

G5 + ♀
Gender five plus

Ending violence against women

The Istanbul Convention and beyond



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Introduction

The European Union bases its policies against gender violence in the EU Treaties and various pieces of derived legislation. In the Treaty of the European Union, Articles 2 and 3 of the Treaty of the European Community place equality between women and men as a crosscutting element in all EU policies ("mission" and "purpose" of the European Community) and Article 13 allows the adoption of appropriate measures to combat all forms of discrimination, including on grounds of sex or sexual orientation.

From such a perspective, Articles 4, 21 and 23 of the Charter of Fundamental Rights of the European Union (CFREU) -which has a legal value equal to that of a Treaty since the entry into force of the Treaty of Lisbon- can also be applied as instruments to combat this form of violence. Article 4 prohibits torture and inhuman and degrading treatment, Article 21 gives the possibility to combat all forms of discrimination based on sex or sexual orientation, and Article 23 establishes equality of women and men in all areas and declares that positive action for the underrepresented sex are not contrary to the principle of equal treatment. As a result of the work of the Network of Independent Experts of the European Union on Fundamental Rights and the guidance provided by the Agency for Fundamental Rights of the European Union, it has been considered that gender violence is a violation of Art. 4 of the Charter of Fundamental Rights, in relation to Arts. 21 and 23.

One interpretation of these provisions in the Treaty of the European Union and the Charter of Fundamental Rights could therefore lead us to believe that there would be a legal basis for *hard law* that could allow community adoption of specific rules to prevent and combat the scourge of gender violence. The European Court of Human Rights has also addressed gender violence in various fields, considering it contrary to the rights in the European Convention on Human Rights. Furthermore, the Court of Justice of the European Union has already dealt with some cases where domestic violence is present, taking for granted the legal concept that equal rights in the exercise of free movement for EU citizens means that they must be able to exercise these rights under the same conditions as nationals of the State of destination.

Despite all this, however it has not been possible until now to establish Community rules of *hard law* to combat domestic violence specifically, despite the constant demands and proposals that have been put forward for this for more than a decade. The most important legal provision that we have to date on this issue is under *soft law*, and is the Declaration on Art. 8 of the Treaty on the Functioning of the European Union (which establishes the goal of eliminating inequalities between men and women and promote equality).

This Declaration does not offer, in principle, a clear and sufficient legal basis for the adoption of rules setting common criteria concerning the prevention and suppression of domestic violence and for the comprehensive protection of victims. Such common criteria are absolutely necessary in a European Union of free movement, since the victims who move within the Union will be subject to protective measures that each State has established for its nationals and the standard is very variable among them. This lack of effective basis is due to the fact that, whereas Article 51 of the Treaty of the European Union provides that the Protocols and Annexes to the Treaties shall

form an integral part thereof, this provision does not include Declarations, within which we find the reference in question.

Despite such a regrettable legal situation, it is worth noting, at least as *soft law*, the contents of the above-mentioned Declaration, agreed by the Intergovernmental Conference. The Declaration states that: "The Conference agrees that, in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat domestic violence in all its forms. It is necessary that Member States take all necessary measures to prevent and punish these criminal acts and to support and protect the victims. " And in this context, the importance of the Daphne Programs must be kept in mind, as well as the European Parliament Resolution on equality of women and men, dated 10 February 2010, which, inter alia, requests the Commission to prepare a general Directive on preventing and combating all forms of violence against women, including the trafficking of women.

In this context, despite the lack of specific regulations concerning gender violence, some *hard law* instruments directly affect the protection of victims of this form of violence, although they are not exclusively aimed at them. We refer here to the European Protection Order, which has been regulated by Directive 2011/99 / EU of the European Parliament and Council in the framework of criminal judicial cooperation between EU member states and Regulation 606/2013 on mutual recognition of protection measures in civil matters.

Under the European Protection Order (EPO), it is intended that victims of violence, including those of gender violence, who have obtained a protection order in one of the Member States of the EU, continue to receive protection if they move to another Member State. What this fundamentally means is that, when exercising a fundamental right of citizenship, such as the freedom of movement, other fundamental rights such as the right to life, physical or moral integrity or dignity are not put at risk or violated. What seems so obvious and simple presents many difficulties and even the European Union has adopted instruments such as the EPO, to ensure that what a judge has decided in one State is also taken into account in another, as required by Art. 82 of the Treaty of the European Union, which provides that judicial cooperation implies mutual recognition of judgments and rulings.

The current legal and political debate on gender violence

In recent times, public authorities have become increasingly aware of the problem, have echoed it and have taken a firm stand on promoting the need to protect the rights of victims of gender violence, taking into account the inadequacy of previous regulations and the special vulnerability of women. In this regard, the legal system is obliged to grant guardianship and protection and create the means and resources needed to repair and correct these situations of vulnerability and discrimination; and above all, to give priority and full attention to cases of great injustice and of inability of the victims to defend themselves.

Within the United Nations, and since the earlier Convention on the Elimination of All Forms of Discrimination Against Women in 1979, work has been undertaken to try to address the issue. In 1993, the Declaration on the Elimination of Violence Against Women, was the first international text dealing exclusively with violence against women, and became a reference document and

starting point for work in this area, though lacking any link to legal measures. Along the same lines, in 1995, the Fourth World Conference on Women held in Beijing marked a turning point for the global agenda of gender equality, establishing and listing measures to empower women that needed to be implemented by States, International Organizations and International Non-Governmental organizations. In 2013, the elimination and prevention of violence was the priority at the 57th session of the Commission on the Situation of Women. Most recently, in 2015, the platform of Sustainable Development Goals introduced gender equality as one of its objectives, and gave it priority.

