The Convention on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) – the Istanbul Convention

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Abstract
The Council of Europe Convention on Combating Violence against Women and Domestic Violence (the Istanbul Convention) was adopted in 2011 and constitutes the latest transnational treaty focusing on violence against women. It entered into force in August 2014 and has been ratified, at the time of writing, by 24 States of the Council of Europe. Open to signature by non-Member States, only the European Union has signed it and signalled its intention to ratify the Treaty, albeit only in two areas. The Convention represents the most comprehensive victim supporting regional treaty that currently exists. Gender-specific for most of its provisions, but gender neutral in relation to domestic violence, and demonstrating the climate of compromise prevalent for women's human rights, the Istanbul Convention fills a regional normative gap. The Convention is based on the understanding that violence against women is a manifestation of historically unequal power relations and maintains a strong link between gender equality and combating that violence. The Convention requires the States Parties to condemn all forms of discrimination against women and to take legislative and other steps to prevent them. It permits the use of special measures to prevent and protect women from gender-based violence and includes a comprehensive list of criminal offences, including domestic violence. There are some drawbacks with the Convention, however, including the move to gender neutrality for domestic violence.

5.1 Council of Europe Action on combating violence against women

The Istanbul Convention is a culmination of years of Council of Europe action in relation to ending violence against women, including case law of the European Court of Human Rights (ECtHR). From 1985 onwards action was taken in variety of forms, including, the Committee of Ministers issuing a recommendation on Violence in the Family (with a follow-up in 1990), actions on the strategies for the elimination of violence against women in society, the media and other means, the 2002 Action Plan to Combat Violence against Women and various

conferences on violence against women organised by the division dealing with gender equality. Between 2006-8 a series of large-scale campaigns, conferences and awareness-raising activities took place. A Task Force to Combat Violence against Women was set up in 2006 that examined the need for a Council of Europe legal instrument on violence against the partner. Following its Stocktaking Study which was published earlier in the year, highlighting the fact that:

> 'Despite the increased attention to violence against women throughout the world, and many positive developments in policy and practices, campaigns and activities to combat violence against women and services to support and protect the victims, violence against women in its various forms is still widespread in all European countries.' (Council of Europe, 2006),

the Task Force endorsed the drafting of a new normative instrument in its 2008 *Final Activity Report*, as did the *Feasibility study for a convention on against domestic violence* (CDPC (2007)09 rev). The latter warned that any legally binding instrument to eradicate violence against women that the Council of Europe was thinking of passing 'should be a comprehensive human rights treaty and its paramount objectives should be the prevention of gender-based violence, the protection of victims and the prosecution of the perpetrators.' It should include girls within its remit, be based on the understanding of the gendered nature of domestic violence and structural barriers faced by women and include a strong monitoring mechanism. In 2008, the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) started preparing for one or more legally binding instrument[s] 'to prevent and combat domestic violence, including specific forms of violence against women, other forms of violence against women, and to protect and support the victims of such violence as well as prosecute the perpetrators.' An interim report was presented six months later, which called for a legally binding instrument that framed the eradication of violence against women in terms of achieving substantive equality as well as recognising it as a form of gender discrimination.[1]

5.2 The Istanbul Convention: Preliminary Issues and Challenges

The Treaty was adopted in 2011 in Istanbul, without a vote[2], and constitutes the latest transnational treaty focusing on violence against women. It is the most

comprehensive victim supporting regional treaty that currently exists. The Convention is made up of 81 articles, listing specific criminal offences that constitute violence against women and girls today. Hybrid or dualist in nature, it encompasses substantive gender equality goals within a human rights framework and language, thus linking the achievement of gender equality with the eradication of violence against women and the enjoyment of all human rights. Gender-specific for most of its provisions, it has had to adopt a gender-neutral approach for domestic violence, demonstrating the climate of compromise prevalent in relation to women's human rights – specifically for the most prevalent form of violence against women in the world at present – domestic violence. It entered into force in August 2014, with ten ratifications. As of October 2017, 26 States of the Council of Europe have ratified and 46 have signed it, with more states (including the UK) voicing their intention to ratify soon.[3] Open to signatures from non-Member States, only the European Union has signed it in June 2017 and demonstrated its intention to ratify the Treaty. Worryingly, the Convention has already received 16 Reservations, several Declarations and a few territorial applications. The promulgation of the Istanbul Convention fills the normative gap in the legal protection of women from violence at pan-European level. It draws upon the work of the Task Force to Combat Violence against Women (including, for instance, the studies on setting minimum standards for support services and data collection), existing international legal frameworks and the Conventions on Trafficking[4] and Exploitation of Children,[5] incorporating international human rights principles and practical requirements for implementation into domestic criminal and civil law. it is not a panacea and does contain some major drawbacks. These, it is hoped, can be rectified in any new UN normative instrument.

One of the major drawbacks of the Convention is the uneasy relationship with the concept of 'gender' that has entered a 'profound ambiguity' in relation to domestic violence (Römkens, 2013). The Istanbul Convention defines gender as a social construct, rather than based on biology and is thus different to other international treaties by incorporating a gender rather than a sex distinction. It requires States to introduce 'gender-sensitive policies' and a 'gender perspective', for some, but not all, of its articles, including, education (Article 14), general obligations on protection and support (Article 18), criminal processes (Article 46) and gender-based asylum claims (Article 60). For these articles, a gender lens means a focus on women. However, as the term can apply to either men or women, the Convention moves to gender neutrality for actions in relation

to domestic violence as both men and women can be victims, separating it out from violence against women more generally. Indeed, Article 2(2) encourages States to apply it to all victims, thereby invisibilising (once again) the structural discrimination which permits the violence to flourish in the first place. As the European Women's Lobby has pointed out, this separation runs the risk of 'weakening the gender approach to the structural phenomenon of male violence against women.' Before the Treaty was enacted it warned that, 'If the convention keeps domestic violence with a gender-neutral dimension in its scope, it will fail to reach its aims, notably to eliminate all forms of discrimination against women and protect women and girls against all forms of male violence' (European Women's Lobby, 2010). Additionally, the approach adopted in the Istanbul Convention is incompatible with Article 2 of the Declaration on the Elimination of Violence against Women and Paragraph 23 of GR35 General Recommendation 19 of the CEDAW both of which classify domestic violence as a form of gender-based violence and (most probably) the Council of Europe's own case law.[6] In *Opuz v. Turkey* the European Court of Human Rights (ECtHR), for the first time, specifically had regard to 'the provisions of more specialised legal instruments and decisions of international legal bodies,' in addition to accepting the statistical data demonstrating domestic violence affected mostly women. This latter fact, alongside judicial passivity in Turkey, created a climate in which domestic violence flourished. The court held that, 'Bearing in mind... that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women.' It was consequently considered serious enough to constitute a breach of several articles of the European Convention on Human Rights (ECHR), namely, articles 2, 3 and 14. There is therefore an inherent contradiction within the law of the Council of Europe, most likely leading to 'misapprehensions' in the term 'gender' at national level (European Parliament, 2017).

