The Council of Europe and Violence against Women—Past, Present and Future

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Abstract

Violence against women and domestic violence took some time to enter the consciousness of the Strasbourg institutions as a discrete form of the degrading treatment prohibited by art.3 of the ECHR. This short article looks at the evolution of the European Court's case law on the substantive and procedural aspects of the phenomenon and at new issues now arising. It also looks at the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) and at some of the misconceptions which have led to the current politisation of the ratification process for certain states and the EU.

Introduction

This article focuses on violence against women—a topic singled out for attention in Ch.E of the Council of Europe's 2022 High Level Report.[1] The High Level Reflection Group that authored the report noted that Ch.E was specifically included in light of the backlash affecting the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).[2] It observed that challenges to the right of women to live a life free from violence should also be considered as part of a broader problem linked to the rampant and negative influence of anti-rights movements.[3] Moreover, it recommends greater efforts to change hearts and minds and to dismantle ingrained patterns of patriarchy and sexism that form the bedrock for violence.[4]

The selection of the phenomenon of violence against women for special attention in the report is self-evidently deserving. Certainly, the failure of several Council of Europe (CoE) states[5] to ratify (or even more seriously, withdraw from or propose withdrawing from) the Istanbul Convention is a matter of great concern and is discussed below. However, those who work in human rights regularly see that systemic and systematic violations of human rights are also suffered across the CoE by other identifiable—and identified—vulnerable groups, such as asylum seekers (and even those who are recognised as refugees or otherwise in need of international protection); members of ethnic or religious minorities;

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[1] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023].

[2] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), p.7, *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023].

[3] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023].

[4] *Report of the High-Level Reflection Group of the Council of Europe* (Council of Europe, 2022), *https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1* [Accessed 2 March 2023].

[5] Armenia, Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Slovakia. The EU has signed but not ratified the Convention as six EU Member States have not so far ratified. Adherence to the Convention is discussed below.

victims of racial discrimination and violence; LBGTI persons; persons with disabilities including mental disabilities; prisoners, and in particular violence committed against persons in detention. These are all groups who suffer from the "rampant and negative influence of anti-rights movements". The CoE Commissioner for Human Rights' most recent newsletter (January 2023) reflects these wider concerns. Their position as victims of human rights violations derives from their membership of those vulnerable and marginalised groups. They should not be forgotten whilst the CoE—understandably—specifically remembers women who are victims of violence and strives to eradicate that particular evil from Europe. This article will look at the history of the CoE's protection in this field, at the present situation and at the future.

The ECtHR and violence against women

Case law under the European Convention on Human Rights (ECHR) in this field has evolved slowly over four decades. The first major case to come before the Strasbourg institutions was in 1980. *X v Netherlands*[6] concerned a child[7] whose mental disability had required her for years to reside in an institution. She was taken one night by the son-in-law of the director to his room and sexually assaulted. Although it was determined that the child, because of her mental disability, was unable to make a criminal complaint, the Commission's fact-finding exercise does not address—in terms—whether she was capable of consenting to the "assault" and thus whether what happened constituted rape.

The distress suffered by the victim *after* the incident was discussed by both the Commission and the European Court of Human Rights (ECtHR or the court) but not the distress suffered *during* it. Both the Commission[8] and subsequently the court considered that art.3 of the ECHR (the prohibition of torture and inhuman or degrading treatment) was not applicable and dealt with the complaint under art.8. The Commission considered that sexual abuse and inhuman or degrading treatment are "by no means congruent concepts" and that it was not necessary to establish whether the victim's mental suffering *after* rape engaged art.3 of the ECHR.[9] Whilst the decision to examine violations of "moral and physical integrity" under the private life rubric of art.8 was a welcome advance in the jurisprudence on that article, the failure to see the sexual assault of a particularly vulnerable minor as a violation of art.3 was both unfortunate and a reflection of the attitudes of the time. The focus of the Commission and court was on the state's responsibility for procedural safeguards in connection with the actions of private individuals who were not agents of the state and on the gaps that existed in Dutch law.

The next important judgment from Strasbourg concerned a case that was brought, not on behalf of a victim of sexual violence, but by a husband who complained, under art.7[10] of the ECHR that he had been convicted of the rape of his wife at a time when this was not a criminal offence. In *SW v United Kingdom*[11] the ECtHR found:

> "The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords—that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim—cannot be said to be at variance with the object and purpose of Article 7 (art.7) of the Convention, namely, to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 32 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of

[6] *X v Netherlands* (App. No.8978/80), judgment of 26 March 1985; (1986) 8 E.H.R.R. 235. Prior to Protocol 11 cases went first to the Commission and only sometimes were later adjudicated by the court.