For its part, the Committee of Ministers of the Council of Europe, for the first time approved Recommendation Rec (2002) 5 on 30 April 2002, calling on Member States to draw up plans to prevent violence and above all, and more specifically, to protect victims. In May 2011, it opened for signature the Istanbul Convention, a fundamental element towards practical and real progress in this field. The Convention came into force in August 2014. It should be noted that this is the first legally binding international Convention on the subject. And as such, it is a development of significance since it creates an integrated and comprehensive framework for the prevention, protection and prosecution of perpetrators. Until today, 28 Member States have signed the Convention, but 14 only have ratified. Currently, following the roadmap issued in 2015 by the Commission on the possible access of the Union to the above Convention, and the Commission's proposal of March 2016, for a council decision to sign the convention on behalf of the member states, negotiations are ongoing. EU accession to the Convention would be a major turning point, a point of departure that would indicate a "before" and "after" at the European level.

It is important to point to the dual approach between the legislative developments on this issue and politics. Political and public commitments seem firm and solid even though they face many obstacles, such as budgetary considerations resulting from the economic crisis which push back the achievement of the agreed targets. In this regard, it is worth highlighting the Stockholm Program 2010-2014 for women victims of violence, who are considered a vulnerable group needing protection. In 2010, the Commission adopted the Women's Charter to promote more effectively equality between women and men in Europe and the world, which visibly reinforced its commitment. However, the evaluation of the Strategy for Equality between Women and Men 2010-2015, finds and concludes that this strategy has not achieved or furthered its goals.

Nonetheless, efforts have been made in the legislative area to delineate and try to regulate and cover the issue stressing the fact that in Europe there is no specific and binding instrument. However, several regulatory instruments have been proposed and adopted. Amongst them, note should be taken of: Directive 2002/73/ EC on the implementation of the principle of equal treatment between men and women as regards access to employment, vocational training and promotion, and working conditions ; Directive 2004/113/ EC on the principle of equal treatment between men and women outside the labor market and Directive 2004/54 / EC; Directive 2011/36 / EU on preventing and combating trafficking in human beings and protecting victims; Directive 2004/81/ EU on residence permits to victims of human trafficking for third country nationals. The commitment of the Union in relation to the promotion and protection of women's rights in third countries in the EU Guidelines on violence against women and combating all forms of discrimination against them was reaffirmed in 2008. Along the same lines, the Union supports projects to combat violence against women through the European Instrument for Democracy and Human Rights. More recently, in 2015, the Plan of Action on gender was adopted by the

Commission and the European External Action Service, in which priority is given to combating violence against women and girls. A relevant step forward was the adoption of Directive 2011/99/EU and the associated Regulation (EU) 606/3013 on the mutual recognition of protection measures in civil matters.

Since 1957 the EU has thus evolved significantly in relation, essentially, to two factors: firstly, political integration, which required a solid approximation of Member States with regard to the values of democracy, the rule of law and fundamental rights; and secondly, the fight against increasing cross-border crime and insecurity.

Member States have addressed the problem differently even though they have similar policies. The crimes of violence generally established by law in most States include domestic violence, psychological and sexual violence. The problem commonly faced by States is the low rate of prosecution and conviction rates. In order to re-orientate the problem, Spain and the United Kingdom have established specialized courts at national level. In this regard, note should be taken of the Spanish Law *Ley Organica* 1/2004 of 28 December on Integrated Protection Measures against Gender Violence, which was a pioneer and role model in Europe. From a different angle on the issue, Sweden, after years of research and studies, passed legislation in 1999 that a) criminalizes the purchase of sexual services and b) decriminalized the sale of such services to eradicate the coercive aspect of the problem.

In recent years Member States have also put much emphasis on political strategies to combat violence against women through the National Action Plans, achieving significant results in prevention measures and subsequent support of the victims. What has been given lower priority are reintegration programs for women victims in need. However, in relation to the National Action Plans, the European Women's Lobby, in its 2015 evaluation of these Plans, concluded that most NGOs working on issues of women are unhappy with the way they are consulted by national authorities. In its report it demands the development and implementation of a comprehensive European Strategy and European legislation to eradicate prostitution and sex trafficking. And finally it reiterates the need for ratification of the Istanbul Convention by all Member States and the Union. Meanwhile, WAVE, Women Against Violence Europe, notes that very few Member States have established, for example, a national free telephone line for assistance, and highlights that the number of places in homes for temporary shelter for women victims is insufficient.

Broadly speaking, the roots of violence against women could be cut off through appropriate actions. The problem, firstly at the political level, is to understand the costs engendered by violence against women. This cost is estimated at 228 billion euros per year. According to Sylvia Walby, there are three types of cost: public, legal, specialized services, health; loss of economic output; and pain and suffering of the surviving victims. She proposes to extend regulations on violence against women to employment and economic policies; for example, by making innovative use of the TFEU, extending the policy of violence against women in the economic field, making use of structural funds, protecting the provision of a specialized service and ensuring greater equality in decision-making bodies.

In 2015, the Equality Report of the Working Document of the Commission on Equality between Men and Women, stressed that equality is one of the fundamental values of the Union and its promotion and development is an obligation enshrined in the Treaty. In order to comply with this,

the Commission adopted the 2010-2015 Strategy for Equality between Men and Women. Equal economic independence for men and women is a goal far from being fulfilled. Despite a moderate recovery until today, part-time work has increased, and women are still not sufficiently represented in the labour market, with a disproportionately low representation. The Report clearly shows that women are more likely to work part-time or not work at all. Despite the increase in temporary jobs, these jobs are the most consistent in maintaining lower pay. All this without taking into account the unpaid work involved in taking care of the home and caring for dependent persons, usually undertaken by women. Measures adopted in order to remove obstacles are of vital importance, but it is mainly women who make most use of them, while men make very limited use of them. Parental leave exists for men but very few men request it, and also the leave period is generally much shorter. And anachronistically, as a result, policies in this area tend to reinforce rather than challenge the problem of traditional stereotypes regarding gender roles in the workplace and family; and greater involvement of women in the labor market is hindered, as is the career advancement of women. It is precisely on these points that the policies on the balance between work and family life can be challenged. They only make sense and only achieve results in practice if both men and women could make use of them under equal conditions. It is for this reason that the Report argues and confirms that these policies have led to mixed results, although some progress has been made in some countries, such as Sweden, Portugal, Ireland, Croatia and Malta. Consequently, the Commission announced in August 2015 a new initiative towards a better balance between work and family life, looking to promote a new mentality among working parents; its goal continues to be to eliminate obstacles to a labor market that is fair to both genders with family responsibilities and to strengthen gender equality. This initiative has the novelty of a broad consultation process, taking into account the voice of social actors and the general public. Without prejudice to the outcome of the consultation process, the new initiative should lead to a broad and comprehensive regulatory framework for a better balance between work and family.