Although for some it 'might' be palatable to separate out domestic violence in light of significant political pressure,[7] however, it is another thing to attempt to make violence against women itself gender-neutral,[8] as one could also interpret the Explanatory Report accompanying the Istanbul Convention in the same way in relation to criminal offences.

> ‘153.The drafters agreed that, in principle, all criminal law provisions of the Convention should be presented in a gender-neutral manner; the sex of the victim or perpetrator should thus, in principle, not be a constitutive element of the crime. However, this should not prevent Parties from introducing gender-specific provisions.’

Whilst it is not disputed that perpetrators can be of any gender, the move to gender neutrality does deny (or hide from view) the overwhelming prevalence of male violence against women and girls, thus nullifying the meaning of the very term violence against women and the rationale for the treaty in the first place. In addition, and as the United Nations Special Rapporteur on Violence against Women has pointed out, a move 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’ (Manjoo, 2014, paragraph 61; see also Choudhry, 2016, p. 417). The current trend to gender neutrality might have even worse consequences. In the 3rd Quarterly Report of 2016, Nils Muižnieks, the Commissioner for Human Rights of the Council of Europe stated

> ‘In recent years, both religious and secular critics of so-called “gender ideology” and “gender theory” have mounted a growing challenge against generally accepted human rights terminology and principles. During my country visits, I have even encountered objections to the very use of the word “gender”, particularly in the context of promoting the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). What should we in the human rights world make of this criticism?’ (Council of Europe, 2016)

5.3 The Preamble

The Preamble and the Explanatory Report accompanying it make reference to several international human rights instruments, including the European

Convention on Human Rights (ECHR), the European Social Charter, the UN Covenants, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), General Recommendation No. 19 of the CEDAW Committee on violence against women (1992) and General Recommendation 28 on intersectionality (2010), reports by the Special Rapporteur on Violence against Women as well as Recommendations and other political statements by the Council of Europe and beyond. Many provisions within the Convention have been directly lifted from CEDAW and other instruments, for example articles on discrimination and special measures. The Convention is therefore an amalgam of good practice and legal definitions from a variety of sources, including hard and soft laws, and domestic legislative initiatives of European countries. The Preamble places the Convention within a structural and gendered framework and reminds the world that 'violence against women seriously violates and impairs or nullifies the enjoyment by women of their human rights, in particular their fundamental rights to life, security, freedom, dignity and physical and emotional integrity, and that it therefore cannot be ignored by governments.' In addition, the Preamble makes clear that the measures in the 'Convention are without prejudice to the positive obligations on states to protect the rights recognised by the ECHR,' and the growing body of case law of the European Court of Human Rights. ….

5.4 Overview of the Istanbul Convention[9]

5.4.1 General Purposes and Scope of the Convention

Article 1 sets out the five main purposes of the Convention. Firstly, the protection of women against all forms of violence and the prevention, prosecution and elimination of violence against women and domestic violence. Second, the contribution to the elimination of all forms of discrimination against women and the promotion of substantive equality. Third, the design of a comprehensive framework, policies and measures for the protection of and assistance to all victims. Fourth, the promotion of international co-operation (including, for example, the exchange of information). Fifth, the provision of support and assistance in a multi-agency framework to organisations and law enforcement agencies in order to adopt an integrated approach. Article 1 also lays out the form of monitoring to be utilised for the Convention, establishing a specific monitoring mechanism to be referred to as the Group of Experts on Action against Violence

against women and Domestic Violence (GREVIO).

Article 2 sets out the scope of the Convention pertaining to all forms of violence against women, including domestic violence perpetrated against women and which affects women disproportionately, with Article 6 proscribing 'a gender perspective in the implementation and evaluation of the impact of the provisions' and the promotion and effective implementation of 'policies of equality between women and men and the empowerment of women.' It is therefore true to state that the Convention attempts to re-balance the other requirement contained in Article 2 of the Convention, namely equally applying domestic violence committed against men and children and actively calling on States to take action in this sphere. The Convention thereby provides a gender dimension that is not present in other human rights treaties (apart from the Rome Statute) and a move, within the context of a gender-specific convention, to gender neutrality – meaning men and women, rather than women. This particular interpretation is pervasive throughout the Treaty and poses major challenges. That, by itself, is not necessarily a negative development. There are men and certainly many children who are victims of domestic abuse and other forms of violence. However, where, for instance, the limited funds and other resources dedicated to victim support and prosecutions that had been ring-fenced specifically for violence against women are being utilised for other offences and services, alongside addressing the structural disparities between men and women's lives, it becomes a major issue. Here action by State parties must be interpreted to mean *additional* services, funding and resources, including Article 8 which calls for 'adequate financial and human resources in the implementation of the Convention', including for NGOs and civil society organisations (see also Article 9).

5.4.2 Definitions

Article 3 of the Convention defines violence against women as a violation of human rights and a form of discrimination against women, covering 'all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'. Domestic violence includes '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.' Including psychological

violence within the definition not only reflects current good practice, it also codifies (in part) the decision in *Aydin v. Turkey* (1997) where the ECtHR found that 'rape leaves deep psychological scars on the victims which do not respond to the passage of time as quickly as other forms of physical and mental violence' and that rape could amount to torture within the meaning of Article 3 ECHR. The inclusion of economic violence, a non-residency requirement and the widening of possible perpetrators within the definition are positive developments, ones that are long overdue.

Unfortunately, the definition does not include 'coercive and controlling behaviour' which is increasingly being recognised as prevalent in most, if not all, domestic violence situations and constitutes a gap in the normative framework. Evan Stark has vividly described the need to recognise the 'invisible cage' in which most women live when subject to domestic abuse (I would add most, if not all, types of violence against women) in order to understand the necessity for coercive control laws and policies to effectively deal with domestic violence. He states that,

> 'The literature documents violent acts and the harms they cause in agonizing detail. But this work suffers the fallacy of misplaced concreteness: no matter how many punches or injuries or instances of depression are catalogued, the cage remains invisible as long as we omit the strategic intelligence that complements these acts with structural constraints and organizes them into the pattern of oppression that gives them political meaning. We see the effects of dominance, anger, depression, dependence, fear, substance use, multiple medical problems or suicide attempts, calls to the police or visits to the ER or shelter, but not domination itself.' (Stark, 2007, p. 198).

