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LEGAL OPINIONS ON GENDER-BASED VIOLENCE BY THE STUDENTS OF THE SCHOOL OF INTERNATIONAL STUDIES

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As part of the collaboration with the association “Donne in Rete contro la violenza” (D.i.Re), students of the Master in European and International Studies at the University of Trento have drafted three legal opinions examining critical issues faced by professionals working in the field of gender-based violence. The following opinions provide insights for the association’s legal and non-legal initiatives aimed at preventing and combating violence against women.

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LEGAL OPINION ON THE CONCEPTUALIZATION OF GENDER-BASED VIOLENCE AS TORTURE¹

Introduction

The association “Donne in Rete contro la violenza” (D.i.Re) is a group of 87 organizations which deals with the issue of violence against women in Italy. The actions brought forward by D.i.Re are aimed at raising the visibility of the social tragedy that is violence against women not only at the national level, but also internationally. In order to do so, D.i.Re has been sending shadow reports on the matter to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Committee since 2014.

Recently, D.i.Re raised the issue of whether further action could be taken to achieve this goal. In particular, D.i.Re brought forward the issue of whether violence against women could be framed as torture, enabling the association to make use of the Committee Against Torture (CAT)’s monitoring system, in addition to the CEDAW’s.

The issue stemming from this question, as already mentioned, is whether gender-based violence can be considered as a form of torture, and how useful this framing could be in reaching the association’s goal. The framing of violence against women as torture could indeed render the act of addressing this practice at an international legal level easier and more effective. Firstly, it would provide a more stable and comprehensive legal framework, as the *erga omnes* nature of the prohibition on torture in the international legal framework would allow an enhanced accountability of the persons responsible for such conduct. Secondly, this new framework could raise public awareness, thus increasing the efforts to combat violence against women at the international level. Lastly, by recognizing violence against women as a form of torture, victims would have greater access to avenues for redress, namely to those available to victims of torture.

Another crucial aspect highlighting the relevance of this question for enhancing the effectiveness of the association's efforts in protecting women facing gender-based violence is the presence of normative gaps and limitations within the CEDAW framework and its reporting system. Most importantly, the CEDAW framework lacks any specific reference to violence against women. Furthermore, CEDAW is one of the human rights conventions with the highest number of reservations, making it less effective in preventing and contrasting violence against women and allowing State parties to evade responsibilities. Although Italy has ratified the Convention without reservations, framing violence against women as torture in the Italian context may prove useful as an example to other States.² Having voiced these considerations, an analysis of the legal framework of violence against women as torture will follow, backed by the practice regarding such topic.

¹ This legal opinion has been authored by Beatrice Argentero, Clara Calvi, Giulia Consoni, Zeynep Tilbe Erdogan, Leonardo Franceschetti, Marco Menchini, Laura Muscardin and Basma Nazih. The authors are master’s students in European and International Studies at the School of International Studies of the University of Trento. The opinion was written in November 2023 within the course of International Law (Advanced Unit) held by Professor Marco Pertile with the teaching assistance of Ms. Giulia Cagol. This challenge-based learning project was financed by the Teaching and Learning Center of the University of Trento.

² Montez, “Women’s Rights are Human Rights: CEDAW Limits and Opportunities”, Berkeley Journal of International Law, 2021.

1. Identification of the constitutive elements of torture according to the Convention against Torture and evolution of the interpretation of torture in the “jurisprudence” of the CAT and of the CEDAW Committee as to integrate a gender-dimension

This section presents the definition of torture according to the Convention Against Torture and a literature review of the main theories on the conceptualization of gender-based violence as torture. In particular, the examination of three General Comments of the Committee Against Torture is followed by the identification of the theoretical problems arising by the framing of gender-based violence as torture. This section thus aims at identifying, from a theoretical point of view, the advantages and disadvantages of the conceptualization of gender-based violence as torture under the CAT.

The Convention Against Torture defines torture as follows:

For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³

The constitutive elements of an act to be considered as torture are thus:

1. Severity of the pain or suffering inflicted on the victim;
2. Intentional infliction of the pain or suffering;
3. The purpose of inflicting the pain or suffering;
4. Infliction by, at the instigation of, or with the consent or acquiescence of a person acting in an official capacity.

The constitutive elements of the definition of torture, as expressed by the Convention, could pose a limitation for cases of gender-based violence. In particular, the requirements of “the official consent or acquiescence” and of the presence of a specific purpose are often difficult to identify in the case of gender-based violence. These elements will be further explained in this section. That being said, the following subsections will explore how the Committee Against Torture has interpreted the Convention in its general comments to give it a more gender-oriented perspective.

Gender based violence is conceptualized as torture in three general comments of the CAT.

I. General Comment No. 2 (2007)

General Comment 2⁴ was a first attempt to integrate a gender-dimension in the Convention against Torture. It identifies a non-exclusive list of forms of official and private violence: gender-based violence and domestic violence can be considered as forms of torture⁵.

³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 on the 10th of December 1984, entry into force the 26th of June 1987, Article 1, Paragraph 1.

⁴ General Comment No. 2 on the implementation of Article 2 by States parties, Committee Against Torture, CAT/C/GC/2, 2007.

⁵ *Ivi*, paragraph 21.

If the State fails to exercise due diligence, "bears responsibility and its officials should be considered as authors, accomplices or otherwise responsible under the Convention for consenting to or acquiescing in such wrongful acts"⁶.

The State shall protect specific minority or marginalised individuals or populations at particular risk of torture. The failure of the State to prevent and protect victims from gender-based violence, such as rape, domestic violence, and other related forms, is regarded as a violation of their duty and a breach of the Convention. The Committee has applied this principle in cases where States have failed to prevent and protect victims from gender-based violence, including rape, domestic violence, female genital mutilation and trafficking.⁷

II. General Comment 3 (2012)

General Comment 3⁸ refers to the right to redress: according to Article 14 of the Convention against Torture, each Member state has the obligation to "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 this regard, General Comment 3 explains the responsibilities of States both in relation to violence against women and violence by private actors: to prevent, protect, investigate and punish perpetrators.

It also asserts the obligation of the State to provide redress, reparation and/or rehabilitation to the victim:

Judicial and non-judicial proceedings shall apply gender-sensitive procedures which avoid re-victimization and stigmatization of victims of torture or ill-treatment. With respect to sexual or gender-based violence and access to due process and an impartial judiciary, the Committee emphasizes that in any proceedings, civil or criminal, to determine the victim's right to redress, including compensation, rules of evidence and procedure in relation to gender-based violence must afford equal weight to the testimony of women and girls, as should be the case for all other victims, and prevent the introduction of discriminatory evidence and harassment of victims and witnesses. The Committee considers that complaints mechanisms and investigations require specific positive measures which take into account gender aspects in order to ensure that victims of abuses such as sexual violence and abuse, rape, marital rape, domestic violence, female genital mutilation and trafficking are able to come forward and seek and obtain redress.⁹

This paragraph refers to the necessity of gender-sensitive procedures, an impartial judiciary and giving equal weight to the testimony of women, as should be done for all other victims, as essential to avoid re-victimisation and stigmatisation of victims of torture or ill-treatment.

Moreover,

The Committee considers the training of relevant police, prison staff, medical personnel, judicial personnel and immigration personnel, including training on the Istanbul Protocol, to be fundamental to ensuring effective investigations. Furthermore, officials and personnel involved in efforts to obtain redress should receive methodological training in order to prevent re-traumatization of victims of torture or ill-treatment. This training should include, for health and medical personnel, the need to inform victims of gender-based and sexual violence and all other forms of discrimination of the availability of emergency medical procedures, both physical and psychological. The Committee also urges States parties to establish human rights offices within police forces, and units of officers specifically trained to handle cases of gender-based and sexual violence, including sexual violence perpetrated against men and boys, and violence against children and ethnic, religious,

⁶ *Ivi*, paragraph 18.

⁷ *Ivi*, paragraph 18.

⁸ General Comment No. 3 on the implementation of Article 14 by States parties, Committee Against Torture, CAT/C/GC/3, 2012.

⁹ *Ivi*, paragraph 33.

national or other minorities and other marginalized or vulnerable groups.¹⁰

Emphasis is given to the necessity for providing gender-sensitive training to law enforcement officers, physicians, judicial officials, prison officials, etc., including training in line with the Istanbul Protocol.

General Comment 3 also clarifies that victims of gender-based violence are entitled to redress, compensation and rehabilitation.

III. General Comment 4 (2017)

General Comment 4¹¹ stresses that Article 3 of the Convention provides that no State party shall expel, return or extradite a person to another State where there are valid reasons to believe that the person would be at risk of being exposed to torture.

The principle of non-refoulement, which prohibits transferring individuals to a State where there is reasonable cause to believe they may face torture or other ill treatment, is clear and absolute.

States are obligated to uphold the principle of non-refoulement in every territory they have jurisdiction over, as well as on any State-registered ship or aircraft, to all individuals, including those seeking international protection, and this without discrimination based on their nationality, statelessness, legal, administrative, or judicial standing under regular or emergency law. Any form of discrimination is prohibited.

Any person who is at risk of being tortured if they are returned to a specific country should be permitted to remain within the borders governed by the relevant State authority as long as the risk of torture remains present. The individual must not be held in detainment without appropriate legal grounds or protections.¹² To determine whether there are substantial grounds to believe that a person would be in danger of being subjected to torture if deported, the Committee considers crucial the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights referred to in Article 3, paragraph 2, of the Convention. These violations include:

- (a) widespread use of torture and impunity of its perpetrators; (b) harassment and violence against minority groups; (c) situations conducive to genocide; (d) widespread gender-based violence; (e) widespread use of sentencing and imprisonment of persons exercising fundamental freedoms; and (f) situations of international and non-international armed conflicts.¹³

In particular, among the specific elements that could affect the rights of the complainant in case of his/her deportation, the Committee lists violence against women:

- (a) the complainant's ethnic background; (b) political affiliation or political activities of the complainant and/or his family members; (c) arrest warrant without guarantee of a fair treatment and trial; (d) sentence in absentia; (e) sexual orientation and gender identity; (f) desertion from the army or armed groups; (g) previous torture; (h) incommunicado detention or other form of arbitrary and illegal detention in the country of origin; (i) clandestine escape from the country of origin for threats of torture; (j) religious affiliation; (k) violations of the right to freedom of thought, conscience and religion, including violations related to the prohibition of conversion to a religion which is different from the religion proclaimed as State religion and where such a conversion is prohibited and punished in law and in practice; (l) risk of expulsion to a third country where the person may be in

¹⁰ *Ivi*, paragraph 35.

¹¹ General Comment No. 4 on the implementation of Article 3 of the Convention in the context of article 22, Committee Against Torture, CAT/C/GC/4, 2017.

¹² *Ivi*, paragraph 29.

¹³ *Ivi*, paragraph 43.

danger of being subjected to torture and (m) violence against women, including rape.¹⁴

General comment 4 is important because, among the substantial grounds triggering the principle of non-refoulement, it also refers to violence against women.

IV. UN Special Rapporteurs: Manfred Nowak (2008) and Juan E. Méndez (2016)

There are two relevant documents by the UN Special Rapporteurs on Torture: the first one was published in 2008.¹⁵ The aim is to apply the torture protection framework in a gender-inclusive way, in order to reinforce the protection of women against torture. Though many international instruments explicitly or implicitly provide for a comprehensive set of obligations in relation to violence against women or rape, the categorisation of an act as "torture" adds a significant level of stigmatisation for the State and reinforces the legal consequences, which include a strong role in criminalising acts of torture, bringing perpetrators to justice and providing reparations to victims. Moreover, the Special Rapporteur suggested adding to the constitutive elements of torture the criterion of powerlessness: when one person exercises complete power over another, when a person is unable to resist the use of force. Specifically,

The Special Rapporteur has suggested adding to these elements the criterion of powerlessness. A situation of powerlessness arises when one person exercises total power over another, classically in detention situations, where the detainee cannot escape or defend him/herself. However, it can also arise during demonstrations, when a person is not able to resist the use of force any more, e.g. handcuffed, in a police van etc. Rape is an extreme expression of this power relation, of one person treating another person as merely an object. Applied to situations of "private violence", this means that the degree of powerlessness of the victim in a given situation must be tested. If it is found that a victim is unable to flee or otherwise coerced into staying by certain circumstances, the powerlessness criterion can be considered fulfilled.¹⁶

The element of powerlessness also allows the specific status of the victim to be taken into consideration, such as sex, age and physical and mental health, in some cases also religion, which might render a specific person powerless in a given context. A society's indifference to or even support for the subordinate status of women, together with the existence of discriminatory laws and a pattern of State failure to punish perpetrators and protect victims, create the conditions under which women may be subjected to systematic physical and mental suffering, despite their apparent freedom to resist.

Regarding violence against women, the "purpose element" required by the CAT definition is fulfilled when the acts are proven to be gender specific, since discrimination is explicitly stated in the above-mentioned definition¹⁷. The Special Rapporteur has determined that cases of torture and ill-treatment can occur in various private contexts. Additionally, the notion of "acquiescence" imposes a responsibility upon the State to prevent acts of torture, surpassing mere protective duties, in the private domain.

The second report was published in 2016¹⁸. The report highlights gaps in prevention, protection, access to justice and remedies, and provides guidance to States on their obligations to respect, protect and fulfil the right of all individuals to be free from torture and ill-treatment. Neglecting to prevent and eradicate gender-based violence can be viewed as a type of promotion or tacit authorization, as stated in General Comment 2. According to the UN Special

¹⁴ *Ivi*, paragraph 45.

¹⁵ UN Special Rapporteur on Torture, A/HRC/7/3, Manfred Nowak, 2008.

¹⁶ *Ivi*, paragraphs 28-29.

¹⁷ *Ivi*, paragraph 30.

¹⁸ UN Special Rapporteur on Torture, A/HRC/31/57, Juan E. Méndez, 2016.

Rapporteur, failure to provide adequate protection and conduct thorough investigations and prosecutions in the face of violations suggests consent, complacency, and even acceptance of violent behavior, which violates the principle of due diligence. Governing bodies must examine all relevant aspects of the situation to assess the extent of the distress and trauma experienced by victims of gender-based violence.

V. Concluding observations of the CAT Committee

The last concluding observations of the CAT Committee on the combined fifth and sixth periodic reports of Italy (2017) contain a specific section on gender-based violence. The Committee expresses concern regarding the widespread occurrence of gender-based violence targeting women and girls within the State party. Furthermore, it is troubled by the low levels of prosecution and conviction for femicide, sexual violence, and other forms of violence directed towards women, such as female genital mutilation, during the time period under review. The Committee urges the State party to intensify its measures in addressing all gender-based violence, guaranteeing thorough investigations of all complaints, prosecution of any presumed offenders, with convictions leading to appropriate punishments. The State party must also guarantee full redress to victims, including fair and adequate compensations and the utmost possible rehabilitation, and offer compulsory instruction on prosecuting gender-based violence for all law enforcement and justice personnel, as well as persist with campaigns to raise awareness on all types of violence against women.¹⁹

VI. Concluding observations of the CEDAW Committee

The CEDAW Committee has contributed as well to the interpretive developments of the conceptualisation of gender-based violence as torture, specifically in the concluding observations on the 8th period report of Sri Lanka (2017), in which it recommends that Sri Lanka criminalizes marital rape and expands the definition of torture in the Torture Act as to include severe forms of sexual violence:

In line with the Convention and general recommendation No. 30, the Committee recommends that the State party: (a) Implement the zero-tolerance policy for sexual violence perpetrated by the army and the police, ensuring the accelerated investigation into and the prosecution and punishment of all allegations of violence perpetrated against women and girls, including arbitrary arrest, torture and sexual violence and surveillance and harassment.²⁰

(...)

Recalling its general recommendations No. 19 (1992) on violence against women and No. 33, the Committee reiterates its previous recommendations (A/57/38, part one, para. 289, and CEDAW/C/LKA/CO/7, paras. 23 and 25) and recommends that the State party: (a) Criminalize marital rape and expand the definition of torture in the Torture Act to include in it severe forms of sexual violence.²¹

¹⁹ Concluding Observations on the combined fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, published by the Committee Against Torture on the 18th of December 2017.

²⁰ Concluding observations on the eighth periodic report of Sri Lanka, CEDAW/C/LKA/CO/8, published by the Committee on the Elimination of All Forms of Discrimination against Women on the 9th of March 2017, paragraph 25.

²¹ *Ivi*, paragraph 23.

After having explored the main interpretative contributions of the CAT and the CEDAW Committees that could be useful for the conceptualization of gender-based violence as torture, the legal opinion will now focus on the main acquisitions of the scholarly debate.

2. Identifying potential challenges arising from framing gender-based violence as torture in the scholarly debate

The framing of gender-based violence as torture in international law has been the subject of a lively academic debate and it is a multifaceted and contentious matter. There are several problems that might arise from framing gender-based violence as torture, for instance in light of the requirement - as expressed in the Convention against Torture - of the involvement of a person acting in their public capacity in the act of torture. In particular, this section focuses on the problematic distinction between the private and public sphere, the issue of the “purpose” requirement, State responsibility and due diligence, the perpetuation of gender stereotypes and biases in the mechanisms addressing torture.

I. The Problem of the Distinction Between Public and Private Sphere

The first problem concerning the conceptualisation of gender-based violence as torture regards the distinction between private and public sphere. Various scholars and activists have engaged in this debate, emphasizing that many forms of violence against women are inflicted by non-state actors, which complicates categorizing such acts as torture.

Byrnes, for instance, in examining the definition of *Article 1* of the CAT, argues that the requirement of official involvement hinders the recognition of certain forms of gender-based violence as torture²². Nevertheless, there is a growing body of jurisprudence that recognizes acts such as rape and other forms of sexual violence as torture or to cruel and inhuman degrading treatment, broadening the definition.²³ Edwards’ argument, as summarized by Copelon, highlights how patriarchal ideology has shielded the private sphere, including family and intimate relations, from State intervention, even in cases of violence.²⁴

Peters contends that intimate violence has historically been considered personal or domestic and that the essence of torture lies in its public character.²⁵ Given the State-based nature of international human rights law, the focus of human rights law has been on State misbehavior directed against individuals, rather than on private attacks against women in their homes or in other private settings. In this regard, it is worth noting that the CAT Committee is interpreting the notions of consent and acquiescence in broader terms so as to expand cases triggering the responsibility of the State also for acts of torture perpetrated by non-State actors. Thus, framing gender-based violence as torture can also involve public officials, who are complicit with such violence.

²² Byrnes, *Gender Challenges for International Human Rights*, in Sheeran, Rodley (eds.), *Routledge Handbook of International Human Rights Law*, Routledge, 2013, pp. 615-634.

²³ Tojo, *Summaries of Jurisprudence/Gender-based Violence* (Center for Justice and International Law (CEJIL), 2010). Leading cases include *Aydin v Turkey*, App. No. 23178/94 (ECtHR, Judgment of 25 September 1997), *Mela vs Peri*, IACHR, OEA/Ser.L/V/II.91, Doc. 7. rev. (1996).

See also *Rosendo Cant y Mexico*, IACtHR, Series C No. 216 (2010) (Preliminary Objections, Merits, Reparations, and Costs), Nowak (n. 14) para. 34 and generally Byrnes (n. 21) 191-194.

²⁴ Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No.2*, 11 *N.Y. Cirt L. Rev.* 229 (2008), pp. 237-238.

²⁵ Peters and Wolper, *Women’s Rights, Human Rights: International Feminist Perspectives*, Routledge, 1995, pp. 45-64.

Women are much more likely to suffer “private” violations and this interpretation should not be strictly confined to state-sanctioned custodial-type scenarios only.²⁶ That said, forced sterilization, as well as other forms of gender-based violence, are typically implemented as part of a State’s policy. These actions constitute a violation of various rights, including the right to be free from torture, the right to bodily integrity, the right to privacy and family life, and the right to health. The involvement of a person acting in their capacity raises questions about accountability and responsibility, as public officials may face legal consequences for their actions. While the involvement of public officials may bring a degree of deterrence, it also presents challenges in prosecution. Proving state responsibility for gender-based violence as torture can be complex, as states may deny direct involvement or claim that the violence was the result of individual actions rather than state policy.

II. The Purpose Requirement

The “purpose” element in defining torture has been another point of contention within the academic debate. The insistence on showing a particular purpose, such as interrogation or confession extraction, has been criticized for potentially limiting the scope of the CAT to abuses within state custody, which disproportionately affects men. The requirement of a specific purpose has the potential to relegate many new forms of abuse to the category of “cruel, inhuman, or degrading treatment” rather than torture, affecting women's protection. This could result in the correlative possibility that women may be unprotected in situations of public emergency, or facing a situation of cruel, inhuman, or degrading treatment or punishment that does not meet the higher threshold reserved for ‘torture’. However, the CAT Committee has acknowledged that the listing provided in *Article 1* is not exhaustive, allowing for a broader interpretation.²⁷ As mentioned above, since discrimination is one of the elements mentioned in the CAT definition, if the acts can be shown to be gender-specific, the purpose element is always fulfilled.²⁸

III. Responsibility of the State and Due Diligence

Framing gender-based violence as torture also raises questions about State responsibility and due diligence. The CAT may not protect women from harm if the State is unaware of it and cannot be said therefore to have consented or acquiesced in it. The concept of “acquiescence”, in particular, has not yet been interpreted so as to include the State inability to act due to a lack of preventive mechanisms to avoid such actions or protect people against such harm. In this respect, Copelon suggests several measures to enhance the protection of women, including training and employment, protection for female detainees, monitoring of private violence, data disaggregation, and public education.

IV. The Stereotypes

The challenge of stereotyping women as mere victims of sexual violence, rather than considering other types of physical or mental torture, is another issue that arises when framing gender-based violence as torture. This stereotype may limit the recognition of other women experiences that meet the criteria for torture.²⁹ In fact, most international adjudicatory bodies

²⁶ Edwards, The “Feminizing” of Torture under International Human Rights Law, *Leiden Journal of International Law*, 19 (2006), pp. 349–391.

²⁷ *Ibidem*, previous note.

²⁸ Sveass, Gaer, The Committee Against Torture tackles violence against women: a conceptual and political journey, *TORTURE* Volume 32, Number 1-2, 2022, pp. 177-190.

²⁹ See *supra* note 25.

are willing to recognize female victims of sexual violence as victims of human rights violations. This is due to the growing tendency to view women as victims of only sexual violence.

V. Challenges associated with accessing the mechanism provided by the Committee Against Torture

Despite the Committee Against Torture putting forth progressive interpretations of the definition of torture to encompass the experiences of women victims of violence, women have not yet taken advantage of such interpretative developments as they do not generally resort to the Committee against Torture. The focus is much more on the requirement that the complainant must be a “victim” of a violation, rather than on prevention or protection against future harm. To conclude, there is also resistance. In conclusion, there is resistance among various groups, including lawyers, feminist advocates, non-governmental organizations, and women themselves, to acknowledge these women’s experiences either as comparable to those of men or as distinct manifestations of torture.³⁰

Conclusions

The framing of gender-based violence as torture in international law presents complex challenges. The distinctions between the private and public sphere, the purpose requirement, the scope of State responsibility, gender stereotypes, and biases in the mechanisms addressing torture, all play crucial roles in shaping the debate. While this framing is essential for recognizing and addressing the unique forms of violence that women endure, it also calls for a nuanced and evolving understanding of torture in international law to adequately protect and empower women worldwide. Addressing these problems requires a continuous academic debate, collaboration with NGOs, and international institutions to ensure that gender-based violence is adequately qualified and punished as torture.

3. Advantages and disadvantages of conceptualizing gender-based violence as torture in the light of the academic debate

A lively scholarly debate has favoured the conceptualization of gender-based violence as torture encouraging, as noted above, the Committee Against Torture to broaden the interpretation of torture. However, this conceptualization is still controversial, as it has both advantages and disadvantages.

As regards the advantages, the first one is that the right to freedom from torture and ill-treatment is universally recognized and protected by international human rights law, both treaty and customary law, and it is a non-derogable right as well as a norm of *jus cogens*.³¹ That means that the prohibition of torture must not be derogated from at any time or circumstance. Torture and ill-treatment are also crimes under international law. Therefore, recognizing gender-based violence as torture allows to consider it a severe breach of *jus cogens* entailing individual criminal responsibility. Another advantage of conceptualizing gender-based violence as torture is the possibility of resorting to the principle of non-refoulement. In fact, the Convention Against Torture states that nobody shall be expelled, returned, deported, surrendered, extradited or otherwise sent to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to gross human rights violations, including torture

³⁰ See supra note 27.

³¹ Bluebook 21st ed., *Sexual Orientation, Gender Identity and International Human Rights Law*, 2009, pp. 99-111.

and ill-treatment.³² Therefore, recognising gender-based violence as torture allows to apply to the victims the non-refoulement obligation, which refers to the prohibition of sending a foreign woman back to her country if in that country she risks to be a victim of gender-based violence.³³ As regards the disadvantages of conceptualizing gender-based violence as torture, they are mainly related to the strict criteria listed in Article 1 of the Convention Against Torture that are required to consider a painful act as torture. First, the definition of torture under Article 1 of the Convention Against Torture requires for “official involvement or acquiescence in the act”.³⁴ Therefore, conceptualizing gender-based violence as torture implies the necessity of demonstrating that the State played an important role in not being able to avoid the violent behavior. This is not only something difficult to prove, but it can also shift the attention from the crime committed by the perpetrator. Second, the definition of torture under Article 1 requires that the pain or suffering is inflicted for a particular purpose.³⁵ It has been already noted in the previous sections that these purpose requirement tends to confine the scope of the CAT to situations of abuse within state custody, a phenomenon more likely to affect men than women, thus avoiding to protect women³⁶ Although one of the purposes outlined in the definition of torture is to discriminate, which could indeed encompass gender-based violence inflicted upon a woman because of her gender the necessity to prove a specific purpose could prevent from considering as torture many episodes of gender-based violence in which the discrimination is not sufficiently clear. To conclude, the Committee Against Torture has accepted the conceptualization of gender-based violence as torture.³⁷ However, the only case of gender-based violence that was brought in front of the Committee is *Mrs. A v. Bosnia and Herzegovina*, which will be examined in the next section. This lack of practice indicates that women have difficulties in the utilization of the Committee’s mechanisms, probably because the admissibility criteria are biased against them. The requirements of consent or acquiescence and purpose, in fact, are often difficult to comply with in cases of gender-based violence.³⁸

³² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 on the 10th of December 1984, entry into force the 26th of June 1987.

³³ See supra note 19.

³⁴ See supra note 20.

³⁵ See supra note 26.

³⁶ See supra note 23.

³⁷ See supra note 24.

³⁸ See supra note 24.

4. Procedures and practice of the CAT and CEDAW Committees

This section presents the relevant procedures of the CAT and CEDAW Committees and compares their composition, as regards the sex, nationality, profession and previous experience with gender issues. It then focuses on the functioning of the individual complaint procedure before the two Committees analyzing some relevant cases.

Procedures of the Committee Against Torture: Gathering information and individual complaints, and Interactions with NGOs

I. CAT procedures

As written in Article 19 of the Convention, the role of States is fundamental for CAT work. States are required to submit an initial report within one year after acceding to the Convention. After the first report, they are required to submit regular periodic reports on how rights are being implemented every four years. Periodic reports are structured in three parts: information relating to the implementation of articles 1 to 16 and any national law or policy taken to comply with the Convention, any information requested by the CAT and measures taken to comply with the conclusions and recommendations addressed to it by the CAT previously.³⁹

The CAT Committee generally holds two sessions per year in Geneva, once in May and once in November, each generally lasting four weeks and examining approximately eight to nine State reports. The current session is taking place from 25 October until 24 November 2023 and the States that are joining the session are Burundi, Costa Rica, Denmark, Egypt, Kiribati and Slovenia.⁴⁰

For the examination of the reports, the Committee invites representatives of the State Parties to attend the meetings when their reports are considered. Such a representative should be able to answer questions which may be put to him/her by the Committee and clarify certain aspects of the reports. After its consideration, the Committee, in accordance with Article 19, paragraph 3, may make general comments on the reports as it may consider appropriate.

According to Article 20 of the Convention, the Committee is empowered to receive information and to institute inquiries concerning allegations of systematic practice of torture in the States Parties. First of all, if the Committee receives reliable information which appears to contain well-founded indications that torture is being systematically practiced in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information.⁴¹ The Committee could also decide to designate one or more of the States parties to make a confidential inquiry and to report to the Committee urgently. After examining the findings of its member, the Committee shall transmit these findings to the State Party concerned together with any comments. At the end, after consultations with the State Party concerned, the Committee will decide to include a summary account of the results of proceedings in its annual report made in accordance with Article 24.

³⁹ See *supra*, note 39.

⁴⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 on the 10th of December 1984, entry into force the 26th of June 1987.

⁴¹ The Special Rapporteur on torture, following a visit to Nepal in September 2005, concluded that “torture is systematically practiced by the police, armed police and Royal Nepalese Army. Legal safeguards are routinely ignored and effectively meaningless. Impunity for acts of torture is the rule, and consequently victims of torture are left without recourse to adequate justice, compensation and rehabilitation”. In accordance with Article 20, paragraph 1 of the Convention, the Committee decided to invite the State Party to cooperate in the examination of such information, and to submit its observations. In 2009, the Committee then decided to undertake a confidential inquiry on Nepal in accordance with Article 20, paragraph 2 of the Convention. Committee Against Torture; “Report on Nepal adopted by the Committee against Torture under article 20 of the Convention and comments and observations by the State party”, 2011.

II. Individual Complaints⁴²

The CAT gives private individuals, in certain circumstances, the right to lodge with the Committee complaints regarding the violation of one or more of its provisions by a State Party. Individual complaints are always examined by the Committee in closed meetings. The communication may be submitted by any private individual who claims to be a victim of a violation of the Convention, under Article 22. If the victim is not able to submit the communication himself/herself, his/her relatives or representatives may act on his/her behalf. In its consideration of the communication, the Committee's first concern is to ascertain its admissibility, and then proceeds to examine the merits. The Committee shall not consider any communication which is anonymous or which it considers to be an abuse of the right of submission of such communications.

The Committee shall not consider admissible an individual communication unless it has ascertained, *inter alia*, that: i. it has not been examined under another procedure of international investigation or settlement ii. all available domestic remedies have been exhausted.

