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# Legal implications of EU accession to the Istanbul Convention

Current Reflections on EU Gender Equality Law, Trier 2017  
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## What is this lecture about

- 1 Development of international human rights law on violence against women
- 2 EU Accession to Istanbul Convention
  - EU competence to accede to the Convention: general; gender equality; criminal law
  - Accession to CRPD: forerunner to accession to Istanbul Convention
  - EU fundamental rights and violence against women
- 3 Violence against women in EU policy
- 4 The Istanbul Convention, compared with EU law
- 5 Situation in the EU Member States
- 6 Conclusions



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## Development of international human rights law on vaw

Traditional human rights law protection of crime suspects, accused and convicted/of crime victims

UN CEDAW (1979) prohibits discrimination against women – no reference to vaw

1990s turn: many recommendation on vaw, a binding regional human rights convention (Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994)

CEDAW Committee General Recommendation No 19 on violence against women (1992): Violence against women is discrimination against women under the Convention

CEDAW Committee General Recommendation No 35 updating No 19 (2017): Prohibition of gender-based violence against women is a principle of customary international law. Clear statement of state obligations to eradicate it



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## Violence against women as discrimination

CEDAW Committee Gen.Rec. No 19 on violence against women: Violence against women is discrimination against women under the Convention

Direct and indirect discrimination: Violence which is directed against a woman because she is a woman, or affects women disproportionately

The obligation to eradicate the impunity of such violence under human rights law is stated



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## Evolution of the state duty to eradicate vaw

Human rights law development of *due diligence* duty

For example case law of the European Court of Human Rights: *Opuz v. Turkey* (application No 33401/02, judgment of 9 June 2009), para 164: international law materials on the evolution of the principles of international law

CEDAW Committee General Recommendation No 35 updating No 19: Prohibition of gender-based violence against women is a principle of customary international law; statement on state obligations to eradicate it

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## EU competence to accede to the Convention: general

The EU has legal personality and competence to conclude international agreements on its own behalf (Art. 216 (1)) TFEU)

The competence covers human rights instruments

A Convention ratified by the EU is binding on the EU and the Member States to the extent of EU's competence to act  
Member States are bound by their own ratifications

The competence was used when the EU acceded to the UN CRPD

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## Strong EU competence: gender equality

**Cross-cutting provisions** (Articles 8 and 10 TFEU) to promote gender equality and combat sex discrimination in all actions

Competence to **legislate to combat sex discrimination** (Art 19 TFEU)

Competence to **legislate to promote equal treatment in employment** and occupation (Art 157 TFEU)

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## Limited EU competence: criminal law

Competence for **judicial cooperation** in criminal matters (Art 82 TFEU); allows mutual recognition of judgments and minimum rules to facilitate it

Competence for **approximation of criminal law** (Art 83 TFEU) is restricted to particularly *serious crimes* with a *cross-border dimension* in certain areas; possibility to identify new areas that meet the criteria

Competence for **legislate to promote** Member State action for **crime prevention**, excluding harmonisation of laws

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## EU accession to the UN CPRD

The EU ratified the UN Disabled Persons Convention in 2010

The framework required for EU representation and cooperation was established

A declaration on the sharing of competences between the EU and the Member States was presented at ratification

Monitoring takes place through reporting (similar to the Istanbul Convention)

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## EU fundamental rights and violence against women

Many provisions of the Istanbul Convention are related to EU fundamental rights

The interpretation of the EU Charter of Fundamental rights is to comply with the ECHR Irrespective of accession to the Istanbul Convention, the ECtHR case law concerning violence against women has an impact on the interpretation of the fundamental rights

Conflicting rights: rights of victims v perpetrators

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## EU policies against violence against women

The EU has extensive policies against vaw:

- soft law instruments against vaw since 1980s
- European Parliament resolutions on including vaw under Art 83(1) TFEU by activating the passarelle clause under Art 83(2) TFEU; and on EU accession to the Istanbul Convention
- soft law gender equality strategies involving vaw
- funding policies (Daphne programmes)
- binding EU law: e.g. the Victims' Directive, the Protection Order Directive, directives on trafficking and sexual exploitation of children



## The Istanbul Convention/EU law

A comparison of the Convention with EU law chapter by chapter was made for the Report

The Convention's XII Chapters cover a broad set of issues; only some main points may be discussed here



## Chapter I of the IC: Purposes, definitions, general obligations

The Convention's purpose (to protect against, prevent, prosecute and eliminate vaw and domestic violence) has a legal basis in EU law

Definitions used in the Convention (gender, gender-based violence against women as discrimination) are not alien to EU law, as EU law uses these in recent legal instruments

