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### Article 2 - Scope of the Convention

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## Article 2 – Scope of the Convention

Micaela Frulli\*

### 1. The Scope of the Istanbul Convention: A Holistic and Integrated Approach to Fighting Violence Against Women

All forms of violence against women are interconnected and generate a continuum of violence ranging from the most apparent and brutal violations of women's rights to the more subtle and devious forms of control over women's lives and bodies, both in the public and in the private sphere, in times of peace and in times of armed conflict. The struggle against such a pervasive phenomenon requires a comprehensive approach including human rights and anti-discriminatory perspectives, a criminal law dimension, and a set of tools to build a gender-sensitivity attitude.

The Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter Istanbul Convention) is an attempt at addressing the issue in a holistic manner, with a specific focus on domestic violence, acknowledging that it concerns both women and men, but affects women disproportionately, as Article 2 clearly states. Both women and men may experience gender-based violence, but most victims are women and girls; for this reason, gender-based violence (GBV) and violence against women (VAW) are often used interchangeably<sup>1</sup>. Gender violence against women is an everyday occurrence: the World Health Organization (WHO) reckons that one woman out of three (35%) has experienced physical or sexual partner violence or non-partner sexual violence in her lifetime. As regards domestic violence, the estimate is that, globally, as many as 38% of murders of women are committed by a male intimate partner.<sup>2</sup> While recognition of violence against women in private contexts by private actors as a human rights issue may be traced back to the 1990s<sup>3</sup> and it is now well established, there are still relevant gaps in the legal protection

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\* Full Professor of International Law, University of Florence (micaela.frulli@unifi.it).

<sup>1</sup> 'However, using the 'gender-based' aspect is important as it highlights the fact that many forms of violence against women are rooted in power inequalities between women and men', see the definition given by the European Institute for Gender Equality (EIGE) <<https://eige.europa.eu/gender-based-violence/what-is-gender-based-violence>> accessed 30 July 2022.

<sup>2</sup> WHO, Factsheet on Violence against Women, 29 November 2017 <<https://www.who.int/news-room/factsheets/detail/violence-against-women>> accessed 30 July 2022.

<sup>3</sup> Hilary Charlesworth, 'Worlds Apart: Public/Private Distinctions in International Law', in Margareth Thornton (ed.), *Public and Private Feminist Legal Debates* (OUP 1995) 243 and more in general Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *EJIL* 387.

of women, especially in the private sphere<sup>4</sup>. For these reasons, a binding treaty with a far-reaching scope, ambitious goals and bound to be applicable across the board was truly necessary.

The thorough approach that characterized the negotiation of the Istanbul Convention is reflected in a variety of features that are fully commented upon in this Commentary. A crucial trait for promoting a comprehensive approach is the dual nature of the treaty. In fact, with a view to addressing all forms of VAW and GBV, the treaty includes classical human rights provisions - i.e. negative and positive obligations incumbent on States to implement individual rights - but also criminal law requirements since it obliges States to criminalize certain acts of violence,<sup>5</sup> to foster their prosecution and to impose adequate sanctions on those found guilty.<sup>6</sup>

In delineating the scope of the Istanbul Convention, it is worth underlying that it is the most recent treaty dealing with VAW and that it places itself as a further step to combat discrimination and violence against women to be read against the background of other treaties and documents that preceded it. It represents not only one of the latest developments in paving the way towards the elimination of discrimination against women and the eradication of gender inequality (as a structural cause of VAW<sup>7</sup>), but it also aims at creating an exchange of ideas among different bodies and institutions sharing the task to tackle VAW and GBV. As duly noted, the Convention had a lot of material to build upon: the *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW) and the regional human rights treaties (including those specifically dealing with VAW<sup>8</sup>); resolutions and declarations of international organizations; the jurisprudence of human rights

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<sup>4</sup> See Jackie Jones, 'The Importance of International Law Institutions', in Jackie Jones, Rashida Manjoo *The Legal Protection of Women from Violence. Normative Gaps in International Law* (Routledge 2018) 9, 12.

<sup>5</sup> The Convention criminalizes physical and psychological violence (artt 33-35); sexual violence including rape (art 36); stalking (art 34); sexual harassment (art 40); forced marriage (art 37); female genital mutilation (art 38); forced abortion and forced sterilisation (art 39). In addition, it provides that 'Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour' (art 42,1).

<sup>6</sup> Artt.44,45.

<sup>7</sup> In the Preamble of the Convention it is stated that 'the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men' and that 'violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women'.

<sup>8</sup> At the regional level two other treaties specifically address VAW. First, the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women*, (also known as Convention of Belém do Pará), adopted in the framework of the Organization of American States (OAS) and entered into force in 1995. The Convention was ratified, as of 30 July 2022, by 32 State Parties to the OAS (excluding Canada and the USA, see <https://www.oas.org/juridico/english/signs/a-61.html>, accessed 30 July 2022). Second, Second, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (PRWA, also known as Maputo Protocol), adopted by the African Union in 2003 and entered into force in 2005. As of 30 July 2022, the PRWA was ratified by 42 States out of 55 State Parties to the African Union (see <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>, accessed 30 July 2022). See Rosa Celorio, *The Istanbul Convention through the Lens of the Americas and Africa*, in this Commentary.