[7] The child in question was one day over the age of 16 when the impugned events occurred. Several relevant provisions of Dutch law referred to those under 16 and under 21. The UNCRC, with its definition of a child as anyone under the age of 18, was not adopted until 1989.

[8] One member of the Commission, Mr Tenekides, dissented on this point.

[9] *X* (App. No.8978/80), judgment of 26 March 1985; (1986) 8 E.H.R.R. 235.

[10] No punishment without law.

[11] *SW v United Kingdom* (App. No.20166/92), judgment of 22 November 1995; (1996) 21 E.H.R.R. 363.

> his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom."[12]

There followed a number of cases of violence against women committed whilst they were in police custody. *Aydin v Turkey*[13] was considered by both the Commission[14] and the ECtHR and judgment was given on 25 September 1997. The events took place in 1993 against the background of the disturbances and emergency rule in south-east Turkey continuing since 1987. Sukran Aydin was a 17-year-old child[15] who had never been outside her conservative rural village when she was arrested, blindfolded and taken to a gendarmerie 10 km away where she was tortured and raped. This time the rape(s) were committed by the security forces so state responsibility was not in question, but the physical pain and mental anguish of the rapes were expressly addressed:

> "Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.
>
> The applicant was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre."[16]

In the following years the ECtHR had occasion to consider many other cases.[17]

The ECtHR has now for over 10 years recognised that violence against women may be sufficiently serious as to be considered prohibited treatment under art.3 of the ECHR. Twenty years after *X v Netherlands*,[18] in the 2009 case of *Opuz v Turkey*,[19] the court took the opportunity to highlight that insufficient police investigations together with judicial passivity at a domestic level had resulted in the death of the applicant's mother and abuse of the applicant herself.[20] This judicial passivity allowed the ECtHR to recognise the "climate conducive to domestic violence" in Turkey.[21] It similarly later recognised in *Talpis v Italy*, that the national authorities had created "a situation of impunity conducive to the recurrence" of acts of gender based violence (GBV).[22] And in *Tërshana v Albania*, the "climate of leniency or impunity" towards perpetrators of violence and the "general climate in Albania that was conducive to violence against women" was also recognised.[23]

[12] *SW* (App. No.20166/92), judgment of 22 November 1995; (1996) 21 E.H.R.R. 363 at [44].
[13] *Aydin v Turkey* (App. No.23178/94), 25 September 1997, Reports of Judgments and Decisions 1997-VI.
[14] In order to establish the facts, the Commission had travelled to Turkey and held at hearing at which witnesses were called.
[15] See mutatis mutandis fn.4 above
[16] *Aydin* (App. No.23178/94), judgment of 25 September 1997 at [83]–[84].
[17] The Council of Europe's Factsheets on Violence against Women and Domestic Violence were recently updated and provide a useful assembly of the most relevant cases. The Factsheets of the Department for the Execution of Judgments on domestic violence also provide useful information about the response of states to findings of a violation in this field.
[18] *X* (App. No.8978/80), judgment of 26 March 1985; (1986) 8 E.H.R.R. 235.
[19] *Opuz v Turkey* (App. No.33401/02), judgment of 9 June 2009; (2010) 50 E.H.R.R. 28.
[20] *Opuz* (App. No.33401/02), judgment of 9 June 2009; (2010) 50 E.H.R.R. 28 at [192]; see also [111] and [195].
[21] *Opuz* (App. No.33401/02), judgment of 9 June 2009; (2010) 50 E.H.R.R. 28 at [198].
[22] *Talpis v Italy* (App. No.41237/14), judgment of 2 March 2017 at [117].
[23] *Tërshana v Albania* (App. No.48756/14), judgment of 4 August 2020; (2021) 72 E.H.R.R. 13 at [156].

Opuz provides an example of how the ECHR was not designed to deal with what was at the time an unseen form of violence against women: that is violence taking place behind closed doors or in the home. The ECtHR recognised that domestic violence may take numerous forms, including both physical and psychological violence. Moreover, it is a "general problem which concerns all member States,[24] and which does not always surface since it takes place within personal relationships or closed circuits".[25] This landmark judgment therefore confirmed that Contracting States have positive obligations to protect individuals under arts 2, 3, and 8 of the ECHR when threatened by private persons. More significantly, *Opuz* confirmed that domestic violence may be considered as prohibited ill-treatment under art.3 of the ECHR. The judgment indirectly led to the adoption of the Istanbul Convention discussed below.

