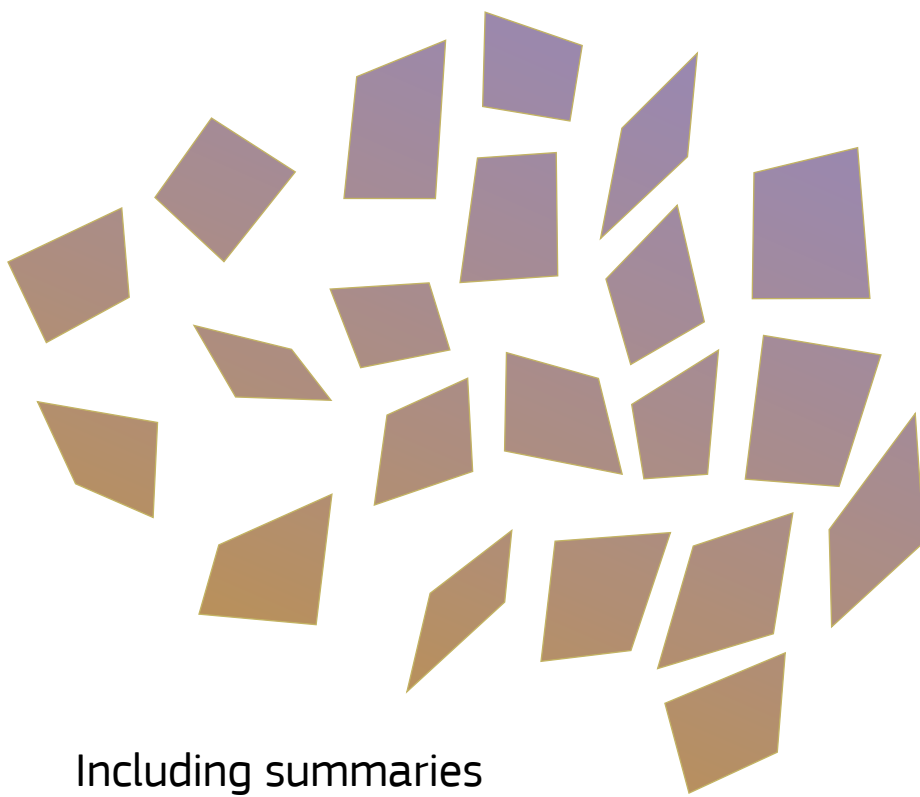




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# Legal implications of EU accession to the Istanbul Convention

**EUROPEAN COMMISSION**

Directorate-General for Justice and Consumers  
Directorate D — Equality  
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*European Commission  
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# **Legal implications of EU accession to the Istanbul Convention**

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December 2015

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Luxembourg: Publications Office of the European Union, 2016

ISBN: 978-92-79-54061-5

Doi:10.2838/15851

Catalogue number: DS-02-15-009-3A-N

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# Executive summary

## Introduction

This report aims to clarify the legal preconditions and legal impact of the possible accession of the European Union to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 2011, commonly known as the Istanbul Convention. The first chapter of this report, written by Christine Chinkin, considers the evolution of human rights law concerning violence against women, gendered violence and domestic violence; the drafting and adoption of the Istanbul Convention; and the main features of the Convention. The second and third chapters, written by Kevät Nousiainen, consider the Istanbul Convention in relation to EU law; and describe the positions of the 28 EU Member States concerning the Convention. This is based on a comparative study of country reports submitted by the gender equality experts of the European network of legal experts in gender equality and non-discrimination. In international law, and also increasingly in EU law, violence against women is considered a form of discrimination against women, and therefore a matter that could be addressed using the expertise of the network's legal experts.

However, the theme is relatively new to EU law. Gender-based violence extends the scope of non-discrimination beyond what is traditionally understood as EU sex equality and non-discrimination law, i.e. the *acquis* on discrimination on the basis of sex and policies aiming at promoting gender equality in working life, access to goods and services, and related areas of life. The theme of the report is also new in the sense that so far the EU has little experience in accession to human rights conventions. While the Lisbon Treaty created the possibility for the EU to conclude international agreements, so far the EU has only acceded to one human rights convention.<sup>1</sup> This means that considerations of requirements that must be fulfilled to facilitate accession, and the solutions to be created for EU as a *sui generis* polity becoming a party to a human rights convention, concern new areas and perspectives in EU law.

## Chapter 1

As Chapter 1 of the report explains, violence against women as a concept in human rights law has developed since the 1990s. Although major human rights instruments of the United Nations prohibit discrimination on the basis of sex, and the women-specific Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) contains provisions that aim to eradicate sex discrimination on a broad basis, none of these instruments specifically refer to violence against women. The CEDAW Committee, which is the monitoring body of the CEDAW, explained in its General Recommendation No. 19 of 1992 that gender-based violence is to be considered a form of discrimination under the Convention. The States Parties are to act with due diligence to prevent this. General Recommendation No. 19 set out what has become accepted as obligations under international law to prevent, investigate, punish and pay compensation to victims of gender-based violence. This General Recommendation was soon followed by similar international law instruments. The main conceptual ideas developed through these instruments – that gender-based violence is to be considered a discriminatory practice, and that States are obliged to act with due diligence to prevent such practices – have had a significant impact on human rights monitoring.

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1 The EU acceded to the United Nations Convention on the Rights of Persons with Disabilities in 2010.

The European Human Rights Court (ECtHR) has since held in its case law, which is binding on the States Parties, that gender-based violence is to be considered as covered by the prohibition against torture and inhuman or degrading treatment under Article 3 of the European Convention on Human Rights Convention (ECHR), and as a violation of the respect for private and family life under Article 8 of the ECHR. All EU Member States have ratified the ECHR. The Inter-American Belém do Para Convention, concluded in 1994, may be considered a forerunner to the European Istanbul Convention.

The Istanbul Convention is based on the understanding that a certain type of violence is a manifestation of historically unequal power relations between women and men. The Convention requires the States Parties to condemn all forms of discrimination against women and to take legislative and other steps to prevent them. For this reason, the Convention includes a strong link between gender equality and combating violence against women, approving the necessary special measures to prevent and protect women from gender-based violence. The Convention also requires the States Parties to take measures to eliminate gender prejudices and biases, thus addressing cultural, religious, social and traditional norms that uphold gender inequality. The due diligence that the States Parties are to exercise in the prevention, investigation, punishment and reparation for gender-based violence committed by private individuals is based on the consideration that even though a State is not responsible for individual acts of violence, it is obliged to prevent acts of violence between private persons.

The concept of gender, originally introduced in academic studies, was adopted in human rights law as part of a somewhat ambivalent development. The definition of gender-based violence in the Istanbul Convention refers to gender as a social construct of roles and attributes that are considered appropriate for women and men in a given society. The Convention requires the States Parties to introduce 'gender-sensitive policies' and a 'gender perspective'. While sexual violence is commonly considered to be based on gendered patterns of behaviour, some delegations participating in the drafting of the Convention considered domestic violence as a crime whose victims are not only women, but men and children of both sexes. The Convention's articles on domestic violence require States Parties to take measures against all forms of domestic violence, but while doing so, to pay particular attention to female victims of such violence. The Convention (unlike, for example, the CEDAW Convention) is therefore not specifically formulated as an instrument against discrimination of women, while its main purport is to eradicate violence against women.

The Istanbul Convention requires the States Parties to take substantive law measures in the areas of criminal, procedural and to some extent even civil law. The Convention lists a number of acts that States Parties are to criminalise, and requires that the States ensure jurisdiction over these crimes and provide for their prosecution. In requiring specific action regarding these issues the Convention differs from all preceding human rights instruments, which use more open-ended language concerning the responsibilities of the States Parties. The approach of the Istanbul Convention is to combat violence against women consistently and comprehensively by a number of actors: the provisions of the Convention rely not only on government action, but also on the media and civil society actors.

## Chapter 2

The possible accession of the EU to the Istanbul Convention has many different legal aspects. The first issue considered in Chapter 2 of the report is the EU mandate for accession, which is possible only within the limits of the EU's general competence to conclude international agreements on its own behalf. Under Article 216(1) TFEU, the EU has external competence to conclude international agreements where Treaties or legally binding EU act so provide, where the agreement is necessary to achieve one of the objectives referred to by the Treaties, or is likely to affect common rules or alter their scope. Combating crime and promoting gender equality are clearly established as objectives in the EU acquis, which means that the EU has the general competence to accede to the Istanbul Convention. According to Article 216(2) TFEU, agreements concluded by the EU are binding on its institutions and its Member States. If the EU

accedes to the Istanbul Convention, the Member States will therefore be bound by Union policies that implement the Convention, in addition to the duties arising from their own ratification.

The EU has a strong competence to eradicate discrimination on certain grounds. Article 19 TFEU allows EU action to combat discrimination based on sex, and Article 157(3) TFEU allows measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Article 157(4) further provides that the principle of equal treatment does not prevent positive action for the underrepresented sex in pursuit of vocational activity and professional careers, taken by Member States.

The EU competence in the area of criminal law is of particular importance, because the Istanbul Convention is an instrument for combating crime. Title V of the TFEU contains provisions in the area of freedom, security and justice, concerning which the competence is shared between the EU and the Member States. Under Article 67(3) TFEU, the EU must ensure a high level of security by taking measures to prevent and combat crime, racism and xenophobia by measures for coordination and cooperation between authorities, mutual recognition of judgments in criminal matters and, if necessary, by approximation of criminal legislation. Criminal legislation is harmonised by setting minimum requirements concerning the content of criminal law. Although the crosscutting provisions under Articles 8 and 10 TFEU mention eliminating inequalities and promoting equality between men and women, as well as combating discrimination based on sex, combating gendered crime is not mentioned under Article 67(3) TFEU. The EU objective to promote equality of the sexes and combat discrimination on the basis of sex in all its activities must be understood to also cover provisions in the area of freedom, security and justice.

Articles 82 on judicial cooperation and 83 on competence for approximation of legislation contain the provisions on EU activities in criminal law. Judicial cooperation in criminal law is based on mutual recognition of judgments and judicial decisions (Article 82(1)). Article 82(2) allows approximation of legislation that is necessary to realise the requirements of mutual recognition and judicial cooperation in criminal matters that have cross-border dimensions. Such minimum rules concern various aspects of criminal procedure, including victims' rights.

Under Article 83(1) TFEU, the competence for the approximation of substantive criminal law allows the introduction of minimum rules on the definition of criminal offences and sanctions in the area of particularly serious crimes with a cross-border dimension. It lists the areas of approximation, which include some (but by far not all) forms of gender-based violence: e.g. trafficking in human beings, sexual exploitation of women and children, and organised violent crimes against women.

Due to new developments, new areas of crime that meet the criteria for approximation may be identified (Article 83(2) TFEU). The Article does not list specific crimes, but the crimes in question must be particularly serious and have a cross-border dimension. As many forms of gendered violence are traditionally considered domestic both in the sense of taking place in intimate relations and in the sense of lacking a cross-border dimension, it may be argued that they do not fit these requirements.

In conclusion, the EU has little competence in the substantive law requirements of the Istanbul Convention that require harmonisation of criminal law. With respect to judicial coordination, the EU has competence especially in the protection of victims in criminal-law procedures. For certain types of gender-based violence, such as sexual harassment in working life and access to goods and services, the EU has the competence to legislate using means other than criminal-law approximation. The EU also has a strong competence to combat human trafficking and sexual exploitation of women and children. These issues, however, have previously been dealt with by other Council of Europe instruments, and are therefore outside the material scope of the Istanbul Convention. On the other hand, the EU has criminal-law competence regarding violent gendered crime that is associated with immigrants. Where a crime prevention measure does not require approximation of criminal law, the EU has competence to act. In the areas where the

EU has power to do so, the Istanbul Convention requirement to take action by legislative as well as other necessary measures would apply at the EU level.

Article 84 TFEU states that measures to promote and support Member State action in the field of crime prevention which does not involve legal harmonisation may be taken by using ordinary legislative procedures. Preventive measures against gender-based violence could thus be initiated under EU law. The European Parliament's Committee for Women's Rights and Gender Equality has requested a European Added Value Assessment to prepare a legislative initiative on combating violence against women. In 2013, this assessment recommended that the EU should adopt a legal act to establish measures by Member States in the field of prevention of violence against women.

The report discusses the EU's accession to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), because so far that is the only human rights instrument ratified by the EU. The procedures adopted at the ratification of the UN CRPD are relevant to the possible accession to the Istanbul Convention. In matters of shared competence, EU representation at the UN is determined in advance. There is a Code of Conduct outlining the forms of cooperation for implementation of the Convention: at its ratification the EU presented a declaration describing exclusive EU competence and the competence shared with the Member States. This division of competences was to be completed later based on relevant developments. The declaration includes a list of Community Acts on the issues under the material scope of the UN CRPD. Accession to the Istanbul Convention would require similar steps, to clarify the sharing of powers between the EU and the Member States.

This report also briefly refers to EU fundamental rights. Irrespective of whether the EU accedes to the Istanbul Convention, the development of human rights law concerning violence against women, especially ECtHR case law, influences EU fundamental rights. Combating gender-based violence often requires a good balance between competing human rights principles (such as the rights of the suspect and accused vis-à-vis the rights of the victim), making the systematic consideration of the fundamental rights very important. The EU's accession to the Istanbul Convention would provide a more systematic approach to the development of EU fundamental rights in the area covered by the Convention.

This report also considers the conceptual differences between the EU provisions against discrimination on the basis of sex and the Istanbul Convention. Of old, EU gender equality law has not used the term gender, as the *acquis* usually refers to 'men and women' or 'sex'. However, EU policies against violence against women have tended to use the term 'gender'. Up to the 2000s, EU measures in the matter of violence against women have been soft law or funding policies. The Daphne funding programme, which has run since 1997 by decisions by the Parliament and the Council, has perhaps been the most extensive commitment in the area. Binding EU law started to pay attention to the specific requirements needed for combating gender-based violence in the 2010s, with Directive 2011/99/EU on the European protection order and Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography setting minimum requirements on Member State legislation. The Victims' Directive 2012/29/EU sets minimum requirements for the Member States regarding issues that are highly relevant to the Istanbul Convention. The Preamble of the Directive contains many references to gender-based violence, as referred to in EU soft-law instruments, the CEDAW Committee's recommendations, and the Istanbul Convention provisions. Similarly, Regulation No. 606/2013 on mutual recognition of protection measures in civil matters pays attention to gendered violence.

The next part of Chapter 2 provides a chapter-by-chapter comparison between the Istanbul Convention and EU law. This part of the report aims to identify the responsibilities of the EU, were the EU to accede to the Convention, and also to point out its added value.

Chapter I of the Convention contains provisions on purposes and definitions, as well as on the Convention's relation to equality and non-discrimination, and on general obligations. The material scope of the Convention is covered by EU action, but harmonisation of legislation regarding many issues where the

Convention requires legislation is not part of the EU mandate. The Convention uses concepts developed in international human rights instruments, such as 'gender-based violence against women', which is defined as violence 'directed against women or that affects women disproportionately'.

EU law has adopted similar terminology in certain recent soft-law instruments, directives and even binding legislation, particularly the Victims' Directive (2012/29/EU). The EU's accession to the Istanbul Convention could make the implementation of existing EU law more coherent. The general obligation under the Convention is to take legislative and other measures to promote the right to live free from violence, as well as to exercise due diligence to prevent, investigate, punish or provide reparation for violence. The EU would need to fulfil these obligations within the scope of its mandate. The due diligence duty would mainly apply in the area of prevention, but also in diligent monitoring of the system of coordination and mutual recognitions of judgments, and the directives within the scope of the Convention.

Chapter II of the Convention contains requirements concerning the responsibility to design comprehensive and coordinated policies that have already been largely met by EU soft-law instruments. The Victims' Directive is important for the requirement that States Parties' measures focus on the rights of the victim. EU policies could be required to be more clearly coordinated than they are at present, should accession take place. A body should be designated for the coordination, implementation, monitoring and evaluation of measures. Data collection and research required by the Convention is within EU competence. This would require clearer focus, better continuity and adequate information for the monitoring body, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO).

Chapter III of the Convention includes the obligation to eradicate practices based on gender stereotypes. The Member States are responsible for the content of their education systems, while the Union supports and supplements these actions. The Victims' Directive covers the training of professionals to deal with victims and perpetrators, as required by the Convention. The EU has a role in the training of the judiciary and the police, and the EU agencies already contribute to the reinforcement of victim protection. Violence against women should receive stronger emphasis. Preventive and treatment programmes for perpetrators, as established by EU funding instruments, should show primary concern for the human rights of the victims. The requirement that States Parties encourage the private sector and the media to implement policies to prevent violence against women is covered to some extent by the Audiovisual Media Services Directive; the EU could add a platform for self-regulation of the media at the transnational level.

Chapter IV of the Convention concerns protection and support services, requiring cooperation between the judiciary, prosecutors, law enforcement, other authorities and NGOs through a formal or informal mechanism. The EU would be obliged to take the standards for services into account in its legislation and policies. In some respects, the EU has already done so by means of the Victims' Directive. EU law, particularly the Victims' Directive, covers some but not all of the obligations to ensure support services to victims. General services, such as healthcare and housing services, are Member State responsibilities. EU law has not yet complied with the Convention requirement regarding helplines and crisis help to victims. The Victims' Directive has a narrower scope than the Convention concerning the protection of victims as the Directive limits the protection to the context of criminal proceedings.

There is no EU legislation on measures to encourage persons who witness or have grounds to suspect acts of violence to inform the authorities. Such measures could be taken by other than legislative means, which the EU is competent to do. The Convention requirements concerning confidentiality rules of professionals that prevent them from reporting suspected acts of violence to authorities are met by EU law only under the Child Abuse Directive. There is no EU legislation on confidentiality rules concerning most crimes under the Istanbul Convention. The Convention does not set binding standards which could only be met by legislation, and thus EU measures could be taken by other means than legislation, but the EU even has the competence to legislate on crime prevention.

All in all, the Istanbul Convention contains a number of provisions that concern matters that fall within the scope of the EU's legislative competence, and the EU has used its powers in this respect. The scope of the Convention is broader than that of EU law; the Convention would create a perspective for further EU policies in this area.

Chapter V of the Convention contains provisions on substantive law; mostly on matters of criminal law, but also of procedural and civil law. However, as noted above, many of the requirements under Chapter V do not fall within EU competence for criminal-law approximation. The Convention contains an obligation for the States Parties to ensure the victim's right to claim compensation for the crimes stipulated in the Convention. The Victims' Directive obliges EU Member States to ensure victims are entitled to compensation at the cost of the offender, and minimum requirements for compensation for injuries the victims have suffered are given under Directive 2004/80/EC.

The civil-law requirements concerning custody, visiting rights and safety concerns of parental rights, as well as the Convention requirements concerning civil consequences of forced marriage, are family-law matters that fall under the mandate of the Member States. Further action could be taken by soft-law measures. Article 84 TFEU allows the EU to take legislative measures to prevent crime, as long as they do not require criminal-law approximation. The EU could comply with the due diligence duty concerning the crimes where approximation of legislation is not possible by implementing other measures targeted at such crimes.

The EU *acquis* already contains prohibitions against sexual harassment in certain contexts. The Convention obligation to take necessary measures against sexual harassment has a broader scope. However, EU law exceeds the Convention's scope in one aspect, in that the EU protection against sexual harassment covers transgender persons. The Convention requirements concerning jurisdiction have an equivalent in EU law concerning some, but by no means all, crimes. The approach of the Convention to alternative dispute resolution measures in matters of gender-based violence is very similar to those measures adopted in EU law, as the Victims' Directive contains safeguards in the context of the use of these services.

Chapter VI of the Convention on investigation, prosecution, procedural law and protective measures sets many obligations that to some extent are already met by EU law. The Convention requirement that law enforcement agencies promptly offer adequate protection to victims is met by the Victims' Directive provisions under which Member States' victims are offered information and services, and that requires identification of the specific protection needs of victims of gender-based violence, violence in a close relationship and sexual violence. The Convention also requires Member States to ensure that in immediate risk situations, authorities have the power to order a perpetrator of domestic violence to vacate the residence of the victim or person at risk. The Victims' Directive requires that Member States provide physical protection to victims and their family members, but only in the context of a legal procedure. The European Protection Order Directive concerns the execution of a national protection order in another Member State but does not provide minimum requirements concerning protection orders. Similarly the Regulation on mutual recognition of protection measures in civil matters aims to facilitate the recognition and enforcement of another Member State's protection measures. Accession to the Istanbul Convention could introduce more coherent soft-law guidelines and model-law initiatives through open methods of coordination.

The Convention obligations concerning evidence relating to the sexual history of the victim and the *ex parte* or *ex officio* proceedings do not require legislative measures, whereas the practices of the EU Member States vary in these respects. The Victims' Directive only partly covers the victims' rights in the event of a decision not to prosecute. In this context, there is room for Member States to implement soft-law measures.

Chapter VII of the Convention on migration and asylum contains provisions that concern situations where the residence status of the victim of gender-based crime depends on the residence status of the victim's



spouse or partner. States Parties are to take legislative or other measures to ensure that an autonomous residence permit is available in the event of the dissolution of marriage or relationship, and that a suspension of expulsion proceedings is provided so that the victim may apply for such a permit. The EU has the competence to adopt measures on the conditions of entry and residence of third-country nationals, including on the conditions of family unification. Common EU asylum policy is implemented by directives that define qualifications for assessing the protection needs of asylum seekers. The requirements of the Convention would be directed predominantly at the EU, if the EU decides to accede.

Chapter VIII requires States Parties to cooperate with each other in civil and criminal matters for the purpose of preventing, combating, and prosecuting crimes under the Convention. The EU Member States cooperate among themselves, but the EU competence to cooperate with third countries requires the establishment of methods of cooperation.

Chapter IX includes provisions on the monitoring mechanism that established a group of experts ('GREVIO'; see above) to monitor reporting by the Member States. The monitoring involves conclusions by GREVIO that are made public and available to the parliaments of the States Parties. The EU reporting to the GREVIO should therefore be carried out by a body nominated for that task in the EU, likely the Commission, and the findings should be reported to the European Parliament.

The final chapters of the Convention, which concern the Convention's relation to other international instruments (Chapter X), the amendments to the Convention (Chapter XI), and final clauses (Chapter XII) contain principles that would apply to the EU as well as to the States Parties to the Convention.

This report concludes that the main legal argument against EU accession to the Convention is the limited competence of the EU in the area of criminal law. However, the lack of competence to fulfil certain obligations does not prevent the EU's accession to the Convention, nor would it render accession meaningless. The requirements under the Convention are not alien to EU law and policies, and added value could be expected from the use of the Convention as a standard by which to interpret EU law. The provisions of the Convention would have greater impact as EU law and policy measures than as human rights standards. As many EU Member States have ratified the Convention (or intend to do so), monitoring through country reports will in any case concern matters which require the implementation of EU law. The EU fundamental rights regime is in any case influenced by, *inter alia*, the human rights monitoring of the ECtHR on violence against women. A more systematic approach to the development of EU fundamental rights could be promoted through an impact arising from EU accession to the Istanbul Convention. Many of the obligations of the States Parties to the Convention do not require legislative measures. EU policies against gender-based violence could be strengthened through accession, as the Convention provides a common framework for both internal and external EU policies.

## Chapter 3

Chapter 3 of the report contains a comparative analysis of the national law of the Member States, based on national reports by the gender equality expert of the European network of legal experts in gender equality and non-discrimination. The analysis concentrates on issues that are especially relevant to the EU, being related to the steps taken to join the Istanbul Convention, or due to a connection to EU law.

By 4 December 2015, the Istanbul Convention was signed by 24 EU Member States, and 12 Member States (**Austria, Denmark, Finland, France, Italy, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden**) had ratified it. The stage of the accession process varied considerably amongst the signatory Member States. The issues under the Convention received varying amounts of attention in the Member States in the past, and the need to make legal amendments and take other measures therefore differs. Member States follow different procedures to ratify international instruments, and this has an impact on the time needed between signing and ratifying. **Belgium, Croatia, Cyprus, Estonia,**

**Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Romania and Slovakia** have signed the Convention. In many Member States that have not yet signed the Convention, there are political indications of preparations towards ratification.

The legislative amendments effected in the Member States before ratification often came in the form of modifications to national criminal codes. Many Member States criminalised forced marriage, female genital mutilation, forced abortion, and forced sterilisation as explicitly defined crimes in the context of ratification. Some Member States followed a more minimalist legislative strategy and did not introduce new crimes where a definition of a more general crime could be considered to cover the acts in question.

Areas considered problematic in the context of ratification in the Member States are mostly criminal-law issues. National controversies concerning organising policies or establishing and financing support services were seldom mentioned by the experts. This is surprising as many experts point out that the provision of support services does not meet the level recommended by the Convention, even in the Member States that have ratified the Convention. Few experts refer to ideological controversies concerning gender-based violence.

The Convention requirements concerning data collection and research on gender-based violence are met in many Member States, but only some of them (**Croatia, Denmark, France, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia and Spain**) have legislated on the provision of specific statistics and studies on such violence.

The Convention requires the provision of manifold support services. Some Member States have introduced (or planned) a regulatory basis for cooperation between authorities and other actors, to protect victims of gendered violence. Legislative provisions have been introduced in many Member States for some but not all forms of violence under the Convention. The Convention makes a distinction between general support services (social, health, and employment) and specialist support services (provision of shelter and accommodation, forensic medical service, psychological counselling, trauma care, and legal services). Provision of general services is in some Member States provided by specific legislation on services to all victims, or for only certain groups of victims in other States. In some Member States many of the services are provided for the population in general, and no specific provision for victims is considered necessary. The Convention requirement concerning general information on access to international complaints mechanisms is very seldom available in the Member States. The Convention requirements concerning the provision of specialist support services coincide to an extent with the obligations that fall under the EU Victims' Directive. **Denmark** has opted out of this Directive, but other Member States are bound by its obligations.

The obligation to provide specialist support services to victims of gender-based and domestic violence and specialist women's support services to all female victims and their children is fulfilled in most EU Member States. However, the provision and funding of the services is not necessarily guaranteed in law. The provision of shelters is often based on law, but many experts note that the number of shelters is insufficient, or that no shelters are provided for vulnerable minority groups. Telephone helplines function in most Member States, but they are often provided by NGOs and lack a legal basis in their operation. The support to victims of sexual violence is even more often provided by NGOs, or lacks a legislative ground. The protection and support to child witnesses under the Convention refers to support to children who have witnessed violence within the context of the Convention. The provisions of Member States vary on this matter.

The Convention's provisions on protection, investigation, and prosecution contain provisions on barring orders, which are regulated under EU law, but only as to recognition of such orders in another Member State. Emergency barring orders are provided in almost all Member States, but on a varying basis, under varying conditions and effects. Similarly, restraining and protection orders for the purpose of preventing



violence and protecting the victim exist under different names and forms to a differing extent in the Member States.

The Convention obligation to ensure that evidence relating to the sexual history and conduct of the victim is permitted only when relevant and necessary, is in practice explicitly met by legislation only in the Member States with a common-law tradition. Other Member States usually have no specific rules on the matter, but general rules on preventing irrelevant evidence from being presented are applied. The Convention's obligations on ensuring that investigations into and prosecution of offences concerning the most serious crimes under the Convention are initiated *ex officio* and will continue even if the victim withdraws her or his statement are not complied with consistently. Rather, the onus of initiating the proceedings continues to fall on the victim in many Member States concerning many of these crimes.

The introduction of measures of protection to be taken by parties to the Istanbul Convention to protect the victims, their families and witnesses against intimidation, retaliation, and repeat victimisation fluctuates between EU Member States. Variation is especially present in the scope of protected persons, as the protection often only involves the victim but not her or his family members or witnesses; and in the forms of protection offered.

The Convention provisions on migration and asylum concern situations where the victim's residence permit depends upon her or him not separating from a perpetrator, or where the victim has joined a spouse or partner under a reunification scheme in order to receive an autonomous residence permit. Many but not all Member States have legal arrangements in place to issue an autonomous residence permit for a victim in these cases. Two EU Member States (Cyprus and Malta) that have ratified the Convention have made reservations concerning the Convention article in question. The conditions for receiving the permit vary, and the authorities are often afforded a margin of appreciation in this process. The crimes in question may be limited only to some types, and the right to obtain an autonomous residence permit might not be automatic due to a limited maximum number of permits, or as a result of some further eligibility criteria the victim has to fulfil.

# Résumé

## Introduction

Le présent rapport s'attache à clarifier les conditions juridiques préalables et les effets juridiques qu'impliquerait l'adhésion de l'Union européenne à la Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique (2011), communément appelée «convention d'Istanbul». Le premier chapitre du rapport, rédigé par Christine Chinkin, se penche sur l'évolution du droit relatif aux droits de l'homme pour ce qui concerne la violence envers les femmes, la violence fondée sur le genre et la violence domestique; sur l'élaboration et l'adoption de la convention d'Istanbul; et sur les caractéristiques principales de la Convention. Le deuxième et le troisième chapitres, rédigés par Kevät Nousiainen, analysent la convention d'Istanbul dans la perspective du droit de l'UE, et décrivent les prises de positions des 28 États membres à son égard – analyse fondée sur une étude comparative des rapports nationaux communiqués par les experts en matière d'égalité hommes-femmes du réseau européen d'experts juridiques dans le domaine de l'égalité des genres et de la non-discrimination. En droit international comme, de plus en plus souvent, en droit de l'UE, la violence à l'égard des femmes est considérée comme une forme de discrimination envers celles-ci, ce qui fait de ce phénomène une matière susceptible de bénéficier du savoir-faire des experts juridiques du Réseau.

Il s'agit néanmoins d'un thème relativement nouveau en droit de l'UE. La violence fondée sur le genre étend le champ d'application d'interdiction de discrimination au-delà de la vision traditionnelle du droit européen en matière d'égalité des sexes et de non-discrimination, qui englobe l'acquis relatif à la discrimination fondée sur le sexe et les mesures destinées à promouvoir l'égalité entre les hommes et les femmes dans la vie professionnelle, dans l'accès aux biens et aux services, et dans des domaines de vie connexes. Le thème du rapport est également neuf au sens où l'UE a très peu d'expérience à ce jour en termes d'adhésion à des conventions relatives aux droits de l'homme. Si le traité de Lisbonne a créé pour elle la possibilité de conclure des accords internationaux, l'Union n'a adhéré jusqu'ici qu'à une seule convention portant sur des droits fondamentaux.<sup>2</sup> Il en découle que les considérations quant aux exigences à remplir pour faciliter l'adhésion, ainsi que les solutions à trouver pour que l'UE en tant qu'édifice politique *sui generis* devienne partie à une convention relative aux droits de l'homme, portent sur des domaines et perspectives nouvelles en droit européen.

## Chapitre 1

Comme l'explique le premier chapitre du rapport, la violence à l'égard des femmes est un concept dont le développement en droit relatif aux droits de l'homme a débuté dans les années 1990. Même si d'importants instruments adoptés par les Nations unies en la matière interdisent la discrimination fondée sur le sexe, et si la Convention spécifique sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW) contient des dispositions visant à éradiquer largement la discrimination fondée sur le sexe, aucun de ces instruments ne mentionne expressément la violence envers les femmes. Le comité CEDAW, à savoir l'organe de surveillance de la CEDAW, a précisé dans sa recommandation générale n° 19 de 1992 que la violence fondée sur le sexe est une forme de discrimination en vertu de la Convention et que les États parties doivent agir avec diligence pour la prévenir. La recommandation générale n° 19 énonce en effet ce qui est désormais considéré comme les obligations du droit international visant à prévenir la violation de droits et à enquêter sur des actes de violence, les punir et les réparer. Cette recommandation générale a été rapidement suivie d'instruments juridiques internationaux similaires,

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2 L'UE a adhéré en 2010 à la Convention des Nations unies relative aux droits des personnes handicapées.

lesquels sont à l'origine des grandes idées conceptuelles – le fait qu'il convienne de considérer la violence fondée sur le genre comme une pratique discriminatoire et que les États parties soient tenus d'agir avec diligence pour prévenir ce type de pratique – qui ont exercé une incidence majeure sur le suivi des droits de l'homme.

La Cour européenne des droits de l'homme (CouEDH) a établi depuis lors dans sa jurisprudence, laquelle est contraignante pour les États parties, que la violence fondée sur le genre doit être considérée comme couverte par l'interdiction de la torture et des traitements inhumains ou dégradants visée à l'article 3 de la Convention européenne des droits de l'homme (CEDH) et comme une violation du droit au respect de la vie privée et familiale visé en son article 8. Tous les États membres de l'UE ont ratifié la CEDH. La Convention interaméricaine de Belém do Para, conclue en 1994, peut être considérée comme un précurseur de la Convention européenne d'Istanbul.

La Convention d'Istanbul repose sur le postulat qu'un certain type de violence est une manifestation des rapports de force historiquement inégaux entre les femmes et les hommes. Elle exige des États parties qu'ils condamnent toutes les formes de discrimination à l'égard des femmes et prennent les mesures législatives et autres nécessaires pour la prévenir. C'est la raison pour laquelle la Convention comporte un lien étroit entre l'égalité hommes-femmes et la lutte contre la violence envers les femmes, approuvant les mesures spécifiques nécessaires pour prévenir et protéger les femmes contre la violence fondée sur le genre. La Convention invite également les États parties à prendre des mesures en vue d'éradiquer les préjugés fondés sur le genre, visant ainsi les normes culturelles, religieuses, sociales et traditionnelles qui maintiennent l'inégalité entre hommes et femmes. La diligence dont les États parties doivent faire preuve en matière de prévention, d'enquête, de punition et de réparation de faits de violence sexiste commis par des personnes privées s'appuie sur l'idée que, même s'il n'est pas responsable des actes de violence individuels, l'État a l'obligation de prévenir ces actes entre personnes privées.

Initialement utilisée dans des recherches universitaires, la notion de genre a été adoptée en droit relatif aux droits humains dans le cadre d'une évolution quelque peu ambivalente. La convention d'Istanbul définit la violence fondée sur le genre en précisant que le genre désigne les rôles et attributions socialement construits qu'une société donnée considère comme appropriés pour les femmes et les hommes. La Convention invite les États parties à mettre en place des «politiques sensibles au genre» et une «perspective de genre». Si la violence sexuelle est généralement considérée comme fondée sur des schémas comportementaux genrés, plusieurs délégations ayant participé à la rédaction de la Convention considéraient la violence domestique comme un délit dont les victimes ne sont pas seulement des femmes, mais également des hommes et des enfants des deux sexes. Les articles de la Convention portant sur la violence domestique exigent des États parties qu'ils prennent des mesures contre toutes les formes de violence domestique mais qu'ils réservent, ce faisant, une attention particulière aux victimes féminines de ce type de violence. Ainsi donc, la Convention n'est pas (à l'inverse de la CEDAW par exemple) spécifiquement formulée comme un instrument de lutte contre la discrimination envers les femmes, alors qu'elle a pour objet principal d'éradiquer la violence à l'égard de celles-ci.

La convention d'Istanbul exige des États parties qu'ils prennent des mesures relevant du droit matériel dans les domaines du droit pénal, du droit procédural et même, jusqu'à un certain point, du droit civil. Elle énumère une série d'actes que les États parties doivent ériger en infraction pénale, et exige d'eux qu'ils établissent leur compétence à l'égard de ces infractions et veillent à ce qu'elles fassent l'objet de poursuites. En requérant une action spécifique sur ces points, la Convention diffère de tous les instruments précédents en matière de droits de l'homme, lesquels utilisent un langage plus ouvert pour ce qui concerne les responsabilités des États parties. L'approche adoptée par la convention d'Istanbul vise à une lutte contre la violence à l'égard des femmes qui soit cohérente et globale, et menée par une série d'acteurs: ses dispositions appellent non seulement à une action de la part du gouvernement, mais également de la part des médias et de la société civile.

## Chapitre 2

L'adhésion éventuelle de l'UE à la convention d'Istanbul Convention revêt plusieurs aspects juridiques. Le premier, analysé au deuxième chapitre du rapport, concerne le mandat de l'UE pour cette adhésion, qui n'est possible que dans les limites de sa compétence générale pour conclure des accords internationaux en son propre nom. L'UE a, en vertu de l'article 216, paragraphe premier, du TFEU, la compétence externe pour conclure des accords lorsque les traités ou un acte juridique contraignant de l'Union le prévoit, lorsque l'accord est nécessaire pour réaliser l'un des objectifs visés par les traités, ou lorsqu'il est susceptible d'affecter des règles communes ou d'en altérer la portée. La lutte contre la criminalité et la promotion de l'égalité entre les hommes et les femmes sont des objectifs clairement établis par l'acquis de l'UE – ce qui signifie que l'UE a la compétence générale pour adhérer à la convention d'Istanbul. L'article 216, paragraphe 2, précise que les accords conclus par l'Union lient ses institutions et ses États membres. Dès lors, si l'UE adhère à la convention d'Istanbul, les États membres seront liés par les politiques adoptées par l'UE pour la mettre en œuvre en sus des obligations découlant de leur propre ratification de la Convention.

L'UE possède de nombreuses compétences pour éradiquer la discrimination fondée sur divers motifs. L'article 19 du TFUE permet à l'UE de combattre toute discrimination fondée sur le sexe, et l'article 157, paragraphe 3, du TFUE autorise des mesures visant à assurer l'application du principe de l'égalité des chances et de l'égalité de traitement entre les hommes et les femmes en matière d'emploi et de travail. L'article 157, paragraphe 4, dispose en outre que le principe de l'égalité de traitement n'empêche pas les États membres de prendre des mesures d'action positive en faveur du sexe sous-représenté dans le cadre de l'exercice d'une activité professionnelle ou de la carrière professionnelle.

La compétence de l'UE en matière de droit pénal revêt une importance particulière dans la mesure où la convention d'Istanbul est un instrument de lutte contre des actes criminels. Le titre V du TFUE contient des dispositions relatives à l'espace de liberté, de sécurité et de justice qui relève d'une compétence partagée entre l'UE et les États membres. L'article 67, paragraphe 3, du TFUE dispose que l'UE doit assurer un niveau élevé de sécurité par des mesures de prévention de la criminalité, du racisme et de la xénophobie ainsi que de lutte contre ceux-ci, par des mesures de coordination et de coopération entre autorités ainsi que par la reconnaissance mutuelle des décisions judiciaires en matière pénale et, si nécessaire, par le rapprochement des législations pénales – ce rapprochement s'effectuant au travers de la fixation d'exigences minimales concernant le contenu du droit pénal. Si les actions transversales visées aux articles 8 et 10 du TFUE portent notamment sur l'élimination des inégalités et sur la promotion de l'égalité entre les hommes et les femmes, ainsi que sur la lutte contre la discrimination fondée sur le sexe, la lutte contre la criminalité fondée sur le genre n'est pas mentionnée à l'article 67, paragraphe 3, du TFUE. L'objectif de promotion de l'égalité des sexes et de lutte contre la discrimination fondée sur le sexe dans toutes les actions de l'UE doit s'entendre comme couvrant également les dispositions relatives à l'espace de liberté, de sécurité et de justice.

L'article 82 du TFUE sur la coopération judiciaire et son article 83 sur la compétence en matière de rapprochement des législations contiennent des dispositions relatives aux activités de l'UE dans le domaine du droit pénal. La coopération judiciaire en matière de droit pénal s'appuie sur une reconnaissance mutuelle des jugements et décisions judiciaires (article 82, paragraphe premier). L'article 82, paragraphe 2, autorise le rapprochement législatif nécessaire pour concrétiser les exigences de reconnaissance mutuelle et de coopération judiciaire dans les matières pénales ayant une dimension transfrontière. Ces règles minimales portent sur différents aspects de la procédure pénale, y compris les droits des victimes.

En vertu de l'article 83, paragraphe premier, du TFUE, la compétence relative au rapprochement des droits pénaux matériels autorise l'établissement de règles minimales relatives à la définition des infractions pénales et des sanctions dans des domaines de criminalité particulièrement grave revêtant une dimension transfrontière. Ledit article énumère les domaines visés par ce rapprochement, lesquels incluent certaines formes de violence fondée sur le genre (une liste loin d'être exhaustive): la traite des êtres humains,

l'exploitation sexuelle des femmes et des enfants, et la criminalité organisée violente envers les femmes, par exemple.

En fonction des développements, d'autres domaines de criminalité remplissant les critères de rapprochement peuvent être identifiés (article 83, paragraphe 2, du TFUE). L'article n'énumère pas d'infractions spécifiques, mais celles-ci doivent être particulièrement graves et revêtir une dimension transfrontière. Étant donné que de nombreuses formes de violence fondée sur le genre sont traditionnellement considérées comme domestiques, à la fois au sens où elles interviennent dans le cadre de relations intimes et au sens où elles n'ont pas de dimension transfrontière, on pourrait faire valoir qu'elles ne répondent pas aux critères en question.

En conclusion, la compétence de l'UE est limitée en ce qui concerne les exigences de droit matériel de la convention d'Istanbul. Lesquelles requièrent l'harmonisation du droit pénal. En ce qui concerne la coordination judiciaire, l'UE est plus particulièrement compétente pour la protection des victimes dans le cadre de procédures pénales. Pour certains types de violence fondée sur le genre, tels que le harcèlement sexuel dans la vie professionnelle et l'accès aux biens et aux services, l'UE est compétente pour légiférer par d'autres moyens que le rapprochement des droits pénaux. Elle possède par ailleurs de nombreuses compétences pour lutter contre le trafic des êtres humains et l'exploitation sexuelle des femmes et des enfants. Ces problématiques faisant toutefois l'objet d'instruments précédemment adoptés par le Conseil de l'Europe, elles sortent du champ d'application matériel de la convention d'Istanbul. D'autre part, l'UE est compétente en matière de droit pénal lorsqu'il s'agit de criminalité violente fondée sur le genre associée des immigrants. Elle est compétente pour agir lorsqu'une mesure de prévention du crime ne requiert par le rapprochement des droits pénaux. L'exigence de la convention d'Istanbul invitant les Parties à prendre les mesures législatives ou autres nécessaires s'appliquerait dès lors au niveau de l'Union dans les domaines où elle jouit de cette habilitation.

L'article 84 du TFUE dispose que des mesures destinées à encourager et appuyer l'action des États membres dans le domaine de la prévention du crime, à l'exclusion de celles impliquant une harmonisation des législations, peuvent être adoptées conformément à la procédure législative ordinaire. Des mesures de prévention d'actes de violence fondée sur le genre pourraient donc être initiées en vertu du droit de l'UE. La commission des droits des femmes et de l'égalité des genres du parlement européen a demandé une évaluation de la valeur ajoutée européenne en vue d'une initiative législative en matière de lutte contre la violence à l'égard des femmes. Cette évaluation a recommandé en 2013 que l'UE adopte un acte législatif visant à ce que les États membres instaurent des mesures dans le domaine de la prévention de la violence envers les femmes.

Le présent rapport examine l'adhésion de l'UE à la convention des Nations unies relative aux droits des personnes handicapées (CDPH) parce qu'il s'agit à ce jour de l'unique instrument ratifié par l'UE en matière de droits de l'homme, et que les procédures adoptées lors de la ratification de cette Convention sont pertinentes pour une éventuelle adhésion à celle d'Istanbul. En ce qui concerne les matières qui font l'objet d'une compétence partagée, la représentation de l'UE aux NU est définie à l'avance. Un code de conduite précise les formes de coopération appliquées à la mise en œuvre de la Convention: lors de la ratification de celle-ci, l'UE a présenté une déclaration spécifiant la compétence exclusive de l'UE et la compétence partagée avec les États membres – une répartition des compétences à compléter ultérieurement en fonction des développements pertinents. La déclaration comporte une liste d'actes communautaires portant sur les questions relevant du champ d'application matériel de la CDPH des NU. Une adhésion à la convention d'Istanbul exigerait une démarche similaire pour préciser le partage des pouvoirs entre l'UE et les États membres.

Le présent rapport aborde aussi succinctement les droits fondamentaux de l'UE, lesquels sont influencés par l'évolution du droit relatif aux droits humains en rapport avec la violence à l'égard des femmes, et par la jurisprudence de la Cour EDH en particulier, que l'Union adhère ou non à la convention d'Istanbul. La lutte contre la violence fondée sur le genre exige souvent la recherche d'un juste équilibre entre plusieurs

principes concurrents en matière de droits de l'homme (droits du suspect/de l'accusé et droits de la victime, par exemple), ce qui rend l'examen systématique des droits fondamentaux particulièrement important. L'adhésion de l'UE à la convention d'Istanbul s'accompagnerait d'une approche plus systématique du développement des droits fondamentaux de l'UE dans le domaine couvert par la Convention.

Le présent rapport s'intéresse également aux différences conceptuelles entre les dispositions adoptées par l'UE pour lutter contre la discrimination fondée sur le sexe et la convention d'Istanbul. Pendant longtemps, la législation européenne en matière d'égalité des genres n'a guère utilisé le terme «genre», l'acquis faisant généralement référence à l'égalité entre «les hommes et les femmes» ou entre «les sexes». Les politiques européennes en matière de lutte contre la violence à l'égard des femmes ont eu tendance, par contre, à utiliser le terme «genre». Jusqu'aux années 2000, les mesures adoptées pour combattre la violence envers les femmes ont consisté en dispositions non contraignantes ou en politiques de financement. Le programme de financement Daphné, qui fonctionne depuis 1997 par décisions du Parlement et du Conseil, constitue sans doute l'engagement de la plus grande envergure dans ce domaine. C'est à partir de 2010 que la législation contraignante de l'UE a commencé de s'intéresser aux exigences spécifiquement requises pour combattre la violence fondée sur le genre avec la directive 2011/99/UE relative à la décision de protection européenne et la directive 2011/92/UE relative à la lutte contre les abus sexuels et l'exploitation sexuelle des enfants, ainsi que de la pédopornographie, lesquelles imposent des prescriptions minimales à la législation des États membres. La directive 2012/29/UE relative aux victimes établit pour sa part des normes minimales à respecter par les États membres en rapport avec des questions directement liées à la convention d'Istanbul; son préambule mentionne à plusieurs reprises la violence fondée sur le genre telle que visée par des instruments non contraignants de l'UE, par les recommandations du Comité CEDAW et par les dispositions de la convention d'Istanbul. De même, le règlement n° 606/2013 relatif à la reconnaissance mutuelle des mesures de protection en matière civile met l'accent sur la violence fondée sur le genre.

La troisième partie du chapitre 2 du rapport propose une comparaison chapitre par chapitre entre la convention d'Istanbul et le droit de l'UE. Elle vise ainsi à recenser les responsabilités de l'Union européenne au cas où elle adhérerait à la Convention, et à mettre en évidence sa valeur ajoutée.

Le chapitre I de la Convention contient les dispositions relatives aux buts et définitions, et au lien de la Convention avec l'égalité et la non-discrimination, ainsi qu'aux obligations générales. Le champ d'application matériel de la Convention est couvert par l'action de l'UE, mais l'harmonisation législative en rapport avec les points sur lesquels la Convention exige une législation ne fait pas partie du mandat de l'Union. La Convention utilise des notions développées dans des instruments internationaux relatifs aux droits de l'homme telles que «la violence à l'égard des femmes fondée sur le genre», définie comme toute violence «faite à l'égard d'une femme parce qu'elle est une femme ou affectant les femmes de manière disproportionnée».

La législation européenne a adopté une terminologie similaire dans certains instruments juridiques récents non contraignants et directives, voire même dans des actes législatifs contraignants, et notamment dans la directive 2012/19/UE sur les droits et la protection des victimes. L'adhésion de l'UE à la convention d'Istanbul pourrait conférer davantage de cohérence à la mise en œuvre de la législation européenne existante – la Convention comportant en effet une obligation générale de prendre les mesures législatives et autres nécessaires pour promouvoir le droit de chacun de vivre à l'abri de la violence, et pour agir avec la diligence voulue afin de prévenir, enquêter sur, punir et accorder une réparation pour les actes de violence. L'UE devrait remplir ces obligations dans les limites de son mandat. L'obligation de diligence s'appliquerait principalement au domaine de la prévention, mais également au suivi diligent du système de coordination et de la reconnaissance des décisions judiciaires, et aux directives relevant du champ d'application de la Convention.

Le chapitre II de la Convention porte sur les exigences quant à l'obligation de concevoir des politiques globales et coordonnées sont déjà largement satisfaites par les instruments juridiques non contraignants

adoptés par l'UE. La directive relative aux victimes est importante étant donné l'obligation pour les États membres de prendre des mesures axées sur les droits de celles-ci. Une coordination plus explicite des politiques de l'UE pourrait être exigée en cas d'adhésion à la Convention. Il conviendrait de désigner un organe chargé de la coordination, de la mise en œuvre, du suivi et de l'évaluation des mesures concernées. La collecte de données et la recherche prévues par la Convention relèvent de la compétence de l'UE, ce qui réclamerait une orientation plus claire, davantage de continuité et des informations adéquates au niveau de l'organe de suivi, à savoir le Groupe d'experts sur la lutte contre la violence à l'égard des femmes et la violence domestique (GREVIO).

Le chapitre III de la Convention prévoit l'obligation d'éradiquer les pratiques fondées sur un rôle stéréotypé des femmes et des hommes. Les États membres sont responsables du contenu de leurs systèmes éducatifs, mais l'Union soutient et complète les actions en la matière. La directive relative aux victimes prévoit la formation des professionnels en contact avec les victimes et les auteurs de faits de violence, comme l'exige la Convention. L'UE joue un rôle dans la formation des services judiciaires et de police, et ses différentes agences contribuent d'ores et déjà au renforcement de la protection des victimes. Un accent plus marqué devrait être mis sur la violence envers les femmes. Les programmes préventifs et de traitement destinés aux auteurs de violence, tels que prévus par les instruments de financement de l'UE, doivent être prioritairement axés sur les droits fondamentaux des victimes. L'obligation pour les États membres d'encourager le secteur privé et les médias à participer à la mise en œuvre des politiques de prévention de la violence à l'égard des femmes est remplie dans une certaine mesure par la directive relative aux services de médias audiovisuels; l'UE pourrait ajouter une plateforme d'autoréglementation des médias au niveau transnational.

Le chapitre IV de la Convention, qui concerne les services de protection et de soutien, exige une coopération entre les autorités judiciaires, les procureurs, les services répressifs et autres autorités, ainsi que les ONG, via un mécanisme formel ou informel. L'UE serait tenue de prendre en compte les normes applicables aux services dans ses dispositions législatives et réglementaires – ce qu'elle a déjà fait, à certains égards, dans le cas de la directive relative aux victimes puisque cette directive, de même que l'ensemble de la législation européenne, couvrent une partie des obligations – mais pas toutes – en matière de soutien aux victimes. Les services généraux tels que les soins de santé et le logement relèvent de la responsabilité des États membres. La législation de l'Union ne se conforme pas encore à l'exigence de la Convention pour ce qui concerne les permanences téléphoniques et l'aide d'urgence aux victimes. Le champ d'application de la directive relative aux victimes est plus restreint que celui de la Convention en matière de protection des victimes – la directive limitant la protection au cadre des procédures pénales.

L'UE n'a adopté aucune mesure législative visant à encourager les personnes qui sont témoins d'un acte de violence, ou qui ont des raisons de croire qu'un tel acte pourrait être commis, à le signaler aux autorités compétentes. Des mesures dans ce sens pourraient être prises par d'autres moyens que la voie législative, ce que l'UE est habilitée à faire. La directive relative à la lutte contre les abus sexuels et l'exploitation sexuelle des enfants fait que la législation européenne satisfait aux exigences de la Convention concernant les règles de confidentialité qui, imposées aux professionnels, les empêcheraient de signaler une suspicion d'actes de violence aux autorités compétentes. Il n'existe aucune législation européenne relative aux règles de confidentialité pour ce qui concerne la plupart des infractions visées par la convention d'Istanbul. Celle-ci n'établit pas de normes contraignantes ne pouvant être respectées qu'au moyen de dispositions législatives – ce qui signifie que l'UE pourrait adopter des mesures par d'autres voies que la législation, même si elle est compétente pour légiférer en matière de prévention de la criminalité.

D'une façon générale, la convention d'Istanbul contient une série de dispositions portant sur des aspects relevant du champ de compétence législative de l'UE, laquelle a fait usage de ses pouvoirs à cet égard. Ayant un champ d'application plus étendu que celui de la législation de l'Union, la Convention pourrait ouvrir la voie à des mesures européennes supplémentaires dans ce domaine.



Le chapitre V de la Convention contient des dispositions portant sur le droit matériel – principalement en matière pénale, mais également sur des questions de droit de procédure et de droit civil. Toutefois, comme indiqué plus haut, bon nombre des exigences de ce cinquième chapitre ne relèvent pas de la compétence de l'UE en matière de rapprochement des droits pénaux. La Convention prévoit l'obligation pour les États parties d'assurer le droit des victimes de réclamer une indemnisation de la part des auteurs de toute infraction établie conformément à la Convention. La directive relative aux victimes oblige les États membres de l'UE à veiller à ce que celles-ci aient droit à une indemnisation aux dépens de l'auteur de l'infraction, et la directive 2004/80/CE relative à l'indemnisation des victimes de la criminalité fixe des normes minimales à cet égard.

Les exigences de droit civil concernant la garde, le droit de visite et la sécurité en termes de droits parentaux, de même que les exigences de la Convention quant aux conséquences civiles des mariages forcés, sont des questions qui relèvent de la compétence des États membres. Des mesures supplémentaires pourraient être adoptées sous une forme juridique non contraignante. L'article 84 du TFUE autorise l'UE à établir des mesures de prévention de la criminalité pour autant qu'elles ne requièrent pas l'harmonisation des dispositions pénales. L'UE pourrait, en ce qui concerne la criminalité pour laquelle une harmonisation législative n'est pas possible, se conformer à l'obligation de diligence voulue en mettant en œuvre d'autres mesures axées sur les infractions en cause.

L'acquis de l'UE comporte déjà l'interdiction de harcèlement sexuel dans divers contextes. L'obligation prévue par la Convention de prendre les mesures nécessaires à l'encontre de ce type de harcèlement a une portée plus large, hormis sur un point, à savoir que la législation de l'UE en matière de protection contre le harcèlement sexuel couvre les personnes transgenres. Les exigences de la Convention en matière de compétence ont leur équivalent en droit de l'UE pour ce qui concerne certaines infractions, mais de loin pas toutes. L'approche de la Convention concernant les mesures relatives aux modes alternatifs de résolution des conflits dans les cas de violence fondée sur le genre est très similaire aux mesures adoptées par la législation européenne: ainsi la directive relative aux victimes prévoit-elle des garanties dans le contexte des services de justice réparatrice.