courts and general recommendations and opinions of the CEDAW Committee<sup>9</sup>. Šimonović argued that the Istanbul Convention translated into binding obligations the content of General Recommendation No. 19 of the CEDAW Committee<sup>10</sup>, the landmark document adopted in 1992 that provided both a definition and an in-depth analysis of VAW widening the scope of CEDAW itself (GR 19)<sup>11</sup>. In 2017, the CEDAW Committee ‘responded’ to the Istanbul Convention with General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 (GR 35)<sup>12</sup> and thus renewing the dialogue over time. The jurisprudence of the European Court of human rights (ECtHR) was also a relevant source of inspiration for the drafting of the Istanbul Convention, being it the human rights body, in Europe, addressing cases of violence against women on a legally binding basis. The ECtHR in turn may now look at Istanbul Convention as a tool for interpreting the provisions of the European Convention on Human rights<sup>13</sup>. Actually, after the entry into force of the Istanbul Convention, the Court often referred to it as a guideline in the determination of the state responsibilities in domestic violence cases.<sup>14</sup>

In other words, the Istanbul Convention calls for an integrated approach to combat VAW, to be carried out in conjunction with all relevant bodies and institutions, both regional and universal ones, engaged in developing legal standards and forging practical tools to eliminate VAW. In this way, it also ultimately enlarges its scope and its reach well beyond the specific obligations that it imposes on State parties.<sup>15</sup>

## 2. The Uncertainties Surrounding Gender Neutrality and Intersectionality

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<sup>9</sup> Christine Chinkin, ‘Regional Approaches to Combating Violence against Women: the Istanbul Convention’. Notes for a talk delivered at the Centre for Women, Peace and Security workshop ‘Tackling Violence Against Women: International and Regional Approaches’ LSE, London, UK (4 February 2016) <<https://www.lse.ac.uk/women-peace-security/assets/documents/2016/LSE-VAW-040216-Chinkin.pdf>> accessed 30 July 2022.

<sup>10</sup> Dubravka Šimonović, ‘Global and Regional Standards on Violence against Women: The Evolution and Synergy of the Cedaw and Istanbul Conventions’ (2014) 36 *Human Rights Quarterly* 590, 604.

<sup>11</sup> CEDAW Committee, ‘General Recommendation No. 19: Violence against Women’ (1992).

<sup>12</sup> CEDAW Committee, ‘General recommendation No. 35 on gender-based violence against women, updating General recommendation No. 19’ (2017). See Sara De Vido, ‘The Prohibition of Violence Against Women as Customary International Law? Remarks on the CEDAW General Recommendation No 35’ (2018) 12 *Diritti umani e diritto internazionale* 379;. Ramona Vijayarasa ‘CEDAW’s General Recommendation No. 35: A quarter of a century of evolutionary approaches to violence against women’ (2020) 19 *Journal of Human Rights* 153.

<sup>13</sup> Sara De Vido, ‘The Istanbul Convention as an interpretative tool at the European and national levels’, in Johanna Niemi, Lourdes Peroni, Vladislava Stoyanova (eds.), *International Law and Violence against Women. Europe and the Istanbul Convention* (Routledge 2020) 57.

<sup>14</sup> See *M.G. v Turkey* App no 646/10 (ECHR 22 March 2016) paras 54, 93, 94, 106, 116; *Halime Kiliç v Turkey* App no 63034/11 (ECHR 28 September 2016) paras 64, 114, 115; *Bălşan v. Romania* App no. 49645/09 (ECHR 23 August 2017) paras 42, 79; *Talpis v Italy* App no. 41237/14 (ECHR 18 September 2017) paras 58, 129; *Kurt v Austria* App no. 62903/15 (ECHR 4 July 2019), para. 47; *Volodina v Russia* App no. 41261/17 (ECHR 4 November 2019) para 60.

<sup>15</sup> Accession to the Istanbul Convention is open to any State, not only to States members of the Council of Europe, Art 76.

One of the issues that have been discussed with respect to the scope of the Convention is the fact that Article 2, paragraph 2 encourages States parties to apply the Convention to all victims of domestic violence, meaning not only women but also men and boys, although keeping the focus on gender-based violence against women and girls<sup>16</sup>. Some authors said that the Istanbul Convention is thus both gender-specific, directed at combating violence against women and girls, but it is also gender-neutral in recognizing the need to take account of other victims of domestic violence<sup>17</sup>. However, there was disagreement on this point during the preparatory works within the *Ad Hoc Committee for preventing and combating violence against women and domestic violence* (CAHVIO)<sup>18</sup>. Actually, the vast majority of delegations were in favour of a treaty focusing on all forms of violence against women, while only a minority of delegates purported the view that the Convention should cover mainly domestic violence and be applicable to all victims irrespective of gender or age<sup>19</sup>. A compromise solution was reached by consensus and embodied in Article 2 establishing that the Convention ‘shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately’ (art. 2, para 1) and that ‘Parties are encouraged to apply this Convention to all victims of domestic violence’ (art. 2, para 2). If on the one hand gender-neutrality may be considered a positive development, since women are not only represented as victims, on the other hand the hidden risk of endorsing gender-neutrality is that of overlooking the structural dimension of VAW<sup>20</sup>, including its epidemic character in the private sphere. In fact, the compromise reached on the text of Article 2 defining the scope of the convention is also reflected in the provisions criminalizing certain conducts that are drafted as gender neutral (with the exception of the female

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<sup>16</sup> According to the Explanatory Note accompanying the Convention: ‘The provision contained in paragraph 2 on the scope of the Convention encourages Parties to apply this Convention also to domestic violence committed against men and children. It is therefore up to the Parties to decide whether to extend the applicability of the Convention to these victims. They may do so in the manner they consider the most appropriate, taking notably account of the specific national situation and of the developments in their society. However, with a view to keeping the focus on the various forms of gender based violence committed against women, paragraph 2 requires Parties to pay particular attention to victims of this form of violence when implementing the Convention. This means that gender-based violence against women, in its various manifestations, one of which is domestic violence, must lie at the heart of all measures taken in implementation of the Convention’, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, *Council of Europe Treaty Series - No. 210*, para.37.

