_EN.pdf >

⁵⁵ FRA, supra note 13, at 6.

⁵⁶ Ibid.

⁵⁷ Ibid at 584.

⁵⁸ Rodríguez-Martínez, P. & Cuenca-Piqueras, 'Interactions Between Direct and Structural Violence in Sexual Harassment Against Spanish and Unauthorized Migrant Women ',Archives of sexual behavior (2019) volume 48, at 586. Online < <https://doi.org/10.1007/s10508-018-1265-9> >

violence against undocumented migrant women, as employers take advantage of the migration status of the women.

Since irregular stay is not allowed in all EU Member States, and punishable in most Member States, undocumented migrant women are less likely to claim State protection. Hence, they try to avoid any contact with State organs as they fear punishment and deportation.⁵⁹ In this regard, undocumented migrant women may become more tolerant to sexual violence perpetrated by employers. Consequently, the situation may encourage the victimization of undocumented migrant women workers, as it seems to create a risk-free environment for perpetrators.

2.4. Feminist perspective of sexual violence

Feminism is an ideology that promotes for the advancement of women's right and interest. It starts with the perception of the existing social, economic, legal and political order as deficient and problematic in addressing the equality rights of women⁶⁰, whereas it's patriarchal and discriminatory. Accordingly, Feminists call for the change in the existing orders so as to assure better protection and equality to women.⁶¹

Feminists asserted that due to the the gender inequality with in a society, it's mostly men who commit sexual violence against women .⁶² In this regard, the patriarchal social, economic and political institutions serve as tools of perpetuating men's dominance over women.⁶³ The dominance of men has a great possibility of stretching in to the use of violence, as a means of securing continuance of women's subordination. Feminists consider sexual violence as man's weapon to subjugate women by direct victimization of some women and creating deterrence and insecurity on all women.⁶⁴ The question of how some women become victims of sexual

⁵⁹ The voice of the anti-racist movement : European Network Against Racism, 'Joint Statement: Violence against women and girls: will Europe rise up in 2017? '. Online <<https://www.enar-eu.org/Joint-Statement-Violence-against-women-and-girls-will-Europe-rise-up-in-2017> >

⁶⁰Rosalind Delmar, What is feminism? (1986) ,Simon Fraser University, at 9. Online <<http://www.sfu.ca/~decaste/OISE/page2/files/DelmarFeminism.pdf> >

⁶¹ Ibid 13.

⁶² Carrie L. Yodanis, 'Gender Inequality, Violence Against Women, and Fear: A Cross-National Test of the Feminist Theory of Violence Against Women '(2004), Journal of interpersonal violence, at 655. Online <<https://journals.sagepub.com/doi/pdf/10.1177/0886260504263868> >

⁶³ Ibid 657.

⁶⁴Ibid 658.

violence are differently addressed by feminist theories. The issue of women victimhood to sexual violence will be discussed from the perspective of feminist victimization theory below.

2.4.1. Feminist routine activity theory of victimization

The Routine activity theory was first coined by Cohen and Felson's in 1979. The theory proposes that a victimization of crime is not a random coincidence, rather it is the result of three factors: the existence of likely offenders, absence of capable guardians, and the accessibility suitable targets.⁶⁵ The assertion of the Routine activity theory by Cohen and Felson was not specifically concerned with crimes of sexual violence. Later, Schwartz & Pitts, 1995 discussed the theory from the perspective of sexual violence against women, and they came up with Feminist routine activity approach.⁶⁶

Schwartz & Pitts dealt with the situation of sexual victimization of university women in relation to the three factors of victimization pointed by Cohen and Felson's. As per the first factor, the 'existence of motivated offenders' is presumed in all cases to be dealt by the theory.⁶⁷ In the case of sexual violence against University women, a motivated male offenders likely exist in the university. As to the second factor, 'the absence of capable guardians', the study considered family as the main guardians who can possibly protect a young women from a sexual violence.⁶⁸ However, a university women mostly are away from their family places, and this leaves them be less protected and more vulnerable to sexual violence. In relation to the third factor, the 'availability of suitable targets', the study focused on intoxication and friendship with likely offenders, as the main variables that intensify the vulnerability of sexual violence among university women.⁶⁹

⁶⁵ Martin D. Schwartz Victoria L. Pitts, Exploring a Feminist Routine Activities Approach to Explaining Sexual Assault, 12 Justice Quarterly 9 (1995), at 9.

⁶⁶ Cortney A. Franklin & Tasha A. Menaker (2018) Feminist Routine Activity Theory and Sexual Assault Victimization: Estimating Risk by Perpetrator Tactic Among Sorority Women, Victims & Offenders, 13:2, 158-178, at 160. Online < <https://www.tandfonline.com/doi/pdf/10.1080/15564886.2016.1250692?needAccess=true> >

⁶⁷ Martin, supra note 65, at 11.

⁶⁸ Ibid.

⁶⁹ Ibid.

As to Feminist routine theory, women are 'suitable targets; and men are the likely offenders.'⁷⁰ However, there are some factors that contribute to the vulnerability of some group of women more than other women. As to Schwartz & Pitt's study on the vulnerability to sexual violence among the university women, women who drink alcohol are more likely to be victims of sexual violence.⁷¹ Ward also stated that, "alcohol is an important part of the student lifestyle and . . . unwanted sexual experiences are a product of that lifestyle."⁷² Since alcohol decreases consciousness' and resistance, university women who drink alcohol are more likely to be targets of sexual violence. Furthermore, "women are more likely to be a target if they have friends who they know use alcohol to get women drunk for the purpose of having sex. "⁷³ In other words, the vulnerability of a university is can be worsened if they have more relationship with men who habitually engage in sexual violence.

2.4.2. Intersectionality approach to sexual violence

The term intersectionality was first found by a black feminist scholar, Kimberlé Crenshaw.⁷⁴ Intersectionality was introduced to signify the experience of black women, by considering the facts of 'being black' and 'being women' as cumulative grounds of discrimination.⁷⁵ Before the inception of this concept, discrimination factors used to be assessed separately. For instance, a discrimination faced by black women used to be corelated either to their color or gender, depending on the case. However, the concept of intersectionality brings the different factors of discrimination in to one table and evaluate how those factors intersect in intensifying vulnerability of an individual or group.

In the beginning, intersectionality has considered 'gender, race, class, and sexuality', as corelated factors that can shape the experience of a person.⁷⁶ Afterwards, the concept of intersectionality was stretched to include other grounds like 'age, ethnicity, ability, nation, citizenship/citizenship status, religiosity, and language'.⁷⁷ As to sexual violence,

⁷⁰ Ibid at 13.

⁷¹ Ibid at 14.

⁷² Ibid.

⁷³ Ibid at 15.

⁷⁴ Laura Marie Clark, ' Intersectionality and the Vulnerability of Irregular Migrant Women to Sexual Assault: the Journey and Arrival to the U.S./Mexico Border', (PhD thesis, Institute of Human Rights, University of Deusto School of Global Studies, University of Gothenburg Department of Social Sciences, University of Roehampton , 2017) ,at 25. Online < <http://hdl.handle.net/2077/53303> >

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

intersectionality identifies how vulnerability differs depending on the existence of the above mentioned discrimination grounds. It also deals with how different identities of a person intersect in enhancing the discrimination and vulnerability to sexual violence. In this regard, persons whose identity is characterized with a multiple discriminatory ground, are highly vulnerable to violence.

For the purpose of this study, in dealing with the case of undocumented migrant women, we will focus ‘gender’ and ‘migration status’ as intersecting grounds that intensify their vulnerability to sexual violence.

2.4.2.1. Gender

The concept of gender refers to the cultural and social construction of the behavior, attitudes and feelings of men and women.⁷⁸ Gender has significant impact on the experience of migration, as man and women have different level of vulnerability in the whole process.⁷⁹ The migration process is highly influenced by a patriarchal order, which is more fit and favorable to men than to women.⁸⁰ The existing patriarchal order rather enhances a violence against migrant women, including sexual violence. Studies revealed that women are most likely to face a sexual violence at every stage of migration period, including on their way to EU Member States and even after their arrival at host countries.

2.4.2.2. Migration status

Their migration status of people may differ, depending on how they enter and stay in the host State. Hence, every migration status is characterized with distinct rights and duties under the state’s legal and administrative system. Apart from this, it also has a significant impact on the social and economic life of migrants as well as their overall wellbeing.

