



Freedom, Security & Justice:
European Legal Studies

Rivista giuridica di classe A

2026, n. 1

EDITORIALE
SCIENTIFICA



DIRETTRICE

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Ordinario di Diritto Internazionale e di Diritto dell'Unione europea, Università di Salerno
Titolare della Cattedra Jean Monnet 2017-2020 (Commissione europea)
"Judicial Protection of Fundamental Rights in the European Area of Freedom, Security and Justice"

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SOME REFLECTIONS ABOUT DUE DILIGENCE BY THE STATE IN THE PROTECTION AGAINST GENDER-BASED VIOLENCE IN EUROPE

Elena Martínez García*

SUMMARY: 1. Introduction to State obligations and due diligence under Article 5 of the Istanbul Convention. – 2. Due diligence in the field of gender-based violence in the Convention. – 3. Actions by victims against the State and perpetrators under Article 29. – 3.1. Article 29.1: civil remedies against the perpetrator. – 3.2. Article 29.2: civil remedies against State authorities. – 3.3. On the failure of the State to fulfil its negative obligations or obligations of abstention. – 3.4. On the failure of the State to fulfil its positive obligations or obligations of action. – 4. Conclusions.

1. Introduction to State obligations and due diligence under Article 5 of the Istanbul Convention

In this article, we will outline a set of obligations that member States of the European Union and the Istanbul Convention have, with the aim of explaining that failure to comply with these obligations, when harm is caused to a victim of gender-based violence, must entitle the victim to take legal action, not only to seek the conviction of the perpetrator, but also to obtain compensation for the harm caused by the State, where applicable, for failing to comply with these obligations. The aim is to establish the standards of due diligence for the States that are signatories to these international agreements or bound by European directives.¹

Perhaps the most convenient way to approach this study is to begin with the conclusion. Article 29 of the Istanbul Convention is the cornerstone of this international treaty.² This provision cannot be understood without reference to Article 5 of the same

Double-blind peer reviewed article.

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¹ See V. MAGRO SERVET, *Proyección en nuestro ordenamiento jurídico de la Directiva (UE) 2024/1385 del Parlamento Europeo y del Consejo, de 14 de mayo de 2024, sobre la lucha contra la violencia contra las mujeres y la violencia doméstica*, in *Diario La Ley*, n. 10514, 28 May 2024. Also see E. MARTÍNEZ GARCÍA, *Ciberviolencia machista en el marco de la Directiva (UE) 2024/1385 y Convenio de Estambul: perspectiva de género y obligaciones del Estado*, in A. DI STASI, R. ESPINOSA CALABUIG (eds.), *Ciberviolencia de género y nuevas “fronteras” normativas y jurisprudenciales: la directiva UE 2024/1385*, Napoli, 2025.

² 1. Parties shall take the necessary legislative or other measures to provide victims with adequate civil remedies against the perpetrator. 2. Parties shall take the necessary legislative or other measures to provide victims, in accordance with the general principles of international law, with adequate civil remedies against

legal text. These two articles recognize, no more and no less, the State's responsibility for lack of due diligence, that is, for failing to comply with the positive and negative guarantees inherent in the human right (under construction) with which we are concerned, namely, to live a life free from gender-based violence of any kind. The Convention has been clear in its conception: if the patriarchal model has been sustained through an entire 'system' of norms and actions that subjugate women, it must now be dismantled through a norm that encompasses 'systemic' changes.³

Article 5, based on everything stated in its commentary, establishes the internationally recognized positive and negative obligations for a State to comply with the guarantees inherent in a human right. In this regard, as will be indicated in the following section, we are at a historic moment, where the consolidation of the right to a life free from gender-based violence, of whatever kind, is being forged. The Convention holds the State responsible for the damage suffered by victims of this type of violence in two cases. This is addressed in the two paragraphs of this provision.

a) First, pursuant to Article 5.1, the State may be held liable for violations of the victims' fundamental rights (as established in Article 4 of the Convention), when such violations have been committed by public authorities, agents, state institutions and any person acting on behalf of the State. This is because it is incumbent upon the State to comply with a series of *obligations of abstention* so that neither the authorities, nor civil servants, nor State agents and institutions, nor other actors acting on behalf of the State, may infringe upon the rights of victims. Any violation of these rights shall entitle victims to reparation in accordance with Article 29.1 of the Convention⁴ on the basis of the damage to their *individual rights*. This is where the concept of *institutional violence* arises, because the authorities fail to fulfil their duty to refrain from deliberately causing harm to women in the exercise of their duties.

