

The Istanbul Convention: An Effective Tool for Combating Violence against Women?

1. Worldwide gender-based violence against women has been described by the UN Secretary-General as a pandemic and as a scourge. In Europe a taskforce on violence against women and girls that was the precursor to the drafting of the [Istanbul Convention](#) reported that while statistics are uncertain and rates vary across countries, nevertheless as a general picture in Europe:
 - Across countries one fifth to one quarter of all women have experienced physical violence at least once in their lives and more than one tenth have suffered sexual violence.
 - Figures for all forms of violence, including stalking are as high as 45%
 - Most violent acts against women are carried out by men in their immediate social environment, committed by partners and former partners and acquaintances
 - It is estimated that about 12% to 15% of all women have been in a relationship of domestic abuse after the age of 16
 - Costs: estimated costs – the Council of Europe Task Force estimates ranged from 2.4 billion euros per year in Spain to 34 billion euros in the UK.
2. The seriousness of the situation and especially the worldwide incidence of gender-related killings caused the UN Human Rights Council special rapporteur on violence against women to call in 2016 upon all states to establish what she termed a femicide watch – to provide accurate data on femicides disaggregated by age and ethnicity of victims, and the sex of the perpetrators, and indicating the relationship between the perpetrator and the victim or victims, be published every year, on 25 November. She explained that ‘given the shortcomings of many national prevention systems, the lack of reliable data and risk assessments, and consequent misidentification, concealment and underreporting of gender-related killings, including of women belonging to ethnic minorities, the proposal would provide crucial information for the development of effective strategies to address this serious human rights violation.’
3. There is a growing recognition that combatting violence against women is not only necessary for the guarantee of women’s human rights but also for conflict prevention and for securing sustainable peace. In the words of the Committee on the Elimination of Discrimination against Women: ‘There is a correlation between the increased prevalence of gender-based violence and discrimination and the outbreak of conflict. ... Accordingly, efforts to eliminate gender-based violations also contribute in the long term to preventing conflict, its escalation and the recurrence of violence in the post-conflict phase.’

4. Against this background I am going to discuss the international legal response to violence against women. Within Europe the primary response has been the adoption of the Convention on Preventing and Combating Violence against Women and Domestic Violence – Istanbul Convention which was adopted in 2011 and now has 33 states parties. The Convention was not negotiated in a vacuum but rather built upon what was already a growing body of normative standards in international human rights law. So what I will do in this lecture is first to outline the developments in international law and in particular the reconceptualization that was needed to bring violence against women into the discourse of international human rights law; then I will outline the Convention and in particular its value added – why it is regarded as the gold standard in international measures - the most comprehensive international instrument to end violence against women. Then I will briefly give a flavour of some of the controversial points in the negotiations for the Convention and finally a few words about further developments in the international arena.

5. So a very brief overview of combatting violence against women and girls in international human rights law. It entered the international law agenda in the late 1980s early 1990s – by this time women’s human rights advocates were voicing a significant critique of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and of human rights law more generally – that the framing of human rights in terms of state actions meant that the Convention failed to address that violence that is experienced by women because they are women – what we now call gender-based violence against women - and in particular that it did not address violence by non-state actors – partners, other family members – rather than by state agents. The UN Committee on the Elimination of Discrimination against Women responded in 1992 with its adoption of General Recommendation No. 19. The Committee affirmed that ‘Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men’ and as such is contrary to the provisions of the Convention regardless of whether those provisions expressly mention violence. The Committee drew upon article 2 (e) of the Convention which calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise – to assert that States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