III. Participation of NGOs and NHRIs in the activities of the Committee⁴³

Under its Rules of Procedures, the Committee invites NGOs to submit written information relevant to its activities. Following a recommendation of the inter-committee meeting and the Chairperson's Meeting and a Committee's decision, the Committee also invites NHRIs and NPMs of the country concerned to submit written information relevant to its activities. However, any NGO or NHRI and NPM, invited or not to submit information, may, at its own initiative, submit relevant information to the Committee. The information must be submitted in writing and is posted on the Committee's webpage, thus making it public and bringing it to the attention of the State Party concerned.⁴⁴

NGOs that have submitted written information prior to the session may also brief the Committee orally during the session. Since the November 2010 session, representatives of NHRIs and NPMs meet with the country rapporteurs and relevant members in a private meeting. Such private briefings or meeting, devoted to one country at the time, are organized before the examination of the State report. CAT meets for a three to four-week session three times a year in Geneva, in April-May, July-August and November-December and is examining up to six reports per session. During these sessions, the Committee meets with non-governmental organizations, national human rights institutions and national preventive mechanisms before meeting with the State party's delegation to examine the report. Following the examination of a State party's report, in a dialogue with the State Party's delegation, the Committee adopts concluding observations.⁴⁵ These include concerns and recommendations, some of which are to be followed-up within one year. The concluding observation reflects the Committee's position with respect to the status of the implementation of the Convention in the

⁴² Art. 22, Part 2, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 on the 10th of December 1984, entry into force the 26th of June 1987.

⁴³ Information for civil society, NGOs, and NHRIs, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 on the 10th of December 1984, entry into force the 26th of June 1987.

⁴⁴ *Ibidem*.

⁴⁵ *Ibidem*.

State party as well as of its previous recommendations. They are transmitted to the State party for implementation, made public on the last day of the session and posted on the website.

5. Comparison between the composition of the Committees

I. Membership of CEDAW Committee:

The membership of the CEDAW Committee, as of 1 January 2023 and up to 31 December 2026 is as follows: 21 Women and 2 Men, all with previous experience with gender issues.

Name of Member	Sex (M/W)	Nationality	Terms expires and Profession on 31 December	Previous experience with Gender issues.
Elgun Safarov	M	Azerbaijan	2026 Lawyer/Expert on human rights protection	yes
Brenda Akia	W	Uganda	2026 Researcher on issues based on women violence	yes
Akizuki (Vice-Chair)	W	Japan	2026 Professor of International human law	yes
Nicole Amelie	W	France	2024 Deputy for Calvados (elected member of the French Parliament)	yes
Bethel Marion (rapporteur)	W	Bahamas	2024 Counsel Attorney at Law	yes

Leticia Bonifaz Alfonzo	W	Mexico	2024 Consultant for the United Nations Development Program	yes
Rangita se Silva de Alwis	W	Sri Lanka	2024 Associate Dean of International Affairs	yes
Corinne Dettmeijer- Vermeulen	W	The Netherlands	2024 Professor of Law	yes
Esther Eghobamien- Mshelia (Vice-chair)	W	Nigeria	2026 Advocacy on women's human and economic rights	yes
Hilary Gbedemah	W	Ghana	2026 Researcher in Law	yes
Yamila Gonzalez Ferrer	W	Cuba	2026 Professor of Law	yes
Daphna Hacker	W	Israel	2026 Professor of Law	yes
Nahla Haidar	W	Lebanon	2024 Deputy focal point for the advanced of Women	yes

Dalia Leinarte	W	Lithuania	2024 Director of the Gender Studies Centre at Vilnius University	yes
Rosario G. Manalo	M	Philippines	2024 Foreign affairs Senior Adviser	yes
Marianne Mikko	W	Estonia	2026 Analyst of a gender equality (journalist)	yes
Maya Morsy	W	Egypt	2026 Political scientist	yes
Ana Narvaez	W	Spain	2024 Psychology	yes
Bandana Rana	W	Nepal	2024 Psychology	yes
Reddock Roha	W	Trinidad and Tobago	2024 Professor of Social studies	yes
Natasha Stott Despoja	W	Australia	2026 Senator for South Australia	yes
Genoveva Tisheva (Vice-chair)	W	Bulgaria	2026 Lawyer	yes
Jie Xia	W	China	2024 Social Scientist	

Tab. 1: List of members of the Committee on the Elimination of Discrimination against Women⁴⁶

II. Membership of the Committee against Torture:

The Committee against Torture is composed of 10 independent experts who are persons of high moral character and recognized competence in the field of human rights. The current membership of the Committee against Torture is: 3 Women and 7 Men, just 3 of them with previous experience with gender issues.

Name of member	Sex (M/W)	Nationality	Terms expires on 31 December	Profession / Previous experience with gender issues
Mr. Todd Buchwald	M	United States of America	2025	Professorial Lecturer in Law / no
Mr Claude Heller	M	Mexico	2023	Ambassador / no
Mr.Erdogan Iscan	M	Turkiye	2023	Former Ambassador / yes
Mr. Liu Huawen	M	China	2025	Professor of Law / yes
Mr. Abderrazak Rouwane	M	Morocco	2025	Expert of International law / no

⁴⁶ Office of the United Nations High Commissioner for Human Rights, available at: <<https://www.ohchr.org/en/treaty-bodies/cedaw/membership>>.

Mr. Sébastien Touze	M	France	2023	Director “Human rights Law and Humanitarian Law”, Paris / no
Mr. Bakhtiyar Tuzmukhamedov	M	Russian Federation	2025	International law principal research Fellow International Law / no
Ms. Maeda Naoko	W	Japan	2025	Professor of International law / yes
Ms. Ilvija Puce	W	Latvia	2023	Senior Lawyer Latvian centre Human Rights / no
Ms. Ana Racu	W	Moldova	2023	Former Member of the Committee for the Prevention of Torture / no

Tab. 2: List of members of the Committee against Torture⁴⁷

⁴⁷ Office of the United Nations High Commissioner for Human Rights, available at: <<https://www.ohchr.org/en/treaty-bodies/cat/membership>>.

6. Individual Complaints before the CEDAW Committee

Concerning the mechanisms provided by the CEDAW Committee, this paragraph assumes familiarity with their general functioning and focuses solely on individual measures, as their discussion plays a significant role for the purpose of this legal opinion. The Optional Protocol of CEDAW, entered into force on 22 December 2000, establishes an additional complaint and inquiry mechanism that allows the direct submission of complaints to the Committee. Articles 1-4 of the Protocol establish that individuals or groups of women can submit the complaints of violation of their rights to the Committee under the condition that a certain number of criteria, including the exhaustion of domestic remedies, must be met.

In accordance with Rule 57 of CEDAW Rule of Procedures (RoP), the Petitions Unit maintains a permanent register containing all correspondence and information related to the Optional Protocol for the Committee's consideration, and verify that the communication contains all required information in accordance to Rule 58 of CEDAW RoP.⁴⁸ If necessary, the Petitions Unit may request documentation from the complainant.

After the case is registered, the complainant and the State party are restricted to submitting two rounds of document exchange for providing updates or comments unless exceptional circumstances require additional information.⁴⁹ The Working Group on individual communications appoints one of its members as a case rapporteur for each registered case. The case rapporteur is required to examine the information in the case file and initiate necessary research before preparing a proposal draft to the Working Group regarding the course of action they believe is appropriate. These drafts include recommendations on admissibility and merits. The draft is then examined by the Working Group. In accordance with the Working Group's comments, the case rapporteur conducts a draft decision regarding the admissibility of the case and/or the merits.⁵⁰

The individual communications that require interim measures are given priority in setting the Working Group's agenda. Otherwise, the agenda is decided based on the chronological order of the registration, regional representation, and thematic issues of importance for the Committee's jurisprudence.⁵¹

Under Articles 8 and 9, the Optional Protocol allows one or more members of the Committee to carry out an investigation and a follow-up on the case if information of severe and/or systematic violations of women's rights has been received. Article 10 of the Protocol includes an "opt-out clause" allowing the states to not recognize the competence of the investigation carried out by the Committee.⁵²

The ratification of the Protocol provides a significant impact on the effectiveness of the CEDAW mechanism by expanding the scope of action of the Committee. Under Article 11 of the Protocol, State parties are required to ensure the protection of victims that submit individual communications. Article 7 allows the Committee to request subsequent reports regarding the remedial steps taken by the State parties.⁵³ The Protocol also encourages the NGOs to submit

⁴⁸ *Working Methods of the Committee on the Elimination of Discrimination Against Women and its Working Group on individual communications received under the Optional Protocol to the CEDAW Convention*. Office of the United Nations High Commissioner for Human Rights. (2020, November 17), available at: <<https://www.ohchr.org/en/treaty-bodies/cedaw/individual-communications>>.

⁴⁹ *Ibidem*.

⁵⁰ *Ibidem*.

⁵¹ *Ibidem*.

⁵² UN General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 6 October 1999, United Nations, Treaty Series, vol. 2131, p. 83.

⁵³ *Ibidem*.

shadow reports, which provides additional information on the State Party's compliance with the Convention.⁵⁴

A Comparative Analysis of the Protection Ensured to the Complainants by the CAT and CEDAW Committees

The protection ensured to the victims by the CEDAW and CAT Committees vary based on their mandates and procedures. Under Article 5 of the Optional Protocol, CEDAW's Working Group on individual complaints can make the decision to request the State party to take interim measures by the simple majority of 3 members of the group. The group can set a deadline for the State party to submit their observations on the interim measures, and if they do not receive an observation, they can maintain and extend the period of these interim measures.

Also the CAT Committee may adopt interim measures to provide protection to the complainants. These interim measures include the stay of deportation or extradition and prevention of evidence destruction during the proceedings to prevent the complainant from being subjected to torture and/or re-victimization. The Committee can also request measures for protection of witnesses by relocation or police protection if there is a risk of intimidation or harm for their involvement in the proceeding.

The CAT and CEDAW Committees' Practice

Within the CAT's quasi-jurisprudence there is only one case related to gender-based violence in contexts extraneous to the issue of refoulement: *Mrs A v Bosnia and Herzegovina* (2019).⁵⁵ In 1993, the complainant was threatened with a gun to get into the car of a member of the *Vojska Republike Srpske* and was repeatedly raped by him in a bus station. The complainant became pregnant and had to terminate the pregnancy, which left her with serious permanent psychological consequences. In 2008, she was diagnosed with permanent personality disorder symptoms and chronic post-traumatic stress disorder while under psychiatric treatment. She claimed before the CAT Committee to be a victim of violations by Bosnia and Herzegovina of her rights under Article 14 paragraph 1 in conjunction with article 1 (1) of the Convention against Torture.

The Committee ruled that "the rape and other acts of sexual violence and ill-treatment to which she was subjected caused her severe physical and mental pain and suffering and were inflicted intentionally during the armed conflict in the State party, in order to punish and intimidate the complainant, to humiliate and degrade her, representing a form of discrimination against her on the basis of her gender and ethnicity" and that "the facts, as submitted, constitute torture within the meaning of article 1 of the Convention".⁵⁶ Moreover, under Article 14 of the Convention, the Committee required the State Party:

- a. To ensure that the complainant obtains prompt, fair and adequate compensation;
- b. To ensure that the complainant receives medical and psychological care immediately and free of charge;
- c. To offer public official apologies to the complainant
- d. To comply with Concluding observations with respect to establishing an effective reparation scheme at the national level to provide all forms of redress to victims of war crimes, including sexual violence, and development and adoption of a framework law that clearly

⁵⁴ International Women's Rights Action Watch. (2009, January). *Producing Shadow Reports to the CEDAW Committee: A Procedural Guide*. Human Rights Library, available at: <<http://hrlibrary.umn.edu/iwraw/Procedural%20Guide-08.pdf>>.

⁵⁵ Case *Mrs. A v. Bosnia and Herzegovina*, no. 854/2017, decision adopted by the Committee Against Torture on the 22nd of August 2019, CAT/C/67/D/854/2017.

⁵⁶ *Ibidem*.

defines criteria for obtaining the status of victims of war crimes, including sexual violence, and sets out the specific rights and entitlements guaranteed to victims throughout the State Party.⁵⁷

In this case, the complainant was able to demonstrate that the abuse she had suffered fulfilled the requirements of the definition of torture under Article 1 of the Convention Against Torture and the Committee recognized this episode of gender-based violence as torture.

By contrast, women victims tend to address CEDAW and there are many cases in which gender-based violence was recognized by CEDAW as a consequence of the State's discrimination against women.⁵⁸

For example, in the case *Karen Tayag Vertido v Philippines*, the complainant claimed to be a victim of discrimination against women within the meaning of Article 1 of the Convention, as interpreted by General Recommendation 19 of the CEDAW Committee.⁵⁹

She also claimed that her rights under Articles 2 (c), (d), (f) and 5 (a) of the Convention had been violated by the State party. Acting under Article 7, paragraph 3, of the Optional Protocol to the Convention, the Committee noted that the State party had failed to fulfill its obligations and had thereby violated the rights of the complainant under Article 2 (c) and (f), and Article 5 (a), read in conjunction with Article 1 of the Convention and General recommendation 19, and made the following recommendations to the State party:

- (a) Concerning the author of the communication
 - Provide appropriate compensation commensurate with the gravity of the violations of her rights
- (b) General
 - Take effective measures to ensure that court proceedings involving rape allegations are pursued without undue delay
 - Ensure that all legal procedures in cases involving crimes of rape and other sexual offences are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women. Concrete measures include:
 - (i) Review of the definition of rape in the legislation so as to place the lack of consent at its centre;
 - (ii) Removal of any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimization of secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either: a. Requires the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or b. Requires that the act take place in "coercive circumstances" and includes a broad range of coercive circumstances;
 - (iii) Appropriate and regular training on the Convention on the Elimination of All Forms of Discrimination against Women, its Optional Protocol and its general recommendations, in particular general recommendation No. 19, for judges, lawyers and law enforcement personnel; Appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid revictimization of women having reported rape cases and to ensure that personal mores and values do not affect decision-making.⁶⁰

In this case, the CEDAW Committee not only recognized the State's responsibility for not protecting the complainant from gender-based violence, considered as a form of discrimination,

⁵⁷ See supra note 23.

⁵⁸ See supra note 23.

⁵⁹ Case *Karen Tayag Vertido v. Philippines*, no. 18/2008, text adopted by the CEDAW on the 22nd of September 2010, CEDAW/C/46/D/18/2008.

⁶⁰ *Ibidem*.

but also required the State to improve its legislation in order to protect the victim against future harm.

In conclusion, it is arduous to draw a comparison between the CAT and the CEDAW quasi-jurisprudence in the field of gender-based violence. In the CAT quasi-jurisprudence there is in fact only one relevant case available. In the light of the large number of cases found in the CEDAW system that indicate to States not only individual, but also general measures for the prevention of gender-based violence, it can be assumed that the CEDAW Committee will have a deeper specialization in understanding the social needs that should be met in tackling the problems underlying gender-based violence in the long run.⁶¹

That being said, the most effective protective measure that the CAT Committee can ensure to victims of gender-based violence derives from the principle of non-refoulement. In fact, as noted above, the Convention Against Torture establishes that individuals cannot be repatriated to their homeland if they risk being subject to torture in that country. As a consequence, if gender-based violence is conceptualized as torture, this means that a woman who can be subject to gender abuse in her homeland cannot be repatriated there. Remarkably, there are more than 500 cases in which victims have asked the Committee to establish non-refoulement. In more than 300 cases, the Committee has considered the measure of non-refoulement appropriate.⁶²

⁶¹ See, for example, CEDAW, *Vertido v Philippines*, 2010, UN Doc. CEDAW/C/46/D/18/2008; CEDAW, *LC v Peru*, 2011, UN Doc. CEDAW/C/50/D/22/2009; CEDAW, *VK v Bulgaria*, 2011, UN Doc. CEDAW/C/49/D/20/2008; CEDAW, *AT v Hungary*, 2005, UN Doc. CEDAW/C/32/D/2/2003; CEDAW, *Goecke v Austria*, 2007, UN Doc. CEDAW/C/39/D/5/2005; CEDAW, *Yildirim v Austria*, 2007, UN Doc. CEDAW/C/39/D/6/2005; CEDAW, *Jallow v Bulgaria*, 2012, UN Doc. CEDAW/C/52/D/32/2011; CEDAW, *SVP v Bulgaria*, 2012, UN Doc. CEDAW/C/53/D/31/2011; CEDAW, *Szijjarto v Hungary*, 2006, UN Doc. CEDAW/C/36/D/4/2004..

⁶² See supra note 41.

7. *General Conclusions*

In light of the analysis conducted in this legal opinion, it is possible to draw the following conclusions:

- The most significant challenges in conceptualizing gender-based violence as torture are rooted in the definition of torture outlined in the Convention Against Torture. Article 1 of the Convention establishes constitutive elements, including notably the requirement for the involvement of a person acting in their public capacity, which might hinder the consideration of acts of gender-based violence occurring in the private sphere. Although this definition has been progressively interpreted over the years by the Committee Against Torture to encompass acts of gender-based violence committed in the private sphere (provided that State negligence is identifiable), in practice, it could be challenging to establish State responsibility for conduct carried out by private individuals.
- The CAT and CEDAW Committees differ in their composition. Examining the composition of both Committees, as previously mentioned, it is apparent at first glance that the makeup of the CEDAW Committee is more conducive to analyzing cases of gender-based violence. Specifically, 22 out of 23 members of the CEDAW Committee are women representing various countries, and who have a solid background in women's rights and gender discrimination. This could enable the CEDAW Committee to more effectively handle cases of gender-based violence, given the heightened sensitivity of its members to the issue. Conversely, the Committee Against Torture consists of 10 members, with only 3 being women, and they specialize in specific sectors within the field of human rights that not necessarily relate to gender issues.
- Framing gender-based violence as torture can still offer substantial protection to victims, especially in instances related to non-refoulement. As mentioned earlier, the conceptualization of gender-based violence as torture allows the invocation of the non-refoulement principle in cases where there is a threat that a woman might encounter gender-based violence in her country of origin, thereby preventing the State from repatriating her. The quasi-jurisprudence of the CAT Committee on non-refoulement is well developed and may include the evaluation of risks related to gender-based violence.
- In view of the disparity in the number of decided cases, it is difficult to draw a comparison between the CAT and the CEDAW quasi jurisprudence on gender-based violence. However, it can be assumed that given the larger number of individual cases decided in this area and considering the background of the members, the CEDAW Committee has more expertise in assessing the social needs underlying state policies against gender-based violence. The general measures indicated by the CEDAW Committee might therefore be more effective.

Bibliography

CONVENTIONS

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 on the 10th of December 1984, entry into force the 26th of June 1987.

COMMITTEE AGAINST TORTURE

- Case Mrs. A v. Bosnia and Herzegovina, no. 854/2017, decision adopted by the Committee Against Torture on the 22nd of August 2019, CAT/C/67/D/854/2017.
- Concluding Observations on the combined fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, published by the Committee Against Torture on the 18th of December 2017.
- Concluding observations on the eighth periodic report of Sri Lanka, CEDAW/C/LKA/CO/8, published by the Committee on the Elimination of All Forms of Discrimination against Women on the 9th of March 2017.
- General Comment No. 2 on the implementation of Article 2 by States parties, Committee Against Torture, CAT/C/GC/2, 2007.
- General Comment No. 3 on the implementation of Article 14 by States parties, Committee Against Torture, CAT/C/GC/3, 2012.
- General Comment No. 4 on the implementation of Article 3 of the Convention in the context of article 22, Committee Against Torture, CAT/C/GC/4, 2017.

UN SPECIAL RAPORTEURS ON TORTURE

- UN Special Rapporteur on Torture, A/HRC/7/3, published by Manfred Nowak in 2008.
- UN Special Rapporteur on Torture, A/HRC/31/57, published by Juan E. Méndez in 2016.

CEDAW

- AT v Hungary, 2005, UN Doc. CEDAW/C/32/D/2/2003.
- Goecke v Austria, 2007, UN Doc. CEDAW/C/39/D/5/2005.
- Jallow v Bulgaria, 2012, UN Doc. CEDAW/C/52/D/32/2011.
- Karen Tayag Vertido v. Philippines, UN Doc. CEDAW/C/46/D/18/2008.
- LC v Peru, 2011, UN Doc. CEDAW/C/50/D/22/2009.
- SVP v Bulgaria, 2012, UN Doc. CEDAW/C/53/D/31/2011.
- Szijarto v Hungary, 2006, UN Doc. CEDAW/C/36/D/4/2004
- Talpis v. Italy, Application no. 41237/14, final judgment on the 18th of September 2017.
- UN General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 6 October 1999, United Nations, Treaty Series, vol. 2131, p. 83.
- VK v Bulgaria, 2011, UN Doc. CEDAW/C/49/D/20/2008.
- Yildirim v Austria, 2007, UN Doc. CEDAW/C/39/D/6/2005.

ECHR

- Case Aydin v Turkey, App. No. 23178/94 (ECtHR, Judgment of 25 September 1997).

IACtHR

- Case Mela vs Peri, IACHR, OEA/Ser.L/V/II.91, Doc. 7. rev., (1996).

- Case Rosendo Cant y Mexico, IACtHR, Series C No. 216 (2010) (Preliminary Objections, Merits, Reparations, and Costs).

SCHOLARSHIP

- Bluebook 21st ed., *Sexual Orientation, Gender Identity and International Human Rights Law*, 2009, pp. 99-111.
- BYRNES A., Gender challenges for international human rights, in SHEERAN, S., & Rodley, S.N. (Eds.), *Routledge Handbook of International Human Rights Law*, Routledge, 2013, pp. 615-634.
- COPELON R., Gender Violence as Torture: The Contribution of CAT General Comment No.2, 11 N.Y. Cirt L. Rev. 229 (2008), pp. 237-238.
- EDWARDS A., The “Feminizing” of Torture under International Human Rights Law, *Leiden Journal of International Law*, 19 (2006), pp. 349–391.
- MONTEZ, P., “Women’s Rights are Human Rights: CEDAW Limits and Opportunities”, *Berkeley Journal of International Law*, 2021.
- PETERS J. and WOLPER A., *Women’s Rights, Human Rights: International Feminist Perspectives*, Routledge, 1995, pp. 45-64.
- SVEASS N., GAER F., The Committee Against Torture tackles violence against women: a conceptual and political journey, *TORTURE Volume 32, Number 1-2, 2022*, pp- 177-190.
- TOJO L., *Summaries of Jurisprudence/Gender-based Violence (Center for Justice and International Law (CEJIL), 2010)*, pp- 191-194.

WEBSITES

- CTI-Ratification_Tool_ENG-2020_Annex-4.pdf: <https://cti2024.org/wp-content/uploads/2021/01/CTI-Ratification_Tool_ENG-2020_Annex-4.pdf>.
- International Women’s Rights Action Watch. (2009, January). *Producing Shadow Reports to the CEDAW Committee: A Procedural Guide*. Human Rights Library. <http://hrlibrary.umn.edu/iwraw/Procedural%20Guide-08.pdf>
- United Nations Human Rights Jurisprudence Database: <<https://juris.ohchr.org/>>.
- *Working Methods of the Committee on the Elimination of Discrimination Against Women and its Working Group on individual communications received under the Optional Protocol to the CEDAW Convention*. Office of the United Nations High Commissioner for Human Rights. (2020, November 17): <<https://www.ohchr.org/en/treaty-bodies/cedaw/individual-communications>>.

LEGAL OPINION ON THE ADOPTION OF RESTORATIVE JUSTICE MEASURES TO ADDRESS GENDER-BASED VIOLENCE*

1. Introduction

As Master's Degree students in European and International Studies at the University of Trento we have been invited by the association D.i.Re to provide a legal opinion on the significance of the adoption of restorative justice measures in cases of gender-based violence.

Firstly, we will examine the academic debate related to the desirability of restorative justice measures with their advantages and disadvantages. Secondly, we will focus on the compatibility of restorative justice measures with human rights protection in the light of four conventions: the Convention Against Torture, the Convention on the Elimination of All Forms of Discrimination against Women, the Istanbul Convention, and the European Convention on Human Rights. We will collect cases in which the competent monitoring bodies have mentioned restorative justice measures in their work (for instance: periodic reports, concluding observations, individual complaints) and we will describe their position. Lastly, we will provide examples of restorative justice measures introduced by specific States (Austria, Belgium, Denmark, Finland, Greece, Ireland, Spain and The Netherlands) also considering the situation of Italy.

Before tackling the cornerstones of our topic, it is important to clarify the meaning of "restorative justice" and in which terms this alternative model of justice differs from the traditional approach of retributive justice.

Even though there are many definitions of restorative justice, a commonly accepted definition used in the international debate is the following:

Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.¹

Retributive and restorative justice thus primarily differ in their main purpose: while retributive justice aims at punishing the perpetrator for a criminal offence, restorative justice focuses on repairing the harm done by the perpetrator and rebuilding that person's relationship with the victim and society. Indeed, restorative justice involves all the actors concerned by the crime and takes the form of a range of practices (mediation, conciliation, public apologies and guarantees of non-repetition) that can be adopted in parallel with or after the criminal proceedings.

2. The Scholarly Debate on Restorative Justice

Restorative Justice (RJ) is widely seen as the alternative to the traditional adversarial criminal trial. Although no single definition of RJ can be found throughout the academic debate,² a common understanding of the concept's core revolves around the "repair of harms and of ruptured social bonds caused by crime, which focuses on the relationships between crime victims,

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¹ Marshall, "Restorative justice: an overview", Research Development and Statistics Directorate, London, 1999, available at: <http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf>.

² Gavrielides, *Domestic Violence and Power Abuse Within the Family: The Restorative Justice Approach*, in Sturme (ed), *Violence in Families. Advances in Preventing and Treating Violence and Aggression*, Springer, 2023.

offenders and society”.³ The main objective of RJ therefore is to put the victims of said crimes in the conditions to attain a sense of satisfaction and justice beyond what is typically provided by criminal justice.

The use of restorative justice in cases of domestic violence is at the centre of a lively debate; however, there is currently not enough research and data to give a definitive answer regarding the effectiveness of RJ in this domain. The main fracture is between pro-RJ advocates and a strong feminist opposition. According to Jokinen, the debate is neither political nor legal, but moral, so it is essential to recognise the diversity and plurality of opinions and try to unite the two different views to create better justice for victims⁴.

The restorative justice movement has grown rapidly in the last 20 years. The main benefits underlined are: providing an alternative to criminal justice, the possibility for the victim to receive an apology and an acknowledgement of responsibility by the offender, the flexibility of restorative justice, the presence of mediators.⁵

First of all, it has been noted that criminal justice tends to focus “on the needs of the offender and the society”⁶ and considers punishment as the only way to solve a criminal act. Instead, restorative justice recognises these acts as 'fissures in a community' in which the community itself plays an important role in fixing these fissures.⁷

Secondly, victims of sexual violence and/or domestic violence in some cases find peace when the offender apologises and acknowledges responsibility. Many victims also want to ask questions and explain the harm that has been done to them.⁸ There is also the possibility that they just want to face their offender to start a new life. Lara’s story, told in chapter 8 of the book “Sexual Violence and Restorative Justice” could help understand this point of view. She was a victim of sexual abuse in her childhood who explained that she wanted to meet the offender to demonstrate to herself that she was no longer afraid. Also, she added that “The restorative dialogue was powerful. The process has allowed me to step into a womanhood that was previously denied to me”.⁹

Furthermore, supporters of RJ emphasise that during the mediation between victim and offender there is always a facilitator and sometimes more than one.¹⁰ These facilitators shall be trained and impartial so as to ensure that the offender is sincere in this process.

Another pro is that RJ practices are flexible because they can vary depending on the situation.¹¹ Elias describes three different practices: the first is the “victim-offender mediation”, that is a face-to-face meeting among the victim, the offender, and a mediator. For instance, during a project in South-Africa, 21 women participated in the mediation and reported a feeling of safety and satisfaction.¹² The second is called “family group conferencing”, where the dialogue is among family members, friends, justice officials and service providers. The last is the “peace-making circle, which is derived from practices used by indigenous cultures in Canada and the United States and entails that the members of the community participate in the dialogue with the victim and the offender.”¹³

³ Gang, Kirkman & Loff, “‘Obviously It’s for the Victim to Decide’: Restorative Justice for Sexual and Family Violence From the Perspective of Second-Wave Anti-Rape Activists” in *Violence Against Women*, 2023.

⁴ Jokinen, “Solving moral conflicts. Case restorative justice in domestic violence cases”, *Contemporary Justice Review*, 2021.

⁵ Ibid.

⁶ Elias, “Restorative Justice in Domestic Violence Cases”, *DePaul Journal for Social Justice*, 2016.

⁷ Ibid.

⁸ Schmidt, “Is It Appropriate to Use Restorative Justice in Cases of Domestic Violence?”, *Ludovika University Press*, 2023.

⁹ Keenan, Zinsstag, *Sexual Violence and Restorative Justice*, Oxford University Press, 2022, chapter 8. Of course, it is necessary here to emphasise that it is not possible to derive general conclusions from the story of a single person.

¹⁰ Jokinen, “Solving moral conflicts”, cit.

¹¹ Elias, “Restorative Justice in Domestic Violence Cases”, cit.

¹² Schmidt, “Is It Appropriate to Use Restorative Justice”, cit.

¹³ Elias, “Restorative Justice in Domestic Violence Cases”, cit.

Finally, as pointed out by Elias, despite the fact that RJ is far from being the perfect solution against gender-based violence it could change cultural elements and attitudes.¹⁴

It has been argued, however, that there is no sufficient data to write a general theory, as the practice of RJ in the case of domestic violence (or intimate partner violence) is relatively new.¹⁵

However, many scholars already recognized some concerns regarding the practice of RJ.

The disadvantages regarding the use of RJ in cases of domestic violence are many with many declensions: the first one is the safety of the victim, both physical and psychological. RJ practices may “have not accounted of ongoing danger occasioned by the victim’s resistance to the batterer’s authority and control”,¹⁶ in the cases in which the victim does not have a “safe port” for shielding themselves from the dangers of stalking (in the cases of ex-partner violence) or the continuing of the battering and/or other intimate partner violence.

Also, when talking about the emotional and psychological safety of the victim, one need to consider that even the idea of meeting the violent (former) partner can be traumatising.¹⁷ Trauma related to prolonged intimal, physical, and psychological abuse (intimate terrorism) can be experienced again (re-victimisation) by the victim if exposed to the violent partner, even with the presence of one or more mediators. Moreover, some aspects of intimate terrorism can be in fact used by the perpetrator of the crime even within the practices of restorative justice. The apology circle is a powerful manipulative tool which works “exploiting their partner’s hope that the abuse will stop, [...] because ‘he means it this time’”.¹⁸ Some may argue that such a manipulation could be used also in the apologies at the end of the restorative process, and it could be hard for the mediators to spot this falseness, as they “have no way of assessing the comparative sincerity of remorse”.¹⁹

Intimate terrorism may also influence the victim’s voluntary²⁰ participation in restorative justice processes and their ability to pose real challenges to the violent partner during the mediation process. Indeed,

When one partner has been controlling the other through violence, then the violent partner has established greater, if not complete, power to control decisions they ostensibly share. The victim may feel unsafe presenting any kind of challenge to the abuser, fearing that they will retaliate by hurting them and/or their children. The violent partner may not need to assert this power at all because the victim knows that their safety depends on anticipating and yielding to the violent partner’s wishes. Or they may reassert their power in the midst of a facilitated dialogue, through covert signals not apparent to anyone but the victim.²¹

Another concern is the minimization of the crime in the acknowledging phase. It is possible that the perpetrators, when acknowledging the violence, hiddenly blame the victim for the triggers of the violence, and the mediators may not spot this abuse.²² On the other hand, victims themselves could minimise the fact by their attachment to the violent partner or the hope that they could go

¹⁴ Ibid.