⁷⁸ Gabriela Pombo, ‘Migrant women and gender violence strategies and perspectives of interventions’, Ministry for Social Development of the Government of the City of Buenos Aires and IOM Argentina (2015), at 39. Online(pdf) < http://argentina.iom.int/co/sites/default/files/publicaciones/Manual_OIM-ENG-web-23-11.pdf>

⁷⁹ Renfroe, SaraJane, ‘Lives of Undocumented Latina Migrants: An Intersectional Analysis of Gender, Nationality, and Migration Status in the United States’ (2018), Honors Program eses. 68, at 21. Online <<https://scholarship.rollins.edu/honors/68>>

⁸⁰ Ibid.

Basically, nationals of a country are expected to be in better position, due to rights, privileges and protections attached to their citizenship. Additionally, the senses of belonging to a state, makes a national to feel safer and more protected. On the other hand, nonnationals (asylum seekers, refugees , undocumented migrants) have an alien status, and they are subjects of different limitations attached to their specific migration status. This has a significant impact in determining the experience of immigrants in hosts States. A study conducted in Netherlands and Belgium revealed that refugees, asylum seekers and undocumented migrants are more suitable to sexual violence.⁸¹Therefore, migrants are highly vulnerable to sexual violence, as compared to the nationals of the host countries.

Even among migrants, their level of vulnerability is highly determined by their migration status. In this regard, documented and undocumented migrants have a different legal status as well as experience. As undocumented status doesn't allow a migrant to reside and work in a host country, such irregular stay facilitates the vulnerability of persons with that status. For instance, as undocumented migrants may be subjects of sexual violence in exchange for a job, as they only engage in an informal employment.⁸²They can also be subjects of sexual violence by their employers, even after they start working. In such case, they have to decided either to tolerate the violence or lose their livelihood. However, documented migrants are less likely to tolerate sexual violence in work places, as they can legally evolve in the labour market. Therefore, it is a migration status has a significant implication in shaping the experience of a person in relation vulnerability to sexual violence.

⁸¹ Keygnaert, I. *Sexual Violence and Sexual Health in Refugees, Asylum Seekers and Undocumented Migrants in Europe and the European Neighbourhood: Determinants and Desirable Prevention*; Ghent University: Gent, Belgium, 2014, at 505.

⁸² Rodríguez-Martínez, P. & Cuenca-Piqueras, 'Interactions Between Direct and Structural Violence in Sexual Harassment Against Spanish and Unauthorized Migrant Women 'Archives of sexual behavior (2019) volume 48, at 584. Online < <https://doi.org/10.1007/s10508-018-1265-9> >

Chapter 3

The prohibition of sexual violence, the right to effective remedy and the principle of non-discrimination

3.1. Prohibition of sexual violence against women

International human rights law lays an obligation on States to enact and enforce legislations that prohibit all forms of violence against women, including sexual violence.⁸³ In this regard, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) recommended State Parties to assure that the laws prohibiting violence against women are equally protective to all women as well as ensure effective civil and criminal remedies for victims.⁸⁴

At regional level, the Council of Europe of the Committee of Ministers recommended that the Member States to criminalize all forms of violence and punish perpetrators of crime as well as ensure the provision of adequate redress and all necessary supports to victims.⁸⁵ Accordingly, all EU Member States, which are also members of the Council of Europe, have prohibited and criminalized sexual violence against women.⁸⁶ Among the EU and COE human rights instruments that prohibit sexual violence against women in EU Member States, only the ECHR and the Istanbul convention are considered for the purpose of this study.

3.1.1. Prohibition of sexual violence under the ECHR

The ECHR , the main human rights instrument in Europe, was drafted by the CoE and entered in to force in 1953. So far, the Convention is ratified by 47 CoE Member State,⁸⁷ including all

⁸³ United Nations Department of Economic and Social Affairs ,'Handbook for Legislation on Violence against Women'(Newyork,2010) at 1. Online(pdf)
<<https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>>

⁸⁴ Ibid at 5.

⁸⁵ Ibid at 9 .

⁸⁶ European Parliament Directorate-General for Internal Policies: Policy department Citizens' Rights and Constitutional Affairs , 'Violence against Women and the EU accession to the Istanbul Convention',(2017) at 20 , Online(pdf)
<[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596815/IPOL_STU\(2017\)596815_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596815/IPOL_STU(2017)596815_EN.pdf) >

⁸⁷ What is the European Convention on Human rights? Online <<https://www.equalityhumanrights.com/en/what-european-convention-human-rights>>

EU Member States. The ECHR doesn't contain a clear and specific provision on sexual violence. However, the European Court of Human Rights (ECtHR) has drawn the prohibition of sexual violence under the ECHR, through interpretation of some provisions in the convention.

3.1.1.1. Sexual violence as violation of Article 2 of the ECHR

Article 2 of the ECHR states that 'everyone's right to life shall be protected by law'⁸⁸As to the precedent of ECtHR , State responsibly could be triggered as per article 2, in cases where violence leads to the death of victim.⁸⁹ In worst cases, sexual violence could lead to sexual homicide.⁹⁰ Sexual homicide refers to 'the intentional killing of a person during which there is sexual behavior by the perpetrator'.⁹¹ Sexual violence may lead to the death of victims in different instances including on struggle to defend violence or due to a serious harm caused by a brutal sexual attack.⁹² Therefore, sexual violence and homicide may consequently occur , and that triggers the applicability of article 2.

According to article 2, States are obliged to refrain from arbitrarily taking the life of people as well as to provide an adequate protection from other perpetrators. This consists of an obligation of a State Party to 'put in place effective criminal provisions', 'take preventive operational measures' as well as to assume 'procedural obligations'.⁹³ As to the obligation of putting in place an effective criminal provisions, States shall ensure the right to life of an individuals by formulating effective laws to criminalize wrongdoers. Additionally, effective criminal rule also

⁸⁸ European Convention on Human Rights (ECHR), 4 November 1950, 213 UNTS 221, art 2(1) (entered into force 3 September 1953).

⁸⁹ Madeleine Eklund, 'Violence against women as a violation of the European Convention on Human Rights: Due Diligence and state Responsibility for Violence against Women by Private actors'(2016), Orebro University, at 6. Online(pdf) < <http://www.diva-portal.se/smash/get/diva2:1010197/FULLTEXT01.pdf> >

⁹⁰ Sharon G. Smith, Kathleen C. Basile, Debra Karch, "Sexual Homicide and Sexual Violence-Associated Homicide: Findings From the National Violent Death Reporting System" (May 4, 2011) 133 , [Vol 15, Issue 2](#) SAGE journals.

⁹¹ Ibid.

⁹² Ibid.

⁹³Osman v the United Kingdom, App.No. 23452/94, judgment of 28 October 1998

, para 115.

has deterrent effect on potential offenders, which will decrease future commissions of sexual violence.

The obligation to take preventive operational measures entails that States shall take all necessary steps to avert criminal acts that could possibly take the life of an individual.⁹⁴ Nevertheless, such obligation comes in cases where ‘the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual and it only includes measures that could be reasonably expected of them.’⁹⁵ As to the ECtHR’s reasoning in *Kontrová v Slovakia*, the knowledge of authorities about the violence could be considered from the continued police reports by the victim.⁹⁶ Similarly, a previous complaint filed to a court, as to the victimization of sexual violence, could signify the knowledge of authorities about incident violence. However, the knowledge must be as to a situation which possibly amounts to a serious danger to victims’ life. Accordingly, a knowledge of authorities about the occurrence of mere sexual violence is not enough to trigger States’ obligation under article 2. The state responsibility under article 2 emanates from the knowledge of authorities as to the existence of real dangers to the life of a victim. In such cases, a State has the obligation to take a preventive measure to avert the risk of sexual violence, which may possibly lead to loss of life.

In relation to the procedural obligations, States have the duty to prosecute those who act in violation of the criminal rules. In situations where a sexual violence led to the death of the victim, the state is under obligation to conduct investigation and punish offenders.⁹⁷ Therefore, the obligation of States in relation to article 2 is not limited to having an effective criminal law, rather it extends up to application of the provisions in real cases. In this regard, the State Parties have the obligation to have functional justice systems that effectively investigate and punish perpetrators of sexual violence.

⁹⁴ *Osman*, supra note 93, para 115.

⁹⁵ *Ibid.*

⁹⁶ *Kontrová v Slovakia*, App. No. 7510/04, judgment of 31 May 2007, para 52.