6. This horizontal application of human rights law was an important conceptual advance on the classic human rights framework which regulates the state's vertical relationship with individuals within its jurisdiction. It strengthens the relevance of norms that have been developed in other areas of human rights law, such as disappearances, in making them applicable to violence against women. It also emphasises the importance of access to justice for victims of violence against women.
7. The Committee's pronouncement was rapidly followed by a slew of other normative developments, for instance through the UN General Assembly that reiterated the Committee's stance while adding that violence against women is a manifestation of historically unequal power relations between men and women, a crucial social mechanisms by which women are forced into a subordinate position compared with men. The 1995 Beijing Platform for Action had a critical area of concern on violence against women and the Human Rights Commission – now Council - further advanced the agenda through resolutions and special procedures, notably the mandate of the special rapporteur on violence against Women. At the regional level, treaties focused on violence against women were adopted in the Americas in 1994 and in Africa in 2003. The regional human rights courts drew upon the work of the Committee in interpreting and applying the European and American Conventions on Human Rights respectively, spelling out states' obligations with respect to domestic violence and rape, emphasising that such violence is not a private or family matter, but is an issue of public interest which demands effective state action and sanction and that failure to do so incurs state responsibility and appropriate remedies.
8. So by the first decade of the century there was a plethora of international instruments explicitly on violence against women but they were in so-called soft law form – non legally binding – resolutions; opinions of the CEDAW Committee; reports of the SRVAW. Judgments of the regional human rights courts are of course binding but entail interpretative methods – that is reading violence against women into Convention articles such as those on torture or family life. The only legally binding instruments were at the regional level and in this Europe was lagging behind the Americas and Africa; the lack of any comprehensive binding treaty allowed for uncertainty and for disagreements about the scope and content of states' obligations.
9. Momentum built for the adoption of a European-wide treaty to provide an effective tool for combating violence against women, in effect to supplement the European Convention on

Human Rights. The Istanbul Convention has been celebrated as ground-breaking and as a model. I am not going to go in detail through its provisions but will highlight three features that I think are especially significant.

10. First it is a careful bringing together of international human rights legal standards with domestic criminal law.

11. Istanbul is a human rights treaty and a number of factors flow from this. It:

- Locates violence against women in the three sites identified by the human rights bodies - in the family, the community and the state;
- Following CEDAW and the General Assembly it sets out states' obligation to act with due diligence in the prevention and prosecution of violence against women. Thus states must introduce positive measures to ensure a legal and social framework that is effectively implemented in seeking to prevent such violence from occurring and taking active steps against perpetrators when it does occur, including against non-state actors, through investigation, prosecution and appropriate punishment of convicted offenders.
- Requires the provision of compensation – reparations – for victims of violence against women (article 30).
- Provides for a monitoring body (GREVIO) to which states must report on the legislative and other measures they have taken to give effect to the Convention.
- It is applicable in conflict as well as in peace (article 2 (3)), recognising the continued incidence of forms of violence against women such as domestic violence in situations of conflict.

12. As a criminal law treaty it requires incorporation and, if necessary, legislative change with respect to domestic law and procedure and to be an effective tool for lawyers seeking to prosecute perpetrators of violence against women. Nor does the focus on criminal law detract from the importance of civil law protective measures such as emergency barring orders and restraining orders.

13. Unlike war crimes, crimes against humanity, genocide and torture, violence against women is not per se an international crime; thus it was necessary to identify specific actions within the rubric of violence against women and require states parties to criminalise these manifestations of violence and ensure state jurisdiction over these crimes (article 44) and to provide for their prosecution at the domestic level, requiring a specificity of language with respect to the substance of criminal law and procedure that is in stark contrast to the more open ended language of human rights treaties. Accordingly the Convention provides a list and definitions of a range of relevant crimes demonstrating the breadth and diversity, yet

commonality of various manifestations of violence against women. It thus brings some coherence to the concept of violence against women, highlighting that such acts are not trivial, or chance, random acts of violence but are rooted in inequality. It thereby takes an important step towards achieving substantive equality and linking the human rights element of gender equality and non-discrimination with that of criminal law.

14. Two important issues are which manifestations of violence are included in the Convention and how they are legally defined. There was some concern among delegations at the inclusion of what were regarded by some as social problems or even just good fun (stalking) rather than as crimes and which were in any case they said difficult to define. The following forms of violence against women are spelled out in the Convention: domestic violence (including economic violence); psychological violence; stalking; physical violence; sexual violence, including rape; forced marriage; female genital mutilation; forced abortion; forced sterilisation and sexual harassment.