Put another way, 'In relationships, where the violence becomes repetitive, it becomes part of a pattern of controlling behaviours towards women. Not the violent incidents as such, but if and how the violence becomes part of the pattern, is the focus of analysis' (Römkens, 2013, p. 98). The inclusion of 'coercive and controlling behaviour' within the Convention could have signalled a significant step in the *de facto* and *de jure* dismantling of pervasive structural barriers that hamper achieving an eradication of violence against women and substantive transformative gender equality. A new Convention or Optional Protocol at the

United Nations level could potentially include such acts within its remit providing the opportunity missed at regional level.

As already outlined above, Article 3 is also limited in its relationship with the concept and definition of gender, with it being defined as 'the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.' Interestingly, the definition of gender within the Convention as it stands has been described as 'absolutely useless' (Agnello, 2013/14, p. 94). 'Gender-based violence against women' means 'violence that is directed against a woman because she is a woman or that affects women disproportionately'. The Convention covers girls under the age of 18 in its definition of women, thereby making visible the girl child, by explicit inclusion in the text of the Convention – arguably *the* most discriminated and violated category of person globally.

5.4.3 The explicit inclusion of the private sphere

Article 4 of the Istanbul Convention reinforces the current trend of human rights instruments (explicitly in this article as opposed to other implicit articles) by including the public and the private spheres within its remit and providing an example of the gender sensitivity approach: 'States must take all the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere.' Article 4 calls for actions to condemn 'all forms of discrimination against women' and to 'take, without delay, the necessary legislative and other measures to prevent it.' Actions should encompass enacting equality clauses within domestic constitutions or other relevant legislation, prohibitions on discrimination against women, including through the use of sanctions (where appropriate) and the abolition of laws and practices which discriminate against women. The provisions in Article 4 mirror the obligations contained in the CEDAW (Article 2), but goes further in explicitly proscribing an intersectional approach for measures to protect the rights of victims, in that no discrimination on any ground such as 'sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status' is permissible. Finally, Article 4 permits special measures, similar to Article 4 of the CEDAW, where

they are necessary to prevent and protect women from gender-based violence. The measures are not discriminatory under the terms of the Convention, as already reflected in the jurisprudence of the ECtHR. In the famous *Belgian Linguistics* (1968) case the Court held that language requirements in education in particular parts of Belgium were not discriminatory under Article 14 ECHR.

5.4.4 State due diligence obligations

The State obligations and due diligence standards contained in Article 5 of the Istanbul Convention require States to 'refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.' The Article also obligates States to fulfil their due diligence obligation to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors. In terms of the type of positive duty a State is under, the case of *Siliadin v. France* (2005) provides a clear example. The ECtHR held that the State failed to live up to the positive obligation to have in place a criminal law system to prevent, prosecute and punish non-State actors involved in domestic slavery. The Article also explicitly enacts the due diligence standard of the judgments in *Velasquez Rodriguez v. Honduras* (1989) of the Inter-American Court of Human Rights and *Gonzales v. United States* (2011) of the Inter-American Commission on Human Rights, as well as the cases on domestic violence by the ECtHR. For example, in *Opuz v. Turkey* (2009)[10] where the Court expanded on the decision in *Bevacqua v. Bulgaria* (2008), stating that:

> '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.' (para. 131).

The due diligence obligation requires an assessment of risk in the circumstances of the case and is an on-going obligation. Thus '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,' and must '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.' It is, by any measure, a comprehensive standard. However, successful cases so far are mainly limited to procedural errors and failings on the part of the State once it is aware of the risk, in other words, accountability for omissions, inaction or neglect of duty. 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 thus based on the point that even though a State is not responsible for individual acts of violence, it is obliged to prevent acts of violence between private persons once notified thereof. The due diligence obligation has been explicitly extended in the Istanbul Convention to cover other actors, for instance, the media and civil society actors, thereby extending the limits of accountability. The development of positive duties within the European human rights system is a long standing one. That, coupled with the concept of 'living instrument', has enabled several progressive judgments on domestic violence to be passed. It is the system of rights and the interpretation given to due diligence within the European region, specifically the Council of Europe, therefore, which will permit the Istanbul Convention to be a success. This system is not transferrable or comparable to any other in the world.

5.4.5 Victim-centred and integrated approach

Article 7 affirms current policy trends in Europe by requiring States to place the victim at the centre of comprehensive and co-ordinated policies and to involve government agencies, the national, regional and local parliaments and authorities, national human rights institutions and civil society organisations in the policies where appropriate. Information sharing continues to be a challenge on two fronts: one the one hand, agencies can be resistant to information sharing. Sometimes this is for very good reasons. For instance, the potential for perpetrators to access information, especially if organised crime is involved (e.g., crimes in the name of so-called 'honour'). Yet often it is because the agencies try to hold on to the information. On the other hand, women's services may not have the capacity to have a data-handler. However, in order to have effective responses to combat the many forms of violence against women it is imperative that a code of conduct (or similar) is developed that will permit information sharing to be institutionalised, not least because depending on the type of violence at issue, different agencies and individuals may need to be at multi-agency meetings or should be providing relevant information in order to adequately assess the risks to the victim. For instance, it can be dangerous to ask for information from certain individuals that

have close ties with the perpetrator or are members of the same community. Similarly, inter-agency cooperation (as outlined in Article 18) is vital for information sharing and other integrated and coordinated actions.

5.4.6 Data collection

Article 11 obligates States to collect disaggregated data on all forms of violence against women and domestic violence. This will certainly help with identifying patterns and trends and States are then under notice to do something about the problem - under their due diligence obligation. In terms of the European Union, the Fundamental Rights Agency survey has highlighted the prevalence of violence against women in Europe, finding that

- one in three women have experienced physical or sexual violence during their adult lives;
- up to 55 per cent of women in the EU have been sexually harassed;
- 32 per cent of all victims in the EU said the perpetrator was a boss, colleague or customer;
- 75 per cent of women in qualified professions or top management jobs have been sexually harassed, and 61 per cent of women employed in the services sector;
- 20 per cent of young women (18-29) have experienced cyber harassment; and
- one in ten women have been subjected to sexual harassment or stalking using new technology. (FRA, 2014)

The EU-wide survey represents an important milestone for the EU in its work in relation to prevalence rates for violence. A second survey has been announced, thereby providing longitudal evidence of violence. The European Institute for Gender Equality also collects and analyses data on violence and provides a vital resource in this regard.