In another landmark development, the ECtHR has recognised that the positive obligation to prevent violence against women and victims of domestic violence applies to domestic violence in all forms, whether this occurs offline or online.[26] For example, in *Volodina v Russia (No.2)* concerning the use of cyberviolence, it recognised that online violence against women may be "considered as another facet of the complex phenomenon of domestic violence".[27] In this case, the ECtHR affirmed that, even in the context of online violence, states have an obligation to establish and apply adequate legal frameworks affording protection against violence by private individuals; to take reasonable measures to avoid real and immediate risks of recurrent violence where the authorities knew or ought to have known; and to conduct effective investigations into such acts.[28]

Other international law instruments

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) entered into force in September 1981 aims at ending all forms of discrimination against women. Article 1 stipulates that gender-based violence against women constitutes discrimination as it prevents or impairs women from enjoying their rights and freedoms.[29] States parties must act with due diligence to prevent, prosecute and punish violence against women and protect victims, including, inter alia, through legislative measures and ensuring competent authorities.[30] States failing to act with due diligence may be held responsible for discrimination by private individuals.[31]

The addition of the UN Committee General Recommendations, including the CEDAW Committee's General Recommendation No.35 has allowed it to go further than the text of the Convention. General Recommendation No.35 notes that gender-based violence can be rooted in gender-related factors, such as a perpetrator's perceived need to "assert male control or power" or to "prevent, discourage or punish what is considered to be unacceptable behaviour".[32] The inclusion of specific General Recommendations has provided authoritative guidance about the interpretation and scope of the Convention.

[24] See, e.g. S. Konstantinović Vilić et al., "Analysis of Case-Law on Femicide and Attempted Femicide in Bosnia and Herzegovina 2017–2021" (The AIRE Centre et al., 2022), available at: *https://www.airecentre.org/Handlers/Download.ashx?IDMF=0635bfdc-3a99-4afd-b786-59492dfdd637* [3 March 2023].

[25] *Opuz* (App. No.33401/02), judgment of 9 June 2009; (2010) 50 E.H.R.R. 28 at [132].

[26] *Volodina v Russia (No.2)* (App. No.40419/19), judgment of 14 September 2021 at [49].

[27] *Volodina* (App. No.40419/19), judgment of 14 September 2021 at [49]. See also *Buturugă v Romania* (App. No.56867/15), judgment of 11 February 2020 at [74] and [78].

[28] *Volodina* (App. No.40419/19), judgment of 14 September 2021 at [49].

[29] CEDAW, art.1. See also CEDAW, General Recommendation No.19 on violence against women (1992), para.6.

[30] CEDAW, General Recommendation No.35 on gender-based violence against women, updating General Recommendation No.19 (2017), paras 34–45. See also CEDAW, *JI v Finland*, 103/2016 (5 March 2018), para.8.8.

[31] CEDAW, art.2(e), read together with CEDAW General Recommendation No.35, paras 24(b) and 35.

[32] CEDAW, General Recommendation No.35 on gender-based violence against women, updating General Recommendation No.19 (2017), para.19.

Recent jurisprudence

In various other cases the ECtHR has affirmed the need for effective investigations into conduct prohibited under arts 3 and 8, including sexual violence. In *JI v Croatia*, the court held that investigations must be available to applicants and operate effectively in practice and not just in theory.[33] The ECtHR makes it clear that in situations where persons have endured physical violence and psychological trauma, the fear of future abuse and threats to life, as well as the feelings of anxiety and powerlessness that come with it, are sufficient to amount to prohibited ill treatment under art.3.[34] In *C v Romania*,[35] the court noted that the authorities had initiated the investigation into workplace sexual harassment promptly, however they had failed to specifically explain how they reached their conclusion nor was it evident to the court that they had considered the coherence and credibility of witnesses.[36] Citing *Opuz*, the court reiterated that sexual harassment in this context is significantly underreported and takes place behind closed doors making it very difficult to prove.[37] It added to existing case law which recognises the need to put an end to impunity of sexual harassment and to protect the rights and interests of victims.[38] Part of this is protecting victims from secondary victimisation. Indeed, the court recognised that the applicant had been confronted during the investigation without explanation as to its need or potential impact. It added that any confrontation of victims must be "carefully weighed by the authorities, and that the victim's dignity and sensitivity must be considered and protected".[39]