15. In most instances there was no existing recognised language to draw upon and the Convention provides the first international legal definitions of such crimes, another of its value-added qualities. A concern about criminalisation of such behaviours was whether the emphasis should be on the perpetrator or on the victim. Classically this becomes a debate between men's perceptions of their behaviour and women's experiences of it, issues that are especially relevant in the context of, for example, stalking, sexual harassment and rape. Since Istanbul this has been an important focus of campaigns such as Me Too. The text focuses on that of the victim: stalking is behaviour that 'causes the victim to fear for his or her safety'; sexual harassment is 'unwanted' behaviour. Rape is defined in accordance with the case law of the European Court of Human Rights and the International Tribunal for former Yugoslavia, so that it does not require physical resistance to sexual intercourse but centres around sexual autonomy and consent, freely given in the context of surrounding circumstances.

16. The Convention is rich in detail and specificities and other important aspects of the application of criminal law include:

- Prohibition of mandatory alternative dispute resolution processes (article 48)
- Aiding and abetting gender-based violence against women is also to be criminalised

- Aggravating circumstances are recognised that make the offence especially serious and which may be taken into account in sentencing. These include repeated offences; extreme violence; commission of an act of violence in the presence of a child; carrying out such violence with a weapon (article 46)
- That there should be no defence or justification for acts of violence against women based on ‘culture, custom, religion, tradition or so-called honour’. This covers claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour, ie gendered constructions of appropriate behaviour, for instance dress codes, autonomy in relationships, accessing public spaces. (article 42).
- Another important and innovative article is that requiring states parties to undertake assessment and management of the lethality risk, the seriousness of the situation and the risk of repeated violence. In this sense the Convention requires states to address both the overall environment, to make it less conducive to violence against women, and take measures with respect to individual women identified as at risk.
- In determining risks states are to take into account whether the perpetrator possesses or has access to firearms. (article 51). Anyone familiar with the European Court of Human Rights case of *Opuz v. Turkey* will be aware of the importance of this obligation.

17. The third value-added of the convention is that it is holistic, comprehensive and practical. A holistic approach sees the Convention in the context of the entire architectural structure constructed under international and national law with respect to combatting violence against women. The Istanbul Convention does not stand alone but is part of a system that is internally consistent, comprehensive in its coverage and provides a coherent approach to and practical measures for addressing violence against women at the domestic level.

18. This holistic character is achieved by the adoption of the 4 ‘P’ approach. It thus requires:

- Prevention of such acts
- Protection against such acts
- Provision of services
- Participation of women as a means of women’s empowerment.

19. Each of these obligations is dealt with fully, combining detailed legal and practical measures, including most importantly commitment to resources. In recognition that an effective response requires more than individual measures in these fields, the Convention adds another P – integrated government policies. These must be gender-sensitive (article 6) and subject to scrutiny at the national level by the official government body that the government must create or designate (article 10). This body is crucial. It has a significant role in securing the holistic approach with its four tasks of coordinating, implementing, monitoring and evaluating the policies and measures devised by the government to give full effect to the Convention. It is also at the centre of ensuring detailed and factual research is carried out and that disaggregated data are collected and evaluated to ensure evidence-based policy. The body must have the capacity to co-ordinate with its counterparts in other states parties. Its designation – and proper resourcing - is thus one of the core undertakings for the implementation of the Convention and ensuring coordination across states parties.
20. Prevention and policy come together in the Convention’s commitment to transformative equality; the obligation to take preventive measures to transform gender relations and 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.’ (article 12). This article repeats CEDAW article 5 and makes it specific to the prevention of violence against women.
21. So the Convention brings together established and emerging standards with respect to violence against women from a range of sources into a single legally binding instrument, combining legal processes – in civil and criminal law – with social, educational and awareness raising measures. It is grounded in sociological understandings of the causes, consequences and prevalence of gender-based violence against women. It is multi-sectoral requiring the active participation by multiple government agencies, national parliaments, national human rights institutions, NGOs and other forms of civil society, men and boys.
22. It can effectively be viewed through a linear lens: from requiring important pre-emptive measures, through emergency protective procedures, to processes for individual accountability, to long term structural and systemic transformation of government agencies, and of social attitudes – through education and training based upon reliable research and

data. It is holistic in its own terms (article 7) and forms part of a wider regional and international system, building upon existing international law, supplementing the work of the European Court of Human Rights, the CEDAW Committee and even the UN Security Council in its women, peace and security agenda. It ensures that violence against women is recognised for what it is, a serious crime of public concern, places it within the social context as constructed by gender hierarchies and takes a practical and pragmatic approach to achieving its vision: 'a Europe free from violence against women and domestic violence'. (Istanbul Convention, Preamble).