Along the same direction, the Commission is monitoring Member States implementation of the directives on equal treatment, maternity and paternity. Special attention should be given to migrant women who appear to be very little represented in economic initiatives; special consideration should be given to their access to the labor market and to decent jobs, with a need to implement the European Agenda for Migration; and a review is required of the Directive on asylum procedures and short-term measures, which need to take into account the gender issue, especially in relation to refugees seeking to enter Europe in large numbers.

Given this legal and political situation, the Union is at a decisive moment of action and should take the lead and make an even greater commitment. A better and more accurate understanding must be brought about between citizens, institutions that depend on them and member States, concerning everything that involves gender violence and violence against women. Prevention, protection and support are regulated in separate directives which, though partial, must be consolidated in transposition and the Commission must exercise proper control over this process.

A major international commitment was demanded and the impulse was given by the Istanbul Convention. In effect, in July 2016 all Member States of the Union signed the Convention but to date not all have ratified it. The Paranova Report underlines the need for criminal legislation, harmonized among Member States, to prevent violence and protect victims. Because of transboundary nature, the Convention should be treated at the level of the Union, the main

international actor, and accession to the Treaty is under consideration in the Parliament. This would be an important political message so that all the regulatory effort and the political commitments made to date could materialize into concrete measures.

A. The Istanbul Convention, an effective instrument for combating gender violence.

1. Precedents.

Since 1990 the Council of Europe and in particular its Steering Committee for Equality between Women and Men (CDEG), created a series of initiatives in order to promote the protection of women against violence. It should be noted that the Parliamentary Assembly has always had a clear and firm political line against all forms of violence against women. In this context they adopted various resolutions and recommendations, of which the most important are the following: Recommendation 1450 (2000) on violence against women in Europe, Resolution 1247 (2001) on female genital mutilation, Resolution 1582 (2002) on domestic violence against women, Resolution 1327 (2003) on alleged "crimes of honor", Recommendation 1723 (2005) on forced marriages and child marriages, Recommendation 1759 (2006) on Parliaments united to combat domestic violence against women, Recommendation 1777 (2007) on sexual assaults linked to "rape drugs", Recommendation 1847 (2008) on combating violence against women: towards a Convention of the Council of Europe, Resolution 1654 (2009) on femicide, Recommendation 1873 (2009) on sexual violence against women in armed conflict, Recommendation 1868 (2009) on action to combat the violation of the rights of the human person founded on sex, including abduction of women and girls, Recommendation 1861 (2009) on femicide, Recommendation 1881 (2009) on the urgent need to combat so-called crimes "of honor", Resolution 1691 (2009), Recommendation 1887 (2009) on the rape of women, including marital rape, Recommendation 1891 (2009) on migrant women: a particular risk of domestic violence, Recommendation 1905 (2010) on children witnessing domestic violence.

It was in this context that the Council of Europe adopted in 2011 the Convention on preventing and combating violence against women and domestic violence, the Istanbul Convention,¹ which is currently the most comprehensive and ambitious international treaty to combat violence against women in all its forms. It must be emphasized that although all the Member States of the European Union have signed the Convention, only fourteen of them have ratified it.

2. Objectives and content of the Convention.

As the Convention itself explains in its first article, its objectives are to protect women against all forms of violence, preventing, pursuing and eliminating violence against women and domestic violence; to contribute towards eliminating all forms of discrimination against women and promote real equality between women and men, including by empowering women; to devise a global policy framework and measures of protection and assistance to all victims of violence against women and domestic violence; to promote international cooperation to eliminate violence against women and domestic violence, and to support and assist organizations and forces and

¹ Convention of the Council of Europe on preventing and combating violence against women and domestic violence (entry into force 1 August 2014), CETS no. 210

security forces to cooperate effectively to adopt an integrated approach with a view to eliminating violence against women and domestic violence.

To this end, the Convention, consisting of 12 chapters and 81 articles, has established a general protection framework with specific performance measures. The Convention covers a wide spectrum of subjects and situations in its specified scope of application, applies to all forms of violence against women, and also includes all victims of domestic violence, both in peacetime and in situations of armed conflict.

In addition, the Convention specifically defines the terminology used and considers violence against women to be all kinds of violation of human rights, discrimination and acts of violence that involve or may involve harm or suffering of any kind, whether of a physical, sexual, psychological or economic nature, including threats to both public and private life. Domestic violence refers to all violence occurring in the family or household, between spouses or co-habiting partners, previous or current, independently of whether they share or have shared the same household as the victim. The term woman includes girls under 18 years of age.

With the measures introduced, the Convention in general obliges the Parties to take all legislative measures both to combat violence and to eliminate all forms of discrimination, guaranteeing implementation in their legal systems, including implementing positive action. It obliges the Parties to ensure that state actors refrain from any act of violence and act with due diligence to prevent, investigate and punish acts of violence committed by non-state actors and to repair the damage caused by them. It also creates a system of prevention, protection and prosecution since it is recognized that legal measures are not always sufficient to address complex problems and Parties undertake to implement integrated policies and provide a global response to eliminate violence against women. This carries an obligation to put the rights of victims at the center of all measures and to ensure effective cooperation between all actors involved at all levels of action.

Furthermore, the Parties should recognize, encourage and support actions that NGOs and civil society undertake in this area. They should allocate the financial and human resources necessary for the implementation of policies, measures and integrated programs to combat and prevent violence, including in this funding resources for non-governmental actors.