Le chapitre VI de la Convention, relatif aux enquêtes, aux poursuites, au droit procédural et aux mesures de protection, établit de nombreuses obligations auxquelles satisfait d'ores et déjà, dans une certaine mesure, le droit de l'UE. L'obligation de la Convention stipulant que les services répressifs responsables doivent offrir une protection rapide et appropriée aux victimes est remplie par les dispositions de la directive relative aux victimes précisant que les États membres doivent fournir des informations et services aux victimes, et veiller à recenser les besoins spécifiques de protection des victimes de violence fondée sur le genre, de violences domestiques et de violences sexuelles. La Convention exige aussi des États membres qu'ils garantissent que, dans des situations de danger immédiate, les autorités compétentes se voient reconnaître le pouvoir d'ordonner à l'auteur de violence domestique de quitter la résidence de la victime ou de la personne en danger. La directive relative aux victimes invite les États membres à assurer la protection physique des victimes et des membres de leur famille, mais uniquement dans le cadre d'une procédure pénale. La directive relative à la décision de protection européenne porte sur l'exécution d'une décision de protection dans un autre État membre, mais ne prévoit pas de normes minimales concernant lesdites décisions. De même, le règlement relatif à la reconnaissance mutuelle des mesures de protection en matière civile vise à faciliter la reconnaissance et la mise en application des mesures de protection adoptées par un autre État membre. L'adhésion à la convention d'Istanbul pourrait donner lieu à des lignes directrices plus cohérentes pour ce qui concerne les dispositions juridiques non contraignantes ainsi qu'à des initiatives de loi type via les méthodes ouvertes de coordination.

Les obligations de la Convention concernant les preuves relatives aux antécédents sexuels de la victime et les procédures *ex parte* et *ex officio* ne requièrent pas de mesures législatives, alors que les pratiques des États membres de l'UE varient à ces égards. La directive relative aux victimes couvre en partie seulement les droits de celles-ci en cas de décision de ne pas poursuivre. Les États membres pourraient considérablement élargir la mise en œuvre de mesures juridiques non contraignantes dans ce contexte.



Le chapitre VII de la Convention, consacré à la migration et l'asile, contient des dispositions relatives à des situations dans lesquelles le statut de résident de la victime d'une infraction fondée sur le genre dépend de celui de leur conjoint ou partenaire. Les États parties sont invités à prendre les mesures législatives ou autres nécessaires pour garantir qu'un permis de résidence autonome soit accordé en cas de dissolution du mariage ou de la relation, et qu'une suspension des procédures d'expulsion soit assurée pour permettre à la victime de demander ce permis. L'UE est habilitée à adopter des mesures portant sur les conditions d'entrée et de séjour des ressortissants de pays tiers, en ce compris les conditions d'un regroupement familial. Une politique commune d'asile est mise en œuvre au niveau de l'UE au moyen de directives définissant les critères pour l'évaluation des besoins de protection des demandeurs d'asile. Les obligations de la Convention s'adresseraient principalement à l'UE, si celle-ci décide d'y adhérer.

Le chapitre VIII exige des États parties qu'ils coopèrent entre eux en matière civile et pénale aux fins de prévenir, combattre et poursuivre les formes de violence couvertes par la Convention. Les États membres de l'UE coopèrent entre eux, mais la compétence de l'Union pour coopérer avec des pays tiers requiert l'instauration de méthodes de coopération.

Le chapitre IX contient des dispositions relatives au mécanisme de suivi et à la création d'un groupe d'experts («GREVIO» – voir plus haut) chargé du suivi des rapports émanant des États membres. Le suivi consiste notamment en l'établissement par le GREVIO de conclusions qui sont rendues publiques et mises à la disposition des parlements des États parties. De la même manière, les rapports de l'UE au GREVIO devraient être établis par un organe désigné à cette fin au sein de l'UE, probablement la Commission, et les conclusions devraient en être transmises au parlement européen.

Les derniers chapitres de la Convention, qui concernent respectivement les relations avec d'autres instruments internationaux (chapitre X), les amendements à la Convention (chapitre XI) et les clauses finales (chapitre XII), contiennent des principes qui s'appliqueraient à l'UE au même titre qu'aux États parties à la Convention.

Le présent rapport conclut que le principal argument juridique à l'encontre d'une adhésion de l'UE à la Convention est la compétence limitée de l'Union en matière de droit pénal. Cette compétence insuffisante pour remplir certaines obligations n'empêche cependant pas l'UE d'adhérer à la Convention, et ne viderait nullement cette adhésion de son sens. Les exigences formulées par la Convention ne sont pas étrangères aux lois et politiques de l'UE, et l'utilisation de la Convention en tant que référence pour l'interprétation du droit de l'UE pourrait constituer une valeur ajoutée. Les dispositions de la Convention auraient davantage d'impact en tant que mesures législatives et réglementaires de l'UE qu'en tant que normes de droits de l'homme. Étant donné que beaucoup d'États membres de l'UE ont ratifié la Convention (ou ont l'intention de le faire), le suivi au travers des rapports nationaux portera de toutes façons sur des points requérant la mise en œuvre de la législation de l'UE. Le régime des droits fondamentaux de l'Union est, quoi qu'il en soit, influencé entre autres par la surveillance du respect des droits de l'homme exercée par la CouEDH en matière de violence à l'égard des femmes. Une approche plus systématique du développement des droits fondamentaux de l'UE pourrait être impulsée par l'adhésion de celle-ci à la convention d'Istanbul. Bon nombre des obligations imposées aux États parties à la Convention ne requièrent pas de mesures législatives. L'adhésion pourrait renforcer les actions menées par l'UE contre la violence fondée sur le genre du fait que la Convention offre un cadre commun tant pour la politique intérieure de l'Union que pour sa politique extérieure.

## Chapitre 3

Le troisième chapitre du rapport propose une analyse comparative des législations nationales des États membres sur la base des rapports nationaux transmis par les experts en matière d'égalité hommes-femmes du réseau européen d'experts juridiques dans le domaine de l'égalité des genres et de la non-discrimination. L'analyse se concentre sur les aspects revêtant une pertinence particulière pour l'UE en

raison de leur lien avec les démarches effectuées pour adhérer à la Convention d'Istanbul ou d'un lien avec le droit de l'UE.

Au 4 décembre 2015, la convention d'Istanbul avait été signée par 24 États membres de l'UE et ratifiée par 12 d'entre eux (**Autriche, Danemark, Espagne, Finlande, France, Italie, Malte, Pays-Bas, Pologne, Portugal, Slovénie et Suède**). L'état d'avancement du processus d'adhésion varie considérablement selon les États parties. Les problématiques abordées par la Convention ont bénéficié par le passé de degrés d'attention divers de la part des États membres avec pour conséquence que la nécessité de procéder à des amendements législatifs ou de prendre d'autres mesures n'est pas la même partout. Les États membres suivent par ailleurs des procédures différentes en matière de ratification d'instruments internationaux, ce qui se répercute sur le délai requis entre la signature et la ratification. **La Belgique, la Croatie, Chypre, l'Estonie, l'Allemagne, la Grèce, la Hongrie, l'Irlande, la Lituanie, le Luxembourg, la Roumanie et la Slovaquie** ont signé la Convention. Dans de nombreux pays ne l'ayant pas encore signée, des indications politiques donnent à penser que des travaux préparatoires en vue de la ratification sont en cours.

Les amendements législatifs effectués dans les États membres préalablement à la ratification se sont souvent concrétisés par des modifications au niveau du code pénal. Bon nombre de pays ont en effet pénalisés les mariages forcés, les mutilations génitales féminines, l'avortement et la stérilisation forcés en tant qu'infractions expressément spécifiées dans le contexte de la ratification. Plusieurs États membres ont opté pour une stratégie législative davantage minimaliste et n'ont pas introduit de nouvelles infractions lorsqu'une définition d'une criminalité au sens large pouvait être considérée comme incluant les actes en question.

Les aspects jugés problématiques au sein des États membres dans le cadre de la ratification relevaient principalement du droit pénal. Les experts ont signalé peu de controverses nationales concernant l'organisation des politiques ou la création et le financement de services de soutien – ce qui peut surprendre dans la mesure où de nombreux experts soulignent que l'offre de ce type de services n'atteint pas le niveau recommandé par la Convention, y compris dans les États membres qui l'ont ratifiée. Rares sont les experts qui font mention de controverses idéologiques à propos de la violence fondée sur le genre.

Les exigences de la Convention concernant la collecte de données et la recherche en matière de violence fondée sur le genre sont satisfaites dans de nombreux États membres, mais quelques-uns seulement (**Croatie, Danemark, Espagne, France, Grèce, Irlande, Italie, Luxembourg, Malte, Pays-Bas, Portugal, Slovaquie et Slovénie**) ont légiféré sur la fourniture d'études et de statistiques portant spécifiquement sur cette forme de violence.

La Convention requiert la mise à disposition de multiples services de soutien. Certains États membres ont mis en place (ou prévu) une base réglementaire de coopération entre les autorités compétentes et d'autres acteurs en vue de protéger les victimes de violence fondée sur le genre. De nombreux États membres ont adopté des dispositions législatives portant sur certaines formes de violence visées par la Convention, mais pas toutes. La Convention établit une distinction entre les services de soutien généraux (services sociaux, de santé et d'emploi) et les services de soutien spécialisés (offre de refuges et de logements, services médico-légaux, conseils psychologiques, soutien lié au traumatisme, et services juridiques). Dans plusieurs États membres, une législation spécifique assure la prestation de services généraux à l'intention de toutes les victimes; dans d'autres, ceux-ci s'adressent à certains groupes de victimes seulement. Dans quelques États membres, beaucoup de ces services sont mis à la disposition de l'ensemble de la population et aucune disposition à l'intention spécifique des victimes n'est jugée nécessaire. L'exigence de la Convention quant à l'information générale concernant l'accès à des mécanismes de plainte internationaux se concrétise très rarement dans les États membres. Les exigences de la Convention concernant la mise à disposition de services de soutien spécialisés correspondent dans une certaine mesure aux obligations relevant de la directive de l'UE relative aux victimes. Le **Danemark**

a demandé d'être exclu de cette directive, mais les autres États membres sont liés par les obligations qu'elle contient.

L'obligation de fournir des services de soutien spécialisés aux victimes de violence fondée sur le genre et de violence domestique, ainsi qu'aux femmes victimes et à leurs enfants, est respectée dans la plupart des États membres de l'UE. La prestation et le financement de ces services ne sont cependant pas nécessairement garantis par la loi. La mise à disposition de refuges s'appuie souvent sur des dispositions législatives, mais de nombreux experts signalent que le nombre de refuges est insuffisant, ou qu'aucun refuge n'est prévu pour les groupes minoritaires vulnérables. Des permanences téléphoniques fonctionnent dans la plupart des États membres mais elles sont souvent assurées par des ONG et manquent de fondement juridique. Le soutien aux victimes de violences sexuelles est davantage encore assuré par des ONG, ou n'est pas doté d'un véritable fondement juridique. La protection et le soutien des enfants témoins portent, aux termes de la Convention, sur l'aide aux enfants témoins de toute forme de violence couverte par la Convention. Les dispositions adoptées par les États membres dans ce domaine varient.

Les dispositions de la Convention relatives à la protection, aux enquêtes et aux poursuites portent notamment sur les ordonnances d'interdiction, qui sont régies par le droit de l'UE, mais uniquement en ce qui concerne leur reconnaissance dans un autre État membre. Des ordonnances d'urgence d'interdiction sont prévues dans la quasi-totalité des États membres, mais avec des disparités en termes de base, de conditions et d'effets. De même, des ordonnances d'injonction ou de protection émises dans le but de prévenir des actes de violence ou de protéger la victime existent sous des appellations et formes différentes, et à des degrés divers, dans les États membres.

L'obligation prévue par la Convention de veiller à ce que les preuves relatives aux antécédents sexuels et à la conduite de la victime ne soient recevables que lorsque cela est pertinent et nécessaire, n'est, dans la pratique, expressément remplie par la législation que dans les États membres ayant une tradition juridique de «common law». Les autres États membres ne se sont généralement dotés d'aucune règle spécifique en la matière, mais les règles générales empêchant la présentation d'éléments de preuve non pertinents s'appliquent. Les obligations de la Convention garantissant que les enquêtes ou les poursuites d'infractions relevant des actes les plus graves visés par la Convention seront initiées *ex officio* et se poursuivront même si la victime se rétracte ou retire sa plainte, ne sont pas respectées de manière cohérente. Il apparaît en effet que, dans de nombreux États membres et pour beaucoup de ces infractions, l'engagement de poursuites continue d'incomber à la victime.

L'instauration de mesures de protection à prendre par les parties à la convention d'Istanbul en vue de mettre les victimes, leurs familles et les témoins à l'abri des risques d'intimidation, de représailles et de nouvelle victimisation varie selon les États membres de l'UE. La disparité est particulièrement marquée en ce qui concerne le champ d'application personnel, étant donné que la protection ne couvre fréquemment que la victime, mais pas les membres de sa famille ni les témoins, de même qu'en ce qui concerne les formes de protection proposées.

Les dispositions de la Convention relatives à la migration et à l'asile concernent l'octroi d'un permis de résidence autonome dans des situations où le permis de résidence de la victime dépend de sa non-séparation d'avec l'auteur des faits de violence, ou dans lesquelles la victime a rejoint un conjoint ou un partenaire dans le cadre d'un programme de regroupement familial. De nombreux États membres (mais pas tous) ont instauré des modalités juridiques permettant de délivrer un permis de résidence autonome dans ce type de situation. Deux États membres de l'UE (**Chypre** et **Malte**) ont ratifié la Convention en formulant des réserves concernant l'article en question. Les conditions d'octroi du permis varient, et les autorités compétentes bénéficient souvent d'une marge d'appréciation dans le cadre de ce processus. Les infractions concernées peuvent se limiter à quelques types de criminalité seulement, et le droit d'obtenir un permis de résidence autonome peut ne pas être automatique en raison d'une limitation du nombre maximum de permis ou de critères d'éligibilité supplémentaires à respecter par la victime.

# Zusammenfassung

## Einleitung

Ziel dieses Berichts ist es, die rechtlichen Voraussetzungen und rechtlichen Auswirkungen eines eventuellen Beitritts der Europäischen Union zum Übereinkommen des Europarats zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt von 2011 (der sogenannten "Istanbul-Konvention") zu klären. Das erste Kapitel des Berichts, das von Christine Chinkin verfasst wurde, beschreibt die Entwicklung der Menschenrechtsvorschriften in Bezug auf Gewalt gegen Frauen, geschlechtsbezogene Gewalt und häusliche Gewalt, befasst sich mit der Ausarbeitung und Annahme der Istanbul-Konvention und umreißt die wichtigsten Merkmale dieses Übereinkommens. Im zweiten und dritten Kapitel, die von Kevät Nousiainen verfasst wurden, wird das Verhältnis zwischen der Istanbul-Konvention und dem Unionsrecht untersucht und es werden die Positionen der 28 EU-Mitgliedstaaten in Bezug auf die Istanbul-Konvention beschrieben. Die Grundlage dafür liefert eine vergleichende Studie von Länderberichten, die von den Expertinnen und Experten für Geschlechtergleichstellung des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung erstellt wurden. Im Völkerrecht, und zunehmend auch im Unionsrecht, gilt Gewalt gegen Frauen als eine Form der Diskriminierung von Frauen und somit als ein Thema, das mit dem Know-how der Rechtsexpertinnen und -experten des Netzwerks angegangen werden kann.

Im Unionsrecht ist dieses Thema jedoch relativ neu. Geschlechtsbezogene Gewalt dehnt den Bereich der Nichtdiskriminierung über das hinaus aus, was herkömmlicherweise als Gleichstellungs und Nichtdiskriminierungsrecht der Union gilt, nämlich der Besitzstand im Bereich geschlechtsbezogener Diskriminierung und die Politiken zur Förderung der Geschlechtergleichstellung im Arbeitsleben, beim Zugang zu Gütern und Dienstleistungen und in damit verbundenen Lebensbereichen. Das Thema des Berichts ist auch insofern neu, als die Union mit dem Beitritt zu Menschenrechtsabkommen bisher wenig Erfahrung hat. Im Zuge des Lissabon-Vertrags erhielt die Union zwar die Möglichkeit, internationale Abkommen abzuschließen, bislang ist die Union jedoch nur einem Menschenrechtsabkommen beigetreten.<sup>1</sup> Daraus ergibt sich, dass Überlegungen hinsichtlich der Anforderungen, die erfüllt werden müssen, um einen Beitritt zu ermöglichen, und der Lösungen, die geschaffen werden müssen, damit die Union als politische Organisation *sui generis* einem Menschenrechtsabkommen beitreten kann, neue Bereiche und Aspekte des Unionsrechts betreffen.

## Kapitel 1

In Kapitel 1 des Berichts wird beschrieben, wie sich Gewalt gegen Frauen als Konzept der Menschenrechtsvorschriften seit den 1990er Jahren entwickelt hat. Zwar verbieten wichtige Menschenrechtsabkommen der Vereinten Nationen geschlechtsbezogene Diskriminierung und enthält das frauenspezifische Übereinkommen der Vereinten Nationen zur Beseitigung jeder Form von Diskriminierung der Frau (CEDAW) Vorschriften, die geschlechtsbezogene Diskriminierung auf breiter Basis beseitigen sollen – keines dieser Instrumente geht jedoch speziell auf Gewalt gegen Frauen ein. Der CEDAW-Ausschuss, der die Umsetzung des CEDAW-Übereinkommens überwacht, erklärte in seiner Allgemeinen Empfehlung Nr. 19 von 1992, dass geschlechtsbezogene Gewalt nach dem Übereinkommen als eine Form von Diskriminierung anzusehen sei. Die Vertragsstaaten seien gehalten, mit gebührender

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1 2010 trat die Union dem Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen bei.

Sorgfalt zu handeln, um diese zu verhindern. Die Allgemeine Empfehlung Nr. 19 beschreibt, was sich als völkerrechtliche Verpflichtungen, geschlechtsbezogene Gewalt zu verhindern, zu untersuchen und zu bestrafen und die Opfer geschlechtsbezogener Gewalt zu entschädigen, durchgesetzt hat. Auf diese Allgemeine Empfehlung folgten bald ähnliche völkerrechtliche Instrumente. Die zentralen Konzepte, die in diesen Instrumenten entwickelt wurden – dass geschlechtsbezogene Gewalt als diskriminierende Praxis anzusehen ist und dass die Staaten verpflichtet sind, mit gebührender Sorgfalt zu handeln, um solche Praktiken zu verhindern –, haben erhebliche Auswirkungen auf die Überwachung der Menschenrechte gehabt.

Der Europäische Gerichtshof für Menschenrechte (EGMR) vertritt in seiner Rechtsprechung, die für die Vertragsstaaten verbindlich ist, seither die Auffassung, dass geschlechtsbezogene Gewalt unter das Verbot der Folter und unmenschlichen oder erniedrigenden Behandlung gemäß Artikel 3 der Europäischen Menschenrechtskonvention (EMRK) fällt und als Verstoß gegen das Recht auf Achtung des Privat und Familienlebens nach Artikel 8 EMRK anzusehen ist. Die EMRK wurde von sämtlichen Mitgliedstaaten der Union ratifiziert. Die Konvention von Belém do Pará von 1994 kann als Vorläufer der europäischen Istanbul-Konvention gelten.

Die Istanbul-Konvention basiert auf dem Verständnis, dass eine bestimmte Art von Gewalt Ausdruck traditionell ungleicher Machtverhältnisse zwischen Frauen und Männern ist. Die Vertragsstaaten dieses Übereinkommens sind verpflichtet, alle Formen von Diskriminierung der Frau zu verurteilen sowie gesetzgeberische und sonstige Maßnahmen zu treffen, um sie zu verhindern. Das Übereinkommen stellt somit eine enge Verbindung zwischen der Gleichstellung von Frauen und Männern und der Bekämpfung von Gewalt gegen Frauen her und befürwortet spezielle Maßnahmen, die erforderlich sind, um geschlechtsbezogene Gewalt zu verhindern und Frauen vor dieser Art von Gewalt zu schützen. Nach dem Übereinkommen sind die Vertragsstaaten außerdem verpflichtet, Maßnahmen zu treffen, um geschlechtsspezifische Vorurteile und Voreingenommenheiten zu beseitigen, sprich: gegen kulturelle, religiöse, soziale und traditionelle Normen vorzugehen, die an der Ungleichheit zwischen den Geschlechtern festhalten. Die Sorgfaltspflicht, der die Vertragsstaaten nachkommen müssen, um geschlechtsbezogene Gewalttaten, die von privaten Akteurinnen und Akteuren begangen werden, zu verhüten, zu untersuchen und zu bestrafen sowie für solche Gewalttaten zu entschädigen, basiert auf dem Gedanken, dass ein Staat, auch wenn er für individuelle Gewalttaten nicht verantwortlich ist, doch verpflichtet ist, Gewalttaten zwischen Privatpersonen zu verhindern.

Das Konzept "Geschlecht", das ursprünglich in wissenschaftlichen Studien eingeführt worden war, wurde im Rahmen einer etwas ambivalenten Entwicklung in die Menschenrechtsvorschriften übernommen. Die Definition des Begriffs "geschlechtsspezifische Gewalt" in der Istanbul-Konvention basiert auf "Geschlecht" als den gesellschaftlich geprägten Rollen und Merkmalen, die eine bestimmte Gesellschaft als für Frauen und Männer angemessen ansieht. Nach dem Übereinkommen sind die Vertragsstaaten verpflichtet, "geschlechtersensible politische Maßnahmen" umzusetzen und die "Geschlechterperspektive" einzubeziehen. Während sexuelle Gewalt gemeinhin als eine Form von Gewalt gilt, die auf geschlechtsspezifischen Verhaltensmustern beruht, wurde häusliche Gewalt von einigen der an der Ausarbeitung des Übereinkommens beteiligten Delegationen als Straftat angesehen, deren Opfer nicht nur Frauen, sondern auch Männer und Kinder beiderlei Geschlechts sind. Die Artikel des Übereinkommens, die sich auf häusliche Gewalt beziehen, verlangen von den Vertragsstaaten, Maßnahmen gegen jede Form von häuslicher Gewalt zu treffen, den weiblichen Opfern dieser Gewalt dabei jedoch besondere Beachtung zu schenken. Das Übereinkommen ist also (anders als zum Beispiel das CEDAW-Übereinkommen) nicht speziell als Instrument gegen die Diskriminierung von Frauen gedacht; sein vorrangiges Ziel besteht vielmehr darin, der Gewalt gegen Frauen ein Ende zu bereiten.

Die Istanbul-Konvention verpflichtet die Vertragsstaaten, materiell-rechtliche Maßnahmen in den Bereichen Straf- und Verfahrensrecht sowie, bis zu einem gewissen Grad, im Zivilrecht zu treffen. Das Übereinkommen zählt eine Reihe von Handlungen auf, die von den Vertragsstaaten unter Strafe zu stellen sind, und verpflichtet die Staaten, ihre Gerichtsbarkeit über diese Straftaten zu begründen und

für deren Verfolgung zu sorgen. Indem das Übereinkommen in diesen Punkten konkrete Maßnahmen vorschreibt, unterscheidet es sich von allen vorherigen Menschenrechtsverträgen, die, was die Pflichten der Vertragsstaaten betrifft, offener formuliert sind. Ziel der Istanbul-Konvention ist es, Gewalt gegen Frauen mithilfe verschiedener Akteurinnen und Akteure konsequent und umfassend zu bekämpfen: Die Vorschriften des Übereinkommens setzen nicht nur auf staatliche Maßnahmen, sondern auch auf die Medien und die Zivilgesellschaft.

## Kapitel 2

Der mögliche Beitritt der Union zur Istanbul-Konvention hat viele verschiedene rechtliche Aspekte. Der erste Punkt, der in Kapitel 2 des Berichts untersucht wird, ist das Unionsmandat für den Beitritt, der nur im Rahmen der allgemeinen Zuständigkeit der Union, internationale Abkommen im eigenen Namen zu schließen, möglich ist. Gemäß Artikel 216 Absatz 1 AEUV ist die Union in den Außenbeziehungen befugt, internationale Übereinkünfte zu schließen, wenn dies in den Verträgen oder in einem verbindlichen Rechtsakt der Union vorgesehen ist oder wenn der Abschluss einer Übereinkunft zur Verwirklichung eines der in den Verträgen festgesetzten Ziele erforderlich ist oder aber gemeinsame Vorschriften beeinträchtigen oder deren Anwendungsbereich ändern könnte. Verbrechensbekämpfung und Förderung der Gleichstellung von Frauen und Männern sind als Ziele im Besitzstand der Union klar verankert, was bedeutet, dass die Union die allgemeine Zuständigkeit hat, der Istanbul-Konvention beizutreten. Gemäß Artikel 216 Absatz 2 AEUV binden die von der Union geschlossenen Übereinkünfte die Organe der Union und die Mitgliedstaaten. Sollte die Union der Istanbul-Konvention beitreten, werden die Mitgliedstaaten daher, zusätzlich zu den aus ihrer eigenen Ratifizierung entstehenden Pflichten, an das Vorgehen der Union bei der Umsetzung des Übereinkommens gebunden sein.

Die Union ist eindeutig befugt, Diskriminierung aus bestimmten Gründen zu beseitigen. Artikel 19 AEUV erlaubt es der Union, Vorkehrungen zu treffen, um Diskriminierungen aufgrund des Geschlechts zu bekämpfen, und Artikel 157 Absatz 3 AEUV erlaubt es, Maßnahmen zu treffen, um die Anwendung des Grundsatzes der Chancengleichheit und der Gleichbehandlung von Männern und Frauen in Arbeits- und Beschäftigungsfragen zu gewährleisten. Artikel 157 Absatz 4 sieht ferner vor, dass der Grundsatz der Gleichbehandlung die Mitgliedstaaten nicht daran hindert, zur Erleichterung der Berufstätigkeit und der beruflichen Laufbahn des unterrepräsentierten Geschlechts positive Maßnahmen zu ergreifen.

Die Zuständigkeit der Union im Bereich des Strafrechts ist von besonderer Wichtigkeit, da die Istanbul-Konvention ein Instrument zur Kriminalitätsbekämpfung ist. Titel V des AEUV enthält Bestimmungen über den Bereich der Freiheit, der Sicherheit und des Rechts, in dem die Zuständigkeit zwischen der Union und den Mitgliedstaaten geteilt ist. Nach Artikel 67 Absatz 3 AEUV ist die Union verpflichtet, durch Maßnahmen zur Verhütung und Bekämpfung von Kriminalität sowie von Rassismus und Fremdenfeindlichkeit, zur Koordinierung und Zusammenarbeit von Behörden sowie durch die gegenseitige Anerkennung strafrechtlicher Entscheidungen und erforderlichenfalls durch die Angleichung der strafrechtlichen Vorschriften ein hohes Maß an Sicherheit zu gewährleisten. Die strafrechtlichen Vorschriften werden durch Festlegung von Mindestanforderungen bezüglich der Inhalte des Strafrechts harmonisiert. Die übergreifenden Bestimmungen der Artikel 8 und 10 AEUV erwähnen zwar die Beseitigung von Ungleichheiten und die Förderung der Gleichstellung von Männern und Frauen sowie die Bekämpfung von Diskriminierungen aufgrund des Geschlechts; die Bekämpfung geschlechtsspezifischer Straftaten wird in Artikel 67 Absatz 3 AEUV aber nicht erwähnt. Das Ziel der Union, bei allen ihren Tätigkeiten die Gleichstellung von Frauen und Männern zu fördern und Diskriminierungen aufgrund des Geschlechts zu bekämpfen, ist so zu verstehen, dass es sich auch auf Bestimmungen im Bereich der Freiheit, der Sicherheit und des Rechts bezieht.

Artikel 82 über justizielle Zusammenarbeit und Art. 83 über die Befugnis zur Angleichung von Rechtsvorschriften enthalten Bestimmungen zu den Tätigkeiten der Union im Bereich des Strafrechts. Die justizielle Zusammenarbeit in Strafsachen beruht auf der gegenseitigen Anerkennung gerichtlicher Urteile



und Entscheidungen (Art. 82 Abs. 1). Artikel 82 Absatz 2 ermöglicht die Angleichung von Rechtsvorschriften, die notwendig ist, um die Erfordernisse der gegenseitigen Anerkennung und justiziellen Zusammenarbeit in Strafsachen mit grenzüberschreitender Dimension zu erfüllen. Diese Mindestvorschriften betreffen verschiedene Aspekte des Strafverfahrens, darunter auch die Rechte von Opfern.

Nach Artikel 83 Absatz 1 AEUV ist es aufgrund der Befugnis zur Angleichung des materiellen Strafrechts möglich, Mindestvorschriften zur Festlegung von Straftaten und Strafen in Bereichen besonders schwerer Kriminalität mit grenzüberschreitender Dimension einzuführen. Die anschließende Liste der entsprechenden Bereiche umfasst auch einige (jedoch bei weitem nicht alle) Formen geschlechtsspezifischer Gewalt, beispielsweise Menschenhandel, sexuelle Ausbeutung von Frauen und Kindern und organisierte Gewaltverbrechen gegen Frauen.

Sollten neue Entwicklungen dies erforderlich machen, so können weitere Kriminalitätsbereiche bestimmt werden, die die Voraussetzungen für eine Angleichung erfüllen (Art. 83 Abs. 2 AEUV). Konkrete Straftaten werden in dem Artikel nicht benannt; die betreffenden Straftaten müssen jedoch besonders schwerwiegend sein und eine grenzüberschreitende Dimension haben. Da viele Formen geschlechtsbezogener Gewalt – sowohl weil sie in intimen Beziehungen stattfinden als auch weil ihnen die grenzüberschreitende Dimension fehlt – traditionell als häusliche Gewalt gelten, könnte eingewendet werden, dass sie diese Anforderungen nicht erfüllen.

Zusammenfassend kann festgestellt werden, dass die Union in den materiell-rechtlichen Anforderungen der Istanbul-Konvention, die eine Harmonisierung des Strafrechts erfordern, geringe Kompetenzen hat. Was die justizielle Koordination betrifft, so erstreckt sich die Zuständigkeit der Union vor allem auf den Schutz von Opfern in Strafverfahren. Bei bestimmten Arten geschlechtsbezogener Gewalt, etwa bei sexueller Belästigung am Arbeitsplatz und beim Zugang zu Gütern und Dienstleistungen, ist die Union befugt, mit anderen Mitteln als der Angleichung strafrechtlicher Vorschriften gesetzgeberisch tätig zu werden. Auch was die Bekämpfung von Menschenhandel und sexueller Ausbeutung von Frauen und Kindern betrifft, verfügt die Union über weitgehende Kompetenzen. Diese Themen wurden jedoch bereits in anderen Instrumenten des Europarats behandelt und fallen daher nicht in den sachlichen Geltungsbereich der Istanbul-Konvention. Bei geschlechtsbezogenen Gewaltverbrechen, die im Zusammenhang mit Zugewanderten stehen, hat die Union hingegen strafrechtliche Kompetenzen. Erfordert eine Maßnahme der Kriminalprävention keine Angleichung strafrechtlicher Vorschriften, so ist die Union befugt zu handeln. In den Bereichen, in denen die Union dazu befugt ist, würde die Anforderung der Istanbul-Konvention, gesetzgeberische und sonstige erforderliche Maßnahmen zu treffen, auf Unionsebene gelten.

Nach Artikel 84 AEUV können im Zuge des ordentlichen Gesetzgebungsverfahrens Maßnahmen getroffen werden, um das Vorgehen der Mitgliedstaaten im Bereich der Kriminalprävention, das keine Harmonisierung von Rechtsvorschriften erfordert, zu fördern und zu unterstützen. Vorbeugende Maßnahmen gegen geschlechtsbezogene Gewalt könnten somit nach dem Unionsrecht veranlasst werden. Der Ausschuss des Europäischen Parlaments für die Rechte der Frau und die Gleichstellung der Geschlechter beantragte, den europäischen Mehrwert der Vorbereitung einer Gesetzesinitiative zur Bekämpfung von Gewalt gegen Frauen zu bestimmen. Aus der Bewertung ging 2013 die Empfehlung hervor, die Union solle einen Rechtsakt erlassen, um Maßnahmen der Mitgliedstaaten im Bereich der Verhütung von Gewalt gegen Frauen festzulegen.

Der Bericht geht auf den Beitritt der Union zum Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen (UN-Behindertenrechtskonvention, kurz: UN-BRK) ein, da es sich hierbei um den bislang einzigen Menschenrechtsvertrag handelt, der von der Union ratifiziert wurde. Das Verfahren, das bei der Ratifizierung der UN-BRK angewendet wurde, ist für einen eventuellen Beitritt zur Istanbul-Konvention von Bedeutung. In Fragen geteilter Zuständigkeit ist die Vertretung der Union bei den Vereinten Nationen im Voraus festgelegt. Es gibt einen Verhaltenskodex, der die Formen der Zusammenarbeit bei der Umsetzung des Übereinkommens beschreibt. Bei der Ratifizierung legte die Union eine Erklärung vor, in der die ausschließlichen Zuständigkeiten der Union und die Zuständigkeiten beschrieben wurden, die sich

die Union mit den Mitgliedstaaten teilt. Aufgrund entsprechender Entwicklungen wurde diese Aufteilung der Zuständigkeiten später ergänzt. Die Erklärung enthält eine Liste gemeinschaftlicher Rechtsakte zu den Themen, die in den sachlichen Geltungsbereich der UN-BRK fallen. Im Fall eines Beitritts zur Istanbul-Konvention wären ähnliche Schritte erforderlich, um die Verteilung der Zuständigkeiten zwischen der Union und den Mitgliedstaaten klarzustellen.

Der Bericht geht auch kurz auf die Grundrechte der Europäischen Union ein. Unabhängig davon, ob die Union der Istanbul-Konvention beitrifft, hat die Entwicklung der Menschenrechtsvorschriften in Bezug auf Gewalt gegen Frauen, insbesondere die Rechtsprechung des EGMR, Auswirkungen auf die Grundrechte der Union. Die Bekämpfung geschlechtsbezogener Gewalt erfordert häufig einen guten Ausgleich konkurrierender Menschenrechtsgrundsätze (zum Beispiel der Rechte von Verdächtigten und Beschuldigten gegenüber den Rechten von Opfern); eine systematische Berücksichtigung der Grundrechte ist dafür von großer Bedeutung. Der Beitritt der Union zur Istanbul-Konvention würde einen systematischeren Ansatz für die Entwicklung der EU-Grundrechte in dem von dem Übereinkommen erfassten Bereich liefern.

Der Bericht geht außerdem auf die konzeptionellen Unterschiede zwischen den Unionsvorschriften gegen geschlechtsbezogene Diskriminierung und der Istanbul-Konvention ein. Seit jeher verwendet das EU-Gleichstellungsrecht im Englischen nicht den Begriff *“gender”* (soziales Geschlecht), da der Besitzstand in der Regel von *“men and women”* (Männer und Frauen) bzw. von *“sex”* (biologisches Geschlecht) spricht. Auf der Ebene der Unionspolitiken zur Bekämpfung von Gewalt gegen Frauen wird jedoch eher der Begriff *“gender”* verwendet. Bis in die 2000er Jahre handelte es sich bei den Maßnahmen der Union in Sachen Gewalt gegen Frauen um Soft Law oder Förderpolitiken. Die vielleicht weitreichendste Initiative in diesem Bereich war das Förderprogramm *“Daphne”*, das aufgrund entsprechender Beschlüsse des Parlaments und des Rates seit 1997 aufgelegt wird. In den 2010er Jahren fanden die spezifischen Anforderungen der Bekämpfung geschlechtsbezogener Gewalt erstmals in verbindlichen Unionsvorschriften Beachtung: Mit der Richtlinie 2011/99/EU über die Europäische Schutzanordnung und der Richtlinie 2011/93/EU zur Bekämpfung des sexuellen Missbrauchs und der sexuellen Ausbeutung von Kindern sowie der Kinderpornografie wurden Mindestanforderungen an die Rechtsvorschriften der Mitgliedstaaten formuliert. Die Opferschutzrichtlinie 2012/29/EU legt bei Themen, die für die Istanbul-Konvention von großer Bedeutung sind, Mindestanforderungen an die Mitgliedstaaten fest. Die Präambel der Richtlinie enthält zahlreiche Verweise auf geschlechtsbezogene Gewalt im Sinne der Soft-Law-Instrumente der Union, der Empfehlungen des CEDAW-Ausschusses und der Bestimmungen der Istanbul-Konvention. Auch in der Verordnung Nr. 606/2013 über die gegenseitige Anerkennung von Schutzmaßnahmen in Zivilsachen wird geschlechtsbezogene Gewalt berücksichtigt.

Im folgenden Teil von Kapitel 2 werden die Istanbul-Konvention und das Unionsrecht Kapitel für Kapitel miteinander verglichen. Ziel dieses Teils des Berichts ist es, die Pflichten zu bestimmen, die der Union im Fall eines Beitritts zu dem Übereinkommen entstehen, und dessen Mehrwert aufzuzeigen.

Kapitel I des Übereinkommens erläutert dessen Zweck, enthält Begriffsbestimmungen und beschreibt die Beziehung des Übereinkommens zu Gleichstellung und Nichtdiskriminierung sowie allgemeine Verpflichtungen. Der sachliche Geltungsbereich des Übereinkommens wird durch Unionsmaßnahmen abgedeckt, die Harmonisierung von Rechtsvorschriften zu zahlreichen Themen, bei denen das Übereinkommen eine Gesetzgebung erfordert, ist jedoch nicht Teil des Unionsmandats. Das Übereinkommen verwendet Begriffe, die in internationalen Menschenrechtsverträgen entwickelt wurden, etwa den Begriff *“geschlechtsspezifische Gewalt gegen Frauen”*, mit dem Gewalt bezeichnet wird, die sich gegen Frauen richtet oder Frauen unverhältnismäßig stark betrifft.

Das Unionsrecht verwendet in einigen neueren Soft-Law-Instrumenten, Richtlinien und auch verbindlichen Rechtsvorschriften, insbesondere in der Opferschutzrichtlinie (2012/29/EU), eine ähnliche Terminologie. Der Beitritt der Union zur Istanbul-Konvention könnte zu einer kohärenteren Umsetzung des bestehenden Unionsrechts führen. Die allgemeinen Verpflichtungen im Rahmen des Übereinkommens bestehen darin, gesetzgeberische und sonstige Maßnahmen zu treffen, um das Recht auf ein Leben ohne Gewalt zu fördern,



sowie gebührende Sorgfalt anzuwenden, um Gewalt zu verhindern, zu untersuchen und zu bestrafen und für erlittene Gewalt zu entschädigen. Die Union müsste diesen Verpflichtungen im Rahmen ihres Mandats nachkommen. Die Sorgfaltspflicht würde vor allem den Bereich der Prävention betreffen, würde sich aber auch auf die sorgfältige Überwachung des Systems der Koordinierung und gegenseitigen Anerkennung richterlicher Entscheidungen und auf die Richtlinien im Geltungsbereich des Übereinkommens erstrecken.

Kapitel II der Istanbul-Konvention enthält Anforderungen bezüglich der Konzipierung umfassender, koordinierter Politiken, die von den Soft-Law-Instrumenten der Union bereits weitgehend erfüllt werden. Die Opferschutzrichtlinie ist im Hinblick auf die Forderung wichtig, dass die Maßnahmen der Vertragsstaaten die Rechte des Opfers in den Mittelpunkt stellen. Sollte es zu einem Beitritt kommen, könnte es erforderlich sein, die politischen Maßnahmen der Union klarer aufeinander abzustimmen, als dies derzeit der Fall ist. Es sollte eine Stelle benannt werden, die für die Koordinierung, Umsetzung, Beobachtung und Bewertung der Maßnahmen zuständig ist. Die in dem Übereinkommen vorgeschriebene Datenerhebung und Forschung fällt in den Zuständigkeitsbereich der Union. Dies würde eine klarere Fokussierung, stärkere Kontinuität und angemessene Informationen für das Überwachungsgremium, die Expertengruppe für die Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt ("GREVIO"), erforderlich machen.

Kapitel III des Übereinkommens beinhaltet die Verpflichtung, Vorgehensweisen, die auf Geschlechterstereotypen beruhen, zu beseitigen. Die Mitgliedstaaten sind für den Inhalt ihrer Bildungssysteme verantwortlich, während die Union dieses Handeln unterstützt und ergänzt. Die Opferschutzrichtlinie regelt die im Übereinkommen vorgeschriebene Schulung von Angehörigen bestimmter Berufsgruppen im Umgang mit Opfern und Tätern oder Täterinnen. Die Schulung des Justizpersonals und der Polizei gehört zu den Aufgaben der Union, und die Unionsbehörden tragen bereits zur Stärkung des Opferschutzes bei. Gewalt gegen Frauen sollte mehr Beachtung erhalten. Hauptanliegen der in den Förderinstrumenten der Union vorgeschriebenen Präventions- und Behandlungsprogramme für Täterinnen und Täter sollten die Menschenrechte der Opfer sein. Die Anforderung, dass die Vertragsstaaten den privaten Sektor und die Medien ermutigen, politische Maßnahmen umzusetzen, um Gewalt gegen Frauen zu verhindern, wird bis zu einem gewissen Grad durch die Richtlinie über audiovisuelle Mediendienste erfüllt; ergänzend könnte die Union eine Plattform zur Selbstkontrolle der Medien auf transnationaler Ebene einrichten.

Kapitel IV des Übereinkommens betrifft Schutz- und Hilfsdienste und schreibt die Zusammenarbeit zwischen Justiz, Staatsanwaltschaften, Strafverfolgungsbehörden, sonstigen Behörden und nichtstaatlichen Organisationen mithilfe eines formellen oder informellen Mechanismus vor. Die Union wäre verpflichtet, die Vorgaben für solche Dienste in ihrer Gesetzgebung und ihren Politiken zu berücksichtigen. In manchen Punkten hat sie dies in der Opferschutzrichtlinie bereits getan. Was die Gewährleistung von Hilfsdiensten für Opfer betrifft, so sind einige, wenn auch nicht alle Anforderungen im Unionsrecht, insbesondere in der Opferschutzrichtlinie, erfüllt. Allgemeine Dienstleistungen wie Gesundheits- und Wohnraumversorgung sind Aufgabe der Mitgliedstaaten. Die Anforderungen des Übereinkommens in Bezug auf Telefonberatung und Krisenhilfe für Opfer erfüllt das Unionsrecht bislang noch nicht. Die Opferschutzrichtlinie hat, was den Schutz von Opfern betrifft, einen engeren Geltungsbereich als das Übereinkommen, da sie den Schutz auf Strafverfahren beschränkt.

Das Unionsrecht enthält keinerlei Regelungen über Maßnahmen, mit denen Personen, die Zeuginnen oder Zeugen einer Gewalttat geworden sind oder Gründe haben, eine solche Gewalttat zu vermuten, ermutigt werden sollen, dies den Behörden zu melden. Derartige Maßnahmen könnten auf nichtlegislativem Weg getroffen werden, was in die Zuständigkeit der Union fällt. Die Anforderungen der Istanbul-Konvention in Bezug auf Vertraulichkeitsvorschriften für Angehörige bestimmter Berufsgruppen, die diese daran hindern, mutmaßliche Gewalttaten an die Behörden zu melden, werden vom Unionsrecht nur im Rahmen der Richtlinie gegen Kindesmissbrauch erfüllt. In Zusammenhang mit den meisten Straftaten, auf die sich das Übereinkommen bezieht, enthält das Unionsrecht keinerlei Regelungen über Vertraulichkeitsvorschriften. Das Übereinkommen macht keine verbindlichen Vorgaben, die nur durch gesetzliche Regelungen erfüllt

werden könnten, weshalb die Union Maßnahmen auf nichtlegislativem Weg treffen könnte; im Bereich der Kriminalprävention hat die Union aber sogar Gesetzgebungsbefugnisse.

Alles in allem enthält die Istanbul-Konvention eine Reihe von Vorschriften, die Themen betreffen, die in die Gesetzgebungskompetenz der Union fallen, und hat die Union ihre diesbezüglichen Befugnisse genutzt. Der Geltungsbereich des Übereinkommens ist breiter als der des Unionsrechts; das Übereinkommen würde eine Perspektive für weitere Maßnahmen der Union in diesem Bereich eröffnen.

Kapitel V der Istanbul-Konvention enthält Bestimmungen, die das materielle Recht – vor allem im Bereich des Strafrechts, aber auch im Bereich des Verfahrens- und Zivilrechts – betreffen. Wie oben bereits erwähnt, fallen viele der Vorschriften in Kapitel V jedoch nicht in die Kompetenz der Union für strafrechtliche Angleichungen. Das Übereinkommen verpflichtet die Vertragsstaaten, dafür zu sorgen, dass Opfer das Recht haben, für die in dem Übereinkommen umschriebenen Straftaten Schadenersatz zu fordern. Nach der Opferschutzrichtlinie sind die Mitgliedstaaten der Union verpflichtet, dafür zu sorgen, dass Opfer Anspruch auf Entschädigung durch den Straftäter bzw. die Straftäterin haben; Mindestanforderungen für die Entschädigung von Opfern sind in der Richtlinie 2004/80/EG enthalten.

Die zivilrechtlichen Anforderungen der Istanbul-Konvention in Bezug auf Sorgerecht, Besuchsrecht und Sicherheitsbelange der elterlichen Rechte sowie die Anforderungen bezüglich der zivilrechtlichen Konsequenzen von Zwangsheirat betreffen das Familienrecht und fallen somit in den Aufgabenbereich der Mitgliedstaaten. Weitere Maßnahmen könnten mithilfe von Soft-Law-Instrumenten getroffen werden. Nach Artikel 84 AEUV kann die Union gesetzgeberische Maßnahmen festlegen, um Straftaten zu verhindern, sofern dies keine Angleichung des Strafrechts erfordert. In Bezug auf Straftaten, bei denen eine Angleichung der Rechtsvorschriften nicht möglich ist, könnte die Union der Sorgfaltspflicht nachkommen, indem sie andere Maßnahmen ergreift, die sich gegen solche Straftaten richten.

Der Besitzstand der Union enthält bereits Verbote sexueller Belästigung in bestimmten Situationen. Die Vorschrift der Istanbul-Konvention, wonach die erforderlichen Maßnahmen gegen sexuelle Belästigung zu treffen sind, ist weiter gefasst. Das Unionsrecht geht jedoch insofern über diese Vorschrift hinaus, als die Unionsvorschriften zum Schutz vor sexueller Belästigung auch Transgender-Personen einbeziehen. Was die Anforderungen des Übereinkommens in Bezug auf Gerichtsbarkeit betrifft, so existiert dafür im Unionsrecht für einige, jedoch bei weitem nicht für alle Straftaten ein Äquivalent. Der Ansatz des Übereinkommens in Bezug auf alternative Streitbeilegungsverfahren in Fällen geschlechtsbezogener Gewalt ist dem des Unionsrechts sehr ähnlich, da die Opferschutzrichtlinie Schutzmaßnahmen im Zusammenhang mit der Inanspruchnahme dieser Dienste enthält.

Kapitel VI der Istanbul-Konvention zum Thema Ermittlungen, Strafverfolgung, Verfahrensrecht und Schutzmaßnahmen enthält zahlreiche Vorschriften, die das Unionsrecht bis zu einem gewissen Grad bereits erfüllt. Die Vorschrift des Übereinkommens, wonach die Strafverfolgungsbehörden den Opfern umgehend geeigneten Schutz bieten müssen, wird von den Bestimmungen der Opferschutzrichtlinie erfüllt, denen zufolge den Opfern Informationen und Dienstleistungen angeboten und die besonderen Schutzbedürfnisse von Opfern geschlechtsbezogener Gewalt, Opfern von Gewalt in engen Beziehungen und Opfern sexueller Gewalt ermittelt werden müssen. Das Übereinkommen verpflichtet die Mitgliedstaaten außerdem sicherzustellen, dass die Behörden befugt sind, in Situationen unmittelbarer Gefahr anzuordnen, dass ein Täter bzw. eine Täterin häuslicher Gewalt den Wohnsitz des Opfers oder der gefährdeten Person verlässt. Die Opferschutzrichtlinie verlangt von den Mitgliedstaaten, dass sie den Opfern und ihren Familienangehörigen physischen Schutz bieten, jedoch nur in Zusammenhang mit einem rechtlichen Verfahren. Die Richtlinie über die Europäische Schutzanordnung betrifft die Vollstreckung einer nationalen Schutzanordnung in einem anderen Mitgliedstaat, sieht jedoch keine Mindestanforderungen für Schutzanordnungen vor. Auch die Verordnung über die gegenseitige Anerkennung von Schutzmaßnahmen in Zivilsachen zielt darauf ab, die Anerkennung und Vollstreckung von Schutzmaßnahmen eines anderen Mitgliedstaates zu erleichtern. Der Beitritt zur Istanbul-Konvention könnte durch offene Koordinierungsmethoden zu kohärenteren Soft-Law-Vorschriften und zu Muster-Gesetzesinitiativen führen.

Die Vorschriften der Istanbul-Konvention in Bezug auf Beweismittel betreffend das sexuelle Vorleben des Opfers und in Bezug auf Verfahren auf Antrag oder von Amts wegen erfordern keine gesetzgeberischen Maßnahmen, wobei die Gepflogenheiten der EU-Mitgliedstaaten diesbezüglich variieren. Die Rechte des Opfers im Fall, dass gegen eine Strafverfolgung entschieden wird, werden von der Opferschutzrichtlinie nur teilweise geregelt. In diesem Bereich besteht Raum für die Implementierung von Soft-Law-Maßnahmen seitens der Mitgliedstaaten.

Kapitel VII der Istanbul-Konvention zum Thema Migration und Asyl enthält Bestimmungen, die Situationen betreffen, in denen der Aufenthaltsstatus des Opfers einer geschlechtsbezogenen Straftat vom Aufenthaltsstatus der Ehefrau oder Partnerin bzw. des Ehemanns oder Partners des Opfers abhängt. Die Vertragsstaaten sind verpflichtet, gesetzgeberische oder sonstige Maßnahmen zu treffen, um sicherzustellen, dass im Fall der Auflösung der Ehe oder Beziehung ein eigenständiger Aufenthaltstitel zur Verfügung steht und das Ausweisungsverfahren ausgesetzt wird, damit das Opfer einen solchen Titel beantragen kann. Die Union ist befugt, Vorschriften bezüglich der Bedingungen für die Einreise und den Aufenthalt von Drittstaatsangehörigen, einschließlich der Bedingungen für die Familienzusammenführung, zu beschließen. Die gemeinsame Asylpolitik der Union wird mithilfe von Richtlinien umgesetzt, die Kriterien für die Beurteilung des Schutzbedarfs von Asylbewerberinnen und -bewerbern festlegen. Sollte sich die Union für einen Beitritt entscheiden, so würden sich die Anforderungen des Übereinkommens in erster Linie an die Union richten.

In Kapitel VIII der Istanbul-Konvention werden die Vertragsstaaten verpflichtet, zur Verhütung, Bekämpfung und Verfolgung von in den Geltungsbereich des Übereinkommens fallenden Straftaten in zivilen und strafrechtlichen Angelegenheiten zusammenzuarbeiten. Die EU-Mitgliedstaaten kooperieren untereinander; die Zuständigkeit der Union für die Zusammenarbeit mit Drittländern erfordert jedoch die Einrichtung von Kooperationsverfahren.

Kapitel IX der Istanbul-Konvention enthält Bestimmungen zum Überwachungsmechanismus; dieser sieht die Einrichtung einer Gruppe von Expertinnen und Experten ("GREVIO", siehe oben) vor, die die Berichterstattung der Mitgliedstaaten überwacht. Nach Abschluss des Überwachungsverfahrens legt GREVIO Schlussfolgerungen vor, die veröffentlicht und den Parlamenten der Vertragsstaaten zugänglich gemacht werden. Die Berichterstattung der Union an GREVIO sollte von einer Stelle durchgeführt werden, die von der Union mit dieser Aufgabe betraut wird – wahrscheinlich die Kommission –, und über die Ergebnisse sollte dem Europäischen Parlament Bericht erstattet werden.

Die letzten Kapitel der Istanbul-Konvention, in denen es um das Verhältnis des Übereinkommens zu anderen völkerrechtlichen Verträgen (Kapitel X), um Änderungen des Übereinkommens (Kapitel XI) und um Schlussbestimmungen (Kapitel XII) geht, enthalten Grundsätze, die sowohl für die Union als auch für die Vertragsstaaten des Übereinkommens gelten würden.

Der Bericht kommt zu dem Ergebnis, dass die beschränkte Zuständigkeit der Union im Bereich des Strafrechts das wichtigste rechtliche Argument gegen einen Beitritt der Union zur Istanbul-Konvention ist. Die mangelnde Zuständigkeit für die Erfüllung bestimmter Pflichten steht einem Beitritt der Union zu diesem Übereinkommen jedoch weder entgegen, noch würde sie diesen sinnlos machen. Die mit dem Übereinkommen verbundenen Pflichten sind den Rechtsvorschriften und Politiken der Union keineswegs fremd, und aus dem Einsatz des Übereinkommens als Maßstab für die Auslegung des Unionsrechts wäre ein Mehrwert zu erwarten. Als Rechtsvorschriften und politische Maßnahmen der Union hätten die Bestimmungen des Übereinkommens größere Auswirkungen denn als Menschenrechtsvorschriften. Da viele Mitgliedstaaten der Union das Übereinkommen ratifiziert haben (oder zu ratifizieren beabsichtigen), wird die Überwachung mithilfe von Länderberichten ohnedies Angelegenheiten betreffen, die eine Umsetzung von Unionsrecht erfordern. Sowieso ist das Grundrechtssystem der Union unter anderem durch die Menschenrechtskontrolle des EGMR in puncto Gewalt gegen Frauen beeinflusst. Die Auswirkungen eines Beitritts der Union zur Istanbul-Konvention könnten einen systematischeren Ansatz zur Entwicklung der EU-Grundrechte fördern. Viele Pflichten, die den Vertragsstaaten aus dem Übereinkommen entstehen,

erfordern keinerlei legislative Maßnahmen. Die Politiken der Union zur Bekämpfung geschlechtsbezogener Gewalt könnten durch den Beitritt gestärkt werden, da das Übereinkommen einen gemeinsamen Rahmen sowohl für die internen als auch für die externen Politiken der Union liefert.

