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# The fight against violence against women in the EU and the Istanbul Convention



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## Outline

- The path to the Istanbul Convention (IC)
- The EU and the Istanbul Convention
- The content, approaches and impact of the IC
- How has the case-law of the European Court of Human Rights (ECtHR) influenced the IC, and vice versa?

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## Contextual background

- Why need a regional tool for combating Violence against Women (VaW) on European level?
- No legally binding instrument in Europe; absence of a global instrument
- CEDAW covers VaW through General Recommendation No.35
- 1993 UN Declaration on the Elimination of VaW remains non-binding
- Regional instruments exist in Latin America and Africa (1994 Belem do Para Convention; 2003 Maputo Protocol)

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## Paving the path to the Istanbul Convention

- Council of Europe (CoE) initiative
- **CoE Recommendation Rec(2002)5** of the Committee of Ministers on the protection of women against violence adopted in 2002
- Europe-wide campaign to combat VaW 2006-2008
- Several resolutions and recommendations by the CoE Parliamentary Assembly called for legally binding standards on VaW and domestic violence
- December 2008: Expert group CAHVIO (Ad Hoc Committee for preventing and combating VAW and domestic violence) set up by the Committee of Ministers to prepare a draft convention

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## The Istanbul Convention (IC)

- First draft finalised in December 2010
- Opened for signature on 11 May 2011 (open for accession also to non-CoE Member States)
- Current state of ratifications: all Council of Europe member States have signed the IC, except Russia and Azerbaidjan
- First country to ratify the IC: Turkey (on 12 March 2012)
- Entry into force: on 1 August 2012 (following ten ratifications)
- Currently, 45 countries plus the EU have signed the IC, and 34 countries have ratified it
- Latvia: signed on 18 May 2016, not yet ratified

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## The EU accession to the IC

- February 2021: IC signed by all EU member States (MS) and the EU; ratified by 21 EU MS
- Chronology: European Council decided in May 2017 that draft decision on signing the IC should be divided into two parts:
  - Judicial cooperation in criminal matters, and
  - Asylum and non-refoulement
- 13 June 2017: EU signed IC
- European Parliament needs to consent to ratification
- Concerns:
  - scope of EU accession (CJEU was requested to issue opinion); and
  - opposition of certain EU MS to its content

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## Issues in EU Member States

- Issues with ratification: several EU Member States, notably Bulgaria and Slovakia, claim that the IC was a “Trojan horse” aimed at introducing a “third sex” and same-sex marriage
- Bulgarian Constitutional Court declared IC “unconstitutional” (on 27 July 2018)
- Poland announced in July 2020 to withdraw from IC
- Allegation that the use of the word “gender” in the Convention has hidden purposes and effects: false!
- The word “gender” in the Convention serves to make the point that “gender stereotypes and roles” about women and men need to be tackled, because they play a part in the perpetuation of violence against women.
- In fact, IC uses binary concept of “gender”!

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## The EU accession to the IC

- 28 November 2019: EP called on the European Council to urgently ratify the IC
- 25 November 2020: Commissioner Dalli stressed the urgency of EU-wide action against VaW, in particular because of the surge of violence during lockdown, and the reduced possibilities to escape and seek help
- Currently: Commission’s commitment to EU accession to IC is contained in its 2021 work programme

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## The content of the IC: Definitions (Art. 3 IC)

- Violence Against Women: 'acts of gender-based violence that result in, or are likely to result in physical, sexual, psychological, economic harm'
- Domestic violence: 'acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former and current spouses or partners'
- Gender-based violence: violence directed against women because they are women and that affects them disproportionately
- Gender: the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men

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## Approaches of the IC

- Gender-sensitive
- Victim-centered
- Cross-border
- "4p"-approach:
  - Prevention
  - Protection
  - Prosecution
  - Integrated Policies

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## Integrated policies and data collection (Articles 7-11 IC)

- “... adopt and implement State-wide effective, comprehensive and co-ordinated policies ... and offer a holistic response to violence against women.” (Art. 7)
- Elaboration and implementation of these policies through:
  - The allocation of appropriate financial resources (Art.8)
  - The contribution of NGOs and civil society (Art.9)
  - The creation of an official coordinating body (Art.10)
  - Data collection and research on violence against women (Art. 11)

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## Prevention (Articles 12-17 IC)

- “Parties shall 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.” (Art. 12 § 1)
- How? Through...
- Awareness-raising (Art. 13)
- Education (Art. 14)
- Training of professionals (Art. 15)
- Preventive intervention and treatment programmes (Art. 16)
- Participation of the private sector and media (Art. 17)

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## Protection (Articles 18-28 IC)

- “Parties shall take the necessary legislative or other measures to protect all victims from any further acts of violence.” (Art 18 § 1)
- Provide for effective co-operation between all relevant state agencies in protecting and supporting victims and witnesses of all forms of violence covered by the IC (Art 18 § 2)
- Provide, for example:
  - Shelters, telephone hotlines, general and specialist support services, rape crisis centers, support for child witnesses, encourage reporting

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## Prosecution (Articles 29-58 IC)

- For certain offences: *Ex officio* prosecution even if victim withdraws complaint! (Art. 55 § 1)
- Obligation to ensure that certain offences are punishable under national criminal law (physical and psychological violence; stalking; sexual violence including rape; forced marriage; female genital mutilation; forced abortion and forced sterilization) – Articles 33-39
- Irrespective of relationship between victim and perpetrator (Article 43)
- Legal sanctions (civil or criminal) for sexual harassment – Article 40
- So-called “honour” may never justify crimes! (Article 42)