⁹⁷ *Opuz v Turkey*, App. No. 33401/02, judgment of 9 June 2009, para 150.

3.1.1.2. Sexual violence as violation of Article 3 of the ECHR

Sexual violence that hasn't led to death, may fall under the scope of article 3 of the convention.⁹⁸ Article 3 states that, 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.'⁹⁹ The ECtHR provided that the act of sexual violence fall under article 3, if it 'attain a minimum level of severity.'¹⁰⁰ This assessment of minimum level 'depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.'¹⁰¹ Therefore, the applicability of article 3 in cases of sexual violence is justified with the existence of the above mentioned factors. once the minimum requirement is met, it can be labeled as torture or inhuman/degrading treatment, depending on the level of severity.¹⁰² In this regard, the most severe form of sexual violence amounts to torture, whereas, the least severe could be considered as a degrading treatment.

Regarding to rape, the European Commission of Human Rights has for the first time assessed the applicability of article 3 in the case of Cyprus v.s Turkey.¹⁰³ In such case, a Greek Cypriot woman was subject of rape by Turkish soldiers, and the Commission has found it to be inhuman treatment.¹⁰⁴ Besides, In Aydin v Turkey, the ECtHR has for the first time recognized that rape could amount to torture as per article 3 of the convention.¹⁰⁵ This was a landmark case where the court has duly recognized that the severity and harshness of rape could be as much as torture. As to the consequent cases dealt by the ECtHR, it is possible to conclude that the court

⁹⁸ Eklund, supra note 89, at 11.

⁹⁹ European Convention on Human Rights (ECHR), 4 November 1950, 213 UNTS 221, art 3 (entered into force 3 September 1953).

¹⁰⁰ Ireland v United Kingdom, App. No. 5310/71, judgment of 18 January 1978, Para 162.

¹⁰¹ Moldovan and Others v Romania, App. No. 41138/98 and 64320/01, judgment of 12 July 2005, para 100.

¹⁰² Eklund, supra note 89, at 11.

¹⁰³ Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009), International and Comparative Law Quarterly, Vol 58, Issue 3, at 570. Online (pdf) <<https://doi.org/10.1017/S0020589309001195>>

¹⁰⁴ Cyprus v. Turkey, Application Nos. 6780/74 and 6950/75, E.H.R.R., decision 10 July 1976, para 371-734

¹⁰⁵ McGlynn, supra note 103, at 565.

considered that every rape attains the minimum threshold under article 3.¹⁰⁶ Accordingly, all acts of rape fall within scope of article 3, and it may amount to torture or inhuman treatment, based on the level of severity.

Article 3 lays negative and positive obligations on State Parties to the convention.¹⁰⁷ States have the negative obligation, so as to refrain from the acts prohibited under article 3. As to the positive obligations, States obligation consists of ‘setting up a legislative framework aimed at preventing and punishing ill-treatment by private individuals and, on the other hand, when aware of an imminent risk of ill-treatment of an identified individual or when ill-treatment has already occurred, applying the relevant laws in practice, thus affording protection to the victims and punishing those responsible for ill-treatment.’¹⁰⁸ The ECtHR provided that State Parties have the obligation to punish ‘all nonconsensual sexual acts.’¹⁰⁹ Accordingly, States are obliged to have effective rules that criminalize acts of sexual violence in violation of article 3. Consequently, the criminal rules should be applicable to cases of violence. State Parties also have the obligation to investigate in compliance with the ‘due diligence standard’¹¹⁰ under article 3.

As to the due diligence standard, ‘the legislative framework must enable the prosecuting authorities to pursue criminal investigations despite withdrawals of complaints.’¹¹¹ In the same manner, the ECtHR found that the authorities have an obligation to conduct investigation when they are aware of the abuse, even in the absence of a formal complaint by the victim.¹¹² As above statements of the court, sexual violence is far more than a mere offence against an individual. In other words, punishing the perpetrators of sexual violence has a positive contribution in the ensuring on the wellbeing of the community, as it disable the actual perpetrators as well as deters potential offenders.

¹⁰⁶ I bid at 572.

¹⁰⁷ Eklund, supra note 89, at 17.

¹⁰⁸ B. v. The Republic of Moldova, App. No. 61382/09, judgment of 16 July 2013, para 52.

¹⁰⁹ M.C. v Bulgaria, App. No. 39272/98, judgment of 2003, para 153.

¹¹⁰ Eklund, supra note 89, at 20.

¹¹¹ Opuz v Turkey, App. No. 33401/02, judgment of 9 June 2009, para 168.

¹¹² T.M. and C.M. v the Republic of Moldova, App. No. 26608/11, 28 January 2014, para 43.

3.1.2. Prohibition of sexual violence under the Istanbul Convention

As part of its commitment in addressing the issue of gender-based violence, the Council of Europe adopted the Istanbul Convention in 2011. The Istanbul Convention is the first international binding instrument that deals with violence against women. As of March 2019, the convention has been signed by all EU Member States, and ratified by 21 Member States and the EU itself.¹¹³ Accordingly, the EU and its member States are supposed to take legal and political initiatives to implement the convention. The Istanbul Convention contains a specific provision that deals with sexual violence. Article 36 of the convention States that;

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

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

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

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

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

*'Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognized by internal law.'*¹¹⁴

Unlike the ECHR, the Istanbul convention clearly defines and prohibit sexual violence. Article 36 of the Istanbul Convention criminalizes a wide range of nonconsensual sexual acts against women. As to this provision, sexual acts that don't involve actual penetration in to the body of

¹¹³ EU accession to the Council of Europe Convention on Preventing and Combating violence against Women (Istanbul Convention), Online(pdf) <<http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-accession-to-the-istanbul-convention>>

¹¹⁴ Istanbul Convention, art 36.

a person may also fall under the ambit of the sexual violence. as to the criminalization sexual acts involving penetration in to a body of a person, such penetration may be either with bodily part or other objects. As to the report GREVIO, which is a monitoring organ of the Istanbul convention, some States Parties to the convention like Slovenia, criminalize the penetration with bodily parts, but not penetration with other objects. ¹¹⁵

As to the sexual acts, the criminal liability doesn't only lay on those who commit the act, rather persons who facilitated the commission of non-voluntary sexual acts are also liable as a perpetrators of sexual violence. GREVIO monitoring report revealed that Belgium and Romania are not fully complying with their obligation under article 36(1)(C), as their criminal codes doesn't consider the act of 'causing another person to engage in non-consensual acts of a sexual nature with a third person'¹¹⁶ as sexual violence, rather it falls under the crime of prostitution.¹¹⁷ Therefore, the definition of sexual violence needs some amendment so as to be in line with the convention.

As to the evaluation of the consent in sexual acts, States shall legislate on the grounds that defeat consent, since the convention allows for an assessment on case to case basis. In *M.C. v Bulgaria* the ECHR has referred to the Recommendation Rec (2002)5 of the Committee of Ministers of the Council of Europe on the Protection of Women Against Violence, which states that 'member states should penalize any sexual act committed against non-consenting persons, even if they do not show signs of resistance.'¹¹⁸ So, even in the absence of physical defense to avert the non-voluntary sexual act, the nonexistence of consent can still be presumed so as to punish the perpetrator. In Finland, the definition of sexual violence is based on 'on the presence or threat of violence, or the inability of the victim to defend himself or herself, or to formulate or express his or her will'.¹¹⁹ Thus, the definition is somehow not in conformity with the convention.

¹¹⁵ European Parliament Directorate-General for Internal Policies: Policy department Citizens' Rights and Constitutional Affairs, ' Violence against Women and the EU accession to the Istanbul Convention'(2017), at 66. Online(pdf)
<[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596815/IPOL_STU\(2017\)596815_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596815/IPOL_STU(2017)596815_EN.pdf) >

¹¹⁶ Istanbul Convention, art 36. 1.c.

¹¹⁷ European Parliament, Supra note 115,at 65.

¹¹⁸ Eklund, supra note 89, at 20.

¹¹⁹ European Parliament, supra note 115,at 65.

