

GENERAL ARTICLES

THE RATIFICATION OF THE COUNCIL OF EUROPE ISTANBUL CONVENTION BY THE EU: A STEP FORWARD IN THE PROTECTION OF WOMEN FROM VIOLENCE IN THE EUROPEAN LEGAL SYSTEM

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The article explores the reasons why the EU should ratify the Council of Europe Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted in 2011, and the consequences the ratification may entail. In the first part, I will make a few remarks on the main provisions of the Convention, which must be considered as the most advanced system of protection of women from violence at the international level in force for the time being, and I will comment on the current status of EU gender equality policies. In the second part, starting from the European Commission roadmap regarding the EU accession to the Convention (October 2015), and the proposal for a Council decision on the signing of the Convention (March 2016), I will analyse the legal bases for the ratification of the Convention by the EU, and the possible impact this treaty may have on EU policies. I argue first that the legal basis of the decision of the Council concluding the agreement cannot be limited to Articles 82 to 84 of the Treaty of the Functioning of the EU (TFEU), but should be extended to – at least – Articles 19 and 168 TFEU. I will then explore the impact of the Convention on future policies of the EU, also providing a comparison with the Convention on the Rights of Persons with Disabilities, which constitutes the first international treaty on human rights ratified by the European Union. Secondly, I will contend that one of the provisions of the Convention, namely Article 30(2), which requires States to compensate victims of violence who have sustained 'serious injury or impairment of health', has direct effect.

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I. INTRODUCTION

The Council of Europe Convention on Combating Violence against Women and Domestic Violence was adopted in 2011 in Istanbul (hereinafter 'Council of Europe Istanbul Convention'), and constitutes a landmark step in providing a unique and advanced legal framework, binding for the ratifying States, aimed at the protection of women and girls from gender-based violence, and any individual from domestic violence.¹ The phenomenon of

¹ See Ronagh JA McQuigg, 'What Potential does the Council of Europe Convention on Violence against Women hold as regards Domestic Violence?' (2012) 16 *The International Journal of Human Rights* 947; Adriana Di Stefano, 'Violenza contro le donne e violenza domestica nella nuova convenzione del Consiglio d'Europa' [2012] *Diritti Umani Diritto Internazionale* 169; Sara De Vido, 'States' Due Diligence

gender-based violence is widespread in every country of the world. In the European Union (EU), according to a report prepared by the European Agency for Fundamental Rights, 33% of women have experienced physical and/or sexual violence since the age of 15, which corresponds to 62 million women.² The data is only partially reliable; the reality is that the situation is even worse. In fact, most cases of violence, committed behind domestic walls, go unreported.³

Entered into force on 1 August 2014, the Convention has been ratified – at the time of writing – by 22 States of the overall 47 of the Council of Europe.⁴ The Convention is open to international organizations, such as the EU, and non-member States of the Council of Europe alike, hence having a universal aspiration. The European Commission published in October 2015 a 'roadmap' on the (possible) EU accession to the Council of Europe Istanbul Convention, and, on the occasion of the International Day for the Elimination of Violence against Women, confirmed that the document was the 'first, concrete step' towards ratification.⁵ In March 2016, the Commission presented the proposal for a Council Decision on the signing of the Convention.⁶

Obligations to Protect Women from Violence: A European Perspective in Light of the 2010 CoE Istanbul Convention' in Wolfgang Benedek et al (eds), *European Yearbook on Human Rights* (Intersentia, 2014) 365.

- ² FRA, Violence against Women: an EU-wide survey http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf accessed on 20 June 2016.
- ³ Enrique Gracia, 'Unreported Cases of Domestic Violence against Women: Towards an Epidemiology of Social Silence, Tolerance, and Inhibition' (2004) 58, *J Epidemiol Community Health* 536, 536.
- ⁴ Albania, Andorra, Austria, Belgium, Bosnia Herzegovina, Denmark, Finland, France, Italy, Malta, Monaco, Montenegro, The Netherlands, Poland, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, Sweden, Turkey.
- ⁵ EU Commission, Roadmap A (possible) EU accession to the CoE Convention on preventing and combating violence against women and domestic violence, October 2015, 2015/JUST/010 and EU Commission, Factsheet Q&A International Day for the Elimination of Violence against Women (24 November 2015) http://europa.eu/rapid/press-release_MEMO-15-6150_en.htm accessed 20 June 2016.
- ⁶ European Commission, Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and

This article will argue that the EU should ratify the Convention, as envisaged by the Commission in the roadmap and in the proposal, as an instrument to reinforce the measures existing at EU level to combat violence against women. I will contend that, although the EU has been particularly active in the adoption of measures aimed at reaching gender equality and protecting female victims of violence, it lacks a comprehensive framework, which could be provided by the Council of Europe legal instrument.

In the first part of the article, I will briefly present the main characteristics of the Istanbul Convention (II), before illustrating the situation with regard to gender equality at EU level (III). In the second part, I will analyse the articles of the EU founding treaties which might constitute the legal basis for the ratification of the Convention: starting from the proposal of the Commission, I will argue that the legal basis of the decision of the Council concluding the agreement should not be limited to Articles 82 to 84 of the Treaty of the Functioning of the EU (TFEU), but should be extended to Articles 19 and 168 TFEU (IV.A). I will then explore the impact of the Convention on future policies of the EU (IV.B). Finally, I will contend that one of the provisions of the Convention, namely Article 30(2), which requires States to compensate victims of violence who have sustained 'serious injury or impairment of health', has direct effect; therefore, in the hypothesis of ratification by the EU, it might be invoked by women before national judges, even though the EU Member State of the *forum* has not ratified the Convention (IV.C).

II. THE COUNCIL OF EUROPE ISTANBUL CONVENTION: AN OVERVIEW

The Istanbul Convention is the outcome of a long process that has raised increasing awareness of the problem of violence against women in Europe,⁷ and, more generally, at the international level. Even when committed by private parties, within domestic walls, instances of violence against women

combating violence against women and domestic violence, Brussels (4 March 2016) COM (2016) 111 final 2016/0063.

⁷ See, for example, Recommendation Rec (2002) 5 of the Committee of Ministers to member states on the protection of women against violence, adopted by the Committee of Ministers on 30 April 2002 at the 794th meeting of the Ministers' Deputies.

constitute a violation of human rights, and States bear due diligence obligations in effectively preventing and combating these crimes.⁸ The private-public distinction,⁹ which previously prevented States from interfering in the individual sphere, has been disrupted thanks to the provisions included in international legal instruments, the work of international and regional tribunals, and feminist theories.¹⁰ Under international law, States must intervene in order to punish the perpetrators of crimes against women, and adopt adequate preventive and protective measures in favour of female victims of abuse.¹¹

⁸ Due diligence obligations are 'best efforts' obligations mainly aimed at preventing, investigating, punishing and providing remedies to the violation of human rights (cfr. Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add. 13, para 8). In particular, States must prevent, investigate and punish violations of human rights committed by private persons or entities, which are not State organs. Inter-American Court of Human Rights, *Velásquez Rodríguez v Honduras* [1988] IACHR Series C No. 4, para. 188, which addressed for the first time the issue of State responsibility for acts committed by non-State actors.

⁹ Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *European Journal of International Law* 387, 389. See also, in general: Hilary Charlesworth, Christine Chinkin and Susan Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 615; Celina Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Rebecca Cook (ed.) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 85; Karen Engle, 'International Human Rights and Feminism: When Discourses Meet' (1991-92) 13 *Michigan Journal of International Law* 17; Donna Sullivan, 'The Public/Private Distinction in International Human Rights Law' in Julie Peters and Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) 126.

