



PREVENTION

PROTECTION

PROSECUTION

CO-ORDINATED
POLICIES

THE EU, THE ISTANBUL CONVENTION AND THE FIGHT AGAINST GENDER-BASED VIOLENCE

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Outline

Current state of ratifications

The European Union (EU) and the Istanbul
Convention (IC)

The content and approaches 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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Current state of ratifications

Istanbul Convention: Council of Europe (CoE) initiative

Opened for signature on 11 May 2011 (open for accession also to non-CoE Member States)

Entry into force: on 1 August 2014

Slovenia: ratified 5 February 2015

Current state of ratifications: 45 CoE countries plus the EU have signed the IC, 37 countries have ratified it (most recently: Ukraine and UK)

EU expected to ratify in June 2023

Turkey withdrew with effect of 1 July 2021

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Monitoring the implementation of the IC

Expert committee GREVIO („Group of experts on violence against women“)

15 experts from State Parties (Slovenian member: Ivo Holc, since 2019)

Evaluation procedure: State Party reports to GREVIO; NGOs submit shadow reports; evaluation visit; (baseline) evaluation report

Committee of the Parties:
Recommendations on and supervision of the implementation by the State Parties

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The road to the EU's accession to the IC

- IC signed by all 27 EU member States (MS) and the EU (13 June 2017); ratified by 21 EU MS (missing: CZE, SVK, LAT, HUN, BLG, LIT)
- Concerns:
 - scope of EU accession (CJEU was requested to issue opinion); and
 - opposition of certain EU MS to its content
- ECJ Advisory Opinion C-1/19 (ECLI:EU:C:2021:198), 6 Oct 2021: EU Council does not have to wait for a «common accord» among the EU member States, but ECJ recognized that this was a political question.
- February 2023: EU Council requested the consent of the European Parliament to adopt the decision on the conclusion of the convention by the EU.
- EU Council expected to ratify IC in June 2022 (Swedish presidency)

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European Commission's Proposal for a directive on combating violence against women (VaW) and domestic violence (DV)

As not all EU MS have ratified IC:
Draft directive requires EU MS to take a minimum level of measures to combat VaW and DV

Set of harmonised criminal offences – e.g. consent-based definition of rape; rape of child as aggravating circumstance. Only applicable to women and children because of EU competencies!

Criminalisation of cyber violence: non-consensual sharing of images and content; cyber stalking

Measures on protection and access to justice

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European Commission's Proposal for a directive on combating violence against women (VaW) and domestic violence (DV)

Effective means of reporting VaW and DV

Guidelines for law enforcement on identifying victims and treating them in an gender-sensitive manner

Perpetrator programmes

Measures of co-ordination within MS and on EU level

→ Draft directive strongly resembles IC

Currently: proposal being discussed by EU Council and EP

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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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Main chapters of the Istanbul Convention

- **Integrated policies** and data collection (Articles 7-11 IC)
- **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)
 - Training of professionals
 - Perpetrator programmes
- **Protection** (Articles 18-28 IC): Provide, for example, women’s shelters, telephone hotlines, general and specialist support services, rape crisis centers, support for child witnesses, encourage reporting
- **Prosecution** (Articles 29-58 IC)

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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 (Articles 33-39)
 - physical and psychological violence;
 - stalking;
 - sexual violence including rape;
 - forced marriage;
 - female genital mutilation; forced abortion and forced sterilization
- 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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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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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 filed by victim (Art. 55)
- Protection of victims and witnesses (Articles 56-58):
 - 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

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How the European Court of Human Rights (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 (defining rape and sexual violence): „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 European Convention on Human Rights 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).

Article 50 IC – authorities must ensure that law enforcement responds promptly and appropriately to all forms of VaW and DV, by offering adequate and immediate protection to victims.

Article 51 IC – obligation for lethality risk assessment, to assess the seriousness of the situation and the risk of repeated violence

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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 (*Osman v. UK*, § 116).”

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First ECtHR Grand Chamber (GC) case on domestic violence:

[Kurt v. Austria](#), no 62903/15, 15 June 2021

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)

Grand Chamber accepted the applicant's referral request (hearing took place on 17 June 2020 – online [webcast](#))

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Kurt v. Austria
[GC]
- How the
IC has
influenced
the ECtHR's
case-law

- Ample reference to Istanbul Convention, its Explanatory Report, GREVIO's Baseline Evaluation Report on Austria, and GREVIO's third-party intervention
- Outcome: Strong general principles, undisputed by all 17 Judges (cf. separate opinions):
 - Special diligence required when dealing with domestic violence cases
 - Obligation to conduct an autonomous, proactive and comprehensive risk assessment
 - Osman-test to be applied in the specific context of domestic violence
 - If real and immediate risk is established – which must be assessed in the specific context of domestic violence – the obligation to take preventive, operational measures is triggered (cf. *Osman-test*)
 - Measures taken must be adequate and proportionate
- Application to facts of *Kurt*: GC fairly divided – 10 to 7 in favour of no violation of Art 2

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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:

- *Bălșan v. Romania*, no. 49645/09, 23 May 2017
- *Teršana v. Albania*, no.48756/14, 4 August 2020
- *M.S. v. Italy*, no. 32715/19, 7 July 2022

Rape/sexual violence:

- *Y.v. Slovenia*, no. 41107/10, 28 May 2015
- *E.B. v. Romania*, no. 49089/10, 19 March 2019
- *J.L. v. Italy*, no. 5671/16, 27 May 2021

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

In relation to State parties to the IC:

Sexual harassment:

- *C. v. Romania*, no. 47358/20, 30 August 2022

Custody and visitation rights:

- *I.M. and Others v. Italy*, no. 25426/20, 10 November 2022

Forced abortion/forced sterilization:

- *G.M. and Others v. Moldova*, no. 44394/15, 22 November 2022

Digital forms of VaW:

- *Buturuga v. Romania*, no. 56867/15, 11 February 2020

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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
- *Y and others v. Bulgaria*, no. 9077/18, 22 March 2022

Cross-fertilisation of the IC and the ECtHR's case-law!

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Tensions
between
ECHR and IC

Article 5 ECHR – right to liberty: pre-trial detention for (alleged) perpetrators of domestic violence and VaW? (cf. *Kurt v. Austria* [GC])

Article 6 ECHR – fair trial guarantees: victims’ rights vs rights of the accused?

Article 8 ECHR – right to private and family life: rights of (alleged) perpetrators of domestic violence/VaW to see their children? Right of children to see their violent parent?

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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:

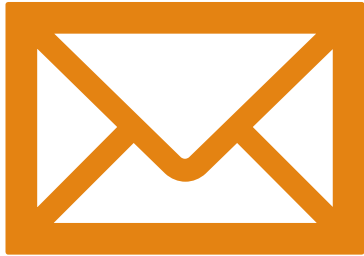
Severe pain and loss of sensation in the applicant’s vagina after surgery. Portuguese Supreme Administrative Court significantly reduced pecuniary damages awarded for the mistake of the hospital:

“...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 violation of Articles 8 and 14

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Thank you for your
attention!

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