The Istanbul Convention places an obligation on state parties, based on four main pillars: preventing violence, protection of victims, prosecution of perpetrators, integrated policies involving all relevant actors and authorities.¹²⁰ As to the prevention of sexual violence, states obligation mainly includes the adoption of effective legislations that criminalize sexual violence and educating the State authorities and the general public.¹²¹ The obligation as to the protection victims involve taking a necessary measures to avert the risk of further victimization as well as to take adequate actions for victim rehabilitation.¹²² It also includes the obligation of Member States to criminalize sexual violence and ‘adopt legislative measures to ensure civil remedies, compensation, effective, proportionate and dissuasive sanctions and the application of aggravating circumstances’.¹²³ As to the prosecution of perpetrators, States have the obligation to conduct a timely investigation and prosecution as well as to pass a restraining orders to protect future violence against victims.¹²⁴

3.2. The right to effective remedy

3.2.1. The meaning and nature of the right to an effective remedy

The right to effective remedy deals with providing a legal remedy to anyone whose human rights has been violated. whosoever is a victim of human rights violation is entitled to claim for effective remedy.¹²⁵ In this regard, the right to effective remedy is dependent on the infringement of another right. The right to effective remedy is triggered with the occurrence of an actual violation or a threat to violation of human rights. In the absence of violation of a specific human right, the right to an effective remedy can never exist. Zegveld also provided that ‘the right to a remedy is a secondary right, deriving from a primary substantive right that has been breached.’¹²⁶ So, the secondary right cannot exist in the absence of the primary right.¹²⁷ In the context of sexual violence, the right to effective remedy can be sought on the basis of national and international human right laws that that prohibit sexual violence.

¹²⁰ European Parliament, Supra note 115, at 43.

¹²¹Ibid at 44.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Agbor AA "Pursuing the Right to an Effective Remedy for Human Rights Violation in Cameroon: The Need for Legislative Reform" (2017) , PER, Vol 20, at 2 online (pdf) < <https://doi.org/10.17159/1727-3781/2017/v20i0a1764> >

¹²⁶Ibid at 10.

¹²⁷ Ibid.

The right to effective remedy requires for someone to be ‘a victim of human rights violation’¹²⁸. So, the victim of human rights violation is the main party with the right to effective remedy. As per the definition provided by the UN, victims are "persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law or serious violations of international humanitarian law".¹²⁹ In this regard, victimhood is associated with being a direct target of the human right violation. Accordingly, the right to effective remedy is entitled to a person who directly suffers from the human rights violation.

The broader definition of victims includes "the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".¹³⁰ As per this definition, victim refers not only to someone who directly experienced the violation, it also includes those who indirectly suffer from the violation occurred on the direct victim. Accordingly, those indirect victims may also be entitled to the right to effective remedy in some situations. For instance, if a sexual violence against a woman led her to death, then her family can claim for an effective remedy as an indirect victim of the human rights violation.

As to recognize the right to remedy for victims of human rights violation, the United Nations Commission on Human Rights has adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of human rights violation. As to the instrument, the right to effective remedy consists of ‘reparation for the harm suffered, access to justice and access to factual information concerning the violations’¹³¹. The guideline document provides that States have the obligation to "provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice irrespective of who may

¹²⁸ Ibid.

¹²⁹ General Assembly resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/60/509/Add.1 (21 March 2006), online < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>>

¹³⁰ Ibid.

¹³¹ Agbor, *Supra* note 125, at 3.

ultimately be the bearer of responsibility for the violation; and provide effective remedies to victims, including reparation.....¹³² As to the guideline document, the right to effective remedy includes ‘reparation for the harm suffered, access to justice and access to factual information concerning the violations’¹³³.

As it can be inferred from the Basic principles and Guidelines document, the right to effective remedy consists of procedural and substantive aspects,¹³⁴ and it will be discussed below.

3.2.1.1. The right to effective remedy as a procedural right

The procedural aspect of the right to effective remedy is mainly associated with the availability and accessibility of a legally prescribed remedies to the victims of human rights violation.¹³⁵ As to the availability, the committee on CEDAW has recommended that State Parties shall ‘ensure the creation, maintenance and development of courts, tribunals and additional entities, as needed, that guarantee women’s right of access to justice without discrimination on the whole territory of the State Party’¹³⁶

As to the accessibility of remedies, the Committee on CEDAW pointed that ‘accessibility requires that all justice systems, both formal and quasi-judicial systems, are secure, affordable and physically accessible to women, and are adapted and appropriate to the needs of women including those who face intersectional or compounded forms of discrimination.’¹³⁷ The committee has also provided that ‘all women have equal access to effective and timely remedies.’¹³⁸ The accessibility of remedy has some indicators like the ‘prompt and effective the remedies’¹³⁹, and ‘access to legal aid.’¹⁴⁰

¹³² Ibid at 12.

¹³³ General Assembly resolution , supra note 129.

¹³⁴ Agbor AA, supra note 125, at 12.

¹³⁵ Ibid at 13.

¹³⁶ Committee on the Elimination of Discrimination against Women, General Recommendation on Women’s Access to Justice 2015, CEDAW/C/GC/33.

¹³⁷ Ibid.

¹³⁸ International Commission of Jurists, ‘A Practitioners Guide :The Right to a Remedy and reparation for gross Human Rights Violations’ (Revised Edition,2018) , at 65. Online (Pdf) < <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf> >

¹³⁹ Ibid at 66.

¹⁴⁰ Ibid at 69.

The speediness of the remedies is an important aspect of accessibility of remedies, as justice delayed is justice denied. The ECtHR has also pointed that “it is not inconceivable that the adequate nature of the remedy can be undermined by its excessive duration”¹⁴¹ In this regard, the speediness of the remedies highly determines its feasibility and effectiveness. Therefore, States have the duty to assure the provision of timely and speedy remedy to victims of human rights violation.

The provision of legal aid services has also a significant implication on the accessibility of remedies. In relation to violence against women, Committee on CEDAW has recommended that the State Parties to take the necessary legislative and enforcement steps to protect and assist before, during and after legal proceedings, including through: “Ensuring access to financial aid and free or low-cost high quality legal aid”.¹⁴² In this sense, the provision of legal aid to a vulnerable sections of the society has a significant contribution in realization of real accessibility of remedies to a victims of human rights.

3.2.1.2. The right to effective remedy as a substantive right

The substantive aspect of the right to effective remedy concerns with the actual outcome of the remedies. In this regard, victims of human rights shall be entitled to a reparation, depending on the gravity of the violation.¹⁴³ In relation to the victims of gender-based violence, Committee on CEDAW recommended State Parties to:

‘Ensure that remedies are adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered. Remedies should include, as appropriate, restitution (reinstatement); compensation (whether provided in the form of money, goods or services); and rehabilitation (medical and psychological care and other social services). Remedies for civil damages and criminal sanctions should not be mutually exclusive.’¹⁴⁴

¹⁴¹ *Souza Ribeiro v France*, App. No. 22689/07, judgment of 13 December 2012, para 81.

¹⁴² CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc CEDAW/C/GC/35 (2017), para 40(c)

¹⁴³ Agbor AA, supra note 125, at 14.

¹⁴⁴ Committee on the Elimination of Discrimination against Women, supra note 136.

Particularly, in cases of sexual violence against women, the Committee on CEDAW has recommended that State Parties shall " provide monetary compensation, provide counselling and therapy free-of-charge for the victims and their families, review legislation that is a barrier to eliminating the gender discrimination, including repeal of aspects, Effectively investigate and prosecute, Better implement the laws enacted, cooperate with NGOs to protect and support victims, provide training and education programs to prevent recurrences and change attitudes, provide rehabilitation, provide gender-specific health care and safeguards in place."⁵² All of the above mentioned responsibilities of state parties, have a significant effect on the realization of fair and effective remedies to victims of sexual violence.

3.2.2. The right to effective remedy in international human rights instruments

The right to effective remedy is recognized under the UDHR, ICCPR, CAT, and CEDAW.¹⁴⁵ Such international instruments guarantee the right to effective remedy to all victims of human rights violence.

The concept of the right to effective remedy is provided under article 10 of the UDHR, as follows ;

*"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*¹⁴⁶

This provision guarantees the right effective remedy with an access to independent and impartial tribunal. It also entails that the provision of the remedy to be on the basis of equal treatment of whosoever seeking a legal remedy. Besides, article 10 doesn't only concern with the rights of those who seek a remedy for infringement of their rights, but also deals with the right of individuals who are charged for violating others right.

¹⁴⁵ Agbor AA , supra note 135, at 8.