¹⁰ See for example the works by Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006); Karen Engle, 'After the Collapse of the Private/Public Distinction: Strategizing Women's Rights' in Dorinda G. Dallmeyer (ed.) *Reconceiving Reality: Women and International Law* (American Society of International Law 1993) 143; Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2012).

¹¹ Ronagh J.A. McQuigg, 'Domestic Violence and the Inter-American Commission on Human Rights: Jessica Lenahan (Gonzales) v. United States' (2012) 12 *Human Rights Law Review* 122, 131; and Jennifer Koshan, 'State Responsibility for Protection

1. The International Legal Background

At the international level, as it is well-known, the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not contain any reference to violence against women or domestic violence. However, the Committee established by the Convention defined in its General Recommendation 19 issued in 1992 gender-based violence as 'a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.¹² Hence, violence against women can be considered among the acts prohibited by the international legal instrument, since violence interferes with the enjoyment of rights and freedoms by women on a basis of equality with men. In 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women, and in 1994 a Special Rapporteur on violence against women, its causes, and consequences was appointed by the then UN Commission on Human Rights in order to monitor the respect of women's human rights by States.¹³

It is worth mentioning that more than twenty years after the CEDAW Committee General Comment, the issue of violence against women is still regarded as a high priority in the political agenda of international and regional organizations. Hence, for example, the United Nations Security Council in its recent Resolution 2242 (2015) stressed the impact of new forms of violence on women and girls, in particular the negative effects of climate change, of international terrorism, and of the global nature of health pandemics, and urged Member States 'to ensure increased representation of women at all decision-making levels in national, regional and international institutions', in particular in sectors pertaining to peace and security.¹⁴ Furthermore, the Agenda 2030 on sustainable development has included among its goals (namely goal no. 5) the achievement of gender equality and the empowerment of all women and girls. This goal can be attained by different means, including

against Domestic Violence: The Inter-American Commission on Human Rights Decision in *Lenahan (González) and its Application in Canada*' (2012) 30 *Windsor Yearbook of Access to Justice* 39, 51.

¹² Cedaw Committee General Recommendation n 19 (11th session 1992) para 7.

¹³ United Nations Commission on Human Rights Resolution 1994/45 of 4 March 1994.

¹⁴ UN SC Resolution 2242 (2015) para 1.

by eliminating 'all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other type of exploitation'.¹⁵

Nonetheless, while the interest of the international community has increasingly acknowledged the gravity of the offence, in part as a result of the path paved by feminist scholars and activists, the pace of such gains has not been matched by a reduction in violence.

2. The Definitions of Violence against Women and of Domestic Violence in the Istanbul Convention

The achievement of the Council of Europe Istanbul Convention must be welcomed as a positive outcome, which fills a normative gap existing in Europe. It is not the purpose here to analyse the Convention article by article; the explanatory notes by the Council of Europe are sufficiently clear to understand the scope and the main provisions of the treaty.¹⁶ A few remarks are however necessary in order to appraise the reasons why the EU should ratify the Convention.

It is noteworthy that the preamble to the Convention emphasises the fact that violence against women is a manifestation of 'historically unequal power relations between women and men', which have led to 'domination over, and discrimination against, women by men', and that it acknowledges the 'structural' nature of violence which means that it is rooted in society and as such must be eradicated.

The Istanbul Convention clearly differentiates between violence against women and domestic violence which might affect women but also children, men, and elderly people. Violence against women is defined as 'a violation of human rights and a form of discrimination against women', which include 'all acts of gender-based violence that result in, or are likely to result in, physical,

¹⁵ Draft resolution referred to the United Nations summit for the adoption of the post-2015 development agenda by the General Assembly at its sixty-ninth session, *Transforming our World: the 2030 Agenda for Sustainable Development*, 18 September 2015.

¹⁶ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11 May 2011.

sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life' (Article 3.a). The definition of domestic violence does not solely refer to acts committed against women, rather to any kind of physical, sexual, psychological or economic violence 'that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim' (Article 3.b). According to some commentators, the neutral formulation of the latter definition disregards the gender aspect of domestic violence, and it is more the outcome of a political compromise rather than of a clear understanding of the social problem.¹⁷

The Convention is, nonetheless, innovative, since it acknowledges that domestic violence is *one* of the forms of violence against women. If we imagine the two forms of violence in an Euler circle, we see that domestic violence is not a proper subset of violence against women, but the two sets overlap, since there are cases of domestic violence where the victim is not a woman. Given the data at the international level, however, it is clear that the intersection among the two sets is predominant. Legally speaking, the Convention does not overlook the fact that women are the majority but not the only victims of violence within domestic walls. Furthermore, States have legal obligations with regard to women (Article 2, para 1), whereas they are 'encouraged' to apply the Convention to 'all victims of domestic violence' (Article 2, para 2). The distinction among the two forms of violence could be useful in order to elaborate the definitions to be introduced in future legal instruments of the EU. The EU could decide, for example, to adopt a directive on domestic violence – as I will discuss further – which encompasses all hypotheses of violence, including against elderly people, men, and children.

¹⁷ Christine Chinkin and Kevät Nousiainen, *Legal Implications of EU Accession to the Istanbul Convention*, Luxembourg, 2016, p. 43. http://ec.europa.eu/justice/gender-equality/files/your_rights/istanbul_convention_report_final.pdf accessed 20 June 2016: 'violence against women is a human rights concern precisely because of the structural discrimination against, and subordination of, women that is both its cause and consequence. Domestic violence against men indubitably occurs but its incidence is not grounded in such structural discrimination'.

3. States' Obligations under the Convention

With regard to States' obligations deriving from treaty provisions, the Convention requires State parties to criminalise several conducts which amount to violence against women and domestic violence, whether these conducts have not yet been included in their respective criminal codes. The conducts encompass forced marriage, female genital mutilation, forced abortion, stalking, sexual harassment, physical and psychological violence and sexual violence. The Convention also requires State parties to ensure that in criminal proceedings regarding the acts of violence covered by the Convention, 'culture, custom, religion, tradition or so-called "honour" are not regarded as justifications of such acts' (Article 42, para 1).¹⁸

The Convention then obliges State parties to take the necessary legislative or other measures to ensure that the offences established in the Convention are punishable by effective, proportionate and dissuasive sanctions (Article 45), taking into account their seriousness and aggravating circumstances, such as the fact that the acts are committed in the presence of a child (Article 46). As for preventive and protective measures, States must promote 'changes in the social and cultural patterns of behavior of women and men with a view to eradicating customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men' (Article 12),¹⁹ and provide support services for victims of violence, including legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment (Article 20), specialist support services (Article 22), shelters (Article 23), and telephone helplines (Article 24). In order to implement the obligations set out the Convention, States must

¹⁸ For a more detailed analysis of the Istanbul Convention, let us refer to Sara De Vido, *Donne, Violenza e Diritto internazionale. La Convenzione di Istanbul del Consiglio d'Europa del 2011* (Mimesis 2016). The Convention, for example, does not address prostitution as a form of violence; secondly, it does not take into account new forms of violence such as the ones committed in the cyber world.

¹⁹ On the concrete actions to be undertaken in order to implement this article, see Marianne Hester, Sarah-Jane Lilley, 'Preventing Violence against Women: Article 12 of the Istanbul Convention' <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046e1fo> accessed 20 June 2016.

allocate 'appropriate measures and human resources', thus creating a precise legal obligation in terms of public expenditure.