b) Secondly, pursuant to Article 5.2, the State may be held liable for violations of victims' rights arising from the failure to comply with the obligations incumbent upon States, guarantees aimed at properly legislating for the protection of those rights, as well as preventing, investigating, punishing and granting compensation for acts of violence committed by the State and by non-State actors, such as victims' offices, companies managing control devices, etc., provided that harm has been caused to the victim, but also – and this is new – for acts committed by abusers, with the State appearing as subsidiarily

State authorities that have failed in their duty to take the necessary preventive or protective measures within the scope of their powers.

³ L. ROMÁN, *La protección jurisdiccional de las víctimas desde la perspectiva constitucional*, Tesis inédita defendida en la Universitat Rovira y Virgili, 2016.

⁴ See *The Explanatory Report CETS 210 Violence against women and Domestic Violence* (2011): «60. The term "reparation" may encompass different forms of reparation under international human rights law such as restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition. As regards compensation, it is important to note that this form of reparation shall only be provided by a Party under the conditions set out in Article 30 (2) of this Convention. Finally, term "non-state actor" refers to private persons, a concept which is already expressed in point II of Council of Europe Recommendation Rec (2002)5 on the protection of women against violence».

liable (*solve et repete*).⁵ These are *positive obligations* aimed at bringing about systemic or structural changes that the State is responsible for implementing so that women feel that their rights are protected in the sense established by the Istanbul Convention. Violation of these obligations will entail their right to reparation in accordance with Article 29.2 of the Convention.⁶

In short, from now on there is no excuse within the Council of Europe for denying some of its member countries the existence of particularly cruel violence directly linked to the fact of being a woman. It is no longer possible for public authorities to tolerate their own failure to fulfil their obligations. For this reason, as we shall see below, Article 29 grants redress to victims in both cases. This is very important to bear in mind in view of the current post-machismo denialist trend.

2. Due diligence in the field of gender-based violence in the Convention

Human rights, as well as fundamental rights, constitute limits on the powers of States. It is incumbent upon the State, through the executive, legislative and judicial branches, to ensure the effective implementation of these rights, on the one hand, by ensuring

⁵ This guarantee is extremely important because it takes the victim's right to compensation to its ultimate conclusion. The fact that the State is liable in all cases for the actions of the abuser is a very important recognition of the role of the State in the damage that has been done to public order. Sometimes it may be due to a lack of diligence on the part of the State that leads to an attack on the victim, but in other cases – the majority – the public authorities will have acted diligently, but damage will still have occurred. Even in these cases, according to the *solve et repete* clause, the State will be present so that the victim is always compensated. Although this idea is not expressly regulated in Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, it can be inferred from the high level of requirements that now apply to the Member States.

⁶ See *The Explanatory Report CETS 210 Violence against women and Domestic Violence* (2011): «59. Against the backdrop of these developments in international law and jurisprudence, the drafters considered it important to enshrine a principle of due diligence in this Convention. It is not an obligation of result, but an obligation of means. Parties are required to organize their response to all forms of violence covered by the scope of this Convention in a way that allows relevant authorities to diligently prevent, investigate, punish and provide reparation for such acts of violence. Failure to do so incurs State responsibility for an act otherwise solely attributed to a non-state actor. As such, violence against women perpetrated by non-state actors crosses the threshold of constituting a violation of human rights as referred to in Article 2 insofar as Parties have the obligation to take the legislative and other measures necessary to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention, as well as to provide protection to the victims, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms». Although the European Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence does not regulate an identical article as Arts. 5 and 29 of the Istanbul Convention, it undoubtedly includes an explicit development of these standards of due diligence in this area. With both rules aligned, we can conclude that the aforementioned Directive establishes the existence of rights to compensation from the State that has failed to fulfil its duty of due diligence. The absence of GREVIO (Group of Experts on Actions against violence against women and domestic Violence) data on the implementation of Article 29 appears to be very significant; perhaps we have found the key to achieve the standard of due diligence and States are not really well prepared to assume it. However, the EU's accession to the Istanbul Convention leaves no room for doubt: it is binding (see <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023D1076>).

abstention (*obligations not to act*) and, on the other hand, by guaranteeing the fulfilment of its duties to act (*obligations to act*) that ensure their realization.⁷ These limits set the scope of enforceability for the different Administrations of the State. This is common to any human right, including the right of women not to suffer gender-based violence.⁸ Article 29 is the result of this premise.

