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The Istanbul Convention and its impact on EU law and policies

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Plan

- The Istanbul Convention. Introductory notes

- The ratification by the EU of the Istanbul Convention

- Legislative train
- Legal bases
- Issues related to the legal bases
- Impact of the Istanbul Convention on EU law: optimistic scenario – directives on violence against women (VAW) and domestic violence (DV).
- Impact of the Istanbul Convention on EU law: pessimistic scenario – no agreement plus reservations to the Convention.

But...

- Impact of the Convention on EU policies
- Impact of the Convention in terms of interpretation
- What about an enhanced cooperation in the field?

Intersection and dialogue between two legal systems: the COE and the EU one.

The Istanbul Convention: Introductory Notes

Convention on preventing and combating violence against women and domestic violence.

Open for signature: 11th May 2011

Entry into force: 1st August 2014

Status of ratification: 33 ratifications, 13 signatures

States parties: Albania, Andorra, Austria, Belgium, Bosnia Herzegovina, Croatia, Cyprus, Estonia, Denmark, Finland, France, Germany, Georgia, Greece, Iceland, Italy, Luxembourg, Macedonia, Malta, Monaco, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, Sweden, Switzerland, Turkey.

Non-CoE countries and the EU can ratify the convention. EU signed last year.

Elements

A human rights and criminal law convention



Criminalisation and prosecution of
certain conducts at the domestic
level (margin of appreciation)



- VAW as a violation of human rights
- State responsibility for human rights violations
- Women's agency and empowerment of women

Definitions

Violence against women is 'a violation of human rights and a form of discrimination against women and shall mean 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' (Article 3.a).

Domestic Violence: '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' (Article 3.b).

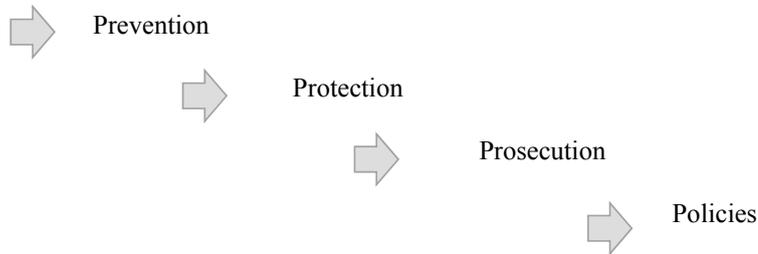
Gender shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men (3.c).

Gender-based violence against women shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately (3.d).

Structure

- Preamble
- Chapter I – Purposes, definitions, equality and non-discrimination
- Chapter II – Integrated policies and data collection
- Chapter III – Prevention
- Chapter IV – Protection and support
- Chapter V – Substantive Law
- Chapter VI – Investigation, prosecution, procedural law and protective measures
- Chapter VII – Migration and asylum
- Chapter VIII – International cooperation
- Chapter IX – Monitoring mechanism
- Chapter X – Relationship with other international treaties
- Chapter XI – Amendments
- Chapter XII – Final clauses

4 Ps



Due diligence obligations

Article 5 Istanbul Convention

State obligations and due diligence

- 1 Parties shall 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.
- 2 Parties **shall take the necessary legislative and other measures to exercise due diligence** 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.

NEGATIVE AND POSITIVE OBLIGATIONS

Novelties, Limits and Challenges of the Convention

Novelties:

- - Human rights and criminal law convention (compare: the Belem do Parà Convention as well).
- - It learns the lesson from the European Court of Human Rights in terms of State obligations.
- - GREVIO, similar to GRETA and other monitoring mechanisms at COE level.

Limits:

- - Only a reference to its application during armed conflicts.
- - No reference to prostitution.
- - Gender.
- - Violence online only indirectly within the scope of the Convention.

Challenges hampering ratification:

- - Societal and political factors. 'Spreading misconceptions and misinformation about the scope and the main aim of the Convention' (Feride Acar).
- - Poor national legislation, limited funding, inadequacy of existing services.
- - Some 'advanced' provisions of the Convention, including Article 8, 30 and 59.

GREVIO

Article 66 – Group of experts on action against violence against women and domestic violence 1 The Group of experts on action against violence against women and domestic violence (hereinafter referred to as “GREVIO”) shall monitor the implementation of this Convention by the Parties.

- On 19 November 2014, the Committee of Ministers adopted Resolution CM/Res (2014) 43 on rules of the election procedure of the members of the Group of Experts on Actions against violence against women and domestic violence.
- Fully operational in September 2015.
- Now 15 Members.
- First reports already adopted.
- Italy presented its report end of October – Country visit scheduled next year.

- Differences with a UN human rights Treaty Body.