<sup>17</sup> Chinkin (9).

<sup>18</sup> The Ad Hoc Committee for preventing and combating violence against women and domestic violence (CAHVIO, composed of governmental representatives of Council of Europe member States) was set up in December 2008 and through nine rounds of meetings held between its creation and December 2010, it finalized the draft text of the Convention which was later adopted by the Committee of Ministers and opened for signature in Istanbul on 11 May 2011.

<sup>19</sup> CAHVIO, Report of the second meeting (25-27 May 2009) para 6.

<sup>20</sup> See Christine Chinkin, Kevät Nousiainen. *Legal Implications of EU accession to the Istanbul Convention*, European network of legal experts in gender equality and non-discrimination (European Commission, 2016) 43, available at <<https://op.europa.eu/it/publication-detail/-/publication/4e3568b9-013b-11e6-b713-01aa75ed71a1>> accessed 30 July 2022.

genitals mutilation).<sup>21</sup> While men are acknowledged as potential victims of domestic violence<sup>22</sup>, they are not expressly mentioned as possible perpetrators<sup>23</sup>. This invisibility may portray a misleading idea of the actual reality of VAW, although the inequality of power relations between women and men is expressly recalled in the Preamble of the Convention<sup>24</sup>.

Other scholars raised the lack of adequate references to intersectionality and the predominance of a binary<sup>25</sup> and cis-normative perspective in the Istanbul Convention as another critical feature, potentially and unduly limiting its scope. As it is well known, the theories of intersectionality challenge the basic assumption that the binary perspective is suitable to explain - let alone eliminate - VAW, because sex is not the only element that characterizes women's identity and experiences.<sup>26</sup> Although intersectionality is gaining momentum in the human rights discourse and jurisprudence<sup>27</sup>, the Istanbul Convention contains only one explicit reference to discrimination on multiple grounds (not only sex or gender)<sup>28</sup>. Moreover, there is no definition of what is intended by women in the Convention<sup>29</sup>, which means that women are simply defined by their belonging to the biological category based on physical characteristics that identify men and women<sup>30</sup>. For instance, although

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<sup>21</sup> See Johanna Niemi, Lourdes Peroni Vladislava Stoyanova, 'Introduction the Istanbul Convention as a response to violence against women in Europe', in Niemi, Peroni, Stoyanova (eds.) (13), 1, 7.

<sup>22</sup> The Preamble recognize 'that domestic violence affects women disproportionately, and that men may also be victims of domestic violence'.

<sup>23</sup> Johanna Niemi, Amalia Verdu Sanmartin, 'The concept of gender and violence in the Istanbul Convention', in Niemi, Peroni, Stoyanova (eds.) (13) 77, 83.

<sup>24</sup> The Preamble reads: 'Recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women;

Recognising the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men'.

<sup>25</sup> 'The Convention recognizes two genders, women and men (...) the text is firmly embedded the heteronormative binary of women and men as the genders. Thus, gender is used as a substitute of sex, sex being women and men', Niemi, Verdu Sanmartin (23), 81.

<sup>26</sup> Intersectionality may be defined as: 'The complex, irreducible, varied, and variable effects which ensue when multiple axis of differentiation - economic, political, cultural, psychic, subjective and experiential - intersect in historically specific contexts', Avtar Brah; Ann Phoenix, 'Ain't I a Woman? Revisiting Intersectionality', (2013) 5 *Journal of International Women's Studies* 75, 76.

<sup>27</sup> The jurisprudence of the ECtHR is gradually including an intersectional perspective in its judgements, Keina Yoshida, 'Towards Intersectionality in the European Court of Human Rights: The Case of *Bs V Spain*' (2013) 21 *Feminist Legal Studies*, 195. On intersectionality see Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Center or the Margins?* (CUP 2017); see also Lorena Sosa and Ruth Mestre i Mestre, 'The Istanbul Convention from and Interdisciplinary Perspective', in this Commentary.

<sup>28</sup> Article 4, para 3: 'The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.', se Lourdes Peroni, 'Article 4', in this Commentary.

<sup>29</sup> In the feminist debate the view that men and women are stable and 'natural' categories has been disputed for decades and the idea of women as a heterogeneous category has been criticized as suitable to address only issues affecting 'white heterosexual middle class women', Lorena Sosa, 'The Istanbul Convention in the context of feminist claims', in Niemi, Peroni, Stoyanova (eds.) (13) 13 25, 29.

<sup>30</sup> On the contrary, the need for an intersectional approach was reaffirmed in the CEDAW Committee General Recommendation 35: 'In general recommendation No. 28 and general recommendation No. 33, the Committee confirmed that discrimination against women was inextricably linked to other factors that affected their lives. The Committee, in its

there were requests to include specific reference to LGBTQI\* persons and a harsh debate during the CAHVIO meetings, eventually no explicit mention was inserted in Article 2 nor in other relevant provisions of the Convention<sup>31</sup>.