The Convention is based on the recognition that we have inherited and live in a structurally unequal society. Its idiosyncrasy is based on recognising that the law has so far proved to be short-sighted or blind to certain social realities, so that its “decontextualised” application, i.e. neutral, rigid and unidirectional interpretation of law, generates shortcomings and damages the rights of women, as well as historically abused or discriminated groups. In this “context”, there is a need to apply the gender perspective⁹ as an instrument for interpreting the law (and other areas of life) in order to overcome apparently neutral biases that conceal these realities, which have traditionally been ignored from a power perspective. With this awareness, it is better understood that the Convention aims to achieve structural transformations that prevent the visibility and promotion of women’s equality and rights within the Council of Europe. Failure to do so makes States, in a way, “jointly responsible” for what is happening. This gives rise to the concept of institutional violence through secondary victimisation (*ex Arts. 5 and 29.2 of the Convention*). We are therefore moving within the framework of positive action, the allocation of human and material resources, and the mandatory training of legal and social professionals to understand this type of violence “contextualised” for what it is, far removed from a simple conception of intersubjective violence.¹⁰

In our opinion, the human right to a life free from gender-based violence is still under construction. There is no such right recognized in national constitutions or international standards, or rather, there was no such right until the arrival of the Istanbul Convention. This Convention has set the limits of freedom¹¹ and due diligence as new parameters for interpreting women’s equality and their right not to suffer any form of violence. These limits are restrictions on public authorities, but also on economic, social and cultural power. States Parties can no longer simply “do” anything, but are required to take specific action, provide services, train and raise awareness among their professionals, offer

⁷ L. FERRAJOLI, *Poderes salvajes. La crisis de la democracia constitucional*, Madrid, 2013; M. AÑÓN ROIG, *Human rights, obligations, especially in times of crisis*, in *The Age of Human Rights Journal*, 2021, n. 17. Also see L. LAVRYSEN, *Human rights in a Positive State*, Antwerp, 2016.

⁸ R. MESTRE MESTRE, *Mujeres, Derechos y Ciudadanías*, in R. MESTRE MESTRE (coor.), *Mujeres, derechos y ciudadanías*, Tirant lo Blanch, 2008; C. TORRES DÍAZ, *La fundamentalidad del derecho a una vida libre de violencia de género*, Themis, in *Revista jurídica de Igualdad de Género*, 2013, n. 13.

⁹ E. MARTÍNEZ GARCÍA, *Función jurisdiccional con perspectiva de género: por qué, para qué y cómo*, Ediciones del Ministerio de Igualdad, 2025; about the European concept of ciberviolence in European Union see A. DI STASI, R. ESPINOSA CALABUIG (eds.), *Ciberviolencia de género y nuevas “fronteras” normativas y jurisprudenciales: la directiva UE 2024/1385*, cit.

¹⁰ This idea is expressly regulated in Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 *on combating violence against women and domestic violence* and it can be inferred from the high level of requirements that now apply to the Member States.

¹¹ The Convention limits certain freedoms to define State obligations and ensure accountability through due diligence.

guarantees, etc. This dual dimension of the State's duty of due diligence in the area of women's equality has been created: an objective or systemic dimension and an individual dimension, and this requires that obligations be derived for the State, aimed at providing effective means of protection, punishment and redress to specific victims of violence. It is not surprising, then, that Article 5 of the Istanbul Convention¹², under the heading 'State Obligations and Due Diligence', holds the State responsible for failing to remove obstacles that prevent equality and fuel inequality.