¹⁵ Restorative Justice itself has been introduced in the 1990s, see Elias, Ibid.

¹⁶ Frederick, Lizdas, “The Role of Restorative Justice in the Battered Women’s Movement” in Ptacek, *Restorative Justice and Violence against Women*, Oxford University Press, 2003.

¹⁷ Burkemper, Balsam, “Examining the Use of Restorative Justice Practices in Domestic Violence Cases”, in Saint Louis University Public Law Review, Vol. 27, No. 1, 2007.

¹⁸ See Brookes, “Restorative Justice and Domestic Violence”, 1 September 2019, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3756614>.

¹⁹ Ibid.

²⁰ In the academic literature analysed, restorative justice should always be a voluntary process and by no means mandatory.

²¹ See Brookes, *Restorative Justice and Domestic Violence*, cit.

²² Ibid.

on and live as a normal family, in order for the victims to reach a sense and a feeling of safety, rather than reparation.²³

On a more general term, RJ may be seen as a “re-privatisation” of domestic violence. The feminist movements starting from the 60s made significant steps towards a publication of the private sphere of violence, in order for violent partners to be seen as bad not only by their family, but by their community as a whole. Restorative justice may pose a threat in this direction, as the perpetrator and their victim are left alone to solve their problems with the practitioners, re-privatizing domestic violence.²⁴

We should also take into consideration the opinion of the UN Special Rapporteur on violence against women, whose mandate is to seek information on violence against women and to recommend actions to tackle it. The UN Special Rapporteur on Violence Against Women presented in two instances some recommendations against the use of alternative dispute resolution: in the case of Israel, the SR makes clear that although there have been clear efforts of legislation for not making ADR accessible in the cases of domestic violence, some practices such as economic and psychological violence are still not mentioned;²⁵ on the other hand, in the SR’s report to Argentina, it clearly states that any mandatory participation in alternative dispute resolutions are to be avoided and that judges need to be trained appropriately in order not to misjudge those cases of domestic violence.²⁶

3. The Law and Practice of the Main Monitoring Systems

Introduction

The purpose of this section is to provide an overview of the positions of the following treaty bodies dealing with gender-based violence: CAT Committee, CEDAW Committee, GREVIO as well as the ECtHR.

CAT – Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Restorative justice measures under CAT General Comment No. 3 (2012)

The aim of this general comment is to explain and clarify to States parties the content and scope of the obligations under article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to Article 14(1):

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 dependants shall be entitled to compensation.

²³ See Stubbs, “Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice”, *Criminology & Criminal Justice*, 2007, pp. 169-187, Sydney Law School Research Paper No. 07/75, available at: <<https://ssrn.com/abstract=1032482>>.

²⁴ See Drost, Haller, Hofinger, van der Kooij, Lünemann, Wolhuis, “Restorative Justice in Cases of Domestic Violence. Best practice examples between mutual understanding and awareness of specific protection needs”, Verwey-Jonker Institute, 2015, available at: <https://www.euforumrj.org/sites/default/files/2019-12/7388_restorative_justice_in_cases_of_domestic_violence.pdf>.

²⁵ See Document A/HRC/35/30/ADD.1, Report of The Special Rapporteur on Violence Against Women, its Causes and Consequences on her Mission to Israel.

²⁶ See Document A/HRC/35/30/ADD.3, Report of The Special Rapporteur on Violence Against Women, its Causes and Consequences, on her Mission to Argentina.

The Committee considers that article 14 is applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment (hereafter ‘ill-treatment’) without discrimination of any kind, in line with its General Comment No. 2.²⁷ Under article 14, victims are persons who have 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 violations of the Convention. A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim. The term “victim” also includes affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimisation.²⁸

The Committee considers that the term ‘redress’ in article 14 encompasses the concepts of ‘effective remedy’ and ‘reparation’.²⁹ The comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention.

Considering this, the Committee emphasises the importance of victim participation in the redress process, and that the restoration of the dignity of the victim is the ultimate objective in the provision of redress. The obligations of States parties to provide redress under article 14 are two-fold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanism, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible. Reparation must be adequate, effective and comprehensive. States parties are reminded that in the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them. The Committee emphasises that the provision of reparation has an inherent preventive and deterrent effect in relation to future violations. Where State authorities or others acting in their official capacity have committed, know or have reasonable grounds to believe that acts of torture or ill-treatment have been committed by non-State officials or private actors and failed to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors in accordance with the Convention, the State bears responsibility for providing redress for the victims (General Comment No. 2).

Restitution

Restitution is a form of redress designed to re-establish the victim’s situation before the violation of the Convention was committed, taking into consideration the specificities of each case.³⁰ The preventive obligations under the Convention require States parties to ensure that a victim receiving such restitution is not placed in a position where he or she is at risk of repetition of torture or ill-treatment. In certain cases, the victim may consider that restitution is not possible due to the nature of the violation; however, the State shall provide the victim with full access to redress. For restitution to be effective, efforts should be made to address any structural causes of the violation, including any kind of discrimination related to, for example, gender, sexual

²⁷ See paragraph 1, General Comment No. 3 (2012), CAT.

²⁸ See paragraph 3, General Comment No. 3 (2012), CAT.

²⁹ See paragraph 2, General Comment No. 3 (2012), CAT.

³⁰ General Comment No. 3 (2012), CAT.

orientation, disability, political or other opinion, ethnicity, age and religion, and all other grounds of discrimination.³¹

Compensation

The Committee emphasizes that monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment.³² The provision of monetary compensation only is inadequate for a State party to comply with its obligations under article 14.³³ The right to prompt, fair and adequate compensation for torture or ill-treatment under article 14 is multi-layered and compensation awarded to a victim should be sufficient to compensate for any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary.³⁴

Rehabilitation

The Committee affirms that the provision of means for as full rehabilitation as possible for anyone who has suffered harm as a result of a violation of the Convention should be holistic and include medical and psychological care as well as legal and social services.³⁵ Rehabilitation, for the purposes of this general comment, refers to the restoration of function or the acquisition of new skills required as a result of the changed circumstances of a victim in the aftermath of torture or ill-treatment. It seeks to enable the maximum possible self-sufficiency and function for the individual concerned and may involve adjustments to the person's physical and social environment. Rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society.³⁶ The Committee emphasizes that the obligation of States parties to provide the means for 'as full rehabilitation as possible' refers to the need to restore and repair the harm suffered by a victim whose life situation, including dignity, health and self-sufficiency may never be fully recovered as a result of the pervasive effect of torture. The obligation does not relate to the available resources of States parties and may not be postponed.³⁷ Furthermore, victims may be at risk of re-traumatization and have a valid fear of acts which remind them of the torture or ill-treatment they have endured. Consequently, a high priority should be placed on the need to create a context of confidence and trust in which assistance can be provided. Confidential services should be provided as required.³⁸

Satisfaction and the right to truth

Satisfaction should include any or all of the following remedies: effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification, and reburial of victims' bodies in accordance with the expressed or presumed wish of the victims or affected families; an official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; judicial and administrative sanctions against persons liable for the

³¹ See paragraph 8, General Comment No. 3 (2012), CAT.

³² General Comment No. 3 (2012), CAT.

³³ See paragraph 9, General Comment No. 3 (2012), CAT.

³⁴ See paragraph 10, General Comment No. 3 (2012), CAT.

³⁵ General Comment No. 3 (2012), CAT.

³⁶ See paragraph 11, General Comment No. 3 (2012), CAT.

³⁷ See paragraph 12, General Comment No. 3 (2012), CAT.

³⁸ See paragraph 13, General Comment No. 3 (2012), CAT.

violations; public apologies, including acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to the victims.³⁹

Guarantees of non-repetition

To guarantee non-repetition of torture or ill-treatment, States parties should undertake measures to combat impunity for violations of the Convention. Such measures include issuing effective, clear instructions to public officials on the provisions of the Convention, especially the absolute prohibition of torture.⁴⁰

General Comment No. 3 (2012) of the Committee Against Torture provides a comprehensive clarification of the meaning and obligations of States parties under Article 14. It is useful, however, to see how the Committee interprets the Convention in specific cases.

Restorative justice measures - Concluding observations on the third periodic report of Kenya (2022) and on the combined fifth and sixth periodic reports of Italy (2017)

According to General Comment No. 3 (2012) of the Committee against Torture that has just been analyzed, States parties shall establish a system to oversee, monitor, evaluate, and report on their provision of redress measures and necessary rehabilitation services to victims of torture or ill-treatment. States parties should thus include in their reports to the Committee data disaggregated by age, gender, nationality and other key factors regarding redress measures afforded to victims of torture or ill-treatment, in order to meet their obligation as recalled in general comment No. 2 to provide continual evaluation of their efforts to provide redress to victims.⁴¹ Related to this, within the concluding observations on the third periodic report of Kenya (submitted over a year later in May 2022), the Committee was concerned that the public finance management (Reparations for Historical Injustices Fund) regulations of 2017, which were designed to operationalize the Restorative Justice Fund, remained at the consultative stage, which prevented victims from obtaining access to full redress for the gross human rights violations that occurred in the context of the 2007 elections. The Committee regrets the lack of information on the status of implementation of the recommendations of the Truth, Justice and Reconciliation Commission. It was further concerned, in particular in the light of the elections scheduled for 2022, that limited progress had been made in ensuring access to justice and remedies, including guarantees of non-repetition, for victims of the grave human rights violations that occurred in the context of the 2017 elections, including lethal use of force, assaults, torture and sexual violence by police officers, and that the regulations to govern the Victim Protection Fund awaited parliamentary approval, which was necessary before victims can gain access to reparations. Moreover, the Committee was concerned about the lack of information regarding the prosecution of these cases (arts. 2, 12, 13, 14 and 16).

It is also worth mentioning the last concluding observations of the Committee on the combined fifth and sixth periodic reports of Italy (2017) in which there is a specific reference about gender-based violence:

The Committee notes with concern the high prevalence of gender-based violence against women and girls in the State party. It is also concerned at the low prosecution and conviction rates for femicide, sexual violence and other forms of violence against women, including female genital mutilation, during the period under review (art. 2, 12, 13 and 16).⁴²

Furthermore:

³⁹ See paragraph 16, General Comment No. 3 (2012), CAT.

⁴⁰ See paragraph 18, General Comment No. 3 (2012), CAT.

⁴¹ See paragraph 45, General Comment No. 3 (2012), CAT.

⁴² See paragraph 44, Concluding observations on the combined fifth and sixth periodic reports of Italy, CAT/C/ITA/5-6.

The Committee encourages the State party to redouble its efforts to combat all forms of gender-based violence, and to ensure that all complaints are thoroughly investigated and that suspected offenders are prosecuted and, if convicted, punished appropriately. The State party should also ensure that victims receive full redress for the harm suffered, including fair and adequate compensation and the fullest rehabilitation possible. It should also provide mandatory training on prosecution for gender-based violence to all enforcement and justice officials and continue awareness-raising campaigns on all forms of violence against women.⁴³

Restorative justice measures - Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 854/2017

The decision adopted by the Committee against Torture is about a woman citizen of Bosnia and Herzegovina. The complainant claimed to be a victim of violations by Bosnia and Herzegovina of her rights under article 14 paragraph 1 in conjunction with article 1 (1) of the Convention against Torture.

The facts as submitted by the complainant

In 1992, the complainant and her 10-year-old daughter lived in an area that was controlled by the forces of Republika Srpska - Vojska Republike Srpske during the non-international armed conflict in Bosnia and Herzegovina. On an unknown date between May and June 1993, a man, who was a member of the Vojska Republike Srpske, raped the mother. The complainant became pregnant and had to terminate her pregnancy. These events severely affected her, leaving serious permanent psychological consequences. The complainant did not report the events immediately as she was afraid to do so while living in the locality controlled by the Vojska Republike Srpske. After other women spoke out, she eventually reported the events to the authorities. On 29 June 2015, the Court of Bosnia and Herzegovina, Section I for War Crimes, found the man guilty of war crimes against civilians for the rape perpetrated against the complainant and sentenced him to eight years of imprisonment and required him to pay the complainant for non-pecuniary damages within 90 days. On 24 November 2015, the Court, sitting as an Appellate Division, confirmed the sentence. The man did not pay the complainant the amount established by the Court.

The victim turned to the Committee Against Torture and stated that she had exhausted all available domestic remedies and such remedies did not prove effective in bringing her relief.

Consideration of the merits

The Committee observed that the rape and other acts of sexual violence and ill-treatment to which she was subjected caused her severe physical and mental pain and suffering and were inflicted intentionally during the armed conflict in the State party, in order to punish and intimidate the complainant, to humiliate and degrade her, representing a form of discrimination against her on the basis of her gender and ethnicity. The Committee concluded that the facts, as submitted, constituted torture within the meaning of article 1 of the Convention. In addition, given the severity of the act of torture and the complainant's right to obtain her compensation, and given the lack of any possibility to enforce her right as full as possible, the Committee concluded that the State party breached its obligations under article 14 of the Convention by failing to provide the complainant with redress including fair and adequate compensation.

Finally, the Committee, acting under article 22 (7) of the Convention, concluded that the facts disclosed a violation of article 14 (1) in conjunction with article 1 (1) of the Convention. The Committee considered that the State party was required: (a) to ensure that the complainant obtained prompt, fair and adequate compensation; (b) to ensure that the complainant received

⁴³ See paragraph 45, Concluding observations on the combined fifth and sixth periodic reports of Italy, CAT/C/ITA/5-6.

medical and psychological care immediately and free of charge; (c) to offer public official apologies to the complainant; (d) to comply with Concluding observations with respect to establishing an effective reparation scheme at the national level to provide all forms of redress to victims of war crimes, including sexual violence, and development and adoption of a framework law that clearly defined criteria for obtaining the status of victims of war crimes, including sexual violence, and settled out the specific rights and entitlements guaranteed to victims throughout the State party.

This decision clearly shows a typical recognised violation under article 14 and also includes reference to restorative justice tools.

Restorative justice - Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 15 January 2008

In its report of 2008, the Special Rapporteur stresses that “truth-telling” is a crucial element of reparation and that criminal justice is at the core of any reparation process and must never be restricted. Moreover, it argues that bringing perpetrators to justice is at the same time the precondition for another key objective of reparations: ensuring the non-repetition of the violence, which might mean that legal and customary practices which sustain the persistence and tolerance of violence against women must be modified. The Special Rapporteur, with regard to justice for women victims of torture, found that in many contexts, the criminal law system, the court rules of procedure and evidence, as well as reparation and rehabilitation programmes and policies are not sufficiently gender-sensitive. As proclaimed by the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, reparation and rehabilitation programmes should be inclusive and participatory at all stages. Truth-telling, criminal justice and ensuring non-repetition should be at their core.

Conclusion

The Committee against Torture has recognized the use of restorative justice measures and has well explained them in its general comment. With regard to the situation of Italy, the Committee underlines that gender-based violence should be prosecuted in order to ensure that victims receive full redress for the harm suffered, including fair and adequate compensation and the fullest rehabilitation possible. In one of its views on individual applications, the Committee has also urged Bosnia and Herzegovina to apply restorative justice in order to satisfy the request of the complainant. Unfortunately, as the Special Rapporteur has stated already in 2008 “in many contexts, the criminal law system, the court rules of procedure and evidence, as well as reparation and rehabilitation programmes and policies are not sufficiently gender-sensitive”.

CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women

Introduction

This subsection’s purpose is to assess how values of restorative justice are connected with CEDAW’s objectives. This alignment will be shown in light of CEDAW’s articles and the Committee’s general recommendations, which illustrate several forms of reparations, including alternative dispute resolution mechanisms and restorative justice processes in cases of violence against women. Subsequently, the subsection will focus on the elements assessed by the CEDAW Committee to understand whether recourse should be made to instruments of restorative justice and its concerns in relation to the application of these means. Lastly, some concluding remarks

will outline the position of the CEDAW Committee on restorative justice measures as applied to cases of gender-based violence.

General overview

While CEDAW primarily addresses issues related to women's rights, it does not explicitly mention restorative justice. However, there are several key principles within restorative justice that align with the goals of CEDAW. Indeed, Article 2 (specifically paragraphs b and c)⁴⁴ urges States to condemn discrimination against women in all its forms, through all proper means. In this Article, a policy of elimination of discrimination against women includes sanctions, where appropriate, and the obligation to establish legal protection of women's rights on an equal basis with men, ensuring the effective protection of women against any act of discrimination through competent national tribunals and other public institutions. Moreover, General Recommendation 28 on the core obligations of States Parties⁴⁵ deals with the appropriate remedies that must be ensured by the State parties' legislations prohibiting discrimination and fostering gender equality. States parties are thus under an obligation to provide reparation to women whose rights under the Convention have been violated. These appropriate remedies include several forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement, as well as measures of satisfaction, such as public apologies, public memorials and guarantee of non-repetition, changes in relevant laws and practices and bringing to justice the perpetrators of violation of women's rights.

In light of the purposes of this legal opinion, it is worth noting that some of the above-mentioned remedies belong to restorative justice. At its core, restorative justice defines "justice" in a radically different way than conventional criminal justice responses. Rather than justice as "punishment," restorative justice conceives of justice as "repair" to the harm caused by crime and conflict. Understanding and responding to the needs of each involved party and the broader community is central to the collective creation of a just outcome.⁴⁶ Indeed, CEDAW's focus on eliminating discrimination against women can benefit from mediation processes, as well as by a conciliation based on the understanding between all stakeholders involved.⁴⁷ At the same time, public apologies or memorials are recognised by restorative justice to acknowledge systemic issues, promote accountability, spread awareness and commemorate past injustice⁴⁸. Lastly, CEDAW's aim to eliminate discrimination against women can be brought forward by measures

⁴⁴ The text of the article's paragraphs reads as follows: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (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".

⁴⁵ The text of the general recommendation reads as follows: "Paragraph 2 (b) contains the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention. This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation, and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women".

⁴⁶ See Pointer, *What is "Restorative Justice" and How Does it Impact Individuals Involved in Crime?*, Center for Justice Reform, Vermont Law School, available at: <<https://bjatta.bja.ojp.gov/media/blog/what-restorative-justice-and-how-does-it-impact-individuals-involved-crime>>.

⁴⁷ Schmidt, "Is It Appropriate to Use Restorative Justice in Cases of Domestic Violence?" in *Hungarian Law Enforcement*, 2023, pp. 219-230, available at: <http://real.mtak.hu/170869/1/14_schmidt_219-230_MR_2023_1.pdf>.

⁴⁸ Van Wormer, Walker (eds), *Restorative Justice Today: Practical Applications*, SAGE, 2013.

that ensure non-repetition, thereby preventing future harm. Overall, the principles and practices associated with restorative justice can be applied in a compatible way with the goals of CEDAW. There are however several elements that the CEDAW Committee takes into consideration to understand how means of restorative justice have to be used.

For instance, in the concluding observations on the seventh periodic report of Italy,⁴⁹ the Committee recommends ensuring that alternative dispute resolution mechanism, such as mediation, conciliation and restorative justice are not utilised by courts for cases of gender-based violence so that these do not constitute an obstacle to women's access to formal justice, and harmonise all relevant legislation with the Istanbul Convention. In the same concluding observations, the Committee claims that it remains troubled by the ongoing practice of courts recommending alternative resolution measures, such as mediation or conciliation, even though these procedures are not mandatory. Additionally, there is an increasing concern about the resort to restorative justice for less severe cases of stalking, which may potentially be expanded, broadening to other forms of gender-based violence against women.⁵⁰ Moreover, there are also other cases - that will be touched upon in the following section - in which the CEDAW Committee expressed its concerns about the referral to alternative measures of restoration, such as mediation, recommending the importance of ordinary prosecution.

As far as Finland is concerned, in 2008 the CEDAW Committee recommended the country to strictly monitor and study a new law on mediation procedures to ensure it respects and promote women's human rights, preventing perpetrators from evading prosecution. Furthermore, the Committee raised concerns about the possibility that the new mediation procedure might result in the re-victimization of women who have already experienced violence.⁵¹ Nonetheless, in 2014, the CEDAW Committee noted the increasing use of mediation and conciliation procedures in domestic violence in Finland and urged the State to enact legislative measures to prohibit mandatory mediation and conciliation, especially in cases of intimate partner and other forms of domestic violence.⁵² In 2022, again, the Committee expressed uneasiness about the growing use of this alternative dispute resolution mechanism in Finland, recommending the prioritisation of prosecution over mediation in such cases and emphasising the importance of ensuring that the resort to mediation does not lead to the discontinuation of criminal investigation and prosecution.⁵³ The position of Committee on the use of this alternative dispute resolution

⁴⁹ The text of the concluding observations reads as follows: "The Committee recommends that Italy: (d) Ensure that alternative dispute resolution mechanisms, such as mediation, conciliation and restorative justice, are not utilised by courts for cases of gender-based violence so that these do not constitute an obstacle to women's access to formal justice, and harmonise all relevant national legislation with the Istanbul Convention;

The Committee remains concerned about: (d) The fact that, although these procedures are not mandatory, courts continue to refer victims to alternative dispute resolution, such as mediation and conciliation, in cases of gender-based violence against women, as well as the emerging usage of restorative justice mechanisms for less severe cases of stalking, which might be expanded to apply in other forms of gender-based violence against women".

⁵⁰ See text of the concluding observations contained in the previous footnote.

⁵¹ In 2008, the CEDAW Committee recommended Finland to "carry out studies and monitor closely the new law on the mediation procedure in order to ensure that such procedure is implemented in a way that respects and promotes women's human rights and does not lead to perpetrators escaping prosecution". Moreover, observed that "the new mediation procedure may lead to the re-victimization of women who have suffered violence" (CEDAW/C/FIN/CO/6 (CEDAW 2008)).

⁵² In 2014, the CEDAW Committee, recalling the general recommendation No.19 on violence against women, observed that "mediation and conciliation procedures are increasingly employed in domestic violence cases, notwithstanding recommendations in the Government Programme and the Government Action Plan for Gender Equality 2012-2015 to limit its use, and notwithstanding the previous concerns of the Committee (CEDAW/C/FIN/CO/6, para. 15) that such procedures may lead to the revictimization of women who have suffered violence" and recommended to "take the legislative and other measures necessary to prohibit mandatory mediation and conciliation in cases of intimate partner and other forms of domestic violence" (CEDAW/C/FIN/CO/7 (CEDAW 2014)).

⁵³ In 2022, the CEDAW Committee concerned about the fact that "mediation in cases of intimate partner violence remains a possibility and is reportedly being increasingly used". In addition, the Committee recommended to "give

mechanism appears to be very cautious. Although the Committee does not oppose the use of mediation categorically, it highlights specific concerns about the risk of re-victimisation and the possible impact on the prosecution.

Conclusions

As has been seen above, means of restorative justice are considered by the CEDAW Committee in cases of gender-based violence to provide reparation to women whose human rights have been breached. However, the Committee seems to prioritize criminal prosecution, especially in cases of domestic and intimate partner violence. The primary concern of the Committee lies in the establishment of the criminal responsibility of the aggressors. Alternative legal tools should thus avoid interrupting or jeopardising the investigation and legal prosecution of perpetrators. Moreover, the Committee often recalls that these are alternative and non-compulsory measures, repeatedly expressing concern about the increasing trend to replace traditional prosecution procedures with restorative justice measures. Overall, the general position of the CEDAW Committee seems to favour a careful regulation of the use of restorative justice measures in situations of violence against women, underlining the need to guarantee the protection of victims' rights and the continuity of legal proceedings.

ECtHR - European Court of Human Rights

Introduction

In this section, we will analyse the ECtHR's position *vis à vis* the use of restorative justice when addressing gender-based violence and domestic violence and we will take into consideration the international legal bases the Court's relies on in relation to RJ. For this purpose, we will make use of the ECtHR's online database (HUDOC) to find any specific references to restorative justice's practices that implicitly or explicitly embody comments or suggestions that the Court provides on the issue.

General overview

The European Convention includes articles that have been interpreted by the ECtHR as to encompass gender-based violence, such as Article 2 on the right to life, Article 3 on the prohibition of torture and Article 14 on the prohibition of discrimination. For instance, starting from the key case *Opuz vs. Turkey* (2009), the ECtHR started to consider the linkage between domestic violence and discriminatory attitudes of domestic authorities in criminal proceedings under article 14. The State's failure to protect women from domestic violence is particularly seen as being linked to the condition of being women and subsequently the State's failure breaches their right to equal protection before the law.

Legal Framework

A Wider Legal Framework: Council of Europe's (2018)8 Recommendation on Restorative Justice in Criminal Matters

Before tackling the Court's position, we believe it is worthwhile mentioning a wider legal framework coming from Recommendation CM/Rec (2018)8 of the Council of Europe. This

priority to prosecution over the use of mediation in cases of intimate partner violence and domestic violence and ensure that referral to mediation does not result in the discontinuation of criminal investigation and prosecution in these cases" (CEDAW/C/FIN/CO/8 (CEDAW 2022)).

recommendation addresses the topic of restorative justice in criminal matters by updating the old Recommendation No. R(99)19 concerning mediation in penal matters. In the text, the CoE encourages member states' policy makers to have a proactive attitude towards restorative justice, by making it available and by increasing local knowledge. At the same time, the recommendation lists the main restorative principles, the basic rules as well as the legal basis for restorative justice and their implications on institutional cultures. Some of the main conditions that are stressed by the Council are: the free consent of the parties, the awareness and knowledge of the parties, the equality in accessing the service, confidentiality.⁵⁴ Even though the Council's recommendation sets a precise framework on restorative justice's application to criminal matters, it also becomes clear the justice gap: it does not explicitly tackle the issue of sexual and domestic violence, which is left implied but not specifically addressed.

The Court's reference to restorative justice practices

The Court's jurisprudence explicitly refers to restorative justice practices using a number of different locutions.

Firstly, the Court mentions the expression "restorative justice" in some domains other than violence against women, specifically in cases in which property rights of refugees or displaced civilians are breached. To quote some cases addressing housing and property restitution that were brought before the Court: Case of Dokić v. Bosnia and Herzegovina (2010),⁵⁵ Case of Mago and Others v. Bosnia and Herzegovina (2012),⁵⁶ Case of Chiragov and others vs. Armenia (2015),⁵⁷ Case of Sargsyan v. Azerbaijan (2015).⁵⁸ In these judgments, the Court makes reference to the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons ("the Pinheiro Principles). In such principals the expression "restorative justice" is used in its general meaning (with the mere purpose of repairing the harm done) and it does not necessarily identify with mediation, conciliation, public apologies, public memorials and guarantees of non-repetition approaches.

In addition, as can be seen in the case Momčilović v. Croatia,⁵⁹ the ECtHR employs another expression to refer to RJ measures: "alternative dispute resolution" (ADR). In this regard, considering this specific case, the Court refers to Croatia's Government requirement to settle such procedures. The Court assesses the Government by considering the main purpose of such

⁵⁴ Committee of Ministers of the Council of Europe, "Recommendation of the Committee of Ministers to member States concerning restorative justice in criminal matters", CM/REC (2018)8, available at: <<https://www.cep-probation.org/wp-content/uploads/2018/10/Recommendation-CM-Rec-2018-of-the-Committee-of-Ministers-to-member-States-concerning-restorative-justice-in-criminal-matters-.pdf>>.

⁵⁵ European Court of Human Rights, *Dokić v. Bosnia and Herzegovina*, Application No. 6518/04, Judgment of 27 May 2010, pp. 12-14.

⁵⁶ European Court of Human Rights, *Mago and Others v. Bosnia and Herzegovina*, Application Nos. 12959/05, 19724/05, 47860/06, 8367/08, 9872/09 and 11706/09), Judgment of 3 May 2012, pp. 14-15.

⁵⁷ European Court of Human Rights, *Chiragov and Others v. Armenia*, Application No. 13216/05, Judgment of 16 June 2015, pp. 36-37.

⁵⁸ European Court of Human Rights, *Sargsyan v. Azerbaijan*, Application No.40167/06, Judgment of 16 June 2015, pp. 30-32.

⁵⁹ European Court of Human Rights, *Case of Momčilović v. Croatia*, Application No. 59138/00, Judgment of 29 August 20015, (pp.8-9). The case involves a Croatian citizen who had left the country before the independence of Croatia and in 1999 (during the war between Croatia and Bosnia and Herzegovina), filed an application for his return to Croatia. However his application was never replied to by the Government. Therefore, he complains under Article 3 § 2 of Protocol No. 4 to the Convention that his right to enter the territory of his country has been violated. He also denounces violations of Article 8 of the Convention (right to respect for his family life) and of Article 14 of the Convention for being discriminated against on the basis of his Serbian origin.

measures: improving the effectiveness of the judicial system and economising the court's workload. The text of the relevant part of the decision reads as follows:

[...] the government's requirements to settle procedure before bringing a claim for damages against the State in the competent civil courts aimed at allowing the parties to settle their dispute without the involvement of courts and to avoid long and expensive court proceedings with an intended effect of reducing the number of cases pending before the courts.

In the final part of the judgement, the Court quotes the 2014's report of the European Commission for the Efficiency of Justice (CEPEJ) focusing on the benefits of the application of ADR's procedures both for the effectiveness of the courts and for the parties involved in the disputes. The Court points out that:

The European Commission for the Efficiency of Justice (CEPEJ) in its 2014 Report on 'European judicial systems: efficiency and quality of justice' noted that:

the application of the alternative dispute resolution (ADR) mechanisms, depending on the way in which it is conducted, can improve the efficiency of justice by reducing the courts' workload, as well as improving the quality of the response to the citizens by offering them an opportunity to resolve a dispute and limiting its prejudicial consequences and cost or (and) attenuating the contentious situation brought before the court.⁶⁰

The nature of such alternative dispute settlement mechanisms is better clarified by the Court in the section related to the relevant international framework. In this section, the Court quotes Recommendation No. (86)12 of the Committee of Ministers concerning measures to prevent and reduce the excessive workload in the courts.⁶¹ The Recommendation was adopted by the Committee of Ministers on 16 September 1986 in response to the increasing number of non-judicial tasks to be performed by judges and to the excessive workload of the courts and with the purpose to improve the administration of justice. The text of the recommendation by referring to a "friendly settlement of disputes" reads as follows:

Encouraging, *where appropriate*, a friendly settlement of disputes, either outside the judicial system, or before or during judicial proceedings.

The Committee also clarifies where these measures shall be employed in relation to legal proceedings: it encourages to provide conciliation measures "*prior to or otherwise outside judicial proceedings*". The Recommendation prompts the States to empower the judges with the task to carry on such procedures. Moreover, it also refers to the lawyers' responsibility in:

seeking conciliation with the other party before resorting to legal proceedings *in all appropriate matters at the commencement and at any appropriate stage* of such proceedings.