## Kapitel 3

Kapitel 3 des Berichts enthält eine vergleichende Analyse des nationalen Rechts der Mitgliedstaaten, die auf Länderberichten der Expertinnen und Experten für Geschlechtergleichstellung des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung basiert. Im Mittelpunkt der Analyse stehen Themen, die für die Union besonders wichtig sind, weil sie entweder mit den Schritten für den Beitritt zur Istanbul-Konvention zusammenhängen oder weil eine Beziehung zum Unionsrecht besteht.

Bis zum 4. Dezember 2015 hatten 24 Mitgliedstaaten der Union die Istanbul-Konvention unterzeichnet, und zwölf weitere (**Dänemark, Finnland, Frankreich, Italien, Malta**, die **Niederlande**, Österreich, **Polen, Portugal, Schweden, Slowenien** und **Spanien**) hatten diese ratifiziert. Die Phase des Beitrittsprozesses war von einem Unterzeichnermitgliedstaat zum anderen sehr unterschiedlich. In der Vergangenheit wurde den Themen, auf die sich das Übereinkommen bezieht, in den Mitgliedstaaten unterschiedliche Beachtung geschenkt, weshalb der Bedarf an Gesetzesänderungen und sonstigen Maßnahmen unterschiedlich groß ist. Die Mitgliedstaaten wenden bei der Ratifizierung internationaler Instrumente unterschiedliche Verfahren an; dies hat Auswirkungen auf die Zeit, die zwischen Unterzeichnung und Ratifizierung vergeht. **Belgien, Deutschland, Estland, Griechenland, Irland, Kroatien, Litauen, Luxemburg, Rumänien**, die **Slowakei, Ungarn** und **Zypern** haben das Übereinkommen bereits unterzeichnet. In vielen Mitgliedstaaten, die das Übereinkommen noch nicht unterzeichnet haben, gibt es politische Hinweise darauf, dass die Ratifizierung vorbereitet wird.

Bei den Gesetzesänderungen, die vor der Ratifizierung in den Mitgliedstaaten durchgeführt wurden, handelte es sich häufig um Novellierungen des nationalen Strafrechts. In Zusammenhang mit der Ratifizierung haben viele Mitgliedstaaten Zwangsverheiratung, Genitalverstümmelung bei Frauen, Zwangsabtreibung und Zwangssterilisierung ausdrücklich als Straftaten definiert und unter Strafe gestellt. Einige Mitgliedstaaten wendeten eine eher minimalistische Gesetzgebungsstrategie an und führten keine neuen Straftatbestände ein, wenn die betreffenden Handlungen von der Definition eines allgemeineren Straftatbestands erfasst wurden.

Als problematische Bereiche im Zusammenhang mit der Ratifizierung gelten in den Mitgliedstaaten vor allem strafrechtliche Themen. Nationale Kontroversen bezüglich des politischen Vorgehens oder der Einrichtung und Finanzierung von Hilfsdiensten wurden von den Expertinnen und Experten selten erwähnt. Dies ist erstaunlich, da viele Expertinnen und Experten darauf hinweisen, dass das Angebot an Hilfsdiensten dem im Übereinkommen empfohlenen selbst in den Mitgliedstaaten, die das Übereinkommen ratifiziert haben, nicht entspricht. Nur wenige Expertinnen und Experten erwähnen ideologische Kontroversen in Bezug auf geschlechtsbezogene Gewalt.

Die Anforderungen des Übereinkommens im Hinblick auf Datenerhebung und Forschung zum Thema geschlechtsbezogene Gewalt werden in vielen Mitgliedstaaten erfüllt; nur einige Mitgliedstaaten (**Dänemark, Frankreich, Griechenland, Irland, Italien, Kroatien, Luxemburg, Malta**, die **Niederlande, Portugal**, die **Slowakei, Slowenien** und **Spanien**) haben jedoch Rechtsvorschriften über die Bereitstellung spezieller Statistiken und Studien zu diesem Thema erlassen.

Das Übereinkommen schreibt die Bereitstellung vielfältiger Hilfsdienste vor. Einige Mitgliedstaaten haben Rechtsgrundlagen für die Zusammenarbeit zwischen Behörden und anderen Akteurinnen und Akteuren zum Schutz der Opfer geschlechtsbezogener Gewalt geschaffen (oder geplant). In vielen Mitgliedstaaten wurden Rechtsvorschriften für einige, aber nicht für alle im Rahmen des Übereinkommens behandelte

Formen von Gewalt erlassen. Das Übereinkommen unterscheidet zwischen allgemeinen Hilfsdiensten (Soziales, Gesundheit und Beschäftigung) und spezialisierten Hilfsdiensten (Bereitstellung von Schutz und Unterkunft, gerichtsmedizinische Versorgung, psychologische Betreuung, Traumabehandlung und Rechtsdienstleistungen). Die Bereitstellung allgemeiner Dienste ist in manchen Mitgliedstaaten in speziellen Rechtsvorschriften geregelt, die sich auf Dienste für alle Opfer, in anderen Mitgliedstaaten nur auf Dienste für bestimmte Gruppen von Opfern beziehen. In manchen Mitgliedstaaten stehen viele der betreffenden Dienste der Bevölkerung im Allgemeinen zur Verfügung und werden spezielle Regelungen für Opfer nicht für notwendig erachtet. Die Anforderung des Übereinkommens hinsichtlich allgemeiner Informationen über den Zugang zu internationalen Klagemechanismen wird von den Mitgliedstaaten nur sehr selten erfüllt. Die Anforderungen bezüglich der Bereitstellung spezialisierter Hilfsdienste decken sich bis zu einem gewissen Grad mit den im Rahmen der EU-Opferschutzrichtlinie bestehenden Pflichten. **Dänemark** beteiligt sich nicht an dieser Richtlinie, die anderen Mitgliedstaaten sind jedoch an ihre Vorschriften gebunden.

Die Pflicht, spezialisierte Hilfsdienste für Opfer geschlechtsbezogener und häuslicher Gewalt sowie spezialisierte Frauenhilfsdienste für weibliche Opfer und deren Kinder zur Verfügung zu stellen, wird in den meisten Mitgliedstaaten der Union erfüllt. Allerdings ist die Bereitstellung und Finanzierung der Dienste nicht unbedingt gesetzlich garantiert. Die Bereitstellung von Schutzunterkünften ist häufig gesetzlich geregelt; viele Expertinnen und Experten weisen jedoch darauf hin, dass die Zahl der Unterkünfte nicht ausreichend ist oder dass keine Unterkünfte für besonders schutzbedürftige Minderheiten zur Verfügung gestellt werden. Telefonberatungen existieren in den meisten Mitgliedstaaten; häufig werden sie jedoch von NROs betrieben und arbeiten ohne gesetzliche Grundlage. Die Unterstützung von Opfern sexueller Gewalt wird sogar noch häufiger von NROs geleistet oder findet ohne gesetzliche Grundlage statt. Der Schutz und die Unterstützung von Kindern, die Zeuginnen oder Zeugen im Sinne des Übereinkommens sind, bezieht sich auf die Unterstützung von Kindern, die Zeuginnen oder Zeugen von in den Geltungsbereich des Übereinkommens fallenden Gewalttaten geworden sind. Die diesbezüglichen Bestimmungen sind von Mitgliedstaat zu Mitgliedstaat sehr unterschiedlich.

Die Vorschriften der Istanbul-Konvention über Schutz, Ermittlungen und Strafverfolgung enthalten Bestimmungen zu Schutzanordnungen, die im Unionsrechts zwar geregelt sind, allerdings nur hinsichtlich der Anerkennung solcher Anordnungen in einem anderen Mitgliedstaat. Eilschutzanordnungen sind in fast allen Mitgliedstaaten vorgesehen, ihre Grundlagen, Bedingungen und Wirkung variieren jedoch. Auch Kontakt- und Näherungsverbote sowie Schutzanordnungen, mit denen Gewalt verhindert und das Opfer geschützt werden soll, existieren – unter verschiedenen Bezeichnungen, in unterschiedlichen Formen und unterschiedlichem Maße – in den Mitgliedstaaten.

Die Vorschrift des Übereinkommens, wonach sichergestellt werden muss, dass Beweismittel betreffend das sexuelle Vorleben und Verhalten des Opfers nur dann zugelassen werden, wenn sie sachdienlich und notwendig sind, wird in der Praxis nur in den Rechtsvorschriften der Mitgliedstaaten mit Common-Law-Tradition ausdrücklich erfüllt. Andere Mitgliedstaaten haben diesbezüglich meist keine speziellen Vorschriften; stattdessen kommen allgemeine Vorschriften zur Anwendung, die das Vorlegen nicht sachdienlicher Beweismittel verhindern. Die Vorschriften des Übereinkommens, wonach sicherzustellen ist, dass Ermittlungen wegen oder die Verfolgung von Tatbeständen betreffend die schwersten in dem Übereinkommen behandelten Verbrechen von Amts wegen eingeleitet und auch dann fortgesetzt werden, wenn das Opfer seine bzw. ihre Aussage zurückzieht, werden nicht konsequent eingehalten. In vielen Mitgliedstaaten obliegt vielmehr die Einleitung eines Verfahrens bei vielen dieser Straftaten weiterhin dem Opfer.

Die Einführung von Schutzmaßnahmen seitens der Vertragsstaaten der Istanbul-Konvention, um die Opfer, ihre Familien und die Zeuginnen und Zeugen vor Einschüchterung, Vergeltung und davor zu schützen, erneut Opfer zu werden, ist von Mitgliedstaat zu Mitgliedstaat der Union unterschiedlich. Unterschiede existieren vor allem, was den Kreis der geschützten Personen betrifft, da sich der Schutz häufig nur auf

das Opfer, nicht jedoch auf seine bzw. ihre Angehörigen oder Zeuginnen und Zeugen bezieht, und bei der Art des gewährten Schutzes.

Die Vorschriften des Übereinkommens zu Migration und Asyl beziehen sich auf Fälle, in denen der Aufenthaltstitel des Opfers davon abhängt, dass sie oder er sich nicht von einem Täter oder einer Täterin trennt, oder in denen das Opfer im Rahmen einer Familienzusammenführung zu ihrem Ehemann oder Partner bzw. zu ihrer Ehefrau oder Partnerin kam, um einen eigenständigen Aufenthaltstitel zu erhalten. Viele, aber nicht alle Mitgliedstaaten haben gesetzliche Regelungen, die es erlauben, Opfern in diesen Fällen einen eigenständigen Aufenthaltstitel zu erteilen. Zwei Mitgliedstaaten der Union (**Malta** und **Zypern**), die das Übereinkommen ratifiziert haben, haben gegen den betreffenden Artikel des Übereinkommens Vorbehalte geäußert. Die Bedingungen für die Erteilung eines Aufenthaltstitels variieren, und häufig wird den Behörden in diesem Verfahren ein Ermessensspielraum eingeräumt. Manchmal sind die entsprechenden Straftaten auf einige Arten begrenzt, manchmal ist der Anspruch auf einen eigenständigen Aufenthaltstitel nicht automatisch, da die Zahl der Aufenthaltstitel nach oben begrenzt ist oder weitere Voraussetzungen existieren, die das Opfer erfüllen muss.



# 1 Introduction: Violence against Women in International Human Rights Law

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) was adopted to provide a set of comprehensive obligations for addressing violence against women within the legal framework of international human rights law.<sup>1</sup> Substantive equality, women's empowerment and the human rights of victims of violence against women are core purposes and obligations.<sup>2</sup> The Convention builds upon and advances existing human rights law relating to violence against women and girls. The first part of this report therefore outlines its most significant antecedents and the existing international legal standards.

The Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR) all require the fulfilment of the relevant rights 'without distinction of any kind' including with respect to sex.<sup>3</sup> States Parties to the ICCPR and ICESCR also undertook 'to ensure the equal right of men and women to the enjoyment' of the rights set forth in the respective Covenants.<sup>4</sup> At the regional level the European Convention on Human Rights (ECHR) also states that Convention rights 'shall be secured without discrimination on any ground such as sex.'<sup>5</sup> In 1979 these mainstream human rights treaties were supplemented by the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which today has 189 States Parties, including all Member States of the Council of Europe.<sup>6</sup> The Convention is women-specific.<sup>7</sup> Article 2 provides that States Parties condemn discrimination against women and 'agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.'

None of these human rights treaties explicitly refer to violence against women, a concept that was not then understood in terms of human rights and did not enter the international law agenda until the early 1990s. The most significant starting point was the UN Committee on the Elimination of Discrimination against Women's (CEDAW Committee) General Recommendation (No. 19 in 1992 (GR No. 19)).<sup>8</sup> The Committee affirmed that '[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men' and as such is contrary to the CEDAW. In paragraph 6 of the General Recommendation the Committee defined discrimination as including gender-based violence, which is 'violence that is directed against a woman because she is a woman or that affects women disproportionately.' In accordance with accepted human rights law that determines the vertical relationship between the State and individuals within its jurisdiction, the Convention applies to violence perpetrated by State authorities. In addition the Committee spelled out in paragraph 9 that 'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.' This statement as to the horizontal application of human rights law, making the State responsible for violence between private individuals, conforms with CEDAW, Article 2 (e): 'To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.' It sets out what have become the standard obligations with respect to violence against women: to prevent, to investigate, to punish (and thus to prosecute) and to pay compensation to victims. A General Recommendation from the CEDAW

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1 CETS No. 210; adopted 11 May 2011 and entered into force 1 August 2014.

2 Istanbul Convention, Articles 1 and 12 (3).

3 ICCPR, Article 2 (1); ICESCR Article 2 (2).

4 ICCPR, Article 3; ICESCR, Article 3.

5 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950, Article 14. Protocol No. 12, CETS No. 177, 4 November 2000, provides for the enjoyment of any right without discrimination including on the ground of sex.

6 Convention on the Elimination of All Forms of Discrimination against Women, 1979, 1249 UNTS 13.

7 CEDAW specifies only women. The CEDAW Committee has clarified that it applies also to girls 'since girls are part of the larger community of women;' CEDAW Committee GR 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, CEDAW/C/GC28, 16 December 2010, para. 21 (hereinafter CEDAW GR No. 28).

8 CEDAW Committee, GR No.19, 29 January 1992, UN Doc. HRI\GEN\1\Rev.1 at 84 (1994) (hereinafter CEDAW GR No. 19).

Committee is not of itself legally binding (unlike the Convention itself); nevertheless it is an authoritative interpretation of CEDAW<sup>9</sup> and the Committee has enhanced its weight through its questioning of States Parties to the Convention on its implementation, through its context-specific concluding observations to States' reports, and, after the adoption of the Optional Protocol,<sup>10</sup> through its application to individual complaints and in the inquiry process.

GR No. 19 was followed by other international normative developments, notably the Declaration and Programme of Action of the Vienna World Conference on Human Rights, 1993, the UN General Assembly's (GA) Declaration on the Elimination of Violence against Women (DEVAW), 1994 and the Beijing Declaration and Platform for Action (PFA), 1995 and follow-up instruments. These instruments largely repeated the definition of gender-based violence and incorporated the concept of due diligence. The GA DEVAW importantly introduced the structural quality of violence against women into an international instrument, that it 'is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men ... and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.' In accordance with the policy of mainstreaming gender into human rights law, the Human Rights Committee and Committee on Economic, Social and Cultural Rights adopted General Comments that read violence against women into the ICCPR<sup>11</sup> and ICESCR<sup>12</sup> respectively. These various instruments spell out a series of practical measures to be taken by States in prevention of and responding to violence against women. The normative framework was further advanced by the special procedures of the Human Rights Council, notably the work of the special rapporteur on violence against women (SR VAW) in exploring the causes and consequences of such violence.<sup>13</sup>

In common with the other mainstream human rights instruments, the ECHR has no provision on gender-based violence. However, through its jurisprudence the European Court of Human Rights (ECtHR) has drawn upon the work of the CEDAW Committee in interpreting and applying the ECHR. It has read violence against women into Article 3 (prohibition against torture, inhuman or degrading treatment) and Article 8 (respect for private and family life) and spelled out States' obligations with respect to domestic violence<sup>14</sup> and rape<sup>15</sup> as issues of public interest demanding positive State action. Failure to take such positive measures on the part of the State incurs responsibility.<sup>16</sup>

At the time of the negotiation of the Istanbul Convention there was thus a plethora of international instruments explicitly on violence against women, supplemented by an increasing jurisprudence from

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9 The International Court of Justice has recognised that the opinion of a UN human rights treaty body – 'an independent body established specifically to supervise the application of that treaty' – should be given 'great weight'; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* [2010] ICJ Rep para. 66. The ICJ was referring to the Human Rights Committee.

10 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP), UN GA Res. 54/4, 15 October 1999.

11 Human Rights Committee, General Comment 28, Equality of Rights between Men and Women (Article 3); UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), especially para. 11: 'To assess compliance with article 7 of the Covenant [right to life], as well as with article 24, which mandates special protection for children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape.'

12 Committee on Economic, Social and Cultural Rights, General Comment No. 16, Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights, UN Doc. E/C.12/2005/3, 13 May 2005, para. 27: 'Gender based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality. States parties ... act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.'

13 The mandate for the special rapporteur on violence against women was first adopted by the UN Commission on Human Rights in UNCHR E/CN.4/RES/1994/45, 4 March 1994.

14 At the time of the adoption of the Istanbul Convention, *Kontrová v. Slovakia* (Appl. No. 7510/04) 31 May 2007; *Bevacqua and S. v. Bulgaria* (Appl. No. 71127/01) 12 June 2008; *Opuz v. Turkey* (Appl. No. 33401/02), 9 June 2009.

15 *M.C. v. Bulgaria* (Appl. No. 39272/98) 4 December 2003.

16 Reparation for the commission of an internationally wrongful act, such as violation of a treaty, is required under the international law of State responsibility; International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 2001.



the CEDAW Committee,<sup>17</sup> the ECtHR and IACtHR.<sup>18</sup> The instruments however are in so-called 'soft law' form: legally non-binding recommendations and opinions of the CEDAW Committee, resolutions and recommendations from UN bodies and the Council of Europe,<sup>19</sup> reports of the SR VAW. Decisions of the ECtHR are binding upon States Parties to the particular case and are relevant to all States Parties to the Convention as indicative of its authoritative interpretation. The only legally binding instrument explicitly on violence against women was the 1994 Convention of Belém do Pará.<sup>20</sup> Another legally binding regional treaty, the Protocol on the Rights of Women in Africa provides guarantees for a range of women's human rights and mainstreams violence against women throughout its text, even though the instrument is not primarily aimed at eradicating violence against women.<sup>21</sup> The lack of any European legally binding instrument on violence against women was thus a significant gap that was exposed by the report of the Council of Europe Task Force<sup>22</sup> and remedied by the adoption of the Istanbul Convention.

The drafters of the Istanbul Convention consciously drew upon much of the existing international legal framework described above and upon its own earlier Conventions on Trafficking<sup>23</sup> and Exploitation of Children,<sup>24</sup> especially with respect to setting out States' obligations under the 3 'Ps': prevention; protection; prosecution. They also accepted the importance of a 4<sup>th</sup> 'P': integrated policy.<sup>25</sup> Nevertheless the Convention has a unique character in combining international human rights principles and practical requirements for implementation into domestic criminal and civil law. It is also mostly gender-specific in its application to violence against women and girls. It is thus both historic in its innovative features while being rooted in existing international law.

## 1.1 The Istanbul Convention as a Human Rights Treaty

In its preamble, the Istanbul Convention recognises the structural nature of violence against women in the language of the DEVAW ('a manifestation of historically unequal power relations between women and men') and has as a purpose the promotion of substantive equality between women and men, including by empowering women. Although CEDAW does not directly use the language of empowerment, this reflects the objective of CEDAW, Article 3 ('ensure the full development and advancement of women') and of UN Women (the United Nations Entity for Gender Equality and the Empowerment of Women). Following the wording of CEDAW, Article 2, under the Istanbul Convention, Article 4 States condemn all forms of discrimination against women and take 'without delay' legislative and other steps to prevent it, thereby setting out the legal link between gender equality and combating violence against women.

CEDAW has been criticised for failing to take account of differences between women, for instance with respect to their age, race, religion, minority or indigenous status and other factors that impact upon their enjoyment of rights. In its 2010 GR No. 28 (adopted towards the conclusion of the negotiation of the Istanbul Convention), the CEDAW Committee recognised this omission and the importance of intersectionality as a basic concept in understanding States' obligations under CEDAW and included

17 E.g., *A.T. v. Hungary*, Comm. No. 2/2003, 26 January 2005; *Fatma Yildirim (deceased) v. Austria*, Comm. No. 6/2005, 6 August 2007, CEDAW/C/39/D/6/2005; *Şahide Goecke v. Austria*, Comm. No. 5/2005, 6 August 2007, CEDAW/C/39/D/5/2005.

18 E.g. *González et al. ('Cotton Field') v. Mexico*, 16 November 2009, (Preliminary Objection, Merits, Reparations, and Costs); *Jessica Lenahan v. United States*, Report No. 80/11, Case 2.626, 21 July 2011.

19 Council of Europe Recommendation Rec(2002)5 of the Committee of Ministers on the protection of women against violence. This resolution is in non-binding form but nevertheless includes a monitoring framework.

20 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Belém do Pará, 6 September 1994. The Convention entered into force on 3 May 1995.

21 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo, Mozambique, 21 July 2003. The Protocol entered into force on 25 November 2005.

22 Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV) Final Activity Report, <http://www.coe.int/en/web/genderequality>, accessed 12 December 2015.

23 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 2005.

24 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 2007.

25 Istanbul Convention, Explanatory Report, para. 63.

sexual orientation and gender identity in its list of factors inextricably linked with sex and gender.<sup>26</sup> The Istanbul Convention, Article 4 provides that it must be applied to all victims without discrimination on a wide range of grounds, including disability,<sup>27</sup> health and – for the first time in an international treaty – on the basis of sexual orientation and gender identity. In this the Convention goes beyond the text of CEDAW itself and is in line with the Committee's more recent articulation. Another significant addition in the non-discrimination provision in the Istanbul Convention is its applicability to migrant and refugee women; CEDAW GR No. 28 does not explicitly include these women (although 'other status' may encompass them).<sup>28</sup> Nor does CEDAW GR No. 28 provide for the broad range of detailed State obligations throughout the criminal process as the Istanbul Convention. CEDAW allows for positive discrimination through its definition of discrimination as distinction with adverse consequences (Article 1) and its provision for 'temporary special measures' (Article 4 (1)). Similarly the Istanbul Convention, Article 4 (4) provides that '[s]pecial measures that are necessary to prevent and protect women from gender-based violence shall not be considered discrimination under the terms of this Convention.'

A radical feature of CEDAW was its requirement that States Parties take appropriate measures to modify social and cultural patterns of behaviour to eliminate prejudices and biases that denote one sex as inferior to the other (CEDAW, Articles 2 (f) and 5 (1)). Article 5 has gained prominence through its application by the CEDAW Committee to find States in violation for attitudes that fail to recognise the public nature and seriousness of domestic violence and for judicial attitudes that rely on myths and stereotypes about the 'proper' behaviour of victims of rape.<sup>29</sup> Reliance on adverse stereotypes has been increasingly recognised as a form of discrimination and their modification is thus important to prevention of violence against women.<sup>30</sup> Article 12 of the Istanbul Convention replicates CEDAW, Article 5. The Istanbul Convention goes beyond requiring only behavioural change by spelling out that that no culture, custom, religion or tradition or 'so-called honour' can be considered as a justification for any acts of violence within the Convention. In this it addresses a specific manifestation of violence against women – so-called honour crimes – and rejects the possibility of any defence to such violence. Other bodies have addressed the issue of violence against women being justified by religion, custom or tradition but this is a stronger statement of legal obligation than had been made by other bodies. For instance, CEDAW GR No. 19 recommends '[l]egislation to remove the defence of honour in regard to the assault or murder of a female family member' and the Beijing PFA, paragraph 124 calls upon States to '[t]ake urgent action to combat and eliminate violence against women ... resulting from harmful traditional or customary practices, cultural prejudices and extremism'. Further, 'honour' crimes have been the subject of UN GA resolutions, including DEVAW where it was noted that States 'should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to [the elimination of violence against women].'<sup>31</sup> The Council of Europe Parliamentary Assembly has urged Member States to take appropriate action.<sup>32</sup> The general preventative obligation in Article 12 of the Istanbul Convention is reiterated in mandatory language in Article 42 where criminal proceedings are addressed more directly: '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.'

26 CEDAW Committee GR 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, CEDAW/C/GC28, 16 December 2010, para. 18.

27 The UN Convention on Persons with Disabilities, 2006, is referenced in the preamble to the Istanbul Convention.

28 CEDAW Committee GR No. 26 on women migrant workers, para. 20 recognises the harassment and violence faced by migrant workers and makes recommendations; UN Doc. CEDAW/C/2009/WP.1/R, 5 December 2008.

29 *A.T. v. Hungary*, Comm. No. 2/2003, 26 January 2005 (domestic violence); *Vertido v. The Philippines*, Comm. No. 18/2008, 1 September 2010, CEDAW/C/46/18/2008 (rape myths); *RPB v. The Philippines*, Comm. No. 34/2011, CEDAW/C/57/D/34/2011, 12 March 2014 (rape myths).

30 Cook, R. and Cusack S. (2010), *Gender Stereotyping Transnational Legal Perspectives* (Philadelphia, University of Pennsylvania Press).

31 UN GA Resolution 48/104, 20 December 1993 (DEVAW), Article 4; see also UN GA Resolution 59/165, 20 December 2004, Working towards the elimination of crimes against women and girls committed in the name of honour.

32 E.g. Council of Europe Parliamentary Assembly Recommendation 1881, Urgent Need to Combat So-Called Honour Crimes, 2009; Council of Europe Parliamentary Assembly Resolution 1681, Urgent Need to Combat So-Called Honour Crimes, 2009.

The Istanbul Convention, Article 5 requires States to exercise due diligence in the prevention, investigation, punishment and provision of reparation for gender-based violence perpetrated by non-State actors. The duty of due diligence under international law evolved from the principles of diplomatic protection whereby a State incurs international responsibility for the commission of an international wrongful act by non State actors against a non-national person. It has been applied in the context of human rights violations since the landmark case of *Velasquez Rodriguez v. Honduras* (1989) in which the Inter-American Court of Human Rights (IACtHR) held in the context of disappearances that a State must take action to prevent human rights violations, and to investigate, prosecute and punish them when they occur. The Court determined that the State's failure to take preventive or protective action represents a violation of basic rights on the State's part: 'An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.'<sup>33</sup> It has been reiterated in a number of the key instruments on violence against women since GR No. 19, including DEVAW, Article 4, the Beijing PFA, paragraph 124 (b); the Convention of Belém do Pará, Article 7;<sup>34</sup> the Council of Europe Recommendation Rec(2002)5 of the Committee of Ministers.

The duty of due diligence with respect to the acts of private actors arises when there is a situation of extreme danger of violence of which the State authorities 'knew or ought to have known.'<sup>35</sup> In its landmark case on domestic violence, *Opuz v Turkey*, the ECtHR adopted the obligation of due diligence: 'it must establish whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of the applicant's mother from criminal acts by H.O.... a crucial question in the instant case is whether the local authorities displayed due diligence to prevent violence against the applicant and her mother.'<sup>36</sup> By referring in its judgment to the opinions of the CEDAW Committee and the jurisprudence of the IACtHR on due diligence, the European Court has contributed to a growing cohesion across jurisdictions on the legal principles relating to States' positive obligations with respect to violence against women. The concept of risk that is at play in *Opuz v. Turkey* is incorporated into the Istanbul Convention in Article 51, which provides that States Parties shall 'ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and if necessary to provide co-ordinated safety and support.' Further, and reflecting the facts of the *Opuz* case, where the mother of a victim of sustained domestic violence was shot, 'such assessment shall take into account at all stages of the investigation and application of protective measures, the fact that perpetrators of acts of violence covered by the scope of this Convention possess or have access to firearms.'<sup>37</sup>

The integrity of CEDAW has been seriously weakened by the large number and substantive content of reservations made to it, despite the limitation imposed by Article 28 (2) that reservations incompatible with the object and purpose of the Convention are prohibited. In order to avoid the possibility of the Istanbul Convention being similarly undermined, Article 78 provides that no reservations may be made except for those expressly provided for under paragraphs 2 and 3 of that Article. Further, under Article 79, any reservation that is made will automatically lapse after five years, unless the State expressly takes steps to extend or modify it.

Scrutiny of States' obligations under the Istanbul Convention at the national level is provided for through the official body that the Government must create or designate (Article 10). This body has a paramount role in securing the holistic approach with its four tasks of coordinating, implementing, monitoring and

33 Inter-Am. Ct. H.R. (ser. C) No. 4, 29 July 1988, para. 172.

34 Applied by the Inter-American Commission on Human Rights in *Maria da Penha v. Brazil*, Case 12.051, 16 April 2001, Report No. 54/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000).

35 Şahide Goecke v. Austria, Comm. No. 5/2005, 6 August 2007, CEDAW/C/39/D/5/2005.

36 Para. 131. See also para. 146 ff.

37 The risk of violence against women through firearms has been subsequently incorporated into the Arms Trade Treaty, 2013, Article 7 (4).

evaluating Government policies and measures to give effect to the Convention. It is also at the centre of ensuring collection and assessment of disaggregated data and that appropriate research is undertaken. It must have the capacity to co-ordinate with its counterparts in other States Parties. Its designation – and proper resourcing – is thus one of the core undertakings for the implementation of the Convention and ensuring coherence across States Parties. In addition, an external mechanism for monitoring progress in implementation is modelled upon both the UN human rights treaty bodies and the Committee created under the Treaty on Actions against Human Trafficking. It combines the techniques of State reporting, visitation and the formulation of general recommendations on the implementation of the Convention.<sup>38</sup> The Convention provides for an independent expert body – GREVIO – elected by the Committee of the Parties, comprised of representatives of the States Parties. States Parties will make periodic reports to GREVIO on the basis of a questionnaire on the legislative and other measures taken to give effect to the Convention. There is provision for input from other bodies such as non-governmental organisations and national human rights institutions. GREVIO will report back to the State with its conclusions and recommendations. On the basis of GREVIO's report, the Committee of the Parties may adopt recommendations on the measures to be taken by the State Party with respect to implementation of GREVIO's conclusions and, more generally, promoting co-operation with the Party.

## 1.2 A Gender-Based Convention

The Convention is in some ways explicitly gender-specific, directed at combating gender-based violence against women. Violence against women is defined in the Istanbul Convention, Article 3 in terms of gender-based violence, which is itself defined in the language of CEDAW GR No. 19 as violence directed at a woman 'because she is a woman' or affecting women disproportionately. Article 3, in common with GR No. 19, DEVAW, the Beijing PFA and the Convention of Belém do Pará includes physical, sexual and psychological<sup>39</sup> harm or suffering, but goes further by also including economic harm.<sup>40</sup> The concept of economic harm as gender-based violence has been taken into account by the CEDAW Committee, for instance by its expression of concern where only 'acts leading to physical injury' are criminalised<sup>41</sup> and in recognising the financial abuse of elderly women.<sup>42</sup> A case before the CEDAW Committee also illustrates the concept of economic harm. The complainant had alleged that her husband 'decided on the spending of the family's income and provided the author with money only for the basic needs of the family. She had no additional money for herself and was not allowed to spend money given to her for other purposes than those strictly specified; nor was she informed about how the rest of her husband's income was spent. As a result, she was economically entirely dependent on her husband.' The Committee criticised the State for its 'overly restrictive definition of domestic violence' that neglected her emotional and psychological suffering.<sup>43</sup>

The concept of gender is not included in CEDAW, which refers only to discrimination on the basis of sex. Although GR No. 19 adopts the concept of gender-based violence, the CEDAW Committee did not define gender at that time. The first treaty to do so was the Rome Statute of the International Criminal Court (ICC) but the Istanbul Convention departs from that definition, which centres on biological sex.<sup>44</sup> Its definition

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38 These techniques are available to the UN human rights treaty bodies according to the terms of each of their constituent instruments. CEDAW provides for state reporting, adoption of general recommendations and, under the OP, individual communications and inquiry.

39 CEDAW GR No. 19 uses the word 'mental' rather than 'psychological' harm.

40 Economic harm is included in the Protocol to the Rights of Women in Africa, Article 1(j). The UN GA also recognised that 'domestic violence can include economic deprivation and isolation and that such conduct may cause imminent harm to the safety, health or well-being of women.' UN GA Resolution 58/147, 22 December 2003, Elimination of domestic violence against women.

41 E.g., Concluding Observations, Madagascar, CEDAW/C/MDG/CO/5 (2008) para. 18.

42 E.g., Concluding Observations Austria, A/55/38 (Supp.) 23<sup>rd</sup> session (2000) para. 230.

43 *V.K. v. Bulgaria*, Communication No. 20/2008, CEDAW/C/49/D/20/2008, 17 August 2011.

44 Rome Statute of the International Criminal Court, Article 7 (3): 'For the purpose of this Statute, 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.'

in Article 3 (c) is closer to that given by the CEDAW Committee in later General Recommendations;<sup>45</sup> it sets out the understanding of gender as a social construct, the ‘roles, behaviours, activities and attributes that a given society considers appropriate for women and men.’ This specification of the meaning of gender is one of the most important aspects of the Istanbul Convention and differentiates it from other human rights instruments. It is relevant throughout the Convention: Article 6 requires ‘gender-sensitive’ policies and a ‘gender perspective in the implementation and evaluation of the impact of the provisions of this Convention;’ Article 14 on education requires States parties to take measures where appropriate to ‘include teaching material on issues such as equality between women and men, non-stereotyped gender roles;’ general obligations on protection and support (Article 18) and on criminal processes (Article 46) are to be based on a ‘gendered understanding’ of violence against women; and there are important requirements on gender-based asylum claims (Article 60).

However in the context of domestic violence the Istanbul Convention is ambivalent about gender. During negotiations there was a reluctance on the part of some delegations to understand domestic violence as gender-based violence, arguing that it is gender neutral in that it occurs against men (and children and elderly persons, thereby intersecting age with gender) as well as against women. The resulting articles on domestic violence are a compromise: Article 2 states that the Convention applies to all forms of violence against women including domestic violence, which affects women disproportionately, while Article 3 (b) provides a gender-neutral definition. Article 2 (2) encourages States to apply the Convention to all victims of domestic violence, although particular attention shall be paid to women victims of violence. These Articles represent an innovative solution to disagreements about the scope of the Convention but they also undermine its grounding in human rights: violence against women is a human rights concern precisely because of the structural discrimination against, and subordination of, women that is both its cause and consequence. Domestic violence against men indubitably occurs but its incidence is not grounded in such structural discrimination. In the words of the SR on VAW, a shift to gender neutrality ‘suggests that male victims of violence require, and deserve, comparable resources to those afforded to female victims, thereby ignoring the reality that violence against men does not occur as a result of pervasive inequality and discrimination, and also that it is neither systemic nor pandemic in the way that violence against women indisputably is. The shift to neutrality favours a more pragmatic and politically palatable understanding of gender, that is, as simply a euphemism for “men and women”, rather than as a system of domination of men over women. ... Attempts to combine or synthesize all forms of violence into a “gender neutral” framework, tend to result in a depoliticized or diluted discourse, which abandons the transformative agenda.’<sup>46</sup>

### 1.3 The Istanbul Convention as a Criminal Law Treaty

Besides being both human rights and gender-based, a third aspect of the Istanbul Convention is that it requires incorporation into the domestic law of States Parties and, if necessary, legislative change with respect to the substance and procedures of both civil and criminal law. Unlike war crimes, crimes against humanity, genocide and torture, violence against women is not of itself an international crime. Thus the Convention has to identify and require States Parties to criminalise specific actions within the rubric of violence against women, ensure jurisdiction over these crimes and provide for their prosecution at the domestic level, necessitating a specificity of language with respect to the substance of criminal law and procedure that is in stark contrast to the more open-ended language of traditional human rights treaties, including the other regional treaty on violence against women, the Convention of Belém do Pará.

The Istanbul Convention is therefore unique in listing and defining a range of relevant crimes, demonstrating the breadth and diversity, yet commonality, of various manifestations of violence against women. It thus

<sup>45</sup> Especially CEDAW GR No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, note 2; CEDAW GR No. 28, para. 5.

<sup>46</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, UN Doc. A/HRC/26/38, 28 May 2014, para. 61.



brings some coherence to the issue of violence against women, highlighting that such acts are not chance, random or private acts of violence but are rooted in inequality thereby taking an important step in achieving substantive equality and linking the human rights element with that of criminal law. The offences covered are domestic violence, psychological violence, stalking, physical violence, sexual violence, including rape, forced marriage, female genital mutilation, forced abortion, forced sterilisation and sexual harassment.

Domestic violence against women and girls had been addressed by the UN GA in 2003 as a human rights issue.<sup>47</sup> With respect to the elements of domestic violence, the GA had recognised it as ‘violence that occurs within the private sphere, generally between individuals who are related through blood or intimacy.’<sup>48</sup> The word ‘private’ may refer to the location of the violence as outside the public space, or to the relationship between perpetrator and victim. It also delineates public acts attributable to the State and private acts, although the GA affirmed that ‘domestic violence is of public concern and requires States to take serious action to protect victims and prevent domestic violence.’<sup>49</sup> Article 3 (b) of the Istanbul Convention attempts to avoid any confusion between the public and private by defining domestic violence as ‘all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.’ The site or location of the violence and the make-up of the family or domestic arrangement are both irrelevant for the application of the Convention.

In other cases there was no previous recognised language to draw upon as the Istanbul Convention provides the first international legal definitions of such crimes, for instance psychological violence (Article 33); stalking (Article 34); forced marriage (Article 37); and sexual harassment (Article 40). Female genital mutilation (Article 38) and forced abortion and sterilisation (Article 39) had in various ways been addressed in international instruments but the Convention’s obligation to criminalise them under domestic law is ground-breaking. Female genital mutilation and forced abortion can only be committed against women and are thus not gender neutral. In defining crimes a balance must be achieved between such broad definitions that they capture too great a range of behaviour, or so narrow that certain behaviours are excluded. A further concern about criminalisation of violent behaviours is whether the emphasis should be on the perpetrator or on the victim. Classically this represents the tension between men’s perceptions of their behaviour and women’s experiences of it, issues that are especially relevant in the context of, for example, stalking, sexual harassment and rape. The text of the Istanbul Convention focuses on that of the victim: stalking is intentional and repeated threatening behaviour that ‘causes the victim to fear for his or her safety’ (Article 34); sexual harassment is ‘unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person.’ (Article 40).

In defining rape the Istanbul Convention drew upon the jurisprudence of the ECtHR in *MC v. Bulgaria*. In that case the Court reviewed the jurisprudence of the International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR) and domestic criminal law across Europe. It determined autonomy to be core to the definition of rape and that ‘member States positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victims.’ Article 36 of the Istanbul Convention adopts this approach from international criminal and human rights law and defines rape through both bodily parts and the requirement that ‘[c]onsent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.’ (Article 36 (2)). Rule 96 of the Rules of Procedure of the ICTY is clear that the prior sexual conduct of a victim shall not be admitted in evidence; this is repeated in Rule 71 in the Rules of Evidence and Procedure of the ICC. However Article 54 of the Istanbul Convention is less categorical in that it allows evidence of prior sexual conduct ‘only when it is relevant and necessary.’ This allows for considerable discretion in determining when the situation comes within this exception.

47 UN GA Resolution 58/147, 22 December 2003, Elimination of domestic violence against women.

48 UN GA Resolution 58/147, 22 December 2003, para. 1 (a).

49 Ibid., at para. 1 (d).

CEDAW has no jurisdictional provision comparable to the ECHR, Article 1. Since the Istanbul Convention requires States to prosecute and punish appropriately the listed crimes it also has to specify that States should establish jurisdiction over them. Article 44 lists bases of jurisdiction generally accepted under international law: territorial jurisdiction (favoured by common law jurisdictions); jurisdiction over crimes committed on a ship flying the State's flag or an aircraft registered under its laws; jurisdiction over a national of the State (favoured by civil law jurisdictions); and jurisdiction over a habitual resident of a State. It also allows States to assert jurisdiction where a national or habitual resident is the victim of such an alleged crime, the somewhat more controversial passive personality head of jurisdiction. Article 44 (3) makes the important safeguard against jurisdiction being denied on the basis of a requirement of double criminality. This is particularly directed at crimes which are likely to be committed outside the territory of the State Party such as forced marriage, female genital mutilation, forced abortion and forced sterilisation. It also adopts the 'extradite or prosecute' approach against perpetrators within the territory that is adopted in international law treaties relating especially to terrorist acts. Under Article 78 reservations are allowed to Article 44 paragraphs 1 (e), 3 and 4.

The Convention contains a number of other detailed provisions directed towards making criminal proceedings effective and which are unique in an international treaty, for instance relating to aggravating circumstances for sentencing (Article 46),<sup>50</sup> that prosecutions can be commenced *ex officio* (Article 55), and that protective measures throughout the legal processes be in place for victims and witnesses (Article 56). Particular safeguards for children in line with the principle of the best interests of the child are required (Article 56 (2)).<sup>51</sup> In combatting violence against women, the Convention does not only look to criminal law and criminal proceedings as it also requires emergency protective orders (Article 53) and barring orders (Article 52). Priority is to be given to the safety of the person at risk, which is line with the jurisprudence of the CEDAW Committee that specifies that property rights cannot override women's right to physical security.<sup>52</sup> Other provisions relate to practical protective and security measures. The provision for legal aid and assistance is limited by the 'conditions provided under internal law.' At a time of financial cuts to legal services this reduces the forcefulness of the Convention.<sup>53</sup> The Convention also prohibits mandatory recourse to alternative dispute resolution mechanisms in cases involving crimes within its scope (Article 48).

## 1.4 Conclusion

The importance of the Istanbul Convention lies in its holistic approach to combating violence against women. It is both holistic in its own terms (Article 7) and integral to the wider international and regional system, supplementing the work of the ECtHR, the CEDAW Committee and even the UN Security Council in its women, peace and security agenda.<sup>54</sup> It requires national legislation and other measures for its effective implementation. The Convention is internally consistent, comprehensive in its coverage and combines legal and practical measures within the framework of the three 'Ps'. It is inclusive and brings together multiple stakeholders: government departments; those working within law enforcement, the health sector, social services, religious communities, education, the media; national parliaments; national human rights institutions; and civil society. The Convention also recognises the importance of encouraging men and boys to contribute effectively to preventing violence against women (Article 12(4)). Prevention and policy come together in the Convention's commitment to transformative equality; the obligation to take preventive measures to transform gender relations by promoting changes in social behaviours

50 Many of these have relevance to cases of violence before the ECtHR, for instance repeated offences and the use of firearms as in *Opuz v. Turkey* and violence against a child as in *M.C. v. Bulgaria* (although the Court in that case did not dwell upon her age).

51 The interest of the child is a 'primordial consideration' in CEDAW, Article 5(b) and in the Convention on the Rights of the Child, 1989, Article 3.

52 *A.T. v. Hungary*, para. 9.3.

53 The ECtHR has upheld the importance of legal assistance in making effective women's access to justice. In *Airey v. Ireland*, 9 October, 1979, the ECtHR held that the ECHR, Article 6 requires the State to provide legal assistance when it is indispensable for effective access to the courts. The complainant was seeking judicial separation from an abusive husband.

54 As set out in UN SC Resolutions 1325, 31 October 2000; 1820, 19 June 2008; 1888, 30 September 2009; 1889, 5 October 2009; 1960, 16 December 2010; 2106, 24 June 2013 and 2122, 18 October 2013.



and cultural patterns (Article 12). It brings together established and emerging standards with respect to violence against women from a range of other sources into a single legally binding instrument, combining legal processes – in civil and criminal law – with social and educational measures. It could be viewed through a linear lens: from important pre-emptive measures, through emergency protective procedures, to processes for individual criminal accountability, to long-term structural and systemic transformation of government agencies and of social attitudes through education and training based upon reliable research and data. It ensures that violence against women is recognised for what it is, a serious crime of public concern, places it within the social context as constructed by gender hierarchies and takes a practical and pragmatic approach to achieving its objectives.

## 2 The Istanbul Convention and EU law

The aim of this chapter is to compare the Istanbul Convention with EU law, in particular to stress key issues related to the possible ratification of the Convention by the EU. The first issue to be considered is the EU mandate for accession. The Istanbul Convention aims at combating violence and crime, thus EU competence to combat crime is the core legal issue of accession (Section 2.1.1). Accession to the Istanbul Convention is also viewed in light of the EU's experiences with acceding to the UN Convention on the Rights of Persons with Disabilities (UN CRPD) (Section 2.1.2). Next, accession to the Istanbul Convention is discussed as a matter of EU fundamental rights in general (Section 2.2.1), and EU sex equality law in particular (Section 2.2.2). There is already comprehensive EU policy concerning violence against women, so accession to the Istanbul Convention is then placed in this context (Section 2.2.3). Subsequently this Section compares the provisions of the Istanbul Convention chapter by chapter with EU law (Section 2.3). It concludes by reflecting on the added value of EU accession to the Istanbul Convention (Section 2.4).

### 2.1 EU competence to accede to the Istanbul Convention

#### 2.1.1 EU competence in the area of criminal law

As the Istanbul Convention is a human rights instrument of the Council of Europe (CoE), the possibility of the EU acceding to the Istanbul Convention depends on the external competence of the EU. Under the Lisbon Treaty the EU has legal personality, which makes the EU a subject of international law, with capacity to conclude international agreements on its own behalf. The capacity includes the competence to join human rights conventions. Under Article 216(1) TFEU, the EU has the external competence to conclude international agreements where Treaties or a legally binding EU act so provide, or where the agreement is necessary to achieve one of the objectives referred to by the Treaties, or is likely to affect common rules or alter their scope. So far as the Istanbul Convention is concerned, the objectives of combating crime, in particular certain types of crime that are common and related to the objective of promoting gender equality, are at stake.

According to Article 216(2) TFEU, agreements concluded by the EU are binding on its institutions and its Member States. The Lisbon Treaty even created an obligation under Article 6(2) TEU for the EU to accede to the ECHR, but 'such accession shall not affect the Union's competences as defined in the Treaties'.

The EU has a strong competence to combat discrimination on the basis of sex. Under Article 19 TFEU, the Union may take action to combat discrimination based on sex (and five other grounds) by unanimous decision. Under Article 157(3) TFEU, measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation may be taken by way of ordinary legislative procedure. Article 157(4) provides that the principle of equal treatment does not prevent any Member State from providing advantages for the underrepresented sex in pursuit of vocational activity or compensation for disadvantages in professional careers. The Article gives the EU a mandate to legislate on some forms of gendered violence, such as sexual harassment in working life. As violence against women is defined as discrimination on the basis of sex by the Istanbul Convention, a strong mandate to combat sex discrimination has relevance for possible EU accession to the Convention.

Gender discrimination is often intertwined with other forms of discrimination, leading to situations of multiple or intersectional discrimination.<sup>55</sup>

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55 On multiple and intersectional discrimination in EU law, see Burri, S. and Schiek, D. (2009) *Multiple Discrimination in EU Law: Opportunities for legal responses to intersectional gender discrimination*, European Network of Legal Experts in the Field of Gender Equality.

The EU acquis requires that the EU, according to Article 6 of the UN Convention on the Rights of Persons with Disabilities, takes measures to combat multiple discrimination against women and girls with disabilities to ensure the full enjoyment of human rights and fundamental freedoms, since the EU has acceded to the Convention (see 2.1.2 of this report). The Istanbul Convention's requirement on paying attention to multiple discrimination of disabled women is thus also an obligation under EU law.

EU competence to accede to the Istanbul Convention depends largely on what can be done, within the EU objectives and powers, in order to prevent crimes, punish perpetrators and protect victims in the manner required by the Convention. A careful consideration of the limits of EU powers is needed in order to decide which state responsibilities, including the due diligence duty, may be converted to EU responsibilities.

Legal literature often stresses that criminal law is a particularly sensitive area, being at the core of a sovereign state's powers.<sup>56</sup> The principle of subsidiarity is, in the area of criminal law, supported by the principle of coherence, namely that the internal coherence of national criminal law systems should not be interfered with by harmonisation of law within Europe without good reason.<sup>57</sup> Many legal scholars therefore tend to give a narrow interpretation to the powers of the EU in this area.<sup>58</sup> These caveats are also stressed in the European Commission's Communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law'.<sup>59</sup>

EU competence in the area of criminal law was extended by the Lisbon Treaty, when the area of freedom, security and justice (AFSJ) was placed at the supranational level. The AFSJ constitutes a shared competence (Article 4)(2)(j) TFEU). The provisions on the AFSJ are placed under Title V of TFEU, with 'respect for fundamental rights and the different legal systems and traditions of the Member States' (Chapter 1, Article 67 (1)). Title V contains provisions on judicial cooperation in criminal matters (Chapter 4) and police cooperation (Chapter 5). The EU ensures a high level of security through measures to prevent and combat crime, racism and xenophobia (Chapter 1, Article 67(3)), through measures for coordination and cooperation between police and judicial authorities and other competent authorities, and through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws (in the sense of setting minimum level criminal law requirements for the Member States). It is to be noted that, while the need to prevent and combat racism and xenophobia through coordination, recognition of judgments and even harmonised legislation is acknowledged, the other grounds of discrimination recognised under EU law, notably combating misogyny or discrimination against women, are not mentioned here. Both racism and misogyny take many and even violent forms, and the Istanbul Convention is targeted at such violence. The cross-cutting provisions under Articles 8 and 10 TFEU on the aims of the EU to eliminate inequalities and promote equality between men and women and combat discrimination based on sex in all its activities covers judicial and police coordination.

The EU must also facilitate access to justice, in particular through mutual recognition of judicial and extrajudicial decisions in civil matters. While the Istanbul Convention is concerned with combating crime, it also contains certain civil-law obligations.

56 Melander, S. (2015), *EU-rikosoiikeus*. Talentum Helsinki, pp. 217-250.

57 Asp, P. (2011) 'European Criminal Law – Challenges for the Future' in Bergström, M. and Jonsson Cornell, A. (Eds) (2011) *European Police and Criminal Law Co-operation*, pp. 61-62, lists six criminal-law principles that a group of 14 criminal law professors recommend to be followed in EU law. These principles include a legitimate purpose of legislation and principles of *ultima ratio*, guilt, legality, subsidiarity and coherence.

58 The development of guiding principles for EU criminal law may even be considered as an answer to warning by criminal law experts for the danger of incoherence of national criminal law systems with the increasing impact of EU criminal law, see *The Manifesto of European Criminal Policy in 2011 by the European Criminal Policy Initiative*, European Criminal Law Review 1/2011, pp. 86-103. The European Commission gathered a group of criminal law experts to create a policy communication on EU criminal law, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM/2011/0573 final.

59 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM/2011/0573 final.

Articles 82 and 83 TFEU list the EU activities in combating crime. Judicial cooperation in criminal-law matters is based on mutual recognition of judgments and judicial decisions (Article 82(1)). Measures for supporting training of the judiciary and judicial staff are to be taken, and cooperation between judicial and equivalent authorities in the Member States is to be facilitated in relation to proceedings in criminal matters and enforcement of decisions.

Article 82(2) TFEU allows approximation of legislation that is necessary for carrying out the requirements of mutual recognition and judicial cooperation in criminal matters having cross-border dimensions. Minimum rules are to be adopted to the extent necessary to facilitate mutual recognition of judgments and judicial decisions, and also to facilitate police action, but these rules are to take into account the differences between the legal traditions and systems of the Member States. Such minimum rules are to concern mutual admissibility of evidence between Member States, the rights of the individual in criminal procedures, the rights of the victims of crime, or other aspects of criminal procedure which the Council has identified in advance by a decision, and taken by unanimous action of the Council and the consent of the Parliament.

Competence for approximation (which corresponds to harmonisation in the field of criminal law) of substantive criminal law is regulated under Article 83 TFEU. Article 83(1) TFEU gives the competence to legislate for minimum rules on the definition of criminal offences and sanctions in the area of particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis, and lists these areas (terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime, which are often called 'Euro crimes'). Certain aspects of violence against women, such as trafficking, sexual exploitation of women and children and any organised violent crimes against women, are also listed here. Through the mobility of EU citizens, both victims and perpetrators must be assumed to cross national borders – that is, for example, the reason for adopting EU law on recognition of national barring and restraint orders in other Member States. This may be seen to give a certain cross-border dimension to violence against women.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in the paragraph. The Council must act unanimously after obtaining the consent of the European Parliament (Article 83(2) TFEU). The Article does not list specific crimes, but the crimes in question must be particularly serious, with a cross-border dimension, which may exclude many forms of violence against women, which are usually considered to be 'domestic' in nature in both senses of the word. Trafficking in human beings is not an issue under the Istanbul Convention, because it is already the subject of another CoE instrument.<sup>60</sup>

The most obvious forms of violence against women with a cross-border dimension under the Convention are probably forced marriages, so-called honour crimes and female genital mutilation; these crimes are also associated with migrant groups. The EU soft-law measures on violence against women have been blamed for focusing on violence against women as an 'outsider' problem pertaining to foreign cultures.<sup>61</sup> The CoE soft law that precedes the binding Istanbul Convention paid considerable attention to crimes associated with immigration to Europe,<sup>62</sup> but the Istanbul Convention covers all forms of violence that are considered gendered. If the approximation of criminal laws and regulations of the Member States proves

60 UN and CoE instruments on trafficking in human beings are already paralleled by secondary EU law, see Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

61 Kantola, J. (2010) *Gender and the European Union*, New York: Palgrave; Montoya C., Rolandsen Agustin, L. (2015) 'The Othering of Domestic Violence: The EU and Cultural Framings of Violence against Women' *Social Politics* vol. 20 No. 4, pp. 534-557.

62 Of the resolutions and recommendations adopted by the CoE Parliamentary Assembly, several deal with crimes that are associated with immigration; see Resolution 1327(2001) on female genital mutilation, Resolution 1247(2003) on so-called 'honour crimes' and Resolution 1723(2005) on forced marriages and child marriages.

essential to ensure the effective implementation of an EU policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives must be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question (Article 83(2) TFEU).

When new criminal law is introduced under Article 83(2), an ‘emergency brake’ is available. Where a draft directive would affect fundamental aspects of its criminal justice system, a Council member may request referral to the European Council, which suspends the ordinary legislative procedure for four months (Article 83(3) TFEU). In the case of a disagreement, at least nine Member States may then establish enhanced cooperation on the draft directive. Denmark does not participate in the measures on substantive criminal law, while Ireland and the United Kingdom participate only in specific substantive criminal law instruments on the basis of a national decision to opt in.<sup>63</sup> These limitations to EU competence need to be taken into account at the possible accession to the Istanbul Convention.