5.4.7 Prevention

Chapter III of the Istanbul Convention specifies States' requirements concerning prevention. Article 12 provides general requirements for States to fulfil, namely to 'take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the

inferiority of women or on stereotyped roles for women and men.' This obligation reflects the position of CEDAW. The structural elements which permit a climate of violence to flourish are mentioned in the Article and require States 'to promote programmes and activities for the empowerment of women.' According to the Explanatory Report, the Convention tries to achieve gender equality 'by increasing women's agency and reducing their vulnerability to violence.' If the Convention is interpreted to include more financial and human resources being spent on prevention, alongside addressing structural barriers, then this might be a good development. The current *de facto* evidence however, across Europe, is contrary, with rape crises centres and women's specific services being shut down or not being provided with adequate financial resources. The transformative agenda is in part at least reliant on the adequacy of State responses to violence, including listening to civil society when it loudly attests to the fact that resources are desperately needed. It is not possible to fulfil the obligations contained in the subsequent articles on awareness raising (Article 13), education (Article 14), training of professionals (Article 15), prevention and treatment programmes for perpetrators (Article 16) and participation of the private sector and the media (Article 17), let alone Chapter IV obligations in relation to protection and support of victims, without sufficient, dedicated and appropriate financial and human resources being allocated for these tasks. All of these measures (and the entire Convention) make up a packet of actions required in order to change the hearts and minds in societies across Europe in order to eradicate violence and end the gender stereotyping that leads to disempowerment. The provisions on educational materials, training professionals, media engagement with the issue, to name a few, are vitally important, as important indeed, as adequately funded awareness raising campaigns, perpetrator programmes and victim support centres. All of these actions make up the holistic approach proscribed by the Convention.

5.4.8 Protection and Support

Article 18 sets out the general obligations of State Parties to the Convention in relation to protection and support and the creation of mechanisms for cooperation between relevant agencies. These obligations are subject to the caveat of compatibility with internal laws, but must be based 'on a gendered understanding of violence against women and domestic violence' and 'focus on the human rights and safety of the victim' and on 'an integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment.' Equally, they must use the protection, prevention and punishment

approach, and aim 'at avoiding secondary victimisation,' 'empowerment and economic independence of women victims of violence,' as well as allowing, 'where appropriate, for a range of protection and support services to be located on the same premises,' including setting up or arranging for a well-resourced specialist support sector. Finally, they must 'address the specific needs of vulnerable persons, including child victims, and be made available to them.' Additionally, the Convention obliges Member States to provide adequate and timely information to victims concerning support services in a language they will understand (Article 19), access to services to help their recovery (including legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment), health care and social services (Article 20), and specialist services (such as shelters, hotlines, support for victims of sexual violence, protection for child witnesses and reporting by both victims and professionals; (Articles 22-28)). The Explanatory Report accompanying the Istanbul Convention clarifies the specific obligations in relation to support services, providing detailed reasons for their inclusion and advice for State Parties (Council of Europe, 2011, pp. 23-27). These provisions are comprehensive and vitally important, representing the most comprehensive list of specialist support services currently enacted at transnational level. The inclusion of so many measures that could make a huge difference in women's lives, is to be commended.

5.4.9 Access to Justice

In terms of access to justice, Article 21 stipulates that States must provide information on the procedure for making individual and/or collective complaints at local, regional and international levels. This would include for instance information on the possibilities and requirements for taking a case to the ECtHR or the CEDAW Committee. As there is no court mechanism attached to the Istanbul Convention, and only a monitoring mechanism, it is important to remind individuals and groups of their options and to allow for the possibility of growth in the jurisprudence on violence against women at the ECtHR. This is particularly relevant in the European context as the European Union has signalled its intention to ratify the Istanbul Convention (it has already signed it). Ratification would open up the possibility of jurisprudence from the European Court of Justice (CJEU) being relevant to the interpretation of the Istanbul Convention as well as questions of compatibility of the Istanbul Convention with the EU Charter of Fundamental Rights and Freedoms, which contain articles on gender equality,

ending violence, as well as on the issue of intersectionality.

5.4.10 Substantive law

Chapter V of the Convention defines and criminalises a variety of forms of violence against women and domestic violence.[11] To give effect to it, State parties are obligated to enact, if they do not have within their domestic laws already, a number of new offences, applicable regardless of the relationship between victim and perpetrator[12] (Article 43). The likely domestic law gaps could be any of the offences specified in the Convention, including: psychological and physical violence, sexual violence and rape, stalking, female genital mutilation, forced marriage, forced abortion and forced sterilisation, sexual harassment, as well as aiding or abetting and attempt of any offence (Articles 33-41).

It is not, however, simply a matter of filling normative gaps at national level. It is equally relevant that the elements making up the offence are effective and enabling for victims to come forward and perpetrators to be convicted. For example, Article 36 on sexual violence and rape, includes the concept of 'consent', that 'must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances,' and must also apply to 'acts committed against former or current spouses or partners' but only 'as recognised by internal law.' The latter provides States an opportunity for the status quo, as the specific wording of domestic legislation and the factors that they consider as precluding 'freely given consent' are left to them, despite guidance from international jurisprudence.[13] It continues to be a problematic area as some States still require proof of resistance, even if not explicitly in the law, certainly implicitly in the court room. The Explanatory Report attempts to mitigate this and other shortcomings in law and practice by clarifying the positive duties States are under as outlined in the jurisprudence of the ECtHR in *MC v. Bulgaria*,[14] the International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR) and domestic criminal law across Europe, stating

> '191. When assessing the constituent elements of offences, the Parties should have regard to the case-law of the European Court of Human Rights. In this respect, the drafters wished to recall, subject to the interpretation that may be made thereof, the *M.C. v. Bulgaria* judgment of 4 December 2003, in which the Court stated that it was "persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types

> of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the 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 victim" (§ 166). The Court also noted as follows: "Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms ("coercion", "violence", "duress", "threat", "ruse", "surprise" or others) and through a context-sensitive assessment of the evidence" (§ 161). (Explanatory Report, p. 33)

Despite the guidance, the Convention still permits sexual history evidence to be admitted into court, albeit under exceptional circumstances only (Article 54). What constitutes 'exceptional' is a matter for internal law and continues to be contentious.