The language used by the Committee here may be lightly suggesting that such alternative measures should be limited by specific conditions. However, the Committee remains vague and does not clarify the meaning behind the word "appropriate". The choice of when and in which cases to apply the measures apparently remains at the discretion of the judges.

Another part of the Recommendation seems to reiterate the same point:

⁶⁰ European Commission for the Efficiency of Justice's Report on 'European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice', 9 October 2014, available at: <<https://rm.coe.int/european-judicial-systems-edition-2014-2012-data-efficiency-and-qualit/1680785d9>>.

⁶¹ Committee of Ministers of the Council of Europe, Recommendation No. R (86)12 concerning measures to prevent and reduce the excessive workload in the Courts, CM/REC (86)12 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804f7b86>

III. Providing for bodies which, outside the judicial system, shall be at the disposal of the parties to disputes on *small claims* and in some *specific areas of law*.

By using the words “small claims” and “specific areas of law” the text is reducing the field of application of such measures to specific cases and specific areas. Therefore, the emphasis on these words might be read as implying that cases of gender-based violence are not included.

The same Recommendation No. (86)12 is mentioned by the ECtHR in another case, the case of *Vitzthum v. Austria*⁶² dealing with breaches of the right to a fair trial and the right to an effective remedy. The Court’s judgement quotes the same part of the Recommendation as in the case of *Momčilović v. Croatia*.

Addressing RJ in cases involving gender-based violence: the Court’s reliance on CEDAW

CEDAW and its interpretations provide a wider legal framework on the use of alternative forms of justice when addressing gender-based violence. The Court relies on CEDAW’s legal bases as authoritative and reliable parameters to address the issue of restorative justice applied to gender-based violence.

In cases of gender-based violence and domestic violence, the ECHR directly invokes in its judgments Article 2 para b) and c) of the CEDAW Convention and General Recommendation No.28 under Article 2 of CEDAW as well as other recommendations and reports which specifically refer to the measures that States shall take in order to provide remedies for the victims of gender-based violence and domestic violence. In this way, occasional reference to mediation or conciliation measures, public apologies and memorials or guarantees of non-repetition are also included by the Court within the measures of dispute resolutions.

For instance, in the case of *Tershana v. Albania*,⁶³ proving violations of articles 2, 3 and 8 of the ECHR, the Court quotes as relevant international law and material concerning gender-based violence CEDAW’s General Recommendation 35⁶⁴ on gender-based violence against women, updating General Recommendation 19. The General Recommendation 35 in section 33 para (a) refers to the practice of guarantees of non-repetition, which is recognised by CEDAW Committee (in Recommendation 28 under Article 2) as one of the types of reparations entailed by restorative justice.

Another case proving the Court’s reliance on CEDAW when addressing restorative justice measures is the case of *Y and Others v. Bulgaria*. In the judgement, the ECtHR includes within the relevant reports the Concluding observations issued by the CEDAW Committee on the eighth periodic report of Bulgaria. The Court only refers to a fragment of the report in which the Committee considers as one of the issues of greatest concern the priority that the judicial system

⁶² European Court of Human Rights, *Vitzthum v. Austria*, Application No. 8140/04, Judgment of 26 June 2007.

⁶³ European Court of Human Rights, *Tershana v. Albania*, Application No. 48756/14, Judgment of 4 August 2020, pp. 15-17.

⁶⁴ General Recommendation No 35 in section 33 para (a) reads as follows: “The Committee recommends that States parties implement the following measures with regard to reparations: a) provide effective reparations to victims/survivors of gender-based violence against women . Reparations should include different measures, such as monetary compensation, the provision of legal, social and health services, including sexual, reproductive and mental health services for a complete recovery, and satisfaction and guarantees of non-repetition. Such reparations should be adequate, promptly attributed, holistic and proportionate to the gravity of the harm suffered; and (b) establish specific funds for reparations or include allocations in the budgets of existing funds, including under transitional justice mechanisms, for reparations to victims of gender-based violence against women”.

in Bulgaria gives to mediation and reconciliation in cases of gender-based violence against women:

The Committee is concerned that women and girls in the State party, in particular those facing intersecting forms of discrimination, have limited access to justice owing to pervasive corruption, social stigma, the inaccessibility of the judicial system, gender bias among law enforcement officers, including the police, the priority given to mediation and reconciliation procedures in cases involving gender-based violence against women, women's limited awareness of their rights and limited knowledge among judges and law enforcement officials of the Convention, the Optional Protocol thereto and the Committee's general recommendations.⁶⁵

Conclusion

In conclusion, the jurisprudence of the European Court of Human Rights only includes few and ambiguous references to restorative justice itself. The Court does not explicitly take a position towards the desirability of applying restorative justice to cases of gender-based violence. However, by referring to other legal frameworks, the need for caution and the implicit need to limit the use of such practices to specific areas, in line with the principle of appropriateness, are underlined.

4. National Legislations on Restorative Justice: An Overview and an Assessment of their Compatibility with International Obligations

Introduction

Some States have introduced measures of restorative justice in their legislations, although not only to deal with cases involving gender-based violence. In this section, we shall analyse the examples of Austria, Belgium, Denmark, Finland, Greece, Ireland, Spain, the Netherlands and Italy. We selected these countries for several reasons. Spain is the only country, among the ones selected, that explicitly prohibits RJ for cases of gender-based violence. In Belgium, RJ is a right at each stage of judicial procedure and, for the more serious crimes, it operates in tandem with conventional justice. In the Netherlands, several types of experiments of RJ have been carried out over the decades. In Ireland, RJ has been included among the priorities of the Department of Justice 2021 Action Plan and mediation or conciliation are not mandatory. Finland, Austria and Denmark have a well-established RJ practice, as they started their pilot projects in the 1980s, whereas Greece, in spite having established RJ measures more recently, differs from the other national experiences in one important respect: it provides for an obligatory observation period of three years after the mediation has been successfully completed. We compared these cases by presenting their legal basis for RJ measures, their application of such measures in practice, and the relevant observations of the CEDAW Committee and GREVIO, where available. It is worth noting that all the States considered have ratified CEDAW, the Istanbul Convention, and are also Members of the Council of Europe.

⁶⁵ European Court of Human Rights, *Y and Others v. Bulgaria*, Application No. 9077/18, Judgment of 5 September 2022, pp. 16-17.

AUSTRIA

Austria: Legal Framework

Austria legally implemented restorative justice measures with the adoption of the Criminal Code (section 46a).⁶⁶

Austria, as a member state of the European Union, is bound by the EU Victims Directive of 2012. Article 12 obliges Member states to take measures that will ensure that victims who choose to participate in RJ processes have access to safe and competent RJ services. However, the Directive does not explicitly refer to the use of RJ in cases of violence against women.⁶⁷

R41 of *Neustrat* (mediation organisation Austria) states that no mediation should take place if the offender blames the victim, downplays or denies his own wrongdoing, and/or if there is a serious power imbalance, a history of violence, or a lack of emotional stability of the victim.⁶⁸

Austria: State Practice

Austria has a well-established system of VOM. All VOM cases are referred to *Neustrat*, a nationwide provider of judicial services (such as probation, help upon release, community service, etc.), financed by the Ministry of Justice. The mediation service has nine regional offices, one for each Austrian province. They deal with more than 1,200 partner violence cases each year. *Neustrat* employed approximately 80 active mediators, who are social workers, lawyers or psychologists with extra training or practice (212 units of theoretical instructions and demands the practical experience of 36 VOM sessions). *Neustrat* deals with around 1500 cases of victim-offender-mediation in domestic violence cases annually.⁶⁹

Only in Austria, mediators may use a risk assessment tool to assess the eligibility of a specific case for VOM. Items in this assessment refer, for example, to whether the offender possesses a firearm or to the history of violence as well as to the risk of another violent incident.⁷⁰

Austria: CEDAW Committee's and GREVIO's Recommendations on the Use of VOM

In 2019, the CEDAW Committee observed with concern that “women with disabilities who raise complaints of discrimination are often referred to mediation by the Social Ministry Service”.⁷¹

In 2017 GREVIO noted an imbalance between the uses of repressive and restorative justice, including victim-offender mediation, observing that “compliance with such diversionary measures closes the case without a criminal judgement, indeed without even a court hearing”.⁷²

However, it also seems to appreciate how VOM measures are handled in Austria, affirming that

this practice in Austria shows that safeguards seem to be built into the system to attempt to ensure the free will of the victim is respected. Victims may refuse participation in mediation and Neustrat actively screens all cases of mediation ordered in domestic violence cases for their suitability. On average, it rejects 50 cases per year where a victim has consented to it, but Neustrat's assessment of the situation indicates that pressure has been exerted on her or that the violence has not stopped.⁷³

⁶⁶ Section 46a, Criminal Code (*Strafgesetzbuch*, StGB), 1998. available at:

<<https://policehumanrightsresources.org/content/uploads/2016/08/Criminal-Code-Austria-1998.pdf?x19059>>.

⁶⁷ L315/57, Directive 2012/29/EU of the European Parliament and of the Council, 2012. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0029> [Accessed 24 November 2023].

⁶⁸ Drost et. al, *Restorative Justice in case of Domestic Violence*, cit., p. 20.

⁶⁹ Ibid. p. 22.

⁷⁰ Ibid p. 25.

⁷¹ Human Rights Index, CEDAW/C/AUT/CO/9 (CEDAW 2019).

⁷² Grevio Baseline Evaluation Report Austria (2017).

⁷³ Grevio Baseline Evaluation Report Austria (2017).

BELGIUM

Belgium: Legal Framework

In criminal cases, mediation is governed, firstly, by Article 216ter of the Code of Criminal Procedure⁷⁴ and, secondly, by the provisions added by the law of 22 June 2005⁷⁵ concerning restorative mediation. These provisions are based on the principle of voluntary participation by the parties. As regards mediation in criminal matters (Article 216ter of the Code of Criminal Procedure), this principle is repeated in COL 4/2006⁷⁶ with one important distinction: criminal mediation must be considered carefully in situations of intimate partner violence where one partner exerts control over the other.

The decision to use criminal mediation is a prerogative of the prosecution service and is confined to acts that are not punishable by a prison sentence of over two years or by a more severe penalty.⁷⁷ Mediation in criminal matters presupposes compensation or redress for the injury caused by the offence.⁷⁸ Once all the conditions laid down by the prosecution service (such as doing community service, completing an accountability programme, paying the analysis and expert evaluation costs) have been met by the perpetrator, the criminal proceedings are terminated.⁷⁹

Belgium: State Practice

Belgium claims that access to RJ is a right at each stage of judicial procedure, regardless of the seriousness or type of offence.⁸⁰

The victim receives letters automatically at each stage of the judicial process reminding them how to proceed if they would like to take up the offer.⁸¹ Prior to the enactment of the current legislation governing RJ measures:

- RJ was only allowed at the request of the victim. This significantly limited the number of referrals. Now that either party can request RJ, 80% of approaches come from the offender, but 50% of victims asked decide to participate.⁸²
- Judges had to rule on the suitability of any request. This was slow and cumbersome, and services found that judges are not particularly well placed to know whether RJ is suitable or not. This requirement has now been removed.⁸³
- RJ operated strictly outside of the criminal justice system to ensure there was no incentive for offenders to participate insincerely in order to obtain a lighter penalty. Now there is limited scope to feed into judicial process, where it is appropriate and

⁷⁴ The Belgian Code of Criminal Procedure (Dutch: *Wetboek van Strafvordering*, French: *Code d'Instruction Criminelle*, German: *Strafprozessgesetzbuch*) is a code of law in the country of Belgium, of which the different parts were formally adopted in November and December 1808 (before Belgium existed as a sovereign state).

⁷⁵ Act of 22 June 2005 on Victim-Offender Mediation. Cited in:
<https://rm.coe.int/grevio-report-on-belgium/16809f9a2c> (p. 48).

⁷⁶ Circular n. COL 4/2006 From the College of Prosecutors General of the Courts of Appeal. Cited in:
<https://rm.coe.int/grevio-report-on-belgium/16809f9a2c> (p. 48).

⁷⁷ GREVIO's Baseline Evaluation Report on Belgium (2020), pp. 49 ff.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Scottish Government, "Uses of Restorative Justice: evidence review", 2019, available at: <https://www.gov.scot/publications/rapid-evidence-review-uses-restorative-justice/pages/3>.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

relevant, which is mainly in situations where the two parties have reached an agreement that it is relevant for the judge to consider.⁸⁴

In Belgium, ‘Penal Mediation’ is offered by ‘justice assistants’ (civil servants), while a small number of NGOs are contracted by the government to provide other RJ services all over the country.⁸⁵ ‘Mediation for Redress’ can be facilitated in respect of any crime reported to the police involving an identifiable victim, and at all stages of the criminal justice process including after sentence. Depending on the type of RJ programme, offenders may be juveniles or adults who must accept some level of responsibility. For ‘Mediation for Redress’, once the crime is reported to the police adult victims and offenders are informed of their right to seek mediation in addition to the police investigation and the RJ process can be initiated by either. Decisions regarding the referral of cases involving juvenile offenders to mediation (RJ) are made by the prosecution service or the presiding judge, and mediation is often used as a diversionary measure.

For the more serious crimes, RJ in Belgium operates in tandem with and not as an alternative to conventional criminal justice processes. However, RJ interventions provided by the Confidential Centres for Child Sexual Abuse (*Vertrouwenscentra Kindermishandeling*) in the Flemish region of Belgium may be provided independently of the criminal justice system when the sexual abuse is intrafamilial.

As a statute of limitations determines the timeframe within which historical cases of sexual violence can be prosecuted in Belgium, victims who disclose child sexual abuse as adults may not be able to seek justice through the conventional criminal justice system and may also therefore be precluded from victim–offender mediation (VOM) through the mediation services. However, in response to historical child sexual abuse in the Catholic Church in Belgium, a Centre for Arbitration was established by the state with the cooperation of the Catholic Church, involving restorative meetings and financial settlements. In Belgium access to RJ is seen as a right.

A number of key factors have contributed to the development of RJ in Belgium. Personal connections between academics and criminal justice professionals facilitated the development of innovative approaches in the criminal justice arena; one of these innovations was RJ.

Restorative justice projects grew out of academic research supported by staff within the prison and prosecution service and from the outset in the early 1990s were targeted at serious crimes. In addition to benefiting the parties directly involved, the projects sought to incorporate restorative principles into the criminal justice system. In the late 1990s the Dutroux case placed the Belgian criminal justice system in the media spotlight and prompted widespread public debate and calls for reform. This focus on the criminal justice system and appetite for reform provided an ideal context to expand and develop the pilot restorative justice projects.

The principal restorative justice intervention used is VOM; VOM can be direct or indirect but is most commonly indirect in most programmes. Family group conferences can also be convened for juvenile offenders but are used infrequently. Funding is provided by the regional governments, i.e. the regional Ministries of welfare and health.

Besides VOM and conferencing offered by NGOs, Belgium has a system of ‘penal mediation’ legally established in 1994. This concerns a form of conditional discharge of relatively minor offences at the level of the public prosecutor or judge. The mediators are civil servants (‘justice assistants’) based in the ‘justice houses’ which are present in each judicial district (*arrondissement*).

⁸⁴ Ibid.

⁸⁵ Keenan, Zinsstag, O’Nolan (2016), *Sexual violence and restorative practices in Belgium, Ireland and Norway: a thematic analysis of country variations*, pp. 97 ff. This whole subsection heavily draws from this paper.

Belgium: GREVIO's Recommendations

In its final report⁸⁶ on Belgium, GREVIO has dedicated a section to the prohibition of mandatory alternative dispute resolution processes or sentencing (Article 48).

GREVIO has acknowledged that:

[...]the risk that, in some cases, a victim may hesitate or feel unable to refuse mediation for fear of future violence or reprisals by the perpetrator. This risk is all the greater when the legal professionals concerned, and in particular judges, prosecutors and mediators, are not trained in the dynamics and risks of violence against women and its impact on children. GREVIO points out in this regard that unequal power relations between victims and perpetrators of violence may influence the victim's ability to consent voluntarily to mediation and put them at risk of secondary victimisation.[...]” GREVIO is also concerned that if many cases are closed without a criminal trial “[...]the use of mediation may help to create the impression that, in the eyes of society, violence does not constitute an offence that warrants a criminal conviction.[...].

[...]170. GREVIO strongly encourages the Belgian authorities to take all necessary measures to ensure that the use of criminal mediation in cases of violence against women is based on full respect for the rights, needs and safety of victims. Such measures should have the effect of ensuring:

- a. that women victims of violence to whom criminal mediation is offered are informed of their rights in the context of such a procedure, in particular as regards the non-mandatory nature of mediation;
- b. that mediation is only offered/applied to women victims of violence who are in a position to decide freely to accept or refuse the procedure;
- c. that the judges, mediators and legal professionals involved in the decision to use mediation and in its application are trained in the field of violence against women and the risks that victims may face in the context of mediation.[...]

[...]174. GREVIO strongly encourages the Belgian authorities to:

- a. bring the legislative provisions on mediation into compliance, taking into account the prohibition by Article 48 of mandatory alternative dispute resolution processes in situations where there is violence against women;
- b. take appropriate measures to train, raise awareness among and provide guidance for the relevant professionals, particularly judges, prosecutors, mediators and support service providers, so that they are able to identify and distinguish between intimate partner violence and situations of conflict and can assess the desirability of mediation in the light of the need to respect the victim's rights and interests [...].

DENMARK

Denmark: Legal Framework

Victim-Offender Mediation was practised in pilot projects during the 1990s (a first one from 1994 -1996 and then a second from 1998-2003) in some Danish police districts.

In 2007, a commission established by the Ministry of Justice set out recommendations to establish a nation-wide permanent scheme (Justitsministeriet, 2008).⁸⁷

In 2010, after an extension on a small scale of the previous pilot projects, The Law on *Konfliktraad* (i.e. Victim-Offender Mediation) was finally implemented.⁸⁸ The legislation stipulates that mediation is confidential and, as a consequence, mediators are included under

⁸⁶ GREVIO's Baseline Evaluation Report Grevio on Belgium (2020), p. 49 ff.

⁸⁷ Justitsministeriet (2008). *Betaenkning om Konfliktraad*, available at: <https://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2008/Betaenkning_om_konfliktraad.pdf>.

⁸⁸ LOV nr. 467 af 12/06/2009, The Law on Konfliktraad (2009), available at: <<https://www.retsinformation.dk/eli/lta/2009/467>>.

various legislative provisions which define criminal responsibility in case of breaking confidentiality with a client.

Denmark: State Practice

In Denmark Victim-Offender Mediation takes the technical terms of *Konfliktraad* and it is established by the National Police. On a national level the VOM secretariat is placed within the National Centre for Prevention. One police coordinator for each of the 12 police districts is responsible for the local implementation. Coordinators are generally reluctant to use mediation in cases of domestic violence, but it is done in some police districts.⁸⁹

Konfliktraad is never an alternative to a criminal sanction. Participation is conditional on a full or partial confession. The participation of both parties must be voluntary and parental consent is necessary under the age of eighteen.

In theory all types of crimes, also cases of severe violence, can be referred to restorative justice. However, only a small number of cases of sexual violence have been referred to *Konfliktraad* since 2010. For example, in 2013 Denmark had around 700 VOM cases, of which only 51 were cases of IPV.

Victim-offender mediation can take place at any stage of the criminal justice process, but for sexual crimes mediation is most likely to take place post-conviction.

In Denmark (as in Finland), mediation offices assess cases by relying mostly on police reports, but they may also conduct phone conversations or have personal discussions with the coordinator, victim, and/or offender.⁹⁰

Konfliktraad employs the services of 60 lay mediators, recruited among citizens by newspaper announcements. The majority of them has a professional background in mediation and they need to follow five days of general training. There is no special training for cases of domestic violence.

Denmark: CEDAW's Committee and GREVIO's recommendations

GREVIO mentioned VOM in its Baseline Evaluation Report on Denmark but remains neutral. It states that it is a voluntary and additional process and that “mediation is carried out by trained and impartial mediators affiliated with the Danish National Police Force, and can take place before or after criminal proceedings. It has no effect on the outcome of the criminal proceedings and does not replace a conviction”.⁹¹

FINLAND

Finland: Legal Framework

In 2006, the Act on Conciliation in Criminal and Certain Civil Cases came into force, introducing court-connected mediation and defining judges as mediators. It promoted more uniformity and legal protection for the involved parties. The act requires voluntary consent by both parties and either party may withdraw their consent at any time. The act also restricts mediation in cases of intimate partner violence because only prosecutors or the police may propose it, whereas it can be initiated by perpetrators and victims of other types of crime.⁹²

⁸⁹ Keenan, Zinsstag, *Sexual violence and restorative justice addressing the justice gap*, Oxford University Press, 2022.

⁹⁰ Drost et. al (2015), *Restorative Justice in case of Domestic Violence*, cit.

⁹¹ Grevio Baseline Evaluation Report Grevio Denmark (2017).

⁹² Ministry of Social Affairs and Health, Act on Conciliation in Criminal and Certain Civil Cases, 1015/2005, (2005), available at: <<https://www.finlex.fi/fi/laki/kaannokset/2005/20051015>>.

Finland, as a Member state of the European Union, is bound by the EU Victims Directive of 2012.⁹³ Article 12 obliges Member states to take measures that will ensure that victims who choose to participate in RJ processes have access to safe and competent RJ services. However, the Directive does not explicitly refer to the use of RJ in cases of violence against women. The following year, in 2016, the Equality Act (915/2016) was amended and the possibility of mediation as a legal remedy was included. It states that mediation is voluntary and is always based on the consent of both parties.⁹⁴

Finland: State Practice

Finland has a relatively long history on the use of mediation as a resolute legal means. The first pilot projects were established in the 1980s, referring mediation also to cases of intimate partner violence. At first, mediation was arranged by civil society organisations and NGOs municipalities with minimal state supervision and guidance.

Nowadays the Finnish Regional State Administrative Agencies are responsible for arranging mediation services and ensuring that they are appropriately accessible throughout the country. Mediators are interviewed and selected and those mediating IPV cases have already been involved in mediating ‘easier’ cases.⁹⁵

The Finnish Forum for Mediation seems to promote a proactive approach to mediation and considers mediation in domestic violence and other cases of serious crime as a viable option. Numbers of domestic violence cases referred to mediation doubled from approximately 1000 cases in 2010 to almost 2000 cases in 2011, and 2300 cases in 2016. In 2017, domestic violence accounted for 16.4% of all mediation cases.⁹⁶

Finland: CEDAW Committee’s and GREVIO’s recommendations

In 2008, the CEDAW Committee recommended Finland to “carry out studies and monitor closely the new law on the mediation procedure in order to ensure that such procedure is implemented in a way that respects and promotes women’s human rights and does not lead to perpetrators escaping prosecution”. Moreover, it observed that “the new mediation procedure may lead to the re-victimization of women who have suffered violence”.⁹⁷

In 2014, the CEDAW Committee, recalling the general recommendation No.19 on violence against women, observed that “mediation and conciliation procedures are increasingly employed in domestic violence cases, notwithstanding recommendations in the Government Programme and the Government Action Plan for Gender Equality 2012-2015 to limit its use, and notwithstanding the previous concerns of the Committee (CEDAW/C/FIN/CO/6, para. 15) that such procedures may lead to the revictimization of women who have suffered violence” and recommended to “take the legislative and other measures necessary to prohibit mandatory mediation and conciliation in cases of intimate partner and other forms of domestic violence”.⁹⁸ In 2022, the CEDAW Committee concerned about the fact that “mediation in cases of intimate partner violence remains a possibility and is reportedly being increasingly used”. In addition, the Committee recommended to “give priority to prosecution over the use of mediation in cases of

⁹³ See footnote n. 67.

⁹⁴ Amendment 915/2016, Act on Equality between Women and Men, available at: https://www.finlex.fi/en/laki/kaannokset/1986/en19860609_20160915.pdf [Accessed 24 November 2023]

⁹⁵ Drost et. al, *Restorative Justice in case of Domestic Violence*, cit.

⁹⁶ Ibid.

⁹⁷ Human Right Index, CEDAW/C/FIN/CO/6 (CEDAW 2008).

⁹⁸ Human Right Index, CEDAW/C/FIN/CO/7 (CEDAW 2014).

intimate partner violence and domestic violence and ensure that referral to mediation does not result in the discontinuation of criminal investigation and prosecution in these cases”.⁹⁹ Also, GREVIO raises some concerns about the use of VOM. In particular, although the Act on Conciliation in Criminal and Certain Civil Cases requires voluntary consent by both parties, in practice it appears to be: “extensive use of mediation by police and prosecution”.¹⁰⁰ Moreover, GREVIO notes with concern that “mediation is carried out by lay mediators with only a small amount of training and that they may not be able to recognise the power dynamics at play in intimate partner violence”.¹⁰¹ It added that, since the power to propose mediation is placed with the police and the prosecutors, this may have an impact on the investigation and the women’s access to justice. A consequence could be that, “depending on the case, less effort is made to investigate domestic violence cases which have already been routed to mediation”.¹⁰² Finally, GREVIO urges the Finnish authorities to reconsider the power vested in the police to propose mediation as a criminal justice measure in domestic violence cases, because: “having this power might jeopardise the effectiveness of criminal investigations”.¹⁰³

GREECE

Greece: Legal Framework

In 2006, Greece adopted the Law on Combating Domestic Violence, which included the availability of mediation procedures.¹⁰⁴ In 2007, Greece introduced penal mediation for IPV cases as a result of the harmonisation of Greek legislation with EU directives. Penal mediation was therefore accepted but only under the following circumstances: the unconditional agreement of the victim, the cohabitation of the couple and in case of not living together, the existence of children in the family.¹⁰⁵

Greece, as a Member state of the European Union, is bound by the EU Victims Directive of 2012.¹⁰⁶ Article 12 obliges Member states to take measures that will ensure that victims who choose to participate in RJ processes have access to safe and competent RJ services. However, the Directive does not explicitly refer to the use of RJ in cases of violence against women.

Greece: State Practice

In Greece, professionals working in the field of domestic violence are not trained mediators, but family therapists and counsellors in the context of family therapy and they follow an internal training.¹⁰⁷ With the law on penal mediation, the procedure was assigned to the National Centre for Social Solidarity (E.K.K.A.), which is a State organisation with a program for couples’ and individuals’ counselling and psychotherapy. In cases of violence against women, the prosecutor must investigate the probability of implementing penal mediation, after having talked to both the victim and the perpetrator, and then sends a referral to E.K.K.A. Victim safety is protected by not referring severe cases to mediation. The prosecutor explains to the couple or the perpetrators that they are obliged to call E.K.K.A to arrange for an appointment. This phone call is necessary and is considered to be part of the process, it proves their consent for starting the mediation

⁹⁹ Human Right Index, CEDAW/C/FIN/CO/8 (CEDAW 2022).

¹⁰⁰ Grevio, Baseline Evaluation Report (Finland), 2019, p. 47.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Grevio Baseline Evaluation Report Grevio Finland (2019).

¹⁰⁴ Law on Combating Domestic Violence (2006), Art.11, 3500/2006.

¹⁰⁵ Drost et al., *Restorative Justice in case of Domestic Violence*, cit., p.18.

¹⁰⁶ See note no 67.

¹⁰⁷ Drost et al., *Restorative Justice in case of Domestic Violence*, cit., p. 22.

process.¹⁰⁸ The case is closed when the counselling program run by qualified psychologists has been conducted and completed. Only in Greece there is an obligatory observation period of three years after the mediation has been successfully completed.¹⁰⁹

Greece: CEDAW Committee's and GREVIO's Recommendations on the Use of VOM

In 2007, the CEDAW Committee observed with concern that the mediation procedure available after the adoption of the Law on Combating Domestic Violence in 2006, in certain cases, could “lead to the re-victimization of women who have suffered violence”. It therefore recommended to “carry out studies and monitor closely Law on Combating Domestic Violence, particularly its mediation procedure, in order to ensure that the legislation is implemented in a way that respects and promotes women's human rights and does not lead to perpetrators escaping punishment r) put in place training measures for judges who conduct mediation in criminal proceedings for domestic violence cases so as to enhance their capacity to deal with violence against women in a gender-sensitive manner”.¹¹⁰

In 2013, the CEDAW Committee noted the adoption of the National Programme for Preventing and Combating Violence against Women for 2009-2013 and the abolition of the use of mediation in cases of domestic violence.¹¹¹

IRELAND

Ireland: Legal Framework

Restorative justice is defined in Irish law as any scheme through which, with the consent of each party, a victim and an offender or alleged offender engage with one another to resolve, with the assistance of an impartial third party, matters arising from the relevant offence or alleged offence.¹¹² It aims to enable all those affected by an offence to participate actively in repairing the harm done and to find a positive way forward.

Ireland: State Practice

In Ireland, restorative justice is currently used in many parts of the country and stages of the criminal justice process, and with various offence types.¹¹³ This includes with lower tariff offences as part of diversion from prosecution or conviction, as well as post-sentence to help meet the needs of people affected by some of the most serious offences. Restorative justice is delivered by the Probation Service (with youth and adult offending, pre-sentence and post-sentence), by An Garda Síochána (within the Garda Youth Diversion Programme), and by several geographically bounded Community-Based Organisations that receive referrals at specific points in the criminal justice process.

Recent research by Restorative Justice: Strategies for Change (RJS4C Ireland) estimated that, in 2019, around 850 cases involved restorative justice in Ireland. Of these, approximately 280 were offences that had an identifiable victim, and the victim chose to participate in some form in around half of such cases.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ CEDAW/C/GRC/CO/6 (2007).

¹¹¹ CEDAW/C/GRC/CO/7 (2013).

¹¹² Criminal Justice (Victims of Crime) Act 2017, s.2.

¹¹³ *Promoting and supporting the provision of Restorative Justice at all stages of the criminal justice system*, Department of Justice, pp. 5 ff, available at: <https://www.drugsandalcohol.ie/39334/1/DOJ_restorative_justice_2023.pdf. This whole subsection is drawn from this paper>.

In response to the Programme for Government commitment, the Department of Justice 2021 Action Plan included restorative justice among its strategic objectives to be prioritised over the next three years. The goals include enhancing community safety; to reduce reoffending; to support victims; and to respond to gender-based violence. The 2021 Action Plan outlined five actions around restorative justice:

- Action 158: Map the current state of play of restorative justice (Q1)
- Action 159: Activate a restorative justice website (Q1)
- Action 160: Develop options for an appropriate mechanism and process to create awareness and availability of restorative justice at all stages of the criminal justice system with consistency of service ensuring quality in training and practice (Q3)
- Action 161: Consult with stakeholders on options and finalise a policy paper on the most appropriate choice (Q3)
- Action 162: Publish policy proposals (Q4)

In relation to Actions 158 and 159, the Department of Justice funded a group of restorative justice experts and researchers to map the delivery of restorative justice in Ireland, and to publish their findings on a new website. This website was launched in January 2021. It includes the findings of that mapping exercise, and around 35 case studies illustrating the use of restorative justice and restorative practices in criminal justice settings, among other resources.