Ambivalence is most often unavoidable when negotiating a treaty and it is bound to increase when the issues at stake are controversial. Thus, most likely a conservative approach prevails in treaty provisions. Just to give another relevant example, article 7, paragraph 3 of the Statute of the International Criminal Court (ICC) reads: ‘it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above’.<sup>32</sup> Indeed, the first definition of gender inserted in an international treaty has been widely criticized because it wrongly ‘elides the notion of gender and sex’<sup>33</sup> and it is excessively narrow<sup>34</sup>. The focus on two sexes was strongly advocated by States which feared that by not expressly linking gender to the male and female sexes other genders would be included in the definition, so the actual definition is a result of ‘constructive ambiguity’ leaving much of the interpretation of the definition to the ICC’s judges<sup>35</sup>. That is why it is the role of jurisprudence<sup>36</sup> and of soft law documents is so crucial with respect to the issues discussed above, as it is, by and large, the role of courts and monitoring mechanisms for advancing an evolutive interpretation of human rights issues.

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jurisprudence, has highlighted the fact that such factors include women’s ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital status, maternity, parental status, age, urban or rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, seeking asylum, being a refugee, internally displaced or stateless, widowhood, migration status, heading households, living with HIV/AIDS, being deprived of liberty, and being in prostitution, as well as trafficking in women, situations of armed conflict, geographical remoteness and the stigmatization of women who fight for their rights, including human rights defenders.<sup>11</sup> Accordingly, because women experience varying and intersecting forms of discrimination, which have an aggravating negative impact, the Committee acknowledges that gender-based violence may affect some women to different degrees, or in different ways, meaning that appropriate legal and policy responses are needed’, (12), para.12.

<sup>31</sup> Sosa (28), 34, Niemi, Verdu Sanmartin (23), 82. The Explanatory report (16) clarifies that in regard to gender identity ‘transgender or transsexual persons, cross-dressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to “male” or “female” categories’ are covered by the non-discrimination provision, i.e. art 4.3, (28).

<sup>32</sup> ICC article 7 on crimes against humanity

<sup>33</sup> Hillary Charlesworth, ‘Symposium on Method: Feminist Methods in International Law’ (1999) 93 *AJIL* 379, 394.

<sup>34</sup> Valerie Oosterveld, ‘The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice.’ (2005) 18 *Harvard Human Rights Journal*, 55, 56.

<sup>35</sup> Valerie Oosterveld, ‘(Mis)understanding Gender in International Criminal Law’ (2015) *Podcast*. University of Oxford, <<https://podcasts.ox.ac.uk/misunderstanding-gender-international-criminal-law>> accessed 31 July 2022.

<sup>36</sup> Very interesting, in this respect, the document of the Office of the Prosecutor on gender based crimes that embraces a comprehensive notion of gender, ICC, *Office of the Prosecutor* ‘Policy Paper on Sexual and Gender-Based Crimes’ (June 2014) <<https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> accessed 7 August 2022. It is worth mentioning also the *OTP Policy on children* of 2016 where it is stated that ‘children may be impacted differently by crimes based on their sex, gender, or other status or identities’ and that they are ‘particularly vulnerable to sexually violent crimes’ and ‘may also be persecuted on intersecting grounds, such as ethnicity, religion and gender’ ICC, *Office of the Prosecutor* ‘Policy on Children’ (November 2016) <[https://www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF)> accessed 7 August 2022.

### 3. The role of the Istanbul Convention in times of armed conflict

According to Art. 2.3, the Convention is applicable in times of peace as well as in times of armed conflict. This means that its provisions – as those inserted in other international human rights law (IHRL) instruments – are complementary to international humanitarian law (IHL) rules dealing with VAW and, to a certain extent, to international criminal law (ICL) rules<sup>37</sup> since several acts consisting in VAW or GBV may fall within the categories of war crimes, crimes against humanity and genocide<sup>38</sup>. The interplay of these three bodies of law and their mutual reinforcement<sup>39</sup> is extremely important in the struggle for the elimination of VAW and GBV precisely because these acts of violence are placed on a continuum. They are recurrent in everyday life in times of peace, take place on a large scale in all kinds of armed conflicts and most often persist in post-conflict environments<sup>40</sup>. It therefore seems interesting to see whether and how the Istanbul Convention may help filling some of the existing gaps or conundrums taking into account its dual nature of human rights/criminal law treaty.

#### 3.1. Violence against women in armed conflict as a human rights violation

Most of the legal instruments dealing with VAW – both binding and soft law ones – deal with the situation of women in peacetime. The CEDAW does not mention acts of VAW committed in times of peace or war. Only in 1992, GR 19 defined VAW a form of discrimination and stated that women's rights under the scope of the convention include 'the right to equal protection according to humanitarian norms in time of international or internal armed conflict'. It also acknowledged that

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<sup>37</sup> The Explanatory Report expressly mentions complementarity: 'Paragraph 3 therefore provides for the continued applicability of the Convention during armed conflict as complementary to the principles of international humanitarian law and international criminal law', Explanatory report (16), para 38.

<sup>38</sup> Of course, crimes against humanity and genocide may be also committed in times of peace; however, they are more likely to happen in situations of armed conflict both of an international or non-international character.

<sup>39</sup> On the convergence on IHL and IHRL as well as on the interplay of these bodies of law with ICL there is a vast literature. It suffices here to refer to very few selected works: Theodor Meron, 'Convergence of International Humanitarian Law and Human Rights Law' (2000), 94 *AJIL* 239; Aleksander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 *EJIL* 161; Hans-Peter Gasser, 'The Changing Relationship between International Criminal Law, Human Rights Law and Humanitarian Law' in Jose Doria, Hans-Peter Gasser, M. Cherif Bassiouni (eds) *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Nijhoff 2009) 1111. On fragmentation, especially related to the topic of VAW Fionnuala Ní Aoláin, 'International law, gender regimes and fragmentation: 1325 and beyond', in Cecilia M Baille (ed), *Non-State actors, soft law and protective regimes: from the margins* (CUP 2012) 53.