The Convention expressly forbids justifications for offences in the Convention based on culture, custom, religion, tradition or honour (Article 42). States should also ensure that civil law remedies are available to protect victims, such as restraining orders (see Articles 29 and 32). The obligation extends to providing the means to seek redress, including reparation and compensation, as well as domestic provisions to sue for libel and defamation for stalking or sexual harassment where criminal laws do not exist, mainly against the perpetrator but equally in relation to (in)actions of States if they fail in their duty to diligently take preventive and protective measures (see Article 5 Istanbul Convention and Explanatory Report, 2011, p. 26). The obligations codify the ECtHR judgments in *Osman v. the United Kingdom* (1998) and *Opuz v. Turkey* (2009), concerning the failure of public authorities to comply with their positive obligation under Article 2 ECHR (right to life). Article 45 sets out the sanctions regime for those convicted, including, deprivation of liberty, monitoring or supervision and withdrawal of parental rights. Importantly, Article 46 proscribes the circumstances to be taken into account that should be considered as aggravating circumstances. For example, the State's failings in relation to investigation were especially negligent due to the complainant's age (a girl child at the time of the incidents) in *MC v. Bulgaria*. This provision, alongside others that set the minimum European standards in relation to actions to end violence against

women, represent an harmonisation of standards that has the potential to help eliminate discriminatory practices within State institutions and from the courtroom.

5.4.11 Criminal justice and procedural provisions

Equally significant are the plethora of criminal justice provisions contained in Chapter VI on investigation, prosecution, procedural law and protective measures (Articles 49-56), codifying (to a large extent) the case law of the ECtHR and setting the boundaries in procedural and evidentiary matters. These have to be viewed through a gender lens (Article 49) and actioned without delay (Article 50). The subsequent articles outline the circumstances under which various orders are to be issued, including, risk assessments (Article 51), emergency barring orders (domestic violence perpetrator residency orders, Article 52) and restraining or protection orders (Article 53). The articles also detail the circumstances under which sexual history evidence (Article 54) and the permissible *ex parte* and *ex officio* proceedings (Article 55) are possible. Witnesses and victim protection measures are covered in Article 56. In addition, Article 57 makes provision for the right to legal assistance and free legal aid dependent on domestic law. Finally, Article 58 deals with the statute of limitation for certain offences within the Convention.

5.4.12 Migration and Asylum and International Co-operation

One of the unique features of the Istanbul Convention is its provisions in relation to migration and asylum contained in Chapter VII, targeting very complicated and problematic aspects of women's human rights, namely where women's rights intersect with policies to 'manage migration'. Many women only have derivative rights of residency as long as they remain married to their partner or stay with a partner. This is clearly problematic in domestic violence settings. Article 59 seeks to mitigate such laws by allowing, but under very strict conditions only, an autonomous residence permit, alongside a suspension of any removal orders to enable an application for a residence permit. In addition, a person may apply for a renewable residence permit but only under two conditions:

> where the competent authority considers that their stay is necessary owing to their personal situation; and/or where the competent authority considers that their stay is necessary for the purpose of their co-operation with the

competent authorities in investigation or criminal proceedings.

There is also a provision permitting residence permits to be issued to victims of forced marriages.

Another unique feature of the Istanbul Convention is its focus on gender-based asylum claims. Article 60 states that 'gender-based violence against women[15] may be recognised as a form of persecution within the meaning of Article 1A(2) of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection.' Article 60 also obligates States 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.' This is welcomed as gender-based asylum claims have been a major obstacle for women seeking security throughout the world. There is a dire need for such procedures, as currently migrant women are one of the most discriminated and vulnerable groups of women, constituting around fifty per cent of all migrants. According to the International Organization for Migration (IOM), in 2015, the number of international migrants worldwide (defined as a people residing in a country other than their country of birth) was the highest ever recorded, reaching 244 million. Female migrants constituted 48% of the international migrants worldwide, 42% in Asia, and the majority of international migrants in Europe (52.4%) and North America (51.2%) (IOM, 2015). It is therefore important for gender-based asylum to be recognised and for violence against women, including sexual violence, rape, human trafficking, female genital mutilation, forced marriage and 'honour' crimes, to be included within the definition of 'persecution' as required under Article 1 of the Refugee Convention 1951. Many of the cases concern State protection from violence by State and non-State actors, perpetrated against women because they are women and usually having other immutable characteristic (such as race, ethnicity, age).[16]

Rounding up the articles dealing with asylum, is the reminder to States of their international law obligation under Article 33 of the Refugee Convention 1951, i.e. not to expel or return an asylum seeker or refugee to any country where their life could be in danger. In addition, Article 3 ECHR forbids a person to be returned to a place where they would be at real risk of being subjected to torture or inhuman or degrading treatment or punishment (Article 61), regardless of their status.

The next Chapter of the Convention focuses on international co-operation and covers actions to prevent violence against women occurring, information sharing, data protection, and judicial cooperation (Articles 62-65).

5.4.13 Reservations

Reservations and Declarations to the Treaty are permitted. However, the types of reservations permitted have been limited, and are stricter than for other women's human rights conventions, thereby learning the lessons from the multitude of reservations to the CEDAW that have seriously hampered its effectiveness (especially in relation to the family). Reservations can be withdrawn at any time. Article 78 provides that no reservations may be made except for those expressly provided for under paragraphs 2 and 3 of that Article, accompanied by an explanation for the reservation. The articles at issue in paragraph 2 are those that raised the sovereignty issue, which was problematic during negotiations. These articles were thus subject to compromise and include: Article 30, paragraph 2 (state compensation); Article 44, paragraphs 1 e, 3 and 4 (jurisdiction); Article 55, paragraph 1 (ex parte and ex officio proceedings of minor offences only); Article 58 (statute of limitation); Article 59 (residence status). In addition, and uniquely, paragraph 3 specifies the form of the reservation in relation to Articles 33 (psychological violence) and Article 34 (stalking), permitting States to pass domestic civil law sanctions/remedies as opposed to only criminal laws for these two types of harms. In order to restrict reservations further, Article 79 stipulates that any reservation made will automatically lapse after five years, unless the State expressly takes steps to extend or modify it. In any event, the State will have to submit a justification for the continuation of the reservation to the monitoring committee (GREVIO).

Despite these restrictive articles, 16 reservations to the Convention have been entered to date. Most of the 16 reservations concern the jurisdiction issue set out in Article 44 which notes that States must pass measures to establish jurisdiction where any offence is committed against 'one of their nationals or a person who has her or his habitual residence in their territory'; or 'on board a ship flying their flag'; or 'on board an aircraft registered under their laws'; or 'by one of their nationals' or 'by a person who has her or his habitual residence in their territory'.

The Article then makes various stipulations, *inter alia*, in relation to criminalisation of specific offences, reporting and extradition.