Ireland: Report to GREVIO

Replying to GREVIO's request about how Irish law respects Article 48 of the Istanbul Convention, Ireland stated:

The Mediation Act 2017¹¹⁴ facilitates the settlement of disputes by mediation and specifies the principles applicable to mediation. Section 3 of the Mediation Act 2017, as amended by section 55 of the Domestic Violence Act 2018, provides that the Mediation Act 2017 does not apply to proceedings under the Domestic Violence Act 2018.

Also:

Under Irish law, mediation or conciliation are not mandatory within the framework of legal separation and divorce proceedings. While there is an obligation on the legal representatives of the parties in such proceedings to make the parties aware of such processes, there is no obligation on the parties to engage in them, as they are voluntary and are not considered appropriate in cases where domestic violence may be a factor.

Intake procedures for the Legal Aid Board's family mediation services include screening for domestic violence issues.¹¹⁵

¹¹⁴ Mediation Act 2017 (n. 27) is an Act to facilitate the settlement of disputes by mediation, to specify the principles applicable to mediation, to specify arrangements for mediation as an alternative to the institution of civil proceedings or to the continuation of civil proceedings that have been instituted; to provide for codes of practice to which mediators may subscribe; to provide for the recognition of a body as the Mediation Council of Ireland for the purposes of this Act and to require that Council to make reports to the Minister for Justice and Equality as regards mediation in the State; to provide, by means of a scheme, an opportunity for parties to family law proceedings or proceedings under section 67A(3) or 117 of the Succession Act 1965 to attend mediation information sessions; to amend the Guardianship of Infants Act 1964, the Judicial Separation and Family Law Reform Act 1989 and the Family Law (Divorce) Act 1996; and to provide for related matters.

¹¹⁵ Report submitted by Ireland pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report) (2022), p. 48, available at: <<https://rm.coe.int/grevio-inf-2022-16-ireland-state-report/1680a81395>>.

SPAIN

Spain: Legal Framework

Article 87 ter of Organic Law 2004 (Ley Orgánica del Poder Judicial) explicitly prohibits the use of mediation as a form of restorative justice when addressing cases of gender-based violence. The use of family mediation is also being regulated by the national legislation (Law 5/2012 of 6 July 2012) and it is supposed to be a voluntary process, although the first attempt of mediation can be ordered by a judge.

For what concerns specifically mediation in Spanish legislation, Article 44, paragraph 5, of Organic Law 1/2004 prohibits mediation in cases of intimate partner violence that come before a specialist violence against women court.¹¹⁶

Spain: GREVIO's Recommendations

In 2020 GREVIO's report to Spain, the Committee assessed the country's level of compliance to Article 48 of the Istanbul Convention on the prohibition of mandatory alternative dispute resolution processes or sentencing. GREVIO positively noted a good level of compliance from the country in implementing such prohibition. Indeed, the Committee appreciates that in Spain Article 44, paragraph 5 of Organic Law 1/2004 expressly prohibits mediation in cases of intimate partner violence that are brought before a specialist violence against women court. Moreover, Measure 116 of the State Pact even reinforces this absolute prohibition against mediation in cases of intimate partner violence in legislation and protocols that are to be adopted or reviewed. However, GREVIO shows particular concern regarding those cases in which mediation applies to a family level especially in divorce proceedings when the victims had not previously disclosed experiences of abuse.¹¹⁷ According to GREVIO, in those particular cases a mediation process can even affect the woman's willingness to denounce any potential abuse that occurred before the start of the mediation. Moreover, GREVIO seems particularly concerned that in some autonomous communities the practice of mediators seems to ignore any events prior to mediation and this leads to the risk that prior experiences of abuse do not surface.

In the text, GREVIO underlined:

the risk that mediation in family law may be proposed in divorce proceedings in cases in which women did not previously disclose their experiences of intimate partner violence. With many mediation professionals untrained to recognise signs of violence, risk factors and the widespread tendency to perceive intimate partner violence as a "family conflict", the results of the mediation process may not adequately reflect the safety concerns and protection needs of all family members. According to the authorities, however, cases must be referred to the specialist violence against women courts where incidents of violence are disclosed during mediation processes and an assessment must always take place before proposing mediation. In this context, GREVIO points to the worrying information that in some autonomous communities, the practice of mediators seems to be to disregard any events prior to the mediation process. For women victims of intimate partner violence who have until that point not disclosed their experiences, this effectively bars them from signalling abusive behaviour that happened in the past and that may have ramifications for the mediation process. This results in the unfortunate situation where prior experiences of abuse do not surface, and no framework exists to ensure that it can be addressed.¹¹⁸

In its response to GREVIO's baseline report, Spain claims that, contrary to what GREVIO pointed out, there is no real risk that mediation would be resumed in cases of lacking prior

¹¹⁶ Spanish legislation, Article 44, paragraph 5, of Organic Law 1/2004.

¹¹⁷ Grevio Baseline Evaluation Report GREVIO Spain (2020), available at: <<https://rm.coe.int/grevio-s-report-on-spain/1680a08a9f>>.

¹¹⁸ Ibid.

evidence of violence. Indeed, whether during the legal proceedings any suspicion that prior violence has been committed emerged, any possibility of mediation would be excluded. Spain's comment explains this point as follows:

[...] we do not agree that there is a risk involved in mediation being resumed where there has been no prior evidence of violence. It is precisely to avoid this risk that the Civil Procedure Act establishes, in its Article 49 bis, a "bridging" procedure. Within this, the presence of any indication, however slight, of a situation that in civil proceedings may give rise to a suspicion of underlying gender violence, the procedure is expressly referred to the Courts of Violence against Women and any possibility of mediation is thereby ruled out.¹¹⁹

THE NETHERLANDS

The Netherlands: Legal Framework

In 2012, a new article was included in the Dutch Code of Criminal Procedure¹²⁰ (Article 51h) that created a legal base for restorative justice in penal cases for the first time. The Article provides an obligation for the police and the public prosecutor to inform victims and offenders about the possibility of mediation. The Article, furthermore, states that any agreement reached should be taken into consideration by the judge when imposing a sanction or measure.¹²¹

The Dutch Legal Framework on Restorative Justice

In the Netherlands, the relationship between Restorative Justice and criminal law differentiates between three models:

- 1) Restorative Justice is a part of the normal criminal law proceedings. In a certain phase of the procedure the case can be handed to a mediator. If he/she can find a solution the case can be waived by police or public prosecutor or is ending with a lower sanction. This model was in use in the Netherlands without being strictly institutionalised. With the nation-wide introduction of the victim-offender meetings in 2007 it became out of use, but theoretically it can be practised.¹²²
- 2) Restorative Justice is an alternative for the normal criminal lawsuit. In former times this model was known as "diversion". At present it is used in the Netherlands frequently in cases of neighbourhood mediation. If the mediation ends successfully, there is no need any more for public bodies sanctions.¹²³
- 3) Restorative Justice is supplementary to criminal proceedings. This model is primarily used in the Netherlands in cases of serious crime, but then mainly after the offender was sentenced at court, but there are also writers who stress that mediation in criminal law cases has to be

¹¹⁹ Spain comments on GREVIO's Report (2020). Available at: <https://rm.coe.int/final-comments-of-the-spanish-government/1680a077b8>.

¹²⁰ Criminal Procedure Code of the Kingdom of Netherlands (1926, as amended 2012). Available at: https://legislationline.org/sites/default/files/documents/d2/Netherlands_CPC_am2012_en.pdf.

¹²¹ Article 51h of the Dutch Code of Criminal Procedure reads as follows: '1. The Public Prosecutor's Office shall promote notification by the Police, at the earliest opportunity, of the possibilities of mediation to the victim and the accused. 2. If mediation between the victim and the accused has led to an agreement, the court is to take this into account in imposing punishment or a measure. 3. Upon having established that the victim has consented to mediation, the Public Prosecutor's Office shall encourage such mediation between the victim and the convicted person. 4. Further rules relating to mediation between the victim and the accused or between the victim and the convicted person shall be regulated by General Administrative Order'.

¹²² European Commission, The 3E Model for a Restorative Justice Strategy in Europe, Final national report of the Netherlands (2013), p. 6 ff, available at: http://3e-rj-model.web.auth.gr/files/national_reports/Netherlands.pdf.

¹²³ Ibid.

exclusively a contact between victim and offender guided by a mediator that takes place in their interest and consequently they have to decide together what has to happen with its results. Such a “full mediation” has to keep its distance from the criminal justice system.¹²⁴

In none of these models the aim is to replace criminal proceedings by Restorative Justice.¹²⁵

The Netherlands: State Practice

The Dutch legislator chose until now primarily to improve the system of material compensation and restoration for the victim in the framework of criminal law while leaving victim-offender mediation in criminal cases with the exception of Article 51h CCP outside this framework.¹²⁶ Furthermore, the category of individuals benefiting from the rights introduced for victims was expanded.¹²⁷ In parallel with these reforms, new institutions were founded, for example the Dutch Mediation Institute and the Foundation Restorative Justice Netherlands.¹²⁸

In the Netherlands some RJ initiatives have been implemented and tested by the Probation Services, the police, the Department of Public Prosecution, youth welfare instances and private organisations locally or district-wide.¹²⁹ The first project, a private law out of court settlement with the name *dading* (compromise) was established more than 20 years ago.¹³⁰ At present it is of little importance. The second model, consisting in victim-offender contacts, is used by two independent organisations: Victim in Focus, facilitating victim-offender conversations, and *Eigen Kracht* (Real Justice/Family group conferences), organising restorative conferences.¹³¹ The third type of initiative involves implementing RJ in penitentiary institutions,¹³² with examples found in both youth and adults’ prisons. These initiatives focus on incorporating RJ into the detention environment, after the offender has been sentenced.¹³³ The Public Prosecutor Service (PPS) can also issue a non-consensual “penalty order” in less serious cases (Law of 7 July 2006, Staatsblad 2006, 330).¹³⁴ This could include a form of hearing even if the victim is not present.¹³⁵ The intention is to resolve cases quickly and this can result in the imposition of a penalty of, among other things, an award of compensation, community service (up to 180 hours) or a fine.¹³⁶ A prison sentence is not an option under this process.¹³⁷

The Netherlands: GREVIO's Recommendations

In its 2019 report to the Netherlands, the Grevio assessed the country’s level of compliance with Article 48 of the Istanbul Convention on the prohibition of mandatory alternative dispute resolution processes or sentencing. After having acknowledged the two types of mediation available in the Netherlands, GREVIO confirmed that “Mediation in criminal law is a voluntary

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ GREVIO’s Baseline Evaluation Report on the Netherlands (2019), p. 50 ff, available at <<https://rm.coe.int/grevio-report-on-netherlands/1680997253>>.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

process intended to supplement the criminal justice process by offering the victim the opportunity to reach closure in a way that the formal criminal justice process cannot.”¹³⁸ Moreover, “Both victim and perpetrator must consent to the process and may withdraw their consent at any time. Mediation is only offered where the perpetrator has admitted guilt, thereby indicating the will to take responsibility for his actions”¹³⁹ Thus, the voluntary and supplementary nature of mediation is underlined, together with the importance of the victim’s consent and perpetrator’s admittance of guilt. However, GREVIO is concerned with the increased reliance on out-of-court settlements and the risk of leniency by the criminal justice system (prosecution and judiciary) towards the perpetrator. This and other factors could lead to the decriminalisation of domestic violence.

GREVIO is also worried “that decisions to defer prosecution are made exclusively by the prosecutor (with the perpetrator’s consent) without consulting or obtaining the consent of the victim. This sends the worrying message that domestic violence is not a crime fit for criminal conviction, which is contrary to the purposes of the convention. It appears that overall there is a lack of victim participation in those decisions made to bring and continue prosecutions”¹⁴⁰ This is particularly important, since authorities are supposed to make sure of the victim’s voluntary participation in mediation.

ITALY

In the Italian legal system, restorative justice is not an alternative method to that of ordinary justice, but assumes an incidental role, which very often only goes to smoothing out the sanctioning treatment of a person who has been found guilty at the end of the trial and has at the same time carried out a programme of reparation with a positive outcome. Article 112 of the Italian Constitution, which enshrines the principle of mandatory prosecution, would seem to preclude a wider use of restorative justice measures.¹⁴¹ In the Italian legal system, the public prosecutor, on the basis of a prognostic judgement on the likelihood of obtaining a conviction, will have to decide whether to file or prosecute. This legal obligation makes it impossible to regard mediation as a mechanism preventing criminal prosecution.

Legal Framework

Restorative justice was regulated for the first time in an organic manner with the so-called *Cartabia Reform (l.d. 150/2022)*,¹⁴² which seeks to implement many European and international norms. Reference is made, among others, to EU Directive 29/2012,¹⁴³ Council of Europe Recommendation No. 19/99¹⁴⁴, the Venice Declaration on the Role of Restorative Justice in Criminal Matters and the Council of Europe Recommendation on Restorative Justice in Criminal Matters, CM/Rec(2018)8. The regulation of restorative justice is contained in Articles 42 to 67 of Legislative Decree 150/2022.¹⁴⁵ Article 42 defines restorative justice as “any programme that enables the victim of the offence, the person named as the offender and others in the community to participate freely, consensually, actively and voluntarily, in the resolution of issues arising

¹³⁸ GREVIO’s Baseline Evaluation Report on the Netherlands (2019), p. 50 ff, available at <<https://rm.coe.int/grevio-report-on-netherlands/1680997253>>.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Art. 112 Const. (“*The prosecutor has an obligation to prosecute.*”).

¹⁴² See G.U. n. 245, 19 October 2022, S.S. n. 5.

¹⁴³ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012.

¹⁴⁴ See Comments on Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters.

¹⁴⁵ See G.U. n. 245, 19 October 2022, S.S. n. 5.

from the offence, with the help of an impartial, appropriately trained third party called a mediator”.

National Practice

The objective of the programme is, therefore, to obtain a restorative outcome, which consists in the reconstruction of the broken bond between victim, offender and community. The reparative outcome may be symbolic, and therefore consist in statements, formal apologies, behavioural commitments also public or addressed to society, agreements concerning the frequentation of persons or places, or material, such as compensation for damages, restitution, efforts to elide or mitigate the harmful or dangerous consequences of the offence or to prevent it from having further consequences (Article 56).

Restorative justice programmes take place at the Restorative Justice Centres established by the local authorities and responsible for the activities related to the organisation, management, delivery and conduct of the programmes.

The restorative programme can be accessed for any offence, regardless of its seriousness, and the request can be submitted at any stage and level of the proceedings.

The Reform has given broad powers to the judge, who is called upon to perform a function of "filtering" of cases to be transmitted to the Restorative Justice Centres. In fact, pursuant to Article 129 bis of the Code of Criminal Procedure,¹⁴⁶ the judge orders the defendant and the victim to be directed to the above-mentioned Centres for the commencement of a restorative justice programme at the request of the defendant, the victim or *ex officio*, if he or she considers that the conduct of a restorative programme may be useful and does not entail a concrete danger for the parties concerned and for the establishment of the facts.

The parties participate in the restorative programme only with their free, informed and written consent (Article 48)¹⁴⁷. During the course of the meetings, the judge has the power to request information on the status and timing of the programme.

At the end of the programme, a report drawn up by the mediator containing a description of the activities carried out and the restorative outcome achieved, as well as the failure to carry out the programme, the interruption thereof or the failure to achieve the restorative outcome, is forwarded to the proceeding judge.

GREVIO's Final Evaluation Report on Italy on the Introduction of Restorative Justice Measures

In the GREVIO final report of 2020, the experts manifest an increasing concern regarding the Italian legislation on restorative justice.¹⁴⁸ In particular, GREVIO shines a light on the fact that using restorative justice in trials regarding domestic violence might amount to a violation of Article 48 of the Istanbul Convention:

[...] 36. GREVIO expresses grave concern in the face of recent legislative proposals which are the clear expression of these tendencies and of their potential to deny the very existence of violence against women which occurs in families. GREVIO refers to this effect to the draft decree No. 735 submitted to parliament, which, had it been approved, would have entailed a serious retrogression in the fight against gender inequality and deprived survivors of domestic violence of important protections. The draft law included, as described in the shadow report, *the proposal to introduce compulsory mediation*, a reference to the so-called parental alienation syndrome, and mechanisms holding women responsible for children's "alienation" towards their father by restricting their parental rights. The proposal contemplated furthermore sanctioning women whenever their claims of violence

¹⁴⁶ Art. 129 bis Code of Criminal Procedure (D.P.R. 22 September 1988, n. 477) [Updated: 02/11/2023].

¹⁴⁷ See CETS No. 210.

¹⁴⁸ GREVIO's Baseline Evaluation Report on Italy, 2020.

do not result in convictions. The draft decree has met with severe criticism from many politicians and members of parliament, women's NGOs, academics and lawyers, and was discussed at length during GREVIO's evaluation visit. GREVIO subscribes entirely to the analysis of the draft decree made by the UN Special Rapporteur on Violence against Women. GREVIO takes note of information provided by the authorities after the evaluation visit indicating that the adoption of such a piece of legislation is not among the objectives of the Italian government. *Nevertheless, GREVIO is extremely concerned that such a proposal contemplated violating important provisions of the Istanbul Convention, including, but not limited to, Article 48 prohibiting compulsory alternative dispute resolution processes.*[...] ¹⁴⁹

Additionally, GREVIO expresses grave concern on the practice of Italy regarding child custody:

[...] as explained in detail in relation to Article 31 of the convention, GREVIO found ample evidence that mediation processes are de facto *enforced upon victims during child custody processes, running counter to the requirement of Article 48 of the convention.* [...]. During mediation, the responsibility for the violence and its consequences was attributed to both parents. *Women and children were blamed for the perpetrators' actions and experienced secondary victimisation as the perpetrators' patterns of power and control continued "Best interests" considerations prioritise the maintenance of perpetrator/child relationships, and this means that priority was given to "abuser's rights" over victim safety As a result, victims of domestic violence were greatly disadvantaged during mediation, and this process resulted in decisions that put them and their children at risk for further abuse In addition, professionals did not know nor apply the Istanbul Convention.* [...] ¹⁵⁰

Finally, GREVIO heavily criticised draft decree 735¹⁵¹ which, should it be confirmed, would introduce compulsory mediation in all separation cases involving children. In this regard:

[...] GREVIO finds it profoundly disquieting that the political agenda of the governing authorities should give legitimacy to the concept of parental alienation as a "serious phenomenon" to combat and give rise to legislative proposals such as the draft decree No. 735 under examination in parliament. In its Articles 1 to 4 and 7 and 8, the decree would introduce compulsory mediation in all separation cases where a child is directly or indirectly involved, elevating mediation to a condition in order to access judicial remedies regardless of any instance of violence. Of particular concern is Article 2 of the draft decree which provides for an obligation of secrecy, meaning that all documents related to the mediation procedure would remain secret and would not be able to be accessed during judicial proceedings except for the agreement reached during mediation. As noted by the UN Special Rapporteur on Violence against Women, this provision would greatly limit the power of the judicial authority to access key information for making a decision in relation to a separation case, limiting the ability of the judiciary to fulfil the state's obligations regarding the protection of victims/survivors of domestic violence[...]. ¹⁵²

5. General Conclusion and Legal Advice to D.i.Re

At the international level there is no absolute prohibition on the use of restorative justice measures as shown by the lack of an explicit regulation in the Conventions as well as in the Committees and Courts' jurisprudence or quasi-jurisprudence. Nevertheless, there is a wide agreement on the need of cautiousness and awareness when applying these tools.

The comparison of the States' national legislation and practice shows that in general the use of RJ in domestic violence cases may raise concerns by both the CEDAW Committee and the GREVIO. A risk of re-victimisation of women and a lack of adequate training of mediators (in mediation cases) is often reported. Furthermore, mediation, when applied before the judgement,

¹⁴⁹ GREVIO, Baseline Evaluation Report on Italy, 2020, *emphasis added*.

¹⁵⁰ *Ibid*, *emphasis added*.

¹⁵¹ See: DDL N.735, XVIII Legislature: *Rules on shared custody, direct maintenance and the guarantee of bigenitoriality*, 1st of August 2018.

¹⁵² GREVIO, Baseline Evaluation Report on Italy, 2020.

is seen as a factor that may have a negative impact on the continuation of investigations. The CEDAW Committee and the GREVIO encourage States to implement national legislation in a way that respects women's rights and does not result in perpetrators escaping punishment.

More concerns were raised with respect to countries that frequently use RJ in cases of domestic violence (such as Finland), as opposed to those that rarely use it (such as Denmark).

The only two countries, among the ones analysed, that reported an appreciation comment were Austria and Spain. GREVIO's Baseline Evaluation Reports indicate that in Austria, women's free will is respected through the introduction of a 'risk assessment tool' that evaluates the eligibility of cases to be referred to mediation. In the case of Spain, GREVIO positively noted the compliance with Article 48 through the adoption of the Organic Law 1/2004 that explicitly prohibits mediation in cases of intimate partner violence.

Indeed, in light of this analysis, best practices should fulfil a number of conditions.

1) The free will of the victim must be prioritised, meaning that the use of restorative justice measures must be voluntary as evidenced by Article 48 of the Istanbul Convention and the GREVIO's report on the Netherlands.

2) According to CEDAW's recommendation to Finland, the priority of prosecution over mediation in cases of intimate partner violence and domestic violence must be ensured, as well as the assurance that referral to mediation will not result in the discontinuation of criminal investigation and prosecution (see subsection "*Finland*").

3) When applying victim-offender mediation, a high quality and extensive training of the mediators is required. As shown by GREVIO's report on Belgium, the fundamental role of facilitators emerges, but they must be properly trained to ensure a thorough understanding of the context concerning both the victim and the offender (see subsection "*Belgium*"). Even the GREVIO's report on Finland states the importance of proper training of the professionals conducting mediation (see subsection "*Finland*"). The importance of ensuring quality in training and practice also emerges from Ireland's Department of Justice 2021 Action Plan.

4) Safeguard measures must be adopted. In this respect, the GREVIO has appreciated how VOM measures are handled in Austria, where safeguards are built into the system to try and ensure the respect of free will of the victim (see subsection "*Austria*").

BIBLIOGRAPHY / WEBSITES

BAROCAS, Briana & AVIELI, Hila & MILLS, Linda, *Restorative Justice Treatment for Domestic Violence Crimes: A Qualitative Study*, 2023, Criminal Justice and Behavior.

BISSARO, S. (s.d.), *La riforma Cartabia e le novità in materia di tutela delle persone offese nei delitti di violenza di genere*, in Osservatorio violenza sulle donne, Università degli Studi di Milano. Available at: [https://ovd.unimi.it/wp-content/uploads/sites/3/2021/10/Bissaro_OVD.pdf]

BROOKES, Derek, *Restorative Justice and Domestic Violence* (September 1, 2019).

DROST, Lisanne, HALLER, Birgitt, HOFINGER, Veronika, VAN DER KOOIJ, Tinka, LÜNNEMANN, Katinka, WOLTHUIS, *Restorative Justice in Cases of Domestic Violence. Best practice examples between mutual understanding and awareness of specific protection needs*, 2015, Verwey-Jonker Institute.

GANG, Daye & KIRKMAN, Maggie & LOFF, Bebe, *"Obviously It's for the Victim to Decide": Restorative Justice for Sexual and Family Violence From the Perspective of Second-Wave Anti-Rape Activists. Violence against women*, 2023.

GAVRIELIDES, T., *Domestic Violence and Power Abuse Within the Family: The Restorative Justice Approach*. In: Sturmey, P. (eds), 2023, *Violence in Families*. Advances in Preventing and Treating Violence and Aggression . Springer.

JOKINEN, Heidi , *Solving moral conflicts. Case restorative justice in domestic violence cases*, *Contemporary Justice Review*, 2021, 155-171.

KEENAN, Marie & ZINSSTAG, Estelle & O'NOLAN, Caroline, *Sexual violence and restorative practices in Belgium, Ireland and Norway: a thematic analysis of country variations*, *Restorative Justice*, 2016, 4. 86-114.

KEENAN, M., ZINSSTAG, E., *Sexual violence and restorative justice addressing the justice gap*, 2022, Oxford University Press.

MARSHALL, Tony F, *Restorative justice: an overview* ,1999, Research Development and Statistics Directorate, London (available on http://www.antonioacasella.eu/restorative/Marshall_1999-b.pdf).

PACKER, Hillary. *Restorative Justice and Intimate Partner Violence: A Summary of Findings from Two Reports*, Center for Court Innovation, 2021.

RONI Elias, *DePaul University, Restorative Justice in Domestic Violence Cases*, 2016.

SCHMIDT, Laura, *Is It Appropriate to Use Restorative Justice in Cases of Domestic Violence?*, 2023, *Magyar Rendészet*. 23. 219-230.

STUBBS, Julie, *Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice*. *Criminology & Criminal Justice*, Vol. 7, No. 2, pp. 169-187, 2007, Sydney Law School Research Paper No. 07/75, Available at SSRN: <https://ssrn.com/abstract=1032482>

STUBBS, Julie , *Gendered violence and restorative justice*, 2014 in *A Restorative Approach to Family Violence: Changing Tack*, edited by Hayden, A., Gelsthorpe, L., Kingi, V. and Morris, A. Published by Ashgate Publishing Ltd, Surrey, UK. ISBN 978-1-4724-1230-0 pp 199-210.

VAN WORMER, Kathryn S. & WALKER, Lorenn, *Restorative Justice Today: Practical Applications*, 2013, SAGE.

Belgian State practice: <<https://www.gov.scot/publications/rapid-evidence-review-uses-restorative-justice/pages/3/>>

Conclusions on the implementation of recommendations in respect of Italy adopted by the Committee of the Parties to the Istanbul Convention, IC-CP/Inf(2023)9. Available at: <https://www.fishonlus.it/files/2023/06/IC-CP-Inf20239_CoP-conclusions_Italy_eng.docx.pdf>

CM/REC (2018)8. Available at: <<https://www.cep-probation.org/wp-content/uploads/2018/10/Recommendation-CM-Rec-2018-of-the-Committee-of-Ministers-to-member-States-concerning-restorative-justice-in-criminal-matters-.pdf>>.

CM/REC (86)12. Available at: <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804f7b86>>.

2014 CEPEJ's report on European judicial systems. Available at: <<https://rm.coe.int/european-judicial-systems-edition-2014-2012-data-efficiency-and-qualit/1680785d95>>.

DECRETO LEGISLATIVO 10 ottobre 2022, n. 149

Attuazione della legge 26 novembre 2021, n. 206, recante delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonche' in materia di esecuzione forzata. (22G00158) (GU Serie Generale n.243 del 17-10-2022 - Suppl. Ordinario n. 38). Available at: <<https://www.gazzettaufficiale.it/eli/id/2022/10/17/22G00158/sg>>.

Document A/HRC/35/30/ADD.1 Report of The Special Rapporteur On Violence Against Women, Its Causes And Consequences On Her Mission To Israel.

Document A/HRC/35/30/ADD.3 Report of The Special Rapporteur On Violence Against Women, Its Causes And Consequences, On Her Mission To Argentina.

Final national report of the Netherlands (2013), pp. 5 ff. Available at: <http://3e-rj-model.web.auth.gr/files/national_reports/Netherlands.pdf-belgium>.

Greivio Baseline Evaluation Report Austria (2017). Available at: <<https://rm.coe.int/greivio-report-austria-1st-evaluation/1680759619>>.

Greivio Baseline Evaluation Report Belgium (2020). Available at: <<https://rm.coe.int/greivio-report-on-belgium/16809f9a2c>>.

Greivio Baseline Evaluation Report Greivio Denmark (2017). Available at: <<https://rm.coe.int/greivio-first-baseline-report-on-denmark/16807688ae>>.

Greivio Baseline Evaluation Report Greivio Finland (2019). Available at: <<https://rm.coe.int/greivio-report-on-finland/168097129d>>.

GREVIO Baseline Evaluation Report Italy (2020). Available at: <<https://executive.law.berkeley.edu/wp-content/uploads/2018/05/Italy-Legislation-on-Sexual-Violence-Sexual-Harassment.pdf>>.

Greivio Baseline Evaluation Report GREVIO Spain (2020). Available at: <<https://rm.coe.int/greivio-s-report-on-spain/1680a08a9f>>.

Greivio Baseline Evaluation Report Greivio The Netherlands (2019). Available at: <<https://rm.coe.int/greivio-report-on-netherlands/1680997253>>.

Greece Report to Greivio (2022). *Report submitted by Greece pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report)*. Available at: <<https://rm.coe.int/inf-2022-4-state-report-greece/1680a60a4e>>.

Ireland. Department of Justice. (2023) *Promoting and supporting the provision of Restorative Justice at all stages of the criminal justice system*. Policy paper. Dublin: Department of Justice. Available at: <https://www.drugsandalcohol.ie/39334/1/DOJ_restorative_justice_2023.pdf>.

Irish Report to GREVIO (2022). *Report submitted by Ireland pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report)*. Available at: <<https://rm.coe.int/greivio-inf-2022-16-ireland-state-report/1680a81395>>.

Raffaelli, F. (2023), *La giustizia riparativa alla luce della nuova riforma*, in D.it. Available at: <<https://www.diritto.it/giustizia-riparativa-alla-luce-della-nuova-riforma/>>.

Spain's Organic Act 1/2004 of 28 December on Integrated Protection Measures against Gender Violence. Available at: <https://www.coe.int/t/dg2/equality/domesticviolencecampaign/countryinformationpages/spain/LeyViolenciaGeneroingles_en.pdf>.

Spain comments on GREVIO's Report (2020). *Comments submitted by Spain on GREVIO's final report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report)*. Available at: <<https://rm.coe.int/final-comments-of-the-spanish-government/1680a077b8>>.

Upcoming recommendations of the Committee of the Parties in respect of Italy Report from Italian women's NGOs coordinated by D.i.Re - Donne in Rete contro la violenza(April 2023). Available at: <https://www.direcontrolaviolenza.it/wp-content/uploads/2023/06/Submission-GREVIO_def.pdf>.

LEGAL OPINION ON INTERIM MEASURES IN CASES OF GENDER-BASED VIOLENCE BEFORE HUMAN RIGHTS MONITORING BODIES¹

1. ADDRESSING THE QUESTIONS OF D.I.RE.

The purpose of this legal opinion is to respond to the question raised by D.i.Re. on the most effective system of individual measures to enhance women's rights before human rights treaty bodies.

By concentrating on specific cases submitted to various courts and committees, namely the European Court of Human Rights (ECtHR), the Human Rights Committee (HRC), the Committee on the Elimination of Discrimination Against Women (CEDAW), and the Committee against Torture (CAT) we examined the law and practice of interim measures in various systems. Time constraints prevented us from looking at protective measures and we decided to focus exclusively on interim measures.