The requisite degree of urgency and diligence was addressed by the Grand Chamber in *Kurt v Austria* in the context of obligations to protect the right to life under art.2.[40] The applicant complained to the authorities that her husband had beaten and later raped her. He had also made dangerous threats to her, either threatening to hurt her, those closest to her, or to himself. The husband went on to shoot their son, who died of the injuries sustained, before shooting himself. While no violation under art.2 was found in this case, it illustrates the requirements and procedures that national authorities must follow in the context of domestic violence allegations and the immediate risk to life of individuals.

The Grand Chamber considered, inter alia, whether the authorities reacted immediately to the domestic violence allegations; the quality of the risk assessment; and whether the authorities knew or ought to have known that there was a real and immediate risk to the life of the applicant's son. The majority of 10 judges was satisfied that the national authorities had responded to the initial domestic violence allegations with the required special diligence as they had, inter alia, questioned the husband, confiscated his keys to the family home, and one of the responding officers had been specially trained in domestic violence cases.[41] It was further satisfied that the initial risk assessment had been conducted proactively and comprehensively and that the authorities had been thorough and taken all the necessary protective measures, leading to the issuance of a barring and protection order.[42] It was because of this that no immediate risk to the child's life was discernible and no additional steps were required to protect against the risk to the son's life.[43] Seven judges presented, however, a lengthy and detailed dissenting opinion in which they made diametrically opposite findings. They particularly emphasised the difference between an "incident-based act", which they considered had occurred in *Osman v United Kingdom*[44] and the kind of escalating conduct that characterises domestic violence.

[33] *JI v Croatia* (App. No.35898/16), judgment of 8 September 2022 at [84].
[34] *JI* (App. No.35898/16), judgment of 8 September 2022 at [89].
[35] *C v Romania* (App. No.47358/20), judgment of 30 August 2022; [2023] I.R.L.R. 87.
[36] *C* (App. No.47358/20), judgment of 30 August 2022; [2023] I.R.L.R. 87 at [79].
[37] *C* (App. No.47358/20), judgment of 30 August 2022; [2023] I.R.L.R. 87 at [78]–[79].
[38] *C* (App. No.47358/20), judgment of 30 August 2022; [2023] I.R.L.R. 87at [85].
[39] *C* (App. No.47358/20), judgment of 30 August 2022; [2023] I.R.L.R. 87 at [84].
[40] *Kurt v Austria* [GC] (App. No.62903/15), judgment of 15 June 2021; (2022) 74 E.H.R.R. 6.
[41] *Kurt* [GC] (App. No.62903/15), judgment of 15 June 2021; (2022) 74 E.H.R.R. 6 at [193]–[194].
[42] *Kurt* [GC] (App. No.62903/15), judgment of 15 June 2021; (2022) 74 E.H.R.R. 6 at [202].
[43] *Kurt* [GC] (App. No.62903/15), judgment of 15 June 2021; (2022) 74 E.H.R.R. 6 at [209].
[44] Osman was the first case brought to Strasbourg by the AIRE Centre, lodged in November 1993.

The September 2022 judgment of *HF v France*[45] concerned two French citizen women and their minor children who had left France for Syria to join ISIS. They were detained in camps in Syria and sought repatriation to France.[46] Several reports indicated that women and children living in these camps suffered from malnutrition, dehydration, PTSD, and were at risk of violence and sexual exploitation and treatment prohibited under art.3.[47] The court held that their art.3 complaints did not fall within the jurisdiction of France but examined the issues arising under art.3 of Protocol No.4 to the Convention, under which no one shall be deprived of the right to enter the territory of the state of which he is a national. The court considered that an individual examination of their requests with appropriate safeguards against arbitrariness was required[48] and that the required safeguards had not been implemented.