It is beyond the scope of this article to delve into what the legislator understands by due diligence in this area. In this regard, it is worth recalling the importance of the *Report of the United Nations Special Rapporteur on violence against women and girls*¹³, its causes and consequences, which details the "systemic problems" that cover up this violent and discriminatory reality. This document can shed much light on how to integrate this level of enforceability into the legislative bodies of the States signatory to the Convention and what internal changes are necessary to comply with due diligence standards¹⁴. On this basis, the Convention regulates this dual structure of which we have been speaking, both systemic and individual. This document makes it abundantly clear that without structural changes, there can be no enjoyment of individual rights; the two go hand in hand. Here, we can only list the structural conditions that must be changed in order to remove the obstacles that prevent equality:

a. There is a right, from a gender perspective, to civil, criminal, administrative and labour legislation that lays the foundations for the transformation of our society (Recital 28 of the Directive). This right guarantees that the legislative and administrative powers develop sufficient legal coverage to be able to understand when women's rights are violated and, therefore, what punishment or sanction is appropriate to ensure that they are repaired and protected (Chapter V). Within this obligation to legislate, we find the express reference to the obligation to create 'guidelines' that ensure police action and that of other authorities with a gender perspective (Article 21 of the Directive), legislation that must include a gender impact assessment (Article 45 of the Directive), as well as the transfer of data to the European Institute for Gender Equality (EIGE). It also includes regulations

¹² A dual system of liability is established, because harm can be caused both by an individual or company – through their actions – and by the State itself – through its omissions or failure to fulfil its duties to protect and prevent harm to victims with due diligence – as established in the judgment in the case of *González and Others v. Mexico 'Campo Algodonero'* of 16 April 2009, handed down by the Inter-American Court of Human Rights, or the judgments of the European Court of Human Rights in the cases of *Opuz v. Turkey* (2 June 2009), *A. v. Croatia* (14 October 2010), *Talpis v. Italy* (2 March 2017), *M.G. v. Turkey* (22 March 2016), *Buturuga v. Romania* (11 February 2020) and the conviction of the Spanish State in the *Ángela González Carreño* case by the ruling of 16 July 2014 by CEDAW in this case. The ruling established the State's responsibility for failing to fulfil its duty of due diligence by failing to protect women, recognising that this deepens a form of structural violence present in society on the basis of harm caused that violates their freedom, physical integrity or safety.

¹³ <https://www.ohchr.org/en/special-procedures/sr-violence-against-women>.

¹⁴ See G. DOMÉNECH PASCUAL, *Rethinking the State's financial liability for unlawful regulations*, Indret no. 4 (2022), which is very interesting because it explains with extreme clarity the State's responsibility to make good rules, detailing the levels of diligence required in these cases and recognizing that if there is damage, there may be liability, provided that there is a rule (also under international law) that individualises the infringement and a direct causal relationship, in which case liability may arise.

on the coordination of services as a minimum legal requirement (Articles 83, 25 and Chapter IV of the Directive, including measures for the preservation of evidence).

In this sense, Article 29, both in its first and second paragraphs, guarantees the right to effective judicial protection and the right to reparation for damage when these legal minimums have not been met and, as a result, damage has occurred.

b. There is a right to legislation that seeks to create a model of advertising, communication, education and health care that is respectful of the special situation of women in our society, transforming values, stereotypes and prejudices about women (Art. 17 of the Istanbul Convention and Recital 74, 75 and 77 of the Directive).¹⁵ This right imposes limits on market freedom. Advertising, the media, etc. must comply with the Convention, because they contribute to “creating” the culture that the Convention seeks to dismantle.

It is an obligation for States to train and raise awareness among professionals who intervene in cases of gender-based violence in order to understand this very specific reality (secondary prevention). Mandatory training for professionals, especially the judiciary and other professionals in the judicial system on gender bias, the dynamics of domestic violence, reports of abuse and parental alienation, etc., ensuring that citizens have access to materials and an information hotline.¹⁶

c. Preventive social care is fundamental, as recognised by the Convention in its articles on primary, secondary and tertiary prevention (Chapter IV of the Istanbul Convention and Arts. 18 and 25 Directive). This right must be guaranteed by whatever means the State Administration decides to employ, provided that it complies with the social protection objectives established by this Agreement. Discretionary power, therefore, finds its limit in these objectives (rights) of the Agreement.¹⁷

d. Finally, protection and judicial action shall constitute the central part of this transformation and responsibility of the State. Among many other possible rights:

1. Victims have the right to legal assistance and defence so that the justice system is financially accessible to them, both in the advisory phase and in terms of representation and procedural defence (Arts. 57 of the Istanbul Convention and Art. 32 of the Directive).