At the time of signing the Treaty, Poland, Lithuania and Latvia also filed Declarations concerning their need to conform to the domestic principles and provisions of their constitutions (see McQuigg, 2017, pp. 149-53). Poland ratified the Istanbul Convention in April 2015 without withdrawing its Declaration. As a result, four State parties[17] objected to the Declaration, judging it to be a Reservation, rather than a Declaration, not permitted under the terms of the Treaty, because of its breadth. Such Declarations undermine the potential of the Convention and are a warning sign, especially as all States are aware of the history of the CEDAW and its many reservations. Hence the reason for the narrow exceptions reservations are permitted to take. Allowing such a wide Declaration to stand post-ratification opens the door for other States (such as Lithuania and Latvia with their Declarations) to follow suit, thus circumventing one of the main aims of the Treaty. It is one of the reasons activists have called for any new Treaty to permit no reservations (of any type), despite the challenges this would bring in respect of ratifications.

5.5 Group of experts on action against violence against women and domestic violence: the GREVIO Committee

The Istanbul Convention makes provision for a Group of experts on action against violence against women and domestic violence (GREVIO) to act as the monitoring body to the Convention. Its remit is set out in Articles 66-70. Article 66 governs GREVIO membership. It provides that GREVIO shall have between 10 and 15 members, depending on the number of Parties to the Convention, and shall take into account a gender and geographical balance, as well as multidisciplinary expertise in the area of human rights, gender equality, violence against women and domestic violence or in the assistance to and protection of victims. GREVIO members must be nationals of the States Parties to the Convention, with 'integrity, competence, independence, availability and language skills (English and/or French)'. There are currently ten members, reflecting the legally proscribed limit, but this can now be expanded to 15 with the 26th State ratification having occurred in October 2017.

5.5.1 Work of the committee

The work of GREVIO undertakes has many similarities to other international monitoring mechanisms, with some noticeable exceptions. States Parties are obligated to submit a baseline report to GREVIO on the basis of a questionnaire on the legislative and other measures taken to give effect to the Convention. The Explanatory Report states that the 'idea is to have a baseline of legislative and other measures the Parties have in place, when acceding to the Convention, with regard to the concrete and general implementation of the Convention.' (Explanatory Report, para 350, Article 68). Thereafter, States report periodically according to a timetable yet to be determined, reporting on certain aspects only, not the entire Convention. It is hoped that this aspect is carefully thought through, and that it is timely, relevant and quick to react to 'hotspots', or maybe better still, cover the entire Convention reflecting the holistic and integrated approach of the Convention. There is scope for input from other bodies such as NGOs, civil society and national human rights institutions. Shadow reporting is encouraged (see below). GREVIO can also take into account existing information available from other regional and international instruments and bodies that intersect with the areas falling within the scope of the Convention. GREVIO can adopt General Recommendations on themes and concepts relevant to the Istanbul Convention but has not yet done so (Article 69). GREVIO is also tasked to report back to the State with its conclusions and recommendations.[18]

According to the Convention, GREVIO is permitted to undertake country visits as a secondary method for monitoring the implementation of the Convention, but the visits should be carried out only in two specific cases. Firstly, if the information submitted or gained in a particular State is insufficient and there is no other feasible way of reliably gaining the information; or, second, where GREVIO has identified a serious issue that requires immediate attention in order to prevent or limit the scale or number of serious violations of the Convention. Country visits must be organised in co-operation with the competent authorities of the Party concerned, meaning that they are established in advance and that dates are fixed in co-operation with national authorities. This narrow scope within which GREVIO is to work is set out in theory, in the Convention. However, in practice, GREVIO does undertake country visits following State dialogues and submission of State reports. This has already become one of the steps in the procedure to monitor the implementation of the Istanbul Convention with GREVIO having visited Austria, Albania, Monaco and Denmark to date.

On the basis of GREVIO's report, the Committee of the Parties can adopt recommendations on the measures to be taken by the State Party and, more generally, to promote co-operation with the Party. GREVIO is also empowered to instigate special inquiries in order to prevent a serious, massive or persistent pattern of any acts of violence covered by the Convention and can draw up and publish reports evaluating legislative and other measures taken by the Parties to give effect to the provisions of the Convention.

Surprisingly, there is no communications mechanism. This is in sharp contrast with international bodies, such as the CEDAW Committee, and regional bodies such as the Inter-American commission on Human Rights. It represents a major gap in access to justice for individuals and groups. The communications procedure has been utilised by the CEDAW Committee to positive effect in relation to violence against women, including the cases of *AT v. Hungary* (2005) and *Yildirim v. Austria* (2007). The Council of Europe's human rights legal regime does permit individuals to take their cases to relevant bodies, once their domestic remedies have been exhausted and if they have standing as a 'victim' (Articles 34 and 35 ECHR). However, these two requirements are particularly onerous on individuals and do not help address the structural barriers women face within their domestic legal systems. The lack of a communications procedure is a gap that could be filled by an international normative instrument.

5.5.2 Co-operation with NGOs and civil society

A positive aspect of the work of GREVIO is its official cooperation with NGOs and civil society actors working in the violence against women field, alongside the recognition that they are a vital source of information and 'strongly encouraged to give their input and share their concerns at any time' with GREVIO.[19] This includes meetings (including *in camera* if necessary) during country visits, 'providing GREVIO's delegations with relevant written information, data and other evidence which may be of use during their country visits or for the drawing-up of GREVIO's reports and conclusions; facilitating the organisation of in situ visits to places of relevance to GREVIO (such as NGO-run shelters for women victims of violence); assisting in the organisation of meetings with independent professionals; and facilitating meetings with victims or groups of victims' The role of NGOs is further strengthened by GREVIO encouraging them 'to provide information on follow-up action or lack of action by the authorities to address GREVIO's concerns and to implement any recommendations made by the Committee of the Parties' (GREVIO, 2017). NGO

submission are confidential unless it is decided otherwise, and have been published on the GREVIO website under 'country monitoring work' (https://www.coe.int/en/web/istanbul-convention/country-monitoring-work).
This type of recognition and access is very welcome at a time when NGOs, especially women's rights NGOs, are experiencing restrictions in their opportunities to engage at all levels of decision-making.

5.5.3 Its achievements so far

Although it has only met twelve times in the short two-year period that it has been in existence, it has already accomplished much. GREVIO held its first meeting on 21 - 23 September 2015 in Strasbourg where it adopted its Rules of Procedure[20] and elected its President and Vice-Presidents for a period of two-years. In March 2016, GREVIO adopted a questionnaire on legislative and other measures giving effect to the provisions of the Convention that States must include in their State report. The questionnaire is comprehensive, holistic and requires detailed information States must provide information on all aspects of the Convention obligations. It rivals, or even surpassing, the level of scrutiny of other human rights monitoring mechanisms.