2. OUTLINE OF THE LEGAL OPINION

Our legal opinion is set out in three separate sections. The first section analyses provisional measures as such in general terms: what is their rationale, what is to be addressed, how do they work and in what context. The second and third sections analyse the legal framework and practice of each convention, commenting on the relevant cases and drawing from the scholarly debate and the available statistical data. These sections will be divided into sub-sections according to the Convention under analysis and will conclude with brief general considerations. The order in which the different treaty bodies are presented is as follows: European Convention of Human Rights (ECHR); Human Rights Committee (HRC); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture (CAT). At the end of our legal opinion, general conclusions are drawn for the attention of D.i.Re.

3. GENERAL UNDERSTANDING OF INTERIM MEASURES

Interim measures are tools available to the treaty bodies to monitor the implementation and observance of human rights treaties. They are usually requested by the Committee or its subsidiary bodies (e.g. Working Groups, Rapporteurs) in response to an individual communication of an alleged violation of the treaty by a State party. The technical functioning of the request, implementation and monitoring of interim measures varies for each human rights treaty and convention, but some common elements can be identified.

¹ This legal opinion has been authored by Arthur Ovanessian, Serena Spagnoletta, Lisa Tassi, Mirna Toccaceli, Gaia Tonesi, Matteo Tornaghi, Emma Trevisan, Rachele Ugolini, Edoardo Veneziani. The authors are master's students in European and International Studies at the School of International Studies of the University of Trento. The opinion was written in November 2023 within the course of International Law (Advanced Unit) held by Professor Marco Pertile with the teaching assistance of Ms. Giulia Cagol. This challenge-based learning project was financed by the Teaching and Learning Center of the University of Trento. All websites were last accessed on 26 November 2023.

The specificity of interim measures is that they are adopted *prima facie*, meaning that they precede any final decision on the merits by the Committees or the Court, as they aim to protect the object of the decision by preventing harmful acts that would not be remedied by the decision itself. They are therefore requested in cases concerning fundamental human rights, in particular the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment. In some more limited occasions, interim measures have also been requested in cases related to the protection of the right to privacy and family life, freedom of conscience and religion, and freedom of expression.²

The ECtHR, the HRC Committee, and the CAT Committee regulated interim measures in their Rules of Procedure.³ Conversely, the CEDAW addresses interim measures only in its Optional Protocol,⁴ thus making their request possible only for those State parties which have ratified both the Convention and its Optional Protocol.

The HRC Committee and the CAT Committee, adhering to the Vienna Convention on the Law of Treaties, have taken the view that compliance with the request of interim measures derives from the good faith obligation to observe the treaty that the States parties ratified.⁵ Interim measures issued by the ECtHR and CAT Committee are considered to be binding as a violation of the right of individual application⁶ or a violation of specific provisions such as the prohibition of refoulement.⁷

Another recurring characteristic of interim measures is that, given the urgent and grave conditions which justify such a request, treaty bodies can choose to act *proprio motu*,⁸ without the need to obtain consent from the beneficiaries. The latter practice should ensure a prompt request by the Committee and, ultimately, effective protection.

Additionally, under the ECHR, the HRC, the CEDAW and the CAT,⁹ third parties (usually referred to with “any person concerned” or similar expressions) are allowed to file petitions on behalf of the alleged victim, which could be a significant option for NGOs as *D.i.Re.* On that, it is necessary to mention, however, that requests for interim measures cannot be anonymous,¹⁰ which means that States - receiving the requests from the Committee to adopt interim measures - will know who the potential victim behind the request is.

² As stated in Point B (7) of the 2017, *Informal guidance note by the secretariat for the States parties on procedures for the submission and consideration by treaty bodies of individual communications*, which refers to the International Covenant on Civil and Political Rights (ICCPR) and, therefore, applies to the HRC, CmTA and the CEDAW. It adds that the “*Adoption of interim measures has nevertheless also been requested in some situations to stop imminent alleged violations of other rights such as those protected under articles 17, 18, 19 or 27 of the Covenant*”.

³ European Court of Human Rights, Rules of Court adopted by the Plenary Court, 30 October 2023, Strasbourg; Rule 94 of Rules of Procedure of the Human Rights Committee, Rule 114 of Rules of Procedures of the CAT.

⁴ See Article 5 of the Optional Protocol of the Convention on the Elimination of All Forms of Discrimination Against Women.

⁵ See Article 26 of the Vienna Convention on the Law of Treaties: “*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*”.

⁶ European Court of Human Rights, *Mamatkulov and Askarov v Turkey*, Applications Nos. 46827/99 and 46951/99, Judgement of 4 February 2005, Grand Chamber.

⁷ See Point B (37) of the General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22 of the CAT.

⁸ As confirmed by Center for Justice and International Law, International Human Rights Law Clinic, University of California, Berkeley, “Comparative Analysis of the Practice of Precautionary Measures Among International Human Rights Bodies”, December 2012, pp. 9-10.

⁹ European Court of Human Rights, Rules of Court (30 October 2023), Rule 39 (1); Convention against Torture, Rules of Procedure, Rule 113 (a); Human Rights Committee, Rule 96 (1); Convention on the Elimination of Discrimination Against Women, Optional Protocol, Art. 2 (specific for communications).

¹⁰ European Court of Human Rights, Rules of Rules of Court (30 October 2023), Rule 47; Convention Against Torture, Article 22 (2); Committee on the Elimination of All forms of Discrimination Against Women, Rules of

Finally, requests for interim measures under the ECHR, the HRC, the CEDAW and the CAT are not published as separate decisions, but they are, instead, asked by treaty bodies through letters or Notes Verbales to the State parties. This further complicates understanding how frequently and efficiently this tool is used.

4. LEGAL FRAMEWORK

4.1. *European Court of Human Rights*

The possibility of ordering precautionary measures is not explicitly addressed neither in the European Convention on Human Rights (ECHR) nor in its subsequent protocols. However, the European Court of Human Rights (ECtHR) derives its power to implement precautionary measures from its mandate to safeguard the rights set out in the European Convention. Under Article 1 of the ECHR, States are responsible for ensuring the rights set forth in the Convention to everyone within their jurisdiction. Article 34 further clarifies that they are under an obligation not “hinder in any way the effective exercise” of the right to individual applications of “any person, non-governmental organisation or group of individuals claiming to be the victim of a violation”.

The ECtHR’s power to order interim measures to any State Party to the Convention has been made explicit under Rule 39 of its Rules of Procedure, that reads as follows:

1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.
2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.
3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.
4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.¹¹

Most interim measures ordered by the ECtHR are related to expulsion or extradition proceedings or to applicants’ state of health in places of detention, to safeguard the right to life (under Art. 2) or to avoid ill-treatment (under Art. 3). Cases of gender-based and domestic violence also fall under the Court jurisdiction as breaches of Articles 2 (right to life) and 14 (prohibition of discrimination).¹²

A request for a Rule 39 interim measure must accompany, or be followed by, a full application submitted to the Court in accordance with Article 34. Provisional measures are designed to prevent or stop harmful human rights violations against applicants who face a serious and imminent risk in the time frame between the filing of a complaint and a decision on the merits by the Court. They are therefore a powerful tool to provide applicants with immediate protection.

Procedure of the Committee, Rule 56 (c) and CEDAW, Optional Protocol, art. 3 (specific for communications); Human Rights Committee, Rules of Procedure of the HRC, Rule 88 (3).

¹¹ European Convention on Human Rights, Article 39.

¹² European Court of Human Rights Press Unit, “Factsheet - Interim Measures”, June 2023.

The ECHR has held that a respondent State's failure to comply with these precautionary measures would undermine the State's formal obligation under Article 1 to protect the rights and freedoms described in the Convention.¹³

The rationale of the ECHR is rooted in the unique nature of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms. This special character enables the ECHR to issue legally binding orders to protect the rights enshrined in the European Convention. Measures ordered under Article 39 also serve to ensure that the individual right of petition (Article 34) is respected.

In *Mamatkulov and Askarov v Turkey*, the Court has stated that “failure by a respondent State to comply with interim measures would undermine the effectiveness of the right to individual application guaranteed by Art. 34 and the State’s formal undertaking in Art. 1 to protect the rights and freedoms set forth in the Convention”.¹⁴ The *Mamatkulov* case was ground-breaking in relation to the binding force of interim measures, as in that occasion for the first time a violation of Article 34 ECHR was established after the noncompliance of a State with an interim measure.

A State can nonetheless exceptionally escape its responsibility for noncompliance or late compliance, when it provides proof that there was an objective impediment which prevented compliance, that it took all reasonable steps to remove the impediment and that it kept the Court informed about the situation.¹⁵ As will be seen, in recent times, Italy has on five occasions tried to escape responsibility for not abiding by an interim measure issued by the ECHR.¹⁶

4.1.1 ECHR’s Procedure

The procedures for individual applications and for granting interim protective measures are outlined in the Rules of Court of the ECtHR and in the annex Practice Directions. The Rules that refer to interim measures are the already mentioned Rule 39 and Rule 47.

Rule 39 states that a request for interim measures can be submitted by both parties involved, but in most cases it is the applicant that makes the request. Additionally, Rule 39 allows for the request to be put forward by “any other person concerned”,¹⁷ a concept which is not better defined.

Rule 47 provides a lengthy and exhaustive account of what information should be included in the individual application. It is then stated that failure to comply with the indications set out in paragraphs 1 to 3 will result in the application not being examined by the Court, except in the case of an application requesting interim measures. The rationale of this exception is to be found in the fact that interim measures are generally requested in cases in which the applicant’s health and/or life is at stake.

The Practice Directions issued by the President of the Court under Article 32 further provide requirements to be met in the request for interim measures. The applicant or their representatives shall submit their request “via the ECHR Rule 39 Site, or by fax, or by post” only, as “[t]he Court will not deal with requests sent by e-mail”.¹⁸ The applicants shall detail the reasons for which they are asking for interim measures, specifying the nature of the alleged

¹³ European Court of Human Rights, *Mamatkulov and Askarov v Turkey*, Applications Nos. 46827/99 and 46951/99, Judgement of 4 February 2005, Grand Chamber, para. 125.

¹⁴ *Ibidem*.

¹⁵ Practical Guide on Admissibility Criteria Updated on 28 February 2023, § *Obligations of the respondent State, para a. Rule 39 of the Rules of Court* (90), Council of Europe/European Court of Human Rights, 2023, available at: <https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng>.

¹⁶ See *infra*, Section 5.1.

¹⁷ European Court of Human Rights, Rules of Court (30 October 2023), Rule 39, available at: <https://www.echr.coe.int/documents/d/echr/rules_court_eng>.

¹⁸ European Court of Human Rights, Practice Directions (annex to the Rules of Court), 30 October 2023.

risk and the Convention provisions that have been allegedly violated. To this end, it is necessary to include any relevant document considered to substantiate the application (i.e. domestic court, tribunal or other decisions, medical reports, etc.).

The Practice Directions seem then to hint to the fact that the burden of proof is to be sustained by the applicant. When reviewing evidence, the Court shall check its *prima facie* authenticity.¹⁹ The ECtHR may also gather further information *proprio motu*,²⁰ in some cases directly from the respondent State, thus easing the burden of proof for the applicant. However, the Court may also reject the applicant's allegations if evidence presented by the latter is considered insufficient. This approach, adopted in different cases of domestic violence,²¹ may put a disproportionate burden on the applicants, despite victims of domestic violence being regarded as a vulnerable group.²²

A request for interim measures can still be submitted when the applicant's case is pending before the Court, and in that case shall include the application number allocated to it. In urgent situations, though, a request for provisional measures may precede the actual filing of an application, if it discloses elements suggesting an arguable case under the Convention.²³ Thus, if the Court agrees to grant provisional measures in these cases, it does so only on the assumption that an application under Article 34 will be made. Should an application under Article 34 not follow, the Court can lift the measures.

4.2. Human Rights Committee

The Human Rights Committee monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) by its States parties. This Committee may receive individual communications, or individual complaints, from a person or a group under the jurisdiction of a State party of the Covenant claiming to be a victim of a violation of a right protected by the Covenant. For the Committee to have this competence it is necessary that the State concerned has recognized the authority of the Committee itself by ratifying the First Optional Protocol to the ICCPR, as specified in Article 1 of the same Optional Protocol.²⁴

Individual complaints can be submitted by the alleged victim of a violation, but the authors of the communication can also be family members or representatives, acting on behalf of another person who cannot submit the complaint. The representative can be either legal (counsel) or non-legal such as NGOs.²⁵ Individual communications must not be anonymous because the identity of the victim is necessary for the State party to be able to respond to the allegation. However, the victim and/or the authors can ask the Committee not to make public their identity in its final decision.²⁶

¹⁹ Information Document by the Registry, para 28.

²⁰ European Court of Human Rights, *Hilal v The United Kingdom*, Application No. 45276/99, Judgement of 6 March 2001, para 60.

²¹ European Court of Human Rights, *Landi v Italy*, Application No. 10929/19, Judgement of 7 April 2022; European Court of Human Rights, *Y and Others v Bulgaria*, Application No. 9077/18, Judgement of 22 March 2022.

²² "Landi v Italy: Proving discrimination with statistics in cases of domestic violence", Strasbourg Observers, 26 August 2022.

²³ Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 5 March 2003 and amended on 16 October 2009 and on 7 July 2011, and on 3 May 2022.

²⁴ Human Rights Committee, *First Optional Protocol to the International Convention on Civil and Political Rights*, 1976, Article 1.

²⁵ Human Rights Committee, *Guidance for Submitting an Individual Application to the UN Treaty Bodies*, paras 8-9, available at: <<https://www.ohchr.org/en/documents/tools-and-resources/form-and-guidance-submitting-individual-communication-treaty-bodies>>.

²⁶ Ivi, para 10.

The Committee may request the State party concerned the adoption of interim measures.²⁷ Interim measures are due to an emergency situation in which the authors need to be protected from “irreparable harm”, i.e. a harm that cannot be repaired because of its nature, as the Rule 94 paragraph 1²⁸ of its Rules of Procedures states. For the Committee to examine a request of interim measures it is essential that the author expressly states this intention and provide a comprehensive explanation detailing the reasons for deeming such action necessary.

The decision of the Committee to request the implementation of interim measures does not imply a determination on the admissibility and the merits of the communication, however, the duty to respect the process of individual communications in good faith is irreconcilable with the failure to implement such measures. This obligation to cooperate in good faith with the Committee, which is also mentioned in the paragraph 19²⁹ of General Comment 33 regarding the Obligations of States Parties under the Optional Protocol, is the effect of the ‘bona fide principle’.

Paragraph 19 also provides examples of irreparable harm, such as the imposition of death penalty and the violation of the duty of non-refoulement. In fact, the author requesting measures must demonstrate that the risk is well founded and personal.

Complaints containing prima facie elements undergo a thorough review by a Special Rapporteur, who assesses whether the case warrants registration and subsequent transmission to the pertinent State party. The Committee has specifically designated the Special Rapporteur on new communications and interim measures to handle requests seeking the issuance of interim measures.

In response to the request for interim measures, the State party may submit arguments, providing justifications for either maintaining or lifting the proposed measures. This establishes a mechanism for a comprehensive exchange of views between the concerned parties.

It is essential to note that a request for interim measures may be withdrawn by the Committee. This decision is influenced by the information and data furnished by both the State party and the author of the communication. The withdrawal process hinges on a careful evaluation of the representations made by each party, ensuring a balanced and fair consideration of the circumstances surrounding the request for interim measures.³⁰

4.3. *Convention on the Elimination of All Forms of Discrimination Against Women*

The CEDAW Committee derives the authority to issue interim measures from its constitutive documents. Article 5 (1)³¹ of the Optional Protocol adopted in 1999 explicitly authorises the body to request precautionary measures. However, this document was ratified by only 115 State Parties. This number is quite below what one might expect, as the text of the Convention was ratified by 189 State Parties.³²

²⁷ Human Rights Committee, *Rules of Procedure of the Human Rights Committee*, 2021, Rule 94, para 1.

²⁸ Ibid.

²⁹ Human Rights Committee, *General Comment no. 33 The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 2009, CCPR/C/GC/33, point 19.

³⁰ See *supra* note 27, para 3-4.

³¹ “At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.” Article 5, (1), CEDAW, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*.

³² UN Human Rights Office of the High Commissioner, Status of Ratification, available at: <<https://indicators.ohchr.org>>.

The functioning of CEDAW's interim measures is described in rule 63 of the Rules of Procedure.³³ Articles 2-4 of the Optional Protocol describe how the communications must be submitted to the Court.

Communications may be submitted by or on behalf of individuals, which means that a Third Party (i.e. NGO) may act on behalf of the alleged victim/victims. CEDAW's system has established an ad hoc Working Group examining individual communications received under the Optional Protocol. Details on interim measures are contained in articles 20 and 21 of the Working Methods of the Committee on the Elimination of Discrimination Against Women and its Working Group on individual communications.³⁴ The Working Group on communications is composed of five members, designated by the Committee, which should have, desirably, a legal background (Artt. 1 and 2). Decisions on interim measures are usually adopted by a simple majority of three, but according to article 21, in extremely urgent cases, "where the decision may be required within less than 24 hours", the Petitions Unit will contact the Chair of the Working Group for an executive decision, and the rest of the Working Group members will be informed accordingly. In any case, Decisions on interim measures shall as far as possible be adopted within 24 hours after receipt of the case through the Petitions Unit. Article 20 goes on to further explain the procedure to be adopted when interim measures are requested:

Where the Working Group requests provisional interim measures –

- (a) it shall determine a short deadline for the State party's observations strictly on the issue of interim measures and for the author's comments thereon;
- (b) it may subsequently review its decision in light of the State party's specific observations on the matter; or
- (c) it may, in the absence of the State party's observations or comments by the author or in the light of such observations or comments, maintain its interim measures request and extend it for such longer period as it may determine.³⁵

Even if communications are not anonymous, those submitted under the Optional Protocol are examined by the Committee, working group or rapporteur in closed meetings, according to Rule 74 of Rules and Procedures. Also, according to this article, the author of the communication is granted considerable protection of his privacy.³⁶ The text of the OP to the CEDAW does not preclude *proprio motu* use of provisional measures either and neither does the text of CEDAW's Rules of Procedure.³⁷

³³ "At any time after the receipt of a communication, and before a determination on the merits has been reached, the Committee or a Working Group may transmit to the State party concerned a request that it take such interim measures." Rule 63, CEDAW, *Rules of Procedure of the Convention on the Elimination of All Forms of Discrimination against Women*.

³⁴ The Committee on the Elimination of Discrimination Against Women has appointed a five-member Working Group on Communications under the Optional Protocol, Decision 54/9. CEDAW/C/2009/II/4 , Annex III "Overview of the working methods of the Committee on the Elimination of Discrimination against Women in relation to the reporting process".

³⁵ Article 20, (d), CEDAW, *Working Methods of the Committee on the Elimination of Discrimination Against Women and its Working Group on individual communications received under the Optional Protocol to the CEDAW Convention*.

³⁶ Article 73, (3),(4),(5),(6), CEDAW, *Rules of Procedure of the Convention on the Elimination of All Forms of Discrimination against Women*.

³⁷ Rieter, *Preventing Irreparable Harm Provisional Measures in International Human Rights Adjudication*, [Doctoral Thesis, Maastricht University], Intersentia, 2010, p. 139.

To sum up, under the CEDAW, interim measures are granted under article 5(1) of the Optional Protocol, which is binding only to the States Parties that ratified it, which are only 115. Their functioning is regulated by Article 63 of the Rules of Procedure and by Articles 20 and 21 of the Working Methods.

4.4. Convention Against Torture

The Convention against Torture allows individual applications against a State party, which has allegedly violated the convention, under Article 22. State parties must explicitly declare their acceptance of Article 22 in order to enable individual complaints.³⁸

Interim measures are specifically addressed in the Rules of Procedures³⁹ of the Convention. CAT introduced in 2002 the role of the Special Rapporteur on new complaints and interim measures, which, as stated in Rule 104(1), registers new complaints together with the Secretary General. The Rapporteur should ensure a quicker and more efficient response by the Committee Against Torture, even though there are no public written guidelines to justify its decisions.

Among other criteria to obtain a successful registration, the Rule states that complaints cannot be anonymous (1, b) and that they have to be submitted either by the victim itself, by its close relatives or by an authorised representative (1, c). Additionally, Rule 105 says that the Rapporteur may request clarifications from the complainant, which include more information regarding his/her identity (1, a), namely name, address, age and occupation.

The latter requirements could turn into possible restraints for those who are not willing to be expressly connected to the complaint by revealing their identity since they reckon this could endanger them.

Rule 114 concerns interim measures, explaining how and by whom they are requested. Interim measures can be requested by the Committee itself, a working group or the Rapporteur (1) to avoid irreparable damage to the alleged victim of violations while the decision is being processed. An important element to notice is the fact that such a request does not imply a determination of the admissibility on the merits of the complaint (2). This is significant since it could ensure protection to the alleged victim even before determining the admissibility of the application.

The request may be reviewed or withdrawn if the State claims that the condition of irreparable harm is not met and considering any subsequent comments from the complainant (3, 7).⁴⁰ The function of the Rapporteur to monitor compliance of the State with the request for interim measures (6) appears to be helpful in guaranteeing the protection of the alleged victim from harm by ensuring the actual implementation of these measures by the accused State.

General Comment 4, adopted by the CmAT in 2017, addresses the implementation of Article 3⁴¹ of the Convention (non-refoulement principle) in the context of Article 22. Additionally, Point B (37) clearly states that the CmAT considers non-compliance with its request for interim measures as a demonstration that the State is not acting in good faith, resulting, ultimately, in a breach of article 22. Non-compliance by the State party would thus constitute a violation of the Convention Against Torture.

³⁸ Article 22 states: “[...] No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration”.

³⁹ Rule 114 of CAT’s Rules of Procedures.

⁴⁰ Under Rule 114 (7), the State party can ultimately request the Committee to lift interim measures.

⁴¹ Article 3 states that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

4.5. Conclusions on Legal Framework

The CEDAW Committee derives the authority to issue precautionary measures directly from its constitutive documents, as they contain explicit provisions authorising the body to issue them.⁴² On the contrary, ECtHR, CmAT, and HRC Committee derive implicit authority to issue precautionary measures from their constitutive documents. These human rights bodies interpret their founding documents in light of their mandates to protect human rights and codify their authority to issue precautionary measures in their corresponding rules of procedure.

5. PRACTICE

When examining the practice of the different human rights bodies, it is important to keep in mind that they generally prioritise efficiency over transparency when issuing precautionary measures. The HRC Committee, CEDAW Committee, CmAT, and ECtHR do not publish their decisions on precautionary measures. Instead, these bodies usually request that the State implement precautionary measures via a letter or a Note Verbale (a diplomatic communication that is less formal than a note, is drafted in the third person, and is never signed).⁴³ Human rights bodies do not publish the contents of these communications; however these decisions may become public if a party decides to publish the communication.⁴⁴

Moreover, the lack of a public archive of decisions on precautionary measures makes it difficult to generalise about the reasoning of human rights bodies applied to such requests.⁴⁵ However, occasionally human rights bodies will reference the contents of a communication during their decisions on the merits. Other human rights bodies publish a summary of the precautionary measures they issued in a given year in their Annual Reports⁴⁶, as in the case of the ECHR, HRC and CAT. The Annual Report of the European Court of 2022 includes information about interim measures and statistics on the number of requests for applications pending, allocated, and decided.⁴⁷ The 2022 Annual Report of the HRC provides a summary of cases, including precautionary measures requested, issued, whether accepted by the State, and the number of precautionary measures that the Special Rapporteur on new communication and precautionary measures issued in a given year.⁴⁸ The annual reports of the CAT provide a summary of cases, including precautionary measures requested, issued, whether accepted by the State, as well as States' views on the precautionary measures⁴⁹. Otherwise, CEDAW latest Annual Report does not mention statistics on the number of requests for interim measures and

⁴² Part IV. "Human Rights Bodies Use Procedures to Issue Precautionary Measures that are necessarily Flexible to Respond to the Urgent Nature Requests" pp. 10-11, in "*Comparative Analysis of the Practice of Precautionary Measures Among International Human Rights Bodies*" Submitted to Special Meeting of the Permanent Council of the Organization of American States by the Center for Justice and International Law (CEJIL) and International Human Rights Law Clinic, University of California, Berkeley, School of Law, Berkeley, California, United States of America.

⁴³ Ibidem.

⁴⁴ Ibidem.

⁴⁵ Ibidem.

⁴⁶ Ibidem.

⁴⁷ See European Court of Human Rights latest Annual report (2022), pp. 136-146, available at: <<https://www.echr.coe.int/annual-reports>>.

⁴⁸ See Human Rights Committee latest Annual Report (2022), para.7, 16, 27, 28, available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/407/03/PDF/G2240703.pdf?OpenElement>>.

⁴⁹ See CAT's latest Report (CAT/A/78/44): Report of the Committee Against Torture of its seventy-fourth (12-29 July 2022), seventy-fifth (31 October-25 November 2022) and seventy-sixth sessions (17 April- 12 May 2023), available at: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=A%2F78%2F44&Lang=en>.

whether accepted by the State. However, we must point out that in the CEDAW Annual Report 2012 the previous data were mentioned⁵⁰.

5.1. European Court of Human Rights

According to a survey carried out in 2011, although the compliance rate with interim measures appeared to be extremely high (99%),⁵¹ States still occasionally failed to comply, even though it had been established since 2003 that non-compliance could lead to a violation of Article 34 ECHR.⁵² The main perpetrators of noncompliance were four countries, namely Russia, France, Italy, and Turkey.⁵³

As mentioned above, Italy has tried to escape its responsibilities on interim measures in five different cases: *Ben Khemais v. Italy*, *Trabelsi v. Italy*, *Ali Toumi v. Italy*, *Mannai v. Italy*, and *Hamidovic v. Italy*.⁵⁴ In the first four cases, regarding extradition of Tunisian nationals arrested on suspicion of terrorism-related activities, the Italian government justified non-compliance adducing the alleged risk that the applicants posed to Italy's national security.⁵⁵ In *Hamidovic v. Italy*, an expulsion decree was issued before the Italian government was informed of the interim measures ordered by the Court.⁵⁶ Notwithstanding the fact that the above cases represent notable breaches of Article 39 measures by Italy, they are not related to cases of gender-based violence and therefore have no predictive value for Italy's non-compliance in this specific domain.

Italy's record of compliance with interim measures is also assessed in the annual reports of the GREVIO Committee (Group of Experts on Action against Violence against Women and Domestic Violence).

Both the GREVIO Committee and the ECtHR are associated with the Council of Europe: the European Court could use the Istanbul Convention as an interpretative tool in cases of gender-based violence, which is not explicitly mentioned by the ECHR.⁵⁷

The 2020 annual report of GREVIO acknowledges Italy's efforts to implement measures that establish mechanisms for the protection of victims during legal proceedings, although the Committee expresses concern that criminal courts are unable to verify the effectiveness of

⁵⁰ See Report of the Committee on the Elimination of Discrimination against Women (2011-2012), p.92, available at:

<<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=dtYoAzPhJ4NMy4Lu1TOebLoKSCPQHtffH%2B5gScoqPxXE5KjKY2ybv8l5kuAmh60GOIAOJx2CF5V1akrafQ2BahXLIOVAHf71CrztgHqWzBI%3D>>.

⁵¹ Haeck, Burbano Herrera and Zwaak, 'Strasbourg's Interim Measures under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?' (2011) European Yearbook of Human Rights, Vol. 11, 375-380.

⁵² Ibidem.

⁵³ Ibidem.

⁵⁴ Ibidem.

⁵⁵ European Court of Human Rights, *Ben Khemais v Italy*, Application No. 246/07, Judgment of 24 February 2009, para. 23: "Par une télécopie en date du 11 juin 2008, le Gouvernement a informé la Cour qu'un arrêt d'expulsion avait été pris le 31 mai 2008 à l'encontre du requérant en raison du rôle que celui-ci avait joué dans le cadre des activités menées par des extrémistes islamistes nourrissant des projets terroristes, et que le tribunal de Milan avait donné son accord (nulla osta) ' l'expulsion en observant qu' l'intéressé représentait une menace pour la sécurité d' l'Etat car il était en mesure de renouer des contacts visant à la repris' d'activités terroristes, y compris au niveau international".

⁵⁶ European Court of Human Rights, *Hamidovic v Italy*, Application No. 31956/05, Judgment of 4 December 2012, paras. 21-22.

⁵⁷ Gizem, "The Group of Experts under the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence and the ECtHR: Complementary or Contradictory Tools?", EJIL: Talk!, 31 March 2020, available at: <<https://www.ejiltalk.org/the-group-of-experts-under-the-istanbul-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence-and-the-ecthr-complementary-or-contradictory-tools>>.

precautionary measures taken to protect victims because they do not collect data on such measures in cases of violence against women.⁵⁸

The Committee “was apprised by legal practitioners that gaps persist in the applicable laws and in courts’ practices which may expose victims to further harm”⁵⁹ and highlights also that women’s organisations specialised in the defence of victims state that their application and availability vary depending on the sensitivity of individual judges and on the configuration of court buildings.⁶⁰

Therefore, GREVIO encourages the Italian authorities to continue to take measures to ensure that victims receive pertinent information for their protection and that of their families, even without their explicit consent; to facilitate victims’ access to protective mechanisms securing their testimony, including by raising awareness among professionals in the judiciary, about the needs of victims during legal proceedings; invest in resources such as IT equipment and adapted rooms in courthouses to enhance the protection of victims nationwide; and lastly to integrate a gender-sensitive approach to the issue expanding aid and support services for female victims of crime during the lawsuit.⁶¹

Moreover, important information emerges from data and scholarly research.⁶² Such data might help to reach some conclusions on the hand-on functioning and effectiveness of interim measures in the ECtHR system. Indeed, some of the issues stemming from said sources point out that:

- a) The notion that the court is overburdened: the effective use of interim measures is endangered by the alarming rise in the number of requests for interim measures made to the Court. Between 2006 and 2010, Rule 39 requests increased by 4,000%.⁶³ The Court’s capacity being limited, it is of paramount importance to ensure that such requests are well-substantiated to facilitate their proper and timely examination by the Court.⁶⁴ On this line, the Izmir declaration of 2011⁶⁵ originates from the concern on the number of interim measures requested in accordance with Rule 39 of the Rules of Court which had greatly increased, thus further increasing the workload of the Court. For this reason, from 2011 we witnessed an increase in demand by the Court for more specific and accessible information, especially to applicants and their lawyers, thus making admissibility criteria stricter.⁶⁶ This new procedure and the creation of the Rule 39 Unit also resulted in a considerable decrease in provisional measures phases in Strasbourg. Since the inception of the streamlined procedure, the number of positive decisions under Rule 39 has been steadily low, at only roughly 5–10 per cent.⁶⁷ Above all, the decrease in the application of Rule 39 aims to secure the long-term future of the notoriously overburdened ECtHR. In fact, during the reform process Contracting Parties had expressly called upon the Court to significantly reduce the number of cases

⁵⁸ GREVIO Baseline Evaluation Report Italy, January 2020, para. 146, 135.