<sup>40</sup> 'The acceptance of violence against women in armed conflict as a violation of human rights as well as of IHL disrupts the traditional divide between the two legal regimes. It supports the notion of a continuum of violence against women linking that which occurs in ordinary everyday life – peacetime – and that taking place in armed conflict, thereby reinforcing states' obligations with respect to elimination of violence against women in public and private', Christine Chinkin, 'International Human Rights, Criminal Law and the Women, Peace and Security Agenda' (12/2018) 4, *LSE Women, Peace and Security blog*, <<https://blogs.lse.ac.uk/wps/2018/01/11/international-human-rights-criminal-law-and-the-women-peace-and-security-agenda-christine-chinkin-122018/>> accessed 31 July 2022.



‘wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures’. In 2013, the CEDAW Committee devoted General Recommendation No. 30 to women in conflict prevention, conflict and post-conflict situations (GR 30),<sup>41</sup> clearly reaffirming that State-parties are obliged to respect its provisions during armed conflict, state of emergency, within its jurisdiction, both in its own territory and in occupied territories<sup>42</sup>. More in general, the UN has gradually drawn its attention to the situation of women and to the protection of their rights in armed conflict in its declarations, resolutions and actions plans<sup>43</sup>. One of the most notable developments for the protection of women rights and more specifically for the struggle against VAW in times of armed conflict is the Security Council’s agenda ‘Women, Peace Security’, launched in 2000 with Resolution 1325, under which 9 subsequent resolutions have been adopted<sup>44</sup>.

Even a superficial reading of this vast array of documents<sup>45</sup> clearly shows that the endemic discrimination that affects women in all kinds of society is the key factor enhancing their vulnerability during armed conflicts and exposing them to many and diverse forms of violence. War exacerbates the dominant role of men in societies and it aggravates pre-existing inequalities in a vicious circle that may lead to renewed forms of discrimination, VAW and GBV. Although most international documents mention the structural causes of VAW, their focus has been primarily on rape and other categories of sexual violence occurring in times of armed conflict. States and other actors attention was thus catalyzed by these forms of VAW/GBV as the most relevant human rights violations. However, the predominant focus on sexual violence was criticized precisely because it overshadows the multiplicity of forms that VAW or GBV may assume also in times of armed conflict and leads to

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<sup>41</sup> CEDAW Committee, ‘General Recommendation No. 30: on women in conflict prevention, conflict and post-conflict situations’ (2013).

<sup>42</sup> See also CEDAW Committee, ‘General Recommendation No 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (2010). On this topic literature is extensive whereas here there is only room for a few references: Judith Gardam; Hilary Charlesworth, ‘Protection of women in armed conflicts’ (2000) 22 *Human Rights Quarterly* 148; Judith Gardam, Michelle Jarvis, *Women, armed conflict and international law* (Kluwer Law International 2001); Christine Chinkin, ‘Gender and armed conflict’ in Andrew Clapham, Paola Gaeta (eds), *The Oxford handbook of international armed conflict* (OUP 2014) 675.

<sup>43</sup> From 1974 with UN General Assembly Declaration on the Protection of Women and Children in Emergency and Armed Conflict, through the Vienna Conference on Human Rights (1993) and the Final Document of the United Nations Fourth World Conference on Women held (Beijing 1995) to the large number of documents dealing with the issue adopted by many UN bodies in more recent times, first of all the Reports of the UN Special rapporteur on VAW touching on the topic of violence in armed conflict.

<sup>44</sup> For the text of the resolutions and other relevant documents: <<https://www.unwomen.org/en/what-we-do/peace-and-security>>. See also the *Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict* <<https://www.un.org/sg/en/global-leadership/office-of-the-special-representative-of-the-secretary-general-on-sexual-violence-in-conflict/all>> accessed 1 August 2022. See also Christine Chinkin, *Women, Peace and Security and International Law*

<sup>45</sup> For the sake of concision, only documents adopted by various bodies of the UN family machinery are here referred to.

diverging attention from the failure to address the structural dimension of VAW. Diane Otto labelled this attitude as the ‘panic about sexual violence’ and warned about the dangers underlying it<sup>46</sup>.

Only recently, there seems to grow a gradual awareness that the nature of conflicts and the forms of VAW and GBV are changing<sup>47</sup> and that the latter depend both on the different context in which the conflict takes place and on the very diverse features that conflicts may assume.<sup>48</sup> As the UN Global Study of 2015 openly puts it: ‘This is a decade where brutal “in your face” beheadings of individuals co-exist side by side with the clinical targeting of places and individuals where women are mere numbers in what is termed ‘collateral damage’. So, women in this century can be brutally gang raped and mutilated in one continent, requiring individual survivor assistance, while being treated as merely an anonymous, clinical number in another’<sup>49</sup>. Moreover, the predominant assumption that in armed conflicts women are most often the targets of strategic violence enacted by strangers (in principle by members of the enemy parties to that conflict) rather than known aggressors (as it frequently happens in peacetime, including cases of domestic violence) is increasingly challenged. The forms and categories of acts of VAW and GBV taking place in armed conflicts are manifold and the very same actors might be involved in enacting both politically and personally motivated acts of violence<sup>50</sup>.