At the level of prevention, the Parties have, among others, the obligations to raise awareness, to include gender equality and the problem of violence at all levels of formal education and informal education (sports, culture, leisure and media communication), to provide appropriate training to the professionals who treat victims and provide treatment for perpetrators, to make available general support services such as legal and psychological counseling, and specialized services such as shelters, free and permanently accessible telephone help lines, to provide specific medical and forensic assistance for victims of sexual violence, to address the needs of child witnesses, to take measures to encourage reporting of violence by any witness of violent acts or any person who has reasonable grounds to believe that such acts can be committed or repeated, as well as adopt rules on the conditions under which the denouncement of violent or possible violent acts by professionals does not infringe their general obligation of confidentiality.

As concerns substantive Law, the Convention requires Parties to establish a number of offenses in their criminal law, such as psychological violence in the form of threats and coercion, harassment,

physical violence, sexual violence and rape, forced marriages, female genital mutilation, forced abortion and sterilization and sexual harassment. Parties must take steps to ensure that "honor" cannot under any circumstances be invoked as a justification for any of these offenses. It also obliges Parties to criminalize assistance and abetting, attempt and incitement of third parties to commit these crimes, to consider a number of aggravating circumstances and to ensure that sanctions are appropriate and dissuasive.

In the civil sphere Parties are required to ensure that there are adequate resources, and that compensation to victims of recognized offenses is given by the perpetrators, with a subsidiary adequate compensation provided by the State. Any incident involving violence must be taken into account in legal proceedings regarding custody, visiting rights and safety of children.

From the procedural point of view, there is an obligation for each Parties to establish jurisdiction in relation to crimes committed on its territory by one of its nationals or a person normally resident in its territory, and to strive to establish its jurisdiction in relation to crimes committed against one of its nationals or a person habitually resident in its territory. Parties are not allowed to establish mandatory alternative modes of conflict resolution.

Regarding protection measures during investigations and legal proceedings, the Parties must ensure that the forces and security forces provide quick protection for victims (including collection of evidence) and carry out a risk assessment of the lethality and the severity of the situation. Special attention should be paid to the possibility that the perpetrators of acts of violence have access to firearms. Legal systems should provide for the possibility of adopting prohibitive measures or emergency limiting or restraining orders which do not impose on the victim an undue financial or administrative burden. As a general rule, the most serious crimes should not rely on the filing of a complaint or lawsuit by the victim.

The Convention establishes an open list of measures to protect the rights and interests of victims, including their needs as witnesses at all stages of investigations and legal proceedings, including, for example, measures to protect them from intimidation and repeated victimization, to provide them with early information when perpetrators escape or are released, and to avoid, where possible, contact between the victim and the aggressor. The needs of children who are victims or witnesses should be particularly taken into account. The Parties must guarantee the right to free legal aid. Moreover, the limitation rules must be interpreted in such a way that in the most serious crimes, the procedure can effectively start after the coming of age of the victim.

The Convention also takes into account that women migrants and asylum seekers are especially vulnerable to gender-based violence and introduces an interpretation of gender violence in these contexts. It establishes the possibility for migrant women victims to be given the status of autonomous residence, for gender violence to be recognized as a form of persecution and for the evaluation of refugee status to be approached from a gender perspective. In addition, Parties have to establish asylum procedures that incorporate the gender dimension and respect the principle of no return in relation to victims of violence against women.

International cooperation has to be ensured and Parties should be able to denounce in the country of residence of the victim crimes committed in the territory of another Party. They should inform each other of any situation involving an immediate risk to any person, so that protective

measures can be taken, including the obligation to process personal data in accordance with the Conventions in this area.

A mechanism is established for monitoring the implementation of the Convention, and to this end an independent group of experts ("GREVIO") will be created, composed of independent and highly qualified experts who are nationals of the Parties.

The Convention does not affect the obligations of the Parties arising from other international instruments, and Parties are free to enter into other international agreements relating to the matters covered by the Convention in order to supplement or reinforce provisions. In addition, the Convention is without prejudice to more favorable provisions of domestic law or binding international instruments.

3. The role of the European Court of Human Rights in relation to gender violence and the implementation of the Istanbul Convention

The European Court of Human Rights (ECtHR), in addition to basing its judgments on the Articles of the European Convention of Human Rights (ECHR), makes use of relevant International Treaties in order to judge its cases. Since the entry into force of the Convention of the Council of Europe on preventing and combating violence against women and domestic violence, the ECtHR has used the Istanbul Convention to ground judgments regarding violence against women, as it had done previously in connection with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

For example, in the judgment *Halime Kiliç*² the Court reiterates that in order to "define discrimination against women and to define its scope, account must be taken not only of the general interpretation of the notion of discrimination in its jurisprudence, but also of the provisions in legal instruments specialising in combating violence against women. In this regard, this judgement recalls that the failure of States- even unintentionally- to fulfil their obligation to protect women against domestic violence is considered as a violation of the rights of women to equal protection under the law."³ It also underlines that "Article 3 of the Istanbul Convention considers that the term violence against women should be understood as a violation of human rights and a form of discrimination against women (relevant international law)".⁴ Therefore, considering that the Convention of the Council of Europe on preventing and combating violence against women and domestic violence adopted on 11 May 2011 was ratified by Turkey on 14 March 2012 and entered into force on August 1, 2014, the judgement condemned the State for breach of Article 2 for failing to take into account the risk of death of a woman in a situation of domestic violence and for discrimination, considering the persistent climate of impunity regarding domestic violence which mainly affects women.

Furthermore, in the judgment of case *Y*,⁵ the Court finds that the Istanbul Convention obliges Parties to establish the necessary legislation or other measures to protect the rights and interests

2 Judgment *Halime Kiliç vs. Turkey*, 28 June 2016

3 *Ibid.* par. 113.

4 *Ibid.* par. 114.

