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The Istanbul Convention (IC) and possible legal implications for the EU accession

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Overview

- Introduction
- The cost of violence
- Violence against women and girls
- The Istanbul Convention - overview
- Some legal consequences of accession

Prevalence of violence

According to a survey by the Fundamental Rights Agency published in 2014 & EU fact sheet:

1. 1 in 3 women in the EU has experienced physical and/or sexual violence since the age of 15;
2. 1 in 20 women has been raped;
3. 75 % of women in qualified professions or top management have been victims of sexual harassment; and
4. 1 in ten women has experienced stalking or sexual harassment through new technologies.
5. Over half (55%) of women have experienced sexual harassment;
6. One in three women has experienced psychological abusive behaviour by a partner;
7. One in three women has experienced physical or sexual violence by an adult during childhood.

The cost of violence against women

The European Institute for Gender Equality:

gender-based violence against women generates **costs** in the EU of approximately **226 billion euros per year**.

If we reduced violence by only 10%, approximately **EUR 7 billion** would be saved each year.



The Istanbul Convention

Council of Europe Convention on prevention and combating violence against women and domestic abuse

Signed in Istanbul, 11/05/2011

Date of entry into force: 01/08/2014 - with 10
Ratifications including 8 EU Member States.

**As of 24 Nov 2019: 34 Ratifications. 22
reservations.**

Comparison btw CEDAW & Istanbul Conv:

[http://www.coe.int/t/dghl/standardsetting/convention-violence/Background%20info/The%20Istanbul%20Convention%20and%20the%20CEDAW%20framework_a%20comparison%20\(short%20version\).pdf](http://www.coe.int/t/dghl/standardsetting/convention-violence/Background%20info/The%20Istanbul%20Convention%20and%20the%20CEDAW%20framework_a%20comparison%20(short%20version).pdf)

The Istanbul Convention

- Very proscriptive & focusses on prevention
- Preamble
- Chapter I - Purposes, definitions, equality and non-discrimination, general obligations
- 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 & protective measures
- Chapter VII - Migration & asylum
- Chapter VIII - International Co-operation
- Chapter IX - Monitoring mechanism
- Chapter XII - Final clauses

The Istanbul Convention is based on the understanding that a certain type of violence is a **manifestation of historically unequal power relations between women and men.**

The Convention includes a strong link between gender equality and combating violence against women.

The Convention requires the States Parties to condemn all forms of **discrimination** against women and to take legislative and other steps to prevent them.

And permits the use of **special measures** to prevent and protect women from gender-based

Due diligence

The **due diligence** that the States Parties are to exercise in the prevention, investigation, punishment and reparation for gender-based violence committed by private individuals is based on the consideration that even though a State is not responsible for individual acts of violence, it is obliged to prevent acts of violence between **private persons**.

As such other actors are also covered:

Article 1 - Purposes of the Convention

1 The purposes of this Convention are to:

a **protect** women against all forms of violence, and **prevent, prosecute** and **eliminate** violence against women and domestic violence;

b **contribute** to the elimination of all forms of discrimination against women and **promote** substantive equality between women and men, including by empowering women;

c design a comprehensive framework, policies and measures for the protection of and assistance to all **victims** of violence against women and domestic violence;

d **promote** international co-operation with a view to eliminating violence against women and domestic violence;

e provide **support** and **assistance** to organisations and law enforcement agencies to effectively co-operate in order to adopt an **integrated approach** to eliminating violence against women and domestic violence.

2 In order to ensure effective implementation of its provisions by the Parties, this Convention establishes a **specific monitoring mechanism. (GREVIO)**

Article 2 - Scope of the Convention

1 This Convention shall **apply to all forms of violence against women, including domestic violence, which affects women disproportionately.**

2 Parties are encouraged to apply this Convention to all victims of domestic violence. Parties **shall pay particular attention** to women victims of gender-based violence in implementing the provisions of this Convention.

3 This Convention shall apply in times of peace and in situations of armed conflict.

Article 3 - Definitions

For the purpose of this Convention:

a **"violence against women"** is understood as 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;

b **"domestic violence"** shall mean 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;

c **"gender"** shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;

d **"gender-based violence against women"** shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately;

e **"victim"** shall mean any natural person who is subject to the conduct specified in points a and b;

f **"women"** includes girls under the age of 18.