Against this backdrop, the Istanbul Convention may play an important role because it tackles the issue of VAW and GBV in a broad perspective. Of course, being a treaty it may extend its scope only with respect to State parties. However, more generally, the reaffirmation in a treaty devoted to the issue of VAW that States have to abide by their obligations also in times of war may help in shifting attention towards the various forms of endemic violence recurrent in situations of conflict. The applicability of the Istanbul convention in times of war makes clear that States are not only bound not to engage, to prevent and punish acts of VAW that are prohibited under IHL, but they have to fulfil their negative and positive obligations with respect to all forms of VWA and GBW, including domestic violence against any victim<sup>51</sup>. A widespread ratification of the Convention is to be encouraged not only *per se*,

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<sup>46</sup> Diane Otto, ‘Women, Peace and Security: A critical analysis of the Security Council’s Vision’ (1/2016) 9, *LSE Women, Peace and Security blog*, <<https://blogs.lse.ac.uk/wps/2017/01/09/women-peace-and-security-a-critical-analysis-of-the-security-councils-vision/>> accessed 1 August 2022.

<sup>47</sup> ‘In 2000 when resolution 1325 was adopted, the major issues facing women in situations of conflict were the brute force of sexual violence, losing children or loved ones to the conflict, being forced to or voluntarily becoming a combatant, and/or leaving one’s possessions as vulnerable refugees or internally displaced persons. Today all these concerns remain, but in addition, in certain wars, women’s concerns have become more dire while, at the same time, the nature of warfare invades their most private spaces, those spaces in the family and the community where their sense of identity and security are deeply threatened.’ *UN Global Study on the Implementation of United Nations Security Council resolution 1325* (2015) 21 <<https://wps.unwomen.org/>> accessed 1 August 2022.

<sup>48</sup> ‘Recognizing diversity also means understanding diversity among women and the different sets of problems that each category of women faces in each context’, *ibid.* 24

<sup>49</sup> *Ibid.* 21.

<sup>50</sup> Aisling Swaine, ‘Beyond Strategic Rape and Between the Public and Private: Violence Against Women in Armed Conflict’ (2015) 37 *Human Rights Quarterly* 755.

<sup>51</sup> In the latter respect is sense, gender neutrality may help to address criticism on the overlooking of sexual violence against men, Sandesh Sivakumaran, ‘Sexual Violence Against Men in Armed Conflict’ (2007) 18 *EJIL* 253.

but also because it may help bringing a paradigm shift and press States to face and uphold their responsibilities with respect to all violations committed during armed conflicts. In other words, ratification and implementation of the Istanbul Convention could foster the process of rebalancing the focus so as to prioritise not only the struggle against sexual violence, but also against acts of VAW and GBV not strictly or exclusively related to the conflict, all the more so since most often there is no clear-cut separation between peacetime and wartime situations. States should not let acts of VAW and GBV committed in the private sphere (that are likely to increase significantly during any type of conflict) fade into the background because of the prevailing focus on VAW committed by the enemy forces. Post-conflict situations are also a very delicate environment, one where the Istanbul Convention could play a role in light of the documented trend of escalating domestic violence in the post-conflict period<sup>52</sup>.

Lastly, the applicability of the Istanbul Convention to armed conflict also obliges State parties to tackle possible acts of VAW and GBV committed by their military and civilian personnel (as well as in peacetime and in all grey area situations) in order not to create accountability gaps. It is worth stressing that as other human rights treaties, the Istanbul Convention may apply extraterritorially, that is to say to acts of violence against women committed anywhere by armed forces or state officials/agents of a State party to the Convention or on a territory which is under the effective control of a State party<sup>53</sup>. In this respect, the role of the monitoring body, GREVIO, is bound to be crucial.

### 3.2. Violence against women in armed conflict as a criminal law violation

The focus on rape and sexual violence characterizes also the prosecution of acts of VAW and GBC committed in armed conflict, in principle those amounting to war crimes, crimes against humanity and genocide. Sexual offences have been considered until recently as a by-product of war or as inevitable consequences of situations of unrest. It is largely by virtue of the efforts to prosecute rape and other sexual offences committed in armed conflict and in other situations of widespread violence - carried out in the last 25 years by international criminal tribunals - that these offences are now expressly recognized as crimes under international law. The impact of the case-law of the International criminal Tribunal for the former Yugoslavia (ICTY) and of the International criminal Tribunal for Rwanda (ICTR) on the definition of sexual and gender-based international crimes was enormous.<sup>54</sup> Their jurisprudence was also a point of reference for other internationalized criminal

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<sup>52</sup> *UN Global Study* (2015) (47), 169.

<sup>53</sup> Marko Milanović, *Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy* (OUP 2011).

<sup>54</sup> The *ad hoc* international criminal tribunals identified a wide range of sexual and gendered conducts as outrages upon personal dignity, for instance forced nudity (including forced public nudity), threats of sexual mutilation, rape, sexual violence, sexual exploitation (including the sale of victims to others as sexual slaves) and the constant fear of being

tribunals such as the Special Court for Sierra Leone, which had to confront the specific practice of exploiting ‘bush wives’ and the crime of forced marriage,<sup>55</sup> and eventually a lot of their findings paved the way for the inclusion of several sexual and gender crimes in the Statute of the International criminal court (ICC). The ICC Statute includes sexual and gender-based crimes such as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence in the provisions on war crimes and crimes against humanity. It also establishes that persecution on the basis of gender may be labelled as a crime against humanity.<sup>56</sup>

These crimes are for the most part committed in times of war, although not exclusively as for crimes against humanity and genocide the existence of an armed conflict is not a required element. On the other hand, the Istanbul Convention prescribes the obligation to criminalize and prosecute specific gender-based violent conducts that do not fall within one of the ‘core crimes’ mentioned above and identifies a set acts of VAW and GBV committed often (but not only) in times of peace. Both international criminal law instruments and the Istanbul Convention in its criminal law dimension aim at implementing mechanisms of individual penal liability, as an indispensable complement to State accountability.