Article 83(2) TFEU does not list specific crimes but sets certain legal criteria for adoption of criminal law measures at EU level. A Commission communication outlines the requirements for enforcing a policy with EU criminal-law sanctions.<sup>64</sup> Criminal law is described in the communication as a sensitive policy field where Member States can usually decide for themselves on the means of enforcement. In cases where the chosen means do not yield the desired results, the EU itself may set common rules on how to ensure implementation, including if necessary criminal-law sanctions for breaches of EU law. Such common rules are to be consistent and coherent, and must not threaten the diversity expressed by Member States’ values, customs and choices. The communication mentions general principles to be respected in adopting EU criminal-law approximation, namely the subsidiarity principle and respect for the fundamental rights guaranteed by the EU Charter of Fundamental Rights and the ECHR. These include the rights of the suspect, the victim or the witness,<sup>65</sup> and as they can result in deprivation of liberty, they require particular attention by the legislator. The first step in using criminal-law measures must be the *ultima ratio*, last resort measure, under the proportionality principle and the EU Charter of Fundamental Rights.

Article 49(3) of the EU Charter of Fundamental Rights requires that penalties are commensurate with the gravity of the conduct and its effects. Criminal-law measures need to be ‘essential’ to achieve effective policy implementation. An impact assessment of whether Member States’ sanction regimes are sufficient for the task is needed. Article 83 TFEU limits the definition of criminal offences and sanctions to ‘minimum rules’, while the principle of legal certainty requires that definitions of criminal acts are clearly specified. The latter task belongs to the Member States. Clear facts for the need for minimum rules for criminal law in the EU are necessary, which can be ascertained by the collection of statistical data to deal with the scope of the EU criminal law.

EU criminal law may contain definitions of offences, including not only the conduct of the perpetrator but often even ancillary conduct (instigating, aiding, abetting), whether attempt is punishable, whether intentionality only or even negligence is included in the definition, and in some cases aggravating or mitigating circumstances. EU legislation can cover rules on jurisdiction and ‘effective, proportionate and dissuasive’ minimum sanctions. Coherent and consistent EU criminal policy should be based on guiding principles by 2020.<sup>66</sup> In fields with an identified enforcement deficit, the Commission will assess the need for new criminal-law measures based on an evaluation of the enforcement practice.<sup>67</sup>

Article 84 TFEU gives a mandate to use ordinary legislative procedures for measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the

63 Protocols Nos. 21 and 22 to the Lisbon Treaty.

64 Com/2011/0573 final.

65 COM/2011/0573 final, par. 2.1.

66 COM/2011/0573 final.

67 COM/2011/0573 final, p. 12.

laws and regulations of the Member States. Many preventive measures and Member State cooperation may be and have been thus brought under EU law. In 2012, the European Parliament's Committee for Women's Rights and Gender Equality requested a European Added Value Assessment to prepare a legislative initiative report with recommendations to the Commission on combating violence against women. The assessment recommended in 2013 that the EU should adopt, on the basis of Article 84 TFEU, a legal act establishing measures to promote and support the action of Member States in the field of prevention of violence and all other necessary steps, as outlined in the assessment.<sup>68</sup>

### 2.1.2 EU accession to the UN CRPD

The EU ratified the UN Convention on the Rights of Persons with Disabilities (UN CRPD)<sup>69</sup> in 2010,<sup>70</sup> prior to accession by all Member States to the UN CRPD. As the UN CRPD is the only human rights treaty which the EU has ratified so far,<sup>71</sup> this section will discuss what lessons can be learnt from that process for the potential ratification of the Istanbul Convention.

Ratification of the UN CRPD and the ratification of the Istanbul Convention pose similar questions and problems related to the division of powers between the Member States (which are or are not parties to the human rights instrument in question) and the EU. The UN CRPD prohibits discrimination against disabled persons, which is also prohibited under EU law, although so far only in the context of work and employment, which is only one area of discrimination prohibited by the UN CRPD. The scope of the UN CRPD is broad, and many of the obligations under it are in the area of Member States' sovereignty. The EU's disability strategy identifies several areas of action focused on eliminating barriers that limit the lives of the disabled. The strategy is implemented by awareness raising, financial support through EU funding instruments and data collection. The UN CRPD requires Member States to set up a framework (focal points, coordination mechanism, independent mechanism representing the disabled), which in the EU will be a two-tier framework, vis-à-vis the Member States and within the EU institutions.<sup>72</sup>

The Council decision on the ratification<sup>73</sup> sets out the framework that the parties to the UN CRPD are required to have at EU level. The European Commission is the focal point required under the UN CRPD, as well as the representative of the EC/EU at the UN bodies. In matters of shared competence, the European Commission and the Member States and the EC/EU determine representation on the UN CRPD bodies in advance. A Code of Conduct<sup>74</sup> was agreed upon on the forms of cooperation for implementation of the UN CRPD, and how the EU will be represented on the bodies established by the UN CRPD. The EU presented at ratification a declaration which explains the exclusive EU competence and the competence shared with the Member States, but as the scope and exercise of the competence is subject to development, the Declaration will be completed in accordance with the requirements of the UN CRPD.<sup>75</sup> A list of Community Acts which refer to matters governed by the UN CRPD was added to the decision.<sup>76</sup> A reservation was

68 European Added Value Assessment EAVA 3/2013 Combating violence against women, [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/femm/dv/eav\\_violence-against-women-eav\\_violence-against-women-en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/femm/dv/eav_violence-against-women-eav_violence-against-women-en.pdf), accessed 21 September 2015, p. 33.

69 Full reference to UN CRPD.

70 The EU signed the Convention in March 2007 and ratified it in December 2010.

71 A draft accession agreement for the EU to join the ECHR was finalised in 2013, but the opinion of the EU Court of Justice on the compatibility of accession outlined in the accession agreement (Opinion 2/13) requires that the ECHR requires better coordination with the Charter of Fundamental Rights of the EU.

72 European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions; Com(2010)636 final.

73 Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities OJ L 23, 27 January 2010, pp. 35-36.

74 Council of the European Union Code of Conduct between the Council, the Member States and the Commission (2010/C 340/08) setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities, OJ C 340 15 December 2010, p. 11.

75 Declaration by the European Union, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec), accessed 1 August 2015.

76 Appendix to the Declaration by the European Union 'Community Acts which Refer to Matters Governed by the Convention'.

made to the UN CRPD article on work and employment, which allows Member States to enter their own reservations concerning non-discrimination of the disabled in the armed forces. The reservation reflects the material scope of Directive 2000/78/EC. Similar steps in defining the EU duties in detail would also need to be taken by the EU under the Istanbul Convention if the decision to accede is made.

The UN CRPD is monitored through States Parties reporting to a committee which decides on guidelines to be applied to the content of the reports and makes suggestions and general recommendations to the State Party concerned; the EU submitted its first report in 2014. This type of monitoring does not easily lend itself to conflicting legal interpretations on human rights in relation to EU fundamental rights. The EU has not ratified the Optional Protocol of the UN CRPD which would allow individual victims of alleged EU non-compliance to take a complaint to the UN Committee on the Rights of Persons with Disabilities.

Some problems related to ratification of the Istanbul Convention differ from those faced on the ratification of the UN CRPD, however, especially in the sense that the Member States and the EU share different competences in the fields under the scope of these Conventions. The degree to which the EU has used the competence to legislate on matters which are of relevance under the Conventions is also different. The legal effects of the Istanbul Convention, if ratified by the EU, depend on how the competence is shared between the EU and its Member States in the areas of criminal law and gender equality. The positive duties of the EU under the Istanbul Convention, including the due diligence duty, only exist where the EU is competent to act in these fields. Many core requirements under the Istanbul Convention do not demand hard law measures. Were the EU to accede to the Istanbul Convention, the main added value would arise from soft-law measures, from the impact of the body established within the EU, and reporting to the monitoring body known as GREVIO. All these instruments and procedures would enhance Member State cooperation and coherent policies at EU level on issues related to violence against women and domestic violence.

Accession to the Istanbul Convention could take place by similar frameworks that were put in place concerning the UN CRPD.

## 2.2 EU fundamental rights and violence against women

### 2.2.1 *EU fundamental rights*

The Istanbul Convention's main impact would be in the area of freedom, security and justice, and the provisions of the Istanbul Convention are related to several fundamental rights of the EU. The fundamental rights of the EU have developed in connection with the doctrine on the precedence of EU law over national law, starting with the case law of the European Court of Justice, now the EU Court of Justice. The original founding Treaties of the European Communities do not expressly refer to fundamental rights, but a doctrine on implied European fundamental rights in the form of general principles of law was developed by the Court of Justice, and was referred to by European institutions already in the 1970s.<sup>77</sup> An explicit reference to fundamental rights was added to the Maastricht Treaty (Article F), according to which the EU was obliged to respect fundamental rights, as guaranteed by the European Convention of Human Rights and as they result from the constitutional traditions common to the Member States as general principles of Community law. The Charter of Fundamental Rights of the EU was issued in 2000, and gained legally binding force as primary EU law with the Lisbon Treaty. The Charter is addressed to the institutions and bodies of the European Union, and is binding on the Member States only when they implement EU law (Article 51 TFEU). Certain types of EU legislation implement the Charter; for example, the legislation on the right to asylum and victims' rights legislation.

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77 Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms OJ C 103, 27 April 1977.



The application of the Charter of Fundamental Rights of the EU must comply with the ECHR as interpreted in the case law of the ECtHR, and the Charter itself refers to the ECHR in its Articles 52 and 53. Irrespective of accession to the ECHR, the EU institutions and Member States are obliged to interpret the Charter in light of the case law of the ECtHR, as Article 52(3) of the Charter contains the legal obligation to give the same meaning and scope to Charter rights and rights in the ECHR, insofar as the Charter rights correspond to those of the ECHR. The Explanations to the Charter of Fundamental Rights list the Charter articles with the same meaning and scope as the ECHR articles, and articles where the meaning is the same but the scope is wider. The legislator must comply with the same standards for limiting the rights as those laid down by the ECHR. The reference covers both the ECHR and the Protocols to it, and the meaning and the scope of the rights are determined by the text of those instruments but also by the case law of the ECtHR. The level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR, while a more extensive level of protection may be guaranteed.

Chapter 1 of the Istanbul Convention has detailed the evolutions in human rights law regarding violence against women. Irrespective of whether the EU accedes to the Istanbul Convention or not, the evolution of human rights law concerning violence against women has an impact on EU fundamental rights through ECtHR case law. The Istanbul Convention monitoring system may be expected to produce a more coherent and systematic approach to issues related to gendered violence, however, than the case law of the ECtHR can provide, as the ECtHR case law on this point is not very elaborate yet.

The Istanbul Convention was drafted to become a vehicle for guaranteeing the rights of victims of violent acts that traditionally went unpunished. Even when these acts have become legally sanctioned as crimes, these crimes are not necessarily combated effectively. As combating violence against women requires a balance between competing human rights principles, it is important that the development of better protection against such violence in human rights law is recognised by the fundamental rights regime of the EU. While the interpretation of the rights under the Charter of Fundamental Rights should be in harmony with the interpretation of the ECHR even without the EU accession to the Istanbul Convention, accession could be expected to advance a more systematic consideration of how the competing and even conflicting rights are to be balanced in the manner required by the development of human rights. The added value of the EU's accession to the Istanbul Convention would therefore lie in bringing systematic considerations concerning rights of women and victims of domestic violence to the EU fundamental rights regime, rather than a totally new system of rights unrecognised by both the EU and the Council of Europe.

### *2.2.2 EU law on promoting equality between men and women and on sex discrimination*

Article 19 TFEU contains the mandate to legislate on several discrimination grounds, including sex, by unanimous Council decision and consent by Parliament. Incentive measures which exclude harmonisation of laws to combat discrimination may be adopted by the ordinary legislative procedure. Since violence against women has been defined as a form of discrimination on the grounds of gender in both international instruments and in many EU instruments,<sup>78</sup> Article 19 could possibly be a legal basis for legislating on minimum standards on many issues under the Istanbul Convention. Taking into account the core values of the EU under Article 2 TEU, non-discrimination and equality between men and women, and Article 8 TFEU which provides that the EU is to 'aim to eliminate inequalities, and to promote equality, between men and women' and that Article 10 TFEU requires that the EU is to aim to combat discrimination based on sex in its policies and activities, Article 19 TFEU seems to provide a legal basis for policies to combat violence against women through preventive measures. As mentioned under 2.1.1, Article 157 TFEU gives the EU a mandate to legislate on some forms of gendered violence in the workplace.

Secondary EU legislation has, since the 1970s, prohibited discrimination on the basis of sex against women in the labour market, and since then, the material scope of the EU anti-discrimination law in

<sup>78</sup> See Chapter 1 of this report by Christine Chinkin on international human rights law on the issue, and Section 2.2.3 on the development of EU law.

this field has broadened to include social security and provision of goods and services. The TEU and TFEU as well as the Charter of Fundamental Rights of the EU, and the directives use a terminology that mostly relies on considering men and women in terms of biological sex. The understanding of gendered structures in society is apparent mainly in the relatively limited acceptance of positive action to promote equality, as well as in the adoption of indirect discrimination as a prohibited type of discrimination. Both positive measures and indirect discrimination conceptually admit an unacceptable power balance between the sexes.

The terminology traditionally adopted by EU equality law differs from that used in the main UN human rights instrument on the rights of women, i.e. the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which recognises gender roles and stereotypes as decisive factors in society.<sup>79</sup> Conceptually, gender and related terms seem to become a part of EU law in the context of violence against women. The EU policy documents have adopted gender terminology. While pay discrimination is legally discussed as equal pay for men and women, policy documents often refer to the 'gender pay gap'.<sup>80</sup> As discrimination against transgender persons is considered to be discrimination on the basis of sex, the scope for understanding gender-based violence as discrimination on the grounds of sex becomes broader.

### *2.2.3 Violence against women as a matter of EU policy*

For decades, EU law on equality between men and women was promoted by binding legislation with a scope limited to employment-related issues. The expansion of the scope of policies on violence against women has had to gather not only political pressure for promoting such policies, but where legislative action has been in question, even face the limited EU mandate to legislate. The expansion of the EU powers by the Maastricht Treaty in 1993 and the Amsterdam Treaty in 1997 helped to get political space for new issues, including violence against women. The evolution of policies has proceeded from measures based on soft-law programmes, non-binding instruments and funding programmes to such legislation which has been within the EU mandate.

Many actors such as the European Women's Lobby were asking for a more active role of the EU in combating violence against women already in the 1980s.<sup>81</sup> The EU responded to the United Nations' efforts to combat violence by non-binding instruments and capacity-building initiatives.<sup>82</sup> The European Parliament's 1986 Resolution on Violence against Women was the first of a number of soft-law instruments on the theme. In 2002, the Presidency Conclusions on Violence against women,<sup>83</sup> and the Council conclusions on the implementation of the Beijing Platform of Action, established indicators on domestic violence against women.<sup>84</sup> In 2004, the Council adopted conclusions on sexual harassment in the workplace.<sup>85</sup> The Council conclusions of the Employment and Social Policy meeting in 2010 emphasised that the Commission and the Member States were to continue efforts to eradicate violence against women. These efforts included introducing a common and free telephone number in all Member States to offer assistance to victims of violence against women and by enhancing the protection of victims and devising a European Strategy to combat such violence.<sup>86</sup> In 1997, the European Parliament called for and the European Commission funded

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79 CEDAW, Article 5 obligates the States Parties to take appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to eliminating prejudices and practices based on the idea of a hierarchy of the sexes and stereotyped roles for men and women.

80 For example the Commission's Communication on Gender Pay Gap of 2007 proposed a series of actions to tackle the gender pay gap, but the Commission Recommendation of 7 March 2014 on the strengthening of the principle of equal pay between men and women through transparency (C(2014) 1405 final), which refers to the legal basis of equal pay, uses the terms 'men and women'.

81 Joachim (2007).

82 Kantola, J. (2010) Rolandsen Agustin, L. (2013), Montoya, C. (2013).

83 Doc. 6994/02.

84 Doc. 14578/02.

85 Doc. 15202/04.

86 Council Resolution on the Eradication of Violence Against Women in the European Union. Brussels, 8 March 2010.

the 'Campaign for Zero Tolerance for Violence against Women' which included three EU conferences. Since the campaign, several soft-law measures have been taken.<sup>87</sup>

In recent years, the European Parliament has taken further resolutions on violence against women, both on eliminating such violence in general and specific forms of it.<sup>88</sup> The European Parliament's resolution of 26 November 2009 on the elimination of violence against women addressed the Member States on improving national laws and policies, and the EU on guaranteeing the right to assistance and support for all victims of violence. In its resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women, the European Parliament proposed a strategy to combat violence against women, domestic violence and female genital mutilation as a basis for future legislative criminal law instruments against gender-based violence. The Parliament also requested in 2014 in a resolution that the Council should make use of the *passarelle* clause under Article 83(2) described above, and include violence against women and girls as an area of crime listed under Article 83(1), which would allow approximation of criminal law. The Parliament also asked the Commission to promote national ratifications of the Istanbul Convention and the accession of the EU after an impact assessment has been undertaken.<sup>89</sup> The European Parliament Resolution for a gender equality strategy post 2015<sup>90</sup> proposed a comprehensive strategy on violence against women and gender-based violence containing binding legislation, and again asked the Council to add gender-based violence to the crimes listed under Article 83(1) TFEU. The Parliament also proposed binding legislation on collecting statistics on violence against women, amendments to the existing EU law and initiation of accession to the Istanbul Convention. As noted under 2.1.1, collecting statistical data is necessary for establishing the facts required for EU criminal law policies.

European Union soft law has an impact mainly in the interpretation of binding norms, but it is not binding on the Member States, nor does it provide justiciable rights to European citizens.<sup>91</sup> Accession countries were expected to implement at the very least soft-law measures on violence against women.<sup>92</sup>

The most extensive EU commitment to fighting violence against women has probably been the Daphne funding programme, started by the European Commission in 1997 and based on decisions by the Parliament and the Council.<sup>93</sup> The programme distributed funding, and aimed to promoting cooperation between organisations. The list of objectives and criteria for funding remained consistent during the different phases of the programme, namely to support specific Commission action, specific transnational projects involving at least two Member States, and activities of NGOs. The projects have involved research and data collecting, support for victims services and training of professional personnel, facilitating networking and exchange of good practices.<sup>94</sup>

87 Actions to combat violence against women by 2014 are summarily described in the factsheet 'European Commission actions to combat Violence against Women', [http://ec.europa.eu/justice/gender-equality/files/documents/140303\\_factsheet\\_vaw\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/140303_factsheet_vaw_en.pdf), accessed 12 December 2015.

88 See, for example, Resolution of 24 March 2009 on combating female genital mutilation in the EU, OJ C 117 E, 6 May 2010, p. 52; Resolution of 14 June 2012 on ending female genital mutilation, OJ C 332 E, 15 November 2013, p. 87; Declaration of 22 April 2009 on the 'Say NO to Violence against Women' campaign, OJ C 184 E, 8 July 2010, p. 131; Resolution of 26 November 2009 on the elimination of violence against women OJ C 285 E, 21 October 2010, p. 53; Resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women OJ C 296 E, 2 October 2012, p. 26.

89 European Parliament Resolution of 25 February 2014 with recommendations to the Commission on combating Violence Against Women (2013/2004(INL)); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM/2011/0573 final; UN and CoE instruments on trafficking in human beings are already paralleled by secondary EU law, see Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

90 European Parliament resolution of 9 June 2015 on the EU Strategy for equality between women and men post 2015 (2014/2152(INI)).

91 Senden L. (2004) *Soft Law in the European Union* Hart Publishing, Portland Oregon, pp. 461-476.

92 Montoya C. (2009) 'International Initiative and Domestic Reforms: European Union Efforts to Combat Violence against Women' *Politics and Gender* 5, pp. 325-348.

93 The first Daphne programme (2000-2003) was followed by Daphne II (2004-2008) and Daphne III (2007-2013).

94 Montoya, C. (2009), pp. 340-341.

Violence against women was also identified as a phenomenon to be eradicated in the general gender equality policy documents in the 2000s (Towards a Community Framework Strategy on Gender Equality (2001-2005),<sup>95</sup> Roadmap for Equality between Women and Men (COM (2006)92),<sup>96</sup> and the Women's Charter (COM(2010)78).<sup>97</sup> The terms 'gender-based violence' and 'violence against women' have appeared in EU policy documents, and refer to definitions used by the UN and the CoE. The Commission's gender equality strategy for 2010-2015<sup>98</sup> contains a chapter on 'Dignity, integrity and an end to gender-based violence', which names forms of violence that women experience because they are women. The strategy refers to an EU-wide strategy on combating violence against women, for instance on eradicating female genital mutilation with measures that include criminal law, within the limits of the EU's powers, and ensuring that EU asylum legislation takes gender equality considerations into account.

EU binding secondary law started to pay attention to the specific requirements needed to combat gender-based violence in the 2010s. Directive 2011/99/EU<sup>99</sup> on the European protection order establishes a mechanism for the mutual recognition of protection measures in criminal matters between Member States. Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims<sup>100</sup> and Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography<sup>101</sup> are examples of setting minimum standards for Member State legislation. Trafficking in human beings is not within the scope of the Istanbul Convention, as there are other human rights instruments that cover the field. These directives replaced former framework decisions. The Protection Order Directive and the Directive on sexual exploitation of children fall within the scope of the Istanbul Convention.

The Victims' Directive (2012/29/EU)<sup>102</sup> contains extensive references to violence against women and the human rights instruments that deal with it. The Preamble of the Victims' Directive (Recitals 5 and 6) refers to EU soft-law instruments, and also to CEDAW and the CEDAW Committee's recommendations and decisions, as well as to the Istanbul Convention. The Preamble further stipulates that 'violence that is directed against a person because of the person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence'. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practice, such as forced marriages, female genital mutilation and so-called "honour crimes". Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and retaliation connected with such violence (Recital 17). The Preamble also refers to violence in close relationships, which is described as committed by a current or former spouse, partner or other family member, and as a serious and often hidden social problem that often traumatises the victim because the perpetrator is a person whom the victim trusts. Victims of violence in close relationships may therefore be in need of special protection measures. The

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95 Towards a Community framework strategy on gender equality (2001-2005). Communication from the Community. Proposal for a Council Decision on the programme relating to the Community framework strategy on gender equality (2001-2005). COM (2000) 335 final, 7 June 2000 (not published in the Official Journal).

96 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – A Roadmap for equality between women and men 2006-2010 [COM(2006)92 final – not published in the Official Journal].

97 Communication from the Commission: A Strengthened Commitment to Equality between Women and Men. A Women's Charter, COM(2010)78 final (not published in the Official Journal).

98 European Commission Strategy for equality between women and men 2010- 2015, adopted 2010, p. 24-25.

99 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L 181/4.

100 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1.

101 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

102 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards for the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57.

Preamble also notes that women are disproportionately affected by this type of violence, and if the woman is dependent on the perpetrator, her situation can be even worse (Recital 18).

## 2.3 The Istanbul Convention chapter by chapter in comparison with EU law

### 2.3.1 *The Preamble to the Istanbul Convention*

The Preamble to the Istanbul Convention refers to several international human rights instruments, including the ECHR, the European Social Charter, the UN Covenants, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and General Recommendation No. 19 of the CEDAW Committee on violence against women (1992). The Preamble stresses that violence against women is a structural and gendered phenomenon. However, the Explanatory Report notes that men and boys may also be victims of domestic violence, and this should also be addressed. Children may also be indirect victims of violence as witnessing domestic violence is also traumatising.<sup>103</sup> The Explanatory Report to the Convention, further notes that the measures under the Convention ‘are without prejudice to the positive obligations on states to protect the rights recognised by the ECHR, and that ‘measures should also take into account the growing body of case law of the ECtHR, which sets important standards in the field of violence against women’, and provided guidance for the elaboration of positive measures needed to prevent violence.<sup>104</sup>

The Convention relies significantly on the CEDAW. The CEDAW is an instrument to which the EU Member States are parties, but EU gender equality policies have rarely relied on the CEDAW Convention. Were the EU to join the Istanbul Convention, Member State and international experience and practices deriving from the CEDAW could become more prominent in EU policies.

### 2.3.2 *Chapter I: Purposes, definitions, equality and non-discrimination, general obligations (Articles 1-6)*

The purposes of the Istanbul Convention are to protect women against violence, to prevent, prosecute and eliminate violence against women and domestic violence, to eliminate discrimination against women, to design a framework for the protection and assistance of victims, to promote international cooperation, and to provide support to organisations and authorities so that they can cooperate. As the Preamble states, there is a link between eradicating violence against women and achieving gender equality in law and in fact.

Combating discrimination, contributing to the assistance of victims, and promoting cooperation in these areas both in internal and external relations are among the aims of the EU. The EU aims at achieving both *de jure* and *de facto* equality of the sexes, as described above.

The scope of the Convention under Article 2 covers all forms of violence against women and domestic violence. The scope of EU action covers that area but, as noted above, harmonisation of legislation is a measure to be used only in limited areas of the Convention while other measures that do not require harmonisation of legislation may be used on a broad basis.

The definitions used in the Convention under Article 3 are adopted from international human rights instruments, which focus on gendered forms of violence and consider violence against women as a form of discrimination of the type that violates the fundamental rights and freedoms of the victim. Article 3, c states that “‘gender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men’. The EU *acquis* mainly refers to (biological) sex,

<sup>103</sup> Explanatory Report, Recital 27.

<sup>104</sup> Explanatory Report, Recital 29.

and defines discrimination on the basis of sex in different contexts as either direct or indirect, and includes sexual harassment and harassment on the basis of sex as discrimination. Discrimination on the basis of gender reassignment is also recognised as discrimination 'based on sex'.<sup>105</sup> The gendered structures assumed by the Istanbul Convention are apparent in EU law mainly in the recognition of positive action to promote equality, and in the adoption of the concept of indirect discrimination, which is implicitly based on the understanding that discrimination can be present when even seemingly neutral measures have gendered outcomes. The definition 'gender-based violence against women' means violence that is 'directed against a woman because she is a woman or that affects women disproportionately', under Article 3, d. That violence affects women disproportionately resembles the definition of indirect discrimination or disparate impact, which both pay attention to the impact of treatment, not only to differential treatment as an element in discrimination.

Conceptually, gender and related terms have become a part of EU law in the context of violence against women. EU policy and soft-law documents have adopted gender terminology. Violence against women has been identified as an issue to be eradicated in the policy documents in the 2000s: Towards a Community Framework Strategy on Gender Equality (2001–2005), Roadmap for Equality between Women and Men (COM (2006)92), the Council's EU Guidelines on violence against women and girls (2008), the Women's Charter (COM(2010)78), and A Strengthened Commitment to Equality between Women and Men 2010.<sup>106</sup> The Council's EU Guidelines contain a list of acts of violence to be considered as gendered violence.

There are clear similarities in the manner in which a victim of gender-based violence is defined by the Convention and under EU law. The EU Victims' Directive (2012/29/EU) is a binding instrument which recognises many aspects of the definition of gendered violence, and requires that victims of gender-based violence are paid special attention in regards to the assessment of a victim's need for protection. The rights of the victim exceed the more traditional rights related to access to justice. For example, Articles 8 and 9 of the Victims' Directive guarantee victims access to a number of victim support services, and Article 9(3)a obligates Member States to provide a minimum of shelters or other interim accommodation for victims, as well as targeted and integrated support for 'victims of special needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships', Article 9(3)(b).

Gender-based violence is defined in the Preamble to the Victims' Directive as violence that is 'directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately' (Recital 17). The definition differs from the one under the Convention mainly by inclusion of gender identity. Gender-based violence is here understood as a form of discrimination and a violation of the fundamental rights and freedoms of the victim, and the definition resembles the one used in the Convention (Article 3). The Preamble to the Directive on the European Protection Order (2011/99/EU) refers to the resolution of the European Parliament which calls for Member State and Union measures for combating violence against women.<sup>107</sup>

Gender-based violence against women thus finds some recognition in EU law. While the definition of gender-based violence is inserted in preambles to recent binding legislation referred to under Section 2.2.3 above, the Victims' Directive in particular reflects a recognition of the special needs of victims of such violence. The EU accession to the Istanbul Convention could bring more coherence to the implementation of the existing EU law in this field, as the Convention concentrates on gender-based violence, while such violence is only one aspect of the EU law to protect victims. Regulation (EU) No. 606/2013 on mutual

<sup>105</sup> Case C-13/94 P.v.S. and Cornwall County Council.

<sup>106</sup> Communication from the Commission *A Strengthened Commitment to Equality between Women and Men: A Women's Charter Declaration by the European Commission on the occasion of the 2010 International Women's Day in commemoration of the 15<sup>th</sup> anniversary of the adoption of the Platform for Action at the Beijing UN World Conference on Women and of the 30<sup>th</sup> anniversary of the UN Convention on the Elimination of All Forms of Discrimination against Women* COM/2010/0078/final.

<sup>107</sup> Resolution of the European Parliament of 26 November 2009 on the Elimination of Violence against Women (P7\_TA(2009)0098).



recognition of protection measures in civil matters<sup>108</sup> also aims to 'prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion'.<sup>109</sup> However, the Regulation applies to all victims, and not just to victims of gender-based violence.

Article 4 of the Convention requires that parties take the necessary legislative and other measures to promote the right for everyone, particularly women, to live free from violence both in the public and the private sphere. As explained in Section 2.1.1 above, the EU mandate is mostly limited to other than those legislative measures that would involve harmonisation of legislation. The parties to the Convention are to condemn discrimination against women by legislative means. The EU has done so by legislation (Article 2 TEU, Articles 8 and 10 TFEU). Article 157 (4) TFEU allows the provision of specific advantages to the under-represented sex in working life, and Article 23 of the Charter of Fundamental Rights is broader in scope as it states that the principle of equality does not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex. Special positive action measures that pay attention to the needs of those affected by gender-based crime, for example by providing shelters and other support services for women victims only, do not violate the general principle of equality. The Preamble to the Directive (2004/113/EC), which implements the principle of equal treatment between men and women in the access to and supply of goods and services, expressly notes that the protection of victims of sex-related violence is a legitimate aim that justifies differences in treatment by sex in such cases as establishing single-sex shelters. The victim support services that the Member States of the EU are obligated to provide may and in some cases should be targeted at women (and possibly men) only. Article 5(1) of the Convention obliges the States Parties to refrain from violence against women and to ensure that state authorities and institutions acting on behalf of the state act in conformity with this obligation. Translated into EU conditions, the EU, as well as Member State institutions and officials when implementing EU policies, will be bound by this obligation, if the EU joins the Convention.

Article 5(2) requires the States Parties to exercise due diligence to prevent, investigate, punish or provide reparation for acts of violence covered by the scope of the Convention. The due diligence duty of the EU, were it to join the Convention, would mainly become realised in the area of prevention, but it would also be relevant in diligent monitoring of the system of coordination and mutual recognition of judgments, as well as the directives within the scope of the Convention, such as the Victims' Directive and the Directive on the European Protection Order.

### *2.3.3 Chapter II: Integrated policies and data collection (Articles 7-11)*

The Istanbul Convention, Article 7(1) requires comprehensive and coordinated policies for the purposes of the Convention. The EU has such policies in place through several soft-law instruments, such as the Commission's Women's Charter 2010.<sup>110</sup> Article 7(2) of the Convention requires that the States Parties ensure these policies place the rights of the victim at the centre of all measures. The Victims' Directive is important from the point of this provision, but the link between the Directive and the soft-law measures is perhaps not as strong as the Convention provisions seem to require, because of the lack of formal integration of policies. The implementation of the Victims' Directive is not formally bound to the exchange of best practices, follow-up of recording of violence against women or other measures mentioned in soft-law documents. Together with other pieces of the EU acquis and soft law instruments that require measures against gendered violence, for example the provisions against sexual harassment under EU non-discrimination law, the EU has a distinctive policy to combat violence. However, they are not such

108 Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181/4.

109 Recital 6 of the Preamble.

110 Communication from the Commission of 5 March 2010 – A Strengthened Commitment to Equality between Women and Men (COM/2010/0078 final) (not published in the Official Journal), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010DC0078&from=EN>, accessed 4 August 2015.



comprehensive policies as to form a coherent whole. The EU already uses resources to implement policies, as Article 8 of the Convention requires. Given that it has the competence to do so, the EU would have the obligation to fulfil this requirement should the EU join the Convention. Encouraging NGO work, as Article 9 requires, is already done by the EU.

The Convention requires, under Article 10, that the Parties designate one or more official body or bodies for the coordination, implementation, monitoring and evaluation of policies and measures, and for coordinating the collection of data, as required by Article 11. The EU level framework similar to that established for the UN CRPD by a Council decision on the ratification would be needed for this purpose, and the cooperation of the EU framework with the Member States could be determined by a Code of Conduct, according to the model established when the Framework for the UN CRDP<sup>111</sup> was designated.

Data collection and research support required under Article 11 of the Istanbul Convention would clearly be within EU competence. Under Article 338(a) TFEU, measures for the production of statistics needed for the performance of the activities of the Union may be adopted in accordance with ordinary legislative procedure. Multiannual European statistical programmes have been adopted, and the present programme includes the production of statistics on safety from crime.<sup>112</sup> Statistical information is collected under the European Statistical System, a partnership between the Commission Eurostat and the Member State national statistical authorities. Several EU bodies already collect relevant data on gendered crime, including the European Institute for Gender Equality (EIGE), the European Union Agency for Fundamental Rights (FRA) and Eurostat. Further, several directives related to violence against women oblige the Member States to report data to the Commission. The information should be gathered and reported to the Convention monitoring body GREVIO (see Chapter IX of the Convention). The collection of data should be based on regular surveys on violence against women. Such surveys have already been provided by Eurostat. Accession to the Istanbul Convention could be expected to give a clearer focus and better continuity to EU measures in this field.

### *2.3.4 Chapter III: Prevention (Articles 12-17)*

The general obligations under Article 12 of the Convention require the eradication of prejudices, customs, traditions and other practices based on gender stereotypes by legislative and other measures. The EU has competence to act, but mainly by soft-law measures. The impact of EU sex equality law has relevance in this context. While EU directives on sex discrimination, including Directive 2006/54/EC (Recast), do not directly refer to the eradication of stereotypes, in practice provisions such as those limiting differential treatment on the basis of sex in access to employment to 'genuine and determining occupational requirements' prevent the use of gender stereotypes as a basis for decision making. However, no clear provision under EU law appears to prohibit gender stereotyping. The other obligations under the Article require action programmes rather than legislation. EU policies and programmes, such as the Daphne programme discussed under Section 2.2.3 above, fulfil these obligations. EU policies already engage in awareness raising as required under Article 13, and this would be a Convention obligation if the EU decides to join. Awareness raising is also a part of existing EU actions, such as the Daphne III programme.

Article 14 of the Convention requires the provision of teaching material on equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal

111 The EU Framework was set up in 2012. EU institutions (the European Ombudsman, the FRA, the European Parliament and the European Commission and the NGO European Disability Forum) take part in the Framework, which meets at least twice a year and operates as a framework where the members contribute to the common goals separately within their mandate, and share information on their activities. The Framework has a secretariat, see the EU Framework to promote, protect and monitor the UN CRPD Operational provisions – The EU Framework's working methods revised after the Framework meeting of 16 May 2013.

112 The present statistical programme covers 2013-2017, see Regulation (EU) No 99/2013 of the European Parliament and of the Council on the European statistical programme 2013-2017 L 39/12. The annex to the Regulation lists the objectives for statistical production, which include Objective 3.2.1 (key areas of social policy) including the provision of statistics on safety from crime.

relationships and other measures to be used in formal curricula at all levels of education. Under Article 165(1) TFEU, Member States are responsible for the content taught in their education system, but the Union encourages cooperation between Member States and, if necessary, supports and supplements their actions. The Union and the Member States also foster cooperation with international organisations, in particular with the Council of Europe (Article 165(3) TFEU).

Article 15 of the Convention requires the training of professionals to deal with victims and perpetrators concerning prevention and detection of violence against women. The EU Victims' Directive (2012/29/EU) contains a provision on the training of practitioners who are likely to come into contact with victims to be guaranteed by the Member States, which are to ensure that those responsible for the training of judges and prosecutors involved in criminal proceedings make general and specialist training available to increase the awareness of judges and prosecutors of the needs of the victims. Member States must, by their public services or funding, encourage initiatives that enable those providing victim support and restorative justice services to receive training for observing professional standards to ensure that such services are provided in an impartial, respectful and professional manner (Article 25).

Training of the judiciary is included in judicial cooperation in criminal law matters in EU law, as well as cooperation between judicial authorities, and takes place on the principles of mutual recognition and harmonisation, as regulated by the TFEU. Similarly, training of the police takes place according to the principles laid down in the TFEU. EU agencies Eurojust (the European Union's Judicial Cooperation Unit), FRONTEX (the European agency for external border control), EASO (European Asylum Support Office), EIGE, CEPOL (European Police College), Europol (the European Police Office) and the FRA are involved in the training of professionals. The European Law Enforcement Training Scheme is developed under CEPOL. The JHA agencies contribute to the reinforcement of the protection of victims, with FRA and EIGE as expert agencies, and training concerning violence against women should be a part of these training programmes. The EU mandate would make the obligation to include violence against women in such training stronger, were the EU to join the Istanbul Convention.

The Convention's Article 16 requires that preventive intervention and treatment programmes are established by legislative or other means. Paragraph 1 requires, according to the Explanatory Report, that the parties establish programmes for perpetrators of domestic violence. The models of programmes chosen by the parties to the Convention should encourage perpetrators to take responsibility for their actions and examine their attitudes towards women, and perpetrators must also cooperate with women's support services, law enforcement agencies, the judiciary, probation services and child protection authorities. Paragraph 2 obliges the parties to the Convention to set up treatment programmes for perpetrators of sexual assault and rape, especially to avoid recidivism. The States Parties are free to choose the model for the service. Article 84 TFEU provides the EU a mandate to legislate on crime prevention which does not require harmonisation.

The EU combatted sexual abuse and exploitation of children through a Council Framework Decision in 2004, later replaced by Directive 2011/92/EU,<sup>113</sup> with a legal basis in Article 83(1) TFEU. While the material scope of the Directive is not covered by the Istanbul Convention, Article 22 requires that persons who fear that they might commit any of the offences under the Directive have access to preventive programmes. The EU has used economic instruments, such as the Daphne programmes, even for programmes aimed at perpetrators. As Paragraph 3 of Article 22 requires that the safety of and support for and human rights of the victims are the primary concern in these programmes, and that the programmes are set up and implemented in close coordination with the specialist support services for victims, the EU programmes must ensure that the programmes implemented in the Member States fulfil this criteria.

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<sup>113</sup> Directive 2011 of the European Parliament and the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, L 335/1.

Article 17 obliges States Parties to encourage the private sector and the media to participate in implementing policies and developing guidelines to prevent violence against women. EU law addresses some aspects of the issue through the Audiovisual Media Services Directive.<sup>114</sup> Article 6 of the Directive requires that Member States ensure audiovisual media services do not contain any incitement to hatred based on race, sex, religion or nationality. Article 9 of the Directive requires Member States to ensure audiovisual commercial communications do not 'prejudice respect for human dignity' or include or promote any discrimination based on sex or other grounds of discrimination prohibited under EU law. EU gender equality policies have not stressed involvement of the media in gender equality policies. The Council of the European Union in its conclusions<sup>115</sup> 'Women and the Media' in 2013 called on the Member States and the Commission to foster gender equality and reduce women's under-representation in decision-making roles in media organisations. The Convention obligation, translated from state to EU duty, would concern the appropriate EU-level actors in particular. The Explanatory Report notes that the Article requires the States Parties to set guidelines and self-regulatory standards to enhance respect for the dignity of women. Four CoE recommendations or resolutions focus on gender stereotyping, with an emphasis on the use of self-regulatory mechanisms to combat gender stereotypes in the media. The EU could offer a platform for self-regulation at the transnational level, and to do so would be a natural step towards fulfilling the Istanbul Convention obligation, were the EU to join the Convention.

### *2.3.5 Chapter IV: Protection and Support (Articles 18-28)*

The general obligations under Article 18 set out general principles to be followed in the provision of protective and supportive services. Paragraph 2 stresses cooperation between the judiciary, prosecutors, law enforcement agencies, local and regional authorities and NGOs. The States Parties are to establish mechanisms to provide effective cooperation. According to the Explanatory Report, the term 'mechanism' refers to any formal or informal structure that enables professionals to cooperate. Transposed to an EU obligation, the existing cooperation between national services should provide the required mechanism. Paragraph 3 lists the criteria on which the services should be based. All measures are to be based on a gendered understanding of violence against women and domestic violence, in the sense that the gendered dynamics, impact and consequences of such violence are recognised. The integrated approach in providing services refers to integrated prevention, protection and prosecution, according to the Explanatory Report. Preventing secondary victimisation of the victims and empowering them are to be aimed at, and needs of vulnerable victims such as children are to be addressed. Paragraph 4 requires that the victim's willingness to press charges or testify against the perpetrator must not be a condition for services.

While setting up the services is a task for the EU Member States that are parties to the Convention, the EU as a party would have an obligation to take these standards into account in its legislation and policies. In some important respects, the EU has already done so. Article 82(2) TEU has been used as the legal basis of the Victims' Directive (Directive 2012/29/EU), which contains many provisions aimed at assisting victims of violence against women. The reporting mechanism under the Convention would complement the EU enforcement of EU legislation, were the EU to join the Convention.

Article 19 of the Convention requires that legislative and other measures are taken to ensure that victims receive adequate and timely information on available support services and legal measures in a language they understand. The provision stresses the need to ensure that victims are provided with information on available support services and legal measures.

These requirements are a central issue in the EU Victims' Directive, even though the scope of the Directive (which reflects the repartition of competences between the EU and the Member States) is narrower

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114 Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation and administrative action in Member States concerning the provision of audiovisual media services, L 95/1.

115 Council conclusions 'Advancing Women's Roles as Decision-makers in the Media'. Employment, Social Policy, Health and Consumer Affairs Council meeting, Brussels, 21-21 June 2013.

than the Convention requirements, as explained under Section 2.3.2 above. Gender-based violence is understood under the Directive as a form of discrimination and a violation of the fundamental freedoms of the victim. A 'victim' is defined in the Victims' Directive as a person who has suffered harm directly caused by a criminal offence or a family member of a person whose death was directly caused by a criminal offence (Article 22 (a)). The Convention has a broader approach, as the definition of a victim refers to persons who suffer harm through gendered or domestic violence, which is not necessarily a criminal law offence (Article 3 e).

Article 3 of the Victims' Directive obliges the Member States to take appropriate measures to assist victims to understand and be understood from the first contact with a competent authority in simple and accessible language. Under Article 4(1), the Member States are to ensure that, at the outset, the victims are offered information on listed issues, namely what support they may obtain and from whom, including information on medical support, any specialist support, and alternative accommodation, procedures for making criminal complaints, what protection, legal aid, compensation, interpretation and translation help they may receive and, if they are resident in another Member State than where the crime was committed, what procedures may be available to protect their interests. Victims are also to be informed on details of communications about their case, of availability of restorative justice services, and reimbursement of any expenses which arise from criminal proceedings. The extent of information may vary depending on the specific needs of the victim and the type of crime (Article 4(2)). Thus EU law already fulfils the requirement of legislating on 'adequate information' to be given to the victims.

Article 20 of the Convention on general support services stipulates that the States Parties are to take necessary legislative or other measures to ensure that victims have access to services facilitating their recovery from violence, for example, legal and psychological counselling, financial assistance, housing, education, and training and assistance in finding employment. The Explanatory Report notes that the victims' difficult situation and trauma is not necessarily sufficiently taken into account. Measures are also to be taken to ensure victims' access to health care and social services. As health and social services authorities are often the first to come into contact with victims, their staff should be trained to respond to victims' specific needs.

The Victims' Directive covers some but not all of the obligations under Article 20 of the Convention. Article 8 (1) of the Directive obliges the EU Member States to ensure that victims have access to confidential victim support services, free of charge, before, during and for an appropriate time after criminal proceedings. Family members must have access to these services to the extent of their needs and the degree of harm they have suffered. Section 2 obliges the Member States to facilitate authorities to refer the victim to victim support services, and Section 3 requires that Member States must establish free of charge and confidential specialist support services as well as the general victim support services, or make use of services by victim support organisations for the victims and their family members. Victim and specialist support services may be set up by either public or non-governmental organisations on a professional or voluntary basis (Article 8(4)). The Member States are to ensure that access to victim support services is not dependent on a victim making criminal charges (Article 8(5)). The provision of support services to victims under the Directive is to be free of charge before, during and for an appropriate time after criminal proceedings.

The minimum services provided by Member States are listed under Article 9 (1) of the Directive. These include information on available support services, emotional support, and advice relating to the financial and practical issues arising from the crime, as well as advice relating to the risk of secondary victimisation, intimidation and retaliation. If specialist support services are not otherwise provided, at a minimum shelters or other interim accommodation is to be provided for victims. Targeted and integrated support for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims in close relationships are to be developed and provided (Article 9(3) of the Directive). Providers of support services are to be encouraged to pay special attention to victims of severe crime (Article 9(2)). While article 9 of the Directive thus aims at providing shelter and targeted support for victims protected

under the Convention, the scope of the support services is narrower. A victim's access to health care depends on Member State legislation, as the Member States are responsible for providing these services. EU law provides only operating principles for cross-border health care.<sup>116</sup> Targeted provision of financial assistance, housing and education for victims of crime depends on the Member States.

Article 21 of the Convention requires that the victims have information about and access to applicable regional and international complaints mechanisms, and that the States Parties promote the provision of sensitive and knowledgeable assistance to victims presenting any such complaints. There is no equivalent to this provision under EU law.

Article 22 obliges the States Parties to provide immediate, short- and long-term specialist support services with an adequate geographical distribution, and specialist support services for women victims and their children. The Explanatory Report stresses that such services are to have specialised and experienced staff, with in-depth knowledge of gender-based violence. Article 9 of the Victims' Directive sets out the minimum standards for victim support services. Under Section 1, such services must provide at least information on and support for national crime victim compensation schemes, and the role of the victim in criminal proceedings, referral to relevant special support services, emotional and, if available, psychological support, advice relating to financial and practical issues arising from the crime, advice relating to secondary victimisation, intimidation and retaliation, unless other services are provided for that purpose. Under Section 2, the Member States must encourage victim support services to pay attention to the special needs of victims of severe crimes.

Article 23 requires Parties to provide easily accessible shelters in sufficient numbers to provide safe accommodation for and to reach out proactively to victims, especially women and their children. The Explanatory Report explains that, to fulfil their task, all shelters are to apply a set of standards. The security situation of each victim should be assessed and an individual security plan drawn up on the basis of the assessment. The technical security of the building has to be taken care of. The sufficiency of the shelter provision is to be measured against the CoE Task Force to Combat Violence against Women, including Domestic Violence, Final Activity Report (EG-TFV(2008)6) which recommends for every region one family place per 10,000 head of population. The minimum standards to be met by the EU Member States under the Victims' Directive are specified under Article 9(3), namely that the Member States develop and provide either public or private shelters or other interim accommodation for victims in need of a safe place, and targeted and integrated support, including trauma support and counselling, for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships.

As noted above, the Victims' Directive contains provisions on the minimum services to victims of sexual and gender-based violence and victims in close relationships. The personal scope of the Directive in this respect coincides largely with the scope of the Convention. However, the Victims' Directive does not contain standards for these services.

Article 24 of the Istanbul Convention obliges the Parties to set up telephone helplines that function around the clock and are free of charge for callers, which provide advice to callers confidentially or with due regard for their anonymity. The Task Force recommendation is that at least one national helpline should operate 24 hours a day 7 days a week and provide crisis support in all relevant languages. A single European emergency call number (112) was introduced by a Council decision<sup>117</sup> in 1991, but it is not clear whether or not it provides crisis support. The Victims' Directive requires support services to be available from the moment the authorities are aware of the victim, throughout the proceedings and for an appropriate time after the proceedings (Recital 37 of the Preamble), but crisis help before a

<sup>116</sup> See Directive 2011/24/EU of the European Parliament and the Council on the application of patients' rights in cross-border healthcare L 88/45.

<sup>117</sup> 91/396/EEC Council decision on the introduction of a single European emergency call number L 217, p. 31-32.

contact with authorities is not within the scope of the Directive. Although the Victims' Directive does not require a risk analysis to be made for every victim who seeks interim safe accommodation in a shelter, Article 22 of the Directive contains minimum rules on an individual assessment of a victim's specific protection needs. The assessment is connected to criminal law proceedings. Member States are to ensure that victims receive timely and individual assessment of their protection needs during the proceedings. Special attention should be paid to certain types of victims, whose relationship to the perpetrator makes them particularly vulnerable. Among such victims, the provision names victims of gender-based violence, violence in close relationships and sexual crimes.

Article 25 of the Convention concerns support for victims of sexual violence. Easily accessible rape crisis or sexual violence referral centres for victims are to be set up by States Parties in sufficient numbers to provide for medical and forensic examination, trauma support and counselling for victims. As the Explanatory Report makes clear, both immediate medical care and trauma support combined with forensic examinations to collect evidence for prosecution are needed, but there is often great need for counselling and therapy long after the event. The CoE Task Force recommendation is that there should be one centre for every 200,000 inhabitants spread geographically so as to make the centres accessible to victims in all regions. Article 9(3)(b) of the Victims' Directive requires that the Member States provide targeted and integrated support, including trauma support and counselling, for victims with specific needs, such as victims of sexual violence.

Article 26 of the Convention requires the States Parties to the Convention to take measures to ensure that the provision of protection and support services to victims takes care of the rights and needs of child witnesses of all forms of violence covered by the Convention. The measures are to include age-appropriate psychosocial counselling, and give due regard to the best interests of the child.

Article 26 requires that due account is taken, in providing support services, of child witnesses of all forms of crimes covered by the Convention. Age-appropriate psychosocial counselling is to be provided. The term 'child witness' refers to children who actively witness the violence or are exposed to it through hearing while hiding. The Victims' Directive defines as victims only the persons who have suffered harm directly caused by a criminal offence; as emotional and psychological harm is included under the definition, children who suffer harm by witnessing it may be considered as victims under the Directive. The Victims' Directive has a narrower scope than the Convention, and limits the protection of victims to criminal proceedings, under which vulnerable victims who appear in the legal procedure as witnesses are to be provided with specific protection under Article 22. For the purposes of the Directive, child victims are presumed to have specific protection needs. Under Article 24, all interviews with a child victim may be audiovisually recorded and the recordings used instead of evidence given in person in criminal proceedings. A special representative for the child victim is to be provided in case of conflict of interest with holders of parental responsibility, or when a child victim is separated from the family. A child is also entitled to individual legal representation in these cases. The Directive aims at preventing further harm to child witnesses, rather than providing support services for them.

Article 27 of the Convention requires that States Parties take the necessary measures to encourage persons who witness or have reasonable grounds to suspect acts of violence within the scope of the Convention to report this to authorities. There is no corresponding provision in EU law, but the measures taken may be other than legislative. Article 28 of the Convention requires measures to be taken to ensure that the confidentiality rules of national law placed on certain professionals do not prevent those professionals from reporting to authorities if they have reasonable grounds to believe that a serious act of violence within the scope of the Convention has been committed and further serious acts of violence are to be expected. According to the Explanatory Report, the provision does not impose an obligation to report on doctors, psychiatrists or other professionals bound by rules of professional secrecy. It grants them the possibility of doing so without risk of breach of confidence, and gives protection to professionals who wish to protect victims of violence. Each State Party is responsible for determining the scope of application of the provision. The rules on professional confidentiality vary in the EU Member States, and there are



no binding minimum standards for legislation. Article 16 of the Child Abuse Directive<sup>118</sup> requires Member States to take necessary measures to ensure the confidentiality rules imposed on certain professionals do not prevent them from reporting to child protection services on reasonable grounds for believing that a child is victim to sexual abuse or exploitation, child pornography, solicitation for sexual purposes, or incitement, aiding or abetting of these crimes. There is no EU legislation on confidentiality rules concerning other crimes within the scope of the Convention, but as the Convention does not set binding standards, the required measures may be of a type other than legislation. Provided such legislation does not require harmonisation, Article 84 TFEU could be the legal basis for legislating.

In sum, Chapter IV of the Istanbul Convention has a considerable number of provisions which coincide with the EU's competence to legislate and existing legislation. The scope of the Istanbul Convention is broader than that of EU law, which would give an important perspective for EU policies if the EU were to join the Convention. Concerning this Chapter, and even most other provisions of the Convention, the specific focus on gendered problems in the context of gender neutral law would enhance the aims of gender equality.

### *2.3.6 Chapter V: Substantive law (Articles 29-48)*

Substantive law provisions form an essential part of the instruments in combating violence against women and domestic violence. The Explanatory Report of the Istanbul Convention states that the chapter contains preventive, protective and compensatory measures for victims and introduces punitive measures against perpetrators. The chapter's provisions set out the obligation to ensure civil-law remedies for victims to seek compensation, primarily against the perpetrator, but also in relation to state authorities if they have failed their due diligence duty to take preventive and protective measures. The chapter also establishes a number of criminal offences. The Explanatory Report considers harmonisation of domestic law necessary because national measures to combat violence against women and domestic violence are not systematic, and because effective policies are needed against widespread crimes. The drafters agreed that in principle all criminal law provisions of the Convention should be presented in a gender neutral manner, so that the sex of the victim or perpetrator should not be a constitutive element of the crime. The States Parties are not prevented from introducing gender-specific provisions. The same conduct that is dealt with in other Council of Europe Conventions, in particular the Convention on Action against Trafficking in Human Beings and the Convention on the Protection of Children against Sexual Exploitation, was left out of the Istanbul Convention. Only seven articles (Articles 33 to 39) require that a particular intentional conduct is criminalised. The Convention provision on sexual harassment, Article 40, does not oblige States Parties to criminalise the conduct in question. Thus it can be subject to remedy either under criminal law or other sanctions.