23. Despite its genealogy in existing law, negotiation of the Convention wasn't straight forward or easy and many articles were controversial and contested. Delegates were not on the whole human rights experts which had some consequences. For instance delegates did not always know or understand human rights language, or even that their states had already entered into other binding obligations – for example that every state of the Council of Europe is a party to CEDAW. The substance of CEDAW was not always known, nor was it necessarily accepted that CEDAW is a legally binding treaty. Proposed language taken directly from CEDAW was challenged, despite having been already accepted by states. Further, landmark jurisprudence of the European Court of Human Rights on domestic violence (*Opuz*), on the definition of rape (*MC v Bulgaria*), was dismissed as of no wider relevance than to the state in question. It was not understood as the interpretation of the ECHR and thus as the standard for such laws in Europe. Other areas of disagreement concerns were the inclusion of economic and psychological violence with delegates questioning what those terms entailed and the viability of their inclusion.

24. But these faded into insignificance against the controversy over the definition of gender (as in gender-based violence) and the concept of domestic violence as gender-based – the concept of gender was not widely understood among delegates – especially those who came from criminal justice departments. Even where it was understood there were arguments that it was a sociological or political concept and thus not suitable for inclusion in a legally binding instrument. In the end the language of definition is familiar to those who have followed linguistic development through CEDAW General recommendations; it sets out the understanding of gender as a social construct, of gender relations as socially constructed relations between women and men, and of violence against women as gender-based violence that occurs exclusively, or disproportionately against women, which applies both to the incidence of violence, and its consequences. As a prevention strategy the Convention

seeks change in gender stereotypes, education, the need for treatment programmes and engaging the media. But these were all controversial because of the perceived tension with freedom of expression, media control and education curricula.

25. I should add that the Council of Europe is currently seeking to take this further – drafting a Recommendation of the Committee of Ministers on combating sexism.
26. The importance of a gendered underpinning to the Convention was especially challenged in the context of domestic violence, as is revealed by its title – that it is a Convention for preventing and combating violence against women and domestic violence, rather than ‘including domestic violence’, thereby separating domestic violence from the rubric of violence against women and indicating a profound resistance to accepting the reality of gender discrimination and violence across all stratas of European society. This was because of the repeated and fierce argument that domestic violence is gender neutral and universally applicable – it occurs to men (and children and elderly persons, thereby intersecting age with gender) and thus that making its applicability woman specific was inappropriate. The result was a compromise achieved late in the negotiations: a statement that the Convention applies to all forms of violence against women including domestic violence, which affects women disproportionately (article 2), but a definition of domestic violence that is gender neutral (article 3 (b) and a further article that extends the scope of the Convention through encouraging states to apply the Convention to all victims of domestic violence, although particular attention shall be paid to women victims of violence. (article 2.2)
27. On the one hand this was an innovative solution to an impasse that threatened to derail the Convention; on the other hand it undermines the very grounding in human rights of the Convention – violence against women is a human rights concern precisely because of the structural discrimination against, and subordination of, women that is both a cause and consequence of such violence. Domestic violence against men certainly occurs but its incidence is less and it is not grounded in such structural discrimination. In the words of the former Special Rapporteur on Violence against Women; ‘This suggests that male victims of violence require, and deserve, comparable resources to those afforded to female victims, thereby ignoring the reality that violence against men does not occur as a result of pervasive inequality and discrimination, and also that it is neither systemic nor pandemic in the way that violence against women indisputably is. The shift to neutrality favours a more pragmatic

and politically palatable understanding of gender, that is, as simply a euphemism for “men and women”, rather than as a system of domination of men over women. ... Attempts to combine or synthesize all forms of violence into a “gender neutral” framework, tend to result in a depoliticized or diluted discourse, which abandons the transformative agenda.’