¹⁴⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, art 10, 217 A (III), online < <https://www.refworld.org/docid/3ae6b3712c.html> >

The ICCPR also contain a provision that deals with the right to effective remedy resulting from a violation of human rights embodied under the convention. Article 2(3) provides that State Parties have the obligation

" (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) to ensure that the competent authorities shall enforce such remedies when granted."¹⁴⁷

As per art 2(3) of the ICCPR, the right to an effective remedy is granted to everyone whose rights under the convention has been violated. Victims of violation can claim the remedy against any perpetrator, regardless of his\her status. The Human Rights Committee stated that ‘‘ the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.’’¹⁴⁸ Article 2(3)(b) clearly shows that a remedy is not limited to judicial remedy, rather it may also include remedies to be sought from an administrative and legislative organs. Additionally, state parties also have the obligation to take a necessary step for the proper application and enforcement of the award remedies. In this regard the ICCPR Committee provided that article 2(3) oblige State Parties to grant a reparation to victims of violation f rights under the covenant

Article 2(3)(C) also require States Parties to make reparation to individuals whose Covenant rights have been violated. As to the Committee reparation includes ‘restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-

¹⁴⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art 2(3) online (pdf) <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> >

¹⁴⁸ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, online <<https://www.refworld.org/docid/478b26ae2.html> >

repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.’¹⁴⁹

The CEDAW , under its article 2, also puts an obligation on state parties to;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

As to article 2 of the CEDAW, State Parties are obliged to guarantee the protection of women from all forms of violence. Accordingly, the protection includes the adoption of adequate laws that prohibit discrimination against women, as well as establishment of competent domestic tribunals or other State institutions that provide effective remedy to victims of discrimination.

Article 14(1) of CAT deals with the right to effective remedy to victims of torture as follows:

*"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation."*¹⁵⁰

The right to effective remedies in the context of art 14(1) entitles appropriate compensation to victims of torture. In this regard, State Parties have the obligation to assess the monetary value of the damage suffered by the victim, so as to grant a ‘fair and adequate’ compensation¹⁵¹.

3.2.3. The right to effective remedy under the Council of Europe Human rights regime

¹⁴⁹ *Ibid.*

¹⁵⁰ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, art 14 online : < <https://www.refworld.org/docid/3ae6b3a94.html> >

¹⁵¹ *Ibid.*

3.2.3.1. The right to effective remedy under the ECHR

The right to effective remedy is a clearly recognized right under ECHR. Article 13 States that:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 13 entitles individuals to seek effective remedy for violation of any of the rights under the Convention. The ECtHR provided that ‘ where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress.’¹⁵² In this regard the court has Clearly stated that there must be an ‘ arguable claim ‘ as to violation of convention rights. As to ‘arguably of a claim’, it’s determined on the basis of a factual and legal issues in each case. ¹⁵³

Article 13 stipulates that the right to effective remedy to be resorted, even when the violation of a convention right was perpetrated by person or group of persons acting in an official capacity. The right to effective remedy depends on the existence of arguable claim as to the violation of a convention right, not on the identity and status of the perpetrator.

Article 13 oblige State Parties to provide an effective remedy to a victims whose rights under the convention has been violated. In this regard, the ‘remedy must be effective in practice as well as in law.’¹⁵⁴ However, the ‘effectiveness of the remedy doesn’t depend on the certainty of a favorable outcome for the applicant.’¹⁵⁵ , as the outcome is determined on the basis of the factual situations each case. As to the form of the remedy, States can determine a specific form of remedies proportional to the level of damage sustained due to the violation of a convention

¹⁵²Silver and Others v the United Kingdom, App.No. 6205/73, judgment of 25 March 1983, para 113.

¹⁵³ European Union Agency for Fundamental Rights and Council of Europe, ‘handbook on European law relating to access to justice’(2016), at 13. Online(PDF) < <https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>>

¹⁵⁴ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, judgment of 21 January 2011, para 288

¹⁵⁵ *Ibid* at para 289.

right. The ECtHR provided that ‘even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so’.¹⁵⁶ Hence, a specific form remedy or a combination of different forms of remedy shall be granted to victims, considering the specific situations on the case.

Article 13 also guarantee a domestic remedy to persons whose convention right has been violated. As to the ‘national authority’ mentioned under article 13, the ECtHR provided that the term doesn’t necessarily refer to a judicial organ, rather it can also include to other organs that has a power to guarantee an effective remedy.¹⁵⁷ The authority may refer to a judicial, administrative or other organs with power to entertain cases in relation to the rights provided under the convention. In other words, States have a discretion to determine the actual organ with a responsibility to guarantee an effective remedy to victims of human rights violation. However, the nature of the violated right matters, as gross human rights violations like torture and homicide demand a judicial remedy.¹⁵⁸

3.2.3.2. The right to effective remedy under the Istanbul Convention

The Istanbul convention aims at putting an end to all forms of violence against women. Besides the convention also guarantee an effective remedy to the victims of violence. Article 29 provides the following:

1 Parties shall take the necessary legislative or other measures to provide victims with adequate civil remedies against the perpetrator.

2 Parties shall take the necessary legislative or other measures to provide victims, in accordance with the general principles of international law, with adequate civil remedies against State authorities that have failed in their duty to take the necessary preventive or protective measures within the scope of their powers.

¹⁵⁶ *Gebremedhin [Gaberamadhién] v. France*, App. No. 25389/05, judgment of 26 April 2007, para 53

¹⁵⁷ *Kudła v. Poland*, App. No. 30210/96, judgment of 26 October 2000, para 157.

¹⁵⁸ International Commission of Jurists, ‘A Practitioners Guide :The Right to a Remedy and reparation for gross Human Rights Violations’ (Revised Edition,2018) , at 77. Online (Pdf) < <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf> >

Article 29(1) recognizes the possibility for victims of violence to seek an adequate civil remedy against perpetrators. State Parties to the Convention shall provide ‘civil law remedies which allow a civil law court to order a person to stop a particular conduct, refrain from a particular conduct in the future or to compel a person to take a particular action (injunctions)’¹⁵⁹ as well as ‘barring orders, restraining orders and non-molestation orders as referred to in Article 53’.¹⁶⁰ In this regard, States enjoy the discretion to identify and apply a proper form of remedy that guarantee the protection of victims from further violation of their rights under the convention. Furthermore, article 30(1) provides that ‘Parties shall take the necessary legislative or other measures to ensure that victims have the right to claim compensation from perpetrators for any of the offences established in accordance with this Convention.’¹⁶¹ Apart from the remedies that combat further victimization, victims are entitled to claim a compensation for the damage caused by the violation of their convention rights.

As per article 29(2), States shall also ensure the victims right to remedy against state authorities who fail to take ‘necessary preventive or protective measures.’ As article 5 of the Istanbul Convention lays an obligation on state parties to exercise a due diligence to prevent, investigate and punish acts of violence covered by the scope of the convention.¹⁶² Accordingly, in cases of State failure to comply with its obligation under article 5, the victims of violence are entitled to claim a civil remedy against State authorities, for the ‘negligent and gross negligent behaviors’¹⁶³ that led to violation of convention right. As to the level of authorities’ negligence behavior that leads to remedy, States have the discretion to determine on their domestic laws.¹⁶⁴

As part of a remedy to be sought against a State, victims are entitled to claim compensation from a State. Article 30(2) clearly states that

Adequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions. This does not

¹⁵⁹ Council of Europe Treaty Series No.210, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (2011), Istanbul, 11.V.2011, paragraph 157. Online < <https://rm.coe.int/16800d383a> >

¹⁶⁰ Ibid.

¹⁶¹ Istanbul Convention , art 30.

¹⁶² Council of Europe Treaty Series, supra note 159, para 162.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

preclude Parties from claiming regress for compensation awarded from the perpetrator, as long as due regard is paid to the victim's safety.

In principle, the primary liability to compensate for a damage sustained by victims of violence, lays on the perpetrator. As a secondary liability holders, States may also be required to award compensation, in which the conditions for its application are left to be provided through national laws.¹⁶⁵ The State compensation should be awarded in cases where the victim has sustained 'serious bodily injury or impairment of health'. As stated in the explanatory report on the Istanbul convention, "'bodily injury" includes injuries which have caused the death of the victim, and that "impairment of health" encompasses serious psychological damages caused by acts of psychological violence'.¹⁶⁶ Article 30(1) also pointed the fact that a victim is compensated by a State doesn't exclude the right to get compensation from the perpetrator, as far as it is necessary to ensure victim safety.