In the analysis of States' obligations, it is useful to also mention Article 30(2) according to which:

Adequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions. This does not preclude Parties from claiming redress for compensation awarded from the perpetrator, as long as due regard is paid to the victim's safety.

States may append reservation on this provision, and some State parties actually did upon ratification.²⁰

4. Compliance Mechanism under the Convention

The effectiveness of a treaty heavily depends on the existence of mechanisms whose purpose is to assess States' compliance with its mandatory obligations. For the assessment of compliance with treaty obligations, the Convention has established an independent expert body, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), and a Committee of the parties, which is a political body. The group of experts will draw up and publish evaluation reports on the measures taken by parties in order to implement the Convention. Furthermore, GREVIO may initiate a special inquiry procedure in order to prevent a serious, massive or persistent pattern of any acts of violence covered by the Convention. After the adoption by the Committee of Ministers of the rules of the election procedure of the GREVIO members, in November 2014,²¹ the first ten members of the group were elected by the Committee of the Parties at its first meeting on 4 May 2015.²² GREVIO held its first meeting in September 2015 in Strasbourg. Its

²⁰ Andorra, Cyprus, Malta, Monaco, Poland, Romania, Serbia, Slovenia.

²¹ Resolution CM/Res (2014)43 on rules of the election procedure of the members of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). The Committee of the Ministers is composed of the Ministers of all 47 States Members of the Council of Europe.

²² The Committee of the Parties refers to the representatives of the State parties to the Istanbul Convention.

impact on national – and (potentially) European – legislation and policies cannot be assessed yet, but generally treaty bodies, despite producing only non-binding acts and recommendations, have proved to be effective mechanisms in order to guarantee respect for treaty obligations.²³

III. THE ACTION UNDERTAKEN BY THE EU TO COMBAT VIOLENCE AGAINST WOMEN

The protection of women from gender-based violence is neither enshrined in the EU treaties nor in the Charter of Fundamental Rights, a fact that has not prevented the EU from taking action to counteract the offences related to violence against women. The action of the EU has been mainly devoted to the achievement of gender equality, which also encompasses initiatives with regard to the eradication of violence against women.²⁴ I argue that this fragmented action with regard to the protection of women from violence is not enough to effectively counteract gender-based crimes and, as will be demonstrated in this and the subsequent section, that the ratification of the Istanbul Convention could provide a comprehensive legal framework for EU acts, both binding and non-binding, in that sector.

In the Treaty on the European Union (TEU), as amended by the Treaty of Lisbon, the focus is on the issue of 'equality between women and men', which constitutes at the same time a value (Article 2) and an objective (Article 3) of the EU.²⁵ In the Treaty on the Functioning of the European Union, among the provisions 'having general applications', Article 8 provides that 'in all its activities, the Union shall aim to eliminate inequalities, and to promote

²³ With regard to UN human rights treaty bodies, see Nigel S Rodley, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed.) *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 621.

²⁴ See Tamara Hervey, 'Thirty Years of EU Sex Equality Law: Leading Backwards, Looking Forwards' (2005) 12 *Maastricht Journal of European and Comparative Law* 307, 307 ff.; Sevil Sümer, *European Gender Regimes and Policies* (Ashgate 2009) 67.

²⁵ See Karl-Peter Sommermann, 'Article 3' in Herman-Joseph Blanke, Stelio Mangiameli (eds) *The Treaty on the European Union. A Commentary* (Springer 2013) 159. See also the preamble as amended by the Treaty of Lisbon: Member States draw 'inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'.

equality, between men and women', whereas Article 19 TFEU enables legislation to combat 'all forms of discrimination, including on the basis of sex'. The well-known principle of equal pay between male and female workers (Article 157 TFEU, former Article 119 ECC and Article 141 EC) dates back to the very foundation of the then European Economic Community, and has been extensively interpreted by the Court of Justice of the European Union (CJEU).²⁶ Although initially conceived to pursue economic interests,²⁷ the principle of equality has been later interpreted by the Court of Justice as a 'general principle of EU law'.²⁸

The only reference to violence against women in the EU Treaties can be found in Declaration 19 to the Final Act of the 2007, referring to Article 8 TFEU, which provides that among the efforts to 'eliminate inequalities between women and men', the Union will aim to combat all kinds of domestic violence in its different policies.²⁹

As far as secondary legislation is concerned, several acts have been adopted over the years with regard the trafficking of human beings, in particular women and children,³⁰ and the victims of crime, including Regulation (EU) 606/2013 on the mutual recognition of protection measures in civil matters which will play a pivotal role in the recognition of restriction orders; and Directive 2012/29/EU, establishing minimum standards on the rights,

²⁶ For more, see: Susanne Burri and Sacha Prechal, *EU Gender Equality Law Update 2013* (European Commission 2014) 5. However, the norms related to parental rights have changed slowly. Clare McGlynn, 'Work, Family, and Parenthood: The European Union Agenda' in Joanne Conaghan and Kerry Rittich (eds.), *Labour Law, Work and Family* (Oxford University Press 2005) 217; Kevät Nousiainen, 'Double Subsidiarity, Double Trouble? Allocating care responsibilities in the EU through social dialogue' in Anne Kovalainen, Marja Keränen, Hanne Marlene Dahl (eds.), *Europeanisation of Care and Gender: Global complexities* (Palgrave 2011) 21.

²⁷ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (Cambridge University Press 2010) 537.

²⁸ See, for example, Cases 117/76 and 16/77 *Ruckdeschel* ECLI:EU:C:1977:160, para. 7.

²⁹ Declaration on Article 8 of the Treaty on the Functioning of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

³⁰ Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

support and protection of victims of crime (hereinafter 'Victims' Rights Directive').³¹ The EU addressed the offence of sexual harassment committed in the workplace in Council Directive 2000/78/EC, established a general framework for equal treatment in employment and occupation in Directive 2002/73/EC, and created Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation to address harassment, including sexual harassment.³²

Moving from legal instruments to policies and non-binding acts, it should be acknowledged that the EU has been prolific in the adoption of measures to address different aspects of gender inequality. The European Parliament has been active in addressing violence against women and domestic violence since as early as 1979, when it voted in favour of establishing the *ad hoc* Committee on women's rights.³³ Nowadays, the EU Parliament Committee on Women's Rights and Gender Equality continues its activity, dealing with several issues, including the eradication of violence against women.³⁴ Furthermore, in 2006, the EU established the European Institute for Gender Equality (EIGE) in Regulation (EC) No 1922/2006, which has recently

³¹ Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters [2013] OJ L 181/4. See also Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57; Directive 2011/99/EU on the European protection order [2011] OJ L 338/2.

³² Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16; Directive 2002/73/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2000] OJ L 269/15; Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23. See also the European Added Value Assessment Combatting violence against women, 'An assessment accompanying the European Parliament's Legislative Own-Initiative Report (Rapporteur Antonia Parvanova, MEP)' (2013) 15 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/femm/dv/eav_violence-against-women-/eav_violence-against-women-en.pdf accessed 20 June 2016.

³³ It should be noted that Simone Veil was at that time the president of the European Parliament and the first woman to be elected for this position.