Article 4 - Fundamental rights, equality and non-discrimination

1 Parties shall take 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.

2 Parties **condemn all forms of discrimination** against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by:

- embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle;
- prohibiting discrimination against women, including through the use of sanctions, where appropriate;
- abolishing laws and practices which

3 The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without 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.

4 **Special measures** that are necessary to prevent and protect women from gender-based violence shall not be considered

Article 5 - 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**.

Article 6 - Gender-sensitive policies

Parties shall undertake to include a **gender perspective in the implementation and evaluation** of the impact of the provisions of this Convention and to **promote and effectively implement** policies of equality between women and men and the empowerment of women.

Chapter II & III – Integrated policies and data collection & Prevention

Data collection has been a major issue
NGO and civil society is acknowledged.

Focus is on shifting the culture of society to rid it of prejudice, customs, traditions and all other practices that are based on the idea that women are inferior or stereotype. (**CEDAW**)

Awareness raising; education; training of professionals; preventive intervention & treatment programmes;

Private sector and media

Chapter V – Substantive law (in part)

Civil lawsuits & remedies

Compensation.

Custody, visitation rights & safety.

Civil consequences of forced marriages (made avoidable).

Psychological violence (to be criminalised).

Stalking. Physical violence.

Sexual violence, including rape.

Forced marriage.

FGM.

Forced abortion & forced sterilisation.

Sexual harassment.

Aiding or abetting & attempt.

A 44 - Jurisdiction.

Chapter VI – investigation, prosecution, procedural law & protective measures

Immediate response, prevention & protection (including law enforcement).

Risk assessment & risk management.

Emergency barring order (DV perpetrator residency order).

Restraining or protection order.

Investigations & evidence (sexual history evidence).

Ex parte & ex officio proceedings.

Measures of protection.

Legal aid (right to legal assistance & free legal aid).

Statute of limitation.

Chapters VII & VIII – Migration & asylum & International Co-Operation

Residence status (spousal rights).

Gender-based asylum claims (A 1(2) Refugee Conv. 1951).

Non-refoulement.

Measures relating to persons at risk.

Information.

Data protection.

The Grevio Committee



Work of the committee

The independent expert body responsible for **monitoring** the implementation of the IC.

It draws up and publish **reports** evaluating legislative and other measures taken by the State Parties giving effects to the provisions of the Convention.

In order to prevent a serious, massive or persistent pattern of any acts of violence covered by the Convention, it can initiate a **special inquiry** procedure.

It can adopt, where appropriate, **general recommendations** on themes and concepts of the Convention.

Use **questionnaire** for MS to supply

Membership is at **15 members** - increased from 10 with 22 ratifications in 2018.

It met for first time in 2015 and has adopted 10 reports and has 8 ongoing reports.

Country reports received by 13 States.

Some legal implications of accession to the IC for the EU

Precedence – method

United Nations Convention on the Rights of Persons with Disabilities (UN CRPD).

A declaration of the division of competences was completed based on relevant developments. The declaration includes a list of Community Acts on the issues under the material scope of the UN CRPD.

Accession to the Istanbul Convention would require similar steps, to clarify the sharing of powers between the EU and the Member States.

European Commission

October 2015, the E Commission issued a **roadmap** on possible EU accession to the Istanbul Convention: a coherent EU level framework for combating violence against women, to improve prevention for all women; better protection & support.

In March 2016, the European Commission issued two proposals for Council Decisions:

1. signing the IC; and 2. Ratification on behalf of the European Union.

Council divided first decision into

1. judicial cooperation in criminal matters; and 2. asylum and non-refoulement.

These two Council decisions were adopted in May 2017.

EU signed the Convention on 13 June 2017.

Progress is slow

- Discussions are taking place in its working party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP);
- Code of Conduct defining how the EU and its Member States will cooperate on implementing the Convention.
- Strong opposition by some governments. Bulgarian Constitutional court held it unconstitutional.
- The file was to be a priority under the Austrian presidency in the second half of

Legal implications of EU accession to the IC

(K Nousiainen and C Chinkin, Dec 2015)

Accession is only possible through the EU's general competence to conclude international agreements on its own behalf.

Article 216(1) TFEU gives legislative competence to the EU to agree international agreements where Treaties or legally binding EU act so provide, where the agreement is necessary to achieve one of the objectives referred to by the Treaties, or is likely to affect common rules or alter their

As gender equality AND crime prevention are part of the EU *acquis*, the EU has general competence to accede to the Istanbul Convention.

The agreements are binding on the institutions and MS.

On accession MS become bound by EU policies that are implementing the provisions of the IC.

Plus their own duties as State Parties.