5 Judgment *Y vs. Slovenia*, 28 May 2015

of victims, which includes protective measures to avoid risks of intimidation, retaliation and revictimisation, the opportunity to be heard and to present their views, the provision in the procedural rules of national law of the possibility for victims to testify in the absence of their aggressors.⁶ In addition, we should keep in mind that the European Union has set minimum standards of protection for victims in Directive 2012/29 / EU of the European Parliament and of the Council of 25 October 2012, which established minimum standards on the rights, the support and protection of victims of crime, replacing the Council Framework Decision 2001/220 / JHA which was implemented in November 2015 and is mandatory for all States of the Union. The judgement condemned the Slovenian State for not having adequately protected the personal integrity of the applicant for criminal prosecution of sexual abuse (Art. 8 right to respect for private life) and for failing to act diligently, quickly and efficiently (Art. 3 in relation to procedure).

Therefore, since the entry into force of the Istanbul Convention, the ECtHR makes use of it in its jurisprudence clearly and consistently as relevant and applicable international law in all its judgments on domestic violence. If States have not signed the Convention, the Court considers this must be done; if they have signed, they are reminded of the absence of ratification; and in States which have both signed and ratified, it considers that every effort possible should have been made to ensure that its domestic law is adequate.⁷

B. The accession of the EU to the Istanbul Convention: effects of a hypothetical ratification of the Convention

As has been shown, and has been clearly proclaimed by the European Union "violence against women is a violation of their human rights and an extreme form of discrimination, not only rooted in gender inequalities but also helping maintain and strengthen these inequalities."⁸

It should be noted that in the words of the Commission "equality between men and women is one of the fundamental values and one of the objectives of the European Union, as recognized by the Treaties" (Articles 2 and 3 of the Treaty of the European Union (TEU)), Article 8 of the Treaty on the Functioning of the European Union (TFEU) and Article 23 of the Charter of Fundamental Rights of the European Union). The Charter also recognizes the right to human dignity, the right to life and the right to the integrity of the person, and prohibits inhuman or degrading treatment and all forms of slavery and forced labor (Articles 1 to 5 of the Charter).

The protection of women against violence is also an obligation under the UN Convention on the Rights of Persons with Disabilities, to which the EU is a Party together with its Member States. The Committee of the United Nations responsible for the supervision of the Convention has recommended that the EU ratify the Convention of the Council of Europe "to make progress in combating violence against women and girls with disabilities".⁹ Two documents have been produced concerning the ratification by the European Union of the Council of Europe Convention

6 *Ibid.* par. 104.

7 Amongst others: Judgment *Civek vs. Turkey*, 23 February 2016; Judgment *M.G. vs. Turkey*, 22 March 2016; Judgment *M.G.C. vs. Romania*, 15 March 2016

8 Proposal for a Council Decision on the Conclusion, by the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence COM (2016) 109 final. Explanatory Memorandum, Background, p.2

9 *Idem*

on preventing and combating violence against women and domestic violence: the Proposal for a Council Decision on the Conclusion, by the European Union, the Convention of the Council of Europe Convention on preventing and combating violence against women and domestic violence and the Proposal for a Council Decision on the Signing, on behalf of the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence.¹⁰

In view of the adoption of the proposals, we will examine below the objectives that are considered for the accession of the European Union to the Convention and the legal aspects of the proposals, that is to say, competence, legal basis and contents.

1. EU objectives for accession to the Convention.

In both proposals, it is considered that the objective of the European Union with the signing of the Convention is as follows: "The approach of the Convention complies fully with the multi-faceted vision the Union has of the phenomenon of gender violence and with the spirit of existing measures under the internal and external policies of the EU. The conclusion of the Convention would send a clear political message on the commitment of the EU to the fight against gender violence, would generate coherence between internal and external action and would create a complementarity between national levels and the EU, reinforcing the credibility of the Union to its international partners. In addition, it would consolidate EU action against gender violence by developing a more coordinated approach internally and assuming a more effective role in international forums".¹¹

2. The legal aspects of the proposals: competence and legal basis of the EU for the conclusion and signature of the Convention.

Regarding the legal aspects of the proposal, we examine below whether the European Union is competent to sign and conclude the Convention and what is the legal basis that allows the EU to do it.

a. EU competence for the conclusion and signing of the Convention.

In the substance of the content of the Istanbul Convention, as described above, it is clear that there are large areas of the Convention where the Member States retain competence, as in most of the provisions of substantive criminal law and in other provisions to the extent they are subject to subsidiarity. Nonetheless, the European Union has jurisdiction over a considerable part of the provisions of the Convention, and for this reason should sign and ratify it together with the Member States.

The EU is competent

▲ In the field of combating discrimination and protection of gender equality under Article

¹⁰ Proposal for a Council Decision on the Conclusion, by the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence COM (2016) 109 final and Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, COM(2016) 111 final, both of 4 March 2016

¹¹ *Ibid*, p.7

157 of the TFEU (several provisions of Chap. I of the Convention) .

- ⤴ With regard to sexual harassment (Art. 40 of the Convention, Chap. V).¹²
- ⤴ In the area of employment and occupation and access to goods and services and delivering them.
- ⤴ In the measures that address the protection of victims and in the research, procedures, procedural law and protective measures under Articles 82 and 84 of the TFEU (measures contained in Chap. IV and V of the Convention). Moreover, in these aspects it has directly applicable derived law.
- ⤴ Regarding the sexual exploitation of women and children, where the legal basis of the action is Article 83, paragraph 1 of the TFEU.
- ⤴ In certain areas in the field of asylum and migration (Ch. VII of the Convention) under Articles 78 and 79 of the TFEU.
- ⤴ In the regime of residence of EU nationals exercising mobility and their spouses from third countries, as well as nationals of third countries who are long-term residents and their spouses, in accordance with Articles 18, 21, 46, 50, 78 and 79 of the TFEU.
- ⤴ In the aspects of consular protection under Article 23 of the TFEU. (Article 18, paragraph 5, of the Convention).
- ⤴ On cross-border issues in civil and criminal matters, in accordance with Articles 81 and 82 of the TFEU which relate to cooperation measures (Ch. VIII on international cooperation).¹³
- ⤴ As regards data protection under art. 16 of the TFEU (Chap. VIII of the Convention).