Many, but not all of the requirements under Chapter V of the Istanbul Convention thus require criminal law measures, and for reasons explained above (Section 2.1.1), approximation of Member State criminal law in these issues faces difficult obstacles, which might be overcome, but overcoming them could hardly be considered a positive duty for the EU, if the EU decides to accede to the Convention. Competence for approximation under Article 83(1) TFEU, as discussed above, does not list the crimes within the scope of the Convention as those under EU competence. Aspects of violence against women such as trafficking, sexual exploitation of women and children and any organised violent crimes against women, are listed, but do not appear under the scope of the Convention. On the basis of developments in crime, the Council may by unanimous decision and with the consent of the Parliament identify other areas of crime for approximation of law under Article 83(2) TFEU. The crimes in question must be particularly serious and have a cross-border dimension. As mentioned above, the cross-border requirement may exclude many forms of violence against women, even though many crimes within the scope of the Convention may be considered particularly serious.

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118 Directive 2011/93/EU of the European Parliament and of the Council on combating sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA L 335/1.



The Convention requires under Article 29(1) that States Parties take measures to provide victims with adequate civil remedies against the perpetrator. The Explanatory Report lists such remedies as injunctions, barring orders, restraining orders or non-molestation orders that are provided under Article 53 of the Convention, or emergency protection orders referred to in Article 52. The EU law that corresponds to these Convention requirements is discussed further in the context of those articles.

The obligation under Article 29(2) that the States Parties are to provide victims with adequate civil remedies against state authorities that have failed in their duty to take necessary preventive or protective measures within the scope of their powers, refers to the liability of state authorities which have failed in their duty to diligently prevent, investigate and punish acts of violence covered by the Convention. Failure to comply with the obligation can result in legal responsibility of the state, and civil law needs to offer remedies to address the failure. Such remedies include civil-law action for damages for negligent and grossly negligent behaviour. The obligation is in line with the case law of the ECtHR concerning the failure of public authorities to comply with their positive obligation under Article 2 ECHR (right to life). Transposed to EU level, the failure to comply could only exist where the EU has the mandate to legislate on the issue. As there are areas where the EU is clearly competent to act and thus also capable of failing in its duty to comply with the positive obligation under the Istanbul Convention, a mechanism for victim compensation would need to be created, were the EU to join the Convention.

The Istanbul Convention Article 30(1) requires that the States Parties ensure the victims' right to claim compensation from perpetrators for offences established in accordance with the Convention.

Article 16(1) of the Victims' Directive provides that Member States have an obligation to ensure that victims are entitled to obtain a decision on compensation by the offender in the course of criminal proceedings. Member States are also obliged to promote measures to encourage offenders to provide adequate compensation to victims, under Article 16(2) of the Victims' Directive. These provisions fulfil what is required under the Istanbul Convention, but only to the extent that the victim is defined as such under the Directive, keeping in mind that the Convention uses a broader definition.

Article 30(2) obliges States Parties to award adequate state compensation to victims who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources. The States Parties may claim redress for compensation from the perpetrator, as long as due regard is paid to the victim's safety. Under EU law, Directive 2004/80/EC<sup>119</sup> adopted minimum requirements for compensation to victims of crimes for injuries they have suffered. The aim of the directive is to ensure that crime victims are entitled to fair and appropriate compensation regardless of where in the European Union the crime was committed. The Directive sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations by designating authorities or bodies to assist the victim of a violent international crime that has taken place in another Member State than the one in which the victim habitually resides. The Member States are to provide compensation schemes for victims of international crimes committed in their territories. The Directive contains no similar provision to the Convention requirement that the state should pay due regard to the victim's safety if a redress claim is presented to the perpetrator. Article 30(3) of the Convention requires that state compensation is to be paid within a reasonable time. The EU rules on implementation should ensure timely compensation, where the EU has the mandate to legislate, as within the scope of the Directive. As the compensation schemes are provided for victims of international crime only, they seldom offer redress for crimes under the Istanbul Convention.

Article 31 of the Convention on custody, visiting rights and safety concerns parental rights, which are within a Member State's legislative mandate. The aims of the Convention's duties may be promoted by the EU through other measures than legislation, however. The Convention article stresses that violence within the scope of the Convention should be taken into account in decisions on custody and visiting

119 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

rights, and the safety of the victim and children are not to be jeopardised by the exercise of these rights. Similarly, Article 32 of the Convention on civil consequences of forced marriages is a family law issue which is in the legislative mandate of the Member States. There is room for soft-law and policy measures aimed at complying with the Convention requirements, however, were the EU to join the Convention. The studies by EIGE<sup>120</sup> and FRA<sup>121</sup> show the need for further EU action in the field. Article 84 TFEU could provide the legal basis for EU legislation, as the requirements of Article 32 of the Convention are clearly connected to crime prevention. However, Article 84 TFEU does not allow harmonisation of laws.

Articles 33 to 39 of the Convention require that a particular intentional conduct is criminalised. These articles cover acts of psychological violence, stalking, physical violence, sexual violence including rape, forced marriage, and forced abortion and forced sterilisation. The legal basis for legislating on these crimes is discussed above (Section 2.1.1). It seems clear that the EU cannot be considered to have a positive duty to legislate on these issues, although sufficient legal basis could be found to legislate, provided there is political will to do so. The EU would comply with the due diligence duty under the Convention even if an approximation of Member State legislation were not to take place. The EU action against violence against women comprises many measures that are targeted at the crimes in question. As an example, the Commission's Communication on eliminating female genital mutilation commits the European Commission to develop better understanding of the practice, prevent mutilation and provide victim support, support effective prosecution in Member States, and protect women at risk living in the EU and address the problem in EU external policies.<sup>122</sup> Similar measures could be taken concerning other acts under the articles in question.

Article 40 of the Convention on sexual harassment obliges the States Parties to take necessary measures to ensure that 'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction'.

EU gender equality and non-discrimination law contains prohibitions of sexual harassment in certain areas of life, namely in working life and in access to goods and services. The Recast Directive (2006/54/EC) covers equal treatment of women and men in employment and occupation, and prohibits sexual harassment in pay, in employment and access to employment, and in occupational social security schemes. Sex discrimination including sexual harassment is also prohibited under the Directive on the access to and supply of goods and services (2004/113/EC). These directives prohibit harassment on the basis of sex and sexual harassment as discrimination (Article 4(3) of the Goods and Services Directive). Harassment on the basis of sex is defined as 'unwanted conduct related to the sex of a person that occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment', and sexual harassment is defined as 'any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature ... with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment' (Article 2 c and d of the Goods and Services Directive, Article 2 c and d of the Recast Directive). The Convention provision on sexual harassment has a much broader scope, as the Convention requires that sexual harassment is subject to sanction irrespective of where the harassment takes place. Thus, Member States which are parties to the Convention are still responsible for taking measures beyond the relatively narrow scope of EU law.

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120 EIGE strategic framework for 2015-2018 stresses improvement of data collection in the Member States and activities that support the Member States in the task, see Strategic Framework on violence against women 2015-2018, European Institute for Gender Equality 2015. EIGE's publications also provide information on good practices in preventing domestic violence, see Collection of methods, tools and good practices in the field of domestic violence', <http://eige.europa.eu/gender-based-violence/eiges-studies-gender-based-violence/collection-methods-tools-and-good-practices-field-domestic-violence-described-area-d-beijing-platform-action>, accessed 12 December 2015.

121 *Violence against women: an EU-wide survey: Main results*. European Union Agency for Fundamental Rights, 2014.

122 See the factsheet on European Commission actions to combat violence against women, January 2015, at [http://ec.europa.eu/justice/gender-equality/files/documents/140303\\_factsheet\\_vaw\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/140303_factsheet_vaw_en.pdf), accessed 8 July 2015.

Both Directives require the Member States to introduce such measures as are necessary to ensure real and effective compensation or reparation for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered (Article 18 of the Recast Directive), or effective, proportionate and dissuasive penalties, which may comprise the payment of compensation to the victim (Article 14 of the Goods and Services Directive).

The EU Court of Justice case law has established that transgender persons are protected under the EU sex equality law,<sup>123</sup> and the principle is noted in the Preamble to the Recast Directive (Recital 3).<sup>124</sup> EU law offers in this sense better protection against harassment than the Convention, as the Convention does not mention the protection of transgender persons against sexual harassment. EU law also protects against harassment on the grounds of sex, which is also premised on gender stereotypes and undermines the dignity of the harassed person. On the other hand, EU law has a narrower material scope than the Convention. Harassment is a pervasive phenomenon which limits the enjoyment of many fundamental EU rights, and if the EU were to accede to the Convention, the added value for the EU might be based on the responsibility to consider what measures should be considered to protect women from sexual harassment in other fields of life than those now protected by EU non-discrimination law.

Article 41 of the Convention concerns measures for ensuring that the intentional aiding and abetting of the crimes under Articles 33–39 is subject to legal sanction. These issues of ancillary conduct are within the EU mandate to legislate if the criminalised conduct itself is within the mandate, which does not seem to be the case with these crimes. Article 42 obliges the States Parties to the Convention to take measures to ensure that violence under the Convention may not be justified by culture, custom, religion, tradition or so-called ‘honour’, or in particular by the claim that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour. The European Parliament’s resolution 2011/2209<sup>125</sup> urges the EU Member States to ‘reject any reference to cultural, traditional or religious practices as a mitigating factor in cases of violence against women, including so-called “crimes of honour”’.

Article 43 of the Convention stipulates that the nature of the relationship between victim and perpetrator shall not preclude the application of any of the offences established in the Convention. The Explanatory Report refers to examples from past practice in Europe of acts where the victim and perpetrator were married or had been in a relationship and where the perpetrators were not prosecuted. As the Article relates to an issue under substantive criminal law, only types of measures other than legislative ones are available in the EU.

Article 44 of the Convention which concerns jurisdiction requires that the States Parties punish offences with which the Convention is concerned when such acts are committed on Member States’ territory, in ships flying their flag or aircraft registered under their laws. A State Party is also obliged to prosecute a national who commits a crime abroad. States Parties must also establish jurisdiction to investigate acts committed abroad by persons whose habitual residence is in their territory. Concerning the most serious offences of the Convention, the requirement of dual criminality<sup>126</sup> is not followed concerning sexual violence, forced marriage, female genital mutilation, forced abortion and forced sterilisation (Articles 26 to 39). The Child Abuse Directive, discussed under Section 2.3.5 above, defines how jurisdiction and

123 *P. v. S. and Cornwall County Council* Case C-13/94; *K.B. v. National Health Service Pensions Agency* Case C-117/01; *Sarah Margaret Richards v. Secretary of State for Work and Pensions* Case C-423/04.

124 Recital 3 of the Recast Directive notes that the EU Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be limited to the prohibition of discrimination based on the fact that a person is of the one or the other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

125 The European Parliament’s resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women (2010/2209).

126 Dual criminality refers to the requirement that the offence in question is criminalised both in the state where it was committed and in the state where the offence is prosecuted. The aim of prohibiting the dual criminality requirement concerning the most serious crimes under the Convention is to facilitate initiating a criminal procedure.

coordinated prosecution is to be ensured among the Member States concerning crimes under the Directive. The European Arrest Warrant, which is based on the mutual recognition of judicial decisions, was adopted as a Framework Decision in 2002.<sup>127</sup> The Framework Decision lists 32 categories of serious crimes for which the dual criminality principle does not apply, when a Member State court issues another Member State with a warrant for the arrest or surrender of an accused person. The list mentions murder and grievous bodily injury and rape, but not explicitly other crimes under Chapter V of the Istanbul Convention. Female genital mutilation is in many EU Member States criminalised as assault or grievous bodily injury, and kidnapping, illegal restraint and hostage-taking could cover some forms of forced marriage. The crimes listed under the Framework decision remain quite limited considering the requirements of the Convention, however. Joining the Convention would bring pressure to broaden the approach under EU law as well.

Article 45 of the Convention requires that the offences established by the Convention are punishable by effective, proportionate and dissuasive sanctions. The principle of effective, proportionate and dissuasive sanctions adopted by the Istanbul Convention is in line with the general principle of EU law on remedies. Remedies made available under national law must provide adequate judicial protection, and be commensurate with the nature and degree of interference with an individual's rights.<sup>128</sup> The substantive law requirements of the Convention lie outside EU criminal law competence, and the Convention would only have relevance if that competence was extended.

Article 46 of the Convention lists circumstances to be considered as aggravating circumstances in sentencing. Even this provision requires legislative or other measures, and 'other measures' could be taken by the EU, for example through soft-law instruments and training of personnel.

Article 47 of the Convention requires the States Parties to take measures for the possibility of taking into account final sentences passed by another State Party in relation to the offences established in the context of the Convention. According to the Explanatory report, the aim of the Article is that previous sentence passed by another States Party is taken into account in assessing the sentence. Recidivism is in many jurisdictions an aggravating circumstance. Recognition of sentences passed by other Member States is the main principle of EU law, as explained above (Section 2.1.1). Council Framework Decision 2008/675/JHA<sup>129</sup> determines the conditions under which in the course of a criminal proceedings in a Member State against a person, previous convictions handed down in another Member State against the same person for different facts are taken into account. (Article 1(1)). Such convictions are to be taken into account and equivalent legal effects attached to them as to previous national convictions (Article 3(1)).

Article 48 of the Convention prohibits mandatory alternative dispute resolution (ADR) processes or sentencing and obligates the States Parties to ensure that the perpetrator assumes his or her financial obligations towards the victim. ADR, also called restorative justice, is increasingly used instead of judicial proceedings. The Explanatory Report points out that, in many CoE Member States, methods of resolving disputes through alternatives to judicial decisions are considered better for family relations, and in some legal systems, Alternative Dispute Resolution methods, such as mediation or conciliation, are also used in criminal law. When such methods are mandatory, victims can never enter the ADR processes on an equal footing with the perpetrator. The Explanatory Report states that fines which the perpetrator is ordered to pay may indirectly punish the victim, who may be dependent on the perpetrator's income.

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127 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. *Official Journal L 190*, 18/07/2002 1-20.

128 Tobler, C. 'Remedies and Sanctions in EC Non-Discrimination Law: Effective, proportionate and dissuasive national sanctions and remedies, with particular reference to upper limits on compensation to victims of discrimination.' European Network of Legal Experts in the non-discrimination field, European Commission 2005, 14.

129 Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

The approach to ADR in EU law is very similar to the one adopted in the Convention. Article 12 of the Victims' Directive concerns safeguards in the context of restorative justice services. Both the Convention and the Directive refer to similar ADR processes. The Victims' Directive is more detailed in setting the limits to the use of ADR. The victims are to have safe and competent services, which are to be used only if they are in the interest of the victim, as well as based on the victim's free and informed consent. The victim is to be informed about the process and whether or not the offender has acknowledged the basic facts of the case. Member States are to establish procedures or guidelines on appropriate referral of cases to restorative justice services. The reporting duties under the Convention would complement the enforcement of EU law.

### *2.3.7 Chapter VI: Investigation, prosecution, procedural law and protective measures*

Article 49(1) of the Convention sets out the general obligations under the chapter. These consist of ensuring that investigations and judicial proceedings in relation to violence under the Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings. The Explanatory Report stresses the low priority of violence against women and domestic violence in investigations and judicial proceedings, which contributes to a sense of impunity among perpetrators and helps to uphold acceptance of such violence. Paragraph 2 obliges the States Parties to ensure effective investigation and prosecution of offences established under the Convention.

The Victims' Directive is premised on the aim of strengthening the overall rights and protection of victims, ensuring they receive information on procedure and during the criminal proceedings, by levelling up the protection from the principles adopted in Framework Decision 2001/220/JHA. The Preamble to the Directive links this aim with the aim of tackling the causes of violence against women by preventive measures, as presented in the Resolution of the European Parliament of 26 November 2009 on the elimination of violence against women (Recitals 4-6). The Preamble explicitly mentions gender-based violence and violence in close relationships, which refers to domestic or family violence, and the need for special protection for victims of these types of violence (Recitals 17-18).

Article 50 of the Convention requires law enforcement agencies to react promptly and appropriately by offering adequate and immediate protection to victims. The Explanatory Report makes it clear that compliance with this obligation includes that the police may enter the place where the person at risk is, that the victim may be given advice and heard by specially trained, where appropriate female, staff in suitably designed premises, and that provision must be made for an adequate number of female law enforcement officers. EU law does not cover coercive measures available to the police. Under Article 4 of the Victims' Directive, Member States must ensure that victims are offered information on the criminal law procedure and available services, which are enumerated in detail. Article 20 of the Directive obliges the Member States to ensure that, during criminal investigations, interviews with victims are conducted without delay and their number is kept to the minimum. The Directive requires that victims with specific protection needs are identified, and lists victims of gender-based violence, violence in a close relationship and sexual violence as ones whose specific protection needs are to be duly considered. Thus, the Directive aims at protection of victims by means that are also required under the Istanbul Convention. Interviews with such victims must be carried out by professionals trained for the purpose, and by the same persons. Interviews with victims of sexual violence, gender-based violence or violence in close relationships should be conducted by a person of the same sex as the victim, if the victim so wishes (Article 23). These requirements are not to prejudice the course of the proceedings, however.

Article 51(1) of the Convention requires that the States Parties ensure that an assessment of the lethality risk, seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and provide necessary safety and support. Under Paragraph 2, the States Parties are to take measures to ensure that the assessment duly takes into account the fact that perpetrators of violence covered by the Convention potentially have access to firearms. Article 22 of the EU Victims'

Directive obliges the Member States to ensure that victims receive a timely and individual assessment to identify special protection needs. Victims of gender-based violence, violence in close relationships, or sexual violence should be paid special attention to, and child victims are to be assumed always to have special protection needs. The victims identified as in need of special protection may benefit from special measures under Articles 23 and 24 of the Directive, if they so wish. There is no specific reference to the possession of firearms by the perpetrator in the context of the risk assessment.

Article 52 of the Istanbul Convention requires the Parties to take measures to ensure that authorities have the power to order, in situations of immediate risk, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence or contacting the victim or person at risk. The Explanatory Report states that rather than placing the burden on the victim to leave, the perpetrator should be ordered to leave the joint residence.

Article 18 of the Victims' Directive contains a general Member State obligation to protect victims of crime and their family members from secondary and repeat victimisation, intimidation and retaliation, as well as to protect the dignity of victims during questioning and when testifying. When necessary, Member States are to provide physical protection of victims and their family members, but these obligations are connected a legal procedure. The European Protection Order Directive<sup>130</sup> concerns the execution of a national protection order in another Member State, so that protection provided to a person in one Member State is maintained in another Member State. Protection measures are defined and adopted by Member States, and recognition of the European Protection Order may be refused in a Member State if the protection measure in question has not been previously adopted in the issuing state. Thus the availability of barring and protection orders depends on Member State legislation and not EU law.

The Protection Order Directive aims at elimination of violence against women and strengthening the rights and protection of the victims<sup>131</sup> (Preamble to the Directive (Recitals 4 and 5)). Whether the protection order fulfils the requirements under the Istanbul Convention depends on substantive Member State legislation. Thus, the availability of the barring and protections orders depends on Member State legislation and not EU law.

The Regulation on mutual recognition of protection measures in civil matters,<sup>132</sup> based on Article 81(1) TFEU, aims at a rapid and simple recognition and enforcement of another Member State's protection measures, so that use of the right to mobility does not mean that a person loses the protection issued in one Member State. The Preamble to the Regulation shows that it is aimed to be used by all victims at risk, but in particular by victims of gender-based violence.<sup>133</sup> Article 3 of the Regulation defines as a 'protection measure' decisions by authorities which impose on the person causing a risk to another person a prohibition (a) on entering the place where the protected person resides, works, or regularly visits or stays, (b) on contacting the protected person, (c) on approaching the protected person closer than a prescribed distance. A civil-law protection order is recognised and enforced in another Member State without any new procedure, on the basis of a certificate provided on request by the protected person by the Member State that issued the protection order. A certificate may only be issued if the person causing the risk has been given the right to challenge the protection order (Article 6), but the content of the protection order may not be reviewed in the other Member State (Article 12). There are certain grounds for refusal to recognise or enforce a protection order, namely that the order is manifestly contrary to the policy in the Member State addressed, or irreconcilable with a judgment given or recognised in that State. Recognition cannot be refused because the law of the addressed Member State does not allow such a measure (Article 13). The aim of the Regulation is not to oblige the Member States to modify

130 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order.

131 Preamble to the Protection Order Directive, Recitals 4 and 5.

132 Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters.

133 Preamble, Recital (6).



their national systems to enable protection measures in civil matters, or to introduce such measures. It remains in the mandate of the Member States to legislate on the enforcement of the protection orders or sanctions for their infringement (Recitals 12 and 18 of the Preamble).

To the extent that there is access to an emergency barring order, based either on criminal procedural law, administrative law or civil law in the Member State where a person is in immediate danger, the EU law thus requires that the order is recognised and enforced in another EU Member State. The process needed is planned so as to reduce delay. The main burden of protecting victims of domestic violence or other victims of gender-based violence remains with individual Member States, however, as they have the competence in the matter. Taking into account the limits to EU competence presents a more coherent set of requirements for States Parties to introduce protection, and the added value of EU accession would arise in the possibility of adding EU legislation on barring orders in a substantive manner. The EU duties in this respect could hardly increase were the EU to accede to the Convention. The Convention requirements, but the requirement for integrated policies dealing with violence against women and domestic violence, combined with reporting in the context of monitoring, could bring better focus on combating gender-based crime.

Article 53 requires that States Parties take necessary measures to make restraining or protection orders available to victims of violence under the Convention. Such orders must be available for immediate protection and without undue financial or administrative burdens being placed on the victim, they are to be issued for a specified period or until modified or discharged, issued on an *ex parte* basis with immediate effect where necessary, and available irrespective of or in addition to other legal proceedings, and allowed in subsequent legal proceedings. Breaches of such restraining or protection orders are to be dealt with using effective, proportionate and dissuasive criminal or other sanctions.

The Explanatory Report makes clear that the orders under this article refer to orders that complement a short-term emergency barring order. The purpose is to offer a fast legal remedy to protect persons at risk by prohibiting, restraining or prescribing certain behaviour by the perpetrator. Such orders exist under various names (restraining order, barring order, eviction order, protection order or injunction), but they all serve the purpose of preventing violence and protecting the victim. The States Parties to the Convention may choose the legal regime under which such orders are issued (civil law, criminal procedure law or administrative law).<sup>134</sup> The Article sets out several standards for States Parties to follow.

Under EU law, there are no substantive requirements for Member State legislation to introduce a certain type of protection order, as the European Protection Order Directive is based on recognition of the protection orders given under Member State legislation, not harmonisation of these instruments. The added value gained by EU accession to the Istanbul Convention would arise from a more coherent set of requirements to be promoted both through EU soft-law policies and through the monitoring of the Convention. A recent study on the European Protection Order<sup>135</sup> shows that Member State legislation on protection orders has developed considerably and all Member States provide both criminal and civil law protection orders. The national approaches vary to a great extent in regards to details such as the range of persons who can apply for a protection order, the effect of such orders, the support to the parties, the inclusion of mutual children, the length of the proceedings, legal representation and costs. The study recommended that, on the EU level, monitoring be enhanced, and an assessment of the effectiveness of the two types of protection orders be carried out with a mind to more far-reaching EU measures. It further recommended that soft-law measures for the approximation of national laws should be considered. These measures could involve a model law on the initiative of the Commission through an 'open method of coordination'.<sup>136</sup> Protection orders aim at crime prevention, and thus are under the scope of Article 84

134 Explanatory Report, Recitals 268-269.

135 Van der Aa, S., Niemi, J., Sosa, L., Ferreira, A. and Baldry, A. (2015) Mapping the legislation and assessing the impact of Protection Orders in the European Member States. Wolf Legal Publishers.

136 Van der Aa, S. et al., p. 247.



TFEU, which does not allow legislation that would involve approximation. Legislation containing guidelines could be helpful, however, as the Member State's national systems currently vary considerably.

Article 54 of the Convention requires that States Parties take legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim will be permitted only when it is relevant and necessary. The Explanatory Report notes that the defence sometimes uses evidence of previous sexual behaviour to challenge the respectability, credibility and lack of consent of victims, in particular in cases of sexual violence. The Report states that the drafters were conscious of the variation of the rules of evidence among States Parties to the Convention. In some jurisdictions, the admissibility and the consideration of evidence lie within the discretion of the judge, whereas in others it is pre-determined by the rules of criminal procedural law. The States Parties to the Convention are to take legislative or other measures to ensure that evidence of the sexual history or conduct of the victim is permitted or considered only when it is relevant and necessary. Such evidence may be presented if it is of significant probative value.

Legislation that limits the use of evidence concerning the sexual behaviour of the victim in other respects than the case at hand (so-called 'rape shield laws') was enacted in many common law jurisdictions from the 1970s onwards. Similar legislation was not as easily adopted in the jurisdictions that follow the tradition of free consideration of evidence. The traditional aim of the human rights instruments has been to protect the suspect and accused in investigation and at trial, and this has sometimes been seen to preclude legislation that in any way limits the right of the person who is charged with an offence to present evidence. That has not been the position taken by the ECtHR, however.<sup>137</sup>

In EU law, the minimum standards for mutual admissibility of evidence between Member States are within the scope of the EU mandate under Article 82(2) TFEU. The Victims' Directive, Article 23(3) requires measures that must be available to victims with specific protection needs; victims of gender-based violence and violence in close relationships are presumed to have specific protection needs under Article 22 of the Directive. Under Article 23(3)(c), measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence must be available for victims of special protection needs. The provision ensures protection against evidence on the victim's past sexual life being presented at a trial. The Convention provision is more clearly targeted at a specific problem often met by victims of sexual crimes. Accession to the Convention could help target EU policies and soft-law measures more precisely to meet the problem. The Convention does not require that States Parties use legislative measures for the purpose.

Article 55 *ex parte* and *ex officio* proceedings require the States Parties to ensure that investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 of this Convention are not to be wholly dependent upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint. Under Paragraph 2, the States Parties are required to take legislative or other measures to ensure, in accordance with the conditions provided for by their internal law, the possibility for governmental and non-governmental organisations and domestic violence counsellors to assist and/or support victims, at their request, during investigations and judicial proceedings concerning the offences established in accordance with the Convention. The Explanatory Report states that the expression 'wholly dependent' in Paragraph 1 was chosen in order to address procedural differences in legal systems. As many offences covered by the Convention are perpetrated by family members, they are seldom reported and thus lead to few convictions. Therefore, law enforcement authorities should be

137 Articles 6 (fair trial) and 7 (*nulla poena* principle) of the ECHR expressly protect the accused, but do not mention the rights of the victim. The rules that restrict the questioning of the victim or admissibility of evidence on the sexual history of the victim have met with criticism on that account. The ECtHR has not interpreted Article 6 so as to preclude protection of victims, and has, for example, accepted that 'in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence, in *S.N. v. Sweden* 2 October 2002, at 47.

proactive in the investigation. Paragraph 1 is open to reservations concerning minor offences of physical violence. While Paragraph 2 requires States Parties to ensure that the victim is supported by organisations and professionals, the paragraph does not refer to legal assistance.<sup>138</sup>

Criminal procedure in EU Member States follows different traditions in regard to official decisions to prosecute and a private initiative to prosecute. It has been common, however, that domestic violence and sexual crimes have often required the victim to report the act and present a complaint. EU law is not harmonised as to the requirement that gender-based and domestic violence should be prosecuted *ex officio*. The provisions under Article 11 of the Victims' Directive contain the victim's rights in the event of a decision not to prosecute. The minimum requirements for Member States include that they ensure that victims have the right to a review of a decision not to prosecute (Article 11(1)), even when the victim's role is established only after a decision not to prosecute has been taken (Article 11(2)). These provisions do not answer the main problem of impunity caused by the fact that, for various psychological and other reasons, victims of the crimes covered by the Istanbul Convention do not report the crime or pursue a complaint against the offender. EU law does not require a proactive approach to prosecuting such crimes.

The Victims' Directive also has a more restrictive attitude than the Convention towards a victim's right to have persons to support them during investigation and court proceedings. Under Article 3(3) of the Victims' Directive, Member States are to allow a victim to be accompanied by a 'a person of their choice' at first contact with a competent authority, when the victim requires assistance to understand or be understood 'due to the impact of the crime'. Meanwhile, the Convention does not limit access to a support person only to the first contact. Under Article 20(c) of the Victims' Directive, victims may be accompanied by their legal representative and a person of their choice during criminal investigations. The EU has little competence to take further measures in the issues under Convention Article 55, although the traditional approach to the type of crimes that are within the scope of the Convention – the tendency of non-interference when the victim is unwilling to press charges – may be considered discriminatory. This is a result of the fact that crimes perpetrated by family members and other persons that are intimate with the victim are seldom reported and prosecuted, and the victims are disproportionately often women. Article 19 TFEU allows incentive measures which exclude harmonisation to be adopted by ordinary legislative procedure. Thus, the EU provisions on gender equality could be taken as the legal basis of introducing a more focused approach by EU law that does not require harmonisation, by use of soft law and other policies.

Article 56 of the Convention obliges the States Parties to take legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses. Victims, as well as their families and witnesses, are to be provided protection against intimidation, retaliation and repeat victimisation, to be informed at least where they and their families might be in danger, when the perpetrator escapes or is released, and informed of their rights and the services at their disposal, the follow-up of their complaint, progress of the investigation and the outcome of their case. Victims must be able to be heard, to supply evidence and present their views, needs and concerns directly or through an intermediary, and victims are to be provided with support services so that their rights and interests are taken into account, at all stages of investigations and judicial proceedings.

States Parties are to ensure that measures to protect the privacy and image of the victim may be adopted, and that contact between victims and perpetrators within court and law enforcement agency premises is to be avoided where possible. The victims are to be provided with independent and competent interpreters when they are parties to proceedings or giving evidence, and the victims are to be able to testify in the courtroom without being present or at least without the presence of the alleged perpetrator, through use of communication technologies, if such means are available.

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138 Explanatory Report, Recitals 279-282.

Paragraph 2 of the Article requires that a child victim and child witness of violence against women and domestic violence is to be given special protection which takes into account the best interests of the child. The Explanatory Report refers to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse as an inspiration for the article. The measures of protection set down in a non-exhaustive list apply at all stages of the proceedings, from investigations to trial proceedings.<sup>139</sup>

Under EU law, the Victims' Directive contains requirements concerning the Convention requirements. Protection against intimidation, retaliation and repeat victimisation is provided by Article 9 (Right to support services), in particular the need for special support services of shelter and other interim accommodation due to imminent risk of secondary victimisation, of intimidation and of retaliation (Article 9 (3)(a)). The targeted and integrated support of victims of sexual, gender-based and domestic violence include trauma support and counselling (Article 9(3)(b)). Article 18 of the Directive requires Member States to put in place measures to protect victims and their family members from secondary victimisation, intimidation and retaliation during questioning and when testifying, including, when necessary, physical protection established under national law. The protection is to be without prejudice to the rights of the defence. However, the material scope of the Directive is narrower than what is required under the Convention. Protection under the Victims' Directive concerns victims during criminal investigations but not witnesses. The legal systems of the Member States differ as to the position of victims in the criminal procedure. In most jurisdictions, victims are considered as witnesses and not parties to the criminal law procedure. The family members of victims are to be protected under the general duty of Member States to take measures to protect victims and their family members from secondary and repeat victimisation, intimidation and retaliation under Article 18 of the Directive. Directive 2011/92/EU on the sexual abuse and exploitation of children (persons under 18 years of age) defines crimes of sexual abuse that may also fall under the scope of the Istanbul Convention. Under Article 20 of the Directive, child victims are to be protected during the criminal investigation and procedure, and where there is a conflict of interest with the holders of parental responsibility, a special representative is to be ordered for the child.

Article 4(1) of the Victims' Directive requires that victims are offered information from their first contact with the competent authority on the support they can obtain and from whom. Where relevant, they are to be informed about medical and any specialist support and accommodation. They are to be informed about procedures for making complaints with regard to a criminal offence and their role in the proceedings, about how they can obtain protection and legal advice, legal aid and other advice, about access to compensation, and how they are entitled to interpretation and translation. If they reside in another Member State than where the offence was committed, they are to be informed about the arrangements available to protect their interests in the Member State where they first make contact with the competent authority. Further, they are to be informed as to the procedures for making complaints if their rights are not respected by the competent criminal law authority, given the contact details for communication about their case, informed about the available restorative justice services, and how the expenses involved in court proceedings can be reimbursed.

All victims are not necessarily informed on all points. The extent or detail of information may vary depending on the needs and circumstances of the victim and the nature of the crime (Article 4(2)).

Article 6 of the Victims' Directive requires the Member States to ensure that victims receive information on their case. Article 6(5) requires the Member States to offer victims the opportunity to be notified when the person in custody, prosecuted or sentenced for criminal offences concerning them is released or escapes from detention.

Article 7 of the Directive contains the minimum requirements for Member States on the victim's right to interpretation and translation. The Article is more detailed than the Istanbul Convention, and requires free of charge interpretation for victims at least during any interviews or questioning of the victim

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139 Explanatory Report, Recital 283.

during criminal proceedings before investigative and judicial authorities, including police questioning, and interpretation for their active participation in court hearings and any necessary interim hearings.

Article 8 requires the Member States to ensure that victims have access to confidential victim support services, free of charge, before, during and for an appropriate time after criminal proceedings, and to facilitate the referral of victims to these services. Specialised support services are to be provided in addition to general support services, and access to these services must not depend on the victim making a formal criminal complaint. Article 9 defines the minimum level of services to be available, which include support on the rights of victims, including information on victim compensation schemes, referral to relevant specialist support services, emotional and, where available, psychological support, advice relating to financial and practical issues arising from the crime, and advice relating to the risk of secondary victimisation.

Article 9(3) lists the specialist support services that are to be provided, which include shelters and targeted and integrated support, including trauma support and counselling, for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships.

Article 10 of the Victims' Directive requires the Member States to ensure that victims have the right to be heard and that they may present evidence during criminal proceedings. The procedural rules under which victims may be heard and provide evidence are determined by national law. However, Article 18 of the Victims' Directive requires that the dignity of the victim is protected during questioning and when testifying.

Under Article 21 of the Directive, Member States are to ensure that authorities protect the privacy, including personal characteristics, of the victims and images of the victims and their family members. Member States must also ensure that authorities take all lawful measures to prevent public dissemination of information that could lead to the identification of a child victim. The Member States are to encourage the media to take self-regulatory measures to protect the privacy, personal integrity and data of victims.

Article 23 obliges the Member States to ensure that victims with specific protection needs (and thus victims under the Istanbul Convention) have the right to special protection during proceedings. The list of special measures that are to be available is detailed. Article 23(3)(a) concerns measures to avoid visual contact between the victim and the offenders, including during giving evidence, by use of communication technology, and Article 23(3)(b) concerns measures that ensure that the victim may be heard in the courtroom without being present.

Article 57 of the Istanbul Convention requires the States Parties to provide a right to legal assistance and to free legal aid for victims, under the conditions provided by their internal law. The Explanatory Report explains that victims of violence against women and domestic violence often leave their belongings and jobs, and the judicial and administrative procedures they are involved in are highly complex. Right to legal assistance and free legal aid is therefore needed. The provision is inspired by Article 15(2) of the CoE Convention on Action against Trafficking in Human Beings.

Under EU law, Article 13 of the Victims' Directive requires that Member States ensure access to legal aid by victims, where they have the status of parties to criminal proceedings. The conditions or procedural rules under which victims have access are for the national law to decide. Thus, access to free legal aid is limited by two conditions set by national legislation: that the victim has the status of a party in the proceedings, and that the national legislation guarantees free legal aid to persons in the victim's position. The EU accession to the Istanbul Convention could at least promote an exchange of information on the impact of national rules on victims of gender-based violence to help improve access to legal aid through more coherent monitoring and policy measures.

Article 58 of the Convention obliges States Parties to take legislative and other measures to ensure that the statute of limitation for initiating any legal proceedings with regard to the offences under Articles 36, 37, 38 and 39 of the Convention is to continue for a period of time that is sufficient and commensurate with the gravity of the offence in question, to allow for the efficient initiation of proceedings after the victim has reached the age of majority. The Explanatory Report points out that the article applies in relation to child victims, who are often unable to report the offences perpetrated against them before reaching the age of majority. The sufficient time refers both to the child reaching majority, and to the time needed for overcoming the trauma caused by the deed. The offences to which the article applies are restricted to certain offences, and the States Parties may under Article 78(2) reserve the right not to apply the principle, or only to apply it in specific cases or conditions in respect of Articles 37, 38 and 39.<sup>140</sup>

The statutes that limit the time for initiating legal proceedings belong to the area of criminal law that is in the mandate of the Member States. Soft-law measures and policies are available for EU action. Thus, the value added by EU accession to the Convention would arise from increased attention to the issue through the monitoring system.

### *2.3.8 Chapter VII: Migration and asylum (Articles 59-61)*

Article 59(1) of the Istanbul Convention obliges the States Parties to take legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or relationship, are granted in the case of particularly difficult circumstances, on application, an autonomous residence permit, irrespective of the duration of the marriage or the relationship. Conditions relating to the granting and duration of such a permit are established by internal law. Paragraph 2 obliges the States Parties to take legislative or other measures to ensure that victims may obtain the suspension of expulsion proceedings initiated in relation to residence status dependent on a spouse or partner, so that a victim may apply for an autonomous residence permit. Paragraph 3 requires that a renewable residence permit is issued to victims where their stay is necessary owing to their personal situation, and/or where their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings. Paragraph 4 obliges the States Parties to take measures to ensure that victims of forced marriage brought into another country for the purpose of the marriage and who, as a result, have lost their residence status in the country where they habitually reside, may regain this status.

The Explanatory Report refers to research which shows that fear of deportation or loss of residence status is a tool used by perpetrators to prevent victims from seeking help and separating from the perpetrator. Most CoE Member States require that spouses or partners remain married or in a relationship for a period from one to three years for the spouse or partner to be granted an autonomous residence status.<sup>141</sup>

In EU law, a person may be entitled to residence on the ground of free movement of EU citizens and their family members, which are issues where the EU has exclusive competence for legislation. Under Article 4(4), the EU has shared competence to carry out activities and conduct a common policy in the areas of development cooperation and humanitarian aid. However, exercising this common policy shall not result in Member States being prevented from exercising their own. Under Article 79(1) TFEU, the Union is to develop a common immigration policy to ensure efficient management of migration flows, fair treatment of third-country nationals and prevention of illegal immigration and trafficking. Article 79(2) TFEU gives the EU a competence to adopt measures on the conditions of entry and residence, including long-term residence permits for family reunification. Common EU asylum policy has been developed since 1999. The Common European Asylum System, which is a part of the area of freedom, security and justice, includes common standards for asylum procedures in the Member States, with the final objective of a common asylum procedure for the EU. The EU asylum policy applies the requirements

<sup>140</sup> Explanatory Report, Recitals 296-297.

<sup>141</sup> Explanatory Report, Recital 301.

of the Geneva Convention,<sup>142</sup> and is implemented by legislative means. These include the Qualification Directive (recast) (2011/95/EU)<sup>143</sup> and the Reception Conditions Directive (2013/32/EU),<sup>144</sup> which define the qualifications for assessing the protection needs of asylum seekers and the procedure to be followed with all applications for international protection. As the EU has exclusive competence both as to free movement within the EU and as to asylum policy, the requirements of the Convention Article 59 would be mostly directed at the EU, were the EU to accede to the Convention.

The Citizens Directive (2004/38/EC)<sup>145</sup> is based on the free movement of persons within the EU, which is also granted to family members irrespective of nationality. The Directive is concerned with persons who have used their free movement rights and wish to bring their families (who may or may not have EU citizenship) to reside in the host country. The Citizens Directive grants a right of up to three months unconditional residence for EU citizens in another Member State other than their own Member State, and also for their family members who are not nationals of any Member State (Article 6). Conditions are set for residence for longer periods of residence than three months (Article 7), but when these conditions are fulfilled, family members of EU citizens who are not themselves EU citizens also have a right of residence. Under Article 2 of the Directive, 'family member' includes the spouse, partner of a registered partnership when the host state considers such partnership equivalent to marriage, direct descendants under 21 years, and dependent direct relatives in the ascending line, as well as such relatives of the spouse. A divorce does not affect the right of residence for family members with EU citizenship. For non-citizen family members, divorce does not entail loss of right of residence when warranted by 'particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting' (Article 13(2)(c)). The Directive stipulates that the family members who are nationals of another Member State retain their right of residence on divorce or termination of a registered partnership (Article 13(1)), and the family members who are not nationals of another Member State do not lose their right to residence under certain conditions, including 'particularly difficult circumstances, such as being a victim of domestic violence while the marriage or registered partnership was subsisting'. Article 28 of the Directive provides protection against expulsion. There is no provision on obtaining suspension of initiated expulsion proceedings in order to apply for an autonomous residence permit for a victim of gender-based violence, even though the right to residence is granted under EU law as noted above.

Directive 2003/86/EC<sup>146</sup> on the right to family reunification regulates the family-based residence of third-country nationals residing lawfully (also as refugees) in the EU. The spouse and minor children of a person who has resided in the EU for one year may be granted a residence permit as family members. The permit is not available for polygamous marriages. The family member may be granted an autonomous residence permit after a maximum of five years, and in the event of widowhood, divorce or separation an autonomous residence permit may be issued. In the event of particularly difficult circumstances the Member States must have provisions that grant an autonomous residence permit, but these circumstances are not specified. The family member's residence permit may be discontinued when the sponsor and the family member no longer live in a real marital or family relationship. The Directive allows a requirement under national legislation that a minimum age may be required for the sponsor (the person who resides legally in the EU Member State and sponsors a relative to immigrate to that state) and his or her spouse, in order to prevent forced marriages, but the Directive (or other EU law) does not include a provision that

142 Geneva Convention Relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.

143 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

144 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

145 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

146 Council Directive 2003/86/EC on the right to family reunion OJ L 251, pp. 12-18.



would ensure that victims of forced marriage, who have lost their residence status in the country where they habitually reside, can regain that status, as Article 59(4) of the Istanbul Convention requires.

Directive 2003/109/EC,<sup>147</sup> concerning the status of third-country nationals who are long-term residents, applies to persons residing in the EU on grounds other than being a refugee or needing protection, or as a diplomat or on a temporary basis. A permanent residence permit requires five years of legal residence. Family members of a long-term resident may accompany the long-term resident, provided they are maintained by their own resources without recourse to EU Member State social assistance or social insurance. Member States regulation on these issues varies.

Article 60(1) of the Istanbul Convention requires the States Parties to take legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection. Paragraph 2 requires the States Parties to ensure that a gender-sensitive interpretation is given to each of the Convention grounds of the 1951 Convention, and that where it is established that the persecution feared is on one or more of these grounds, applicants are to be granted refugee status according to the applicable relevant instruments. The Explanatory Report refers to the longstanding failure of asylum law to address the difference between women and men in why and how they experience persecution. Rape and other forms of gender-related violence are acts which have been used as forms of persecution. Paragraph 3 requires that States Parties take measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.

Under EU law, the Qualification Directive (recast) defines the standards for the qualification of third-country nationals or stateless persons to receive international protection (a refugee status), the uniform status for refugees or persons eligible for subsidiary protection, and the content of the protection in the EU. Chapter III of the Directive defines the qualifications for being a refugee, including 'acts of gender-specific or child-specific nature' (Article 9(2)(f)), which relate to the requirements under Article 60(1) and 60(2) of the Convention. The Preamble to the Directive states that the applicant's gender, including gender identity and sexual orientation, may be related to certain legal traditions and customs that result for example in genital mutilation, forced sterilisation or abortion. Such issues arising from an applicant's gender should be given due consideration so far as they are related to the applicant's well-founded fear of persecution.<sup>148</sup> The implementation of the Directive Article would be under Convention monitoring, were the EU to accede to the Convention. Accession could lead to a more coherent manner of considering situations related to gender-based violence. The Preamble to the Directive notes that the 'specific needs and particularities of the situation' of refugees should be taken into account in the integration programmes provided for them.<sup>149</sup>

Articles 24 to 35 of the Directive allow the beneficiaries of international protection residence permits, travel documents, access to employment and education, necessary social assistance and health care as provided to the nationals of the Member State in question, access to accommodation under equivalent conditions with other legally residing third-country nationals, free movement within the Member State and access to integration facilities. These rules provide access to support services only to persons who have been granted protection, however, not to asylum seekers, as the Convention requires. As the Directive is based on the Common European Asylum System, which includes the approximation of rules on the recognition of refugees and the content of refugee status, the requirements laid down by the Convention Article 60 (3) would be directed at the EU, were the EU to accede to the Convention.

147 Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents OJ L 16, pp. 44-53.

148 Recital 30.

149 Recital 47.



The Reception of Applicants Directive (recast) (2013/33/EU),<sup>150</sup> Article 24 contains provisions on applicants in need of special procedural guarantees. The Member States are obliged to assess the need of such guarantees. The Preamble to the Directive notes that certain applicants may need procedural guarantees in the asylum procedure due to, inter alia, gender, sexual orientation, gender identity, or as a consequence of serious forms of psychological, physical or sexual violence. Such applicants should be granted adequate support, including sufficient time, in order to create the conditions that are necessary for presenting and substantiating their application for international protection.<sup>151</sup> Where adequate support cannot be provided for an applicant in need of special procedural guarantees in the accelerated or border procedures, such applicant should be exempted from those procedures.<sup>152</sup> The national measures for identification of signs of serious acts of violence, including sexual violence, may be based on the so-called Istanbul Protocol.<sup>153</sup> For ensuring substantive equality between female and male applicants, examination procedures should be gender-sensitive and make it possible for them to speak of experiences of gender-based persecution, and the complexity of gender-related claims should be properly taken into account in procedures based on safe third country, safe country of origin or subsequent applications.<sup>154</sup>

Directive 2013/33/EU,<sup>155</sup> Chapter IV, contains more detailed provisions concerning vulnerable persons and the assessment of vulnerability. Member States are to take into account the specific situation of vulnerable persons, among other persons who have been subjected to serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation and assess their special reception needs (Articles 21 and 22 of the Directive). Victims of torture, rape and other serious forms of violence are to be ensured necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care, and those who work with them are to continue to receive appropriate training concerning their needs (Article 25(4)). The requirements of Article 60(2) of the Istanbul Convention on gender-sensitive interpretation of the asylum grounds are thus recognised under EU law, and their application would be under the monitoring system of the Istanbul Convention, were the EU to accede to it.

Article 61(1) of the Convention requires that the States Parties take necessary measures to respect the principle of non-refoulement<sup>156</sup> in accordance with existing obligations under international law. The Explanatory Report states that the principle of non-refoulement has acquired the status of customary international law and thus applies to all states. Article 60(2) obliges the States Parties to take necessary measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, must not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.

The principle of non-refoulement is recognised under Article 78(1) TFEU, as well as under Articles 18 and 19 of the European Charter of Fundamental Rights. The Return Directive (2008/115/EC)<sup>157</sup> sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals. Under Article 9(1)(a) of the Directive, the Member States are to postpone removal of an illegal migrant when it would violate the principle of non-refoulement. The Directive does not contain specific provisions concerning victims of violence against women in need of protection and at risk of being

150 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

151 Recital 29.

152 Recital 30.

153 Recital 31.

154 Recital 32.

155 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

156 The principle of non-refoulement is a key principle in refugee law. It forbids returning a victim of persecution to a territory where his or her life or freedom could be threatened.

157 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

subjected to torture or inhuman or degrading treatment or punishment. It is difficult to assess whether the general reference to the principle of non-refoulement in EU law, combined with the Member States' non-refoulement duty, would fulfil the obligations of the EU if the EU were to accede to the Istanbul Convention. In any case, EU standards for returning illegal migrants would in that case be overseen by the monitoring mechanism of the Convention in this respect.

### *2.3.9 Chapter VIII: International cooperation (Articles 62-65)*

The Istanbul Convention's general principles on international cooperation require that the States Parties cooperate with each other in civil and criminal matters for the purpose of preventing, combating and prosecuting crimes under the Convention, in protecting and providing assistance to victims, in investigations or proceedings, and enforcing civil and criminal judgments. The Parties must take measures to ensure that victims who reside in the territory of another State Party may make a complaint in the state of residence. If a Party asks for extradition or enforcement in a matter under the Convention from a Party which is not bound by a treaty to do so, the Convention may be considered the legal basis for mutual legal assistance. Parties must integrate prevention and fight against violence against women and domestic violence in assistance programmes with third states. Information on a person being at risk of rape, forced marriage, female genital mutilation and forced abortion or sterilisation in the area of another party is encouraged to be transmitted, and Parties are to inform other Parties on the final result of the action under the chapter. Personal data is to be stored pursuant to the obligations under the European Council Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; among the EU Member States, the cooperation required is guaranteed by the EU regulation, but in relations with third countries the EU competence to regulate needs to be examined. The EU may, under Title VI TFEU, establish 'all appropriate forms of cooperation' with the Council of Europe (Article 220), but establishing such cooperation is to be implemented by the High Representative of the Union.

### *2.3.10 Chapter IX: Monitoring mechanism*

The Istanbul Convention monitoring procedure takes place through reporting to the group of experts (GREVIO), consisting of 10 members (or 15 members after 25 ratifications or accessions) and working under rules of procedure adopted by the GREVIO itself. The members are chosen for their recognised competence in the issues under the Convention and they should represent the main legal systems as well as relevant actors and agencies in the field. The election procedure is determined by the Committee of Ministers of the Council of Europe with the consent of the parties. Parties submit to the CoE Secretary General a report based on a questionnaire prepared by the GREVIO, and the reports are considered by the GREVIO. Non-governmental organisations may inform the GREVIO, and receive information from the CoE Commissioner for Human Rights and the Parliamentary Assembly. Country visits may be organised where information is insufficient. The GREVIO prepares a draft country report on which the party may comment, and the report and the conclusions are sent to the Committee of the Parties, which may adopt recommendations concerning the Party. Special reports may be requested in cases of serious violations. The GREVIO may adopt general recommendations on the implementation of the Convention. National parliaments are invited to participate in the monitoring of the measures, and the reports of the GREVIO are submitted to national parliaments.

As the monitoring is based on conclusions made public and available to the parliaments of the parties, monitoring where the EU is in question would be done through gathering information and by reporting the findings to the European Parliament. Problems pointed out by the EU Court of Justice in the context of accession to the ECHR (that the monitoring body could interpret EU fundamental rights in a manner that is not prescribed by the TFEU) are not very likely to appear, as there is no individual complaints mechanism involved. General recommendations seldom contain interpretation of rights of the type that the EU Court of Justice feared when it criticized the draft document on EU's accession to the ECHR.

### 2.3.11 Chapter X: Relationship with other international instruments (Article 71)

The Istanbul Convention does not affect obligations arising from other international instruments by which parties are bound. The States Parties may conclude bilateral or multilateral agreements on the matters under the Convention, for the purpose of supplementing, strengthening or facilitating the principles embodied in it. The same principles would apply to the EU.

### 2.3.12 Chapter XI: Amendments to the Convention (Article 72)

Amendments to the Istanbul Convention may be taken by the proposal of a State Party, including the EU (were the EU to join the Istanbul Convention), and an amendment to the text will be presented by the Committee of Ministers of the CoE for acceptance by the States Parties. The proper procedure for proposing amendments to international law instruments has to be followed under EU law.

### 2.3.13 Chapter XII: Final Clauses (Articles 73-81)

The Istanbul Convention provisions do not prejudice internal law and binding international instruments currently in force. Disputes on the application or interpretation of the provisions of the Convention are to be peacefully settled, and the Committee of Ministers of the CoE may establish procedures of settlement to be available for the consenting parties in dispute; no contradiction with EU law seems to be present here. The Convention is open for signature by Member States of the CoE, non-Member States which participated in its elaboration, and the EU. The Convention entered into force on 1 August 2014, when it had garnered 10 signatories. For new signatories the Convention comes into force three months after ratification. The Committee of Ministers of the CoE may, by unanimous consent of the Parties to the Convention, invite new Parties to accede. The EU Member States may specify the territory to which the Convention applies. Reservations to the Convention are allowed in specific cases concerning certain provisions of the Convention. These concern state compensation, the jurisdiction clauses, *ex parte* and *ex officio* proceedings, statutes of limitation and residence status. EU Member States may provide non-criminal sanctions for psychological violence and stalking. These reservations are caused by lack of agreement among the drafters. The reservations are reviewed and have validity for five years after they have been given, after which they will relapse unless expressly renewed. Any party may denounce the Convention.

## 2.4 Conclusions: added value of accession

The EU received the mandate to accede to human rights conventions, as well as to conclude other international agreements, with the Lisbon Treaty. So far, the capacity to accede to human rights conventions has been used sparingly. The EU has thus far only acceded to one international human rights convention, namely the UN Convention on the Rights of Persons with Disabilities. Under Article 216(1) TFEU, the EU has the external competence to conclude international treaties where the agreement is necessary to achieve one of the objectives referred to by the Treaties, or is likely to affect common rules by the EU in international law. The objective of the Istanbul Convention (to combat violence against women and domestic violence by preventing such violence, protecting its victims and punishing perpetrators) is related to two objectives of the EU: to promote gender equality and combat discrimination on the grounds of sex, and to combat crime.

The main legal argument against the EU accession to the Convention could be that the EU competence in the area of criminal law is relatively limited, while the Istanbul Convention requires the States Parties take legislative means to combat certain crimes. Taking into account the ambition and commitment of the EU to combat sex discrimination and the well-documented damage that violence against women and domestic violence causes for EU citizens and persons residing within the EU, as well as the economic consequences of such violence, an approximation of criminal law on these issues in the future could well

be undertaken, provided the political will to do so exists. At the moment, the EU may not have competence to fulfil some of the substantive law requirements under the Istanbul Convention.

The lack of competence to fulfil certain obligations does not prevent the EU's accession to the Convention. The EU has exclusive or shared competence in many issues under the Convention. It would be important for the objectives of gender equality and freedom from violence that EU law on these issues is interpreted in the manner required by the Convention, as the Convention offers a consistent and comprehensive framework for interpretation not only to Member State jurisdictions but also to the Court of Justice of the European Union. The requirements under the Istanbul Convention are not alien to EU law as it stands, as there is a strong connection between the fundamental rights of the EU and human rights under the EHRC, as interpreted by the ECtHR, which in many ways has formed the basis of the Istanbul Convention.

Not all Member States have ratified or even signed the Convention yet, but that does not prevent EU accession. The added value of accession would lie in binding those Member States that have not ratified to the extent of EU competence. Similarly, the UN CRPD had not been ratified by all EU Member States at the time of EU accession to that Convention. The ratification document would define the EU commitment to the Istanbul Convention in a similar manner to the ratification of the CRPD.