In the first place, it is interesting to observe that there is a partial but noteworthy correspondence in the set of acts of VAW and GBV identified as war crimes and crimes against humanity and those to be criminalized by States according to the Istanbul Convention, both converging on sexual offences. Articles 7 and 8 of the ICC Statute include: ‘Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.’<sup>57</sup> The Istanbul Convention impose on States the obligation to penalise a wider set of acts, namely: physical and psychological violence (artt 33-35); sexual violence including rape (art 36); stalking (art 34);

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subjected to sexual violence. Although the legal literature on sexual and gender-based crimes before international criminal tribunals is very extensive, references here are limited to a few recent works: Kelly D. Askin, ‘Gender Crimes Jurisprudence in the ICTR: Positive Developments’ (2005) 3 JICJ, 1007; Serge Brammertz & Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (OUP 2016); Valerie Oosterveld, ‘The Legacy of the ICTY and ICTR on Sexual and Gender-Based Violence’, in Milena Sterio, Michael Scharf (eds) *The Legacy of Ad Hoc Tribunals in International Criminal Law* (CUP 2019) 197.

<sup>55</sup> See Micaela Frulli, ‘Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a “New” Crime against Humanity’ (2008) 6 JICJ 1033.

<sup>56</sup> There is a very extensive literature on this topic. Just a few selected references: Kelly D. Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles’, (2002) 21 *Berkeley Journal of International Law*, 288; Valerie Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice’, in (2005) 18 *Harvard Human Rights Journal*, 55; Solange Mouthaan S. ‘The Prosecution of Gender-based Crimes at the ICC: Challenges and Opportunities’, (2011) 11 *International Criminal Law Review* 775.

<sup>57</sup> Article 7, (1) (g) for crimes against humanity. See also ‘Article 8 (b) (xxii): ‘Committing rape, sexual slavery, enforced prostitution, forced pregnancy (...), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions’ listing war crimes committed in international armed conflicts ; ‘Art. 8 (e) (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy (...), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;’, listing war crimes committed in non-international armed conflicts

sexual harassment (art 40); forced marriage (art 37); female genital mutilation (art 38); forced abortion and forced sterilisation (art 39). Besides the coincidence of certain crimes, such as sexual violence, forced marriage and forced sterilisation and the predominant focus on sexual offences, other forms of VAW and GBV listed in the Istanbul Convention could be qualified as war crimes if committed in an armed conflict and connected thereto, or as crimes against humanity or even acts of genocide if committed respectively as part of a widespread or systematic attack against any civilian population or with the specific intent to destroy in whole or in part a national ethnic, racial or religious group as such.<sup>58</sup>

This parallelism is a clear reaffirmation of the continuum on which acts of VAW and GBV are placed and of their structural dimension unfolding in different situations. Obviously, certain conducts may be prosecuted as international crimes both by national and international tribunals only if they present the contextual elements required to fall in one of the categories, in particular a nexus to an armed conflict (international or internal) to be charged as war crimes. However, the contribution of the Istanbul Convention to the criminal prosecution of VAW and GBV could be very important because the obligation to prosecute a detailed set of sexual offences alongside international crimes in times of war and in a context of mass atrocities increases the chances of bringing all those responsible to justice<sup>59</sup>. On the one hand, the applicability of the Istanbul Convention in times of war could advance the prosecution of sexual offences not only as part of a mass atrocities campaign or a large scale conflict, but also as domestic crimes when they do not reach the threshold to be qualified as war crimes or crimes against humanity. On the other hand, acts of VAW and GBV other than sexual offences do not cease during armed conflict – as highlighted above - and the Istanbul Convention could further the implementation of individual criminal liability for these acts - in the first place acts of domestic violence and other acts of violence committed in the private sphere - committed in times of war<sup>60</sup>. For instance, in *Ntaganda*, the ICC interpreted of the prohibition of acts of VAW and GBV under IHL and ICL as applicable also to intra-party violations on the assumption that no distinction can be based on the legal status of individuals and that sexual violence is never justified or necessitated in armed conflicts<sup>61</sup>. In other words, victims of one of these crimes are not necessarily

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<sup>58</sup> Both Articles 7 and 8 have residual clauses that could allow the judges to interpret them as including some of these conducts under the categories of war crimes or crimes against humanity. See art 7 (g): ‘or any other form of sexual violence of comparable gravity’; Art 8 (b) (xxii) ‘or any other form of sexual violence also constituting a grave breach of the Geneva Conventions’; Art. 8 (e) (vi) ‘any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions’.

<sup>59</sup> Just to give an example: an act of forced marriage that does not bear the elements of a war crime because it not linked to a conflict nor those of a crime against humanity because it is not part of a widespread or systematic attack against any civilian population, could be prosecuted as a domestic crime, depending of course on the jurisdictional criteria/competence available in each case.