Moreover, as explained in the Commission proposals, it should be noted that the Union has adopted numerous rules of secondary legislation in the following areas: sexual harassment in employment and occupation and access to goods and services and the provision thereof;¹⁴ rights, support and protection of victims of crime in criminal proceedings, including the phase of investigation and prosecution;¹⁵ asylum and migration as well as the residence status of third country nationals;¹⁶ transborder cooperation in civil and criminal matters;¹⁷ provisions of

12 In addition there is also the following secondary legislation: Directive 2004/113 / EC of 13 December 2004 implementing the principle of equal treatment for men and women in the access to and supply of goods and services, OJ L 372, 21.12.2004, p. 37; Directive 2006/54 / EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation OJ L 204, 26.7.2006, p.23 ; Directive 2010/41 / EC of 7 July 2010 implementing the principle of equal treatment for men and women in the access to and supply of goods and services, OJ L 180, 15.7.2010, p. 1.

13 In this case, the Explanatory Report to the Convention (par. 329) indicates that Article 62 (2) of the Convention is based on Council Framework Decision 2001/220 / JHA of 15 March 2001 on the status of victims in criminal proceedings (OJ L 82, 22.3.2001, p.1).

14 Directive 2004/113 / EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 372, 21.12.2004, p. 37; Directive 2006/54 / EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation OJ L 204, 26.7.2006, p.23 ; Directive 2010/41 / EC of 7 July 2010 implementing the principle of equal treatment for men and women in the access to and supply of goods and services, OJ L 180, 15.7.2010, p. 1.

15 Directive 2012/29 / EU laying down minimum standards on the rights, support and protection of victims of crime, OJ L 315, 14.11.2012, p. 57.

16 Relevant secondary legislation includes, inter alia, Directive 2004/81 / EC on the issue of a residence permit to third-country nationals who are victims of trafficking in human beings, OJ L 261, 6.8.2004, p. 19; Directive 2003/86 / EC on the right to family reunification, OJ L 251, 3.10.2003, p. 12; Directive 2008/115 / EC on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98; Directive 2009/52 / EC laying down minimum standards on sanctions and measures applicable to employers of illegally staying third-country nationals, OJ L 168, 30.6.2009, p. 24; Directive 2011/95 / EU laying down rules on the conditions for the recognition of third-country nationals or stateless persons as beneficiaries of international protection, on a uniform status for refugees or persons entitled to subsidiary protection and on the content of the protection granted, OJ L 337, 20.12.2011, p. 9. Directive 2013/33 / EU on the approval of standards for the reception of applicants for international protection (recast text), OJ L 180, 29.6.2013, p. 96; Directive 2013/32 / EU on common procedures for granting or withdrawing international protection, OJ L 180, p. 60; See also Directive 2004/38 / EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77 and Council Directive 2003/109 / EC on the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44.

substantive criminal Law for the protection of minors (in the case of girls, also covered by the Convention);¹⁸ provisions on audiovisual media services and protection of minors, prohibition of discrimination in commercial advertising and of the incitement to hatred based, among other factors, on sex,¹⁹ and data protection.²⁰ There is also legislation of the Union on certain aspects of cooperation of Member States on consular protection of EU citizens.²¹

There exist also obligations in relation to the United Nations Convention on the Rights of Persons with Disabilities, to which the EU and its Member States are Contracting Parties.²² Articles 6, 7, 15 and 16 of this Convention require States who are Parties to take all necessary measures, to the extent of their competences, to ensure that women, children and girls with disabilities enjoy equal rights and that people with disabilities are protected from exploitation, violence and abuse.²³

The Union has exclusive competence (Art.3 par.2 of the TFEU) if the Convention affects the scope of these rules or changes them. In addition, some provisions are minimum standards that may be affected or modified by the interpretation of jurisprudence.

b. Legal basis for the proposed decisions

As stated in the examined proposals²⁴ "following repeated jurisprudence, the choice of the legal basis for an EU measure must rest on objective factors subject to jurisdictional control, including the purpose and content of the measure.²⁵ If the examination of a EU measure reveals that it pursues a twofold objective or has a twofold component, of which one is identifiable as main or predominant and another as merely incidental, the measure must be based on a single legal basis, namely the one required for the main or predominant objective or component. Exceptionally, if it is proven that the measure simultaneously pursues several objectives which are inseparably

17 Regulation (EU) No 606/2013 on the mutual recognition of protection measures in civil matters, OJ L 181, 29.6.2013, p. 4; Directive 2003/8 / EC to improve access to justice in cross-border disputes by establishing common minimum rules on legal aid for such disputes, OJ L 26, 31.1.2003, p. 41; Directive 2004/80 / EC on compensation of victims of crime, OJ L 261, 6.8.2004, p. fifteen; Council Framework Decision 2008/947 / JHA on the implementation of the principle of mutual recognition of judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008, p. 102; Directive 2011/99 / EC on the European protection order, OJ L 338, 21.12.2011, p. 2. Council Framework Decision 2009/315 / JHA on the organization and content of the exchange of information between criminal records between Member States, OJ L 93, 7.4.2009, p. 23. Council Decision 2009/316 / JHA establishing the European Criminal Records Information System (ECRIS) pursuant to Article 11 of Council Framework Decision 2009/315 / JHA, OJ L 93, 7.4.2009, P. 33; Council Framework Decision 2008/675 / JHA on the taking into account of convictions handed down between the Member States of the European Union on new criminal proceedings, OJ L 220, 15.8.2008, p. 32.

18 Directive 2011/93 / EU on combating sexual abuse and sexual exploitation of children and child pornography, OJ L 335, 17.12.2011, p. 1.

19 Directive 2010/13 / EC (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1.

20 Directive 95/46 / EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31; Council Framework Decision 2008/977 / JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008, p. 60.