Moreover, added value of accession would rise from the use of the Convention as a standard for interpretation of EU law. If the Convention were to be applied and monitored as EU law, it would have greater effectiveness than it might have as a human rights standard for EU Member States. As many Member States have ratified the Convention or intend to do so, the monitoring through country reports will in any case concern matters in which the Member States implement EU law.

A comparison of the obligations under the Convention with EU law requirements shows that there are important areas of coincidence, not only concerning the main objectives of the Convention and EU law, but concretely, in issues concerning the rights of crime victims, and requirements concerning victims of gender-based crime in the context of immigration and asylum in particular.

Many of the obligations of the States Parties to the Istanbul Convention do not require legislative measures. The EU already has policies on violence against women and domestic violence. Monitoring procedures and international cooperation required by the Convention could give added value to EU policies by making them more comprehensive and coordinated. As the EU has promoted policies concerning violence against women in its external relations and accession processes, the added value of joining the Convention would be to provide a common framework for both internal and external policies.

### 3 Comparative analysis of national law

#### 3.1 Introduction

The comparative analysis of the national law of 28 EU Member States was carried out by means of a questionnaire given to the members of the EU gender equality law network. The questions asked concentrate on issues with special EU relevance, being related either to the steps taken in the Member States to join the Istanbul Convention, or due to a connection to EU law.

The comparative analysis is based mainly on the answers received from the experts, the Convention's requirements in the light of the Explanatory Report to the Convention and, to some extent, EU law obligations. Most questions presented to the experts relate to specific clauses of the Convention. The analysis is structured as follows: the Convention provision is discussed, and then answers given by national experts to a question related to that provision are presented.

#### 3.2 Variations in policies on gender-based violence among EU Member States

When considering the differences in national policies concerning gender-based violence within the EU, it should be kept in mind that national policies in the original and enlarged EC and EU Member States in combating violence against women have not followed identical paths, and that a considerable variation among the Member States still exists.

In many early European Community Member States national demands for reform were presented from the 1970s on: for shelters, for criminal law amendments and preventive measures. However, few governments introduced reforms in the following years. **Ireland** and the **United Kingdom** had strong political movements against gendered violence, and introduced criminal law amendments. **Austria** legislated against domestic violence, and in **Sweden** the Government's gender equality policies also covered violence against women. The law on sexual crimes, rape in particular, was eventually amended in most Member States of the then European Communities, with the exception of **Germany** and **Italy**.<sup>158</sup>

Since the 1990s, many EU Member States have adopted policies aimed at combating violence against women, often motivated by international human rights developments. The EU has had an impact on the development in various ways. It has become difficult to distinguish between domestic and international initiatives for reform, however, as EU policies against violence are often welcomed and made use of by national NGOs and policymakers. For some Member States that joined the EU in the 2000s, such as **Poland** and **Romania**, the issue of domestic violence became part of the monitoring framework for EU accession, whereas other candidates such as **Bulgaria**, **Croatia** and **Hungary** were not similarly monitored. Accession countries were in some cases expected to implement soft law measures on violence against women.<sup>159</sup> The EU Daphne funding was opened to project partners from the Central and Eastern European accession states from 2000,<sup>160</sup> and an increasing number of organisations from accession states were funded. Almost 20 % of the Daphne project funded in 1997-2004 dealt with legislation, often by assessing national law or lobbying for legislative reform.<sup>161</sup>

The drafting of the Istanbul Convention was preceded by Council of Europe action, partly at the level of CoE Member States which carried out national legal and policy measures. The Council of Europe Task

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158 Montoya, C. (2009), 'International Initiative and Domestic Reforms: European Union Efforts to Combat Violence against Women' *Politics and Gender* 5, pp. 325-348, p. 336.

159 Krizsan, A., Popa, R. (2010), 'Europeanization in Making Policies against Domestic Violence in Central and Eastern Europe' *Social Politics* 17 3, pp. 383-385.

160 Montoya, C. (2008), 'The European Union, Capacity Building, and Transnational Networks: Combating Violence Against Women Throughout the Daphne Program' *International Organization* 62, pp. 383-385.

161 Montoya, C. (2008), 'The European Union, Capacity Building, and Transnational Networks: Combating Violence Against Women Throughout the Daphne Program' *International Organization* 62, pp. 364, 366.

Force to Combat Violence against Women, including Domestic Violence monitored a large-scale campaign for a stronger implementation of Recommendation Rec(2002)5 on the protection of women against violence. While many CoE Member States took measures, the campaign brought to light the need for harmonised standards for the Council of Europe, and finally brought about the need to adopt a binding convention.

The Council of Europe gathered data on the prevalence of violence against women, both from administrative sources<sup>162</sup> and by surveys, and also published a study on legislation concerning violence against women in all CoE Member States.<sup>163</sup> The Council of Europe has also carried out evaluations on the implementation of Recommendation Rec(2002)5 in the CoE Member States. The third round of evaluation<sup>164</sup> showed that legislative reforms had come to a standstill, and that relatively few cases were actually prosecuted. Even the progress in providing services for women's safety and recovery was meagre. The report, which contributed towards the adoption of the Istanbul Convention, presented an analysis on the typology of domestic violence laws then in force in the CoE Member States.<sup>165</sup>

In the EU, the European Institute for Gender Equality (EIGE) now collects similar information on legislation on gendered crimes (legal definitions of gendered crimes in the Member States) and a study of the cost of such crimes.<sup>166</sup> The Fundamental Rights Agency (FRA) has carried out a survey on the prevalence of violence against women in the EU Member States.<sup>167</sup> The results of the FRA survey show that violence against women and domestic violence is 'an extensive human rights abuse that the EU cannot afford to overlook'. The survey results provide 'ample support for EU Member States to ratify' the Istanbul Convention, and for the EU to explore the possibility of accession.

The Member States policies differ as to the national attitude to gender neutrality. In **Spain**, for example, the specific legislation on violence against women is gender specific and targets women victims. In **Sweden**, specific legislation has been introduced for violence against women, but a similar provision also gives protection for men. In many or most Member States, legislation adopted in order to combat violence against women is given in gender neutral terms. The Istanbul Convention (as well as the CEDAW Convention) is targeted at promoting the rights of women, but does not require implementation by gender specific legal provisions. The Istanbul Convention may thus be implemented by gender neutral norms. The Explanatory Report to the Convention explains that the drafters agreed that, in principle, the provisions based on the Convention should be gender neutral, but that the States Parties are not prevented from introducing gender specific provision.

In some Member States, the provision of shelters and other victim support measures are targeted at women, and the strong emphasis on targeting women has been criticised for neglecting provision on

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162 Ruuskanen, E., Aromaa, K. (2009), *Administrative data collection on domestic violence in Council of Europe member states*. Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI) and Directorate General of Human Rights and Legal Affairs, Council of Europe, Strasbourg.

163 Council of Europe EG (2009), *Legislation in the Member States of the Council of Europe in the field of violence against women: Volumes I-III*, Strasbourg [http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/EG%282009%293-vol1\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/EG%282009%293-vol1_en.pdf); [http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/EG\(2009\)3-vol2\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/EG(2009)3-vol2_en.pdf); [http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/EG\(2009\)3\\_fr.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/EG(2009)3_fr.pdf) accessed 4 August 2015.

164 Hagemann-White, C. (2010), *Protecting women against violence: Analytical study on the results of the third round of monitoring the implementation of Recommendation Rec(2002)5 on the protection of women against violence in the Council of Europe member states*. Directorate General of Human Rights and Legal Affairs, Council of Europe, Strasbourg.

165 Hagemann-White, C. (2009), *Typology of Domestic Violence Laws in Council of Europe Member States – a Preliminary Overview*. Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO), CAHVIO 13, [http://www.coe.int/t/dghl/standardsetting/convention-violence/CAHVIO/CAHVIO%20\\_2009\\_13%20%20e.pdf](http://www.coe.int/t/dghl/standardsetting/convention-violence/CAHVIO/CAHVIO%20_2009_13%20%20e.pdf) accessed 4 August 2015.

166 For legal definitions, <http://eige.europa.eu/gender-based-violence/legal-definitions?page=4> and for administrative data sources, <http://eige.europa.eu/content/document/administrative-data-sources-on-gender-based-violence-against-women-in-the-eu-report>.

167 Violence against Women: an EU wide survey. Main results European Agency for Fundamental Rights, 2014 [http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf), accessed 11 July 2015.



support services for victims of domestic or sexual violence, or support for violent men. On the other hand, in some Member States, for example in **Finland** and in the **Netherlands**, the support services including shelters are gender neutral in the sense of being open for both sexes. The Istanbul Convention, as well as the CEDAW Convention, clearly emphasise the need to protect the rights of women. Gender neutral legislation may have a gendered impact, which would displace the special attention to the needs of women. Thus, the choice to use gender neutral legal solutions should be combined with a gender impact assessment.<sup>168</sup>

EU gender equality law, Directive 2004/113/EC, allows the provision of separate services on certain conditions. These conditions are fulfilled where support services to victims of gendered violence are in question, as the victims of such crimes may require gender sensitive support. Under EU law, establishing services that are available to one sex only may require that similar services are established separately for both sexes.

### 3.3 Signature and ratification of the Istanbul Convention by EU Member States

By 4 December 2015 the Istanbul Convention had been signed by 38 members of the Council of Europe, of which 20 had ratified the Convention. 24 EU Member States had signed, and 12 EU Member States had also ratified it. The ETA states **Iceland** and **Norway** had also ratified the Convention.

So far, EU Member States **Austria, Denmark, Finland, France, Italy, Malta**, the **Netherlands, Poland, Portugal, Slovenia, Spain** and **Sweden** have ratified the Convention, and **Belgium, Croatia, Cyprus, Estonia, Germany, Greece, Hungary, Lithuania, Luxembourg, Romania, Slovakia**, and the **United Kingdom** have signed it. According to national experts, several Member States that so far have signed the Convention have also taken some steps towards ratification.

The stage of the process towards becoming States Parties to the Convention and the measures undertaken for ratification vary considerably, however. Some EU Member States have had policies for combating violence against women, or policies against domestic violence in place for decades, while other Member States have tackled the problem much later. Some Member States have paid considerable attention to domestic violence, but less to other forms of gendered violence. For example, **Austria, Bulgaria, Cyprus, France, Greece, Malta, Poland, Portugal** and **Slovenia** have adopted specific acts aimed at domestic violence. The scope of domestic violence may in some cases cover even acts of sexual violence, however. The **Polish** Law on counteracting family violence, for example, covers acts that endanger sexual freedom, but only between family members, which does not include ex-spouses or ex-partners. The provision of victim services often concentrates on victims of domestic violence. For example, in the **Netherlands** 'Safe at Home' centres are established for victims of domestic violence. Some Member States, such as **Spain**, have adopted legislation aimed at more comprehensive protection against gender-based violence. Criminal law provisions on gender-based violence (rape, other sexual crimes, stalking and harassment) have also been amended or adopted in many Member States.

Member States seem to be motivated to introduce policies on violence against women for different reasons, as some Member States have been motivated by internal pressure, and in others external pressure to introduce policies has been prevalent.<sup>169</sup> The preparedness to proceed with the ratification and implementation of the Convention has an impact on how detailed the assessment of the need to change national legislation and policies is expected to be. Many Member States have adopted new legislation on issues under the Istanbul Convention during the time that the Convention was being negotiated.

<sup>168</sup> For an EU guide on gender impact assessment, see for example *A Guide to Gender Impact Assessment*, <http://ec.europa.eu/social/BlobServlet?docId=4376&>, accessed 4 August 2015.

<sup>169</sup> Montoya, C., (2013), *From Global to Grassroots: The European Union, Transnational Advocacy, and Combating Violence against Women*, Oxford University Press.



Participation in the negotiation process may have made national Governments recognise a need for legal amendments.

For example **Cyprus** has not yet ratified the Istanbul Convention, but has a relatively long experience of combating domestic violence. **Cyprus** enacted the Violence in the Family Act (No. 47(I)/1994) two decades ago, and replaced that with a new Violence in the Family (Prevention and Protection of Victims) Act (No. 119(I)/2000), amended in 2004 (No. 212(I)/2004) and complemented by legislation to protect witnesses, namely the Protection of Witnesses Act (No. 119(I)/2002). **Spain** introduced comprehensive protection against gender-based violence in 2004 (Law 1/2004), which has been assessed as one of the best laws combating violence against women. **Sweden** introduced national policies in the 1990s, and gender-based violence has held a central position in Swedish gender policies since then.

Special attention to domestic violence has often led to special legislation that is not incorporated in the main body of criminal law or criminal procedure. For example, in **Greece** a comprehensive set of legal provisions was adopted on domestic violence. The substantive and procedural matters under the Act fall within the scope of several 'ordinary' legal codes: the Penal Code, the Civil Code, the Code of Penal Procedure, and the Code of Civil Procedure, but most of the provisions of the special legislation are not incorporated into these codes, or follow their system. Lawyers and judges are not always aware of the special legislation. The provisions are not easy to apply, as it is not always clear how they relate to general legislation.

In some Member States, gender-based violence has come to the attention of political decision-makers through international programmes. For example, violence against women, or gender-based violence, has become a major topic in need of attention in **Estonia** partly due to a Norway Grants programme on domestic and gender-based violence, which has activated Estonian NGOs and politicians to tackle the issue, leading to Government strategy (Development Strategy for Preventing Violence 2015-2020) to reduce violence against children, domestic violence and trafficking in human beings.

As noted in Chapter 2, many requirements under EU law coincide with those under the Convention. The Victims Directive in particular obliges Member States to provide services to the victims of crime, and pays special attention to victims of gender-based violence. As the questionnaire issued to national experts did not concentrate on the implementation of the Victims Directive, the reasons related to the implementation of the Directive for introducing certain support services to victims are not explained in the national reports. It seems obvious, however, that the EU Directive has motivated Member States to legislate on services that are required both by the Directive and by the Istanbul Convention, especially when the Member State in question does not plan to ratify the Convention at present.

Each state follows its legal, often constitutionally given, provisions on adopting international obligations. In civil law countries this happens mostly by a decision of the Parliament, but in common law countries the Government often has the power to ratify international treaties. The legal traditions of states also vary as to how the adopted obligations are implemented into the national legal system. In the monistic legal tradition, ratification of an international law instrument means that the contents of the instrument are incorporated into national law, with the effect that the international law may be directly applied after ratification. **Malta**, a dualist state, passed the Ratification (Council of Europe Convention on Prevention and Combating of Violence against Women and Domestic Violence (Ratification) Act) in 2014, whereby via Article 5 the Convention was incorporated into Maltese law and became enforceable. In the dualist tradition, the international instrument needs to be translated into national legislation in order to be applicable as valid law. An interministerial committee was set up to ensure proper implementation of the Convention and is to submit recommendations to the Government for that purpose. The ratification process thus is more complicated when the dualist tradition is followed, as national legislation needs to be monitored and amendments made to provisions considered to be in violation of the obligations introduced by the international instrument.

The question as to whether full conformity of national law with the international obligations is to be gained before ratification is answered differently in different jurisdictions. Some EU Member States try to have the legal modifications and other measures needed for compliance in place before ratifying an instrument. For example the **German** Constitution requires full conformity of German law with the international law instrument before ratification. Others allow such modifications to be made after ratification.

The national ratification process is more complicated for federal states or states where autonomous areas may have competence over issues within the international instrument. Among the Member States that have signed but not ratified the Istanbul Convention, there are federal states where ratification needs to be carried out by all federal states or entities. For example, the **Belgian** ratification requires the ratification of all federal entities, as each of them has jurisdiction for certain issues under the Istanbul Convention. The ratification process that started in 2013 has now reached a stage when it can proceed formally in the Parliament.

These differences have an impact on the time needed from signing to ratification in the Member States. Comparison of national measures taken for ratification of any international law instrument is for these reasons a complicated exercise.

Legislation was considered to be fully or mostly in compliance with the Convention obligations in the EU Member States that have already ratified the Istanbul Convention (**Austria, Denmark, Finland, France, Italy, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain** and **Sweden**). Many EU Member States among those that have already ratified the Convention have an established policy of legislative amendments and policies to eradicate domestic violence and violence against women (**Austria, Denmark, France, Spain** and **Sweden**). In some cases, the emphasis may have been only on domestic violence, while legal provisions on sexual violence and provision for victims of that type of violence have been less common.

For example **Austria** introduced the Domestic Violence Act (242/1996) two decades ago, and was the first European state to start to implement barring and restraining orders. National legislation in **Denmark** was considered to be already almost in compliance with the Istanbul Convention, with few new rules needed, in this case only criminal law provisions on the limitation period for initiating legal proceedings. **France** had introduced two acts in 2006 (Nos 2006-399 and 2010-769) to protect women against violence, but further legislation (No. 2013-722) was considered necessary for ratification. **France** also inserted provisions dealing with violence against women into the gender equality legislation (No. 2014-873 for Real Equality between Women and Men). **Italy** introduced new legislation for tackling domestic and sexual violence, and provided more severe sanctions, precautionary measures and improvements for the protection of the victim (Decree 14 August 2013, No. 93, converted in Act No. 119/2013), and further legislation after ratification introducing measures aimed at supporting victims of gendered violence. **Slovenia** ratified the Convention without introducing new legal provisions. **Spain** had introduced a legal framework earlier for protection against gender-based violence (Law 1/2004, of 23 December 2004), but a new law aimed at better protection of children in the context of gendered violence was introduced in 2015, after ratification of the Convention.<sup>170</sup> **Swedish** legislation was mainly considered to be in compliance with the Convention, but nevertheless amendments were made to the Criminal Code concerning forced marriage and stalking, as well as an amendment to the rules on residence permits.

On the other hand, **Greece** has signed but not ratified the Convention. An increase of acts of violence including violence against women has taken place since the onset of the economic crisis. A law commission was set up for the ratification recently, and the inadequacy and ineffectiveness of the law now in force on domestic violence has been criticised and the persistence of gender stereotypes at the root of violence has been highlighted at two hearings on gender violence in the Special Parliamentary Committee for Equality, Youth and Human Rights in May and June 2015. In **Estonia**, which has signed the Convention,

<sup>170</sup> Organic Law 8/2015, of 22 July 2015.

ratification is planned by the Violence Prevention Strategy for 2015-2020, which was approved by the Cabinet in February 2015. **Hungary** has signed the Convention, but there is a heated public debate about ratification, and measures that need to be taken, with left-wing politicians in favour of ratification and the ruling conservative party unwilling to introduce legislative amendments. **Ireland** has signed the Istanbul Convention, and the Minister for Justice and Equality in May 2015 stated that an assessment was underway on the actions needed for ratification. The necessary actions were to be included in the new National Strategy on Domestic, Sexual and Gender-based Violence, which is to replace the present strategy in the coming months.

**Germany** has signed the Convention, but the German Constitution requires full conformity with the Convention before ratification. The Federal Parliament discussed a draft law to the Criminal Code containing amendments required by several European law instruments, including the Istanbul Convention. The most controversial topic in **Germany** was and is the question of whether Article 36 of the Convention requires amendments to the definitions of rape and sexual assault in the Criminal Code. The Federal Ministry of Justice is investigating the issue, and a draft provision should be brought before the Parliament before the summer recess of 2015.

**Lithuania** has signed the Convention, and the ratification is being prepared by the Ministry of Social Security and Labour, the Ministry in charge of implementing national gender equality policies. There have been expressions of strong disagreement in the Parliament by conservative MPs, but there has also been political support for ratification. The mention of 'gender identity' under Article 4 (3), which secures implementation without discrimination on the grounds of sex and gender, is a matter of public debate amid claims that it would lead to formal recognition and wider protection of LGBT rights in **Lithuania**.

**Slovakia** signed the Convention in 2011, but has not ratified it. The Government declared its intention to ratify in 2012, and the new Government announced that ratification would take place in 2013. Since then, the ratification was to be incorporated as a part of the National action plan to prevent and eliminate violence against women for the years 2014-2019, and the ratification postponed to 2016 in order for legislation on domestic violence to be enacted. A draft on Gender-based Violence and Domestic Violence Act is under preparation; however, adoption has been postponed to 2016. Institutional reforms have been made, supported by Norway Grants.

Of the Member States which have not signed the Istanbul Convention, **Bulgaria** has not started any formal process towards accession. The **Bulgarian** Ministry of Justice has stated that a comparative analysis of Bulgarian legislation's compliance with the Convention is to be made. The **Czech Republic** is to decide soon whether or not the accession process will start. **Latvia** has not signed the Convention, but there has been some discussion in the Parliament on acceding. Policy papers to that effect are under preparation in the Cabinet of Ministers, and according to the Ministry responsible for the task there is a political intention to make amendments needed to put the national legislation in line with the Istanbul Convention before Latvian accession. For **Romanian** ratification, a Government Bill has been drafted and is being discussed by the Ministry of Justice before it is sent to the Parliament.

An overview of the state of play in the Member States as regards ratification of the Istanbul Convention is presented below.

## Countries that have ratified the Istanbul Convention

Country	Existing legal framework considered compliant?	New laws introduced?
<b>Austria</b>	Yes	No
<b>Denmark</b>	Yes	Limitation period under the Criminal Code prolonged
<b>Finland</b>	No	The Penal Code amended (introducing stalking and sexual harassment), Act on compensation for shelter providers from state funds introduced
<b>France</b>	No	The Penal Code amended (introducing forced marriage, sexual mutilation, abortion without informed consent)
<b>Italy</b>	No	The Criminal Code amended (introducing forced abortion, forced sterilisation and forced marriage), free legal aid for victims amended, stronger sanctions against and better protection of victims of violence against women
<b>Malta</b>	Yes, generally	Ratification Act
<b>The Netherlands</b>	Yes, generally	No
<b>Poland</b>	Yes, generally	No
<b>Portugal</b>	Yes	No
<b>Slovenia</b>	Yes	No
<b>Spain</b>	Yes	Yes. Organic Law 8/2015 of 22 July 2015 increases the protection of children in cases of gender-based violence
<b>Sweden</b>	Yes, generally	The Criminal Code amended (forced marriage, stalking provisions amended), special rules on residence permit amended

## Countries that have not ratified the Istanbul Convention

Countries	State of play: discussion about ratification and difficulties
<b>Belgium</b>	The IC was signed in 2012. The Federal Government is agreed upon ratification, but ratification requires that all federal entities assent to the ratification. The process has been completed recently
<b>Bulgaria</b>	The IC is not signed. The Ministry of Justice plans an analysis of compliance of Bulgarian legislation with the Convention. No political decisions
<b>Croatia</b>	The IC was signed in January 2013. The Committee for Gender Equality of the Parliament has discussed ratification, but ratification is not in the Parliament's agenda
<b>Cyprus</b>	The IC was signed in June 2015. The Council of Ministers decided to sign in April 2015 with reservations relating to state compensation to victims of discrimination, Article 44 on jurisdiction and Article 59 on residence status
<b>Czech Republic</b>	The IC is not signed. A decision in 2015 was expected on starting the ratification process
<b>Estonia</b>	The IC was signed in December 2014. The new Development Strategy for Preventing Violence 2015-2020 was approved in February 2015, and includes ratification of the Convention
<b>Greece</b>	The IC was signed in 2011, and Governments have since declared intention to ratify. The Act on domestic violence of 2006 is considered in need of amendment before ratification
<b>Germany</b>	The IC was signed in 2011, and Bill on amendments to the Criminal Code brought before Parliament in 2014. Controversies on IC Article 36 (rape) have held back the ratification process which should proceed soon.
<b>Hungary</b>	The IC was signed in 2014, but a debate on ratification is going on in the Parliament. The need to combat violence against men is set against 'feminist' policies, and financial effects are being discussed
<b>Ireland</b>	The IC was signed in November 2015, and the Minister for Justice and Equality has stated in Parliament that ratification should take place. An assessment of actions needed for ratification is being made
<b>Latvia</b>	The IC is not signed, and there have been Parliamentary debates on accession. A report on compliance with the IC is to be made by the Ministry of Welfare by the end of 2015, and a draft Bill on accession is to be prepared
<b>Lithuania</b>	The IC was signed in 2013, but the ratification process is pending in the Ministry of Social Security and Labour. There is controversy on the issue of accession in the Parliament, and a strong public debate as to whether provisions on 'gender identity' and 'gender' would lead to recognition of LGBT rights in Lithuania
<b>Luxembourg</b>	The IC was signed in 2011, and the ratification is mentioned in the Government Programme, but there has been no debate in the Parliament
<b>Romania</b>	The IC was signed in 2014, and the Ministry of Labour, Family, Social Protection and the Elderly has prepared a draft Bill for ratification. The approval by other ministries is required, before the Bill may be brought to the Parliament
<b>Slovakia</b>	The IC was signed in 2011. Governments have postponed ratification, and the present Government included the ratification (now planned for 2016) in the NAP to prevent violence against women for 2014-2019. A new act on gender-based and domestic violence is being prepared; however, its adoption was postponed to 2016.
<b>The United Kingdom</b>	The <b>United Kingdom</b> signed the Convention in 2012 but has not ratified it. The Joint Committee on Human Rights (JCHR) has warned that failure to ratify could harm the UK's national reputation. <sup>1</sup> Compatibility between the Convention and domestic criminal law is claimed to be necessary before ratification. The JCHR report was a part of an investigation towards ratification, but the recommendation to ratify is not binding on the Government.

1 Parliamentary question 18 March 2015 Commons 226663, 8 December 2014 Lords HL 3233. The JCHR Report of 19 February 2015 on Violence against Women and Girls.

### 3.4 Problematic areas in the context of ratification

Legislative amendments carried out in the Member States before ratification were often modifications of national penal codes, introduced in order to comply with the Convention obligation to criminalise certain acts. Forced marriage, female genital mutilation, forced abortion and forced sterilisation were often criminalised as explicitly defined crimes.

On the other hand, some Member States followed a more minimalistic legislative strategy and avoided criminalisation that introduced new explicit crimes where acts to be prohibited already fell under a more general crime definition, such as assault. For **Portugal**, the obligations under the Istanbul Convention were mostly fulfilled by national legislation, but the Portuguese Parliament discussed the need for specific incrimination of forged marriage and stalking, as well as changing the definition of rape. In **Finland**, the Government Bill for ratification aimed to avoid new criminal offences being added to the Criminal Code, if an act to be sanctioned, such as female genital mutilation, was already covered by a more general crime definition. The Parliamentary standing committee which reported the ratification act to the Parliament proposed that, in particular, the need for amending legal provisions on forced marriage should be followed up. **The United Kingdom** signed the Convention in 2012 but has not ratified it. There has been a debate in the Parliament on the basis of Parliamentary questions, and the Joint Committee on Human Rights has warned that failure to ratify could harm the UK's national reputation.<sup>171</sup> Compatibility between the Convention and domestic criminal law is claimed to be necessary before ratification. A review of criminal legislation is said to be underway for **England** and **Wales**, but not for **Scotland** and **Northern Ireland**. The JCHR report was a part of the investigation towards ratification, but the recommendation to ratify is not binding on the Government.

Most national experts reporting problematic areas in the context of ratification referred to criminal law issues, especially criminalising forced marriage, feminine genital mutilation, forced abortion and forced sterilisation. Controversies are rarely mentioned concerning organising comprehensive and co-ordinated policies or establishing and financing support services, although few Member States seem to have a legally guaranteed multi-agency cooperation, or to provide all the services required by the Istanbul Convention. Support services in many Member States are not only provided by NGOs but also lack state funding. For example, in **Estonia** a telephone helpline for victims was provided by the Norway Grants, and in **Slovakia**, a coordinating body was reputedly established on funding from Norway Grants. Many experts point out that the provision of support services is not at the level recommended by the Convention (which is that the provision fulfils Recommendation EG/TFV 2008(6) of the Council of Europe Task Force to Combat Violence against Women).<sup>172</sup> In all these cases, the funding of policies may not be on a permanent basis or at the level of the Recommendation.

Nevertheless, financing problems have been a key issue only in a few Member States, as only experts for **Cyprus**, **Finland** and **Hungary**, mention financing the required support services as a problem discussed in the debate on ratification. Providing the funding needed for covering the costs for shelters from the state budget raised a debate in **Finland**, as the funds for the purpose covered what was needed to compensate expenses for the present shelter providers, but were not sufficient for expanding the shelter network to fulfil the recommendation of the Council of Europe Task Force.

Ideological controversies are important both for the national decision to join the Convention and for the measures undertaken as a result of the decision. Policies on combating violence against women have, from the beginning, been met with resistance and attempts to discredit the claims of feminists. It has

171 Parliamentary question 18 March 2015 Commons 226663, 8 December 2014 Lords HL 3233. The JCHR Report of 19 February 2015 on Violence against Women and Girls.

172 EG-TFV (2008), 5 rev 1, *Final Activity Report of the Task Force to Combat Violence Against Women, Including Domestic Violence: Proposals for Future Action of the Council of Europe and its Member States to Prevent and Combat Violence Against Women*, paragraph 60, [http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/EG-TFV%282008%295-rev1\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/EG-TFV%282008%295-rev1_en.pdf), accessed 31 August 2015.

been argued that men are frequently victimised in domestic violence, and to concentrate on women as victims is therefore a mistaken policy. While the Istanbul Convention aims at reducing domestic violence, including violence against boys and men, it foregrounds violence against women. The Convention does not preclude gender-neutral legislation, however. For example, the study on the role of men in gender equality in Europe<sup>173</sup> stresses that, in international empirical research, violence is consistently a men's issue, and this is especially evident concerning sexual violence. Since the Daphne II programme, the EU funding programme has targeted perpetrators as well as victims of violence, and many national groups and programmes have aimed at a change in traditional male roles that foster violent behaviour. The need to extend support services to male victims of domestic violence was one of the recommendations of the study. There is considerable ambivalence within the men's movement, with clearly anti-feminist and pro-feminist attitudes, which may make it difficult to find support for the Istanbul Convention.

Few national experts refer to these controversies, although they exist in many European states. In **Finland**, the claim that men's victimisation in domestic violence is a silenced topic has been favoured by many activists in the men's movement, although the official gender equality policies stress the need to implement the Istanbul Convention. In **Hungary**, the ruling political parties emphasise the need to combat violence against men, and promote mediation as a method to solve cases of domestic violence. Domestic violence is seen as a feminist topic, which flavours political statements on the issue. Several cases of domestic violence have been documented in **Hungary** where police officers and child welfare services have threatened a woman victim with loss of custody on grounds of 'child endangerment'.<sup>174</sup> As divorce, child custody and visiting rights disputes often take place in the context of domestic violence, the issues often become entangled, and the men's movement in many European states demands equal treatment of the sexes both as custodians of children and as perpetrators of domestic violence. In **Poland**, the fundamental concepts of the Convention, such as gender and the structural character of violence against women have created controversies.

### 3.5 Data collection and research (Article 11 of the Istanbul Convention)

The Article reads as follows:

- 1 For the purpose of the implementation of this Convention, Parties shall undertake to:
  - a collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of this Convention;
  - b support research in the field of all forms of violence covered by the scope of this Convention in order to study its root causes and effects, incidences and conviction rates, as well as the efficacy of measures taken to implement this Convention.
- 2 Parties shall endeavour to conduct population-based surveys at regular intervals to assess the prevalence of and trends in all forms of violence covered by the scope of this Convention.
- 3 Parties shall provide the group of experts, as referred to in Article 66 of this Convention, with the information collected pursuant to this article in order to stimulate international co-operation and enable international benchmarking.
- 4 Parties shall ensure that the information collected pursuant to this article is available to the public.'

The States Parties to the Convention have the obligation (paragraph 1) to design and implement evidence-based policies and assess whether they meet the needs of those exposed to violence. The States Parties are to collect relevant disaggregated statistical data at regular intervals on cases of all forms of violence within the scope of the Convention. This means that statistical information is to target victims and perpetrators. Data should be disaggregated by sex, age and type of violence as well as by

173 European Commission (2013), *The Role for Men in Gender Equality – European Strategies and Insights*, pp. 104-119 contain a discussion on violence and recommendations on policies in the field.

174 Human Rights Watch (6 November 2013), *Hungary: Chronic Domestic Violence*.



the relationship of the perpetrator to the victim and geographical location (although the Convention leaves it to the States Parties to decide which categories are used in statistics). Relevant statistical data may include administrative data from health care and social welfare services, law enforcement agencies and non-governmental organisations, as well as judicial authorities. Such data may then be used for assessing the performance of the authorities. Official data meant for administrative use is not sufficient for the aims of the Convention. The Explanatory Report to the Convention refers to the Council of Europe study on administrative data collection on domestic violence in Council of Europe Member States, which identifies categories and designs a model for data collection.<sup>175</sup>

The Article (paragraph 2) creates the obligation to support research in the field of all forms of violence within the scope of the Convention. States Parties are to base their policies and measures on research-based information. The States Parties to the Convention are to conduct population-based surveys on violence. Such surveys are to be conducted at regular intervals in order that trends may be tracked. The States Parties may decide the sample size and regularity of such studies, as well as whether they are to be made at national, regional or local level. States Parties to the Convention are advised to refer to the WHO 'Multi-country Study on Women's Health and Domestic Violence against Women', as well as to the 'International Violence Against Women Survey' as models. The data should be collected and stored according to the standards on data protection contained in the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.<sup>176</sup>

The Article on data collection and research (paragraph 3) also relates to the monitoring system under the Istanbul Convention. The States Parties have the obligation to provide the GREVIO with information in order to stimulate international cooperation and enable international benchmarking, which is needed in order to identify good practices and contribute harmonisation across the States Parties.<sup>177</sup>

The fourth aim of the Article (paragraph 4) to gather data and support research is to make the collected data available to the public in the manner chosen by the State Party, while paying attention to the privacy rights of persons affected.<sup>178</sup>

The duties of States Parties to the Convention are not defined in detail, but carrying out these duties needs to have some binding basis in administrative law, as well as regular public financing.

Several EU Member States (**Croatia, Denmark, France, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Spain**) follow legally regulated measures in providing specific statistics and studies on violence against women (or at least on domestic violence).

The **Croatian** Act on protection against domestic violence obliges authorities to keep records in actions taken under the Act and report them, but the obligation does not cover offences prosecuted under the Criminal Code. The **Danish** action plan to combat violence against women provided statistics under the annual budget act. The **Greek** action plan (2009-2013) on preventing and combating violence against women was also based on an act, and provided for some data on such violence to be collected. The **French** national legislation (Décret 2013-07, 3 January 2013) relating to the inter-ministerial mission to protect women against violence also covers production of data and research. Similarly, **Italy** introduced Decree No. 93/2013 to provide for an annual data collection on cases of all forms of violence, but the plan has not yet been implemented. The data is to be collected at the Equal Opportunity Department, and to be coordinated with existing data. The Italian Decree states that the Home Office is to set out a criminological analysis of gender violence as a section of the Department's annual report to Parliament, but the analysis was missing from the report for 2013. The **Irish** National Office for the Prevention of Domestic, Sexual and Gender Based Violence has within its remit the duty to provide research and publications. In

175 Explanatory Report, recitals 74-76.

176 Explanatory Report, recitals 77-80.

177 Explanatory Report, recitals 80-81.

178 Explanatory Report, recital 82.

**Luxembourg**, legislation provides for the collection of data on domestic violence, but not on other types of gendered violence. The **Maltese** Domestic Violence Act contains a provision that incorporates the obligation to undertake data collection and research into national law. In the **Netherlands**, provisions under the Act on Youth Care in combination with provisions under the Act on Social Support oblige the 'Safe at Home' Centre to register its activities. Information on implementing family violence under the **Polish** Act on counteracting family violence is collected by the Ministry of Labour and Social Policy, the National Police Headquarters, and by the Ministry of Justice concerning criminal cases involving family violence. The **Portuguese** Act on Domestic Violence establishes a duty to report domestic violence statistically in connection with the Commission for Equality and Citizenship, and the **Slovenian** Family Violence Prevention Act stipulates how relevant statistical data is to be collected. The **Slovakian** Draft Act on Gender Based Violence and Domestic Violence contains an article on data collection. The **Spanish** Royal Decree on State Observatory on Violence against Women states that the Observatory must collect, analyse and periodically disseminate all available information on gendered violence.

National experts from **Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Romania, Sweden** and the **United Kingdom** say, however, that there is no special legislation on collecting data and doing specific research on the type of violence covered by the Istanbul Convention, even where such data is collected and studies made. Several experts say that statistical data is collected according to Government action plans within the bounds of the annual budget act. In **Austria**, a parliamentary enquiry into the two ministries responsible for data revealed that neither of them had plans for legislation on extended data analysis on domestic violence. Collecting and publishing criminal statistics is often regulated by legislation, as is the case under the **Estonian** Procedure of publication of criminal statistics, which contains general provisions on producing such statistics, but does not define the contents in a specific manner.

Special statistics and studies on violence against women and domestic violence are produced in many EU Member States, however. For example, in **France** the first major survey to identify and quantify types of gendered violence and the number of victims was made in 2000, and the need to update it has been inserted into an inter-ministerial plan to prevent and fight against violence against women adopted in 2013. Several **Finnish** bodies collect and publish information on various forms of violence, including violence against women. Data is collected, and victim surveys and special studies are produced by the Institute of Criminology and Legal Policy (which formerly functioned under the Ministry of Justice until it became a part of Helsinki University in 2014), Statistics Finland and the Police University College. All these are public services with the task of providing information on crime, but the exact contents of the data and research they are to produce is not defined by law. In **Ireland**, various agencies receive state funding for data collection, and research is in the remit of the National Office for the Prevention of Domestic, Sexual and Gender Based Violence. In **Germany**, the yearly published criminal statistics contain sex-disaggregated data as well as data on offences within the scope of the Protection Against Violence Act. In **Greece**, there is the collection of same data under Article 12(5) of Act 3500/2006, which requires that cases submitted to criminal mediation are registered. The National Action Plan on Preventing and Combating Violence against Women 2009-2013 provides for the development of tools such as indicators to be developed, and the General Secretariat of Gender Equality collects information. Police statistics for all investigated cases are gender disaggregated, but not so as to allow linking the gender of perpetrators and victims in gender-based crime.

The **Italian** Department for Equal Opportunities promotes research on violence against women as a part of its general activity and without a specific normative reference. **Latvia** at the moment regulates the national statistical production by legislation (State Statistics Law), but the contents of the statistical programme are defined by the Cabinet of Ministers Regulation on the yearly state statistical programme. The programme for 2015 establishes a duty to collect statistical data on violence against children, but not on other violence. In **Hungary**, a Proposal for Parliamentary Resolution in June 2015 on national action against domestic violence, also states that measures must be based on research, surveys and statistics, and their impact monitored regularly. In **Lithuania**, the Police department provides partial

information on the number of complaints related to domestic violence, and the number of investigations, sentenced people and victims. In the **Netherlands**, the police make an annual analysis of the extent, form and character of domestic violence on the basis of reported crime, the National Centre for Expertise on honour-related violence publishes overviews on honour-related violence, and the Prosecutor separately registers incidents of violence against women.

### 3.6 Support services (Articles 18, 20, 22, 23, 24 and 25 of the Istanbul Convention)

#### 3.6.1 *General obligation to provide mechanisms for cooperation between agencies (Article 18(2) of the Istanbul Convention)*

The paragraph reads as follows:

‘2 Parties shall take the necessary legislative or other measures, in accordance with internal law, to ensure that there are appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of this Convention, including by referring to general and specialist support services as detailed in Articles 20 and 22 of this Convention.’

The Convention in general promotes a comprehensive multi-agency approach to combating violence against women. The Convention requires the States Parties to the Convention to ensure that there are appropriate mechanisms in place to provide for effective cooperation among the judiciary, public prosecutors, law enforcement agencies, local and regional authorities and non-governmental organisations, and any other relevant actors in the field. The mechanisms refer to either formal or informal structures and methods that enable a standardised cooperation among the professionals. The best way to achieve the aim of the Convention is, according to the Explanatory Report, for the States Parties to provide a concerted coordination of the agencies involved with this aim as one of the general obligations under the Convention.<sup>179</sup>

To fulfil the requirement of a cooperation mechanism does not require that the States Parties to the Convention set up an official body for this purpose, or settle the rules for cooperation by means of legislation. The national experts were asked whether national legislation ensures such cooperation.

Some Member States (**Austria, Bulgaria, Finland, Lithuania, Portugal**) provide a regulatory basis for cooperation to protect victims of violence against women, or plan such regulation (**Germany, Slovakia, Sweden**). In **Austria**, victims of violent crimes may claim legal and psycho-social support by specialised advisers, and the police, prosecution and courts are required to inform victims of these rights and of the private organisations that provide the support, under Security Police Act Paragraph 25 Section 3 and Criminal Proceedings Act, Paragraphs 65 no. 1 a and b and 66 section 2. In **Bulgaria**, there is legislation on cooperation in domestic violence issues under Chapter 2, Articles 4 and 5 of the Regulation for the implementation of the Law on Protection from domestic violence. In **Finland**, most victim services have been delegated to municipalities as a part of the general municipal responsibility to arrange health and social services for the population under the Municipalities Act (365/1995). The Act on Social Services (1301/2014) defines nationwide equal standards for social services, and also the cooperation between municipal and other (often private) actors. Under the Act, social services are to be provided to meet the needs caused by violence in close relations and domestic violence as well as other violence and abuse, and every person who resides in a municipality has the right to receive services to meet his/her individual

<sup>179</sup> Explanatory Report, recitals 113-114.

needs in a case of emergency. The need for emergency services is to be assessed immediately. The Act on multi-professional cooperation obliges the authorities and individual social workers to cooperate with other authorities and actors. Further special legislation on various services defines, for example, the services for specific groups of people. There are experimental forms of cooperation on cases of gender-based violence under three different programmes, which aim at local social service and police cooperation in cases of domestic violence, but these are not covered by legislation. The municipal social and health services have been under reform, and there have been proposals for special regulation of the type of cooperation required by domestic violence. At the state level, the national Action Plan to reduce violence against women ran from 2010 to 2015, and consisted of measures that could be undertaken without special means, mainly through the cooperation of officials.

In **Lithuania**, the Law on Protection against Domestic Violence of 26 May 2011 provides strong links between police officers and prosecutors, as well as the police and specialised assistance centres. State and municipal institutions and NGOs are obliged to cooperate when implementing assistance measures. These measures include the special regulation used to evict a perpetrator, and the procedure that police officers must follow when encountering cases of domestic violence. The National Programme 2014-2020 on Support to Victims of Domestic Violence, adopted by the Government in 2014, contains further guidelines.

In **Poland**, the Law on counteracting family violence obliges the administration to cooperate with NGOs and religious organisations. Every municipality must establish an interdisciplinary team for actions against family violence. The interdisciplinary team implements actions defined in the community programme to counteract family violence and to facilitate the protection of victims. It also integrates and coordinates the actions of participating organs.

In **Portugal** cooperation between state agencies in protecting and supporting victims of violence is established by Law No. 112/2009, which involves the police, the national social security services, the Agency for Equality and Citizenship, public defenders and legal counsellors, employers and local entities. The cooperation is to be enhanced by a proposed amendment under discussion.

In **Germany**, so-called intervention protection were established in all states and many municipalities, with the main task to ensure cooperation between all state and other actors concerned. Some of these activities were established by resolutions by State Parliaments. The intention is to improve cooperation by political and administrative rather than legislative means. In **Sweden** a National Coordinator against violence in close relationships has been established, but the body is not a permanent structure. A proposal was made in 2014 to establish a permanent group at ministerial level, complemented at county and municipal level.

In **Ireland**, the national agency Cosc (National Office for the Prevention of Domestic, Sexual and Gender Based Violence) prepares the national strategy in these issues, and Section 8 of the Child and Family Agency Act 2013 provides for all child and family related services. In **Slovakia**, the Draft Act on Gender Based Violence and Domestic Violence contains provisions on obligations of the actors, on the coordinating body, and intervention team. In **Spain**, the national legislation on gendered violence created a Special Government Delegation on Violence against Women, which provides coordination and facilitates collaboration between all relevant agencies under Article 29 of Law 1/2004. Public authorities must develop plans that ensure effective action, which involves health and justice authorities, Security Forces, social services and equality bodies, under Article 32.1. In **France**, Décret 2013-07m 3 January 2013, creating the inter-ministerial mission to protect women against violence, created an inter-ministerial mission to work with local, regional and state agencies to coordinate their actions. At local (department) level commissions to combat violence against women have been established to implement state policy and coordinate action. In **Italy**, the 'Extraordinary plan against violence' was created by Decree No. 119/2013, Article 5. Paragraph 2 (2) provides a mechanism for the effective cooperation of relevant state

agencies, both local and central, and planned the creation of a National Observatory on violence against women.

Many EU Member States use legislative provisions for establishing cooperation between actors in the field, but the legislation does not necessarily cover all forms of gender-based violence, or all activities and relevant actors (**Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, France, Greece, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia and Spain**).

For example, the **Belgian** Police Function Act of 5 August 1992, Article 46 provides that police officers must put any persons asking for help in contact with specialised services, and in particular must assist victims by giving them relevant information. The **Bulgarian** Regulation for the implementation of the Law on Protection from Domestic Violence provides cooperation concerning cases of domestic violence, but not other forms of violence against women. The situation in **Poland** is similar. In **Cyprus**, an Advisory Committee for the prevention and combating of violence in the family was created by Law No. 202(I)/2004 (Article 7(1) of Law No. 119(1)/2000). The Committee consists of public and private sector representatives, and its functions consist of informing the public and the professionals about violence through conferences and educational programmes, promoting research on domestic violence, and monitoring the effectiveness of the services established for combating domestic violence. The **Czech Republic** has legislation on the collaboration of police and courts for assisting victims of all crimes. In **Denmark**, the Consolidation Act on Social Services No. 1093 of 5 September 2013, Section 19 obligates the municipal councils to provide counselling in respect to housing, finances, the labour market, education, day-care facilities, and the health sector. This counselling is initiated by the admission to accommodation facilities of a victim of violence or a family crisis. In **Estonia**, the victim support service under the Victim Support Act, Article 3(1) relies on police, medical and social services and other specialist networking to find support for victims of negligence, mistreatment, physical, mental or sexual abuse. Article 4(2) stipulates that the Social Insurance Board shall co-operate with state and local government authorities and legal persons in providing victim support services, involve victim support volunteers, and provide training for such volunteers. Networking has been developed by several projects, some of them supported by EU or CoE funding.

In **Malta**, the Domestic Violence Act, Article 4 requires the Commission on Domestic Violence to facilitate intervention by public and private agencies on domestic violence. The Act covers domestic violence, but not other crimes under the Convention. The violence even covers verbal violence, however, and domestic violence refers to violence against a member of the same household.

In the **Czech Republic**, the collaboration between the police and the courts is legally ensured (Act No. 273/2008 Coll., on the Police of the Czech Republic, Sections 44-47, and Act No. 292/2013 Coll., on special court proceedings, Sections 492-496). Collaboration between the police and victims organisations is provided for in Act No. 45/2013 Coll., on victims of crime, Section 3 (5). The collaboration here takes place in the context of removing a violent person from a common home. Coordination with social services and the police is laid down under Act No. 108/2006 Coll., on social services. In the **Netherlands**, the Act on Social Support, Article 4.1.1 requires municipalities to each establish a Centre for advice on and reporting of domestic violence and child abuse. As of 1 January 2015, these centres are referred to as 'Safe at Home' centres. In **Slovenia**, cooperation takes place on the basis of the Family Violence Prevention Act, under which authorities and organisations are to cooperate for protecting and supporting victims of violence. At the ministerial level, relevant Ministers are to ensure concerted action of these entities.

In **Luxembourg**, there is cooperation between state agencies concerning domestic violence, but not other types of violence under the Convention. In **Croatia**, there is no legislation ensuring cooperation, but the Ministry of Family has adopted a protocol on conduct for domestic violence, and the Office of Gender Equality has adopted protocols which require cooperation in sexual violence which oblige relevant state agencies and institutions to cooperate. In **Hungary**, there are guidelines for police, but they are poorly implemented, and there are no corresponding guidelines for prosecutors, judges, medical professionals

or social workers. The national expert for **Latvia** reports that there are no specific mechanisms of cooperation for the purposes of the Convention obligations, but the general legal framework provides cooperation between state agencies. In **Romania**, there is no cooperation in place or planned.

### 3.6.2 General support services (Article 20 Istanbul Convention)

The Article reads as follows:

- ‘1 Parties shall take the necessary legislative or other measures to ensure that victims have access to services facilitating their recovery from violence. These measures should include, when necessary, services such as legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment.
- 2 Parties shall take the necessary legislative or other measures to ensure that victims have access to health care and social services and that services are adequately resourced and professionals are trained to assist victims and refer them to the appropriate services.’

According to the Explanatory Report, the Convention makes a distinction between general and specialist support services. The general support services refer to public services such as social, health, and employment services, which provide long-term help and are not exclusively designed for the benefit of victims but for the public at large. The obligation contained in Article 20 requires welfare services such as housing, employment and unemployment services, public education and training services, as well as psychological and legal counselling services and financial support, for the specific needs of victims of the violence under the Convention. The Article stresses the particularly difficult situation and trauma of these victims, which should be addressed systematically. The Article aims at ensuring that the long-term needs of the victims for health and social services are responded to.<sup>180</sup>

The experts were asked about national law to ensure that victims have access to services that facilitate their recovery from violence, and further, if there is legislation, which services are provided from a list of psychological counselling, financial assistance, housing, education, training and assistance in finding employment.

The manner of providing general support services to victims of violence against women and domestic violence varies in the EU Member States depending on whether specific legislation or soft law measures are in place for these victims. Where that is the case, the support services offered may cover all types of services mentioned in the Istanbul Convention Explanatory report (as in **Croatia**, the **Czech Republic**, **Denmark**, **Finland**, **Greece**, **Ireland**, **Latvia**, **Lithuania**, **Slovakia**, **Slovenia**, **Spain**), or there is a plan for introducing such services (**Hungary**).

For example, in the **Czech Republic**, Act No. 45/2013 Coll., on victims of crime and Act No. 273/2008 Coll., on the police provide victims with specialist free assistance, including psychological and legal aid and restorative programmes. The police are to inform the victim about the available services. Specialised social counselling is provided under Act No. 108/2006 Coll., on social services. In **Croatia**, the Act on protection against domestic violence ensures access to legal and psychological counselling, housing, education, training and assistance in finding employment. In **Denmark**, Section 109 in the Consolidation Act on Social Services, No. 1093 of 5 September 2013, and amending Act No. 650 of 18 May 2015 obligates the municipal councils to provide housing, economic, employment, school, day care, health care and other services to victims, as well as to offer psychological treatment to children who stay at a facility for providing services. In **Finland**, the Act on Social Services obliges the municipalities to provide services to victims of crimes. In **Greece**, Article 21 of Act 3500/2006 and the Action Plan provide for 14 counselling centres staffed by a psychologist, social worker, lawyer and office clerk, 14 shelters set up by local authorities, and an SOS telephone helpline. There are 40 counselling centres at the moment, run by

180 Explanatory Report, recitals 125-127.



municipalities or the General Secretariat for Gender Equality. However, these structures are insufficient. In **Hungary**, the low level of protection and assistance to the victims is not much discussed, but the Proposal for Resolution of the Parliament submitted in 2015 refers to the need to ensure such support. In **Ireland**, Section 39 of the Health Act 2004 (as transferred to the Child and Family Agency Act 2013) provides funding for state agencies which provide services available to alleged victims of sexual violence.

In **Latvia**, state support services are provided both for victims and perpetrators under Articles 3(1)(3) and 3(1)(11) of the Social Services and Social Assistance Law. More detailed regulation is provided by the Cabinet of Ministers Regulation No. 790 on the procedure on the provision of social rehabilitation services for the victims of violence and for perpetrators. The Regulation ensures the victims a right either to individual consultation with a psychologist, lawyer or social worker, or 30 days of recovery in a social rehabilitation centre. The general framework provides housing, education, training and employment finding services. In **Lithuania**, the Law on Protection against Domestic Violence of 26 May 2011 provides a programme on Specialised Assistance Centres, adopted jointly by the Ministers of Health, Social Protection and Labour and the Interior. In **Slovenia**, the Family Violence Prevention Act names bodies (authorities, organisations and NGOs) responsible for offering help to the victims. The services include legal and psychological counselling, housing and financial assistance. In **Spain**, Law 1/2004, Article 27 provides special assistance to a victim of gendered violence. For economically constrained victims, a six-month subsidy may be provided if a victim of gender-based violence does not have an income or receives less than 75 % of the minimum wage. A disabled victim or victim with children may have 12, 18 or even 20 months of the subsidy of unemployment, depending on her circumstances. A victim of gendered violence has priority in the access to protected homes. Under Article 19(1)(2) of the act, women who are victims of gendered violence have the right to social services of the kind required under the Istanbul Convention.

Other Member States provide services only for some groups of victims. For example in **Germany**, the services financed by state subsidies under Social Codes No. 2 and No. 12 cover persons entitled to welfare payments or those who pay for the service themselves. The legislation covers counselling, financial assistance, housing, education, training and assistance in finding employment, but the services are not specifically designed to meet the special needs of victims of violence. Asylum seekers, students, and women victims with special needs are not covered. Legal solutions to the problem before ratification are sought by the Government. In **Estonia**, a victim who is involved in a criminal procedure or is a minor who has experienced sexual abuse or is a victim of human trafficking may receive services when needed under the Victim Support Act, Article 3(2); which lists services, including counselling, assisting in contacts with authorities, ensuring safe accommodation, health services, economic assistance and psychological and translation help. A draft law with legal amendments is currently being developed by the Government. The removal of these legal constraints is planned so that victim support services are available to a broader group of victims.

In **Luxembourg**, general services are available only to the victims of domestic violence. In **Malta**, Articles 4 and 9 of the Domestic Violence Act contain provisions on establishing bodies to provide services for both victims and perpetrators. The national social welfare agency for children and families in need (*Agenzija Appogg*) runs a Domestic Violence Service and a service for men, and in practice provides legal and psychological counselling and possibly legal aid. The *Appogg* also helps in matters of financial assistance, housing, education and training. The services listed under the Victims of Crime Act (Chapter 539, Laws of Malta) are meant for victims in general, and include psychological support, financial and practical advice needed as a result of being affected by crime, and a general reference to specialist services.