⁵⁹ Ivi, para. 247.

⁶⁰ Ivi, para. 248.

⁶¹ Ivi, para. 250.

⁶² Marti, *Provisional Measures: European Court of Human Rights (ECtHR)*, Max Planck Encyclopedia of Public International Law, September 2018.

⁶³ Toolkit on how to request interim measures under Rule 39 of the Rules of the European Court of Human Rights for persons in need of international protection, p. 4, available at: <<https://www.refworld.org/pdfid/4f8e8f982.pdf>>.

⁶⁴ Ibidem.

⁶⁵ High Level Conference on the Future of the European Court of Human Rights Organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe.

⁶⁶ Izmir declaration 2011, Follow-up implementation, A right to individual petition, para 3, available at: <<http://www.coe.int/izmir>>.

⁶⁷ Marti, *Provisional Measures: European Court of Human Rights (ECtHR)*, Max Planck Encyclopedia of Public International Law, September 2018.

in which requests under Rule 39 are granted.⁶⁸ Following the general assumption that national courts are, at least in principle, better placed to evaluate evidence, the Court has held that a “detailed and precise reasoning of national courts constitutes a solid base allowing the Court to be assured that the examination of the risks alleged by the applicant has been in conformity with the requirements of the Convention, and consequently to conclude by the possible rejection of the request for interim measures”.⁶⁹ If a request for provisional relief is granted, the underlying application will usually be prioritised and communicated directly to the government, ensuring that the case is dealt with speedily.⁷⁰ A refusal to apply Rule 39, on the other hand, is often coupled with a decision to declare the underlying application inadmissible.⁷¹

- b) Transparency issues: the ECtHR does not disclose or provide rationales for its Rule 39 decisions. This lack of transparency poses challenges for applicants, States, and scholars in understanding the Court's practices. Specifically, the ECtHR does not make public its determinations on provisional relief or elaborate on the reasons for approval or rejection in individual cases. Interested parties can only ascertain the occurrence of a provisional measures phase by examining the final decision or judgement, where the Court typically includes a statement indicating the application of Rule 39 and its specific demands. Despite this, the ECtHR does release statistics detailing its use of provisional measures, organised by respondent State and year. These statistics cover the preceding three years, providing insights into the Court's decisions, including the number of refusals, approvals, and cases falling outside Rule 39's scope. Additionally, biannual statistics for the ongoing judicial year disclose the destination country for Rule 39 requests related to the prevention of expulsions. This approach sheds light on the Court's actions, as illustrated in the case of Italy.

Rule 39 requests listed by respondent state, granted and refused by the Court in 2020, 2021 and 2022

STATE	2020			2021			2022			TOTALS BY STATE						
	OUTSIDE THE SCOPE	REFUSED	GRANTED	OUTSIDE THE SCOPE	REFUSED	GRANTED	OUTSIDE THE SCOPE	REFUSED	GRANTED	OUTSIDE THE SCOPE	REFUSED	GRANTED				
Italy	43	49	4	96	59	18	2	79	61	22	5	88	163	89	11	263

ECtHR, Rule 39 requests listed by respondent State, granted and refused by the Court in 2020, 2021 and 2022 (from https://www.echr.coe.int/documents/d/echr/Stats_art_39_01_ENG).

- c) admissibility in practice: provisional measures are typically adopted to prevent violations of the right to life (Art 2 ECHR) or the right not to be subjected to torture or inhuman treatment (Art 3 ECHR)⁷² but in a few instances the ECtHR has adopted provisional measures under other rights and freedoms set forth in the Convention and its Protocols, including the right to respect for private and family life (Art 8 ECHR), the right to property (Art 1 Protocol 1), the right to liberty and security (Art 5 ECHR), the right to fair trial (Art 6 ECHR), or the right to freedom of expression (Art 10 ECHR).⁷³ In particular we can identify four main contexts of application for Rule 39 in

⁶⁸ Ivi, para 4.

⁶⁹ Information Document by the Registry, para 28.

⁷⁰ Rule 41, Rules of Court.

⁷¹ CDDH Report, para 14.

⁷² *Mamatkulov and Askarov v Turkey*, 2005, para 104.

⁷³ European Court of Human Rights Press Unit, “Factsheet - Interim Measures”, June 2023.

the European Court of Human Rights Jurisprudence: the first being deportation or extradition when an applicant faces a “real and personal risk” of life deprivation or treatment contrary to Article 3 ECHR in the destination country. Secondly, protection of the life and health of detainees with serious medical conditions lacking necessary care in prison. Thirdly, enforced disappearance, where the interim measure aims at revealing information about disappeared persons or prevent involuntary disappearances, such as protecting an individual harassed by law enforcement after initiating proceedings in Strasbourg. Finally, beginning or end of life cases, which has been used in cases like *Lambert et al v. France* and *Gard et al v. United Kingdom* to suspend the execution of court decisions allowing withdrawal of life-sustaining measures or preventing the destruction of embryos. There are also exceptional cases where Rule 39 is applied for other purposes, these being securing legal representation, preventing evictions leading to extreme hardship, expediting compensation payments, or ensuring the independence of a television station from government influence.⁷⁴ Apart from these contexts, the Court typically denies other types of requests as falling “outside the scope of Rule 39” in that they do not meet the required gravity threshold. This highlights the selective application of provisional relief in accordance with the rule's specific criteria.

- d) Recent cases indicate that the Court is willing to take a rigorous stance when it comes to measures concerning the safeguarding of the right to life, particularly when assessing the potential harm posed to an individual by the criminal actions of another.⁷⁵ This becomes particularly pertinent in instances of gender-based or domestic violence, where the Court may be prompted to evaluate the significance of “repeated threats [...] that have not yet manifested as a tangible physical offense”.⁷⁶

5.2. Human Rights Committee

The Human Rights Committee has established that failure to adhere to interim measures may not only be considered regrettable behaviour but may also constitute a violation of State parties’ obligations under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). The Committee has consistently maintained this stance, as evidenced by its General Comment 33 of 2009, reiterating that States are not merely encouraged but are obliged to comply with interim measures as an integral part of their duty to genuinely respect the individual communication procedure.⁷⁷

Despite opposition from certain States,⁷⁸ which expressed their disagreement with the draft’s obligatory tone and the binding nature of interim measures,⁷⁹ the Committee has consistently upheld its position, emphasising the obligatory nature of compliance with its views

⁷⁴ Marti, *Provisional Measures: European Court of Human Rights (ECtHR)*, Max Planck Encyclopedias of International Law, September 2018, para. 22.

⁷⁵ European Court of Human Rights, *L.C.B. v. the United Kingdom*, Application No. 23413/94, Judgment of 9 June 1998, para 36.

⁷⁶ Saccucci, “Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges”, in Palombino, Virzo, Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals*, Springer, 2021, p. 228.

⁷⁷ Naldi, *Interim Measures in the UN Human Rights Committee*, *The International and Comparative Law Quarterly*, 2004, Vol. 53, No. 2, p. 448.

⁷⁸ Belgium, France, Germany, Japan, Norway, Russia, Sweden, Switzerland, UK and US expressed their disagreement with the draft’s obligatory tone while France, Japan, Norway and Russia expressly denied the obligatory character of interim measure.

⁷⁹ Kanetake, *UN Human Rights Treaty Monitoring Bodies Before Domestic Courts*, *International and Comparative Law Quarterly*, 2018, pp. 204-206.

and interim measures,⁸⁰ thereby reinforcing the commitment to safeguarding the rights sanctioned in the ICCPR.

While the draft of General Comment 33 characterised the Committee's Opinions as an 'authoritative determination',⁸¹ in the current General Comment 33 the phrase 'the obligation to respect the Committee's views'⁸² has been replaced by referring to an obligation to cooperate with the Committee, based on the application of the principle of good faith in order to fulfil all Treaty obligations. Consequently, the HRC retreated from its previously assertive position regarding the imperative nature of its views. Nonetheless, the HRC maintained its insistence on States parties' obligation to implement interim measures.⁸³

Against this background, it might be useful to analyse some interesting cases regarding the use of interim measures.

The first case, *Piandiong et al v. The Philippines*,⁸⁴ led the Human Right Committee to determine that its requests for interim measures are binding. The individuals who filed the complaint were condemned to death after being found guilty of robbery with homicide. The Supreme Court affirmed the sentence, and despite the subsequent denial of clemency by the President of the Republic, they brought their case to the Committee, claiming violations of Articles 6 (right to life) and 14 (right to a fair trial) of the Covenant. The Committee, invoking rule 86 at the time (now rule 94), urged the State party to refrain from executing the death sentence during the ongoing consideration of their case. However, the State party proceeded with the execution despite the Committee still deliberating on a potential remedy.

The Committee proceeded to dismiss the State Party's argument that complying with the request for interim measures would impede the course of justice. It emphasised that State parties cannot unilaterally impose restrictions on the Committee's authority or the complainants' right to submit communications. The Committee concluded by explicitly stating that:

Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with Article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.⁸⁵

Piandiong is significant because this is the case that led the HRC to determine "that its indication of interim measures is effectively binding on a State party, wilful ignorance of which amounts to a violation of the Optional Covenant."⁸⁶ As we can see, the Committee considered the failure in implementing the interim measure as a breach of an obligation under Optional Protocol.

Another relevant case is *Purna Maya v. Nepal*.⁸⁷ Purna Maya (name changed to protect her privacy) is a Nepalese woman who was raped by four soldiers in 2004 during Nepal's

⁸⁰ HRC, *Draft General Comment No 33 (Second Revised Version as of 18 August 2008)*, CCPR/C/GC/33/CRP.3 (2008), para 28.

⁸¹ *Ivi*, para 15.

⁸² *Ivi*, para 28.

⁸³ See *supra* note 27, para 2.

⁸⁴ Human Rights Committee, *Piandiong et al v. The Philippines*, Communication No. 869/1999, Judgement of 19 October 2000, CCPR/C/70/D/869/1999. Available at: <<http://hrlibrary.umn.edu/research/Philippines/Piandiong%20v%20The%20Philippines,%20%20Case%20No.%20869-1999.pdf>>.

⁸⁵ See *supra* note 77.

⁸⁶ *Ibid*.

⁸⁷ Human Rights Committee, *Purna Maya v. Nepal*, Communication No. 2245/2013, Judgement of 23 June 2017, CCPR/C/119/D/2245/2013, available at: <<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsukPtYsnxNH1>>

internal armed conflict. She suffered grave physical injuries as well as severe depression and post-traumatic stress disorder.⁸⁸ In March 2006, the applicant visited the District Administration Office to pursue compensation as an internally displaced person. Upon arrival, J.T. (one of the aggressors) was also present, and she openly accused him of torture and rape. Despite the Chief District Officer recommending “interim relief” for the author as an internally displaced person, no action was taken in response to the torture allegations. The author emphasized that, although the authorities of the State party were informed about the alleged crime, there had been no initiation of an investigation into her claims of torture. Furthermore, she had consistently been denied access to a remedy before a competent judicial authority, which infringed upon Article 2 (3) of the Covenant.⁸⁹ The victim urged the Committee to ask the State party to implement provisional measures. These could include ensuring access to justice for rape victims by safeguarding their confidentiality throughout the complaint, investigation, and legal processes. Additionally, the author recommended increasing the presence of female police officers and prosecutors, establishing policies for securely storing medical records of sexual violence victims in hospitals, and providing interim relief for victims of sexual violence during the conflict.⁹⁰

The Committee advised the State party to make several changes including to eliminate the 35-day limitation for reporting rape, ensure confidentiality and protection for victims throughout the process, provide interim relief for victims of sexual violence, and adequate protection for victims of violence against women.⁹¹

Another relevant case is the *R.M. and F.M. v. Denmark*⁹² cases. Here, the authors,⁹³ who fled Afghanistan after having sexual relations outside of marriage leading to pregnancy, faced threats from F.M.’s family. The authors fled Afghanistan after having sexual relations outside marriage at F.M.’s residence, leading to pregnancy and a threat to R.M.’s family. F.M.’s cousin killed R.M.’s brother, who helped escape. The authors stayed in Turkey and Greece before entering Denmark without valid travel documents. F.M. and R.M. applied for asylum, fearing death by their uncles and blood revenge. The Danish Immigration Service rejected their applications. The Refugee Appeals Board upheld the Immigration Service’s decisions, deeming the authors’ explanations divergent and implausible. The authors sought to reopen their case in 2015, arguing that F.M.’s illiteracy and contact with an Afghan attorney confirmed the high risk of returning to Afghanistan. However, the Refugee Appeals Board refused to reopen the case in 2016. Moreover, in August 2017 the authors contested that, “in several cases, the State party has not respected the Committee’s recommendations”.⁹⁴ On November 25, 2015, in accordance with rule 92 of the Committee’s rules of procedure, the Special Rapporteur on new communications and interim measures requested the State party to avoid deporting the authors and their children to Afghanistan while the case was under consideration by the Committee. Subsequently, on January 27, 2017, and again on April 9, 2018, the Special Rapporteur declined the State party’s requests to lift the interim measures.⁹⁵ In its consideration of merits,

DBeueuCbK4jpBRHauy74FDcfEr2JZeaKm8E6B1VIS8Z3645mBRIZVA9UI9%2FQB8NPexx76gmleQZNQG8mY5jEgpxdVFq24UtKI8tVLd%2FXL50PgwA4kB9cZg%3D%3D>.

⁸⁸ Ivi, para 1.1.

⁸⁹ Ivi, para 3.5.

⁹⁰ Ivi, para 3.8.

⁹¹ Ivi, para 15.

⁹² Human Rights Committee, *R.M. and F.M. v. Denmark*, Judgement of 17 July 2020, HRC Communication No. D/2685/2015, CCPR/C/126/D/2685/2015, available at: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%252fC%252f126%252fD%252f2685%252f2015&Lang=en>.

⁹³ R.M., born on 12 March 1989, and his wife, F.M., born on 23 April 1994.

⁹⁴ See *supra* note 92, para 7.1.

⁹⁵ See *supra* note 92, para 1.2.

the Committee criticized the State for inadequately assessing the authors' real, personal, and foreseeable risks in Afghanistan, concluding that the State failed to consider the consequences of the authors' specific situation in their home country.⁹⁶ If implemented, the authors' removal from Afghanistan would violate the rights under articles 6 and 7 of the ICCPR,⁹⁷ for this reason the Committee requested the State concerned to "refrain from expelling the authors while their request for asylum is being reconsidered".⁹⁸

The examined cases seem to show that States tend to underestimate the level of risk faced by the victims. This pattern highlights the critical need for a more thorough and accurate assessment of the risks involved, emphasizing the urgency of adopting and enforcing effective preventive measures.

In this respect, the Annual Report of the Human Rights Committee on its Seventy-seventh Session states that:

In several cases decided during the period under review, the Committee noted that States parties had failed to cooperate in the procedure by not providing observations on the admissibility and/or the merits of the authors' allegations or by disregarding the request for interim measures to prevent the occurrence of an irreparable harm to the alleged victims.⁹⁹

This underscores the States' persistent reluctance to adhere to the mandatory stance of the Committee and to recognize the obligatory nature of interim measures.

Additionally, by examining the Committee's quasi jurisprudence, it becomes evident that there is a scarcity of cases involving interim measures taken in connection with cases of gender-based violence, this could be explained also by the availability of other monitoring systems such as CEDAW or ECHR which are more specialized on this topic or are regarded as being more effective.

5.3. *Convention on the Elimination of All Forms of Discrimination Against Women*

There is little literature on the jurisprudence of CEDAW and even less on the interim measures required by it.¹⁰⁰ That is mainly because only in recent times CEDAW has dealt with a large number of cases, so that few generalisations have been made by scholars.¹⁰¹ Before 2006 CEDAW had no individual applications' system. The Optional Protocol, which contains the norms on interim measures, was adopted in 1999 and entered into force in the early 2000s.

⁹⁶ Ivi, para 9.8.

⁹⁷ Ivi, para 10.

⁹⁸ Ivi, para 11.

⁹⁹ Human Rights Committee, *Report of the Human Rights Committee*, 2nd session (28 June–23 July 2021), 3rd session (11 October–5 November 2021) 4th session (28 February–25 March 2022), available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/407/03/PDF/G2240703.pdf?OpenElement>>.

¹⁰⁰ Interesting articles are: S. Cusack, S. Pusey, *CEDAW and the Rights to Non-Discrimination and Equality*, Melbourne Journal of Law, Volume 14, June 2013, which provides a brief historical summary of CEDAW practice and relevant debates; N.A. Engelhart, *CEDAW and Gender Violence: An Empirical Assessment*, Michigan State Law Review, Volume 2014 provides useful information and statistics studies on CEDAW and compliance; E. Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication*, [Doctoral Thesis, Maastricht University], Intersentia, 2010, reviews in detail the functioning of the interim measures in all four conventions analysed.

¹⁰¹ Ivi, pp. 103, 132; Part IV. "Human Rights Bodies Use Procedures to Issue Precautionary Measures that are necessarily Flexible to Respond to the Urgent Nature Requests" p. 10, in "*Comparative Analysis of the Practice of Precautionary Measures Among International Human Rights Bodies*" Submitted to Special Meeting of the Permanent Council of the Organization of American States by the Center for Justice and International Law (CEJIL) and International Human Rights Law Clinic, University of California, Berkeley, School of Law, Berkeley, California, United States of America.

As previously mentioned, the most recent Annual Report of CEDAW does not provide statistics regarding requests for interim measures and their acceptance by States, whereas only the Annual Report for 2012 did include information on these aspects.¹⁰²

CEDAW's quasi-jurisprudence under the Optional Protocol began with *A.T. v. Hungary*:¹⁰³ a gender-based-violence case where the Committee asked the State party to apply interim measures to protect the author of the communication. The author was a Hungarian woman, mother of two children. She was repeatedly the victim of both physical and psychological domestic violence perpetrated by her husband. Although she managed to remove him from the house, the victim lived in a constant state of fear as her husband occasionally visited the apartment in a drunken state and beat the author and threatened the children. The woman asked the authorities to provide her with a safe place where she could live in peace with her family and for legal measures to be taken against her husband, but the Hungarian judicial system proved to be very slow and ineffective in protecting the woman. On 20 October 2003, ten days after the communication, a Note Verbale was sent to the State party for its urgent consideration, requesting the State party to provide immediate, appropriate and concrete preventive interim measures of protection to the author, as may be necessary, in order to avoid irreparable damage to her person.¹⁰⁴ The Committee also invited the State party to provide information no later than two months from then, on the type of measures it had taken to give effect to the Committee's request.¹⁰⁵

On 26 January 2004, the State party stated that urgent measures were enforced for securing the safety and the personal development of the children. Few months later, on 20 April 2004, the State party informed the Committee that the Hungarian Governmental Office for Equal Opportunities established contact with the author in January 2004, in order to inquire about her situation and that it retained a lawyer with professional experience and practice in cases of domestic violence for her. However, no further communication from the State party followed. On 13 July 2004 a Note Verbale with a follow-up to the Committee's request of 20 October and 17 November 2003 was sent to the State party, conveying the Working Group's regret that the State party had furnished little information on the interim measures taken to avoid irreparable damage to the author.¹⁰⁶ The Working Group reiterated its request for A. T. to be immediately offered a safe place for her and her children to live and for the State party to ensure that the author receives adequate financial assistance. Nonetheless, by its note of 27 August 2004,¹⁰⁷ the State party repeated that it adopted the above-mentioned measures. Surprisingly, at the same time the State party admitted that these remedies were not capable of providing immediate protection to the author from ill-treatment by her former partner.¹⁰⁸ For this reason, the State party stated that it had instituted a comprehensive action programme against domestic violence in 2003, saying that on 16 April 2003, the Hungarian Parliament adopted a resolution on the national strategy for the prevention and effective treatment of violence within the family, setting forth a number of legislative and other actions to be taken

¹⁰² See *supra* note 50.

¹⁰³ Committee on the Elimination of Discrimination Against Women, *A.T. v. Hungary*, Judgement of 26 January 2005, CEDAW Communication No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2005), available at: <<http://hrlibrary.umn.edu/cedaw/decisions/2-2003.html>>.

¹⁰⁴ *Ivi*, para. 4.1, 4.2.

¹⁰⁵ *Ivi*, para. 4.2.

¹⁰⁶ *Ivi*, para. 4.7.

¹⁰⁷ *Ivi*, para. 4.8.

¹⁰⁸ *Ivi*, para. 5.6: "The State party maintains that although the author did not make effective use of the domestic remedies available to her, and although some domestic proceedings are still pending, the State party does not wish to raise any preliminary objections as to the admissibility of the communication. At the same time, the State party admits that these remedies were not capable of providing immediate protection to the author from ill-treatment by her former partner".

in the field by the State party.¹⁰⁹ Yet, the author subsequently reported that her situation had not changed and that she still lived in constant fear as regards her former partner.¹¹⁰

In its final decisions on merit, the Committee could do nothing but note that the State party's lack of effective legal and other measures prevented it from dealing in a satisfactory manner with the Committee's request for interim measures.¹¹¹

Despite the less than encouraging outcome, the *A.T. v. Hungary* case is historic in inaugurating the jurisprudence of CEDAW towards Optional Protocol's State parties. Since then, according to the *JURIS Index*, CEDAW has dealt with at least 150 cases, where in at least 43¹¹² a request for interim measures was made.¹¹³ Cases mainly concerned issues of gender-based violence, discrimination based on gender and non-refoulement.¹¹⁴ It appears from the analysed practice¹¹⁵ that the Working Group on individual communications generally requests interim measures several days after the communication from the author (usually within a month of the request),¹¹⁶ but several months may also pass before a request from the Committee, depending on the severity of the case.¹¹⁷ In *D. N. S. v. Denmark*, a non-refoulement case, the Committee requested for interim measures two days after the communication.¹¹⁸ Conversely, in the case *M. W. v. Denmark* the communication was made on 21 August 2012, but interim measures were requested on 9 July 2013 and 4 April 2014.¹¹⁹ This highlights a potential lack of protection because of the long processing time of the applications.

Most of the time the Committee adopts the decision to request interim measures separately from the admissibility decision of the case.¹²⁰ In fact, the majority of cases are judged inadmissible by the Committee: again, according to the *JURIS index*, only eight cases out of 43 with the request for interim measures were later judged admissible.¹²¹ Although in some cases the Committee denied the request for interim measures simultaneously with a declaration of inadmissibility of the application,¹²² there are many cases of non-refoulement where interim measures were granted even if the case was deemed inadmissible in the aftermath.¹²³ Among these there are a number of cases where the State has complied with the request not to deport the authors of the communication to their countries of origin, as an interim

¹⁰⁹ Ivi, para. 4.4-4.8; 5.6-5.7.

¹¹⁰ Ivi, para. 6.3.

¹¹¹ Ivi, para. 9.5.

¹¹² Cross-analysis of the case-law from this database: <<https://juris.ohchr.org/SearchResult>> using specific terms: a) interim measures; b) CEDAW; c) provisional; d) precautionary; e) violence against women.

¹¹³ See *supra* note 112.

¹¹⁴ See *supra* note 112.

¹¹⁵ See *supra* note 112. For the full list of cases taken into account, see *infra* Bibliography - "Case-law of CEDAW".

¹¹⁶ See *supra* note 112.

¹¹⁷ See *supra* note 112.

¹¹⁸ Committee on the Elimination of Discrimination Against Women, *D.N.S. v Denmark*; Judgement of 11 March 2022, CEDAW Communication No. 144/2019, CEDAW/C/81/D/144/2019, available at: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2F81%2FD%2F144%2F2019&Lang=en>.

¹¹⁹ Committee on the Elimination of Discrimination Against Women, *M.W. v Denmark*; Judgement of 21 March 2016, CEDAW, Communication No. 46/2012, CEDAW/C/63/D/46/2012, available at: <<https://juris.ohchr.org/casedetails/2098/en-US>>.

¹²⁰ Zyberi, The function and legal status of interim measures indicated by various human rights bodies and the International Court of Justice, in NCHR Occasional Paper Series #15, 2022, p. 9, available at: <<https://ssrn.com/abstract=4299067>>.

¹²¹ See *supra* note 112.

¹²² For more information see: Committee on the Elimination of Discrimination Against Women, *B. M. v Switzerland*, Judgement of 21 November 2022 CEDAW, Communication No. 132/2018, CEDAW/C/83/D/132/2018.

¹²³ See *supra* note 112.

measure.¹²⁴

In *M. N. N. v. Denmark*, for instance, the author, of Ugandan origins, requested interim measures for fear that if she were brought back to her country she might have suffered genital mutilation and other types of violence. Even if the case was later adjudicated as inadmissible – as the author failed to sufficiently substantiate her claims – nonetheless the Committee requested the State party to refrain from expelling the author to Uganda while her communication was under consideration by the Committee. Few days later, the State party complied by notifying the Committee that the author’s time limit for departure had been suspended until further notice.¹²⁵

Currently there are no cases at CEDAW concerning Italy that also involve the request for interim measures. The only two cases concerning Italy, *Mukhina* and *A. F.* are therefore not relevant for this research.¹²⁶

To sum up, the numbers are not sufficient to advance statistical analysis regarding the cases of gender-based violence where interim measures were requested. One could perhaps note, however, that there is a significant number of cases where States failed to comply with interim measures.¹²⁷ Illuminating is the example of *N.Q. v United Kingdom*, a non-refoulement case. When the Committee found that the State party had breached its obligations under article 5 of the Optional Protocol by deporting the author, the State party stated that it “does not

¹²⁴ Relevant examples: Committee on the Elimination of Discrimination Against Women, *Maimouna Sankhé v Spain*, Judgment of 28 October 2013, CEDAW Communication No. 29/2011, CEDAW/C/56/D/29/2011, available at: <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CEDAW/C/56/D/29/2011&Lang=en>.

Committee on the Elimination of Discrimination Against Women, *Guadalupe Herrera Rivera v Canada*, Judgment of 30 November 2011, CEDAW Communication No. 26/2010, CEDAW/C/50/D/26/2010, available at: <<https://juris.ohchr.org/casedetails/1706/en-US>>.

Committee on the Elimination of Discrimination Against Women, *V. v Denmark*, Judgment of 2 August 2016, CEDAW Communication No. 57/2013, CEDAW/C/64/D/57/2013, available at: <<https://fln.dk/-/media/FLN/Nyheder/CEDAW-57-2013.pdf?la=da&hash=47CF2B4740E0D97A69C736346835FC3E51B08AD2>>.

¹²⁵ Committee on the Elimination of Discrimination Against Women, *M.N.N. V. Denmark*, Judgment of 15 August 2013, CEDAW, Communication No. 33/2011, CEDAW/C/55/D/33/2011. Para. 1.2, available at: <<https://juris.ohchr.org/casedetails/1695/en-US>>.

¹²⁶ Committee on the Elimination of Discrimination Against Women, *Zhanna Mukhina v Italy*, Judgment of 30 November 2011, CEDAW, Communication No. 27/2010, CEDAW/C/50/D/27/2010, available at: <https://www2.ohchr.org/english/law/docs/CEDAW-C-50-D-27-2010_en.pdf>.

Committee on the Elimination of Discrimination Against Women, *A.F. v Italy*, Judgment of 18 July 2012, CEDAW, Communication No. 148/2019, CEDAW/C/82/D/148/2019, available at: <<http://www.europeanrights.eu/public/provvedimenti/CEDAW-C-82-D-148-2019.pdf>>.

¹²⁷ Cases of gender-based violence in which States have not complied with Interim Measures are for instance: Committee on the Elimination of Discrimination Against Women, *A.T. v Hungary*, Judgment of 26 January 2005, CEDAW Communication No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2005), available at: <<http://hrlibrary.umn.edu/cedaw/decisions/2-2003.html>>; Committee on the Elimination of Discrimination Against Women, *J.I. v Finland*, Judgment of 5 May 2018, CEDAW Communication No. 103/2016, U.N. Doc. CEDAW/C/69/D/103/2016 (2018), available at: <<https://juris.ohchr.org/casedetails/2432/en-US>>; Committee on the Elimination of Discrimination Against Women, *M.W. v Denmark*, Judgment of 22 February 2016, CEDAW Communication No. 46/2012, U.N. Doc. CEDAW/C/63/D/46/2012 (2016), available at <<https://juris.ohchr.org/casedetails/2098/en-US>>; Committee on the Elimination of Discrimination Against Women, *S.N., E.R. v North Macedonia*, Judgment of 24 February 2020, Communication no. 107/2016, U.N. Doc. CEDAW/C/75/D/107/2016 (2020). Available at <<https://juris.ohchr.org/casedetails/2703/en-US>> ; Committee on the Elimination of Discrimination Against Women, *L.A. et al. v North Macedonia*, Judgment of 24 February 2020, Communication no. 110/2016, U.N. Document CEDAW/C/75/D/110/2016 (2020). Available at <<https://juris.ohchr.org/casedetails/2705/en-US>>.

consider that it is obliged to comply with requests for interim measures”.¹²⁸ Nevertheless, practice seems to demonstrate that non-refoulement cases have a higher incidence of compliance.¹²⁹ Out of 27 cases of non-refoulement with request for interim measures analysed, in 19 cases the interim measures were complied with by the State party.¹³⁰ These cases have demonstrated on different occasions that requesting interim measures proves useful as they can be applied even when the complaint is later found non-admissible.

5.4. Convention Against Torture

We will now analyze how the Convention against Torture qualifies interim measures in its practice and where and if these measures are implemented for gender-based violence cases. First of all, it is essential to note that under the Convention against Torture, the majority of cases trigger Article 3,¹³¹ which asserts the non-refoulement principle. Additionally, other UN treaty bodies, such as the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women, and the Committee on the Rights of the Child also receive individual petitions related to non-refoulement and frequently seek guidance from CAT.¹³² Moreover, the CAT stands out as the second most effective UN human rights treaty-body, after the Human Rights Committee, when it comes to dealing with individual complaints.¹³³ Since 1989, CAT has recorded 1,068 complaints and has rendered decisions on the merits for nearly 400 of them.¹³⁴ As indicated in paragraph 47 of the 2021 Annual Report,¹³⁵ there was a backlog of 219 complaints pending consideration as of April 2021. CAT cases are highly relevant to the discussion of evidence requirements: typically, CAT’s preliminary risk assessment

¹²⁸ Committee on the Elimination of Discrimination Against Women, *N.Q. v United Kingdom of Great Britain and Northern Ireland*, Judgment of 21 March 2016, CEDAW, Communication No. 62/2013 CEDAW/C/63/D/62/2013, para. 2.4, available at: <http://www.bayefsky.com/pdf/unitedkingdomofgreatbritainandnorthernireland_t5_cedaw_62_2013.pdf>.