¹⁵ About stereotypes see L. CLÉRICO, *Hacia un análisis integral de estereotipos: desafiando la garantía estándar de imparcialidad*, in *Revista Derecho del Estado*, 2018, n. 41; M. LORENTE ACOSTA, *La refundación del machismo, Poscultura y guerra cultural*, Comares, 2023; ID., *Justicia, Género y Estereotipos*, in AA.VV., *Análisis de la Administración de Justicia desde la perspectiva de género*, Tirant lo Blanch, Valencia, 2018.

¹⁶ In this sense, see Report of the Special Rapporteur on violence against women and girls, its causes and consequences, Reem Salem, in custody, violence against women and violence against children, A/HRC/53/36, 13 April 2023.

¹⁷ It refers to the right to support services for victims (Articles 18 and 25 of the Directive) and to their recovery, with particular emphasis on cases of sexual violence (Article 26) and cases of female genital mutilation (Article 27) and sexual harassment at work (Article 28); the right to health services (Article 25 of the Directive), the existence of accessible helplines for victims that guarantee effective communication (Article 29), and specific support services for the intersectional needs of victims and at-risk groups (Article 33). In general, a whole framework of rules is designed that points in the direction of optimal social services to prevent and repair damage, with the requirement of effective coordination (Articles 39 and 40 of the directive). Nothing is said about the victim’s right to economic autonomy in this directive; it will be left to the discretion of each State, which is presented as a weakness of this directive.

2. There is the right to the regulation of legal and social support programmes for victims (Arts. 16, 20, 56 of the Istanbul Convention and Arts. 25 and 26 of the Directive), both for women and for child victims, with a special focus on security in matters of custody and visitation rights (Art. 31 of the Istanbul Convention and Art. 70 of the Directive), including the loss of parental authority (Art. 45 of the Istanbul Convention) and requiring that this support be financed by the State (see also Conclusion 74 Rapporteur A/HRC/56/36), as well as for foreign women. Here we can include, among many others, the existence of shelters (Art. 33 of the Directive and Art. 23 of the Istanbul Convention).

3. There is a right to effective judicial protection against gender-based violence through the proper investigation and collection and securing of evidence, as well as protection, redress and specialisation of the judge in the investigation and trial phases, guaranteeing the right to adequate civil and criminal remedies (Articles 29, 44 and 54 of the Istanbul Convention and Arts. 20, 30 and 34 of the Directive).

4. There is a right to a fair trial without undue delay, not only to find out what happened, but also to ascertain the circumstance or the “context” in which it happened. Ascertaining this context means delving deeper into the actual facts that explain the behavior of the victim (Art. 36 of the Directive and 8, 11, 15 of the Istanbul Convention).

5. The right to have legal requirements observed that prevent the secondary victimisation of women and children before the administration of justice (Conclusion 74 - Rapporteur A/HRC/56/36).

6. There is a right to effective comprehensive coordination (Chapter VI and Article 25 of the Directive) and, in the event of a failure of the system, an investigation must be carried out into what happened and the possible responsibility of the State for not regulating the legal framework for effective police and judicial protection (Article 21 of the Directive). The victim’s right to reparation or compensation is regulated solely by the abuser, something that must be combined with our aspiration to structurally change the needs of these people in society (Recital 56 and 57 of the Directive, Art. 30 of the Istanbul Convention and Conclusion 74 of the Report of the Special Rapporteur on violence against women and girls, 13 April 2023, A/HRC/56/36).

7. The right to have shelters or reception centres (Conclusion 74 - Rapporteur A/HRC/56/36) for national or foreign victims, leaving the door open to a kind of co-payment, which hinders leaving the home as a preventive police or judicial measure.

8. Along with the right to compensation for damages from the perpetrator and, failing that, from the State (*solve et repete*) under Article 5 of the Istanbul Convention, guarantees of non-repetition must be regulated (Recital 56 and 57 of the Directive and Art. 21 of the Directive).