³⁴ Elimination of violence against women in the EU, procedure ongoing 2015/2855(RSP).

launched the Gender Equality Index 2015.³⁵ The European Commission, along with the support given to numerous awareness-raising campaigns in EU countries, adopted the Women's Charter in 2010,³⁶ and in June 2015 promoted a 'Forum on the Future of Gender Equality in the European Union'.³⁷

With specific regard to one form of violence against women – female genital mutilation – all EU institutions have clearly taken a position to prohibit this practice.³⁸

IV. THE RATIFICATION OF THE COUNCIL OF EUROPE ISTANBUL CONVENTION BY THE EU

In this section I will discuss the process of ratification by the EU of the Istanbul Convention, analysing first the legal basis of the – probably forthcoming – decision on ratification, and secondly, the impact of the Council of Europe legal instrument on EU policies. With regard to the latter,

³⁵ The progress in gender equality are still not sufficient. See <http://eige.europa.eu/news-and-events/news/eige-launches-gender-equality-index-2015-marginal-improvements-gender-equality> accessed 20 June 2016.

³⁶ Communication from the Commission, A Strengthened Commitment to Equality between Women and Men – A Women's Charter: Declaration by the European Commission on the occasion of the 2010 International Women's Day in commemoration of the 15th anniversary of the adoption of a Declaration and Platform for Action at the Beijing UN World Conference on Women and of the 30th anniversary of the UN Convention on the Elimination of All Forms of Discrimination against Women COM(2010) 78 final.

³⁷ See the Report of 10 June 2015 http://ec.europa.eu/justice/events/future-of-gender-equality-2015/files/report_forum_gender_equality_en.pdf accessed 20 June 2016.

³⁸ See, for example, European Parliament Resolution on Ending Female Genital Mutilation (2012/2684(RSP)); EU Commission, Communication to the European Parliament and the Council Towards the elimination of female genital mutilation COM(2013) 833 final; European Parliament Resolution on the Commission Communication entitled 'Towards the elimination of female genital mutilation' (2014/2511(RSP)); Council of the EU Justice and Home Affairs Conclusions on preventing and combating all forms of violence against women and girls, including female genital mutilation, 5 June 2014.

I will argue that one of the provisions of the Convention, namely Article 30(2), could be considered as having direct effect.

1. Legal Basis: Going beyond the EU Commission Proposal

Concerning the legal basis, in this sub-section I will first discuss whether the EU has competence to ratify a convention on violence against women, and on which grounds. I will then briefly illustrate the proposal of the European Commission included in the roadmap,³⁹ and finally suggest that the EU should also consider other articles of the TFEU as legal basis.

With regard to international treaties on human rights, despite its longstanding action in the protection of human rights, the EU has been reluctant in ratifying conventions in this field; for the time being, it has only ratified the UN Convention on the Rights of Persons with Disabilities.⁴⁰

The EU may conclude an international agreement where the conclusion of a treaty is necessary, 'within the framework of the Union's policies', to achieve one of the objectives referred to in the Treaties, 'or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope' (Article 216(1) TFEU). The central question is consequently the following: may the EU ratify a convention regarding the prevention and suppression of violence against women and domestic violence? Or, in other terms, does the EU have competence in this field?

I argue in this article that the answer is positive, as clearly anticipated by a commentator,⁴¹ and as confirmed by the roadmap and the proposal presented by the European Commission. First of all, the Council of Europe Istanbul Convention expressly paves the way for the EU accession, according to Article 75. The Convention is open for signature and ratification both by members and non-members of the Council of Europe, including the European Union. Secondly, shifting to the EU legal system, the EU has

³⁹ Roadmap (n 5).

⁴⁰ Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, ratified by the EU on 23 December 2010.

⁴¹ Steve Peers, 'Should the EU Ratify the Istanbul Convention on Violence against Women' (23 April 2014) <http://eulawanalysis.blogspot.co.uk/2014/04/should-eu-ratify-istanbul-convention-on.html> accessed 20 June 2016.

competence to ratify the Convention since violence is a form of gender-based discrimination, and gender equality constitutes one of the objectives enshrined in the founding Treaties. As acknowledged by the Commission, 'violence against women is a violation of their human rights and an extreme form of discrimination, entrenched in gender inequalities and contributing to maintaining and reinforcing them'.⁴²

According to the Commission, the legal bases which are of relevance with regard to the ratification of the Istanbul Convention are several;⁴³ nonetheless, since the 'predominant purpose' of the legal instrument consists of the prevention of violent crimes against women and the protection of victims, the Commission has decided to only consider Article 82(2) TFEU, providing for minimum rules to facilitate mutual recognition of judgments and judicial decisions, and police and judicial cooperation in criminal matters; and Article 84 TFEU, envisaging measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.⁴⁴

However, I propose that the European Commission should also consider, in addition to the ones listed in the proposal, other Articles of the EU Treaties as legal basis, in order to further emphasise the importance of the EU action in combating violence against women. First, given the fact that violence against women is a form of discrimination on the basis of sex – or, better, on

⁴² Proposal for a Council Decision (n 6) 2.

⁴³ Article 16 TFEU (data protection), Article 19(1) TFEU (sex discrimination), Article 23 TFEU (consular protection for citizens of another Member State), Articles 18, 21, 46, 50 TFEU (free movement of citizens, free movement of workers and freedom of establishment), Article 78 TFEU (asylum and subsidiary and temporary protection), Article 79 TFEU (immigration), Article 81 TFEU (judicial cooperation in civil matters), Article 82 TFEU (judicial cooperation in criminal matters), Article 83 TFEU (definition of EU-wide criminal offences and sanctions for particularly serious crimes with a cross-border dimension), Article 84 TFEU (non-harmonising measures for crime prevention), and Article 157 TFEU (equal opportunities and equal treatment of men and women in areas of employment and occupation). Proposal for a Council Decision (n 6) 9.

⁴⁴ Proposal for a Council Decision (n 6) 9.

the basis of gender – the Commission should have used Article 19 TFEU as legal basis.⁴⁵

Secondly, the institution should have considered Article 168(1) TFEU, according to which Union action, in complementing national policies, 'shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health'.

Concerning the principle of non-discrimination, it should be acknowledged that adopting this legal basis has a precedent. The Council Decision of 26 November 2009 regarding the conclusion by the then European Community of the UN Convention on the Rights of Persons with Disabilities referred to Article 13 of the then Treaty of the European Communities (prohibition of discrimination, now Article 19 TFEU).⁴⁶ Therefore, this legal basis is pertinent to the ratification of the Istanbul Convention as well.

Focusing on Article 168 TFEU, violence against women, since it clearly causes severe bodily and mental injuries to women, is a 'public health' issue.⁴⁷ Despite the lack of an express reference to the right to health in the Council of Europe Convention, a reference to health policies is enshrined in the conventional text, namely Article 30. The individual right to health is increasingly becoming a national public health issue, and, in considering the international community as a network of actors, I agree with the World

⁴⁵ Article 19 TFEU (former Article 13 TEC) confers power to the Council and the European Parliament to legislate to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Discrimination on the ground of sexual orientation was introduced in the Charter of Fundamental Rights of the European Union, at its Article 21.

⁴⁶ Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities 2010/48 [2010] OJ L 23/35.

⁴⁷ World Health Organisation, 'Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence' (2013) 4 http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf accessed 20 June 2016.

Health Organisation that combating violence against women is becoming a global public issue that implies national and international efforts alike.⁴⁸

To envisage a more articulated legal basis – Articles 82 and 84 TFEU, but also 19 and 168 TFEU – for the future decision on ratification is more than a matter of mere formality, rather it would allow a stronger action in combating and preventing violence against women. This action would be characterized by both binding (directives) and non-binding (guidelines, best practices) acts.