¹²⁹ Cases of non-refoulement in which the State has complied with Interim Measures are for instance: Committee on the Elimination of Discrimination Against Women, *M.N.N. v. Denmark*, Judgment of 15 August 2013, CEDAW, Communication No. 33/2011, CEDAW/C/55/D/33/2011, available at: <<https://juris.ohchr.org/casedetails/1695/en-US>>.

Committee on the Elimination of Discrimination Against Women, *Maimouna Sankhé v Spain*, Judgment of 28 October 2013, CEDAW Communication No. 29/2011, CEDAW/C/56/D/29/2011. Available at: http://www.bayefsky.com/pdf/spain_t5_cedaw_029_2011.pdf; Committee on the Elimination of Discrimination Against Women, *Guadalupe Herrera Rivera v. Canada*, Judgment of 30 November 2011, CEDAW Communication No. 26/2010, CEDAW/C/50/D/26/2010, available at: <<https://www.refworld.org/cases,CEDAW,519f80e14.html>>

Committee on the Elimination of Discrimination Against Women, *A.R.I. v. Denmark*, Judgment of 8 April 2019, CEDAW/C/72/D/96/2015, available at: <<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsnKIbGfsCt5nq0PhdiTF3%2BmaYTPmyU08hZ6LBYppJOTMIQHrmS3ITAMnOxJHQdQccCTthNrFeGAqKx9yVm6cB3NrGP5r%2Bxbri9PLGKZdViWsYPq8V0ne3pvxrJzosRcKLA%3D%3D>>

¹³⁰ See *supra* note 112.

¹³¹ Cali, Cunningham, *Part I: A few steps forward, a few steps sideways and a few steps backwards: The CAT’s revised and updated GC on Non-Refoulement*, in EJIL: Talk!, 2018.

¹³² *Ibidem*.

¹³³ Sanchez Madrigal, Zyberi, *The function and legal status of interim measures indicated by various human rights bodies and the International Court of Justice*, in NCHR Occasional Paper Series #15, 2022, pp. 4-5, available at: <<https://ssrn.com/abstract=4299067>>.

¹³⁴ Report of the Committee Against Torture of its sixty-ninth (13 July 2020) and seventieth sessions (26-28 April 2021), (CAT/A/76/44), para. 47.

¹³⁵ *Ibidem*.

determines the use of provisional measures or the denial of applicants' claims.¹³⁶ These cases are therefore crucial to the understanding of the evidence standard.

The Committee against Torture has a long tradition of granting interim measures in its quasi-judicial procedures.¹³⁷ In its individual complaints proceedings, CAT 'requests' interim measures instead of imposing them, under its Rules of Procedure.¹³⁸ Although General Comment 4 by CAT does not provide an exhaustive list of what qualifies as an appropriate interim measure, it clearly states that non-compliance with them is a breach of Article 22 just in situations stemming from violations of Article 3 (non-refoulement) of the Convention.¹³⁹ Nevertheless, all the instruments mentioned in the above "legal basis" (section 4.4) are silent on the binding nature of their requests for interim measures. The task of maintaining such force has therefore been left to the interpretative efforts of the relevant treaty body. Indeed, like the HRC, the CAT has implicitly upheld the binding nature of its requests through the General Comment 4, linking it to the "good faith" obligation for States which have accepted the right of individual petition under article 22 of the Convention.¹⁴⁰ The 2023 Annual Report claims that preventive protection is often requested by complainants.¹⁴¹ During the reporting period (seventy-fourth, seventy-fifth, and seventy-sixth sessions), requests for interim measures of protection were received in 51 registered complaints, of which 36 were granted by the Rapporteur on new complaints and interim measures, who regularly monitors the compliance of States parties with such requests.¹⁴² Therefore, given that the Committee comments that States need to comply with interim measures as for an obligation of "good faith", General Comment 4 assumes a broad importance in all the individual complaints proceedings, not only the non-refoulement ones. Indeed, the implicit binding nature of interim measures (in cases of individual complaints not directly linked to Article 3 of the Convention) does not imply States' non-compliance with such measures. As reported in the above-mentioned Annual Report, States generally comply with interim measures. As we will discuss more in detail later in the Opinion, States have low incentives to deviate on compliance with provisional measures, especially for the sake of their reputation. This could be an asset to cases related to gender-based violence as torture¹⁴³, as the victim could be protected legally from these measures while the Committee analyses the case.

Notwithstanding the aforementioned, as CAT-non refoulement cases represent 80 percent of CAT's caseload,¹⁴⁴ we will proceed by analysing jurisprudence in the field of this principle. An examination of CAT non-refoulement jurisprudence reveals significant compliance with interim measures, with only 14 cases of non-compliance between November 2014 and May

¹³⁶ Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication*, [Doctoral Thesis, Maastricht University]. Intersentia, 2010, p. 266.

¹³⁷ See *supra* note 133, p. 4.

¹³⁸ See *supra* note 39.

¹³⁹ CAT/C/GC/4, para. 37.

¹⁴⁰ See *supra* note 133, p.5.

¹⁴¹ Report of the Committee Against Torture of its seventy-fourth (12-29 July 2022), seventy-fifth (31 October-25 November 2022) and seventy-sixth sessions (17 April- 12 May 2023), (CAT/A/78/44), para. 46: *Complainants frequently request preventive protection*.

¹⁴² *Ibidem*.

¹⁴³ See "Legal Opinion for the Association D.i.Re about the conceptualization of gender-based violence as torture" of Group 1.

¹⁴⁴ See *supra* note 131.

2017.¹⁴⁵ The latter are mainly States which opposed to the strict position taken by the Committee in its General Comment 4. Canada has a distinctive history as it is the sole country among the others that did not comply with such requests in some cases.¹⁴⁶ In *T.P.S. v. Canada*,¹⁴⁷ Canada ignored a provisional measure, as it considered the ‘request’ for interim measures not as an order, but rather as a recommendation. According to the State, support for this proposition was to be found in the word employed (‘request’) in the former Rule 108, paragraph 9.¹⁴⁸ Given that Canada had ratified the Convention against Torture and therefore had voluntarily accepted the Committee’s competence to consider individual communications, CAT expressed profound concern.¹⁴⁹ Canada deported the petitioner to India, notwithstanding the Committee’s provisional measures. In the light of this, CAT reinforced this approach, by recognizing the right of individual complaint. As stated in *Mahfoud Brada v. France*, the use of provisional measures is “vital to the role entrusted to the Committee” under Article 22 of the Convention [as] failure to respect that provision, in particular through such irreparable action as deporting an alleged victim, undermined protection of the rights enshrined in the Convention’.¹⁵⁰ Moreover, the complainant is ‘entitled to rely’¹⁵¹ on its provisional measures. The expulsion of the petitioner ‘in the face of the Committee’s request for interim measures nullified the effective exercise of the right to complaint conferred by Article 22, and has rendered the Committee’s final decision on the merits futile and devoid of object’.¹⁵² One of the first cases of breach of both Article 3 and Article 22 was *Tebourski v. France* (2007). This case explicitly connects the right of petition, outlined in Article 22, to the fundamental rights specified in Article 3. By expelling the complainant to Tunisia ‘under the conditions in which it did and for the reasons adduced, thereby presenting the Committee with a *fait accompli*, the State party not only failed to demonstrate the good faith required of any party to a treaty, but also failed to meet its obligations under article 3 and article 22 of the Convention’.¹⁵³ In short, failure to comply with interim measures undermines the successful exercise of the right to petition, according to CAT.¹⁵⁴

¹⁴⁵ Cali, Cunningham, *Part 2: A few steps forward, a few steps sideways and a few steps backwards: The CAT’s revised and updated GC on Non-Refoulement*, in EJIL: Talk!, 2018, available at: <<https://www.ejiltalk.org/part-2-a-few-steps-forward-a-few-steps-sideways-and-a-few-steps-backwards-the-cats-revised-and-updated-gc-on-non-refoulement>>.

¹⁴⁶ Ibidem.

¹⁴⁷ CAT *T.P.S. v. Canada*, 4 September 2000, para. 8.2.

¹⁴⁸ CAT/C/3/Rev.3, 13 July 1998, Rule 108, paragraph 9: “In the course of the consideration of the question of the admissibility of a communication, the Committee or the Working Group or a special rapporteur designated under rule 106, paragraph 3, may request the State party to take steps to avoid a possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation. Such a request addressed to the State party does not imply that any decision has been reached on the question of the admissibility of the communication.”

¹⁴⁹ CAT *T.P.S. v. Canada*, 4 September 2000, para. 15.6: “The Committee is deeply concerned by the fact that the State party did not accede to its request for interim measures under rule 108, paragraph 3, of its rules of procedure and removed the author to India.”

¹⁵⁰ CAT *Mahfoud Brada v. France*, 17 May 2005, para. 6.2.

¹⁵¹ Id., para. 13.3.

¹⁵² Id., para. 13.4.

¹⁵³ CAT *Tebourski v. France*, 1 May 2007, para. 8.7.

¹⁵⁴ Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication*, [Doctoral Thesis, Maastricht University], Intersentia, 2010, pp. 904-905.

However, it could be affirmed that there are some additional costs of non-compliance for State parties. In fact, as previously stated, States parties generally comply with requests for interim measures. Compliance with such decisions by the State parties is often ensured not only because it typically requires measures that can be implemented easily (like temporarily not deporting the complainant), but also because the respondent State can avoid the reputational implications of being identified as an actual violator that has exposed immigrants under its jurisdiction to the threat of torture. This is demonstrated by the prompt response by State parties to the request to implement interim measures. In *Flor Agustina Calfunao Paillalef v. Switzerland*, for instance, the Committee requested the State party not to deport the complainant to Chile on 23 August 2018 while the complaint was being considered, and on 27 August the State party complied with the request.¹⁵⁵ Another example is *T.K.T. v. Switzerland*. Also in this case the State party complied with the request for interim measures the day after the Committee asked them.¹⁵⁶ Moreover, it must be noted that in cases in which State parties requested to lift interim measures, the Committee denied this request and, conversely, put pressure on the State to grant provisional measures. Some examples are *H.S. v. Denmark*¹⁵⁷ and *A.Sh et al. v. Switzerland*.¹⁵⁸

In *S. v. Sweden*, the complainant had asked for the implementation of interim measures to the European Court of Human Rights on 10 February 2015, which considered her application inadmissible.¹⁵⁹ On 25 November 2016, at its fifty-ninth session, the Committee considered the admissibility of the complaint and decided that it was admissible. The Committee concluded that the succinct reasoning provided by the European Court of Human Rights in its decision of 10 February 2015 did not allow the Committee to verify the extent to which the Court had examined the complainant's application, including whether it conducted a thorough analysis of the elements related to the merits of the case'¹⁶⁰.

Based on these premises, we will now connect our findings to the Legal Opinion by Group 1 on the conceptualization of gender-based violence as torture. Characterizing gender-based violence as torture allowed them to state that such a framing holds strategic advantages. In fact, we not only align with this perspective but also emphasise that it could yield even more beneficial outcomes for the victims given that cases linked to the principle of non-refoulement demonstrate a heightened level of compliance with interim measures. The requests for interim measures could thus protect migrant women or asylum seekers from gender-based violence. This is proved by two arguments. First, CAT includes 'gender-based violence, including rape'¹⁶¹ among the indications of personal risk of torture in the context of non-refoulement cases. Second, applicants who can demonstrate that they would face a high risk of ill-treatment in a given country could not be deported to that country, according to Article 3 of the Convention. In *E.K.W. v. Finland*, for instance, as reported in the table below, rape was specifically

¹⁵⁵ CAT *Flor Agustina Calfunao Paillalef v. Switzerland*, 2 January 2020, para. 1.2.

¹⁵⁶ CAT *T.K.T. v. Switzerland*, 8 September 2021, para. 1.2.

¹⁵⁷ CAT *H.S. v. Denmark*, 31 August 2021, para. 1.2.

¹⁵⁸ CAT *A.Sh. et al. v. Switzerland*, 21 June 2018, para. 1.2.

¹⁵⁹ CAT *S. v. Sweden*, 6 February 2019, para. 4.2.

¹⁶⁰ *Id.*, para. 6.

¹⁶¹ CAT/C/GC/4, para. 45.

addressed as a form of torture, therefore constituting an indicator of an actual risk, and brought the Committee to request the State not to expel the complainant while the complaint was being considered.

FACTS as submitted by the complainant	RELEVANCE
<ul style="list-style-type: none"> ● The complainant was born and resided in the Democratic Republic of the Congo ● She worked with the NGO Lisanga Boboto to support women in the country and was a member of the Mouvement de Libération du Congo (MLC) <p>→ During a meeting of the MLC, the Forces armées de la République démocratique du Congo (FARDC), engaged in armed conflict with MLC, arrested the complainant.</p> <p>→The complainant was imprisoned in their camp, held in a pit, raped and constantly assaulted by the soldiers during the two to three months that she was detained.</p> <p>→Once escaped, she travelled to Finland and applied for asylum.</p> <p>→The Finnish Immigration Service decided to deport the complainant, finding that the injuries listed in the medical certificate presented by the complainant could have been inflicted in ways other than those described by the complainant. The Immigration Service did not find the complainant to have a political profile that would place her at risk of rights violations upon return to her home country.</p> <p>→The complainant claims that her deportation to the Democratic Republic of the Congo would amount to a violation of Article 3 of the Convention</p>	<p>→Application of Rule 114 (1): request of the Committee not to expel the complainant to the Democratic Republic of the Congo while her complaint was being considered</p> <p>→Paras 9.6 and 9.7: the Committee notes that the complainant alleges that she was subjected to rape and other torture by members of FARDC; the Committee notes the complainant’s argument that violence against women in the Democratic Republic of the Congo is widespread.</p> <p>→Committee’s decision: The complainant’s removal to the Democratic Republic of the Congo by the State party would constitute a breach of Article 3 of the Convention.</p>

CONCLUSIONS

Our research aimed to comprehensively evaluate the operational mechanisms governing interim measures within various pertinent conventions. This involved the identification of strengths and weaknesses within each framework, along with an in-depth examination of pertinent case law. Ultimately, the goal was to identify the most effective mechanism for facilitating the submission of cases related to gender-based violence. After analyzing the four different systems under the four conventions and having taken into consideration the possibility of conceptualizing gender-based violence as a form of torture, we have concluded that there is no one system that is necessarily preferable, but that the pros and cons of each system should be carefully weighed up.

- The European Court of Human Rights has explicitly held that interim measures are binding on States parties.¹⁶² The practice has shown that the Court is prepared to adopt a strict approach in the case of measures related to the protection of the right to life assessing the risk of harm to an individual deriving from criminal acts of another individual. This could be relevant in cases of gender-based or domestic violence and the Court could be induced to consider the value of “reiterated threats [...] which did not yet materialise into a physical offence”¹⁶³. However, within the system of the Council of Europe, there is a strong pressure from States to reduce the adoption of interim measures and the predictability of non-compliance in non-extradition cases remains uncertain. Italy generally complies with ECtHR interim measures, although significant gaps may persist in the implementation, especially in cases involving non-refoulement and national security issues.¹⁶⁴
- The Human Rights Committee has affirmed the binding force of interim measures referring to a good faith obligation in the implementation of the rights protected by the Covenant.¹⁶⁵ In its recent annual reports, the Committee denounces a lack of compliance by State parties with its interim measures and there is a scarcity of cases clearly related to gender-based violence. This scarcity of cases does not, however, necessarily demonstrate a reluctance on the part of the Committee to request interim measures in gender-based violence cases, since such cases are likely to be predominantly directed towards CEDAW and the ECtHR.
- The CEDAW Committee is certainly the most specialised in gender-based violence cases and has adopted interim measures in relation to non-refoulement issues as well as in cases of domestic violence. However, the data gathered here seem to cast doubt on the level of compliance of states, especially in cases other than non-refoulement, also demonstrating a certain slowness on the part of the Committee in issuing provisional measures, which may preclude the effectiveness of the measures themselves.
- The CAT Committee considers interim measures binding, particularly in the context of non-refoulement,¹⁶⁶ which may benefit vulnerable groups like migrant women and asylum seekers. States generally exhibit compliance with CAT's interim measures.¹⁶⁷ In this respect, the view can be taken that non-compliance with the CAT is considered more costly for States due to ethical and reputational reasons related to a violation of the Convention against Torture, potentially ensuring better protection for victims of gender-based violence. For this reason, recourse to the CAT Committee may be the best choice if the author wishes to turn to obtain prompt and effective interim measures.

¹⁶² European Court of Human Rights, *Mamatkulov and Askarov v Turkey*, Applications Nos. 46827/99 and 46951/99, Judgement of 4 February 2005, Grand Chamber.

¹⁶³ Saccucci, “Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges”, in Palombino, Virzo, Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals*, Springer, 2021, p. 228.

¹⁶⁴ See *supra* note 55.

¹⁶⁵ See *supra* note 27, para 2.

¹⁶⁶ See *supra* note 41.

¹⁶⁷ Some case examples are: *CAT H.S. v. Denmark*, 31 August 2021, para. 1.2., and *CAT A.Sh et al. v. Switzerland*, 21 June 2018, para. 1.2.

Overall, our analysis has shown that it is generally convenient to request interim measures even if the complaint might be deemed inadmissible. Treaty bodies could request State parties to implement interim measures even before the decision on admissibility, thus protecting the alleged victim at least for that period. Finally, it is of note that interim measures may be requested *proprio motu* by monitoring bodies to protect the victim's rights in situations where the State's failure to act may aggravate the risk of irreparable harm.

BIBLIOGRAPHY

Çali B., Cunningham, S., "Part 1: A few steps forward, a few steps sideways and a few steps backwards: The CAT's revised and updated GC on Non-Refoulement". Blog of the European Journal of International Law, March 2018. Available at: <https://www.ejiltalk.org/part-1-a-few-steps-forward-a-few-steps-sideways-and-a-few-steps-backwards-the-cats-revised-and-updated-gc-on-non-refoulement/>.

Çali B., Cunningham, S., "Part 2: A few steps forward, a few steps sideways and a few steps backwards: The CAT's revised and updated GC on Non-Refoulement". Blog of the European Journal of International Law, March 2018. Available at: https://www.ejiltalk.org/part-2-a-few-steps-forward-a-few-steps-sideways-and-a-few-steps-backwards-the-cats-revised-and-updated-gc-on-non-refoulement/?relatedposts_hit=1&relatedposts_origin=16035&relatedposts_position=0.

Center for Justice and International Law (CEJIL); International Human Rights Law Clinic, University of California, Berkeley, "Comparative Analysis of the Practice of Precautionary Measures Among International Human Rights Bodies", December 2012, pp.10-11.

Committee against Torture, General Comment no.4 (2017) on the implementation of article 3 in the context of article 22, 4 September 2018.

Committee against Torture, Report of the Committee Against Torture Sixty-ninth (13 July 2020) and Seventieth sessions (26-28 April 2021).

Committee against Torture, Report of the Committee against Torture Seventy-fourth session (12–29 July 2022) Seventy-fifth session (31 October–25 November 2022) Seventy-sixth session (17 April–12 May 2023).

Cusack S., Pusey L., "CEDAW and the Rights to Non-Discrimination and Equality", Melbourne Journal of Law, 2013, pp. 54-92.

Englehart Neil A., "CEDAW and Gender Violence: An Empirical Assessment", Michigan State Law Review, 2014, pp. 265-280.

European Court of Human Rights Press Unit, "Factsheet - Interim Measures", June 2023. Available at https://www.echr.coe.int/documents/d/echr/fs_interim_measures_eng [Accessed on 26 November 2023].

Kanetake M., “UN Human Rights Treaty Monitoring Bodies Before Domestic Courts, International and Comparative Law Quarterly, 2018, 2018, pp. 201-232.

Haecck, Yves, et al. “Strasbourg's Interim Measures Under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?” *European Yearbook on Human Rights*, vol. 11, 2011, pp. 375-403.

Legeay H., Ferstman C., and Rodriguez-Pinzon D., “Panel I: The Use of Interim Measures by the Committee against Torture: Towards a Comprehensive Instrument for the Protection of Victims and Witnesses in Torture Cases”, *Human Rights Brief* 20, no. 4 (2013). Available at: <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1888&context=hrbrief>.

Naldi, G.J., “Interim Measures in the UN Human Rights Committee”, *International and Comparative Law Quarterly*, 2004, pp. 445-454.

Rieter E., *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* [Doctoral Thesis, Maastricht University], Intersentia, 2010, pp. 266, 904-905.

Saccucci A., “Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges”, in Palombino F., Virzo R., Zarra G. (eds), *Provisional Measures Issued by International Courts and Tribunals*, Springer, 2021, pp. 215-252.

Sánchez Madrigal E., Zyberi G., “The Function and Legal Status of Interim Measures Indicated by Various Human Rights Bodies and the International Court of Justice”, *NCHR Occasional Paper Series*, December 2022, pp. 4-6.

CASE-LAW

European Court of Human Rights

European Court of Human Rights, *Ben Khemais v Italy*, Application No. 246/07, Judgement of 24 February 2009, available at: <<https://hudoc.echr.coe.int/fre?i=001-91510>>.

European Court of Human Rights, *Gard et al v United Kingdom*, Application No. 39793/17, Judgement of 27 June 2017, available at: <<https://hudoc.echr.coe.int/fre?i=001-175359>>.

European Court of Human Rights, *Hamidovic v Italy*, Application No. 31956/05, Judgement of 4 December 2012, available at: <<https://hudoc.echr.coe.int/fre?i=001-114949>>.

European Court of Human Rights, *Hilal v The United Kingdom*, Application No. 45276/99, Judgement of 6 March 2001, available at: <<https://hudoc.echr.coe.int/fre?i=001-59339>>.

European Court of Human Rights, *Lambert et al v. France*, Application No. 46043/14, Judgement of 5 June 2015, available at: <<https://hudoc.echr.coe.int/fre?i=002-10758>>.

European Court of Human Rights, *Landi v. Italy*, Application No. 10929/19, Judgement of 7 April 2022, available at: <<https://hudoc.echr.coe.int/fre?i=002-13632>>.

European Court of Human Rights, *Mamatkulov and Askarov v Turkey*, Applications Nos. 46827/99 and 46951/99, Judgement of 4 February 2005, Grand Chamber, available at: <<https://hudoc.echr.coe.int/fre?i=003-1258099-1310506>>.

European Court of Human Rights, *Y and others v. Bulgaria*, Application No. 9077/18, Judgement of 22 March 2022, available at: <<https://hudoc.echr.coe.int/fre?i=002-13609>>.

European Court of Human Rights Annual report (2022), pp. 136-146, available at: <<https://www.echr.coe.int/annual-reports>>.

Human Rights Committee

Human Rights Committee, *Piandiong et al v. The Philippines*, Communication No. 869/1999, Judgement of 19 October 2000, CCPR/C/70/D/869/1999, available at: <<http://hrlibrary.umn.edu/research/Philippines/Piandiong%20v%20The%20Philippines,%20%20Case%20No.%20869-1999.pdf>>.

Human Rights Committee, *Purna Maya v. Nepal*, Communication No. 2245/2013, Judgement of 23 June 2017, CCPR/C/119/D/2245/2013, available at: <<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsukPtYsnxNH1DBeueuCbK4jpBRHauy74FDcfEr2JZeaKm8E6B1VIS8Z3645mBRIZVA9UI9%2FQB8NPexx76gmleQZNQG8mY5jEgpxdVFq24UtKl8tVLd%2FXL50PgwA4kB9cZg%3D%3D>>.

Human Rights Committee, *R.M. and F.M. v. Denmark*, Judgement of 17 July 2020, HRC Communication No. D/2685/2015, CCPR/C/126/D/2685/2015, available at: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%252fC%252f126%252fD%252f2685%252f2015&Lang=en>.

Committee on the Elimination of All forms of Discrimination Against Women

Committee on the Elimination of Discrimination Against Women, *A.F. v Italy*, Judgment of 18 July 2012, CEDAW, Communication No. 148/2019, CEDAW/C/82/D/148/2019, available at: <<http://www.europeanrights.eu/public/provvedimenti/CEDAW-C-82-D-148-2019.pdf>>.

Committee on the Elimination of Discrimination Against Women, *A.T. v. Hungary*, Judgement of 26 January 2005, CEDAW Communication No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2005), available at: <<http://hrlibrary.umn.edu/cedaw/decisions/2-2003.html>>.

Committee on the Elimination of Discrimination Against Women, *A.R.I. v Denmark*, Judgment of 8 April 2019, CEDAW/C/72/D/96/2015, available at: <<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsnKIbGfsCt5nq0PhdiTF3%2BmaYTPmyU08hZ6LBYppJOTMIQHrmS3ITAMnOxJHQdQccCTthNrFeGAqKx9yVm6cB3NrGP5r%2Bxbrl9PLGKZdViWsYPq8V0ne3pvxrJzosRCkLA%3D%3D>>.

Committee on the Elimination of Discrimination Against Women, *B. M. v Switzerland*, Judgement of 21 November 2022 CEDAW, Communication No. 132/2018, CEDAW/C/83/D/132/2018, available at: <<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsgekS3XMuMTIW18D8vtwB3%2Bw%2FbZQxtUyYXjeWhHQdfqa9B9p69GdZu5yf%2>>

FxcNHDGXpuC1ChETitdAD%2BjdSHvCWjxYGubfdAJHt7kuTcl8GEI7suOniH1BVutB6AaHEOv7g%3D%3D>.

Committee on the Elimination of Discrimination Against Women, *D.N.S. v Denmark*; Judgement of 11 March 2022, CEDAW Communication No. 144/2019, CEDAW/C/81/D/144/2019, available at: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2F81%2FD%2F144%2F2019&Lang=en>.

Committee on the Elimination of Discrimination Against Women, *Guadalupe Herrera Rivera v Canada*, Judgment of 30 November 2011, CEDAW Communication No. 26/2010, CEDAW/C/50/D/26/2010, available at: <<https://juris.ohchr.org/casedetails/1706/en-US>>.

Committee on the Elimination of Discrimination Against Women, *L.A. et al. v. North Macedonia*, Judgment of 24 February 2020, Communication no. 110/2016, U.N. Document CEDAW/C/75/D/110/2016 (2020), available at: <<https://juris.ohchr.org/casedetails/2705/en-US>>.

Committee on the Elimination of Discrimination Against Women, *J.I. v. Finland*, Judgment of 5 May 2018, CEDAW Communication No. 103/2016, U.N. Doc. CEDAW/C/69/D/103/2016 (2018), available at: <<https://juris.ohchr.org/casedetails/2432/en-US>>.

Committee on the Elimination of Discrimination Against Women, *Maimouna Sankhé v Spain*, Judgement of 28 October 2013, CEDAW Communication No. 29/2011, CEDAW/C/56/D/29/2011, available at: <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CEAW/C/56/D/29/2011&Lang=en>.

Committee on the Elimination of Discrimination Against Women, *M.N.N. V. Denmark*, Judgment of 15 August 2013, CEDAW, Communication No. 33/2011, CEDAW/C/55/D/33/2011. Para. 1.2, available at: <<https://juris.ohchr.org/casedetails/1695/en-US>>.

Committee on the Elimination of Discrimination Against Women, *M.W. v Denmark*; Judgement of 21 March 2016, CEDAW, Communication No. 46/2012, CEDAW/C/63/D/46/2012, available at: <<https://juris.ohchr.org/casedetails/2098/en-US>>.

Committee on the Elimination of Discrimination Against Women, *N.Q. v United Kingdom of Great Britain and Northern Ireland*, Judgment of 21 March 2016, CEDAW, Communication No. 62/2013 CEDAW/C/63/D/62/2013, para. 2.4, available at: <http://www.bayefsky.com/pdf/unitedkingdomofgreatbritainandnorthernireland_t5_cedaw_62_2013.pdf>.

Committee on the Elimination of Discrimination Against Women, *S.N., E.R. v North Macedonia*, Judgment of 24 February 2020, Communication no. 107/2016, U.N. Doc. CEDAW/C/75/D/107/2016 (2020), available at: <<https://juris.ohchr.org/casedetails/2703/en-US>>.

Committee on the Elimination of Discrimination Against Women, *V. v Denmark*, Judgment of 2 August 2016, CEDAW Communication No. 57/2013, CEDAW/C/64/D/57/2013, available

at: <https://fln.dk/-/media/FLN/Nyheder/CEDAW-57-2013.pdf?la=da&hash=47CF2B4740E0D97A69C736346835FC3E51B08AD2>.

Committee on the Elimination of Discrimination Against Women, *Zhanna Mukhina v Italy*, Judgment of 30 November 2011, CEDAW, Communication No. 27/2010, CEDAW/C/50/D/27/2010, available at: https://www2.ohchr.org/english/law/docs/CEDAW-C-50-D-27-2010_en.pdf.

Committee Against Torture

Committee Against Torture, *A.Sh. et al. v. Switzerland*, Application no. CAT/C/63/D/717/2015, Judgment of 21 June 2018, available at: <https://atlas-of-torture.org/en/entity/jqoeyumdgt?page=1>.

Committee Against Torture, *E.K.W. v. Finland*, Application no. CAT/C/54/D/490/2012, Judgment of 25 June 2015, available at: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPpRiCAqhKb7yhsq1pKjSuhb3H3Sm4FHCtH5Pi%2BYTj0e7MPOW0%2FQXhgVMTTjhlxORrJNc%2FttvaFvD5CgNLWbl59CYnnQj%2Fm9W8yeAHaAfQGGsUNNVE2z3Q0zZq0voV7XjAMgGBxXM7RWr2fQ%3D%3D>.

Committee Against Torture, *Flor Agustina Calfunao Paillalef v. Switzerland*, Application no. CAT/C/68/D/882/2018, Judgment of 2 January 2020, available at: <https://juris.ohchr.org/casedetails/2701/en-US>.

Committee Against Torture, *H.S. v. Denmark*, Application no. CAT/C/71/D/792/2016, Judgment of 31 August 2021, available at: <https://atlas-of-torture.org/en/entity/q0hg0s2dgbg>.

Committee Against Torture, *Maftoud Brada v. France*, Application no. CAT/C/34/D/195/2002, Judgment of 17 May 2005, available at: <https://www.refworld.org/cases,CAT,42ce734b0.html>.

Committee Against Torture, *S. v. Sweden*, Application no. CAT/C/65/D/691/2015, Judgment of 6 February 2019, available at: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPpRiCAqhKb7yhsmKS5GoGH5f0orb62VhgckBqbqt8zfRcuSDiIEu%2FPjeiXM11j1LBVbJb0CGY8FglNPEQwC8aBq%2FsBERdjam8rOH9NgObC4iK7Cf%2BW0cwfZ89hZPUadPyglSFPP632y5LQ%3D%3D>.

Committee Against Torture, *T.P.S. v. Canada*, Application no. CAT/C/24/D/99/1997, Judgment of 4 September 2000, available at: <https://www.refworld.org/cases,CAT,3f588ed03.html>.

Committee Against Torture, *Tebourski v. France*, Application no. CAT/C/38/D/300/2006, Judgment of 11 May 2007, available at: <https://www.refworld.org/cases,CAT,47975b0421.html>.