3. Actions by victims against the State and perpetrators under Article 29

Having considered all these positive obligations of States, we can now analyse and understand the scope of the Istanbul Convention when, in Article 29, it grants remedies

to persons due to a lack of due diligence on the part of the defendant. Following the framework established for the understanding and scope of Article 5, the Convention now proceeds to grant victims – harmed by the abuser but also by the lack of diligence on the part of State operators – civil actions aimed at repairing that harm in the various possible ways and always actions characterised by the State’s failure to fulfil its obligation, which has caused harm to the victim. Therefore, we dare to say that this article does not refer to criminal or other actions arising from the various legal rights that may be damaged, but rather to actions against the State that failed and allowed that damage to occur through its failure to comply, both for the damage caused directly by it and by its public and private agents, and even assuming subsidiary liability of the perpetrator.¹⁸

3.1. Article 29.1: Civil remedies against the perpetrator

This Article establishes a guarantee of compensation and reparation for the victim against their abuser. This is a different or additional action to those arising from actions committed against their physical integrity, right to life, sexual freedom, etc. These actions arise from the legal rights that have been damaged. But this Article 29 also establishes the victim’s right to reparation, which is why this article refers to “civil remedies”.

This reparation is not only financial, but must also cover guarantees of non-repetition of the act, restitution, rehabilitation, etc. This is recognised by the Explanatory Report when it states: «60. The term “reparation” may encompass different forms of reparation under international human rights law such as restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition. As regards compensation, it is important to note that this form of reparation shall only be provided by a Party under the conditions set out in Article 30(2) of this Convention. Finally, the term “non-state actor” refers to private persons, a concept which is already expressed in point II of Council of Europe Recommendation Rec (2002)5 on the protection of women against violence». This Report clearly includes the State’s responsibility for the actions of private individuals. Given that in this first paragraph we find ourselves before that individual level of damages and reparation to the victim, it is very likely that it is assuming that kind of subsidiary responsibility of the State for the actions of the offender, so that the victim is compensated with certainty for their property. This is the assumption of the *solve et repete* principle. This interpretation is consistent with the new Victims Directive cited above.

This implies a very high level of diligence on the part of the State, assuming that it “must” cover this compensation or reparation because “public order has been damaged” by harming this woman.

¹⁸ This idea is in line with the new EU Directive 2024/1712 on Victims, whereby, in order to facilitate the payment of compensation to victims, Member States may set up a national victims’ fund or similar instruments, which may include laws guaranteeing compensation for victims of human trafficking. Thus, Article 17 states that ‘Member States shall ensure that victims of human trafficking have access to existing compensation schemes for victims of intentional violent crimes. Member States may establish a national victims’ fund or similar instrument, in accordance with their national law, for the purpose of compensating victims’.

3.2. Article 29.2: Civil remedies against State authorities

It is in this second paragraph that we find the ultimate meaning of due diligence regarding the actions taken on behalf of the victim when the State has failed to fulfil its obligations of abstention or action, as the case may be. On this occasion, Article 29.2 of the Convention obliges the parties to assume responsibility for damage caused by the State's failure to fulfil its obligations. We must understand that there are two different levels of non-compliance addressed in this Article. Its application modifies the State's civil liability regime compared to the previous paradigm.

3.3. On the failure of the State to fulfil its negative obligations or obligations of abstention

In this instance, the harm caused to a victim is no longer a failure of the system, but rather the authorities who should have protected her, through their malpractice or inaction minimising the importance of the reported events, for example, have caused harm to the female victim.¹⁹ Stereotypes among law enforcement officers involved in the prevention and protection of women can cause them to downplay the seriousness of the facts, fail to consider the gender perspective, and thus lead to poor investigation, protection, or processing of the case. There has been a breach of the duty of abstention under Article 5 of the Convention. According to Article 29, this entitles her to claim compensation from the State for the damage caused by its failure to protect her or prevent a particular situation, which has resulted in harm. This constitutes a form of institutional violence.

All possible claims shall be directed towards obtaining restitution, compensation, rehabilitation, satisfaction, and a guarantee of non-repetition for the victim who has been personally harmed. Depending on the State, we will find different models of civil actions or remedies. Therefore, this second paragraph grants effective judicial protection for individual rights harmed by the abuser and by the State itself through its omissions.