2. Effects on EU Policies

Having in mind the legal bases that I discussed in the previous sub-section, I will now consider the impact of the Convention on EU policies. I will first discuss the possible adoption of EU directives related to specific crimes of violence against women. I will then propose that, in line with the action undertaken after the entry into force for the EU of the Convention on the Rights of Persons with Disabilities, the European Commission adopts a Strategy on violence against women as a form of discrimination on the basis of gender. Finally, I will argue that, despite having a flexible competence on issues of public health, the European Union could promote recommendations in order to provide guidelines to EU Member States in the adoption of preventive measures aimed at complying with the Convention. In that respect, I will contend that Article 168 TFEU could not be considered the legal basis for a directive regarding measures of harmonization, but rather for best practices aimed at directing States in the adoption of health policies against violence.

A. The Adoption of New EU Directives to Protect Women from Violence

As acknowledged by the European Parliament in its 2016 study on the issue of violence against women, EU policy concerning this sensitive issue is predominantly based on soft law acts, such as Council conclusions, resolutions of the Parliament, and Commission strategies.⁴⁹ The directives that I mentioned previously, such as the Victims' Rights Directive, 'have a

⁴⁸ WHO (n 47) 35.

⁴⁹ European Parliament, 'The Issue of Violence against Women in the European Union' (Brussels 2016) 41 [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556931/IPOL_STU\(2016\)556931_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556931/IPOL_STU(2016)556931_EN.pdf) accessed 20 June 2016.

broader scope than just violence against women and therefore only make reference to this topic'; in other words, 'they are not specific enough'.⁵⁰ It is hence necessary to assess whether the adoption of directives by the European Parliament and the Council addressing specific instances of violence against women is possible, and desirable.

According to a study commissioned by the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services of the General Secretariat of the European Parliament, there is EU legal competence to adopt directives on some forms of violence against women.⁵¹ The study, which is also mentioned by the European Parliament in the aforementioned document, refers to four directives: on rape, on female genital mutilation, on domestic violence, and, as an alternative, a more general directive on violence against women.

With regard to the first directive proposed, the directive as legal instrument is considered to be useful in order to identify 'the minimum standard of the definition rape for purposes of effective judicial cooperation when there is a cross-border issue in bringing an alleged offender to justice'.⁵² The same can be argued with regard to female genital mutilation, an offence which is usually characterised by a transnational dimension.⁵³ The legal basis can be found in Articles 82 and 83 TFEU. Article 82 would allow the mutual recognition of judgments and judicial decisions related to convictions for rape and female genital mutilation practices. Furthermore, rape and female genital mutilation amount to 'sexual exploitation of women and children' (Article 83(1) TFEU) against which the European Parliament and the Council may 'establish

⁵⁰ European Parliament (n 49).

⁵¹ Sylvia Walby and Philippa Olive, European Added Value of a Directive on combatting violence against women, (Brussels, 2013) II-62 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/femm/dv/eav_violence-against-women-/eav_violence-against-women-en.pdf accessed 20 June 2016.

⁵² Walby and Olive (n 51).

⁵³ In the sense that families often return to their country of origin for the only purpose to force their daughters undergo female genital mutilation. See Sara De Vido 'Culturally Motivated Crimes in a Multicultural Europe. The case of Criminalization of FGM in the 2011 CoE Istanbul Convention' in Marilena Vecco and Lauso Zagato (eds.), *Citizens of Europe. Culture e diritti* (Ca' Foscari 2015) 93.

minimum rules concerning the definition of criminal offences and sanctions', in all cases where the offence presents a transnational dimension. The Council also has competence, according to Article 83(1) and acting unanimously provided that the European Parliament gives its approval, to adopt a decision identifying other areas of crime that meet the criteria specified in the same paragraph. Rape and female genital mutilation could be included in the list if the Council and the European Parliament agree so. I would add that the reference to Article 19 TFEU would be of utmost importance in order to stress the fact that these offences are gender-related.

As far as domestic violence is concerned, the reasoning is more complex, since domestic violence cannot be trivialized as merely 'sexual exploitation', in light of Article 83 TFEU; instead, sexual exploitation is *one* of the elements of domestic violence, which is also characterized by threats, economic violence, and psychological pressure. The study commissioned by the European Added Value Unit⁵⁴ identifies the legal basis of a future directive in Article 82(2) TFEU, concerning the adoption of directives aimed to establish minimum rules on the 'mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension', in one of the following instances: 'a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision'.⁵⁵ Despite referring to the study, the European Parliament more cautiously relies on Article 84 TFEU, which excludes harmonisation of the criminal law of Member States but would constitute the legal basis to adopt measures aimed to 'pressure Member States to take action on national level to prevent domestic violence'.⁵⁶ The European legislative institutions will also have to decide whether to consider domestic violence as an offence only against women or also against children, men, elderly people, and members of the LGBTI community; the Istanbul Convention creates an

⁵⁴ The European Added Value Unit is part of the Directorate for Impact Assessment and European Added Value, which in turns is a depending entity of the Directorate-General for Parliamentary Research within the Secretariat of the European Parliament.

⁵⁵ Walby and Olive (n 51) 64.

⁵⁶ European Parliament (n 49) 43.

obligation on States with regard to domestic violence against women, but only encourages the parties to apply its provisions to all victims of domestic violence (Article 2(2) of the Istanbul Convention).

Furthermore, the study commissioned by the EU Added Value Unit suggests, as an alternative, the adoption of a general directive on violence against women, whose legal bases are Article 84 TFEU, which, as I said, excludes harmonisation, and Article 82 TFEU, concerning the adoption of directives aimed to establish minimum rules on the 'mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension' (Article 82(2)). A directive on violence against women could well include a minimum standard for the definitions of the different forms of violence.⁵⁷ This interesting proposal presents some elements of risks and one major obstacle. As for the former, first, a general directive on violence against women might be 'too general', hence unable to adequately address the phenomenon of violence against women; secondly, it can result in a mere 'copy and paste' of provisions of the Convention. The obstacle consists of the element of transnationality: despite the fact that the victim or the perpetrator of the offence may reasonably move from one EU Member State to the other, the directive will exclude purely internal situations, which, however, might represent the majority of cases of, for example, domestic violence. Nonetheless, Articles 82 and 84, possibly in conjunction with Article 19 TFEU to emphasize that violence against women is a form of discrimination on the basis of gender, are the most appropriate legal bases.

In sum, the adoption of binding instruments related to violence against women is of extreme importance. Nonetheless, one can reasonably argue that the implementation of the Istanbul Convention by the European Union, once completed the process of ratification, will consist of both binding and non-binding acts, and will pave the way for actions in less explored sectors, such as the protection of women's health.

⁵⁷ Walby and Olive (n 51) 65.

B. Learning the Lesson from the Process of Ratification of the UN Convention on the Rights of Persons with Disabilities

The ratification of the Istanbul Convention could depend on the adoption of a code of conduct, to be adopted before the deposition of the instrument of formal confirmation on behalf of the European Union, with the purpose to set internal arrangements for the implementation of the treaty provisions and to regulate the representation of the EU's position at the meetings of the GREVIO, the monitoring mechanism established by the Convention. In that respect, the Convention could learn the lesson from the ratification of the Convention on the Rights of Persons with Disabilities. According to the Council Decision 2010/48/EC concerning the conclusion of the Convention, in the matters falling within the shared competences of the then Community (now EU) and the Member States, 'the Commission and the Member States shall determine in advance the appropriate arrangements for representation of the Community's position at meetings of the bodies created by the UN Convention'.⁵⁸ The Decision envisaged that the Code of Conduct should have been prepared before the deposition of the instrument of formal confirmation on behalf of the Community.

