

# GENDER BASED VIOLENCE

ERA  
EU GENDER  
EQUALITY LAW  
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## *Introduction*

### • The Istanbul Convention

### • ECtHR case-law

### • Developments in EU law

## *Conclusions*

- Criminalisation and substantive law
- Preventive and protective operational measures
- Procedural guarantees during and after court proceedings



## The Istanbul Convention

Adoption (2011) and entry into force (2014)

Ratifications: 37

GREVIO =  
Independent monitoring  
treaty body



GREVIO established under Art 66

Evaluation procedure: Art 68 - 69



## The Istanbul Convention

### The Convention:

The most comprehensive legal instrument

The "4 Ps" approach:

-Prevention

-Protection

-Prosecution (substantive law provisions  
and procedural safeguards)

-Policies



# The Istanbul Convention

## QUIZ

### The Istanbul Convention:

- A. Obliges States to authorise same-sex marriages
- B. Does not oblige but only encourages States to authorise same-sex marriages
- C. Does not deal with the authorisation of same-sex marriages



# The Istanbul Convention

## QUIZ

### GREVIO:

- A. Evaluates the implementation of the Istanbul Convention on a country by country basis
- B. Receives individual complaints
- C. Both A and B

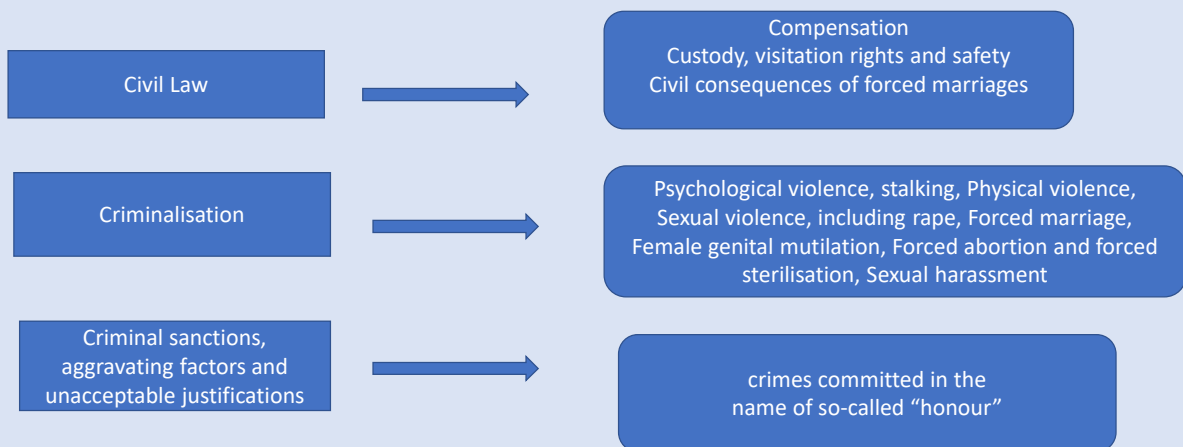


# The Istanbul Convention and the European Convention on Human Rights

- ❖ Criminalisation, substantive law and investigation
- ❖ Preventive and protective operational measures
- ❖ Procedural guarantees during and after court proceedings



## Criminalisation and substantive law: The Istanbul Convention



## Criminalisation and substantive law: The ECHR

A legal framework which :

- does not define **domestic violence** whether as a separate offence or an aggravating element of other offences
- establishes a **minimum threshold of gravity** of injuries required for launching public prosecution
- does not allow criminal proceedings to be brought **irrespective of whether the complaints had been withdrawn**

falls short of the ECHR obligations (*Opuz v. Turkey*, 2009, *Talpis v. Italy*, 2017, *Volodina v. Russia*, 2019, *Tunikova and others v. Russia*, 2021)

## Criminalisation and substantive law: The ECHR

The example of rape:

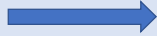
- universal trend towards **recognising lack of consent** as the essential element in determining rape and sexual abuse (*M.C. v. Bulgaria*, 2003)
- obligation to prosecute any non-consensual sexual act, even where the victim had not resisted physically (*M.C. v. Bulgaria*, 2003)
- The investigation and its conclusions must be centred on the issue of non-consent (*M.G.C. v. Romania*, 2016, *I.C. v. Romania*, 2016, *E.B. v. Romania*, 2019 (well-established case-law). See also article 36 of the Istanbul Convention)
- Need for a consistent effort to engage in a **context-sensitive assessment of the consent** of the alleged victim (*Z. v. Bulgaria*, 2020)

the investigating authorities should, for example (*Z. v. Bulgaria*, 2020) :

- ❖ examine whether the **actions of the victim** (e.g. pulling herself, pushing the perpetrator, pretend to sleep, etc.) can be related to the charges
- ❖ examine the **victim's mental state** at the time of the assault (e.g. psychological report)
- ❖ examine the **specific circumstances** under which the intercourse took place

## Preventive and protective operational measures: the Istanbul Convention

Risk assessment and risk  
management



Standardised and systematised procedures  
Multi-agency cooperation and coordination  
Access to firearms

Immediate and effective  
response



Emergency barring orders  
Restraining or protection orders  
Ex parte and ex officio proceedings



## Preventive and protective operational measures: the ECHR

- positive obligation to take preventive operational measures to protect someone whose life is at risk from violence by another individual (if the authorities know or ought to know of the existence of a real and immediate risk to the life)

The authorities must:



(a) respond immediately to allegations of domestic violence (from the first contact) (See, *Y. and others v. Bulgaria*, 2022, *Talpis v. Italy*)

(b) should carry out an autonomous, proactive and comprehensive risk assessment (e.g. *Kurt v. Austria*, *A and B v. Georgia*)

(c) must take preventive operational measures to avert the risk.