The duty to take necessary measures to promote the Convention aims coincides with EU law, within the bounds of the EU competences

The due diligence duty to prevent, investigate, punish and provide reparation would oblige the EU to due diligence in crime prevention and protection of victims in particular

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## Chapter II: Integrated policies and data collection

The Convention requires comprehensive and coordinated policies for the purposes of the Convention; the EU has such policies in place

The Convention requires a body/bodies for coordination of policies; could be determined by a Code of Conduct at accession

The obligation to data collection and research; the EU already collects data (also needed for deciding on need of further measures)

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## Chapter III: Prevention

The Convention obligations concerning eradication of prejudices and customs based on gender stereotypes are partly covered by EU equality law. Obligations on training professional to deal with victims and perpetrators concern EU agencies (Eurojust etc.) training activities in judicial cooperation. The EU has a mandate to legislate on crime prevention which does not involve harmonisation.

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## Chapter IV Protection and Support

The chapter includes many provisions that coincide with EU competence, while EU law and measures have a narrower scope than the Convention

The obligations include cooperation between different actors that provide protection and support services; a list of the criteria for services is provided

EU Victims' Directive provides minimum rules on services, but has a narrower scope and no criteria for the services

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## Chapter IV: Art 21

The Article requires that victims have information about and access to applicable human rights instruments

No such duty exists in EU law

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## Chapter IV: Art 22, 23, 24

Articles require provision of short and long-term specialist support services for women victims and their children, and provision of shelters in sufficient numbers (measured against CoE Task Force Final Activity Report EG-TFV(2008)6), and 24 hour free telephone help lines

The Victims' Directive has a narrower scope and it does not provide criteria for provision of minimum services. EU law provides a general European emergency call number but no specific help lines

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## Chapter IV: Art 25, 25 and 27

The Articles require provision of centres and support services for victims of sexual violence and for children who have witnessed violence, and measures to encourage witnesses or persons who have reasonable grounds to suspect violence to report to the authorities.

The EU Victims' Directive only partially covers these provisions. The Child Abuse Directive requires measures concerning confidentiality rules, but no EU legislation exists on confidentiality in general. The Convention does not require binding law

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## Chapter V Substantive law

Many but by no means all articles of the Chapter require legislation (criminal, procedural or civil law)

Article 83(1) TFEU does not list all crimes which under the Convention require criminal law measures as ones under EU competence for approximation of legislation. Inclusion of these crimes would require adding them by the procedure under Article 83(2) (as particularly serious crimes with a cross-border requirement)

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## Chapter V, Art 30

The Article requires adequate state compensation to victims with serious bodily injury or impairment of health where not otherwise covered

EU Crime Victims' Compensation Directive contains minimum requirements for compensation and facilitates access to compensation in cross-border situations, but does not pay regard to the victim's safety

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## Chapter V, Art 33-39

The Articles require that a particular intentional conduct is criminalised

The EU due diligence duty under the Convention, where the EU is not competent to criminal law approximation, would require other action against law. Such action could involve e.g. soft law measures, open method of coordination, model law instruments

The main aim for such measures could be to ensure that the proportionality principle is met (crime prevention through general deterrence), and that the legislation is diligently applied in the Member States (prevention of discrimination)

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## Chapter VI Investigation, prosecution, protective measures

The Convention requires that the rights of the victim are given due consideration in the criminal proceedings. Law enforcement should react promptly and offer protection to victims, and that a risk assessment is made

The Victims' Directive covers some but not all the scope of the requirements

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## Chapter VI, Art 52 and 53

The Articles require availability of protection orders

EU law consists of the Protection Order Directive and Regulation on mutual recognition of protection measures in civil matters, which aim at recognition of protection orders given in one Member State in other Member States, but does not contain minimum rules on such orders

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## Chapter VI Art 54 -56

The Articles require measures to prevent unnecessary use of the sexual history of the victim as evidence, and to ensure that investigation and prosecution proceeds *ex officio*, and that the victims and their families are protected against repeat victimisation

EU law provisions cover the obligations to a limited extent, but as they involve the protection of victims, the EU could take measures

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## Chapter VII Migration and asylum

The Convention requires that parties ensure a victim whose residence status depends on that of the spouse to be granted independent residence permit, that gender-based violence is recognised as persecution and that the non-refoulement principle is applied so that victims in need of protection are not returned to face risk.

The EU has competence to legislate and has done so. EU law to a great extent follows the principles of the Convention

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## Chapters VIII -XII

The Convention chapters on international cooperation, monitoring mechanism of the Convention, the Convention's relationship with other international instruments, amendments to the Convention and final clauses would require that the EU establishes appropriate methods and forms for the purpose.