Issues on the horizon in tackling violence against women

Cyberviolence

Modern technologies pose a challenge to the protection of women and girls from violence. Sexual and gender-based violence can be, and is, perpetrated online. *Volodina v Russia*, mentioned above, established that cyberviolence, taken together with domestic violence and other gender-based violence, falls within the scope of art.8 of the ECHR.[49] The court specifically recognised that acts of cyberviolence are "sufficiently serious to require a criminal-law response on the part of the domestic authorities".[50] The court advised authorities on proactive measures to obtain technical information, including requests to online platforms or sites to verify account owners; questioning persons about device usage; determining telephone numbers and IP addresses; and so on.[51]

Abduction and asylum

The 1980 Hague Convention currently[52] lacks specific provisions addressing an abducting parent's position as a victim of domestic violence.[53] Many international abductions are carried out by mothers fleeing violent relationships, a scenario on which the Hague Convention's drafters, understandably, did not focus in the 1970s.[54] The underlying principle of the Hague Convention is that the left behind parent can seek and obtain the return of wrongly removed (or retained) child(ren) to their jurisdiction of habitual residence so that the national courts there can deal with all the issues relative to the abduction. In such cases, abducting

[45] *HF v France* [GC] (App. Nos 24384/19 and 44234/20), judgment of 14 September 2022; (2022) 75 E.H.R.R. 31.

[46] Contrast the UK case of Shamima Begum who was stripped of her citizenship. See *Begum v Secretary of State for the Home Department* [2023] 2 WLUK 353 (SIAC, 22 February 2023).

[47] *HF* [GC] (App. Nos 24384/19 and 44234/20), judgment of 14 September 2022; (2022) 75 E.H.R.R. 31 at [24]–[25].

[48] *HF* [GC] (App. Nos 24384/19 and 44234/20), judgment of 14 September 2022; (2022) 75 E.H.R.R. 31 at [277].

[49] *Volodina* (App. No.40419/19), judgment of 14 September 2021. For a summary, see I. Jelić and H. Smith, *Gender Equality and Discrimination on the Grounds of Sex: A Guide on the Relevant Jurisprudence of the European Court of Human Rights* (The AIRE Centre, 2022), p.183, available at: *https://www.airecentre.org/Handlers/Download.ashx?IDMF=936db83f-388d-41d6-911c-db4d86a5c3c4* [Accessed 3 March 2023]. The case concerned a lack of effective investigation into acts of online violence in the context of domestic violence. It was found that the state had failed to fulfil its positive obligations under art.8 in securing respect for the victims' private life by providing effective protection, preventing further violence and carrying out an effective investigation.

[50] *Volodina* (App. No.40419/19), judgment of 14 September 2021 at [57]; *KU v Finland* (App. No.2872/02), judgment of 2 December 2008; (2009) 48 E.H.R.R. 52 at [45] and [47]; *Opuz* (App. No.33401/02), judgment of 9 June 2009; (2010) 50 E.H.R.R. 28 at [176]; *Volodina v Russia* (App. No.41261/17), judgment of 9 July 2019 at [86].

[51] *Volodina* (App. No.40419/19), judgment of 14 September 2021 at [66].

[52] The 1980 Hague Convention on the Civil Aspects of International Child Abduction. One of the current projects of The Hague Conference is to explore the creation cross-border enforceability of foreign civil protection orders. See, *https://www.hcch.net/en/projects/legislative-projects/protection-orders* [Accessed 3 March 2023].

[53] See B. Quillen, "The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction" (2014) 49(3) *Texas International Law Journal* 621, 625.

[54] See Quillen, "The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction" (2014) 49(3) *Texas International Law Journal* 621, 625.

mothers will normally accompany the children who are subject to return orders, but this can sometimes make them vulnerable to re-victimisation.[55]

Hague Convention returns can be denied when the child(ren)'s return risks exposing them to "physical or psychological harm" or an "intolerable situation".[56] This exception does not (expressly) consider harm against the mother.[57] Unlike some national jurisdictions the court has yet to recognise that children may be indirect or direct victims, and thus fall within the s.13(b) exceptions when exposed to domestic violence against their mother.[58]

The question of gender-based violence can also have implications for a woman's claim to remain in a country either in Hague Convention cases or where abduction is not involved.[59] Meanwhile, developing considerations of violence against women may mean that persecution on the basis of gender as a "social group" can be grounds for asylum claims under the Refugee Convention, and protection from return under the ECHR.[60] A European Court of Justice preliminary ruling on whether the situation in Afghanistan qualifies a woman for asylum is awaited.[61]

The issue of non-consent

Many criminal codes require proof of physical violence, which risks leaving instances of rape or sexual violence unpunished.[62] States are required to conduct an effective investigation which focuses on the question of consent, not just establishing the physical evidence of rape this has been recognised by the ECtHR.[63]

Judiciary and gender bias

Finally, concerns remain that cases of violence against women are not being adequately responded to at all levels of the judiciary. Women may have their experiences of digital violence minimised, or their report of rape undermined by the perception that previous sexual relations amounts to the giving of consent in a separate, subsequent incident.[64]

[55] See K. Trimmings and O. Momoh, "Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings" (2021) I*nternational Journal of Law, Policy and the Family* 1, 4.