3.4. On the failure of the State to fulfil its positive obligations or obligations of action

Also, this Article 29.2 sets out an action against the State, based on failure to comply with the obligations to regulate, protect, investigate, prevent and provide redress, all of which are obligations to act, as seen above, and aimed at fulfilling the human right to a

¹⁹ Case *Buturuga vs. Romania*, ECHR 12. 02.2020 affirms that: «In a case concerning alleged acts of domestic violence, the investigating authorities ought to have taken the requisite action to elucidate the circumstances of the case. Accordingly, even though the legal framework put in place by the respondent State had provided the applicant with some form of protection, the latter had taken effect subsequently to the impugned acts of violence and had failed to remedy the shortcomings in the investigation. (...) No examination had been carried out on the merits of the present case. The domestic authorities had failed to take the procedural steps to gather evidence in order to establish the reality or the legal classification of the facts. They had been overly formalistic in dismissing any possible connection with the domestic violence which the applicant had already brought to their attention, and had thus disregarded the various possible forms taken on by domestic violence».

life free from gender-based violence. Failure to do so diligently legitimizes harm to women in some way. This responsibility of the State extends both to the damage resulting from this failure to exercise due diligence on the part of State bodies (legislators, administrators, judges, prosecutors, police, etc.) and to that caused by bodies often subcontracted by the State, for example, to carry out certain services and aspects related to gender-based violence (shelter, electronic monitoring of restraining orders, etc.). The responsibility lies in failing to transform — or failing to do so sufficiently — the systemic conditions that prevent equality and reinforce gender-based violence.

This translates into a right for victims to seek redress before the courts based on a request for recognition of the ruling and the error of the system that has directly harmed them, leading to a condemnation of the State to regulate, for example, a certain type of conduct or to create a certain type of gender training obligation for police officers or judges, or to modify a certain protocol...which ultimately changes the reality that provided “cover” for this institutional violence.²⁰

In conclusion, civil action under Article 29 is a complementary action to that derived from their fundamental right to life, physical integrity, sexual freedom, etc. It is an action aimed at seeking recognition of the State’s liability for its failure to exercise due diligence, potentially resulting in a court order for the State to take specific action (such as legislating, regulating, or training) and to provide reparations to the victim. Both rulings will be in the same judgment. This happened in the complex Case *Ángela González Carreño*, ruled by Spanish Supreme Court ruling STS (contentious-administrative) 17/7/18, which recognised the State’s financial liability for moral damages, based on the binding nature of the CEDAW ruling, but also the State was ordered to address systemic changes by the systemic failures committed by the State itself.²¹

²⁰ «59. Against the backdrop of these developments in international law and jurisprudence, the drafters considered it important to enshrine a principle of due diligence in this Convention. It is not an obligation of result, but an obligation of means. Parties are required to organise their response to all forms of violence covered by the scope of this Convention in a way that allows relevant authorities to diligently prevent, investigate, punish and provide reparation for such acts of violence. Failure to do so incurs State responsibility for an act otherwise solely attributed to a non-state actor. As such, violence against women perpetrated by non-state actors crosses the threshold of constituting a violation of human rights as referred to in Article 2 insofar as Parties have the obligation to take the legislative and other measures necessary to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention, as well as to provide protection to the victims, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms», *Explanatory Report*, op. cit.

²¹ See Committee on the Elimination of Discrimination against Women 20 June-18 July 2014 Communication No. 47/2012 (points 9 (b)(ii), 9 (b) (iii) and 11. The CEDAW ruling established measures with regard to *Ángela*, stating that the State must provide adequate redress and full compensation commensurate with the seriousness of the violation of her rights, as well as conduct a thorough and impartial investigation to determine the existence of failures in State structures and practices that led to her and her daughter’s lack of protection. Secondly, it establishes measures for the State to take appropriate and effective action to ensure that a history of gender-based violence is taken into account when determining custody and access rights for children, and that the exercise of access or custody rights does not jeopardise the safety of victims, including their children. In addition, the CEDAW Committee points out that the application of the legal framework must be strengthened to ensure that the competent authorities exercise due diligence in responding appropriately to situations of gender-based violence. Finally, the opinion states that mandatory

4. Conclusions

Only by fulfilling this dual level of rights, namely systemic and individual, can we conclude that the right to a life free from gender-based violence, as developed by the Istanbul Convention, is guaranteed. Failure to comply with Article 5 entails specific actions against the State to seek redress for failure to comply with these minimum standards of diligence established in an international agreement.