## Preventive and protective operational measures: the ECHR

Those measures must be adequate and proportionate to the assessed level of the risk. The nature and severity of the assessed risk is an important factor (Kurt v. Austria)

Indicative list of measures:

- interim and final protection orders/ barring orders (N.P. and N.I. v. Bulgaria (dec. 2016))
- protection orders that can effectively be implemented (see Y and others v. Bulgaria)
- seizure of guns (Kurt v. Austria, see also Kontrová v. Slovakia)
- arrest if the terms of the protection order are breached and initiation of criminal charges in that regard (Y and others v. Bulgaria)
- placement under some form of police protection (Y and others v. Bulgaria)
- Alerting social and psychological services and placing the victim and her children in a women's refuge (Landi v. Italy, 2022)
- Treatment programmes for perpetrators are desirable (Kurt v. Austria)

## Procedural guarantees during and after court proceedings: The Istanbul Convention

Prohibition of mandatory alternative dispute resolution processes or sentencing

Measures of protection



Examples:

- Protection from intimidation, retaliation and repeat victimization
- Provision of information on rights and perpetrator's whereabouts
- Provision of appropriate support services
- Avoid contact with accused where possible

# Procedural guarantees during and after court proceedings: The ECHR



- Public character of hearings
- Cross-examination
- Content and wording of judgments

# Procedural guarantees during and after court proceedings: The ECHR



## Public character of hearings

Rule and exception

**From the alleged perpetrator's perspective: Article 6 ECHR** ECtHR, *Mraovic v. Croatia* (subsequently dec.): exclusion of public from entire rape trial in order to protect victim, even though she had given interviews to media about the case was compatible with article 6 ECHR

➤ Partially closed proceedings not sufficient as intimate information might be disclosed at any stage of trial (*Mraovic v. Croatia*)

**From the victim's perspective: Article 3 or/and 8 ECHR**

➤ traumatic nature of a public hearing for the victim; questioning her in a public hearing is likely to undermine her dignity and her private life (*G.U. v. Turkey*)

➤ Whether or not the victim is supported by a female psychologist in the procedure is a factor to be taken into account (*G.U. v. Turkey*)

➤ national judges should consider the possibility of moving the trial to another town, to ensure the victim's safety (see, *N.Ç v. Turkey*, where the girl had to confront the aggressive attitude of the defendants' relatives at the close of the hearings)



# Procedural guarantees during and after court proceedings: The ECHR

## CROSS-EXAMINATION

Article 6 ECHR: rule and exception:

-Exception:

- > the rights of the accused as guaranteed by Article 6 paragraph 3(d) of the ECHR **cannot** be interpreted as requiring **in all cases that questions be put directly to the victim** by the accused or his/her defence counsel, through cross-examination or by other means.
- > There should be **counterbalancing factors**
- > **Questions** can be put to the witness/victim **indirectly**, such as, for instance, in writing in the course of the trial, or via a two-way mirror, through the use of video, audio recording, closed-circuit television or live television links (see, *Accardi v. Italy, D.T. v. the Netherlands*)

If cross-examination is absolutely necessary:

- duty to protect the victim's personal **integrity** during the criminal investigation and trial (attention to the way the questions are formulated, and the language used) (*Y. v. Slovenia*)
- cross-examination should **not** be used as a means of **intimidating or humiliating** (*Y. v. Slovenia*)
- right to defend oneself does **not** provide for an **unlimited right to use any defence arguments**

# Procedural guarantees during and after court proceedings: The ECHR

## Content and wording

***J.L. v. Italy, 2021***

“Secondary victimisation” of a victim of sexual assault on account of comments in the **reasoning of the judgment** that were guilt-inducing, moralising and conveyed sexist stereotypes

Judges’ entitlement to express themselves freely in decisions is limited by the **obligation to protect the image and private life** of persons coming before the courts from any unjustified interference.

Unjustified *references to the red underwear “shown” by the victim* in the course of the evening, comments regarding her bisexuality, relationships and casual sexual relations prior to the events in question.



## ➤ *Developments in EU law*

- EU accession to the Istanbul Convention: The Council of the EU allowed the signature of the Convention by the EU in May 2017, and the Union signed the Convention on 13 June 2017.
- Following an Opinion of the CJEU (Opinion 1/19), it was clarified that the EU can only accede to the Convention on the subjects of judicial cooperation in criminal matters, asylum, non-refoulement, and public administration of the Union.
- In February 2023, the Council officially asked for the consent of the European Parliament for the ratification of the Convention. This consent was given by the plenary session of the Parliament on 10 May 2023.
- Towards....finalization and adoption by a qualified majority in the Council of a Decision regarding the ratification of the Convention!
- In parallel, in March 2022, the Commission adopted a Proposal for a Directive on combatting violence against women and domestic violence. The Proposal is currently being debated in the FEMM and LIBE committees of the Parliament.



## Conclusions