21 Directive 2015/637 on coordination and cooperation measures to facilitate the consular protection of Union citizens not represented in third countries, OJ L 106, 24.4.2015, p. 1.

22 Council Decision of 26 November 2009 on the conclusion by the European Community of the United Nations Convention on the Rights of Persons with Disabilities (2010/48 / EC), OJ L 23, 27.1.2010, p. 35.

23 Proposal for a Council Decision on the Conclusion, by the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence COM (2016) 109 final and Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, COM(2016) 111 final, both of 4 March 2016, p.9

24 *Ibid.* p. 9-10

25 C-377/12, Commission/Council, par. 34

linked, which cannot be considered as one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases."²⁶

"The legal bases of the Treaty on the Functioning of the European Union that are relevant to the issues discussed here are: Article 16 (data protection), Article 19, paragraph 1 (discrimination on grounds of sex), Article 23 (consular protection of citizens of another member State), articles 18, 21, 46 and 50 (free movement of persons, free movement of workers and freedom of establishment), Article 78 (asylum and subsidiary and temporary protection), Article 79 (immigration), Article 81 (judicial cooperation in civil matters), Article 82 (judicial cooperation in criminal matters), Article 83 (definition of criminal offenses and penalties related to crimes of particularly serious cross-border dimension), Article 84 (prevention of crime without harmonizing effect) and 157 (equal opportunities and equal treatment for men and women in matters of employment and occupation)".²⁷

If one considers that although there are several components, the general and overriding objective of the Convention is the prevention of crimes of violence against women, including domestic violence, and the protection of victims of such crimes, the main legal bases for the EU to exercise its powers over the entire Convention (excluding those items for which there is no competence), are Article 82, paragraph 2 and Article 84 of the TFEU.²⁸

2. The content of the Commission proposals for a Decision

The Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence,²⁹ has 9 recitals and 4 Articles.

It is clear from the recitals, and is highlighted, that the EU participated together with the Member States as an observer of the negotiation of the Convention³⁰ and that its signature on behalf of the Union contributes to the achievement of equality between men and women, an objective and fundamental value of the EU and a principle that should be applied to all its activities (Art. 2 and 3 of the TEU, Art. 8 of the TFEU, Art. 23 of the CFREU).³¹ The Articles only relate to the signing and subsequent ratification and the text of the Convention is attached.

The Proposal for a Council Decision on the Conclusion, by the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence³²

²⁶ *Ibid*, par.34

²⁷ Proposal for a Council Decision on the Conclusion, by the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence COM (2016) 109 final and Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, COM(2016) 111 final, both of 4 March 2016, p.10

²⁸ *Idem*

²⁹ Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, COM(2016) 111 final, 4 March 2016

³⁰ *Ibid*, recital 1

³¹ *Ibid*, recital 4

³² Proposal for a Council Decision on the Conclusion, by the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence COM (2016) 109 final

consists of 11 recitals and 5 articles. In its preamble it reiterates the provisions of the proposal for signature and adds that the Convention should complement existing standards and contribute to a coherent interpretation of Union law.³³ It also states that since the Union and its Member States have competence in the areas covered by the Convention, they should all become parties thereto.³⁴

In the Articles we note that it is established that in matters falling under the jurisdiction of the Union, the Commission shall serve as the coordinating body in accordance with the provisions of art. 10 of the Convention and shall comply with the reporting requirements of Chapter IX of the Convention,³⁵ will represent the Union at meetings of the bodies created by the Convention and in particular in the Committee of the Parties (art. 67 of the Convention) and will select, propose and participate in the appointment of experts for the expert Group on combating violence against women and domestic violence ("GREVIO"), on behalf of the Union.³⁶ Given that the Convention covers also powers not conferred on the Union, the Commission and the Member States will cooperate concerning supervision, information, voting arrangements and the operation of the coordinating body. The appropriate provisions for this purpose will be determined in advance, with a view to representing their respective positions in the meetings of the bodies of the Convention. These provisions will be set out in a Code of Conduct that would have to be approved before the deposit of an instrument of formal confirmation on behalf of the Union.

C. The foreseeable consequences of ratification of the Convention.

From the above, it appears that there is a clear willingness of the Commission to ratify the Istanbul Convention on behalf of the EU. This would entail a number of consequences that should be considered.

One element is that all Member States should ratify the Convention. As of 2 October 2016, all states have signed the Convention but only 13 of them have ratified it. Furthermore, the proposed accession to the Istanbul Convention should be discussed in the Council of Ministers and the European Parliament, whose approval is needed for the conclusion of the Convention by the EU. Within the European Parliament there have been repeated calls, both by the Parliament itself as well as other stakeholders (the European Women's Lobby), urging the Commission to accede to the Convention as this would represent a promotion of fundamental rights and gender equality.³⁷

If the European Union finally ratifies the Convention, this would signify a number of advantages for both the EU and the Member States. Among others, it would mean a mandate for collecting data of higher quality at EU level since currently there is insufficient data to demonstrate the scope and nature of violence against women. EU accession to the Convention would require members to collect and submit accurate and comparable data States to Eurostat, the Statistical Office of the European Union. In addition, it would extend the responsibility of the EU in the

³³ *Ibid*, recital 7

³⁴ *Ibid*, recital 8

³⁵ *Ibid*, Art. 3

³⁶ *Ibid*, Art. 4.1

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http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf

international arena, as the EU would report through the control body of the Convention on the correct and effective implementation of aspects of the Convention for which it is responsible. In addition, it would enhance the role of the EU in the fight against gender violence in the international arena.³⁸

Furthermore, the EU would have to fulfill the obligations that the Convention entails. Among others, as we have noted, Art. 12 requires Parties to adopt such legislative or other measures necessary to prevent all forms of violence against women. Although the EU already has a significant and extensive *acquis* in this area, most of the instruments to combat gender violence are to be found scattered in various rules governing different areas. There is currently no item of secondary legislation dealing in a harmonized and coherent way with gender violence. For this reason, it would be desirable and necessary that the European Union adopt a rule directly applicable to harmonize its legislative *acquis* in line with active policies and existing *soft law* standards. A ratified Istanbul Convention would be a directly applicable rule for the EU, but the fact that the EU is not competent in all aspects leaves its application at the mercy of several Parties, to the good will of the Member States and of the Union itself. Furthermore, although the Conventions of the Council of Europe has a direct application to the Parties, it is not as efficient as the secondary legislation of the European Union.