To date, GREVIO has received several State reports and has reviewed two State Reports (Austria and Monaco) and published its findings. In addition, it has held dialogues with several representatives of State parties that have submitted their draft reports (for example, Montenegro and Turkey). GREVIO has had dialogues with the Director of EIGE and the United Nations Special Rapporteur on Violence against Women. It has recently started a dialogue with judges of the European Court of Human Rights which it will continue in the future. In 2017, it officially responded to the call by the Special Rapporteur on Violence against Women for submissions on the adequacy of the international legal framework on violence against women. The submission is equivocal in recognising a gap in the normative framework at international level, but notes that the timing is not conducive to filling it. The submission's general comment notes:

> 'While GREVIO appreciates any initiative that further enhances the international framework on violence against women, it would like to recall that it is a monitoring body that has only recently been set up and that is yet to embark on its core task of evaluating the level of implementation of the Istanbul Convention by its state parties. Given the early stage of its

work and its regional limitation, it is not in a position to offer a full assessment of whether or not legally binding standards are warranted at global level. GREVIO is fully aware of the fact that it operates in a region of the world which has chosen to develop very advanced legally binding standards which other regions may or may not aspire to. The following replies are fully anchored in this awareness and were provided in the spirit of adding one voice to many in an on-going debate.' (GREVIO, 2017)

The success of the Istanbul Convention is, in part at least, contingent on the work of GREVIO. It is, of course, too early to give an accurate assessment. However, bearing in mind that GREVIO has only existed for two years, that it has developed a comprehensive questionnaire States are obligated to use, its cooperation with the NGOs and civil society working in the field of violence against women, and the most modern provisions of any international normative instrument on violence against women to date, the outlook is promising.

5.6 Relationship with the European Convention of Human Rights and the European Court of Human Rights

The Explanatory Report to the Convention, 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 provides guidance for the elaboration of positive measures needed to prevent violence. (Recital 29). This is a symbiotic relationship. The ECtHR, consequently, has a leading role to play in providing guidance on States' obligations in relation to acts constituting violence against women and domestic violence which breach the provisions of the ECHR. This is reflected in the jurisprudence of the Court and reflects the 'living instrument' method of interpretation. Also, there is ample case law to draw on, which is mostly positive.[21]

In the last ten years or so the ECtHR has developed a substantial body of cases concerning violence against women and domestic violence in particular, some of which has already been discussed above. The ECHR has no specific article dealing with violence against women. That has not prevented the Court from

utilising the concept of a 'living instrument' to read it into the ECHR. On a few occasions, the jurisprudence of the ECtHR reflects decisions and General Recommendations 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), Article 8 (respect for private and family life) and Article 14 (non-discrimination) [22] and spelled out States' obligations with respect to domestic violence (*A v. Croatia; E.S. and Others v. Slovakia; Kontrová v. Slovakia*; *Bevacqua and S. v. Bulgaria*; *Opuz v. Turkey*) and rape (*M.C. v. Bulgaria*) as issues subject to the positive duty obligations of State Parties. These have focussed on procedural and substantive criminal law aspects, but have not covered support and social protection measures. The latter are now part of the Istanbul Convention and may be subject of future litigation and might shift the Court's views on such matters. There are, however, limits to the positive effect of the Court's rulings. For instance, in a case where a woman's health was threatened if she gave birth, the ECtHR found a violation of the applicant's right to her private life, but did not establish that this amounted to inhuman treatment (See *Tysiąc v. Poland*, 2007).

There is no strict system of precedent in the ECtHR, but jurisprudence is usually followed by States. Decisions of the ECtHR are, however, binding upon States Parties to the particular case and are relevant to all States Parties to the Convention as indicative of its authoritative interpretation. Failure to take such positive measures as set out in the judgment on the part of the State incurs liability, including compensation for the parties.

5.7 The Istanbul Convention – not just for Council of Europe members but a norm for the world?

The Istanbul Convention is open for signature to any State in the world and to international bodies. So far, only member States of the Council of Europe have signed or ratified the Convention. There may be several reasons for this, but this could be mainly related to the specific region that the Convention is anchored in. Firstly, and perhaps most obviously, the provisions within the Istanbul Convention are Euro-centric, specifically adapted to the legal and social situations within the Council of Europe States. Secondly, the provisions codify the case law of the ECtHR, which in turn is mostly based on the domestic

situations within Council of Europe States. Compatibility of domestic laws and State action are judged by the standards of the ECHR, adjudicated on by the ECtHR which has particular methods of interpretation that it uses, unique to Europe. They include 'proportionality', 'margin of appreciation' and 'living instrument'. These methods do not necessarily translate well into other legal jurisdictions. This is not a value judgment, but rather a difference in methodology particular to regional variations. Thirdly, the provisions on protection and support for victims require a substantial commitment of financial and human resources. Specific services such as 24 hour hotlines, rape crises centres, shelter, and the like, are costly, and may be beyond the resource capacity of some regions. Despite the need for them, it is perhaps unrealistic to expect the standards within the Convention to be attainable by the poorest regions at present, especially as the Convention makes no provision for a 'progressive realisation' approach common in other international instruments. That also includes the poorest countries in Europe. It is therefore not surprising that there is no rush by States, from other parts of the world, to sign and ratify the Convention.

5.7.1 The Accession of the European Union to the Istanbul Convention

In October 2015, the European Commission issued a roadmap on possible EU accession to the Istanbul Convention, stating that this would 'create a coherent EU framework for combating violence against women, improve prevention for all women and afford better protection and support for women and children who are victims of violence and specific groups of women.' On 4 March 2016, the Commission proposed the EU's accession to the Istanbul Convention and in May 2017, the European Union announced its intention to sign the Istanbul Convention. It did so on 13 June 2017, albeit with the reservation that there be a limitation to two areas upon ratification: matters related to judicial cooperation in criminal matters and asylum and non-refoulement, thus raising legal uncertainties as to the scope of the EU's accession, as well as concerns regarding the implementation of the Convention. The Interim Report by the European Parliament has denounced such a limitation as well as national 'misapprehensions about the term "gender" employed in the Convention'. Interestingly, the European Parliament Report also called for, *inter alia*, an 'EU Coordinator to act as representative of the EU to the Committee of the Parties at the Council of Europe once the Istanbul Convention is ratified by the EU. This coordinator would be responsible for the coordination, implementation, monitoring and evaluation of policies and measures to prevent and combat all forms of violence

against women and girls' - which would be a positive development. The process of ratification now requires the adoption of Council decisions on the conclusion of the Istanbul Convention, after approval is granted by the European Parliament. The limitation to two areas might prove problematic at this stage. On accession, the institutions of the EU and the Member States of the European Union become bound by the Istanbul Convention.