The Code of Conduct was adopted the following year and it regulates the 'division of tasks' between the European Union and its Member States.⁵⁹ The principle of sincere cooperation inspires the text. Hence, for example, with regard to matters falling within shared competence and on matters falling within supporting competences, the EU and its Member States 'will aim at elaborating common positions', in particular as concerns legislative acts provided in the Declaration annexed to the Decision 2010/48/EC or new acts or policy measures aimed at, among other purposes, combating discrimination on the ground of disability, and ensure equal pay for male and female workers.⁶⁰ The Code of Conduct also coordinates the positions of the Union and its Member States before the Committee on the Rights of Persons

⁵⁸ Council Decision 2010/48/EC (n 46) Art. 4 para 2.

⁵⁹ Code of Conduct of 15 October 2010 between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities [2010] C 340/11.

⁶⁰ Code of Conduct (n 59) para 5.

with Disabilities at UN level. A Council Working Group was established to fulfil this function.⁶¹ With regard to the monitoring mechanism created by the Convention, 'reports of the Union and its Member States will cover their respective competences [...] and shall be complementary'.⁶²

A similar code of conduct could be envisaged for the ratification of the Istanbul Convention to coordinate the actions of the EU and its Member States.

Furthermore, given the fact that violence against women is a form of discrimination on the basis of gender, the Commission could prepare a strategy as it did for the Convention on the Rights of Persons with Disabilities.⁶³ The Strategy 2010-2020 identified the 'actions at EU level to supplement national ones', and determined 'the mechanisms needed to implement the UN Convention at EU level, including inside the EU institutions. It also identifies the support needed for funding, research, awareness-raising, statistics and data collection'.⁶⁴ The Strategy on violence against women could discuss the measures aimed at eradicating discrimination, for example by establishing a 'femicide watch' as suggested by the UN Special Rapporteur on Violence against Women, its Causes and Consequences, Dubravka Šimonović, in 2015.⁶⁵ This instrument would be in compliance with States' obligations deriving from the Convention, and, at the same time, it would follow the recommendation by the Special Rapporteur. She concretely proposed a collection of data on the number of femicides or cases of gender-related killings of women, disaggregated by age and ethnicity of victims, and the sex of the perpetrators, and indicating the relationship between the perpetrator and the victim or victims, which should be published every year, on 25 November.

⁶¹ Code of Conduct (n 59) para 6.

⁶² Code of Conduct (n 59) para 12.

⁶³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe COM/2010/0636 final.

⁶⁴ Communication (n 63) para 2.

⁶⁵ Report of the Special Rapporteur on violence against women, its causes and consequences Dubravka Šimonović A/HRC/32/42 (2016) para 45.

C. A Possible EU Action in the Field of Women's Health

I have anticipated that the health sector should constitute one of the prominent fields of intervention. In the following pages, I will argue that Article 168 TFEU can constitute the legal basis for the adoption of best practices in combating violence against women. I will also show that, despite being desirable, a directive harmonising measures on women's health as public health concern is not conceivable, though Article 114 TFEU offers some room for manoeuvre.

With regard to the first aspect, best practices can be adopted under EU law. It is worth clarifying that, although the health sector is still a matter which pertains to Member States' sovereignty,⁶⁶ the EU has some margin of action. The European Commission has already funded the Rights, Equality and Citizenship programme based on Article 168 TFEU, just to mention an illustrative example.⁶⁷ Furthermore, in its resolution of 10 March 2015 on progress on equality between women and men in the European Union in 2013, the European Parliament posited that 'sexual and reproductive rights are fundamental human rights and should be taken into account in the EU action programme in the field of health'.⁶⁸

Despite acknowledging that the implementation of health policies is a competence of the EU Member States, the European Parliament recommended that all Member States strengthen their free public services to support all women victims of violence, and encouraged the adoption of best practices among Member States.⁶⁹ Best practices on the establishment at national level of shelters for victims, the training of professionals, the promotion of educational programmes and awareness campaigns, just to make few examples, can be easily adopted by the European Commission upon recommendation, for example, of the Women's Rights and Gender

⁶⁶ On health as having a transversal nature, cutting across different areas of EU law, see Tamara Hervey, 'EU Health Law' in Catherine Barnard and Steve Peers (eds.), *European Union Law* (Oxford University Press 2014) 622.

⁶⁷ See also the reference to the 'improvement of health and lives of victims' in the roadmap: Roadmap (n 5) 4.

⁶⁸ European Parliament resolution on progress on equality between women and men in the European Union in 2013 (2014/2217(INI)).

⁶⁹ European Parliament resolution (n 68) paras 33 and 46.

Equality Committee of the European Parliament. Nevertheless, I am referring here to non-binding instruments, which might hinder the correct implementation of the Council of Europe Istanbul Convention.

Turning to the second aspect, I am arguing that harmonising measures on health policies are inconceivable under Article 168 TFEU, but not excluded with regard to cross-border healthcare under the combined legal basis of Articles 168 and 114 TFEU. A directive regarding health policies in the prevention and protection of women victims of violence would surely constitute a very useful instrument in this field. However, the question is whether or not we can find in the founding treaties the correct legal basis. By only applying Article 168 TFEU, even if combined with the flexibility clause enshrined in Article 352 TFEU, the answer will be negative. First, Article 168(5) TFEU excludes 'any harmonisation of the laws and regulations of the Member States'. As acknowledged by the Court in the *Tobacco Advertising Directive* judgment, although the then Article 129(4) TEC (now Article 168 TFEU) did not imply that 'harmonising measures adopted on the basis of other provisions of the treaty [could] not have any impact on the protection of human health', other Articles of the Treaty could not be used 'as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 129(4) of the Treaty'.⁷⁰ In the case at issue, the European Court of Justice annulled the 1998 Tobacco Advertising Directive on the grounds that 'the directive was a disguised health measure rather than an internal market provision'.⁷¹ The subsequent cases confirmed that European

⁷⁰ Case C-376/98 *Germany v Council* ECLI:EU:C:2000:544, paras 78-79. See on the judgment, Robert Schütze, 'EU Competences. Existence and Exercise' in Anthony Arnall and Damian Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 82; Hervey (n 66) 646; Tamara Hervey and Jean V McHale, *Health Law and the European Union* (Cambridge University Press 2004) 96. The case originated as an application lodged by the Republic of Germany for the annulment of Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L 213/9. The pleas alleged that the legal basis – then Article 95 TEC, now 114 TFEU – was incorrect. The Directive was eventually annulled by the Court. See also Case C-380/03, *Federal Republic of Germany v European Parliament and Council of the European Union* ECLI:EU:C:2006:772, para 95.

⁷¹ Fernanda Nicola and Fabio Marchetti, 'Constitutionalizing Tobacco: The Ambivalence of European Federalism' (2005) 46 *Harvard International Law Journal*

Union has competence to harmonise divergent national laws which may adversely affect the internal market, but it is precluded from adopting 'measures that have the effect of harmonising excluding areas beyond what is necessary to eliminate distortions of competitions'.⁷²

Secondly, one cannot refer to Article 352 TFEU, which provides that the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, can adopt the appropriate measures to attain one of the objectives set out in the Treaties, where the Treaty has not provided the necessary powers. Although the then Article 308 TEC (now 352 TFEU) constituted the legal basis of the 2004 Directive relating to compensation of crime victims,⁷³ after the entry into force of the Treaty of Lisbon its application has become impossible in the field of public health. Article 352(3) TFEU is extremely clear in that respect: 'Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation'.⁷⁴

With regard to some aspects related to the protection of female victims of violence, it is possible to invoke the combined legal basis of Article 114 and Article 168 TFEU. As it is known, according Article 114 TFEU the European Parliament and the Council can adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. Article 114(3) TFEU explicitly requires that, in achieving harmonisation, a high level of protection of human health is to be guaranteed

507, 517; Geraint G. Howells, 'Federalism in USA and EC - The Scope of Harmonised Legislative Activity Compared' (2002) 5 *European Review of Private Law* 601, 604-05; Stephen Weatherill, 'The Commission's Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis' (2002) 13 *European Business Law Review* 497, 503-05.