3.2.4. The principles of non-discrimination and intersectionality under the Council of Europe human rights regime

The principle of non-discrimination is a widely accepted concept in an international and national jurisprudence. the principle of nondiscrimination prohibits "a different treatment without objective and reasonable justification lacking a legitimate aim, necessity and proportionality."¹⁶⁷In other words, the principle forbids a situation "where persons of groups of people in an identical situation are treated differently, and where persons or groups of people in different situations are treated identically."¹⁶⁸

The CoE human rights system has prohibited nondiscrimination in many of its instruments, including the ECHR and Istanbul convention.

The ECHR, under its artic 14, clearly provides that

¹⁶⁵ Council of Europe Treaty Series, supra note 159, at 166.

¹⁶⁶ Ibid.

¹⁶⁷ Office for Democratic Institutions and Human Rights, "Note on the Antidiscrimination legislation and Good Practices in the Osce Region" (2019), at 24 . Online (pdf) < <https://www.legislationline.org/documents/id/22303> >

¹⁶⁸ European Union Agency for Fundamental Rights and Council of Europe, 'Handbook no European nondiscrimination Law' (2018), at 42. Online(pdf) < <https://fra.europa.eu/en/publication/2018/handbook-european-law-non-discrimination> >

“enjoyment of the rights and freedoms set forth in this Convention should be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”

The rights under ECHR are granted to all people within a territory of a Member State, both citizens and noncitizens, and even to the people who live out of the territory in an area where the State has effective control.¹⁶⁹ Article 14 of the ECHR prohibits any differential treatment based on the above-mentioned illustrative lists of grounds.¹⁷⁰ The phrase ‘other status’ entails for the recognition of different statuses that characterize an individual or a group of people. Therefore, article 14 considers prohibiting discrimination based on status, may also be applicable to a migration status.

The Istanbul Convention, under its article 4(2) lays an obligation on State Parties to prohibit all forms of discrimination against women through the abolishment of discriminatory laws and practices as well as punishing discriminatory acts through an effective national legal system. Article 4(3) of the Convention also provides that;

*‘in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.’*¹⁷¹

While dealing with victims, State Parties to the Convention are under obligation to assure the nondiscriminatory implementation of all measures and remedies. As to the prohibited grounds of discrimination, the above-mentioned provision consists of more illustrative lists than the ECHR provision on nondiscrimination. However, in the same manner with ECHR, the article 4(3) of the Istanbul Convention contains the phrase ‘other status’, which seems to accommodate

¹⁶⁹ ECtHR, *Al-Skeini and Others v. the United Kingdom* No. 55721/07, judgment of 7 July 2011, para 138.

¹⁷⁰ Office for Democratic Institutions and Human Rights, “Note on the Antidiscrimination Legislation and Good Practices in the OSCE Region” (2019), at 15, online (pdf) <<https://www.legislationline.org/documents/id/22303>>

¹⁷¹ Istanbul Convention, art 4(3).

more ground of discrimination other than the grounds listed in the provision. Article 14 of the ECHR and article 4 of the Istanbul Convention guarantee a nondiscrimination as to the rights under the respective conventions.¹⁷² In other words, discrimination always relates to unfair differential treatment as to the enjoyment of substitutive rights recognized under the conventions.

Article 14 of the ECHR also allows a victim of discrimination to claim on the basis of multiple protected grounds.¹⁷³ Even though the term intersectionality is found neither in the ECHR nor in the ECtHR precedent, the concept is recognized in many decisions passed by the ECtHR. For instance, in *B.S. V. Spain*¹⁷⁴, a woman of Nigerian origin, who work as prostitute and legally reside in Spain, alleged that she has been subject of discriminatory treatment because of her 'gender, origin and profession'¹⁷⁵. The woman alleged that, unlike other prostitutes with European origin, she has been frequently asked for identity paper and subjected to sexual assault and physical attack by police officers. Accordingly, the court recognized that there has been violation of article 14, on the basis of the different grounds of discrimination, with out stating the term intersectionality.

¹⁷² European Union Agency for Fundamental Rights and Council of Europe, *supra* note 168, at 29.

¹⁷³ *Ibid* at 61.

¹⁷⁴ *B.S. v. Spain*, *App.* No. 47159/08, judgment of 24 July 2012

¹⁷⁵ European Union Agency for Fundamental Rights and Council of Europe, *supra* note 168, at 61.

Chapter 4

Assessing challenges to the right to effective remedy of undocumented migrant women victims of sexual violence in EU Member States

4.1. Migration control as a challenge

4.1.1. Migration control laws in EU Member States

The EU has adopted laws and policies with the idea of creating an effective migration control system in the region. The EU migration laws are not comprehensive rules which uniformly apply to the member states, rather they can be referred as general guideline. Most EU laws provide general standards to be considered by the member states, while legislating and enforcing migration control laws at national level.

The issues in relation to undocumented migration status are regulated at EU level as well as at national level with in the domestic legal frame work of Member States. In EU context, undocumented status is associated with irregular entry or stay of migrants in EU Member States.¹⁷⁶

In most EU Member States, irregular entry or stay is criminalized and punishable under their respective domestic law.¹⁷⁷ Additionally, undocumented migrants could be subject of detention and deportation for irregularly entering or staying in EU Member States.

4.1.1.1. Detention and deportation of undocumented migrants

The EU Return Directive allows an EU Member States to pass a return decision against any migrant with undocumented status.¹⁷⁸ However, the return of irregular migrants shall be done

¹⁷⁶ European Commission Migration and Home Affairs, Irregular migration. Online < https://ec.europa.eu/home-affairs/content/irregular-migration-0_en >

¹⁷⁷ FRA, supra note 13, at 5.

¹⁷⁸ European Union: Council of the European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (EU Return directive), 16 December 2008, art 8. online < <https://www.refworld.org/docid/496c641098.html> >

incompliance with the standards and provisions under the Return Directive.¹⁷⁹

The directive presupposes for a voluntary return to be the principle¹⁸⁰, as far as migrant's willingness to cooperate with the authorities is assured. As an exception to the principle, forced return of deportation may be enforced by EU Member States.¹⁸¹ However, EU Member States are obliged to comply with fundamental human rights, while passing and enforcing return and deportation decisions.¹⁸²

The Return directive also allow EU Member States to detain irregular migrants, but only when all other measures are not sufficient for implementing the return procedure.¹⁸³ In principle, the directive specifically provides that detention shall be done in 'specialized detention facilities.'¹⁸⁴ In exceptional circumstance, undocumented migrants may be detained in normal prison centers, but still they should be detained separately from other prisoners. The main intention behind this treatment is the fact that the detention of undocumented migrants in such cases is an administrative measure to assure their compliance with the return\ deportation decisions, but not to consider them as convicted criminals.

4.1.1. 2. Criminalization of undocumented status

4.1.1.2.1. Irregular entry and stay

The EU laws neither criminalize nor oblige EU Member states to criminalize migrants who irregularly enter in to the territory of Member States. Despite this, all EU Member States , except Malta, Portugal, Spain , have criminalized unauthorized entry through their domestic legal frame work.¹⁸⁵ In this regard, the punishment could be fine or imprisonment, and in some EU Member States it could consist of both.

As to the punishments which combine a custodial sentence and fine, the Bulgarian Criminal Code provides that anyone who irregularly crosses its territory without an authorization or permit to be subject of an Imprisonment for up to five years and by a fine ranging from € 50 to

¹⁷⁹ I bid, art 6.

¹⁸⁰ Ibid at art 10.

¹⁸¹ Ibid.

¹⁸² Ibid art 24.

¹⁸³ Ibid at art 16.

¹⁸⁴ Ibid at art 19.

¹⁸⁵ FRA, supra note 13, at 5.