However, it should be highlighted that the legal basis used by the Commission for the EU to exercise its powers over the entire Convention (excluding those items for which it has no competence) are Article 82, paragraph 2 (judicial cooperation in criminal matters) and Article 84 (prevention of crime without harmonizing effect) of the TFEU.³⁹ In an explanatory report, ADF International⁴⁰ calls into question this legal basis, as in their view it is only possible to adopt directives in this context, besides other considerations they put forward against the EU ratification of the Convention. Without going into the question of the relevance of the legal basis, one could certainly consider the appropriateness of using need to ratify the Convention in order to issue a Directive in this area, which would take over the text of the Convention on matters of EU competence.

We must also stress that for some decades the two great creators of European Law, the Council of Europe and the European Union, provide material for each other both at the legislative and the jurisprudential level for the creation of their legal provisions in all areas and also in relation to gender violence. Numerous examples illustrate this: paragraph 329 of the explanatory report of the Convention indicated that Article 62, paragraph 2 of the Convention is based on the Council's Framework Decision 2001/220 / JHA on the status of victims in criminal proceedings⁴¹, the ECtHR refers to EU legislation in its judgments,⁴² the European Union uses the Council of Europe's legislative measures to create its own regulations⁴³ and the Court of Justice of the EU also bases

38 http://europa.eu/rapid/press-release_IP-16-549_es.htm

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40 Istanbul Convention and EU Accession to it - Problem Analysis, ADF International

41 Council Framework Decision 2001/220 / JHA of 15 March 2001 on the status of victims in criminal proceedings (OJ L 82, 22.3.2001, p.1).

42 Judgment Y vs. Slovenia, 28 May 2015, see previous explanation

43 For example, Directive 2011/93 / EU on combating sexual abuse and sexual exploitation of children and child pornography, OJ L335, 17.12.2011, p.1.

its judgments on instruments of the Council of Europe. Therefore, creating a binding rule by the European Union in relation to gender violence not only means meeting the obligations of the Istanbul Convention that the EU itself wants to ratify, but would also be the logical consequence of ratification and would enable the Member States of the EU to bring together or create legislation in this area.

Why a European Directive for the implementation of the Istanbul Convention?

Certainly, with the ratification of the Convention, the EU would give a big impetus to the effectiveness of the Convention, as it would make it binding for itself and for the Member States when they will implement EU law. However, the Convention does not have a jurisdictional guaranteeing body but only a conventional one, it is not guaranteed by a court but by a committee or council. This has very important legal consequences, since a court issues judgments which have to be executed and a committee or council issues opinions or dictums, which are "soft law" and therefore are no more than mere guidelines. Any violation of the contents of the Convention, therefore, would generate no more than political responsibility.

It could be argued that, as the Convention is an international treaty, it would be binding in the EU Member States. There is no objection to this. But international treaties, when ratified, generate international responsibility (before the appropriate committee or council), unless they are inserted in the domestic legal system with constitutional or legal value, in which case, their non-compliance generates legal responsibility before the judges or courts, depending on the case. In this case, it should be noted that not all States integrate international treaties into their internal system with constitutional or legal value, or with the same legal instrument or at the same time; in France, for example, there is a need to adopt a Law integrating the Convention, which may take years to be approved. In other countries, such as Spain, law becomes effective with its publication in the Official State Gazette, but there is no set deadline for this to happen. Years can pass from the entry into force of the Convention in accordance with the rules of International Law until judges can apply it as internal legislation. And this is not acceptable in an EU that has embedded equality in its internal and international values and goals.

It would therefore be advisable for the European Union legal system to adopt appropriate "hard law" legislation that would make the legislative, preventive and remedial measures of the Istanbul Convention become part of the legal system of Member States. This would give rise to two important achievements:

Firstly, it will integrate in a harmonized way, the measures provided for in the Convention in the legal system of all EU member states.

Secondly, it will ensure that, if EU Member States do not comply with the mandates of the European legislation, the Court of Justice of the Union, activated by the Commission, the Parliament or one or more Member States, can pass a judgment which prevents the breach of the European mandate. With all the effects of this.

What type of European standard would be most suitable for driving these objectives? Undoubtedly a directive. Why? Because the objectives and "tempus" of a directive respond to what is needed to

implement the Istanbul Convention.

Many Member States have already incorporated into their legal system the objectives and measures provided for in the Convention, but others have not yet done so for many of them. Moreover, a directive would give them time to adapt the internal legal system, since appropriate time-limits usually provided for. And in the event that the transposition is not carried out or if the transposition is inappropriate, there is always recourse to the direct application of the directive or even compensation for failure to comply with its provisions, following the guidelines established by the Court of Justice of the EU, which considers that a directive creates concrete rights and that these can have an economic value.

All this is not about legal engineering. It is only a matter of enforcing the obligations arising from the ratification of an international Convention by the EU. Ratification must have concrete effects, it cannot be converted into a “declaration”, and needs to be effective. To this end, we consider it necessary to adopt a European directive that will permit full implementation. It is legislation of an appropriate nature, the effects of which are pertinent for the fulfillment of international obligations.

Everything will depend on the political will of the EU in this regard. But, as already indicated, the EU cannot limit itself to a ratification that does not result in an implementation of what the Istanbul Convention requires. It cannot do so because the EU has included equality of women and men in Art. 2 of the TEU, describing the values which govern it and which have been accepted by the Member States, as well as in the objectives of Art. 3 of the TEU, aimed at promoting the values of the EU both internally and in its relations with the rest of the world.