⁷² Lorna Woods and Philippa Watson, *EU Law* (Oxford University Press 2009) 353. See also Case C-491/01 *R v Secretary of State for Health, ex parte British American Tobacco and others* ECLI:EU:C:2002:741, paras 95-96: in that case the conditions under Art. 95 TEC (now Art. 114 TFEU) were met.

⁷³ Council Directive 2004/80 relating to compensation to crime victims [2004] L 261/15.

⁷⁴ Its application in the field of public health was theorised, before Lisbon, by Hervey and McHale (n 70) 88.

taking account in particular of any new development based on scientific facts. As antecedent, it is worth mentioning here the EU Directive on the application of patients' right in cross-border healthcare, which was precisely adopted having regard to both Article 114 and Article 168 TFEU.⁷⁵ Concerning women's health, a new directive, or an amendment to the Directive on patients' right already in force, could provide the possibility for women to receive cross-border healthcare which can better respond to the physical and psychological consequences of violence. The effects of violence, in particular sexual violence, are severe, such as anxiety, mental distress, hopelessness, suicidability, and require attentive medical support to allow the female victim to recover.⁷⁶ Hence a directive or an amendment to the already existing directive could be a useful instrument in order to implement the provisions of the Istanbul Convention.⁷⁷

The reference to Article 168 TFEU in the (possible) future Council Decision concluding the agreement for the accession of the EU to the Council of Europe Istanbul Convention appears of extreme importance, since it would stress the relevance of such policies for the EU and for its Member States, and the fact that violence against women *is* a public health issue.

3. The Direct Effect of Article 30(2) of the Council of Europe Istanbul Convention and its Consequences

In this sub-section, I will argue that Article 30(2) of the Istanbul Convention has direct effect, and it creates a right for the female victim of gender-based violence to receive compensation for severe impairment of her health. As an alternative, even denying direct effect to the provision of the Convention, an obligation for States to compensate victims of violence does exist under EU law, which, as we will see, precisely obliges States to create an *ad hoc*

⁷⁵ Directive 2011/24/EU on the application of patients' rights in cross-border healthcare [2011] OJ L 88/45.

⁷⁶ John Briere and Carol E Jordan, 'Violence against women: Outcome complexity and implications for assessment and treatment' (2004) 19 *Journal of Interpersonal Violence* 1252, 1253.

⁷⁷ I am referring to Articles 20, 22 and 25 of the Istanbul Convention on the provision of services to female victims of violence.

mechanism of compensation. I will eventually assess the impact of the Istanbul Convention in that respect.

Let us start from the issue of direct effect. Once in force in the EU, an international agreement is binding both 'upon the institutions of the Union and its Member States' (Article 216(2) TFEU). Even without ratifying a treaty, EU Member States are bound by international treaties concluded by the EU, but 'on the basis of EU law, rather than on the basis of international law'.⁷⁸ Indeed treaty provisions, the CJEU posited, form 'an integral part of the EU legal system'.⁷⁹ In other words, States cannot 'ignore' international agreements concluded by the EU, although this does not automatically mean that all their provisions have direct effect.⁸⁰

Nonetheless, as pointed out by former judge of the then European Community Court of Justice, Pierre Pescatore, 'though the Court has showed that it is willing to recognise the direct effect of certain provisions of international agreements, its attitude in this respect is much more reserved than in the field of Community law'.⁸¹

The 'attitude' of the Court demonstrates that the topic is of 'intensively political nature', and that the notion of direct effect, 'in any given case, is contested, and is bound to be contested'.⁸² This article neither purports to illustrate or revisit the 'doctrine' of direct effect, which has been subject to deep doctrinal scrutiny,⁸³ nor to re-analyse all the relevant judgments by the

⁷⁸ Bart Von Vooren and Ramses A. Wessel, *EU External Relations Law* (Cambridge University Press 2014) 42.

⁷⁹ Case 181/73 *Haegeman v Belgium* ECLI:EU:C:1974:41, paras 2-6. See Piet Eeckhout, *EU External Relations Law* (Oxford University Press 2011) 325.

⁸⁰ Von Vooren and Wessel (n 78) 42.

⁸¹ Pierre Pescatore, 'The Doctrine of Direct Effect: An Infant Disease of Community Law' (2015) 40 *European Law Review* 135, 149.

⁸² Jan Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect' (2001) 21 *Yearbook of European Union Law* 263, 264.

⁸³ See, *inter alia*, the contribution in the special section dedicated to *Van Gend en Loos*: A Joint Symposium with the *International Journal of Constitutional Law (I•CON)* (2014) 25 *European Journal of International Law* 94. All manuals dedicated a part to the direct effect of EU law. See, e.g., Chalmers (n 27) 284; Woods and Watson (n 72) 100; Hervey (n 66) 143; in Italian, see the outstanding works by Giuseppe Tesaro, *Diritto dell'Unione europea* (Cedam 2012); Roberto Adam and Antonio Tizzano, *Manuale di*

Court of Justice on the direct effect of international treaties.⁸⁴ The purpose is rather to analyse whether or not a specific provision of the Council of Europe Istanbul Convention has direct effect. The reasoning of the Court has never been very clear in that respect, denying the direct application of the provisions of both the WTO Treaty and of the Aarhus Convention, and confirming the direct effect of provisions in some other agreements.⁸⁵ Hence, we can only speculate, having in mind the legal reasoning of the Court, about the possible outcome of a case filed before it with regard to the implementation of the Council of Europe Istanbul Convention. This hypothesis is based on the fact that the EU will ratify the Convention.

The CJEU affirmed that a provision enshrined in an international treaty must be regarded as being directly applicable when, 'regard being had to its wording and to the purpose and nature of the agreement', it contains a 'clear and precise' obligation which, in other words, is not subject, in its implementation or effects, to the adoption of any subsequent measure.⁸⁶ Accordingly, two elements are necessary in order to assess the direct effect of

diritto dell'Unione europea (Giappichelli 2014); in French, Jean-Paul Jacqué, *Droit institutionnel de l'Union européenne* (Dalloz 2012).

⁸⁴ See, *inter alia*, Von Vooren and Wessel (n 78) 228; Eeckhout (n 79) 327; Mario Mendez, *The Legal Effects of EU Agreements* (Oxford University Press 2013) 94.

⁸⁵ Héléne Ruiz Fabri, 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?' (2014) 25 *European Journal of International Law* 151, 153; Woods and Watson (n 72) 119; Pieter Jan Kuijper et al (eds), *The Law of EU External Relations* (Oxford University Press 2013) 929. The ECJ confirmed the direct effect of a bilateral trade agreement in Case 104/81 *Hauptzollamt Mainz v Kupferberg* ECLI:EU:C:1982:362, para 7; and of a partnership and cooperation agreement with Russia in Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* ECLI:EU:C:2005:213, para 29. The Court denied direct effect to Article 9 of the 1998 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ECLI:EU:C:2011:125, para 52; of the WTO agreement since the judgment Joined cases 21/72 and 24/72, *International Fruit Company and Others v Produktschap voor Groenten en Fruit* ECLI:EU:C:1972:115, para 27; of the Montego Bay Convention for the Law of the Sea in Case C-308/06 *Intertanko and Others v Secretary of State for Transport* ECLI:EU:C:2008:312, para 64.