The provision of some services targeted at victims of violence against women and domestic violence may be available, but not all the support services mentioned in the Explanatory Report. In **Cyprus**, Law No. 119(1)2000, as amended in 2004, provides shelter and safe accommodation to victims. In **France**, the 4th inter-ministerial action plan to prevent and fight against violence to women contains procedures to be followed when a woman reports an act of violence against her. She is to be informed

of her rights and available services, such as social worker help. Psychological and legal counselling are services provided under the action plan. The **Italian** legislation offers services to victims as a part of the National Health System under the Act 23 December 1978 No. 833. The System provides local public gynaecological and other health services, and family counselling, social services, hospitals and first aid. The Equal Opportunities National Advisor and the net of local advisors are also available under Decree No. 198/2006. Organisations also offer support services. The Equal Opportunities Department has mapped the available services and established a help line service for information on them for the victims of violence. In the **Netherlands**, the Code of criminal procedure, Art 51a defines what is meant by 'victim', whom the Prosecution has to inform on possibilities of claiming compensation. The Act on Judicial Subsidies names the organisation 'Victim support the Netherlands' as the body to provide to victims and their relatives legal and practical support and short-term emotional support, and to refer the victims to bodies that offer services to the general public. The organisation is established by the Regulation on the Designation of the legal entity for victim support. Further, the victims may turn to the Safe at Home Centre, which is a body established for helping specific victims. Domestic violence includes all forms of violence at home; thus against women, men, children, and elderly people.

In **Poland**, under the Law on counteracting family violence medical, psychological, legal, social, professional and domestic consultation is available for victims of domestic violence. **Portuguese** law also specifies services to victims of domestic violence who, under Law No. 112/2009, Articles 20 and 22, have the right to specific protection measures adequate to their particular situation. Victims in economically distressed situations may receive legal counselling and support free of charge. In **Slovakia**, an amendment Act on social services (Act No. 448/2008 Coll. On Social Services) that came into force in January 2014 introduced gender-based violence as a situation in which a person and his/her family is at risk and which requires immediate action by social services. The amended act provides social services in emergency accommodation for a special target group such as those at risk from domestic violence or gender-based violence. The Act No. 327/2005 Coll. On Provision of Legal Aid for People in Material Need guarantees the right to legal aid free of charge to victims who meet the conditions.

In some Member States, many of the services required by the Istanbul Convention are provided for the population in general, as a part of national health and social services, and services targeted at crime victims cover only circumstances that are directly caused by crime. In **Austria**, health and recovery services are provided under general statutory social security rules under the General Social Security Act which have a very high coverage for all residents. There is an additional compensation for crime victims under the Crime Victims Act, which gives a right to compensation to EU citizens or persons with a minimum of five years of EU residence. No specific unemployment, housing or financial assistance exist, but information on the general services is available at information centres. In **Belgium** the public offices for Social Welfare provide social assistance to all citizens under the Act of 8 July 1976. Law centres are responsible for general information on services to crime victims, under Criminal Procedure Code Article 3bis. These centres are municipal, but other support services are organised by federate authorities and not under national legislation; and it is NGOs that organise such targeted services. The **Finnish** social welfare legislation delegates provision of social services to municipalities, which offer a diverse number of services of varying quality on a general basis and, in general, the right of victims to receive general support services follows the general rules. The right to health care services, housing, social assistance and education are based on universal rules. Legal counselling and assistance at court proceedings is provided free or partly free by state legal aid offices, depending on the economic situation of the victim. A support person for a victim of domestic, sexual or severe violence, paid for from state funds, may be nominated by the court. Special victim services are provided by NGOs, but they are often publicly funded. Such services are also available, to an extent, for the perpetrators. In **Sweden**, national law ensures victims access to services, but health care services are provided for all residents in the country. The Social Assistance Act Chapter 5 Sec. 11 contains rules on the right of all victims to support. For the implementation of the Social Assistance Act and the Health Care Act, rules and guidelines concerning violence in close relations are given by the National Social Authority. The right to legal counselling and financial assistance in relation to legal claims has been established and housing and financial assistance is offered on a universal basis

to any resident in need. No special rules on education or assistance in finding employment for victims of crime have been made, but these services are offered on a universal basis to all.

The **Romanian** law No. 217 of 22 May 2003 on the prevention of and combating violence in the family contains what the national expert considers to be declaratory provisions on the right of the victims to services, as well as the structures to provide these services.<sup>181</sup> These rights and services are not ensured or available in practice, however. In the **United Kingdom**, there are some such services, but no right to obtain them exists.

### 3.6.3 Assistance in individual/collective complaints (Article 21 Istanbul Convention)

The Article reads as follows:

‘Parties shall ensure that victims have information on and access to applicable regional and international individual/collective complaints mechanisms. Parties shall promote the provision of sensitive and knowledgeable assistance to victims in presenting any such complaints.’

Under the Article, the States Parties to the Convention have the obligation to ensure that victims have information on and access to applicable regional and international complaints mechanisms. Victims are to receive information about the regional and international complaints mechanisms that are available consequent upon the state in question having ratified international treaties which allow complaints. Both CoE Member States and EU Member States are States Parties to a high number of regional (European) and international human rights treaties, and most have accepted the jurisdiction of the treaty bodies and complaints mechanisms. Access to these complaints mechanisms requires that the national complaints mechanisms have been exhausted. The Explanatory Report to the Istanbul Convention refers especially to the European Court of Human Rights and the CEDAW Committee as bodies which are open to individual complaints from the states which have accepted their jurisdiction. Article 21 aims to stress that victims should receive information on the admissibility rules and procedural requirements relating to these complaints mechanisms, when the national remedies are exhausted. The aim is also to promote the availability of assistance to victims in presenting such complaints. Assistance, which may consist of the provision of information and legal advice, could be provided by the state, Bar associations, relevant NGOs or other actors.<sup>182</sup>

The experts’ answers reveal some confusion and give a picture of even those EU Member States which have ratified the Convention not having paid much attention to the requirement of assisting victims to lodge complaints through international mechanisms. In **Malta**, by virtue of Article 5 of the Ratification Act, the articles of the Convention, including Article 21, are in force as national law; and the victims of violence may refer to it.

Most experts simply say that there is no national legislation to ensure that victims have the information. Many experts refer to the legislation that ensures victims access to information on their legal position. In these cases it is difficult to know whether the information given through legal counselling and assistance *de facto* also covers the international complaints mechanisms, as most legal professionals are familiar with available national remedies, but not necessarily with the international ones. Access to international complaints mechanisms requires that the national remedies have been exhausted, and thus information on the international complaints mechanisms only becomes relevant after the national mechanism no longer offers a remedy. Many EU Member States have adopted the ombudsman institution, which allows complaints about authorities to be made to an official mandated to making an inquiry into the matter. Complaints to ombudsmen are not mechanisms meant under Article 21 of the Istanbul Convention,

181 *Legea 217/2003 pentru prevenirea și combaterea violenței în familie* (Law No. 217 of 22 May 2003 on the prevention and combating of violence in the family), Articles 6, 17, 18, 20, republished in the Official Journal No. 205 of 24 March 2014.

182 Explanatory Report, recitals 128-130.

however, nor are they national remedies which have to be exhausted as a condition of making an international complaint.

Some experts refer to the national legislation on assistance to victims of violence against women. For example, the **French** action plan on violence against women provides that a woman reporting a violent crime receives systematic information on her rights and the legal procedures to be followed. In **Belgium**, the federal agencies in charge of supporting and assisting victims in the fields of human trafficking and gender discrimination are entrusted with the mission to inform the public. The Gender Institute (created by Act of 16 December 2002) has *locus standi* to take legal action to support claimants in the field of gender equality, and the Federal Centre for Migration and Protection of Fundamental Rights of Foreigners (created by the Act of 17 August 2013) has the responsibility concerning human trafficking and migration. In **Malta**, the Victims of Crime Act provides for a right to information on procedures available for the victim of domestic violence. International complaints are covered in the scope of this Act.

National administration may offer more or less explicit information on the access to international complaints mechanisms, for example via the Internet. The **Finnish** Ministry of Foreign Affairs provides information on access to international complaints mechanisms on its website, but no legal provision obligates the Ministry to do so. In **Poland**, there is information on the website of the Ministry of Foreign Affairs on the individual complaints under the ECHR. General information on access to international complaints mechanisms is available through various websites in **Sweden**, such as the web page of the National Centre for Knowledge on Men's Violence against Women. The service located at Uppsala University is commissioned by the Swedish Government. In **Austria**, information about legal remedies can be obtained from specialised NGOs or from the attorneys' corporation which offers free basic legal advice. Member States may also support human rights bodies that give information about the complaints mechanisms, as the **German** state does by supporting the German Institute for Human Rights.

#### 3.6.4 Specialist support services (Article 22 Istanbul Convention)

The Article reads as follows:

- '1 Parties shall take the necessary legislative or other measures to provide or arrange for, in an adequate geographical distribution, immediate, short- and long-term specialist support services to any victim subjected to any of the acts of violence covered by the scope of this Convention.
- 2 Parties shall provide or arrange for specialist women's support services to all women victims of violence and their children.'

According to the Explanatory Report, the obligation to set up specialist support services complements the obligation to provide general support services. The aim of specialised support is to empower victims by catering to their specific needs. The services may be provided by women's organisations or local authorities with in-depth knowledge of gender-based violence. The specialist support services should be spread throughout the country and accessible to all victims, and address the different types of violence covered by the Convention. Provision of shelter and accommodation, forensic medical services for sexual crimes, psychological counselling, trauma care and legal services as well as telephone helplines and specific services for children are the specialist support services meant by the article.<sup>183</sup>

The article refers to services that are further elaborated in separate articles of the Istanbul Convention (Articles 23-26). The obligations under these articles have a close connection to those that the EU Member States have under the Victims Protection Directive. The Directive takes into account violence against women and the need to protect women victims of violent crimes, and ensure that victim support services are available for the victims. The Directive sets minimum standards for national legislation in the EU

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183 Explanatory Report, recitals 131-132.

Member States. **Denmark** has opted out of the Victims Protection Directive, but other Member States are bound by the obligations under the Directive. The Directive's transposition period ends in November 2015.

In **Austria**, the victims of domestic or sexual violence, and other victims of violent crimes, have the right to specialised psycho-social support, and the police, prosecution and courts are required to inform victims of these rights and where they are available, under Paragraph 25 section 3 Police Act and Paragraphs 65 and 66 Criminal Proceedings Act. In **Croatia**, the Social Welfare Act provides psychosocial treatment by social welfare centres or other service providers, and the Protocols on conduct in case of domestic violence and on conduct in case of sexual violence require that specialist services are provided for victims. In **Cyprus**, Article 6(1) of Law No.19/2000 on family violence was amended in 2004 (Law No. 212(1)2004) by adding a service by family counsellors to, among others, making many kinds of arrangement for family members. In **Belgium** the support services are organised at federate, not national level, and there is regional legislation in place. Victims of trafficking and sexual exploitation are protected under national legislation, including the provisions of services. The **Czech Republic** has introduced Act No. 45/2013 Coll., on victims of crime, under which registered providers of assistance to victims of crime have an obligation to provide assistance to particularly vulnerable victims. The legislation is not aimed specifically at women victims of violence and their children. In **Denmark**, the Ministry of Social Service informs victims of violence against women on a special web page about the specific services available for women victims and children. In **Finland**, municipalities are responsible for health and social services, and there is no binding national level regulation of the services that are offered specifically for women and children. The availability of services thus depends on local decision-making. While the resources of the municipalities are balanced by a transfer of municipal tax income from richer to poorer municipalities, the resources remain uneven and, especially in the thinly populated areas, the provision of specialist services is poor. In **Greece**, Article 21 of Act 3500/2006 provides for services to be given by counselling centres and shelters.

In **Estonia**, the Victim Support Act defines victims narrowly, and the provision of services is scarce, information on available services is lacking, and only some victims receive state funded services.

In **France**, the adoption of two acts to protect women against violence has improved the provision of services. In **Italy**, specialist support is mainly provided by private or voluntary associations often funded from public means, and organised as centres against violence or shelters. Even services for specific victims, such as migrants or victims of stalking, have been provided by private organisations. Often the services have been regulated regionally and locally. The Equal Opportunity Department has mapped the available service, and Decree No. 93/2013 was enacted in order to regulate at the national level the services financed by regional authorities. In **Germany**, there are specialist support services, but their organisation differs by state and region, each with their respective legal framework. The support systems are classified as voluntary state tasks, with funding that is politically and not legally defined, and with no statutory entitlement for victims. Most specialist support services are organised as projects, with a yearly budget and part-time staff. In **Latvia**, the right to both victims and perpetrators for rehabilitation services was introduced by the amended Social Services and Social Assistance Law, complemented by the Cabinet of Ministers Regulation No. 790. In **Luxembourg**, specialist support services are only available for victims of domestic violence.

In **Ireland**, Section 39 of the Health Act 2004 provides for services for victims. In **Hungary**, no specialist support services are provided. The Proposal for Resolution of the Parliament in 2015 requires that the special needs of victims of domestic violence are to be taken into account in judicial and administrative procedures. In **Lithuania**, the Specialised Assistance Centres provide comprehensive assistance to victims.

In **Malta**, Articles 12 and 13 of the Victims of Crime Act detail the services available to victims of domestic violence. In the **Netherlands**, the organisation 'Victim support the Netherlands', the Safe at Home centres, and the shelters for women provide the services. In **Poland**, the Law on counteracting family violence established support centres to provide specialist support services for victims of family violence. The qualifications of the persons running such centres is defined in the Law on social care. In

**Portugal**, the law 112/2009, article 53, establishes the National Network for the Support of Victims of Domestic Violence, which represents the Commission for Equality and Citizenship, the Social Security Institute, shelters, emergency counselling and housing. The Network provides short- and long-term support services. In **Romania**, there are no specialist support services for victims of violence against women.

In **Slovenia**, the Family Violence Prevention Act, Article 17 ensures provision of specialist support services, by providing the legal basis to NGOs operating in the field and cooperating with authorities.

In **Spain**, Article 19 (3) of Law 1/2004 states that women who are victims of gender-based violence have the right to specialised support services. Article 20 (3) of the act obligates Bar Associations to ensure the provision of special training on gender-based violence to lawyers, and Article 47 ensures the provision of training to deal with gender-based violence to employees of the administration of justice, security forces and forensic doctors. Special courts for cases of gender-based violence were established under Article 43 of the act. In **Slovakia**, Articles 21-25 of the Draft Act on Gender Based Violence and Domestic Violence promises support services and Article 24 makes provision for shelters for women.

In **Sweden**, specialist support services are provided under the Social Assistance Act (2001:453), Chapter 5, Section 11, which concerns victims of crime generally. The rights under the Health Care Act (1982:763) provide the general right to health services. The guidelines given by the National Social Authority contain rules on the application of the rights in the area of domestic violence. In the **United Kingdom**, there are specialist support services, but not provided as of right. The funding of the services has been an increasing problem. The CEDAW Committee has expressed concern over the lack of adequate support and services.

### 3.6.5 Shelters (Article 23)

The Article reads as follows:

'Parties shall take the necessary legislative or other measures to provide for the setting-up of appropriate, easily accessible shelters in sufficient numbers to provide safe accommodation for and to reach out pro-actively to victims, especially women and their children.'

According to the Explanatory Report, the article requires the parties to the Istanbul Convention to provide for the setting-up of appropriate, easily accessible shelters in sufficient numbers for the purpose of ensuring immediate, preferably around-the-clock, access to safe accommodation. The service is especially for women and children, when they are no longer safe at home. Temporary housing or general shelters, such as those for the homeless, do not provide the necessary support or empowerment. Specialised women's shelters address the multiple problems which the women face. All shelters should apply a set of standards: assessment of the security situation of each member, an individual security plan to be drawn up and the technical security of the building ensured. Effective cooperation with the police on security issues is indispensable. The provision of shelters in 'sufficient numbers' refers to the Final Activity Report of the Council of Europe Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV (2008)6) which recommends that specialised women's shelters should be available in every region, with one family place per 10 000 head of population, depending on the actual need. So far as shelters for other forms of violence are concerned, again, the number of places depends on the actual need.<sup>184</sup> Neither the text of the Article nor the Explanatory report refers to women who are particularly vulnerable, because they belong to a minority, but Article 4 (3) of the Convention prohibits discrimination in the State Parties' implementation of the Convention. The Explanatory report stresses that discrimination against certain groups of victims is wide-spread, and mentions gay, lesbian and bisexual victims, migrant and refugee women, women with disabilities and women of ethnic minorities, women with HIV/AIDS as

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184 Explanatory Report, recitals 133-135.



some examples of such groups.<sup>185</sup> As the Convention prohibits even intersectional discrimination, the provision of shelters must cover the actual need of all women.

In **Austria**, there are 30 shelters for female victims of domestic violence and their children, operated by private associations or by city councils. The funding comes from city councils and from provincial and federal councils, but the provision is not at the level of the Istanbul Convention standard. In **Cyprus**, two shelters are operated by the Association for Prevention and Handling of Violence in the Family. The expenses are in part covered from public social welfare services, and the assistance given to the victims consists of legal and psychological counselling, housing, training and assistance in finding employment. The shelters accommodate all women and children, regardless of nationality. No specific shelters are provided for minority women. The legislation is described above.

In **Belgium**, the shelters are organised at federate level. Setting up shelters is not regulated by national law, but it is recognised and funded by federate authorities within the limits of resources and political priorities. Specific shelters for women victims and their children exist, but assessment reporting stresses the insufficient provision of the service. There are no specific shelters for minority women. The first shelter for male victims of violence was opened recently in Flanders.

In **Croatia**, the Social Welfare Act, Article 89 contains provisions on temporary shelters to be provided to victims on domestic violence in crisis situations, but the provision of shelters does not fulfil the criteria of the CoE Recommendation Rec(2002)5. In the **Czech Republic**, the Act No. 108/2006 Coll., on social services regulates intervention centres, which also have the task of providing shelter. A sufficient number of shelters is not legally guaranteed, nor is their accessibility and state funding for their expenses is not legally regulated.

In **Denmark**, the shelters are provided under the Consolidation Act on Social Services, under Sections 4 and 5. The act requires municipalities to make the decisions on providing the services and facilities. The municipal council is to ensure that all services and facilities under the act are provided. In **Estonia**, there are 13 shelters for female victims of domestic violence and their children, operated by NGOs. These shelters have qualified staff, and counselling and legal advice is provided. In **Finland**, there is no legislation on shelters, which are run by NGOs and municipalities to the extent that municipalities consider them necessary. The shelters are not free for the victims, but often municipalities cover the costs. With one exception, all shelters have been, from the time they were first established in the 1980s, open for both women and men. There are no shelters for minority women, and many shelters do not offer the services referred to by the Explanatory Report. The provision of shelters especially in the thinly populated areas in northern and eastern Finland is scarce. There are no secret shelters. There is a recommendation by the National Institute for Health and Welfare on the quality of shelter services, but the Government has decided that legislation on shelters is not needed. A demand that the costs of shelters should be carried by the state was loudly voiced by NGOs during the ratification process, and the Parliament adopted in 2014 the budget Act on compensation to shelter providers from state funds (1354/2014), and further made a statement that the shelter network is to be expanded gradually to fulfil the EG-TFV 2008(6) recommendation.

In **France**, shelters are provided on the basis of an inter-ministerial governmental plan to prevent and fight violence against women. The plan aims at increasing the number of shelters by 2017, but their number is still insufficient. In **Hungary**, there is no legislation on setting up shelters, but 14 crisis centres, four halfway exit houses and one secret shelter are operated on public funding. The provision does not cover the need, however. The Proposal for Resolution of the Parliament in July 2015 mentions the need

<sup>185</sup> Article 23 of the Istanbul Convention does not refer to the specific needs of minority women. The Preamble to the Convention refers to international instruments that underline the need to pay attention to problems associated with minority women, such as the Council of European Parliamentary Assembly's Recommendation 1881 (2009) on the urgent need to combat so-called 'honour crimes' and Recommendation 1891(2009) on Migrant women: at particular risk from domestic violence.

to ensure availability of shelters. In **Germany**, the present 400 shelters for women do not meet the need of victims. They are funded by federal, state and municipal subsidies, welfare payments, donations and other sources, and their organisation differs by state. Discussions on a federal law on funding shelters in 2008 and 2009 did not lead to a legal decision.

In **Greece**, shelters are provided under Article 21 of the Act 3500/2006, but not in sufficient numbers. In **Italy**, Decree No. 93/2013 was issued in order to regulate, at national level, shelters (as well as other services for victims of violence against women). The plan provided permanent state funding for the shelters, which are run by NGOs. The financing is undertaken by regional authorities, and the amount of funding depends on the regional plan, number of shelters, and the necessity of establishing new ones in areas with insufficient services. The regional authorities are to report the use of funds to the Department of Equal Opportunities each year. Even before the national legislation was passed, some private associations already provided services for migrants. In **Ireland**, Section 39 of the Health Act 2004 provides the full range of services.

In **Latvia**, shelters consist of rehabilitation centres regulated by the Cabinet of Ministers Regulation No. 790. These are mostly private centres funded by the state and municipalities. There are no centres for minority women, according to the expert, due to the small population and the similar needs of the main ethnic and linguistic groups (Latvians and Russian speakers). In **Lithuania**, there is no legislation on the matter, but some NGOs and other institutions registered as special assistance centres provide temporary accommodation for victims.

In **Luxembourg**, there are shelters financed by the Government. In **Malta**, the provision of shelters is under the 'incorporated' article of the Istanbul Convention, and Articles 4 and 9 of the Domestic Violence Act. Shelters are organised by *Agenzija Appogg*, which provides shelter in cooperation with other organisations and bodies. There is an emergency centre for women victims and their children, and a number of other shelters operate around the clock. No shelters are established for minority women, but the shelters are made accessible for disabled women.

In **the Netherlands**, the shelters are regulated by the Act on Social Support, Article. 4.1.1, which obligates municipalities to establish a centre for advice on and reporting of domestic violence and child abuse (the Safe at Home centres). There are at present 26 Safe at Home centres, which are subsidised by the Government. About 30 other shelters for abused women offer temporary housing. The shelters are especially for women victims and their children, but the AMHKs are for the victims of domestic violence in general, and for abused children. No shelters are for minority women, although most of the users are minority women.

In **Poland**, Art 3(1)4 of the Law on counteracting family violence and Art 47 of the Law on social aid provide shelters for victims of violence, and other persons in a crisis situation. In **Portugal**, Law No. 107/2009, Decree No. 107/99 and Act No.1/2006 set out the legal regulation of shelters. Shelters are public or private, but funded by the state. There are shelters for women victims only (Article 60 No. 2 of Law No. 112/2009). Specific shelters for minority women are not known to the expert.

In **Romania**, national Law No. 217 of 22 May 2003 on the prevention and combating of violence in the family, Article 17 stipulates the setting-up of shelters, but according to the national expert, the provision is not enforced.<sup>186</sup> Existing shelters are especially for women victims and their children, but there are no specific shelters for minority women.

In **Slovakia**, the Draft Act on Gender Based Violence and Domestic Violence, Article 24 provides for shelters for women. In **Slovenia**, the shelters are provided under Family Violence Prevention Act, Articles

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186 *Legea 217/2003 pentru prevenirea și combaterea violenței în familie* (Law No.217 of 22 May 2003 on the prevention and combating of violence in the family), Article 17, republished in the Official Journal No.205 of 24 March 2014.

10/1, 14/1 and 17/2. The legal provisions are very general, however, and obligate authorities, organisations and NGOs to cooperate. One of the tasks of the social work centres is to provide services to the victim of violence. Existing shelters are for women victims and their children, but some shelters are established for men. No specific shelters for minority women exist.

In **Spain**, Law 1/2004, additional provision 15, stipulates the agreements made for funding sheltered housing for victims of gender-based violence between NGOs and municipalities and the Government. The shelters are for women victims of gendered violence, as only women are under the protection of Law 1/2004. There are no specific shelters for minority women.

In **Sweden**, the legislation on the right to support for the victims of crime under Chapter 5 Sec 11 of the Social Assistance Act is general and vague. Centres and shelters for women are to provide protected housing, other services are mainly provided by NGOs and the state provides some funding. Municipalities sometimes provide shelters or safe housing. The present Government intends to increase the funding for shelters, and the National Coordinator against violence in close relations has proposed in her Inquiry report (SOLU 2014:49) that regulation of the municipal obligation should be enacted. In the **United Kingdom**, there are shelters, but many of them are in financial crisis as public funding to voluntary organisations has been cut. An All-Party Parliamentary Group on Domestic and Sexual Violence report presented in 2015<sup>187</sup> draws attention to these cuts, and states that single-sex services have become increasingly difficult to access. Since the beginning of the financial crisis, their local government funding has been decimated, and many of them have been forced to close. Single-sex services are increasingly difficult to access.

### 3.6.6 Telephone helplines (Article 24)

Article 24 of the Istanbul Convention reads as follows:

‘Parties shall take the necessary legislative or other measures to set up state-wide round-the-clock (24/7) telephone helplines free of charge to provide advice to callers, confidentially or with due regard for their anonymity, in relation to all forms of violence covered by the scope of this Convention.’

The Explanatory Report names helplines as one of the most important ways that enable victims to find help and support. A helpline should have a widely advertised public number that provides support and crisis counselling and refers to face-to-face services, and is thus needed for any services under the Convention. The States Parties to the Convention have an obligation to set up state-wide helplines, available around the clock and free of charge. The Report of the CoE Task Force (EG-TFV(2008)6) recommends that at least one free national helpline should be established to cover all forms of violence against women, and it should operate 24 hours a day, 7 days a week and provide crisis support in all relevant languages. The callers should remain anonymous and receive confidential support, if they so wish.<sup>188</sup>

In **Austria**, there are helplines run by private associations with public funding, and in Vienna there is a helpline operated and funded by the city council. These helplines are accessible around the clock free of charge. In **Belgium**, there are general emergency helplines that function around the clock free of charge, but these are private and not legally regulated except as regards the qualifications of the staff, knowledge of local support services, etc. Specialised helplines for victims of violence operate on working days in Dutch and in French, but these cover only domestic violence and not other forms of violence against women. Local shelters have telephone lines that operate around the clock, but these are not free of charge.

<sup>187</sup> <https://www.womensaid.org.uk/appg-reports/>.

<sup>188</sup> Explanatory Report, recitals 136-137.

In **Croatia**, there is no legal provision setting up round-the-clock helplines. In **Cyprus**, the Association for Prevention and Handling of Violence in the Family has set up a helpline that is free of charge, which provides advice confidentially. In the **Czech Republic**, the first round-the-clock free helpline was set up in February 2015, but there is no legislation to regulate its functioning. In **Denmark**, a Government action plan of 2002 concerning violence against women requires that authorities must ensure that they provide the support which is needed. In **Estonia**, since the beginning of 2014 there has been a helpline service that is available around the clock. Funding is provided by support from the Norway Grant programme, and the helpline is a project and not a permanent arrangement. There has been since 2004 a helpline for victims of trafficking, funded from different sources and partly by the Ministry of Social Affairs.

In **Finland**, there are some NGO-run helplines for victims, one for victims of violence (Victim support) which is supported from state funds, and another for victims of sexual crimes, but these do not offer services round the clock. The NGO for immigrant women has a helpline that operates around the clock. The callers may remain anonymous, and they are offered services in several languages. The Ministry of Social Affairs and Health was proposed as the responsible ministry for special support services, including the helpline service in the context of the ratification of the Istanbul Convention.

In **France**, there is a national women's helpline with the title '3919-Domestic Violence info', established in 1992 and functioning under the National Federation of Women's Solidarity. The helpline operates on working days from morning to late at night, and at weekends for shorter hours. The helpline was made free of charge in 2014. There is multilingual support (in French, Arabic, Spanish and certain African languages). In **Hungary**, helplines are operated by NGOs, but there are no legal provisions on the matter, or proposals to amend the law. In **Germany**, the Statute on the Establishment and Operation of a State-Wide Telephone Helpline 'Violence Against Women', of 7 March 2012 sets up state-wide, round-the-clock telephone helplines free of charge to provide advice and information, offered by specialised female staff, confidentially, in an easily accessible manner and in many languages. A website complements the service. In **Greece**, the General Secretariat of Gender Equality operates a national, round-the-clock helpline in two languages, Greek and English. Another helpline is operated by National Centre of Social Solidarity (EKKA).

In **Italy**, Decree No. 9/2011, Article 12 provides a free of charge, nationwide round-the-clock helpline. Another helpline for female genital mutilation functions at the Home Office, but not around the clock. A free of charge helpline for violence at schools is run by the Department of Education, and a helpline for underage and teenager victims is run by the Equal Opportunity Department. In **Ireland**, Section 39 of the Health Act 2004 provides for support services, including the helpline service.

In **Latvia**, there is no helpline such as is required by the Istanbul Convention, nor are there any proposals for amending the situation. In **Luxembourg**, there are helplines financed by the Government, but no state-wide round-the-clock helpline as required by the Convention. In **Lithuania**, there is no legislation, but the Specialised Assistance Centres have different working hours for telephone lines, which cover the hours from 09:00 to 21:00 seven days a week. A website of the Police department offers further help. In **Malta**, the agency *Agenzija Appogg* is required to provide a public helpline under Article 9(3)(b) of the Domestic Violence Act, and the agency provides a 24-hour service. There is not a specific helpline for women, but the general helpline provides support for women and girls.

In the **Netherlands**, the Safe at Home centres have a telephone line that is available around the clock for a low rate. There is no state-wide round-the-clock helplines in **Poland**, and so far no action has been taken to implement the requirement of the Convention, although the need of doing so has been discussed. In **Portugal**, there is a state-wide round-the-clock telephone helpline, free of charge, for callers who are ensured confidentiality and regard for their privacy for all forms of violence under the Istanbul Convention. The helpline is regulated by Law No. 112/2009, Article 53. In **Romania**, there is no helpline such as is required under the Istanbul Convention. In **Slovenia**, national legislation gives a legal

basis for NGOs' assistance to victims under the Family Violence Act, Article 17. The NGOs run a round-the-clock telephone helpline free of charge to provide advice to callers. The service is co-financed by the state.

In **Slovakia**, there is no legislation in force, but proposed Article 21 which defines the forms of support services and their implementation and Article 25, which provides for a crisis counselling telephone line, of the Draft Act on Gender Based Violence and Domestic Violence cover the service. In **Spain**, the Special Government Delegation on Violence against Women provides a telephone service for information and legal advice in the field of gendered violence. The line offers assistance in several languages, as well as communication support for handicapped persons. No specific legislation regulates the service, which is established by an initiative of the Special Government Delegation on Violence against Women, which has a general mandate in the field.

In **Sweden**, the National Centre for Knowledge on Men's Violence against Women runs a national helpline for victims of violence, free of charge and around the clock. The function is initiated and sponsored by the Government. An evaluation report on the helpline contains a proposal to make the helpline permanent as to funding. In the **United Kingdom**, there are helplines, but not provided by virtue of legislation. Some of them receive government funding, but the National Sexual Violence Helpline, for example, does not.

### *3.6.7 Support for victims of sexual violence (Article 25)*

The Article reads as follows:

'Parties shall take the necessary legislative or other measures to provide for the setting-up of appropriate, easily accessible rape crisis or sexual violence referral centres for victims in sufficient numbers to provide for medical and forensic examination, trauma support and counselling for victims.'

The Explanatory Report refers to the traumatic nature of sexual violence, which requires a sensitive response by trained and specialised staff. Victims need immediate medical care and trauma support, combined with immediate forensic examinations to collect the evidence needed for prosecution. The need for psychological counselling and therapy often lasts long after the event. The States Parties to the Convention have the obligation to provide accessible rape crisis or sexual violence referral centres in sufficient numbers. The States Parties have the option to set up only one type of centre, not both. Rape crisis centres typically offer long-term help that centres on counselling and therapy, and they also support victims during court proceedings by providing woman-to-woman advocacy and other practical help. Sexual violence referral centres, on the other hand, may specialise in immediate medical care, high-quality forensic practice and crisis intervention, for example in a hospital setting. It is good practice to carry out forensic examinations regardless of whether the matter will be reported to the police. A decision on reporting may be taken at a later date. The CoE Task Force report (EG-TFV (2008)6) recommends that one such centre should be available for every 200 000 inhabitants and that their geographic spread should make them as accessible to victims in rural areas as in cities.

In **Austria**, the six centres for female victims of sexual violence are run by private associations and funded from provincial and federal budgets, but not under specific legislation. The provision does not meet the International Convention standards, according to an assessment of the organisation that provides support for victims of domestic and sexual violence. In **Belgium**, a 'Kit on Sexual Aggression' was made available, under guidelines from the Prosecutors-General in August 1992 and a ministerial circular of 15 September 1998, as an implementation of the Act of 4 July 1989 concerning rape. The aim is to ensure smooth conduct of the investigation through improving the collection of evidence to ensure that the perpetrators are prosecuted and the victims protected against retaliation. The Act was assessed and a new ministerial circular adopted in 2005, as well as new guidelines from the Prosecutors-General (Col. 10/2005).

In **Croatia**, the Protocol on conduct in case of sexual violence requires that the victims of sexual violence are provided psychological/psychiatric treatment as a part of medical treatment immediately after filing a complaint to the police. In **Cyprus**, law No. 119(I)2000 gives family counsellors the mandate to make arrangements for medical examinations. In the **Czech Republic**, the national law contains general but not specific provisions on services to victims. What is said on support services to victims of violence above, concerning the Czech Republic, is also true for services for victims of sexual crimes. In **Denmark**, under the provisions of the Government action plan of 8 March 2002, there are eight official, public rape centres. The centres receive victims of rape and sexual assault on an emergency basis. The service may remain anonymous.

In **Estonia**, there is a project carried out by the Estonian Sexual Health Association which networks with the health sector. The project 'Creating and Enhancing a Multi-sectoral Network to Help the Victims of Sexual Violence' was initiated in 2014, and runs until 2016. In **Finland**, there is no legislation in force, and an NGO helpline for victims of sexual crimes does not operate around the clock. The ratification act promises improvements in this respect. In **Hungary**, there is only limited provision of these services by NGOs. In **Germany**, there is no legislation, but many rape crisis centres offer trauma support and counselling and refer victims to medical aid, but no federal statutory funding exists. In **Greece**, Article 21 of the Act 3500/2006 provides support for victims of sexual violence as well as other support services, which are however insufficient. In **Italy**, the provision of support services for victims of sexual crimes comes under the Centre against violence and the Shelters. In **Ireland**, there are no legislative provisions, but six Sexual Assault Treatment Units provide specialist care for women and men who have been sexually assaulted or raped. The staff on the specialist team offer holistic services to address the medical, psychological and emotional needs and appropriate follow-up care, including emergency contraception and medication to reduce the risk of sexually transmitted infection. The services respond to requests from the police for collection of forensic evidence and provide services for persons who do not wish to report the incident. General provisions for state funding for the protection of children and families apply to the service.

In **Latvia**, there are no specific centres for victims of sexual violence. The same rehabilitation centres work with victims of all types of violence. There is no national legislation on rape crisis or sexual violence referral centres for victims of sexual violence. In **Lithuania**, the Specialised Assistance Centres offer support for victims of sexual violence. In **Malta**, the support services for victims of crime provide assistance to victims of sexual violence confidentially and free of charge. In the context of sexual crimes, these services are provided by *Appogg* and the NGO Victim Support through a Sexual Assault Response Team, which operates from the main hospital.

In the **Netherlands**, there is no national law on rape crisis or sexual violence referral centres, but the Safe at Home centres and the organisation Victim Support the Netherlands offer help and can refer victims to specialised care as well as to medical and forensic examination. Further, there are four Centres for sexual violence in the Netherlands, established by private initiative. The Centres offer medical, forensic and psychological support to victims of rape or sexual assault. The Government is making an assessment on possible public support for these centres. **Polish** law does not provide for special referral centres for victims of sexual violence, but some support centres for victims of family violence, run by NGOs, also provide services to all victims of sexual violence. In **Portugal**, national law No. 112/2009, Article 32 makes provision for attendance by the police for the victims of rape and sexual violence, and for cooperation with the social security and national health services to provide for medical and forensic examination, trauma support and counselling. In **Romania**, legislation does not provide for rape crisis or sexual violence referral centres.

In **Slovakia**, the Draft Act on Gender Based Violence and Domestic Violence proposes an obligation to health service institutions in sexual violence cases, and a provision on shelters for women. In **Slovenia**, there are no special rape crisis or sexual violence referral centres, or proposals to amend legislation. In **Spain**, the legislation does not provide for such services, but several NGOs provide these services which are partially subsidised by the public administration. In **Sweden**, the National Centre for Knowledge



on Men's Violence against Women, which is sponsored by the Government, runs a clinic at the Uppsala University Hospital. There may be other county or municipal level clinics established by local decisions. In the **United Kingdom**, there are services run by, for example, the Metropolitan Police in London and the National Health Service, but these services are not required by law.

### 3.6.8 Protection and support for child witnesses (Article 26)

The text of the Article reads as follows:

- '1 Parties shall take the necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses of all forms of violence covered by the scope of this Convention.
- 2 Measures taken pursuant to this article shall include age-appropriate psychosocial counselling for child witnesses of all forms of violence covered by the scope of this Convention and shall give due regard to the best interests of the child.'

The Explanatory Report makes clear that violence and abuse between parents or other family members breeds fear, causes trauma and adversely affects the development of children. When providing services and assistance to victims with children who have witnessed violence, the rights and needs of these children have to be taken into account. 'Child witnesses' not only refers to children who actively witness violence, but also those exposed to screams and other sounds of violence, or the long-term consequences of such violence. States Parties to the Convention have the obligation to provide psychosocial interventions specifically tailored to children.<sup>189</sup>

In **Austria**, the right to legal and psycho-legal support during criminal law proceedings for victims of violence is general, and explained above. Minors under 14 make their witness statements by video, under Paragraph 165 section 2 Criminal Proceedings Act. Child witnesses within the scope of this provision may apply for support to specialised services funded by the Ministry of Justice. There is no specific legislation on the issue, however. In **Bulgaria**, domestic violence committed in the presence of a child is perceived as psychological and emotional violence against the child. In **Belgium**, the national law provides for the possibility to avoid that a child is heard in court; although there is no national legislation in place that provides for support services for children who have witnessed violence. The **Croatian** Criminal Procedure Act contains special forms and procedures for interrogation of children as witnesses in criminal proceedings. In **Cyprus**, Article 18(1) of Law No. 119(1)2000 provides that the Court may order the testimony of any victim of violence to be taken in the absence of the accused. The act does not refer specifically to child witnesses. In the **Czech Republic**, Act No. 137/2001 Coll. on special protection of witnesses and other persons in connection with criminal proceedings, does not provide for any special regard to be given to a child as a witness. If the child is a victim of crime, the hearing must be undertaken by a trained person.

In **Denmark**, the police can interrogate a child via video, under the Administration of Justice Act (1308/2014) Section 745e. A child victim of violence or rape is to have a court-appointed lawyer during the police investigation. In **Estonia**, Article 8(6) of the Code of Criminal Procedure provides that criminal investigation bodies, prosecutors' offices and courts must ensure that minor children of a person held in custody are supervised, and his or her close family members have assistance when necessary. Article 70 of the same Code addresses the hearing of child witnesses; the situations in which a child protection official, social worker, teacher, or psychologist could be involved; and the possibility to video record hearings. In **Finland**, the Child Welfare Act 417/2007 contains provisions on various measures to be taken for children at risk. There is a working group proposal on provision of support to child witnesses who are not immediate victims of violence, but no legislation is considered necessary. In **France**, the general system for protecting children (Article 375 of the Civil Code) applies to the situation, and the actors who

<sup>189</sup> Explanatory Report, recitals 143-144.

are in charge of supporting women will also take into account the rights and needs of children. No specific provisions exist. In **Germany**, protection and support services and state authorities take into account the rights and needs of child witnesses of violence, but there is no special legislation outside criminal law proceedings and family law. In **Greece**, pre-trial investigation of child victims takes place in specifically designed premises, in the presence of psychologists or psychiatrists. The child may be accompanied by a legal representative unless a conflict of interest or involvement in the crime prevents it. The testimony is saved in writing and on videotape, and the child may appear in person at the age of 18. In **Italy**, Article 5, paragraph 2(d) of Decree No. 93/2013 provides as one of the objectives of the Extraordinary plan that protection and assistance for women victims of violence and for their children is strengthened. No specific provisions exist, nor are there any proposals to amend legislation. In **Ireland**, children may give evidence via live television or through an intermediary and pre-trial statements may be admissible. In **Hungary**, no such support exists.

In **Latvia**, there is a general provision on the protection of the rights and needs of child witnesses under the Criminal Procedure Law. In **Luxembourg**, the Act on domestic violence gives protection to victims of domestic but not other forms of violence. In **Lithuania**, Articles 7 and 9(1) of the Law on Protection against Domestic Violence provide that, no later than the next working day, police officers inform a children's rights protection division when a minor has been exposed to domestic violence, been a witness of domestic violence, or lives in an environment where violence takes place or with a person suspected of violating a minor. In **Malta**, the incorporated Istanbul Convention Article is in force. Article 646 of the Criminal Code provides that where the witness is under 16 years of age, an audio and video-recorded testimony is produced in evidence. *Appogg* takes care of the needs of witnesses beyond the context of Court proceedings, as laid down in Article 9 Domestic Violence Act and Article 12 (b) Victims of Crime Act.

In the **Netherlands**, the Safe at Home centres and the organisation Victim Support the Netherlands support children who have witnessed violence. Children may also be referred to a social work centre or youth services for more specialised help. Since July 2013, a procedure for the reporting of suspected domestic violence and child abuse has been required by the health and child care, education, social support, youth care and justice professionals, who are to contact the AMHK. In **Poland**, the Law on counteracting family violence requires that when assessing the needs of victims of family violence with regard to therapy and support, the situation of children is assessed and they are provided with support. In **Portugal**, both the victim and the family has the right to be protected, under Article 152 No. 4 and No. 5 of the Criminal Code and Article 20 of Law No. 112/2009. No specific protection measures for child witnesses, besides the social security measures provided under general child welfare legislation and witness protection under criminal procedural legislation, seem to exist. In **Romania**, there are no provisions on the matter.

In **Slovenia**, Article 4 of the Family Violence Act contains a provision on special protection against violence to be provided for young family members, who are witnesses of family violence. In **Spain**, Article 19 (5) of Law 1/2004 states that children under parental authority or guardianship and custody of the person assaulted have the right to the same comprehensive social assistance as the victims of gendered violence. In the judicial process concerning gendered violence, the judge can order the suspension of the parental authority of the perpetrator, or even visitation rights (Articles 61, 65 and 66 of Law 1/2004). In **Slovakia**, the Draft Act on Gender Based Violence and Domestic Violence contains a provision on protective and supportive measures during investigation. In **Sweden**, the general duty to support in Chapter 5 Section 11 of the Social Assistance Act applies here, but there are special provisions on the rights of children in this act, in Chapter 1 Section 2 and Chapter 5 Section 1. Act 1999:997 on children's special representatives and the Legal Aid Act 1988:609 provide the right to legal counselling and representation and financial assistance. The Crime Damage Act 2014:322 Section 9 is also relevant.

In the **United Kingdom**, the Youth Justice and Criminal Evidence Act 1999 Part II provides special measures to be taken to protect witnesses. Witnesses under 18 or some other groups of witnesses may be protected by screens preventing the witness from seeing the accused, by evidence being given

by a live television link, or given in private, by removal of wigs and gowns by judges and lawyers, by evidence being recorded, by the examination being given through an intermediary, or by provision of aids to communication. The court may also be cleared of the public when a child witness gives evidence of a sexual nature.

### 3.7 Protection, investigation, prosecution

#### 3.7.1 Emergency barring orders (Article 52)

The Article reads as follows:

‘Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk.’

The Explanatory Report makes it clear that the safety of a domestic violence victim may most effectively be guaranteed by putting distance between the victim and the perpetrator, often by one of them leaving the joint residence. Rather than expecting the victim to find safety elsewhere, the removal of the perpetrator and allowing the victim to stay at home is preferred. The provision establishes the obligation of giving competent authorities the power to order a perpetrator of domestic violence to leave the residence of the victim and bar him or her from returning or contacting the victim. The immediate danger must be assessed by the relevant authorities. The States Parties to the Convention decide the length of period for the emergency barring order, but it should be long enough to provide effective protection to the victim. The Explanatory Report refers to a range of between 10 days and four weeks as lengths allowed in CoE Member States, and there may or may not be a possibility of renewal. ‘Immediate danger’ refers to any situations of domestic violence in which harm is imminent or has already materialised and is likely to happen again. Safety of the victim or person at risk is to be given due consideration.

In **Austria**, Paragraph 38a of the Security Police Act gives the police called to a domestic incident the right to issue an order to the potential perpetrator to leave the residence immediately regardless of the ownership situation. Another order the police may issue is to bar the potential perpetrator from returning home for 10 days. If the order is not complied with, the police can restrain the perpetrator from entering and issue administrative fines of up to EUR 5 000. In **Belgium**, after the Act of 24 November 1997 on combating domestic violence was adopted, victims still had to leave their home. However the Act of 15 May 2012 gave the public prosecutor the power to order a perpetrator of domestic violence to leave the residence of the victim and bar him or her from returning or contacting the victim. Guidelines of the Prosecutors-General, Col. 18/2012 explain this Act. In **Bulgaria**, the court may issue an emergency protection order within 24 hours and in *in camera* proceedings, under Articles 5 and 18 of the Law on Protection from domestic violence. The protection order may concern vacating the residence of the victim or a person at risk, and a prohibition on contacting the victim or person at risk. In **Croatia**, the court may order protection measures (prohibiting contact with the victim or ordering the perpetrator to vacate the residence of the victim) at the proposal of the victim or the public prosecutor even before initiation of court proceedings for misdemeanour. The decision must be rendered within 24 hours. In **Cyprus**, Article 21(2) of Law No. 119(I)/2000 as amended by Law No. 212(I)/2004 provides that the Court may, during or after the trial of a case of violence where the victim is a minor, order the removal of the victim and his or her placing in a safe place or being taken into care. Article 22(1) of Law No. 119(I)/2000 provides that the Court may, on application by a member of the family, the police or the Attorney-General or by a Family Counsellor, issue an interim order restraining the suspect or the removal of the minor victim, until the case is tried. The order is valid for up to eight days, and may be extended by up to eight more days by the court.

Section 44 Act No. 273/2008 Coll. on police of the **Czech Republic**, gives a police officer the mandate to expel a person from an apartment or house inhabited together with the endangered person, for a maximum of 10 days, provided it may be assumed that the person in question commits a dangerous attack against life, health or freedom, or an especially serious attack against human dignity. A court must decide on an extension of the order by a decision, according to Section 12 of the Act No. 292/2013 Coll. on special court proceedings.

In **Denmark**, the Act on restraining orders, ban on residence, expulsion from home, section 7 in particular, and the police instruction of 19 June 2009 give all persons a right to help from the Danish authorities if they or their children are subjected to violence or threats of violence at home. For these restraining orders there are no time-limits. At the request of the victim, the police can in such cases restrain or expel a person over 18. In **Estonia**, there is at the moment no legislation on an emergency barring order. However, the Code of Criminal Procedure allows a suspect to be detained for up to 48 hours without the necessity of a court-ordered arrest warrant.

In **Finland**, the Act on Barring Orders 898/1998, Section 1 (2) concerns barring orders used in domestic violence cases. A person who, by threats or in some other manner, may be assumed to perpetrate a crime against another family member may be barred from entering the home. An interim barring order may be given immediately by a court, or by an official who has a mandate to make an arrest (Section 11 of the Act). The interim barring order given by some other authority than a court is to be confirmed by a court as soon as possible. The 'internal' barring order may be given for a maximum of three months, in contrast to an 'external' one which does not require removal from the home, and which may be given for a maximum of a year.

In **France**, Law No. 2010-769 of 9 July 2010, and Law No. 2014-873 on Real Equality between Women and Men, and Articles 505-9 to 505-13 of the Civil Code on protection orders provide that a protection order may be issued by the Family Court if it considers, on evidence provided, that there are reasonable grounds to consider that the alleged victim shows that the victim is in danger. The judge may evict the perpetrator, and may also prohibit the perpetrator from contacting the victim. In **Italy**, the legislation on emergency barring orders is available where there is the risk that the accused commits serious crimes using arms or other instruments of violence. The Criminal Procedural Code gives competent authorities the power to order the accused to leave the residence of persons at risk or to prohibit the person from entering a residence or contacting the persons at risk. The measures can also be applied to threats of crimes punishable with long sentences (Articles 274, 282 bis, 282 ter, 283, Article 9 of Decree No 9/2011). Article 2, paragraph 1 (Ob) of Decree No. 93/2013 allows emergency barring orders to be authorised for crimes of domestic violence or sexual domestic violence. When a crime of domestic violence has not been committed but there is a situation that puts the physical or moral integrity or freedom of the spouse or cohabiting partner at risk, Articles 342vis and 342 ter of the Civil Code (introduced by Act No. 154/2001) give the judge the power to issue an emergency order for a duration of a year, which may be extended for serious reasons.

In **Germany**, Section 1 of the Protection against Violence Act of 11 December 2001 provides the competent court with the power to order a perpetrator of domestic violence to vacate the residence where the victim lives, not to enter again or contact him/her. The court may make the decision in summary proceedings. The Police laws of the German states contain specific regulations, except in Bavaria where the police authorities act under more general police law regulations. The police law aims at avoiding protection gaps, and authorises the police to impose similar orders of up to ten days. When the victim applies for a court order, the police order can be extended for another ten days, until the court's decision. In **Greece**, Article 15 of the Act 3500/2006 provides for emergency orders issued by civil courts and states that, in cases of domestic violence, the offender may be ordered to vacate the residence or workplace of the claimant, the residence of the claimant's close relatives, the school of the claimant's children and the shelter hosting the claimant. Article 18 of the Act concerns orders issued by penal courts, by which, in a case of domestic violence, the judge may order the offender for as long as necessary to vacate the family

home, and keep away from the places listed under Article 15. The order ceases if the case is filed for penal mediation. The order may be withdrawn, replaced or amended at the request of the defendant. The judge may seek expert opinion on domestic violence issues.

In **Ireland**, Section 2(1)(a)(ii) and Section 3(4) of the Domestic Violence Act apply where an urgent application can be made *ex parte* to a court for a barring order, in which case the court must find reasonable grounds for the decision. Interim barring orders may also be granted as a temporary protective measure, for example under the Child Care Act 1991. A safety order may be applied for, for protection in respect of threats that exist in a person's domestic living arrangements. The safety order does not remove the respondent from the family home if the parties reside together, but directs the respondent not to use violence. The Domestic Violence Act 1996 provides that a cohabitant must have lived with the respondent for at least six months in order to be eligible to present an application, and the applicant must have sole or majority legal or beneficial interest in the property. The Irish Constitution's provision on property rights is seen as an impediment to the amendment of the condition. The Child and Family Agency may apply to court for a safety or barring order under the Domestic Violence Act 1996.

In **Hungary**, there are three relevant acts. Act LXXII of 2009 on Restraining orders regulates temporary preventive restraining orders and preventive restraining orders. The Administrative Procedure Act CXL of 2004 provides general rules of police procedure in temporary preventive restraining order cases. Act III of 1952 on Civil Procedure gives general rules on court procedure. A temporary preventive restraining order can be issued by the police immediately at the scene, with a maximum duration of 72 hours. The order may be issued *ex officio*, or by request of the victim or his or her relatives, or on the basis of a report by several institutions defined by Article 2 of Act LXXII of 2009, under Article 17 (1)-(3) of Act XXXI of 1997 on Protection of Children and Administration of Guardianship. The police are obliged to refer the temporary order to a court, which may lift or finalize it as a preventive restraining order. The preventive restraining order may be issued *ex officio*, on police referral, or on request by the victim or his/her relatives. It can be ordered for a maximum of 30 days. Neither the temporary order nor the preventive order can be extended. Non-married partners are not protected, and orders may not be issued against minors and persons with limited capability. The order does not provide clear guidelines on contact with the victim, or require the authorities to confiscate weapons from the perpetrator. Mediation between the parties is provided by the family protection coordination body. The civil law restraining order considers violence as a conflict between the parties.

In **Latvia**, Articles 12 and 12(1) of the Law on Police, and the Cabinet of Ministers Regulation No. 161 provide the police with the competence to take immediate interim measures to isolate the victim from the perpetrator. A police officer who considers that a person presents a genuine threat to the others in the household may adopt an immediate order on the restraining of the perpetrator. The order may impose an obligation to leave the household immediately, a prohibition on approaching the household, or approaching or contacting the victim by any means. In **Lithuania**, Articles 5-7 of the Law on Protection against Domestic Violence require that on receipt of a report on domestic violence, police officers record the incident and initiate a pre-trial investigation without a complaint from the victim. Police officers may move the perpetrator out temporarily from his/her residence and notify a specialised assistance centre. In **Luxembourg**, the Law on Domestic Violence provides the prosecutor with the power to make an order of expulsion on a perpetrator of domestic violence for the duration of 15 days. The order may be extended.

In **Malta**, Articles 355AH, 355E and 355X of the Criminal Code give the police powers to arrest without a warrant a person who is about to commit an offence or is suspected of having done so. This may be done with urgency. The courts have powers to make protection orders. Article 412C Criminal Code provides for protection orders to be issued by the Court of Magistrates against any person who has been charged or accused before the court, but this measure involves delay.

In the **Netherlands**, Article 2 of the Act on temporary restraining orders gives the mayor the right to order a perpetrator of domestic violence to leave the residence of the victim for 10 days, and to prohibit

the perpetrator from contacting the victim. The order requires evidence of immediate danger or a serious assumption of danger. The order may be extended to 28 days. In **Poland**, the police may detain someone suspected of committing family violence who is living with the alleged victim on the same premises for maximum 48 hours under Articles 244 (1a) and (1b) of the Code of Criminal Procedure. This may be immediately followed by a prosecutor's order to the suspect to leave the premises for a period of up to three months under Article 275a of this Code. In **Portugal**, Article 200 of the Criminal Procedure Code gives the judge the power to order the perpetrator to vacate the residence of the victim or person at risk, and to prohibit the perpetrator from entering the residence or contacting the victim or person at risk. Article 31 of Law No. 112/2009 contains the same provisions specifically regarding domestic violence. The order may be given by the judge after the first hearing in the procedure against the perpetrator, if the conditions for trial are fulfilled. In **Romania**, there is no emergency barring order available under national law.