[56] Hague Convention s.13(b).

[57] *OCI v Romania* (App. No.49450/17), judgment of 21 May 2019; [2019] 2 F.L.R. 748.

[58] See Trimmings and Momoh, "Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings" (2021) *International Journal of Law, Policy and the Family* 1, 3.

[59] The Istanbul Convention specifically provides that victims whose residence status depends on that of the abusive spouse or partner are granted an "autonomous residence permit".

[60] Some argue this has been typically overlooked. See, e.g. H. Crawley and C. Lewis, "Gender Issues in the Asylum Claim'", Amara International, *https://www.amerainternational.org/gender-issues-asylum-claim/* [Accessed 3 March 2023].

[61] Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 22 September 2022—FN(C-609/22), available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62022CN0608* [Accessed 3 March 2023].

[62] *Maslova v Russia* (App. No.839/02), judgment of 24 January 2008; (2009) 48 E.H.R.R. 37 at [91].

[63] *MC v Bulgaria* (App. No.39272/98), judgment of 4 December 2003; (2005) 40 E.H.R.R. 20 at [177]–[182]; *EM v Romania* (App. No.43994/05), judgment of 30 October 2012 at [6]. GREVIO (the Istanbul Convention implementing body) has praised the criminal code amendments undertaken by Sweden to fulfil its obligations under art.36 of the Istanbul Convention. Sweden's "affirmative consent approach" alters the previous wording, which required the use of force, threats or the taking advantage of a vulnerable situation of the victim in order to constitute it as rape. Now the onus is on the perpetrator to establish whether the act is engaged in voluntarily; failure to take reasonable measures to establish the victim's consent incurs criminal liability under the new offences of "negligent rape" and "negligent sexual abuse".

[64] *The Decriminalisation of Rape: Why the justice system is failing rape survivors and what needs to change* (November 2020), A Report by the Centre for Women's Justice, End Violence Against Women Coalition, Imkaan, and Rape Crisis England & Wales in response to the England & Wales Government's "End to End" Review of the Criminal Justice System's Response to Rape, pp.52 and 56. Available at: *https://bit.ly/3JSE5sn* [Accessed 3 March 2023].

The Istanbul Convention

The Convention on preventing and combating violence against women and domestic violence[65] entered into force on 1 August 2014. The CoE has created and assembled a library of publications on the instrument.[66] The Convention has also been signed by the EU,[67] but not yet concluded (ratified). In the light of the fact that some states were reluctant to ratify the CJEU delivered Opinion 1/19 in 2021 which held that the council can await the "common accord" of the Member States, but the treaties prohibit the council from making the decision concluding that Convention contingent on the prior establishment of such a "common accord". Since then, significant further steps have been taken by the council in February 2023 towards conclusion.

Within the CoE states, only Azerbaijan has not signed the Istanbul Convention. Yet whilst the Convention has not been amended since it was signed,[68] Turkey denounced it in 2021. As noted above—and in the *High-Level Report*—the lack of ratification of the Convention has retrograde consequences for preventing and combating violence against women although this has not been the focus of the resistance on the part of the states concerned as some examples will show.

Bulgaria has decided not to ratify. The Constitutional Court ruled use of the term gender is misleading and introduces a concept not compatible with the understanding of sex as stated in the Constitution. It also did not agree with the definition of gender as socially constructed roles. Bulgaria considers the Convention introduces a system that threatens traditional family values and beliefs, would lead to legalisation of same-sex marriage and lead to a "third gender" and a higher likelihood of young people identifying as transgender. Bulgaria also considered that ratification did not prevent violence; the problem still exists in countries that have ratified the treaty.[69]

Poland has also indicated its intention to withdraw. Poland rejects the idea in the Istanbul Convention that the main cause of domestic violence is structural inequality between men and women. Poland considers the Convention threatens traditional family values, imposes gender ideology and requires schools to teach children about gender, violates the rights of parents, is based too heavily on ideology and that there is already sufficient protection in place.[70]

Hungary's objections are wider. It considers that the Convention promotes destructive gender ideologies and illegal migration. It rejects the references to gender in the treaty, rejects obligations to receive refugees persecuted over sexual orientation or gender; considers that the Convention allows faster and easier immigration to Europe and that sufficient protection for women against violence is already in place.[71]

Slovakia will not ratify as it considers that the Convention is incompatible with the country's constitutional definition of marriage as a heterosexual union. Slovakia claims ratification will lead to the

[65] Council of Europe Treaty Series No.210 (2011).