It is striking that the latest document produced by GREVIO (Group of Experts on Action against Violence against Women and Domestic Violence) does not include a study on the results of the application of Article 29 of the Convention after eleven years of its implementation²². This may be a symptom of how far we still are from understanding that there is a level of diligence required of the signatory States to the Istanbul Convention; that we are dealing with a human right that is still under construction; that, precisely, the Istanbul Convention constitutes an international agreement on the positive and negative obligations that every State must comply with in order for this human right to be respected; and that, finally, the breach of these guarantees must give rise to responsibilities for the State as the guarantor of human rights through the creation of sufficient structural or systemic conditions to ensure that this right is adequately protected and that women victims of gender-based violence can demand redress for their rights before the courts.

Perhaps the development of Article 29 is the unfinished work to be consolidated in the next decade; this is in line with the times we live in, where due diligence is being demanded as a real horizon for understanding that human rights are being respected by States and their public authorities.

At a historic moment when international human rights law seems to carry no weight, it is precisely this law that has the power to “turn this ship around”, metaphorically speaking. In a globalised world, the injustices suffered by women on the other side of the planet are the same as those suffered here. This evidence gives strength to our demands, making it clear that this is a “battle” against States, which are responsible for changing

training should be provided to judges and relevant administrative personnel on the application of the legal framework for combating gender-based violence, including training on the definition of this type of violence and on gender stereotypes, as well as appropriate training on the Convention, its Optional Protocol and the Committee’s general recommendations, in particular General Recommendation No. 19. The Committee also determines that the opinion should be published and widely disseminated to reach all relevant sectors of society.

²² *Report Building Trust by Delivering support, protection and justice*, 21 November 2024, at <https://rm.coe.int/first-thematic-evaluation-report-building-trust-by-delivering-support-/1680b28368>. We consider this information to be very important, as we have said, because it shows, on the one hand, that it has not been developed by the States or required by GREVIO. It leads us to believe that this point relating to the State’s due diligence is the cornerstone of this international treaty, which is binding on the EU and which, if implemented, would profoundly change the course of the protection of this human right to a life free from gender-based violence and the prohibition of discrimination, necessarily entailing structural changes in the State and positive and negative obligations for the State.

the “system” that fuels inequality and, therefore, violence against women. That is why this international agreement in Istanbul is a real opportunity to achieve these changes, and why the jurisprudence of international Courts and Committee (CEDAW Committee, ECtHR, etc.) has the transformative power of judgments, which can highlight the importance of the gender perspective when legislating, preventing, protecting and redressing the injustices of the patriarchal system we have inherited. Looking the other way as a State is a short-sighted approach, because women have already realized that their power lies in the fact that they make up more than half of the population and that they can and must demand changes from their States to remove the obstacles that prevent equality²³ and that, if they do not do so, international instruments guarantee them redress for these obstacles. This is the greatness of Article 29 of the Istanbul Convention. Although the European Directive does not regulate an identical article as Arts. 5 and 29 of the Istanbul Convention, it undoubtedly includes an explicit development of these standards of due diligence in this area. With both rules aligned, we can conclude that the Directive establishes the existence of rights to compensation from the State that has failed to fulfil its duty of due diligence.

In summary, between these two legal instruments, we can affirm a change of era in the creation and consolidation of this human right to a life free from gender-based violence. It is a great start, the fruits of which will take time to be reaped, but there is no doubt that there can be no turning back if we want to recognise ourselves as a mature democracy in terms of equality and freedom.

ABSTRACT: The international Istanbul multilateral Treaty is a real opportunity to achieve systemic changes. As the jurisprudence of international judicial bodies (ECtHR, CEDAW Committee, etc.) has recognised, the transformative power of judgments must highlight the importance of the gender perspective when legislating, preventing, protecting and redressing the injustices of the patriarchal system we have inherited, since States bound by EU law and the Istanbul Convention are required to remove the obstacles that prevent equality and, if they fail to do so, international instruments guarantee redress for such obstacles. This is the greatness of Article 29 of the Istanbul Convention: due diligence of States and positive obligations to transform the position of women in society and, of course, legal remedies for those cases where a harm was done by the inaction of the State. This is aligned with the heightened safeguards and due diligence also recognised by Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence. This study has a comparative, jurisprudential and dogmatic methodological focus in order to achieve

²³ R. ESPINOSA CALABUIG, *Sorority, Equality and International Private Law*, in this *Journal*, 2023, n. 1, p. 113 ff.

the main objective: to initiate a new period for such a human right for women, defining specific State obligations.

KEYWORDS: Gender-based violence – Due diligence by State – Positive obligations – Istanbul Convention.