€ 150.¹⁸⁶ In the same manner, persons who irregularly stay in the Bulgarian territory will be punished with fine ranging from €250 to €2,500.¹⁸⁷ The Belgium Immigration act also specifies an imprisonment of 8 days to 3 months and with fine of € 26 to € 200, for those who irregularly enter and stay in its territory.¹⁸⁸

In relation to punishments without imprisonment, the Italian Immigration law specifies that a third party national who enter or stay in the territory of the State without fulfilling the legal conditions of immigration to be punished with fine of 500€ - 1000 €. ¹⁸⁹ Slovenia also punishes irregular entry and stay with fine ranging from 500€ - 1000 €. ¹⁹⁰

4.1.1.2.2. Assistance in irregular entry and stay

The criminalization in relation to irregular entry in to the territory of EU Member States is not limited to undocumented migrants, rather it also includes persons who assist undocumented migrants. The EU Facilitation Directive obliges EU Member States to punish those who intentional aid a foreigner to enter or transit cross the territory of a Member state, without fulfilling the legal conditions required under the Member State's law.¹⁹¹ The Facilitation Directive also obliges EU Member States to punish:

*“ any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens. ”*¹⁹²

All EU member States, except Ireland, punish for assisting irregular stay of undocumented migrants in their territory.¹⁹³ In this regard, renting house and employing undocumented migrants could amount to assisting irregular stay of migrants. Accordingly, Land lords and

¹⁸⁶ European Union Agency for fundamental rights (FRA), Annex: EU Member States' legislation on irregular entry and stay, as well as facilitation of irregular entry and stay (2014), online(pdf) < https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-criminalisation-of-migrants-annex-0_en.pdf >

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ European Union: Council of the European Union, Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence (EU Facilitation Directive), 04 December 2002, art 1(1)(a). Online(pdf) < <http://data.europa.eu/eli/dir/2002/90/oj> >

¹⁹² I bid at art 1(1)(b).

¹⁹³ FRA, supra note 13, at 11

Employers may be subject to punishments under the national laws of the EU Member states, for the mere fact of renting house and employing undocumented migrants, respectively. In 13 EU Member States, a financial motive is not a requirement for assistance in irregular stay to be criminalized.¹⁹⁴ Furthermore, all EU Member States, except Spain which punishes with imprisonment, provide fine and imprisonment against anybody who assists undocumented migrants as stated under the EU Facilitation Directive.¹⁹⁵

4.1.2. The Challenge on the ground

As to the study conducted by FRA, undocumented migrant women are more vulnerable to sexual violence than documented migrants.¹⁹⁶ Accordingly, undocumented Migrant women can be subject to sexual violence at any stage of their stay in EU Member, by any perpetrator, including landlords and employers. Despite the higher risk to victimization to sexual violence, undocumented migrant women in EU Member States face much difficulty in claiming and securing their right to effective remedy.¹⁹⁷

The fact that irregular stay and facilitation of irregular stay is punishable in EU Member States, prevent undocumented migrant women from formally getting housing and job. This situation forces undocumented migrants to lay on the black market, to fulfil their basic need for housing as well as jobs for securing their livelihood. Being part of the informal sector accelerates undocumented migrant women's vulnerability to sexual violence, as they engage out of the protected State system. Thus, such situation also restricts the possibility of claiming their right to effective remedy under the EU Member States formal legal system.

As to sexual violence perpetrated by land lords, undocumented migrant women mostly choose to reserve themselves from reporting to police.¹⁹⁸ The criminalization of undocumented status together with the risk detention and deportation in EU Member States, 'further fuel the belief, including among the victims themselves, that migrants in an irregular situation do not have any

¹⁹⁴ Ibid.

¹⁹⁵ FRA, *supari* note 13.

¹⁹⁶ Eve, *supra* note 7, at 13.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

rights'.¹⁹⁹ For instance, all public servants in Germany and Italy , which may also include police and other guardians of justice, has the obligation to report the existence any undocumented migrant.²⁰⁰ Therefore, undocumented migrant women who reach to any state organ or institution for any reason, even for reporting violence, could possibly be subject to the migration control actions.

While conducting a research on the situation of undocumented migrants workers in EU Member States, FRA has conducted multiple interviews with undocumented migrant workers living in Poland, Germany, Sweden, France and Ireland .²⁰¹ A Latin American undocumented migrant women, who live in Germany, express the challenge in claiming the right to effective remedy as follows:

“What you said, 'Can one claim a few rights here?' Yes, but you have to leave. That's the price.”²⁰²

This statement clearly tells that any claim of rights, including the right to effective remedy, by undocumented migrants in EU Member States, could be followed by deportation. In another interview conducted by FRA , undocumented migrant women in Sweden has explained the situation in the following manner:

“The reporting of migrants in an irregular situation to the police is also used by offenders as a weapon against their victims, for once the migrants are expelled, the offenders are not held liable for their crimes against them “²⁰³

¹⁹⁹ FRA, ‘Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States ‘ (2010) , at 42 online (pdf) <https://fra.europa.eu/sites/default/files/migrants_in_an_irregular_situation_employed_in_domestic_work_en.pdf>

²⁰⁰ Mark Povera, ‘the criminalization of irregular migration in the European Union’ (2015), at 18 online (pdf) <http://aei.pitt.edu/60856/1/Criminalisation_of_Irregular_Migration.pdf>

²⁰¹FRA, Supra note 199.

²⁰² Ibid.

²⁰³ Ibid.

Therefore, undocumented migrant women victims of sexual violence are less likely report violence, since the police usually punish, deport or detain the women, without considering the situation of violence. This will in turn lead an impunity of perpetrators committing sexual violence against undocumented migrant women in EU Member States.

4.2. Assessment of the challenges in light of the ECHR and Istanbul Convention

4.2.1. Nondiscrimination and the right to effective remedy

The ECHR and Istanbul Convention oblige EU Member States to ensure the protection of the rights under the respective convention, without discrimination on the basis of any prohibited ground under the conventions. Accordingly, the right to effective remedy, as enshrined under the ECHR and Istanbul Convention, is a right guaranteed to any victim who has been subject to violation of his/her right under the conventions. In this regard, sexual violence amounts to violation of the right under ECHR²⁰⁴ and the Istanbul Convention²⁰⁵. In other words, EU Member States have the obligation to equally ensure the right to effective remedy to all victims of sexual violence.

Studies has shown that a significant number of undocumented migrant women in EU Member States had been subjected to sexual violence. Even though, their victimhood entitles them to claim for an effective remedy as per the ECHR and Istanbul Convention, undocumented migrant women are facing some challenges in claiming their right to effective remedy in EU Member States. Such challenges are linked to their undocumented status, as EU Member States are prioritizing their migration control interest at the expense of their human rights obligation under the ECHR.

As per the ECHR²⁰⁶ and the Istanbul Convention²⁰⁷, EU Member States have the obligation to ensure the availability and accessibility of effective remedies to victims of human rights violation. Regarding to the availability, almost all EU Members States have the national rules and institutions required to safeguard the right to remedy of victims of sexual violence.

²⁰⁴ See ECHR, art 2 &3.

²⁰⁵ See Istanbul Convention, art 36.

²⁰⁶ See ECHR, art 13.

²⁰⁷ See Istanbul Convention, art 29.

However, the accessibility of the remedies for undocumented migrant women in EU Member States is challenging. Despite the obligation of EU Member States to ensure the right to effective for all victims of sexual violence, studies and reports of international organizations signified that undocumented migrant could be subject to punishment, deportation and detention at the moment they reach police for reporting violence.²⁰⁸ The fear of being subject to the migration control measures also ties undocumented migrant women from claiming their right to effective remedy, for the sexual violence they encountered. In such cases, undocumented migrant women are facing a double violence, sexual violence on the one hand and denial of effective remedy on the other hand.

The obligation of EU Member States to safeguard the accessibility of the right to effective remedy could also comprise the provision of legal aid for vulnerable groups, including undocumented migrants. However, the reality in EU Member States discloses that most sexual violence complaints by undocumented migrant women are not even considered for investigation, instead of granting them a legal aid. In such cases, the EU Member States are failing to comply with obligation of ensuring the right to effective remedy under the ECHR and Istanbul Convention.

The denial of the right to effective remedy for undocumented migrant women victims of sexual violence could also amount to violation of a substantive right, as to the prohibition of sexual violence under the ECHR and the Istanbul Convention. In this regard, the provisions on prohibition of sexual violence also impose a positive obligation on EU Member States to investigate complaints, redress victims and punish the perpetrators. However, EU Member States are prioritizing their migration control interest on irregular migrants, instead of investigating the undocumented migrant women's complaint for being victims of sexual violence. Therefore, EU Member States are also failing to comply their positive obligation as to the right to be free from sexual violence as per the ECHR²⁰⁹ and the Istanbul convention.²¹⁰

²⁰⁸ Human rights watch, HRW, “‘The Law Was Against Me’: Migrant Women’s Access to Protection for Family Violence in Belgium’ (New York, 8 November 2012). Online ≤ <https://www.hrw.org/report/2012/11/08/law-was-against-me/migrant-womens-access-protection-family-violence-belgium> >

²⁰⁹ See ECHR, art 2 &3.