[66] See Council of Europe, *https://www.coe.int/en/web/istanbul-convention/publications* [Accessed 3 March 2023].

[67] As a hybrid instrument.

[68] Signature does not create an obligation to ratify but does create an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty. See arts 10 and 18 of the Vienna Convention on the Law of Treaties 1969.

[69] See "Bulgarian Rights Groups Condemn Rejection of the Istanbul Convention" (2 August 2018), Liberties, *https://www.liberties.eu/en/stories/top-court-in-bulgaria-rejects-the-istanbul-convention/15388* [Accessed 3 March 2023]; M. Dimitrov, "Bulgaria Scraps Plan to Ratify Women's Violence Convention" (7 March 2018), BalkanInsight, *https://balkaninsight.com/2018/03/07/bulgarian-government-withdraws-plans-to-ratify-istanbul-convention-03-07-2018/* [Accessed 3 March 2023] and G. Hervey, "Bulgaria backs away from treaty opposing violence against women" (15 February 2018), Politico, *https://www.politico.eu/article/bulgaria-istanbul-convention-backs-away-from-treaty-opposing-violence-against-women/* [Accessed 3 March 2023].

[70] See C. Ciobanu, "Poland's Replacement for Istanbul Convention Would Ban Abortion and Gay Marriage" (15 March 2021), Reporting Democracy, *https://balkaninsight.com/2021/03/15/polands-replacement-for-istanbul-convention-would-ban-abortion-and-gay-marriage/* [Accessed 3 March 2023] and "Istanbul Convention: Poland to leave European treaty on violence against women" (25 July 2020), BBC News, *https://www.bbc.co.uk/news/world-europe-53538205* [Accessed 3 March 2023].

[71] See Parliamentary Question for Written Answer, E-002981/2020, European Parliament, available at: *https://www.europarl.europa.eu/doceo/document/E-9-2020-002981_EN.html* [Accessed 3 March 2023]; L. Rodriguez, "Hungary Backs Out of International Treaty That Aims to Stop Violence Against Women" (7 May 2020), Global Citizen, *https://www.globalcitizen.org/en/content/hungary-rejects-istanbul-convention/* [Accessed 3 March 2023]; and A. France-Presse, "Hungary's parliament blocks domestic violence treaty" (5 May 2020), *The Guardian*, *https://www.theguardian.com/world/2020/may/05/hungarys-parliament-blocks-domestic-violence-treaty* [Accessed 3 March 2023].

legalisation of gay marriage and the promotion of homosexuality in schools through the promotion of gender-ideology which constitutes a threat to traditional family values.[72]

In response to the reluctance of some states to ratify, the CoE gave a "legal opinion"[73] in which it made clear that these concerns were not founded on the text of the Convention.

However much it is reiterated that ratification of the Convention does not have the consequence some states declare they fear, these objections persist and are a sticking point in constructing a Europe united in combating violence against women. In the end it will be politics not law that is decisive.

[72] See G. Gotev, "After Bulgaria, Slovakia too fails to ratify the Istanbul Convention" (23 February 2018), Euractiv, *https://www.euractiv.com/section/future-eu/news/after-bulgaria-slovakia-too-fails-to-ratify-the-istanbul-convention/* [Accessed 3 March 2023].

[73] See "Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No 210)—scope of obligations" (11 January 2018), Council of Europe Directorate of Legal Advice and Public International Law, *https://www.coe.int/en/web/dlapil/-/legal-opinion-on-istanbul-convention* [3 March 2023], which notes: "The Istanbul Convention calls for a gendered understanding of violence against women and domestic violence as a basis for all measures to protect and support victims. However, any positive measures in this respect are clearly circumscribed by the Convention's scope and purposes. In particular, the Istanbul Convention does not imply the obligation to legally recognise a third sex or to provide legal recognition of same-sex marriages."