28. Equating domestic violence against all victims, including men, with domestic violence against women reveals a profound ambivalence about women being discriminated against in society and this dimension is lost; it becomes a crime like any other. It raised other problems – were all provisions suitable to be applied to all victims of domestic violence, for instance the availability of shelters. In times of economic austerity shelters are closing – not least because they have to provide space for male victims of domestic violence, which is not used while that for women is insufficient. Violence against the elderly and children also requires specialised responses directed at their particular needs that could not be accommodated in this Convention (although there are some sporadic references to children). This compromise might possibly be a precursor to further treaty-making but in the meantime it is based on somewhat confused conceptual thinking.
29. There have of course been further developments and debates at the international level since 2011. The former Special Rapporteur on violence against women lamented the lack of a global treaty tackling violence against women and there have been suggestions that the Istanbul Convention might be a model for such a Convention. There is provision for non-member states of the Council of Europe to become a party and although there are some indications that some states are apparently considering this (Israel and Morocco) no state has done so. The concern is of course that the Istanbul Convention is European was crafted in the European context and there can be no assumption that it is appropriate for situations elsewhere. Further any suggestion of universalising it reawakens fears of imperialism and imposition of values.
30. In the meantime CEDAW Committee has updated its General Recommendation 19 with a new General Recommendation 35 adopted last year. It too is in soft law form but it observes that the practice of states now suggests that the prohibition of gender-based violence against women has evolved into a principle of customary international law. This might obviate the need for a treaty although the Recommendation cannot provide the practical detail of a treaty like Istanbul.

31. GR 35 has much to recommend it and goes beyond Istanbul in scope and content. It gives voice to structural causes of gender-based violence notably ‘the ideology of men’s entitlement and privilege over women’ (para 19) and the pernicious effects of prejudices and gender stereotyping. It recognises the adverse impact of aspects of contemporary life – environmental degradation, militarisation, displacement, globalisation of economic activities, foreign occupation, armed conflict, violent extremism and terrorism (para 14) and that violence against women occurs in: ‘all spaces and spheres of human interaction’; not just the family, community and state as in Istanbul. More specifically it adds ‘the public spaces, the workplace, leisure, politics, sport, health services, educational settings and their redefinition through technology-mediated environments ... the Internet and digital spaces.’ (para 20). It also recognises the diversity of women and that ‘gender-based violence may affect some women to different degrees or in different ways’ and accordingly that different legal and policy responses must be devised to address violence targeted against women within some such categories, for instance to repeal laws that allow for medical procedures on women with disabilities without their informed consent,. GR 35 highlights that women may be made vulnerable to violence because of other state policies, for instance with respect to immigration or creation of statelessness – issues that take on significance in light of the Windrush scandal.
32. GR 35 reiterates what are often viewed as major impediments to elimination of violence against women and effective state responses – culture, tradition, religion, fundamentalist ideology. But it also makes reference to factors that are less often remarked – reduction in public spending, austerity economics, extraterritorial corporate behaviour. The former are implicitly associated with the Global South; through this coupling the Committee tacitly recognises the complicity of the Global North in ‘the pervasiveness of gender-based violence against women’ and the culture of impunity (para 7) an approach that is not part of Istanbul.
33. The Special Rapporteur on violence against women carried out a consultation with civil society about the desirability and feasibility of a global convention that elicited a range of views. In her conclusions she recognised the symbolic impact of a global treaty, but also the risk of dilution of what we have – a view I share following my experiences in the negotiation of Istanbul where we had to fight to ensure the Convention did not detract from existing norms. She also emphasised the importance of GR 35 deriving its authority from CEDAW – the core international treaty on women’s equality and that the practice of States under the

Convention has, explicitly or implicitly, expressed their acceptance of the Convention's interpretation of violence against women, without dissenting on its core contents.

34. In conclusion I hope that I have said enough about Istanbul to show that it provides a practical framework that can be adapted to local contexts for effective implementation of a strategy for combatting violence against women, provided of course it is accompanied by adequate resources and political will. However it should be taken in conjunction with the CEDAW's General Recommendation No 35 which adds to our understanding of the causes and consequences of such violence.

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