²¹⁰ See Istanbul Convention, art 36.

The systematic denial of the right to effective remedy to undocumented migrant women victims of sexual violence also amounts to discrimination, since the right to effective remedy under the ECHR and the Istanbul convention is guaranteed to all women victims of sexual violence. The denial of a convention right on the basis of migration status fall within the prohibited grounds of discrimination under the ECHR²¹¹ and the Istanbul Convention.²¹² Furthermore, human rights are entitlements guaranteed for the mere fact being human, their application should not depend on artificial statuses, including migration status, that represent State interest.

Finally, It can be concluded that EU Member States are failing to protect their obligation under the ECHR and Istanbul Convention in relation protection form sexual violence, grantee the right to effective remedy and nondiscrimination of undocumented migrant women victims of sexual violence.

4.3. Assessment of the Challenges from feminist perspective

4.3.1. Feminist routine activity theory and Intersectionality approach

4.3.1.1. Existence of likely offenders

According to the Feminist routine activates theory the presence of likely offenders is always presumed.²¹³ As per the feminist perspective to sexual violence, ‘men are the likely offenders, and women are the suitable victims’.²¹⁴ In the same manner, undocumented migrant women could also be victims of sexual violence perpetrated by any men, including their intimate partner, relatives, land lords, employers, migration officers..etc. For the purpose of this thesis, land lords and employers are presumed to be the likely offenders in relation to undocumented migrant women victimization to sexual violence. In this regard, studies also exposed an actual victimization and threat to sexual violence perpetrated by land lords and employers against undocumented migrant women in EU member States.²¹⁵

²¹¹ See ECHR, art 14.

²¹² See Istanbul Convention, art 4.

²¹³ Martin, supra note 65, at 11.

²¹⁴ Carrie, supra note 62, at 655.

²¹⁵ Eve, supra note 7, at 13

4.3.1.2. Accessibility of Suitable targets

For a sexual violence to be committed by likely offenders the availability of a suitable targets is a necessary base. In the context of sexual violence against undocumented migrant women, their suitability to violence could be assessed by focusing on the factors that determine their vulnerability. Accordingly, factors like age, gender, race, nationality, migration status and other grounds can have a different level of contribution in determining the suitability to sexual violence. The thesis will analyze how undocumented migrant women in EU Member States could be perceived as suitable targets by perpetrators of sexual violence or likely offenders. For this purpose, only gender and migration status will be considered as an intersecting factor causing the suitability of undocumented migrant women to sexual violence.

4.3.1.2.1. Intersectionality approach

Undocumented migrants are neither allowed to stay nor work in EU Member States . As a result, undocumented migrants life is highly associated with the informal economic sectors, both as service provider (i.e. employee) and service seeker (i.e renting house). In this regard, their invisibility in state system exposes them to more abuse and violence, compared to documented migrants who can engage in the protected and formal socioeconomic system.

In determining the level of susceptibility to sexual violence among undocumented migrants in EU Member States, gender could be a differing factor. From feminists perspective, the existing social, economic, legal and political orders are believed to be male centered, and sexual violence is perceived as a means of perpetuating women's subordination in the patriarchal system²¹⁶ In dealing with the vulnerability of undocumented migrant women in EU Member States, its necessary to assess the gender sensitivity of migration rules. Most migration control rules applicable in EU Member States, specifically the rules in relation to criminalization, detention and deportation of undocumented migrants, seem to be gender neural. However, such migration control rules end up in putting much burden on women, since such rules fail to accommodate the intersection between migration status and gender.

²¹⁶ Carrie, *supra* note 62, at 658.

Researches on sexual violence against undocumented migrants in EU Member States also confirmed the high vulnerability of women as compared to men. In this regard, undocumented migrant women may be subjected to sexual violence by their employers in the informal sector. In such situations, undocumented migrant women would have to choose between tolerating the violence and losing the job. In most cases, the first option is expected from undocumented migrant women, since getting a job is hardly easy with their irregular status in EU Member States. Therefore, the undocumented status coupled with gender contributes for undocumented migrant women to be perceived as suitable targets by the likely offenders, as per the feminist routine activity theory.

4.3.1.3. Absence of capable Guardians

Under the international and regional human rights instruments, States have the obligation to guarantee the human rights of people living in their respective territory. Accordingly, EU Member States are obliged to safeguard the rights enshrined under the ECHR and the Istanbul Convention. In relation to sexual violence, EU Member States owe the obligation to ensure protection from sexual violence and to guarantee an effective remedy for victims of violence. These rights are guaranteed under the ECHR and Istanbul Convention to anyone in the territory of the EU Member States, regardless of gender, race, nationality, migration status and other factors. Based on the above-mentioned obligations of States, it's fair enough to consider EU Member States as a 'guardians', as per the Feminist routine activity theory, of undocumented migrants residing in their territory.

The EU Member States, as guardians, are expected to ensure the human rights of undocumented migrant women through their laws and institutions. As part of EU member states' obligation in relation to sexual violence against undocumented migrant women, Member States shall ensure the right to effective remedy of victims by conducting proper investigations, prosecuting perpetrators and providing adequate remedy to victims. Due to the vulnerability associated with their gender and migration status, legal aid services shall also be available to undocumented migrant women victims of sexual violence.

Despite their obligations under the ECHR and the Istanbul Convention, EU Member States fail in safeguarding the right to effective remedy for undocumented migrant women victims of sexual violence, by prioritizing their migration control interest. This situation discourages and

undocumented migrant women victims of sexual violence from claiming their right to effective remedy, as they fear the migration control measures that could possibly follow their contact with police. The systematic discrimination of undocumented migrant women victims of sexual violence from accessing their right to effective remedy in EU Member States, creates an impunity of perpetrators that could possibly encourage potential perpetrators. Finally, it's possible to conclude that the failure of EU member states in this sense entails the absence of capable guardian, as per the Feminist routine activity theory.

Chapter 5

Conclusion

The right to effective remedy concerns with the provision of legal remedy to victims of human rights violation. Such right is a secondary right that triggers after a violation of substantive rights recognized under international, regional and national human rights instruments. The right to effective remedy is recognized under the ECHR and the Istanbul convention. As State parties to the ECHR and the Istanbul Convention, EU Member States have the obligation to safeguard the right to effective remedy to victims of human rights violation. In this regard, remedy can be in the form of restitution, compensation, rehabilitation or other forms.

Since sexual violence is considered as a human right violation under the ECHR and the Istanbul Convention, victims of sexual violence are entitled to the right to effective remedy. Both the ECHR and the Istanbul convention provide that the rights under their respective convention to be guaranteed to anyone residing within the territory of State Parties, including all EU Member states. In this regard, discrimination on the basis of any ground including gender and migration status is prohibited. Despite this, undocumented migrant women victims of sexual violence are facing a challenge in accessing their right to effective remedy, due to migration control laws and practices that prohibit and punish an irregular stay in EU Members States. In some situations, undocumented migrant women victims of sexual violence may be subjected to punishment, detention and deportation by the time they try to claim the right to effective remedy before authorized state organs. In other situations, undocumented migrant women victims of sexual violence may refrain from reporting violence, fearing the migration control measures that could possibly follow the contact with state organs. Both situations signify EU Member States noncompliance with their obligation under the ECHR and the Istanbul Convention, as to non-discriminatorily guarantee the right to effective remedy for all victims of sexual violence in their respective territory.

Undocumented migrant women's vulnerability to sexual violence composed with the challenges they face in accessing their right to effective remedy in EU Member States can be analyzed as per Feminist routine activities theory on victimization. According to the Feminist routine activities theory, victimization is the result of three correlated factors: the existence of motivated offenders, the accessibility of suitable targets and absence of guardians. The theory

presumes the existence of likely offenders in relation to any victimization, including sexual violence. Concerning suitable targets, the thesis considered that the intersection of vulnerabilities emanating from 'gender' and 'irregular status' make undocumented migrant women suitable targets of likely offenders. As to the absence of capable guardians, EU Member States can be presumed as guardians of everyone in their territory, including undocumented migrant women. However, the fact that EU Member States are prioritizing their migration control interest at the expense of their human rights obligations in relation to undocumented migrant women victims of sexual violence, could amount to absence of guardian as per the Feminist routine activities theory. Consequently, this may create impunity of perpetrators that incites the perception of undocumented migrant women as a risk-free victim and foster their victimization.

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