<sup>60</sup> Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court* (CUP 2019)

<sup>61</sup> ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, 4 January 2017 <[https://www.icc-cpi.int/CourtRecords/CR2017\\_00011.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_00011.PDF)>, accessed 7 August 2022; Yvonne McDermott, ‘ICC extends War Crimes of

belonging to ‘protected groups’, such as civilians or enemy combatants no longer participating in hostilities, but may well be combatants within the same armed group.<sup>62</sup>

In addition, the Istanbul Convention could play a pivotal role for the prosecution of acts of reproductive violence<sup>63</sup>, not expressly envisaged in international criminal law such as forced abortion. It could also have in the long term a positive impact on how international criminal law tackles reproductive crimes<sup>64</sup>. As emphasized by scholars, reproductive violence has been to a large extent overlooked in international criminal law<sup>65</sup> and when it has been addressed the focus has been on the targeted group to which the woman belongs and not on the violations of women individual rights, autonomy and self-determination<sup>66</sup>. In this respect, the Constitutional Court of Colombia delivered, in February 2020, a very important ruling where it found that forced contraception and forced abortion are both violations of a woman’s sexual and reproductive rights and a form of sexual and gender-based violence in the context of IHL, that is to say that they constitute war crimes<sup>67</sup>.

On a final note, it is also important to underline that the Istanbul Convention establishes a detailed list of jurisdictional criteria, in the first place the territoriality and active nationality criteria as compulsory ones<sup>68</sup>. It also includes the faculty (not the obligation) for States parties to exercise jurisdiction on the basis of the passive personality principle<sup>69</sup> and the *aut dedere aut judicare*

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Rape and Sexual Slavery to Victims from Same Armed Forces as Perpetrator’ (2017) INTLAWGRRLS <<https://ilg2.org/2017/01/05/icc-extends-war-crimes-of-rape-and-sexual-slavery-to-victims-from-same-armed-forces-as-perpetrator/>> accessed 7 August 2022.

<sup>62</sup> Eventually Ntaganda, known as ‘Terminator’, was convicted as an indirect co-perpetrator for rape and sexual slavery against child soldiers belonging to his own group (including an instance of rape against a girl of approximately nine years of age), and sentenced to 30 years of imprisonment, *Prosecutor v Ntaganda* (Sentencing judgment) ICC-01/04-02/06-2442, 7 November 2019. Còman Kenny, Yvonne McDermott, ‘The expanding protection of members of a party's own armed forces under international criminal law’ (2019) 68 *ICLQ* 943. Although some skepticism has been expressed by other scholars: Luca Poltronieri Rossetti, ‘Intra-party sexual crimes against child soldiers as war crimes in Ntaganda. ‘Tadić moment’ or unwarranted exercise of judicial activism?’ (2019) *QIL* <[http://www.qil-qdi.org/wp-content/uploads/2019/09/04\\_Child-Soldiers\\_POLTRONIERI\\_FIN-2.pdf](http://www.qil-qdi.org/wp-content/uploads/2019/09/04_Child-Soldiers_POLTRONIERI_FIN-2.pdf)> accessed 7 August 2022.

<sup>63</sup> Angélica Cocomà Ricuarte; Juliana Laguna Trujillo, ‘Reproductive violence, a necessary category of analysis in transitional justice scenarios’, LSE Blog, 24 June 2020 < <https://blogs.lse.ac.uk/wps/2020/06/24/reproductive-violence-a-necessary-category-of-analysis-in-transitional-justice-scenarios/>> accessed 7 August 2022.

<sup>64</sup> More in general, on the issue of violations against women’s health, see Sara De Vido, *Violence Against Women's Health in International Law* (Manchester University Press 2020).

<sup>65</sup> It has also been overlooked by the UN Security Council, see Sara De Vido, ‘Yes, women’s sexual and reproductive health should matter to the UN Security Council’, *OpenGlobalRights*, 6 August 2020 <<https://www.openglobalrights.org/women-sexual-and-reproductive-health-should-matter-to-united-nations/>> accessed 8 August 2022.

<sup>66</sup> Rosemary Grey, ‘The ICC’s First “Forced Pregnancy” Case in Historical Perspective’ (2017) 15 *JICJ* 905.

<sup>67</sup> Sentencia SU599/19, 11 February 2020 (Section II, 3.2) <<https://www.corteconstitucional.gov.co/Relatoria/2019/SU599-19.htm>> accessed 7 August 2022.

<sup>68</sup> Art. 44, para 1 including the criterion of habitual residence in the State of an alleged perpetrator. See further Elena Carpanelli, ‘Article 44’ in this Commentary.

<sup>69</sup> Art.44, para 2: Parties shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention where the offence is committed against one of their nationals or a person who has her or his habitual residence in their territory.

principle<sup>70</sup>. These criteria allow States to prosecute also acts of VAW and GBV committed abroad, that is to say to exercise extraterritorial criminal jurisdiction. This is a crucial element for prosecuting acts of VAW and GBC (including but not limited to sexual crimes) committed by military or civilian personnel employed by States in multinational forces or put at the disposal of IOs for peacekeeping operations<sup>71</sup> that are deployed in situations of armed conflict or in post-conflict situations. At the same time, the set of criteria provided for in the Convention allows the exercise of criminal jurisdiction in territories occupied by a State party or in other areas under the effective control of a State party. In this way, the Istanbul Convention could extend its scope to an extraterritorial dimension (in times of armed conflict or in post-conflict environments) both as a human rights instrument and as a criminal law convention.

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<sup>70</sup> Art 44, para 5: 'Parties shall take the necessary legislative or other measures to establish jurisdiction over the offences established in accordance with this Convention, in cases where an alleged perpetrator is present on their territory and they do not extradite her or him to another Party, solely on the basis of her or his nationality'.

<sup>71</sup> Jasmine-Kim Westendorf; Louise Searle 'Sexual exploitation and abuse in peace operations: trends, policy responses and future directions' (2017) 93 *International Affairs* 365; Valorie K.Voidij 'Sexual abuse and exploitation by UN Peacekeepers as conflict-related gender violence' in Niamh Reilly (ed.) *International Human Rights of Women* (Springer 2019) 405.