The ratification by the EU of the Istanbul Convention

Proposal for ratification, European Commission 4 March 2016 COM (2016) 109 final –



Two decisions by the Council: Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, OJ L 131, 20.5.2017, p. 11–12. Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention with regard to asylum and *non-refoulement*, OJ L 131, 20.5.2017, p. 13–14.



Resolution of the European Parliament, 12 September 2017 – encourages the Council to 'activate the passerelle clause by adopting a unanimous decision to identify VAW and girls as an area of crime under article 83(1) TFEU'.



Resolution of the European Parliament, of 19 April 2018 on the implementation of Directive 2011/99/EU on the European Protection Order, further encourages ratification by the EU.

Legal basis I

Article 82 (2) – judicial cooperation in criminal matters from a procedural point of view

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

Legal basis II

Article 83(1) TFEU cooperation in criminal matters from a substantive point of view

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

Passerella clause



Legal basis III (second decision)

Article 78 (2)

[...] The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

Issues related to legal bases

- Absence of other legal bases, mentioned in the proposal by the Commission which then focused on Articles 82 (2) and 84 only.

- In particular, Article 19 TFEU.
- Plus, not mentioned in the Commission's proposal, Article 168 TFEU

THE COUNCIL DECISIONS ARE LIMITED:

- - The Convention should be signed 'on behalf of the European Union as regards matters falling within the competence of the Union insofar as the Convention may affect common rules or alter their scope'.
- - Plus the decisions are related to specific aspects of the Convention, what about Article 59 of the Convention?

- The European Parliament has stressed that the Council activates the 'passerella clause'.

Impact of the Istanbul Convention on EU law: optimistic scenario

Adoption of directives on rape, female genital mutilation (FGM), domestic violence and/or a more general one on violence against women:

- - As for rape and FGM, they can fall within the scope of Article 83(1) as forms of sexual exploitation.

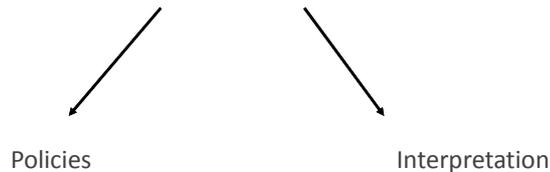
- - As for DV and VAW, necessary to trigger the passerella clause under Article 83 (1) BUT main obstacle: unanimity within the Council.

- Are EU States and societies ready for that?

Impact of the Istanbul Convention on EU law: pessimistic scenario

No agreement on directives plus reservations to the Convention (especially on Article 30 and Article 59 of the Convention).

What is the margin of action of the European Union?



Impact in terms of policies

- European coordinator
- Code of conduct
- Strategy on preventing and suppressing VAW and DV

See in that respect the recent **EP resolution of 19 April 2018 regarding the European Protection Order Directive:**

Para. 44. Welcomes the signing, on 13 June 2017, of the EU's accession to the Istanbul Convention, which follows a holistic, comprehensive and coordinated approach, placing the rights of the victim at the centre, [...] calls on the EU to conclude a broad accession to the Convention to prevent violence against women, combat impunity and protect victims; underlines the importance of this instrument in overcoming one of the barriers to the application of EPOs, namely the lack of recognition of stalking as a criminal offence across all Member States; in line with its resolution of 12 September 2017 on EU accession to the Istanbul Convention, asks the Commission to designate an EU coordinator on Violence Against Women who would be responsible for the coordination, implementation, monitoring and evaluation of EU policies, instruments and measures to prevent and combat all forms of violence against women and girls and to act as representative of the EU on the Committee of the Parties to the Convention.

Impact of the Istanbul Convention in terms of interpretation

Impact on EU law – some examples:

Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6.8.2004, p. 15–18.

- Compensation measures:

- *Paola C. v. Consiglio dei Ministri* (C-122/13) – order of 30 January 2014.
- *Commission v. Italy* (C-601/14) – judgment of 11 October 2016.

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014, regarding the European Investigation Order in criminal matters, OJ L 130 1.5.2014, p. 1.

- Notion of 'sexual violence' interpreted in light of the Istanbul Convention.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77–123.

- Overcoming the limits of judgments such as *SSHD v. NA* (C-115/15) – judgment 30 June 2016. And advisory opinion by Judge Wathelet.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

- Child marriages and interpretation of Article 4(5) of the Directive: 'In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her'.

A proposal for an enhanced cooperation on VAW

- What is an enhanced cooperation?

- Enhanced cooperation is one option in the Treaty which allows a group of at least nine nations to implement measures if all Member States fail to reach agreement.

- Legal bases: Articles 20 TEU, 326 TFEU, 'fast-track' route under Article 83(3) TFEU, when a member of the Council considers that a draft Directive 'would affect fundamental aspects of its criminal justice system', Article 329 TFEU.

Risk: unanimity by the Council.

Potential of an enhanced cooperation on violence against women and/or domestic violence in terms of procedural and substantive cooperation in criminal matters.

Thank you very much!

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