In **Slovenia**, emergency barring orders are defined under Articles 21 and 22 of the Family Violence Act, which give the victim who has been hurt physically, whose health has been damaged, or whose dignity and other personal rights have been offended by the perpetrator, the right to propose to the court the right to exclusive possession of the common accommodation. The court limits the duration of the measure, if the victim and perpetrator both own or have the right to use the accommodation. If a spouse has been violent towards the other spouse or children at the moment of divorce, the other spouse may get exclusive possession of the accommodation they shared. The duration of both these measures is a maximum of six months, which may be exceptionally extended for another six months. In **Slovakia**, the police are entitled to expel the perpetrator from an apartment or house and ban him or her from entering for 48 hours, under the Act on the Police Force, Article 27a. The court may impose a preliminary measure under Article 76(1) g of the Code of Civil Procedure. The preliminary measure may order a person not to enter into a house or apartment, or may order the person not to contact or approach the person whose physical or mental integrity may be at risk. The Criminal Code, Article 51(4) provides that a court may, when issuing a ruling attached to probationary supervision, issue an injunction not to go near the injured party.

In **Spain**, Article 544 of the Criminal Procedure Law (Royal Decree of 14 September 1882) gives a judge the power to order, in situations of immediate danger, the perpetrator of domestic violence to vacate the residence of the victim or person at risk and to prohibit the perpetrator from entering the residence or contacting the victim or person at risk. In Sweden, Sections 1 and 1a of the Restraining Order Act (1988:688) provide the possibility of a domestic exclusion order in the case of a risk of violence causing a threat to life, health, freedom or peace, in relation to the cohabiting partner. The Police Act (1984:387) and the Code of Judicial Procedure contain the general provisions on the conditions for using coercive measures against a person.

In the United Kingdom, the Crime and Security Act 2010, Sections 24-33 provide for domestic violence protection orders. These orders were first piloted for a year, and after that they were implemented in England and Wales from March 2014. Police and magistrates may put in place protection in the immediate aftermath of a domestic violence incident by banning a perpetrator with immediate effect from returning to a residence and from having contact with the victim for up to 28 days.

### *3.7.2 Restraining or protection orders (Article 53)*

The Article reads as follows:

- '1 Parties shall take the necessary legislative or other measures to ensure that appropriate restraining or protection orders are available to victims of all forms of violence covered by the scope of this Convention.
- 2 Parties shall take the necessary legislative or other measures to ensure that the restraining or protection orders referred to in paragraph 1 are:



- available for immediate protection and without undue financial or administrative burdens placed on the victim;
- issued for a specified period or until modified or discharged;
- where necessary, issued on an *ex parte* basis which has immediate effect;
- available irrespective of, or in addition to, other legal proceedings;
- allowed to be introduced in subsequent legal proceedings.

3 Parties shall take the necessary legislative or other measures to ensure that breaches of restraining or protection orders issued pursuant to paragraph 1 shall be subject to effective, proportionate and dissuasive criminal or other legal sanctions.'

The Explanatory Report states that the provision sets out the obligation to ensure that restraining and/or protection orders for victims of violence under the Convention are available, and establishes criteria for such orders. The national legislation may provide for the combined use of both restraining and protection orders. The purpose of such orders is to offer a fast legal remedy to protect persons at risk by prohibiting, restraining or prohibiting certain behaviour by the perpetrator. These orders exist under various names, but they serve the purpose of preventing violence and protecting the victim. The States Parties to the Convention may choose the legal regime – civil law, criminal procedure law or administrative law – under which such orders may be issued. The criteria under Paragraph 2 require that orders offer immediate protection and are available without undue financial and administrative burdens placed on the victim, that is, without lengthy proceedings or burdensome fees. The measure is to be given for a determined period or until modified or discharged by a judge or other competent official.

The States Parties are to ensure that in certain cases these orders may be issued on an *ex parte* basis with immediate effect, when one party asks for it. Such orders must not prejudice the rights of the defence or the requirements of fair and impartial trial under Article 6 of the European Human Rights Convention. There must be a possibility of appeal for the person against whom such an order has been issued. The victims are to have the possibility of obtaining a restraining or protection order even when they do not set in motion any other legal proceedings. The orders should not be dependent on divorce proceedings. The States Parties may provide that criminal proceedings are instituted after a motion for such an order has been received by authorities.

Paragraph 3 aims at ensuring respect for these orders by requiring 'effective, proportionate and dissuasive sanctions' for any breach of them. As it may be difficult to establish the truth in domestic violence cases, States Parties to the Convention may limit the possibility of the adversary or perpetrator preventing the victim's attempts to seek protection. Restraining or protection orders may not be issued against the victim and perpetrator mutually. Notions of provocative behaviour in relation to the right to apply for these orders should be considered to be removed from national law. States Parties may also consider allowing the standing to apply for these orders to other persons than victims, especially when the victims are incapable or vulnerable.

In **Austria**, Paragraphs 382 b, e and g of the Act on Sequestration and Enforcement in Civil Cases gives civil courts the mandate to issue orders on application by the victim to restrain potential perpetrators from re-entering the residence in continuance of a barring order given by the police, or independently, or from being in contact with the victim. The duration is a maximum of three months, or linked to court proceedings in the cases in question (divorce proceedings or criminal law proceedings). The orders are to be issued quickly, but they may be appealed. Persons in breach of a court order can be fined by the court a sum that is determined on the basis of personal circumstances. The hearing may take up to two weeks, and an application for waiving the costs can be made in cases of economic distress. In **Belgium**, the Act of 15 May 2012 concerning temporary interdiction of residence in case of domestic violence gives the public prosecutor the power to compel the violent partner immediately to leave the residence for a maximum of 10 days. During that period, the decision has to be either confirmed for a maximum of three months, or it has to be rescinded by a justice of peace. If the order is violated, the perpetrator is liable to imprisonment from eight days to six months and/or a fine of EUR 26 to 100 multiplied by 6, under the

Act of 15 June 2012 punishing the breach of a barring order in a case of domestic violence. In **Bulgaria**, the victims of domestic violence may apply for protection in a civil court. The Law on Protection from Domestic Violence regulates the issuance of protection orders.<sup>190</sup> In cases in which the victim's health or life is in direct and imminent danger, the victim can apply for an emergency protection order, which the court can issue within 24 hours. The proceedings for the issuance of a protection order can be initiated by: 1. the direct victim, if he or she is aged more than 14 years or is under limited guardianship; 2. a sibling of the victim or a person in direct kinship relations with the victim; 3. the guardian of the victim; and 4. the Director of the Social Assistance Directorate in cases in which the victim is a minor, under guardianship, or has a disability. If a protection order is issued, the perpetrator is ordered to pay between EUR 100 and EUR 500, and the judge may issue one or more of the possible measures, including banning the perpetrator from the common dwelling for a specified period, removing the custody of the child from the perpetrator, and banning the perpetrator from approaching the victim in any situations. If the perpetrator does not comply with the measures, the police have the power to arrest the perpetrator.

In **Croatia**, the Act on protection against domestic violence, Article 11 provides for a restraining order which is issued on *ex parte* basis for a period, given for a period and is available irrespective of other court proceedings. A fine of minimum HRK 3 000 fine or 10 days of imprisonment is prescribed for a person who breaches the restraining order. In the **Czech Republic**, the national legislation does not ensure restraining or protection orders. In **Cyprus**, the same act that regulates the emergency barring orders gives the power to a court to issue an order to prohibit a person from entering or remaining in the marital home, for a certain period and on certain conditions (Article 23(1)). The sanction for violating the order is imprisonment for up to two years (Article 23(7)). The court may, in lieu of any other sentence, accept the perpetrator's request of probation under the Probation and other Means of Treatment of Offences Law on the condition that he will submit to self-control treatment by specialists, or on such other conditions as the court considers necessary to prevent repetition of violence.

In **Denmark**, the national regulation on restraining or protection orders is the same as under emergency barring orders, namely that the police have the power to restrain, expel or exclude persons over 18 from their homes who have made criminal threats of violence. There are legal sanctions on breaking these orders. In **Estonia**, it is possible to apply for three kinds of restraining orders. To protect life or other integrity rights, a court may apply a restraining order or other civil law measures for up to three years. These orders are given by civil courts. In criminal proceedings the court may apply a temporary restraining order until the proceedings are over, at the request of a Prosecutor's Office. In criminal proceedings, the court may apply a restraining order for up to three years based on civil law to an offender who is convicted of a crime against a person or against a minor. Offences against the person include offences against life, offences against health, acts of violence, the illegal termination of pregnancy, illegal treatment of foetus, offences against liberty, offences against sexual self-determination, and offences against deceased persons. In addition, following the amendment of Article 121 of the Penal Code, which entered into force on 1 January 2015, a broader scope of 'physical abuse' was defined. This includes repeatedly committed physical abuse in close relationships or in relationships of subordination, and is punishable by up to five years imprisonment. This amounts to an act of violence (violence against the person). In **Finland**, the Act on Barring Orders 898/1998 applies to emergency barring orders and other barring orders. A barring order may be given for a maximum of three months by a court. Violating a barring order is punishable.

In **France**, the same legislation applies to emergency barring orders and restraining or protection orders. Article 227-4-2 of the Penal Code provides a sanction of a maximum of two years imprisonment and a fine of EUR 15 000. In **Italy**, the same legislation applies to emergency barring orders and restraining or protection orders. In **Hungary**, Articles 138/A-138/B on restraining orders of Act XIX of 1998 on Criminal Procedure provide a poorly implemented order for 15-60 days. The order may be issued on an *ex parte* basis. In **Germany**, Section 1 of the Protection against Violence Act provides that the court can order a

190 Law on Protection from Domestic Violence, available at: <http://www.lex.bg/bg/mobile/ldoc/2135501151>, accessed 14 December 2015.

perpetrator to vacate the residence where the victim lives, not to come near it, enter it or contact the victim or come to places where the victim generally shows up. Section 2 of the Act provides the court with the power to assign the residence of perpetrator and victim to the victim. In **Greece**, civil courts may issue orders under Article 735 of the Code of Civil Procedure, amended by Article 15 of the Act 3500/2006, while penal courts may also issue orders under Article 18 of Act 3500/2006. A fine of EUR 50 000 to the benefit of the victim and detention for up to one year are sanctions for violating the order of a civil court. It is unclear whether the same applies to orders of penal courts, since the provision was not incorporated in the Code of Penal Procedure. Article 21 of the Act 3500/2006 and Article 28 of the Act 4055/2012 exempt victims of domestic violence from court fees for lodging applications for interim protective measures and criminal complaints respectively.

In **Ireland**, Section 3 of the Domestic Violence Act 1996 allows a protection order to be granted as interim relief when the applicant has applied for a barring order, but the order only requires the respondent to desist from abusive behaviour. The protection order may be issued *ex parte*, but as it is an interim order, it is used pending the hearing of a barring order application. A respondent who contravenes a safety or barring order, an interim barring order or a protection order is liable to a fine up to a maximum of EUR 1 500 or imprisonment not exceeding 12 months, or both. In **Latvia**, the Civil Procedure Law and the Cabinet Ministers Regulation No. 161 provide protection against domestic violence or violence between persons who are bound together by social ties. A restraining order is available in cases of domestic violence. A restraining order may be issued by the police with immediate effect, to be confirmed by a court. The proceedings for a restraining order are free of charge, and violation of a restraining order leads to coercive measures under the Administrative Procedure Law. In **Lithuania**, Articles 5–7 of the Law on Protection against Domestic Violence of 26 May 2011 oblige police officers who receive notice of an incident of domestic violence to initiate pre-trial investigation without a complaint, and put into effect a temporary barring order by the court immediately.

In **Luxembourg**, there is no restraining or protection order available to victims of the forms of violence under the Convention. In **Malta**, the legislation that applies to emergency barring orders also applies to restraining or protection orders. The order is not necessarily available for immediate protection, as a court orders it in passing a judgment against the accused. The order cannot be issued on an *ex parte* basis. The sanctions for violating the order are appropriate. In the **Netherlands**, Article 540 of the Code of criminal procedure provides that a restraining order may be applied for from the Prosecutor or the police. The orders may be applied during a criminal procedure, if the victim can show that the perpetrator will continue to harass him/her. A restraining order may also be applied for through a summary proceeding in a civil court. The restraining order under the Code of criminal procedure does not entail extra costs for the victim. In the civil court, the victim needs to hire a lawyer and pay court costs. Both orders can be applied at short notice, and *ex parte*, if the victim is able to demonstrate the threat posed by the perpetrator. The sanctions are criminal sanctions including imprisonment under the Code of criminal procedure or, for a restraining order based on civil law, the victim may claim civil penalties.

In **Poland**, restraining or protection orders may be issued at all stages of criminal proceedings; as well as by courts in civil proceedings. During an investigation, such orders may be applied on a general basis as part of police supervision (Article 275(2) CCP), or only in cases of family violence as either a substitute to temporary detention (Article 275(4) CCP) or as a self-standing preventive measure (Article 275(a) CCP). Sentences on certain offences (sexual offence against a juvenile, offence against liberty, violence) may be combined with a prohibition based on the Penal Code to contact certain individuals, be in certain locations or with an order to leave certain premises (Articles 39 (2)(b) and (e), and Articles 72 (1)(7), 7(a), and 7(b) of the Penal Code). The Law on counteracting family violence, Article 11a allows the court in a civil procedure to require a person whose violent behaviour makes cohabitation particularly difficult to leave the shared residence. In **Portugal**, a judge can impose various measures such as prohibiting the perpetrator's contact with the victim or the perpetrator's presence in certain places, under Article 31 No. 1 d of Law No. 112/2009. The orders can be applied by the police immediately and without burdens being placed on the victim.

In **Romania**, protection orders are ensured for the protection of victims of violence in the family, but not for all forms of violence covered by the Convention. Partners who do not live together are not protected, nor victims of violence carried out outside the family. Protection orders may be issued for up to six months. Article 27(7) of Law 217/2013 states that the examination of a case for a protection order should proceed with urgency and receive priority,<sup>191</sup> but the median length of the proceedings was found to be over a month according to a study, although some cases were decided very quickly.<sup>192</sup> The orders may not be issued on an *ex parte* basis without full court proceedings, but have immediate effect when taken. Breach of a protection order is a criminal offence sanctioned with up to one year's imprisonment. A settlement with the victim removes the criminal sanction.

In **Slovenia**, restraining or protection orders are provided under Articles 60 and 61 of the Police Tasks and Powers Act, and the Rules on Restraining Orders Prohibiting the Approaching of a Particular Person, Place or Area, and under Articles 19 and 24 of the Family Violence Act. The police may independently issue a restraining order, about which the competent centre for social work must be informed. The victim may *ex parte* request a court for a restraining or protection order under the Family Violence Act. Such an order prevents a perpetrator who has physically harmed the victim, caused damage to the victim's health or in any other way offended the victim's dignity or other personal rights, from entering the victim's apartment, and sets restraints on the perpetrator's right to approach the victim. The measure does not place a financial burden on the victim, and the order may be given orally by a police officer to be followed by a written document in six hours, to be reviewed by a judge within 48 hours. A police order may be valid from 48 hours to 60 days, and a court order valid for a maximum of six months, exceptionally extended by a further six months. The court procedure may also be decided *ex parte*, and is handled as a matter of priority. The police monitor the police restraining orders, remove the violator and inform the judge who may impose a fine. Continued breach may lead to detention of the violator. The breach of an order is not classified as a criminal offence, and legislation lacks appropriate sanctions. In **Slovakia**, protection orders pursuant to Article 27a of the Act on Police Force may be given without undue delay, and a civil court may decide on a preliminary measure within 48 hours from the motion for the measure being filed. Under Criminal Code, Article 348/1, a person who obstructs or substantially impedes the execution of a public order by breach of restraining order is liable to imprisonment for up to two years. A procedural fine of EUR 820 for disrespect of the court's order may be imposed by a civil court under Article 53 of the Code of Civil Procedure.

In **Spain**, the restraining and protection orders are regulated under the same provision as the emergency barring orders. Article 544 (ter) of the Criminal Procedure Law states that the judge will issue the order immediately after having heard the offender, and always before 72 hours have elapsed. The protection order can be issued on request by the victim *ex parte*, either by a judge or a prosecutor. Article 544 (bis) sanctions breaches of protection orders with imprisonment.

In **Sweden**, both emergency barring orders and restraining or protection orders are made under the Restraining Order Act 1988:688. A public prosecutor can issue a restraining order, when a person poses a threat to someone due to potential crime, by stalking or other serious harassment. The order covers any contact with the victim and can be expanded to include entering the area where the victim lives or works. If such an expanded restraining order is violated, electronic monitoring can be applied. There are no undue financial or administrative burdens on the victim, and the order may be issued on an *ex parte* request without full court proceedings. The sanctions are in principle appropriate, and electronic monitoring has increased the effectivity of the measure. Yet, the effectivity of the legislation and the severity of the sanction have been questioned. The national Coordinator against violence in close relations has suggested

191 *Legea 217/2003 pentru prevenirea și combaterea violenței în familie* (Law No.217 of 22 May 2003 on the prevention and combating of violence in the family), Article 27(7), republished in the Official Journal No.205 of 24 March 2014.

192 Asociația TRANSCENA (2013), *Studiu la nivel național cu privire la implementarea ordinului de protecție – Legea 25 din 2012* (National study on the implementation of the Protection Order – Law 25 of 2012), pp.12-13, <http://www.aleg-romania.eu/docs/protectie.pdf>, accessed 8 June 2015.

that the sanction should be raised from one to two years imprisonment, and that punitive fines should also be used for minor violations.

In the **United Kingdom**, the Family Law Act 1996, Sections 42-49, the Protection from Harassment Act 1997, Sections 3, 3 a and 5 a (England and Wales) and Sections 8 and 8 A (Scotland) provide that non-molestation orders backed with the power of arrest are available to present and former spouses, civil partners, cohabitants, relatives, fiancé(e)s, intimates and co-parents under the Family Law Act 1996. Restraining orders, similarly backed with the power of arrest, are available and provide immediate protection under the Protection from Harassment Act 1997 regardless of the relationship between the parties. 'Molestation' includes acts of threat of violence, as does 'Harassment' under the 1997 Act, but harassment requires that more than one incident has occurred. Breach of a non-molestation or restraining order can be punished by imprisonment for up to five years and/or a fine.

### 3.7.3 *Investigations and evidence (Article 54)*

The Article reads as follows:

'Parties shall take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary.'

The Explanatory Report refers to the use of the sexual history and conduct of a victim in judicial proceedings being exploited in order to discredit the evidence presented by the victim, and as a usage that may reinforce stereotypes of victims as promiscuous, immoral and not worthy of legal protection. This may lead to de facto inequality, since victims are overwhelmingly women, who are more likely to be provided with legal protection if they are judged respectable. The victim's past sexual behaviour should not be considered as an excuse for violence. The drafters of the Convention were aware of the different procedural systems in Europe. In some States Parties to the Convention, the judge has the discretion to admit and consider evidence, whereas in others the rules of criminal procedural law pre-determine these issues. The States Parties to the Convention have the obligation to take legislative or other measures to ensure that the sexual history and conduct of the victim is to be considered only when it is relevant and necessary. The admissibility of such evidence is not ruled out, but where it is admitted, it should only be presented in a way that does not lead to secondary victimisation.

In **Belgium**, there is no specific regulation on police investigation other than point 54 of the Code of Conduct annexed to the Royal Decree of 10 May 2006 on the conduct of police forces, which provides that police officers must respect and protect citizens' rights to privacy and avoid unnecessarily intrusive acts. There are specific guidelines for the police and the judiciary must ensure that evidence is collected with due respect to the victim, in particular with regard to domestic violence (Col 4/2006) and sexual violence (Col 10/2005). **Croatian** national law does not include a specific rule on the issue. In the **Czech Republic**, there is no legal provision or instruction for authorities on the issue. In **Cyprus**, national law does not include a specific rule on admissibility of evidence on the sexual history and conduct of the victim. In **Denmark**, it is a general principle in Danish law that irrelevant and unnecessary evidence is not admitted. In **Estonia**, there is no specific rule on evidence in these issues, but police officials, prosecutors and judges have received training on sexual violence. Participation from courts has been extremely low, and the rhetoric used in courts is often hostile and intimidating for the victim. A recent media debate about judgments and evidence in cases of sexual abuse took place in March 2015. In **Finland**, Chapter 17 of the Code of Judicial Procedure (4/1734 as amended in February 2015) concerns the free evaluation of evidence presented by parties or taken on the court's initiative. Section 8 of the Act gives grounds on which the court may refuse to admit evidence (that the evidence is irrelevant, unnecessary or not the best available evidence). There is no mention of the need to limit evidence on the sexual history or conduct of the victim, nor are there instructions for the judges on the matter.

In **France**, there is no specific rule or debate on the matter. The general rule of the Code of Criminal Procedure is that evidence will not be admitted unless it is relevant. In **Italy**, Article 190 on the Criminal Procedural Code states that the judge has to ban evidence prohibited by law, and that is manifestly irrelevant or superfluous. There are no specific rules and no proposal to amend legislation. In **Germany**, Section 68a of the Criminal Procedure Code prohibits questions concerning the personal life of a witness or which threaten his or her reputation. The judiciary does not agree on whether the provision is to be applied to prevent questions concerning the sexual history and conduct of the victim. In **Hungary**, there is no legislation on the matter. The scope of forensic evidence in sexual crimes is covered by guidelines in Methodological Letter No. 20 of the National Institute of Forensic Medicine which is addressed to forensic psychologist experts. The guidelines concern the experts' investigation, in regard to the victim, of the probability of the accused act, the vividness of the explanation of the criminal act, the psycho-sexual development, sexual development, and sexual knowledge and its source, as well as the possibility of the victim's statement being false. In **Ireland**, Section 13 of the Criminal Law (Rape) (Amendment) Act 1990 provides that, at the trial of a person for a sexual assault offence, no evidence is to be adduced and no question asked in cross-examination by or on behalf of the accused person about any sexual experience (other than that to which the charge relates) of a complainant with any person, except with the leave of the judge. However, applications made under the Domestic Violence legislation are civil matters, and the provision that limits admitting evidence does not apply. In **Latvia**, there is no specific rule on the matter, nor is there one in **Lithuania**.

In **Malta**, the Convention is national law as incorporated, but there is no specific legal provision. No proposals to amend legislation are known to the expert. In the **Netherlands**, there is no specific rule. In a criminal procedure, the Prosecutor has primary responsibility for evidence to be presented, but the defence may also present evidence. The judges allow only evidence that is relevant, but there are no further instructions on how the relevance of evidence on past sexual history of the victim is to be considered. The **Polish** law includes no specific rule on the issue. In **Portugal**, the expert has no information on rules on the matter. In **Romania**, there is no legislation on the matter, no instruction for judges or proposals for amendment.

In **Slovenia**, there is no rule on inadmissibility of evidence of the sexual history and conduct of the victim, but the general rule is that only relevant and necessary evidence is admitted. The judges are not instructed on the matter, nor are there proposals to amend legislation. In **Spain**, no specific rule on the matter exists, nor are there proposals for amendment. Article 47 of Law 1/2004 requires that judges and magistrates, prosecutors, personnel of the Administration of Justice, Security Forces and forensic doctors will be adequately trained to deal with gender-based violence. In **Sweden**, there is no specific rule on the matter, and no proposals for amendment. The judges are not instructed on the matter, but legal education and competence development for judges cover the issue. In **Slovakia**, the Draft Act on Gender Based Violence and Domestic Violence contains a provision on protective and supportive measures during investigation.

In the **United Kingdom**, Section 41 of the Youth Justice and Criminal Evidence Act 1999 provides that sexual history evidence may not be introduced without permission from the court. Permission should be granted only where it rebuts evidence led by the prosecution or relates to a relevant issue at trial other than consent, except that permission may be granted in relation to the issue of consent where the behaviour to which it relates is either alleged to have taken place at or about the same time as the alleged offence or is so similar to the complainant's behaviour at the time that it cannot reasonably be explained as coincidence. The court must also be satisfied that to refuse leave would result in the jury or the court reaching an unsafe conclusion on a relevant issue of trial, and should refuse permission if it considers that the main aim of evidence claimed to relate to a relevant issue is simply to undermine the complainant's reliability. In a case<sup>193</sup> the House of Lords read Section 31 against its express words, relying on the Human Rights Act 1998 and Article 6 ECHR, so as to allow evidence to be admitted where

193 *R v A (No.2)* [2002] 1 AC 45.



honest belief in consent was pleaded, the defence argued that the complainant was biased against the accused or had a motive to fabricate the evidence, and the sexual history evidence provided an alternative explanation to establish the conditions of intercourse, and where the defence argued that there was an alternative explanation for the details of their account.

### 3.7.4 Ex parte and ex officio proceedings (Article 55)

The Article reads as follows:

- '1 Parties shall ensure that investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 of this Convention shall not be wholly dependent upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint.
- 2 Parties shall take the necessary legislative or other measures to ensure, in accordance with the conditions provided for by their internal law, the possibility for governmental and non-governmental organisations and domestic violence counsellors to assist and/or support victims, at their request, during investigations and judicial proceedings concerning the offences established in accordance with this Convention.'

The Explanatory Report makes clear that the aim is to ease the burden on victims by enabling proceedings to be carried out without placing the onus of initiating the proceedings on the victim, and to ensure that perpetrators are brought to justice. 'Wholly dependent' in the wording means that proceedings that are underway may continue even after the victim has withdrawn her or his statement. Law enforcement officers should investigate in a proactive way to gather evidence. The States Parties to the Convention may make reservations in respect of Article 35 regarding minor offences. The States Parties may determine what constitutes minor offences of physical violence. Good practice has shown that victims supported or assisted by a specialist support service during investigations and proceedings are more likely to file a complaint and testify, and are better equipped to actively contribute to the outcome of proceedings. The services referred to under Paragraph 2 are of a psychological and practical nature, not legal ones.

In **Austria**, Paragraph 3 of the Criminal Proceedings Act requires that criminal investigations and court proceedings advance under the direction of the Court (following the *Officialmaxime*). The impact of a retraction of a witness account is to be given consideration under the rules of evidence. In **Belgium**, the public prosecutor is in charge of criminal proceedings and may carry on with them despite the victim's withdrawal or complaint, under Articles 1 and 5 of the Criminal Proceedings Code. The public prosecutor may abandon the case if the victim's complaint is withdrawn and the victim decides to continue his or her relationship with the perpetrator. The Act of 24 November 1997 aimed at fighting domestic violence provides that public bodies and private associations with the aim of preventing domestic violence may support victims. In **Croatia**, the Criminal Code, Articles 115-119, 152, 153 and 169 stipulate that cases of forced abortion, female genital mutilation, bodily injury, involuntary sexual intercourse, rape and forced marriage are to be prosecuted *ex officio*. The not aggravated form of bodily injury is prosecuted *ex parte*. In the **Czech Republic**, Sections 11 and 163 of Act No. 141/1961 Coll., on criminal judicial procedure, provides that criminal prosecution may not start or continue if the consent of the victim has not been granted or is withdrawn. Article 21 of Act No. 45/2013 Coll., on victims of crime, gives the victim the right to be accompanied by a friend chosen by the victim in all criminal proceedings. NGOs can provide psychological and social counselling and legal information (Section 39 of Act No. 45/2013 Coll., on victims of crime). In **Cyprus**, investigation and prosecution are dependent on a complaint by the victim. The Association for Handling of Violence in the Family is an NGO that assists and supports victims during investigations and proceeding.

In **Denmark**, the Administration of Justice Act, Sections 96(2) and 724(2) provide that the prosecutor brings the case to court. The Administration of Justice Act, Section 741a provides that an attorney must be available for the victim, but there is no legislation on a support person other than the legal representative. Support other than legal assistance is not provided. In **Estonia**, the legality principle in the criminal justice system in principle requires that when there is reason to believe that a crime has been committed, authorities cannot decide not to initiate a proceeding. The medical professional should report sexual abuse to the police even if the victim is unwilling to do it. The police do not always initiate proceedings unless the victim has clearly stated a wish for it. In **Finland**, the public prosecutor may proceed *ex officio* in homicide and assault cases, but in petty assault cases only when the deed is committed against a minor or a family member, under Chapter 21 of the Penal Code. All sexual crimes under Chapter 20 of the Penal Code against minors proceed *ex officio*, as well as all sexual crimes against adults, except sexual harassment (*ahdistelu*) which was criminalised in 2014. **Finland** made a reservation concerning the crimes under *ex parte* proceedings. The possibility of having a support person present in the proceedings is available for sexual crimes. In **France**, the public prosecutor is in charge of the prosecution even when no claim is made or the victim withdraws the claim. There is the possibility of having assistance and support under Article 41 of the Code of criminal procedure.

In **Germany**, offences under the Criminal Code are prosecuted *ex officio*, if not otherwise regulated. No such regulation for the criminal offences in question is in place, except for bodily assault which is only prosecuted when a victim files a complaint, unless there is special public interest to prosecute or an aggravated assault is in question (Section 230 of the Criminal Code). It is often assumed that there is special public interest to prosecute domestic violence. In **Greece**, Article 17 of Act 3500/2006 requires *ex officio* prosecution for several offences (bodily injury or damage to health, coercion, affront to sexual dignity, violence against a witness or member of family for obstructing justice under Articles 6, 7, 9 and 10 of the same Act). Article 8 of Act 3500/2600 amended the articles of the Penal Code on rape (Article 336) and sexual abuse (Article 338) so that even marital rape and sexual abuse are now punishable. Rape is investigated and prosecuted *ex officio*, but the public prosecutor may exceptionally refrain from prosecution. Sexual abuse is also investigated *ex officio*, but a report, complaint or other information is needed that an offence has been committed.

In **Italy**, proceedings are generally conducted *ex officio*, but there are exceptions, such as Article 609 of the Criminal Code which provides for *ex parte* proceeding for crimes of sexual violence. When proceedings have been initiated, they cannot be revoked, however. Crimes against underage victims, where the perpetrator is a grandparent or parent of the victim, and crimes perpetrated by the cohabiting partner of the victim or the victim's mother, or a tutor of the victim, proceed *ex officio*. Stalking is an *ex parte* crime, which may be revoked except in the case where the perpetrator is the victim's spouse or a person linked to the victim by an affective relationship and has threatened the victim often, or stalking has involved repeated electronic threats. Non-profit organisations that are recognised by law may support the victims of violence against women with their consent, and have, in proceedings, the same rights as the victim, under Article 91 of the Criminal Procedural Code. In **Ireland**, legislation does not ensure *ex officio* proceedings for the relevant offences.

In **Hungary**, Section 212/A on domestic violence of Act C of the Criminal Code of 2012 has two subsections. Subsection (1) lists acts that are prosecuted *ex parte*. They cover acts which seriously violate the dignity of the victim on a regular basis, or of concealing assets from conjugal or common property. Subsection (2) lists battery of and slander of an aggravated kind, and violation of personal freedom or duress of aggravated kind, to be prosecuted *ex officio*. Sexual violence is not classified as domestic violence, and rape and other forms of sexual violence under Section 197 of the Criminal Code are not a matter for public prosecution, except in cases where the violence amounts to serious bodily harm or when accompanied by another offence which is subject to public prosecution.

In **Latvia**, the prosecutors are formally in charge of prosecution, but the police and prosecutors point out that, in practice, it is almost impossible to prove violent crimes unless supported by victims' testimonies.

Under the general legal framework, NGOs are allowed to assist victims in human rights issues but only in civil proceedings. In **Luxembourg**, the proceedings depend on the victim's complaint. In domestic violence cases, assistance services may support and assist victims. In **Lithuania**, Article 407 of the Code of Criminal Procedure lists *ex parte* crimes which cannot be investigated without private complaint. They include Article 140(1) of the Criminal Code on causing physical pain or negligible health impairment. Under certain circumstances, the prosecutor may start investigation or proceedings without complaint, namely if the action has public significance or the person cannot protect his/her interests independently. In **Malta**, under Articles 543 and 544 of the Criminal Code a complaint by the victim is required, except in cases of domestic violence or crimes related to such violence. The issue is being considered by the inter-ministerial committee, but no proposals for amendment have been presented so far. Maltese law may permit victims to be assisted by *Appogg* or an NGO such as Victim Support or Merhba Bik, but such support is not ensured.

In the **Netherlands**, a complaint or report to the police is not a formal requirement for the prosecution of offences mentioned by the Convention. The organisation Victim Support the Netherlands assists and supports victims during proceedings, under Article 51e of the Code of criminal procedure. Under the **Polish** Penal Code Articles 148, 156, 157, 205 and 207 the offences mentioned by the Convention are offences that are prosecuted *ex officio*. Only the unintentional light bodily harm is prosecuted *ex parte*. The **Portuguese** legislation divides crimes into public crimes that proceed *ex officio*, semi-public crimes where a victim's complaint is necessary but the proceedings may continue even when the complaint is withdrawn, and private crimes which depend on the victim's complaint unless the victim is minor or unable to protect him- or herself. Crimes of physical violence are public, as well as domestic violence under Article 152 of the Criminal Code. Rape and other sexual crimes under Articles 163 and 164 of the Criminal Code are public only if the victim dies or is under 18 years old, and private in other cases. Genital mutilation under Article 144 No. 1 a of the Criminal Code is a public crime, but forced marriage and sexual harassment may be punished either as serious coercion or sexual coercion, which are either public or semi-public crimes. Stalking (Article 153) is a private crime. NGOs may assist and support victims during investigations and judicial proceedings.

In **Romania**, only forced abortion is a crime that is not wholly dependent upon the victim's report or complaint. Article 199 of the Penal Code stipulates that offences established in accordance with Article 35 of the Convention may start without a complaint having been filed by a victim.<sup>194</sup> If a friendly settlement between the perpetrator and the victim takes place, there is no longer criminal accountability. Crimes of sexual violence are wholly dependent on a complaint filed by the victim. Forced marriage, female genital mutilation and forced sterilisation are not explicitly criminalised. There are no provisions on assistance or support by NGOs. In **Slovenia**, domestic violence is a criminal offence under Article 191 of the Criminal Code, and criminal offences are prosecuted *ex officio*. Sexual violence and rape under Articles 170 and 171 of the Criminal Code are either *ex officio* or *ex parte* cases. Forced abortion is criminalised under Article 121 of the Criminal Code, but forced sterilisation or female genital mutilation are not explicitly criminalised. The Family Violence Act, Article 7 provides that the victim may choose a specific person to assist him or her, helping in protecting the victim's integrity and providing psychological support. Article 8 of the Act provides for legal representation for the victim. In **Slovakia**, the Code of Criminal Procedure, Article 211 stipulates that the consent of the victim is not required for offences of violence against women.

In **Spain**, Article 105 of the Criminal Procedure Law lays down the prosecutor's obligation to start judicial proceedings against the perpetrator in any criminal case, even without the victim's complaint or if the victim withdraws his or her complaint. Article 18 of Law 1/2004 gives the victims of gendered violence the right to receive full information and advice from public administration officials. NGOs or private counsellors are not mentioned by the law, but victims of any crimes have the right to be assisted by

194 *Legea 286 Codul penal din 17 iulie 2009* (Law 286 Penal Code of 17 July 2009), Articles 218.(5), 219.(5), published in the Official Journal No. 510 of 24 July 2009.

whom they wish. In **Sweden**, Chapter 20 Section 15 and Chapter 23 Section 5 of the Code of Judicial Procedure provide that prosecution is the duty of the authorities. Forced abortion, sterilisation or genital mutilation are not explicit crimes, but are covered by other crimes under general prosecution. Chapter 5 Section 11 of the Social Assistance Act (2001:453) provides that an accompanying counsellor from the Social Services may help the victim.

In the **United Kingdom**, the normal rules of criminal evidence can be investigated and prosecuted without the victim's participation or cooperation. There is no legislation on assisting or supporting the victim during investigations and judicial proceedings, but there is no explicit reason why such support could not be given.

### *3.7.5 Measures of protection (Article 56)*

The Article reads as follows:

- '1 Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:
  - a providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation;
  - b ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively;
  - c informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case;
  - d enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;
  - e providing victims with appropriate support services so that their rights and interests are duly presented and taken into account;
  - f ensuring that measures may be adopted to protect the privacy and the image of the victim;
  - g ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible;
  - h providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence;
  - i enabling victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.
- 2 A child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child.'

The Explanatory Report states that the provision is inspired by Article 31, Paragraph 1 of the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Paragraph 1 contains a non-exhaustive list of procedures designed to protect victims, to apply at all stages of proceedings. States Parties to the Convention may employ whatever means they consider best to achieve the provision's objectives under items c, d, g and i.

In **Austria**, there are no specific rules on the matter. In **Belgium**, the Act of 8 April 2002 provides that witnesses may be granted total or partial anonymity, and certain threats are covered specifically by rules regarding protection of endangered witnesses. In the **Czech Republic**, Act No. 137/2001 Coll., on special protection of witnesses and other persons in connection with criminal proceedings, provides for a general protection for witnesses, but pays no special attention to victims of gendered violence. In **Croatia**, the Witness Protection Act provides physical and technical protection, relocation, concealment of identity and ownership and change of identity. In **Cyprus**, the Protection of Witnesses Law No. 95(I)/2001 as amended by Law No. 15(I)/2014 provides protection for both victims and witnesses from intimidation and retaliation. Articles 16(1), (2), (3), (4) and (5) set up a Scheme for Protection of Witnesses and Collaborators with Justice under the supervision of the Attorney-General. Protection measures may be extended to the spouse, children, parents or other relatives of the witness, under Article 17(4). The witness may be given a guard, moved to another town, have a changed identity card or transferred abroad. A victim under the Violence in the Family Law No. 119(I)/2007 is a witness in a criminal procedure, s/he is considered as a witness who requires help, unless s/he states to the court that s/he does not need help, under Article 3(4).

In **Estonia**, the law does not protect witnesses, who are not victims, from intimidation and retaliation. The Victim Support Act considers only persons who are victims of negligence, mistreatment, physical, mental or sexual abuse, trafficked persons and sexually abused minors as victims. There are plans to broaden the scope of the Act. The Witness Protection Act entered into force on 1 January 2013. Witness protection can now be provided to protected persons and to family members and close relatives of protected persons. In **Finland**, the reform of Chapter 17 of the Code of Judicial Procedure in 2004 introduced anonymous witness hearings. The text of the new provisions has not yet been published. In **France**, Articles 706-57 and 706-58 of the Code of Criminal Procedure provide protection for witnesses in general, not specifically in cases of violence against women. The name and/or address of the victims may remain confidential under the provisions. In **Hungary**, the general witness protection laws can be applied, but there are no specific rules concerning witnesses who are not victims. In **Italy**, national legislation does not provide specific protection from intimidation and retaliation for witnesses who are not victims. There are no current proposals for amendment. In **Greece**, threatening or bribing a witness in a case of violence is punishable with imprisonment from three months to three years under Article 10 of Act 3500/2006.

In **Latvia**, national law provides protection under the general regime of the criminal procedure. In **Luxembourg**, the national legislation protects witnesses in matters of domestic violence. In **Malta**, the protection of witnesses under Article 90(2) of the Police Act, Chapter 164 and Article 412C of the Criminal Code mandates the ministers responsible for the police and for justice to provide regulations to secure greater protection of the personal safety, modesty, and psychological stability of such witnesses as may, due to special circumstances, require such protection. The protection through protection and restraining orders may be extended to 'other individuals', which includes witnesses. In the **Netherlands**, the Regulation on auditory and audio-visual registration of hearings of reporters, witnesses and the accused stipulates that victims may make statements in court without being physically present, and the recordings will be destroyed as soon as they are no longer necessary. There are separate waiting rooms for perpetrators and victims. If victims or witnesses are afraid of the consequences of their report to the police, they can opt for a partly anonymous report or deposition in order to avoid their identity becoming known to the accused. Extra attention is to be given to children, under the Regulation on domestic and honour-related violence, by the Prosecutor. The programme '*Kindspoor*' is directed at providing specialised help to children who have been witnesses to domestic violence.

In **Poland**, Articles 177(1)(a) and 148 (2)(a)-(2)(c) of the Code of Criminal Procedure include the provisions on protection and support for victims and witnesses. Articles 3-7 and 10 of the Law on protection and support for victims and witnesses implements the Directives 2012/29/EU and 2011/99/EU. The legislation allows the examination of a witness by use of technical devices, and provides personal protection and assistance in changing the place of residence when the life or health of a victim or witness is in danger. In **Portugal**, Article 152 of the Criminal Code and Article 20 No. 1 of Law No. 112/2009 grant protection to the victim and also to his or her family as regards personal security and privacy, if authorities consider

there is a danger of retaliation or intimidation. This protection can include measures to grant the personal safety of the victims and their family; the granting of psychological support and adequate conditions for testimony; the prohibition of contact between the perpetrator, the victim, and the family; and other measures established under the national programme for the protection of witnesses. In **Romania**, there is no protection provided under national law, nor any proposals for legislative amendment. In **Slovenia**, national law does not provide protection either. In **Spain**, Article 544 (ter) of the Criminal Procedure Law states that the protection order can be issued to protect not only the victim of gendered violence, but also other members of the victim's family who live with her. In **Sweden**, Sections 1 and 2 of the Restraining Order Act (1988:688), Section 2a of the Police Act (1984:387) and the Decree on the Special Personal Security Programme (2006:519) provide different measures for witness protection, from restraining orders and classified personal information to special witness protection programmes organised by the police.

In the **United Kingdom**, the protection of young witnesses under the Youth Justice and Criminal Evidence Act 1999 provides the special measures described under Article 26 of the Convention. Further, Section 17 of the Act provides that in relation to offences listed at Schedule 1 A to the Act such as homicide and crimes of violence, witnesses may access the same protection if 'the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings', and taking into account conditions such as the age or certain other circumstances of the witness or the accused.

### 3.8 Migration and asylum

#### 3.8.1 Residence status (Article 59.2)

The paragraph reads as follows:

'2 Parties shall take the necessary legislative or other measures to ensure that victims may obtain the suspension of expulsion proceedings initiated in relation to a residence status dependent on that of the spouse or partner as recognised by internal law to enable them to apply for an autonomous residence permit.'

The Explanatory Report refers to the fear of deportation or loss of residence status as a powerful tool used by perpetrators to prevent victims of violence against women and domestic violence from seeking help from authorities or from separating from the perpetrator. Most CoE Member States require spouses or partners to remain married or in a relationship from one to three years for the spouse or partner to be granted an autonomous residence status. The provision aims at ensuring that the risk of losing residence status should not constitute an impediment for victims leaving an abusive and violent marriage or relationship.

Paragraph 2 refers to cases where victims have joined their spouses or partners under a family reunification scheme, and face repatriation because of expulsion proceedings initiated against their abusive and violent spouse or partner. Repatriation then means that the victim continues to be subjected to abuse in his or her country of origin. The States Parties to the Convention are to take appropriate measures so that victims have the possibility of obtaining suspension of expulsion proceedings while they apply for a residence status on humanitarian grounds. The paragraph is applicable to cases where the sponsor spouse or partner is a perpetrator of domestic violence, and the victim will be expelled together with the perpetrator. The purpose is to provide protection from expulsion, and does not constitute a residence permit in itself.

In **Austria**, paragraph 57 of the Asylum Act and paragraph 27 of the Settlement and Residence Act are part of interdependent asylum, immigration and residence rules, which give family members of regular residents the right to apply for independent residence status in cases where the holder of the residence



permit has died or a divorce was granted on grounds of his/her guilt. Fugitives who have applied for asylum may be granted a special limited residence permit in cases where they are material witnesses in human trafficking cases or where a restraining order has been applied or issued. In **Belgium**, the Act of 15 December 1980 on access to the territory, stay, establishment and return of foreigners provides that a person's residence permit may not be withdrawn on the grounds that the married couple or partners are not living together, if that person is a victim of violence (rape, attempted homicide or personal injury). The victim must demonstrate, however, that s/he has adequate financial resources and sickness insurance (Article 11(2)4 of the Act). In other cases of violence, for example psychological or economic violence, the Foreigners' Office has more discretionary powers. In **Croatia**, the Foreigners Act, Article 171(5)(4) provides that a family member of a national of EEA Member State and is an employee or free-lance worker, with sufficient means for supporting him- or herself and has a health insurance retains the right to temporary residence if this is justified by exceptionally severe circumstances, such as family violence. In the **Czech Republic**, the national legislation does not ensure suspension of expulsion proceedings in the case at hand. **Cyprus** has made a reservation on Article 59 of the Convention, and has no legislation in place on the issue. In **Denmark**, under the Aliens Act, Sections 18 and 19, the victim must document having been subjected to violence, and that the violence is the reason the victim wants to divorce or separate. Further, the victim has to present proof of having special ties to Denmark. However, if a woman leaves her spouse due to violence against her person or children, the authorities have to take this into consideration and may grant her permission to stay.

In **Estonia**, the Act on Granting International Protection to Aliens contains principles of the Geneva Convention and requirements deriving from EU directives. A person enjoying subsidiary protection is an alien who does not qualify as a refugee, but in respect of whom substantial grounds show that his or her return or expulsion to his or her country of origin may result in a serious risk. It is, in practice, not an easy procedure, as there is a limited annual number of permanent residence permits, and a fee has to be paid for these. Article 10(2)3 of the Act provides that an asylum seeker and residence permit applicant under temporary protection is entitled to victim support services under the Victim Support Act, although the services are generally meant for Estonian residents. Article 9(1) of the Victim Support Act stipulates that Estonian citizens who have suffered damage as a result of a crime of violence have the right to compensation. In **Finland**, the Aliens Act (301/2004), Section 54 which will come into force in August 2015, explicitly stipulates that if a person, who has a residence permit on the basis of family ties, is in a personally difficult situation because of the spouse's violence against the other spouse or children may be given a residence permit, if giving the permit would not be unreasonable in the prevailing conditions.

In **France**, Law No. 2010-769, Article L313-12 of the Code for Entry and Residence of Foreigners provides migrant women who are victims of domestic violence a right to a residence permit independent from their spouse. If the victim is covered by a protection order, the residence permit is delivered or renewed automatically, and the victim exempted from taxes and fees caused by an application. In **Italy**, Article 4 of Decree No. 93/2013 provides for a special residence permit for reasons of protection of foreign persons who are victims of domestic violence. The permit is issued by the competent authority, or authorised by a judge when domestic violence against a foreign person is detected during police operations, investigations or criminal proceedings. The permit is also issued by the competent authority when domestic violence is detected in the context of general or specialist support services. The residence permit is personal and autonomous, but it is withdrawn in cases of conduct that is incompatible with the reason for its concession, or when the risk to health and life of the permit holder has ceased. In **Hungary**, there is no provision in place. In **Germany**, there is no legislation on the matter. **Germany** made a reservation on Article 59 (2) and (3). In **Greece**, the general provisions of the Code for Migration and Social Integration (Act 4251/2014) stipulate that if a victim who is a third country national satisfies the conditions for residence status, s/he may obtain a personal residence permit, and Article 1(1)(c) of Joint Ministerial Decision No. oik.30651/2014 requires that victims of domestic violence who are third country nationals are granted a one-year residence permit on humanitarian grounds, renewable for two years. The permit is granted to the victim's children or the adult who has guardianship of a child victim of domestic violence if that person is not the perpetrator.

In **Latvia**, there is no legislation besides the national legislation implementing Directive 2004/38/EC. The legislation leads to 'reverse discrimination' by treating third country nationals married to a Latvian citizen differently. If a marriage between a Latvian and a Russian citizen is ended because of violence, the Russian citizen has to leave Latvia, but when a partnership between a Lithuanian and a Russian citizen is dissolved in similar circumstances, the Directive grants the Russian citizen a right to residence. In **Lithuania**, there is no legislation on the matter. In **Luxembourg**, the right of residence is individual, and not affected by spouses and partners. **Malta** has filed a reservation to Article 59 of the Convention, and national legislation does not allow a residence permit of the type in question. In the **Netherlands**, Article 3.51 sub 1 h of the Foreigners Decree provides a permit for continued residence after the termination of a relationship due to violence within that relationship. Further detailed provisions are given in the Foreigners Circular, Chapter B8, under 2. Under Article 3.48 Foreigners Decree, victims of domestic violence may apply for an autonomous residence permit on the basis of proven domestic violence. During the procedure, the victim may stay in a shelter. If the distressing situation continues after a year, the residence permit is no longer extended, but the victim may apply for residence on the basis of Article 3.51 Foreigners Decree and Foreigners Circular Chapter B9 under 10.

In **Poland**, the Law on foreigners, Article 158 (2) and (3) allows a foreigner who has a temporary permit to stay in Poland as a family member of a Polish citizen a new permit at a divorce or separation, when important interest speak for it, or at the death of the spouse. In **Romania**, there is no legal provision on the matter. In **Slovenia**, there is no provision to allow an autonomous residence permit for victims in the case at hand. In **Spain**, Article 31(bis) of Law 4/2000, of 11 January 2000 about foreigners' rights and freedoms and their social integration, states that victims of gendered violence may obtain the suspension of any sanction related to their irregular stay in Spain, including expulsion, during the judicial procedure. If the court finds that gendered violence has taken place, the victim and her children will have the right to residence and working permits.

In **Sweden**, Chapter 5, Section 16 of the Aliens Act, a residence permit granted because of family ties is only valid as long as the relationship continues. A new residence permit can be granted, however, if the relationship has ended primarily because the alien or his or her child has been subjected to violence or other serious violation of liberty or peace. If violence is reported during the expulsion process, a new residence permit will be granted, and if the expulsion decision has already been made, enforcement may in general be suspended on special grounds under Chapter 12 Section 13 and, if circumstances have changed, under Chapter 12 Section 18. This possibility is used very sparingly, and there is no rule that explicitly grants a new trial in that situation. In the **United Kingdom**, Paragraph 34B(i) (b) of the Immigration Rules provides that a person may be granted indefinite leave to remain as a victim of domestic violence. The Joint Committee on Human Rights report on Violence against Women and Girls notes that women in these circumstances are unable to access legal aid or alternative housing so as to be in a position to make an application for indefinite leave.

### 3.9 Conclusions

Policies against gender-based violence have been introduced during the last decades both by the EU Member States and the EU. The motivation for national changes often derives from efforts to introduce more harmonised European standards and measures, undertaken by the EU and the CoE. The legislation and policies against gender-based violence in the EU Member States are far from having become harmonised, but there are common trends in dealing with violence against women and domestic violence. Shelters for victims of violence have been established, helplines provided, and criminal law amendments taken place.

The majority of the EU Member States have taken steps towards accession to the Istanbul Convention, although the States that have already ratified it are so far in minority. On the other hand, few Member States have not signed the Convention (**Bulgaria**, the **Czech Republic**, and **Latvia**), but even in three of these States, a political process concerning the accession is expected to start.

Both for the Member States that already have ratified the Convention and for those in which the accession process is going on, the political problems that create most controversies seem to involve the need to amend criminal law provisions. When the EU accession to the Convention is considered, these controversies do not necessarily create problems, as the Convention's substantive law requirements would mostly lie outside the EU competence.

On the other hand, the political accession process in most Member States seems to have paid relatively little attention to the need to improve the provision of support services to the victims of gender-based violence, including domestic violence.

Many Member States have introduced shelters and support services for victims of domestic violence, while services for victims of other type of crime under the Convention (victims of sexual crimes, genital mutilation and forced marriage, stalking and harassment), seem to be less developed. Even where services (including shelters for victims of domestic violence) are available, their funding is often from the third sector, or from international sources, and not on a permanent basis. Even in the Member States that have ratified the Istanbul Convention, the provision of shelters and other services does not often (if ever) fulfil the criteria referred to by the Convention, namely standards presented in the Final Activity Report of the CoE Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV (2008)6).

There is considerable overlap by the requirements under the Istanbul Convention concerning the provision of support services, and the services required by the EU law to be provided for victims. The Victims' Directive requires the Member States to provide protection against intimidation, retaliation and repeat victimisation, as well as targeted and integrated support of victims of sexual, gender based and domestic violence. The victims and their family members are to be protected from secondary victimisation, intimidation and retaliation during questioning and when testifying. The Istanbul Convention requires protection that is not bound to a legal procedure. Provision of coordinated services for victims of gender-based violence is required under both EU law and the Convention, however. As it seems that many Member States have not ensured coordination of the institutions that provide support services to victims, EU policies in this field could benefit from EU accession to the Istanbul Convention.

The accession to the Istanbul Convention could even give an even more sustained direction to the EU policies of funding initiative against violence against women. The Daphne programmes have provided projects aiming at reducing such violence for a considerable time. The situation in respect of support services to victims seems shows that initiative is not lacking in most Member States. The reports in this study imply that the existing services often depend on non-permanent funding. The EU funding could create more permanence to these efforts, if the guidelines of the Convention would be adopted.

Even though both the EU and many Member States have paid much attention to providing more data and research on violence against women, including domestic violence, the collection of such data and systematic research on the basis of that data is still lacking. The Istanbul Convention requirements in this respect coincide with what is needed for evidence-based decision making in the EU, and accession to the Convention could promote the aim of producing such evidence.

The EU has a strong non-discrimination legislation, which even pays attention to the problem of intersectional and multiple discrimination. Women are typically victims of discrimination both on the basis of their sex/gender, and on some other ground, typically a ground that is, along with sex, a prohibited ground of discrimination under EU law. The reports from the Member States imply that few Member States provide support services that are targeted at minority women, who may be unable to use the services targeted for victims in general. The Istanbul Convention prohibits discriminatory implementation of its provisions. Here, requirements of EU law and the Convention coincide. The accession to the Convention could bring even more emphasis on the responsibility to provide support services in a non-discriminatory manner.

The majority of EU Member States provide both emergency barring orders and restraining orders against perpetrators of domestic violence. The national legislation and procedure is quite varied, however. The EU law does not set any substantive requirements for a barring or restraining orders that may be enforced in another Member State, and the Member States decide whether to introduce these measures. The Istanbul Convention presents a coherent set of requirements for Parties in this respect, and the added value of the EU accession would be from stronger EU soft law cooperation to meet the Convention requirements. The EU measures for supporting training of officials involved with gender-based violence could also benefit from coherent standards for barring orders, which could have an impact in interpretation of national legislation.

The Istanbul Convention requires that the national rules on residence status of a victim of violence against women do not prevent the victim from reporting violence and leaving an abusive relationship. The EU has relatively extensive mandate in setting the minimum standards on the right of third country nationals to remain within the EU, and the citizens of a Member State to remain in another Member State, as well as in setting minimum standards for the asylum process. EU law in this area is under pressure at the moment, as the economic crisis has coincided with an increasing number of migrants and asylum seekers. The requirement that a victim of gender-based violence should have an individual right to remain in an EU Member State is important for access to justice and crime prevention, however. EU accession to the Istanbul Convention would create a pressure to introduce an explicit minimum standard to guarantee such a right.

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