## Comparative analysis of national law: contents

Member State policies on gender-based violence

Signature and ratification of the Convention

Problems in ratification

Specific issues: Data collection: Support services; Protection; Migration and asylum



## Signature and ratification by Member States

**Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Germany, Italy, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and Sweden** have ratified the Convention

**Belgium, Croatia, Czech Republic, Greece, Hungary, Ireland, Lithuania, Luxembourg, Slovakia, and the UK** have signed it (Croatian and UK ratification to be expected)



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## Introduction of new legislation before ratification

**Austria, Malta, Poland, Portugal, and Slovenia** did not introduce new legislation

In **Denmark, Finland, France, Italy and Sweden**, the Criminal Code was amended



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## Steps taken towards accession

Almost all Member States have taken some steps towards accession

The Member States that have signed but not ratified are in different stages in the process

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## Problems at ratification

Most experts who reported problematic issues at ratification mention **criminal law**, criminalising forced marriage, feminine genital mutilation, forced abortion sterilisation in particular

**Support services** were reported to have caused problems only in **Cyprus, Finland** and **Hungary** (although the experts report failures in meeting the criteria for service provision)

**Ideological controversies** were seldom reported

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## Legislation on data collection

**Croatia, Denmark, Greece, France, Italy, Ireland, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, Slovakia and Spain** provided statistics and studies on vaw/domestic violence on a legal basis

Many Member States provide statistics, but not due to legislation

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## Obligation to cooperation between agencies

The comprehensive multi-agency approach to vaw required by the Convention is introduced on a regulatory basis in **Austria, Bulgaria, Finland, Lithuania, Portugal**, and such regulation is planned in **Germany, Sweden and Slovakia**

In many Member States cooperation between actors does not cover all forms of gender-based violence, actors or activities (**Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, France, Greece, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia and Spain**)

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## General support services

Services such as counselling, financial assistance, housing, education, training and assistance in finding employment are to be provided for the victims.

The manner of providing such services varies among Member States, as some states have introduced them for the victims of vaw/domestic violence only, some states for all crime victims, and others provide services to all citizens/residents

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## Specialist support services

The legislative basis for specialist support services is either in special legislation concerning victims of vaw, all crime victims, or the general social welfare legislation. In some Member States, such support services are not provided, and in others they are provided but not on the basis of law.

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## Provision of shelters

Shelters are provided in many Member States by NGOs, often but not always financed by public funds. In other Member States, there is a legal basis for providing shelters, but the right to the service is often not clear. The provision in most, if not all Member States does not fulfil the criteria by the CoE Task Force recommendation

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## Telephone helplines

In many Member States, helplines are run by private associations, often with public funding. The service is often not based on legislation. In some Member States, there is no such helpline as required under the Convention

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## Support for victims of sexual violence

The provision of rape crisis or sexual violence referral centres is limited and in most cases not based on legislation. There are no special services for victims of sexual violence in some Member States

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## Protection and support for the child victim

The Convention requires that children who have witnessed violence are to be provided with age-appropriate psychosocial counselling. The provision of such support is rarely provided. Child witnesses are protected in court proceedings in many Member States, however

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## Emergency barring orders and protection orders

The Convention requires that authorities have the power to give emergency barring orders and protection orders. Such orders are available in most Member States, but their conditions vary considerably

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## Investigations and evidence

The Convention requires that evidence relating to the sexual history of the victim is permitted only when relevant. Specific rules on the matter exist only in Member States who follow common law. Other Member States rely on general admissibility rules

The Convention requires that the proceedings in cases of law the proceedings may continue even without the victim's complaint (ex officio). The situation varies in the Member States

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## Protection of victims

Victims are to be protected at all stages of the investigations and proceedings against intimidation, retaliation and repeat victimisation. Many, but not all Member States have introduced protection measures

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## Migration and asylum

The Convention requires that the victims of vaw whose residence status depends on the spouse's may obtain an autonomous residence permit. Most Member States have provisions to that effect, but not all. **Cyprus** and **Malta** have made reservations on the issue

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## Conclusions

There are common trends in the Member States in dealing with vaw – shelters have been established, helplines provided, and criminal law amendments taken place. The majority of the EU Member States have taken steps towards accession. The political controversies in the context of accession are often related to criminal law, but relatively little attention has been given to improving the support services. Even where such services are available, their funding is often uncertain.

There is overlap between the requirements under the Convention and the EU law. Accession of the EU to the Convention would enhance monitoring and give a more sustained direction to EU policies, as well as more coherent guidelines on provision of services, protection orders and other protective measures.