5.7.1.1 Legal base for accession

Article 216(1) of the Treaty on the Functioning of the European Union (TFEU) permits the EU to accede to international agreements where the Treaties or legally binding EU acts so provide and 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. There is precedence for the EU to ratify international human rights instruments. For example, it has acceded to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD). The process for ratification of that Convention serves as a blueprint for the Istanbul Convention. There is a Code of Conduct that regulates the working relationship between the two supranational bodies and a declaration that includes a list of Community Acts on the issues under the material scope of the UN CRPD as well as the Strategy 2010-2020 that identifies actions at EU level to supplement national ones, and determines 'the mechanisms needed to implement the UN Convention at EU level, including inside the EU institutions.' Undoubtedly similar instruments will need to be agreed to for the Istanbul Convention.

Two key areas of the Istanbul Convention intersect with EU competencies: gender equality is a general principle of the European Union and crime prevention is part of the EU *acquis*. It also reflects its policy objective of progressively eliminating violence against women and reflects decades of action (both soft and hard law) in the area, including the Victims Directive, action on human trafficking, the European Arrest Warrant and European Protection Orders. In addition, the 2016 European Institute for Gender Equality has pointed out that the cost of violence against women to the EU amounts to approximately 226 billion euros per year (EIGE, 2014). There is therefore an economic imperative for accession which sits alongside the prevalence imperative. The EU Agency for Fundamental Rights 2014 survey of 42,000 citizens across the European Union detailed the prevalence of violence against women (see above, EU FRA Survey, 2014). The EU has little competence in the area of substantive criminal law

harmonisation as laid out in the Istanbul Convention, however, and this would, presumably, remain outside the EU's competence. It does have such competence in the area of sexual harassment in working life and access to goods and services but only in relation to civil law actions and remedies, not criminal ones. With respect to judicial coordination, the EU has competence in the protection of victims in criminal law procedures under Title V TEFU – freedom, security and justice.[23] Here, the EU has scope to attempt to include several of the provisions within the Istanbul Convention under this umbrella. In addition, the articles of the EU Charter of Fundamental Rights intersect with many of the guarantees and rights contained in the Istanbul Convention and therefore potentially provide another legal source to draw upon in litigation (Jones, 2004, 2012).

5.8 Conclusion

It is uncontested that the Istanbul Convention embodies the most advanced system of protection for women from violence at international level. It is comprehensive, modern and provides many essential legal provisions to support women subjected to violence. It includes substantive criminal law provisions and provides guarantees for access to justice. It details the States' due diligence obligations in relation to violence against women and domestic violence, codifying some of the most important cases from the ECtHR. The Convention sets up a potentially effective monitoring mechanism to ensure compliance by State Parties. It represents a significant step towards the full recognition of violence against women as a human rights issue that has wide-reaching consequences for all in European society.

There are challenges. The political compromises resulting in an uneasy relationship with gender, the separating out of domestic violence from other forms of violence against women and the move to gender neutrality; ensuring ratification by all members of the Council of Europe and member states of the European Union; adding the European Union as a signatory, but with its potentially limited scope of application; the lack of a right to individual petition; the caveats to defer to internal laws of the State parties; and, the number of reservations and declarations. These are major challenges for the Convention, some of which may also be issues for a new United Nations normative instrument. The fact remains, however, there is a normative instrument for Europe, but none that covers the globe.

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[1] See McQuigg Chapter 3 for excellent overview and Choudhry, 2016.

[2] See Agnello, (2013-14) for a detailed discussion.

[3] Albania, Andorra, Austria, Belgium, Bosnia Herzegovina, Denmark, Estonia, Finland, France, Georgia, Germany, Italy, Malta, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, Sweden, Turkey.

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

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

[6] See also Nousiainen and Chinkin (2015). But also de Vito (2016) who does not subscribe to this view.

[7] Römkens notes that the proposals for gender neutrality were brought forward by 'a substantive minority of MS, notably from various first-generation EU MS.' Römkens, 2013, p. 203.

[8] Indeed, the gender neutrality debate has led the CEDAW Committee as well as the UN Special Rapporteur on Violence against Women to employ the term 'gender-based violence against women' (see General Recommendation 35, 2017).

[9] For a comprehensive guide, see McQuigg, 2017.

[10] See Manjoo, R. (2013). 'State Responsibility to act with Due Diligence in the

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[11] Interestingly, it does not include conduct already covered in other Council of Europe instruments, notably, the Convention on Action against Trafficking in Human Beings (CETS No. 197) and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).

[12] The provision was specifically enacted to deal with offences that are persistently viewed as 'private', such as rape in marriage.

[13] See Trial Chamber of the ICTY, *Prosecutor v. Anto Furundžija*, case no. IT-95-17/1-T, judgment of Dec. 10, 1998, and Rudolf and Erikkson (2007).

[14] *Ibid*. See also Conaghan (2005).

[15] Note the term 'gender-based violence against women' is used here, rather than violence against women, reflecting the case law and the current trend to using this term.

[16] For example, *PS (Sri Lanka) v. SSHD* (2008). See generally, Hathaway and Foster (2014), Clayton (2016).

[17] Austria, Finland, the Netherlands and Sweden.

[18] See also McQuigg (2012) for overview.

[19] See GREVIO Rules of Procedure, Rule 35.

[20] Resolution CM/Res(2014)43 on rules of the election procedure of the members of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), adopted by the Committee of Ministers on 19 November 2014.

[21] A cursory indication only is provided here. There is a rich literature on the topic, cited above, as well as Harris *et al* (2014).

[22] See, for example, *Kontrova* v. *Slovakia* ECtHR 31 May 2007; *Branko Tomasic and Others* v. *Croatia* ECtHR 15 January 2009; *Opuz* v. *Turkey* (2010) 50 EHRR 695; *ES and Others* v. *Slovakia* ECtHR 15 September 2009; *EM* v. *Romania* ECtHR 30 October 2012; *Valiuliene* v. *Lithuania* ECtHR 26 March 2012; *Bevacqua* v. *Bulgaria* 12 June 2008; *A* v. *Croatia* 14 October 2010; *Kalucza* v. *Hungary* 24 April 2012; *Eremia and Others* v. *Moldova* 8 May 2012.

[23] For an overview on the legal implications of EU accession, see Nousiainen and Chinkin (2015) and de Vido (2016).