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## Immediate response of law enforcement

- Duty to respond promptly and appropriately to violence covered by IC, by offering adequate and immediate protection to victims, including by taking preventive operational measures and the collection of evidence (Art. 50)
- Risk assessment and risk management – assessment of lethality risk, seriousness of the situation and risk of repeated violence by all relevant authorities (Art. 51)
- Emergency barring orders (Art. 52)
- Restraining or protection orders (Art. 53)

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## Special protection measures during investigation and judicial proceedings

- Ensure that evidence relating to sexual history and conduct of the victim shall be permitted only when relevant and necessary (Art. 54)
- Investigation/prosecution of most serious offences shall not be wholly dependent upon report/complaint filed by victim (Art. 55)
- Protection of victims and witnesses: protect from intimidation and repeat victimisation; inform of release or escape of perpetrator; inform of progress of proceedings and their rights therein; protect their privacy; make sure that they are heard; enable them to testify without presence of perpetrator; provide for free legal aid; ensure adequate statute of limitation (Articles 56-58)

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## Safety first in custody proceedings (Art. 31)

- In the determination of custody and visitation rights of children, incidents of domestic violence/VaW must be taken into account
- Exercise of visitation and custody rights must not jeopardize the rights and safety of victims and children!
- Shared custody or visitation regimes have been identified as enabling the perpetuation of abuse
- Tension with Article 8 of the European Convention on Human Rights (ECHR)!

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## How the ECtHR has shaped the content of the IC through its case-law

- *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003 XII: what is consent?
- Article 36 IC: „Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.”
- *Kontrová v. Slovakia*, no. 7510/04, 31 May 2007: violent threats with a shotgun
- Article 51 IC: Parties shall duly take into account in taking protective measures that a perpetrator is in possession of or has access to firearms

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## How the ECtHR has shaped the content of the IC through its case-law

- *Opuz v. Turkey*, no. 33401/02, ECHR 2009: landmark case on domestic violence
- Positive obligation on the authorities under Articles 2 and 3 of the ECHR to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman v. the United Kingdom*, 28 October 1998, § 115, Reports 1998-VIII).

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## Positive obligations under the ECHR's case-law

- „Bearing in mind the difficulties in policing modern societies, the ***unpredictability of human conduct*** and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an ***impossible or disproportionate burden*** on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities ***knew or ought to have known*** at the time of the ***existence of a real and immediate risk to the life*** of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Another relevant consideration is the need to ensure ... the guarantees contained in Articles 5 and 8 of the Convention (see *Osman*, cited above, § 116).

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## Pending Grand Chamber case: Kurt v. Austria, no 62903/15

- Applicant's son killed by her husband three days after she reported him to the police for rape and domestic violence
- Risk factors: previous criminal conviction for domestic violence, escalation of violence (rape and choking), death threats against the applicant and her children, gambling addiction, pending divorce
- Chamber found no real and immediate risk discernible – no violation of Article 2 ECHR (right to life)
- IC signed, but not yet ratified at time of the events
- Grand Chamber accepted the applicant's referral request (hearing took place on 17 June 2020 – online webcast: [www.echr.coe.int/Pages/home.aspx?p=hearings&c=](http://www.echr.coe.int/Pages/home.aspx?p=hearings&c=) )

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## How the IC has influenced the ECtHR's case-law

- In relation to State parties to the IC:
- Domestic violence cases:
  - *Halime Kılıç v. Turkey*, no. 63043/11, 28 June 2016;
  - *Talpis v. Italy*, no. 41237/14, 2 March 2017;
  - *Bălșan v. Romania*, no. 49645/09, 23 May 2017
- Rape/sexual violence:
  - *Y. v. Slovenia*, no. 41107/10, 28 May 2015;
  - *E.B. v. Romania*, no. 49089/10, 19 March 2019

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## How the IC has influenced the ECtHR's case-law

- In relation to States which are not parties to the IC:
- *Volodina v. Russia*, no. 41261/17, 9 July 2019 – gender-based violence recognized as a form of discrimination
- Reference to the IC without making use of its principles in the legal analysis:
- *J.D. and A. v. the United Kingdom*, nos. 32949/17 and 34614/17, 24 October 2019
- Cross-fertilisation of the IC and the ECtHR's case-law!

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## Tensions between ECHR and IC

- Article 5 – right to liberty: pre-trial detention for (alleged) perpetrators of domestic violence and VaW?
- Article 6 – right to a fair trial, right to be presumed innocent until found guilty
- Article 8 – right to private and family life: rights of (alleged) perpetrators of domestic violence/VaW to see their children?

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## ECtHR's case-law on gender-based discrimination

- *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, 25 July 2017:
- Severe pain and loss of sensation in the applicant's vagina after surgery. Portuguese Supreme Court significantly reduced pecuniary damages awarded for the mistake of the hospital:
- "...considering the age of her children, she [the plaintiff] probably only needed to take care of her husband; this leads us to the conclusion that she did not need to hire a full-time maid ..."
- "...it should not be forgotten that at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age."
- ECtHR found a violation of Articles 8 and 14

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# Thank you!

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