Soft laws and funding (DAPHNE)

Gender equality

A 19 TFEU EU action to combat discrimination on the basis of sex;

A 157(3) TFEU principle of equal opportunities and treatment of women and men in employment & occupation;

A 157(4) TFEU MS may take positive measures for the underrepresented sex in vocational activity & professional careers;

Criminal law

Title V TFEU - freedom, security & justice:

A 67(3) TFEU security measures to prevent and combat crime, racism & xenophobia by measures for coordination and cooperation between authorities, mutual recognition of judgments in criminal matters and, if necessary, by approximation of criminal legislation.

Promoting equality of the sexes & combat sex discrimination applies to **Title V**.

A 83(1) TFEU - many forms of gender-based crimes are cross-border: human trafficking (covered by other C of E instruments), forced marriage, honour crimes, organised crime.

The EU has little competence in the **substantive law** requirements of the Istanbul Convention that require harmonisation of criminal law.

With respect to **judicial coordination**, the EU has competence especially in the protection of victims in criminal-law procedures.

For certain types of gender-based violence, such as **sexual harassment** in working life and access to goods and services, the EU has the competence to legislate using means other than criminal-law approximation.

Directives and other laws

Victims' Directive

Anti-Trafficking Directive

Sexual exploitation of children Directive

European Arrest Warrant

Mutual recognition of protection orders

Migrants' rights Directive

EU Prosecutors' Office

Therefore there is already legislation in place which covers many aspects of the Convention.

But not all. Domestic legislation and especially the provision of specialist services, data collection, monitoring will be required. Most states do this before

Potential legal implications for the Court

Increased caselaw in relation to ending VAWG and clashes between rights: accused and accuser -

EU Charter of Fundamental Rights - prevention, protection, assistance, right to fair trial...

Enforcement proceedings where provisions of the IC have not been transposed or transposed incorrectly.

Enforcement of the due diligence standard (*Opuz; Rantsev* etc. judgments of the ECtHR)

Subsidiarity issues relating to criminal laws.

Challenges

- Not all EU MS have ratified the IC.
- Substantive criminal law compliance with the IC is problematic at the moment.
- Most MS do not have adequate funding for specialist services.
- Most specialist services, especially sexual violence services, are provided by NGOs. There is a dire lack of funding in the sector.
- Sexual history evidence protection provisions are sporadic.

Court decision

- In June 2017 the EU signed the IC. It did so on the basis of two Council decisions adopted on 11 May 2017:
 - one with regard to asylum and non-refoulement, based on Article 78(2) of the TFEU in conjunction with Article 218(5) thereof,
 - and the other with regard to matters related to judicial cooperation in criminal matters, based on Articles 82(2) and 83(1) of the TFEU, in conjunction with Article 218(5) thereof.
- In April 2019 the EP sought an opinion from the CJEU:

1. Takes the view that there is legal uncertainty as to whether the accession to the Istanbul Convention as proposed by the **Council is compatible with the Treaties**, in particular as regards the choice of the appropriate legal basis for the decisions on the signing and on the conclusion by the European Union of the convention, and as regards the possible split into two decisions on the signing and on the conclusion of the convention as a consequence of that choice of legal basis;

2. Considers that, given the above questions as regards the choice of legal basis and the split into two decisions, there is also legal uncertainty as regards the compatibility with the Treaties of the practice of a 'common accord' by the Council in its decision-making, which is applied in addition to or alternatively to the relevant decision-making procedure in the Treaties, and, in this context, as regards the application of the principle of sincere cooperation in the light of the expressed objective of the Union to conclude the Istanbul Convention;

3. Decides to seek an opinion from the Court of Justice on the compatibility with the Treaties of the **proposed accession of the EU** to the Istanbul Convention and **the procedure for that accession**;

Challenges

Migration and asylum - residence permit.

There are a number of reservations. Especially in relation to extraterritoriality.

There is a need for a Code of Conduct/Methods of Working similar to the court judgments of the ECtHR and the CJEU. Yet to be finalized.

False perception of 'gender

Thank you.
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Report: Legal implications of EU accession to the Istanbul Convention
http://ec.europa.eu/justice/gender-equality/files/your_rights/istanbul_convention_report_final.pdf

Jones J. 2018. 'The European System: The European Convention on Human Rights (ECHR) and The Council of Europe Convention on Violence against Women and Domestic Violence (Istanbul Convention)', in **The Legal Protection of Women From Violence: Normative Gaps in International Law** (Routledge; eds: Manjoo & Jones)