⁸⁶ Case C-240/09 *Lesoochranárske zoskupenie VLK* (n 85) para 44.

a treaty provision: the wording of the provision on the one hand, and the purpose and the nature of the agreement, on the other hand.⁸⁷

With regard to the specific case of the Council of Europe Istanbul Convention, the majority of its provisions contain States' due diligence obligations; in other words, obligations of means rather than of results. However, Article 30(2) of the Convention which, requires States to compensate victims of violence who have sustained 'serious injury or impairment of health' to the extent that 'the damage is not covered by other sources, such as the perpetrator, insurance or State-funded health and social provisions', seems to have a different nature. Although the provision does not explicitly confer rights to individuals,⁸⁸ one may argue that it contains a 'clear and precise obligation capable of directly regulating the legal position of individuals'.⁸⁹ As a consequence, a woman victim of violence can invoke the individual right to compensation before a national court, even though the State of the *forum* (Member State of the European Union) has not ratified the Convention.⁹⁰ In other words, in light of the Convention, a judge should decide that a woman is entitled to a reparation which must be provided by the State in the case in which the perpetrator is not able to provide it.

A major objection can be raised in that respect: the norm does not have direct effect since it is always necessary that the State adopts a mechanism of

⁸⁷ Francesca Martines, 'Direct Effect of International Agreements of the European Union' (2014) 25 *European Journal of International Law* 129, 140.

⁸⁸ Martines (n 87) 138.

⁸⁹ Case C-240/09 *Lesoochránárske zoskupenie VLK* (n 85) para 45. See also, with regard to Art 30, Roberto Senigaglia, 'La Convenzione di Istanbul contro la violenza nei confronti delle donne e domestica tra ordini di protezione e responsabilità civile endofamiliare' [2015] *Rivista di diritto privato* 135.

⁹⁰ *Mutatis mutandis*, the International Court of Justice derived the right of the individual to 'consular assistance' from States' obligations under Article 36(1)(b) of the Vienna Convention on Consular Relations. See *Germany v United States* [2001] ICJ Reports 466, para 77 (*LaGrand* case). In the case at issue, two German brothers were executed by the State of Arizona despite numerous pleas arguing that US officials had violated their right to consular access. According to the Court, Article 36(1)(b), obliges the receiving State to inform the consular post of the sending State of the individual detention 'without delay'; the clarity of the provision leaves no doubt on the fact that the article creates 'individual rights'. See also *Mexico v United States* [2004] ICJ Reports 12 (*Avena and other Mexican nationals case*), paras 130-131.

compensation. Therefore, I now move to the second aspect of the argument. Even though it might be controversial whether or not Article 30(2) has direct effect, it should be acknowledged that States are obliged under EU law, in particular under Council Directive 2004/80⁹¹, to establish a compensation scheme for victims of violent intentional crime committed in their respective territories, provided that it refers to cross-border situations (Article 12). According to a report issued by the European Commission in 2009, 25 EU Member States have put in place such scheme.⁹² Therefore, a mechanism to compensate women victims of violence should be active in the majority of EU Member States and the application of Article 30(2) of the Council of Europe Istanbul Convention would not be prevented.

The Directive 2004/80 is however only applicable with regard to violent intentional crime committed in a Member State other than the Member State where the applicant for compensation is habitually resident (Article 1). It therefore appears useless in hypothesis of, for example, domestic violence which occurs at national level. This limitation clearly emerged in the order of the Court of Justice of the European Union adopted on 30 January 2014, *Paola C. v. Presidenza del Consiglio dei Ministri*.⁹³ In that case, the claimant tried to have compensation from the Italian State for being victim of sexual violence, since the perpetrator could not afford the compensation. However, the Court posited that the directive did not apply to purely domestic cases, but only to transnational ones. A commentator has considered the judgment as a form of 'reverse discrimination' against rape victims.⁹⁴ The entry into force of the Convention could determine an evolution in the interpretation of the Directive 2004/80. The CJEU posited that 'the primacy of

⁹¹ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims [2004] OJ L261/15.

⁹² Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 20 April 2009 on the application of Council Directive 2004/80/EC relating to compensation to crime victims COM(2009) 170 Final.

⁹³ Order of the Court, Case C-122/13 *Paola C. v. Presidenza del Consiglio dei Ministri* ECLI:EU:C:2014:59, paras 17-18.

⁹⁴ Steve Peers, 'Reverse Discrimination against Rape Victims: A Disappointing Ruling of the CJEU' (24 March 2014) <http://eulawanalysis.blogspot.co.uk/2014/03/compensation-for-crime-victims.html> accessed 20 June 2016.

international agreements concluded by the Community over provisions of secondary Community legislation meant that such provisions had to be interpreted, as far as possible, in a manner consistent with those agreements'.⁹⁵ Accordingly, in cases of violence against women or domestic violence, the directive should be interpreted in such a way as to guarantee a system of adequate compensation to the victims, notwithstanding the fact that the offence occurred within the territory of the State where the applicant for compensation was habitually resident.⁹⁶

In other words, even in the case in which the Court of Justice affirms that the provisions of the Istanbul Convention are not directly applicable, the latter would have an 'indirect effect',⁹⁷ namely the obligation for national judges to interpret EU law in a manner that is consistent with the agreement.⁹⁸ Hence, for example, as pointed out by an author, 'EU law must be interpreted to mean victims receive a residence permit based on their personal situation, if the authorities consider it necessary (Article 59(3) of the Convention)'.⁹⁹

Furthermore, the European Commission could start an infringement procedure against the Member States which did not correctly apply the provisions of the Convention as transposed into EU law, in relation to all instances within the exclusive competence of the European Union or for which the European Union has exercised its competence by means of the adoption of a directive.

⁹⁵ Case C-61/94 *Commission v Germany* ECLI:EU:C:1996:313, para 52.

⁹⁶ The Advocate General Yves Bot has come to the same conclusion, though, even without relying on the Istanbul Convention. See his conclusions in Case C-601/14, *European Commission v Italy* ECLI:EU:C:2016:249, para 80. The Advocate General considers a mechanism to compensate victims of violent offences within the territory of a Member State as a prerequisite for the application of such a system according to the directive.

⁹⁷ The CJEU denied the direct effect of the provisions of the UN Convention on the Rights of Persons with Disabilities in Case C 363/12 *Z v. A Government department and The Board of Management of a Community School*, para 90.

⁹⁸ Steve Peers, 'Violence against women: what will be the impact of the EU signing the Istanbul Convention?' (4 March 2016) <http://eulawanalysis.blogspot.it/2016/03/violence-against-women-what-will-be.html> accessed on 20 June 2016. See also Case C-61/94 *Commission v Germany* (n 95), para 52.

⁹⁹ Peers (n 98).

V. CONCLUSION

Given the analysis above, the EU should achieve the ratification of the Council of Europe Istanbul Convention – a process that has already started – in order to provide a more coherent legal framework with regard to the actions to counter violence against women at EU level. The European institutions have already adopted measures aimed at combating violence against women, but by virtue of the Istanbul Convention they could provide States guidelines on the best measures to adopt in order to implement the Convention itself. Furthermore, the Commission could propose to the European Parliament and the Council some directives whose purpose would be to harmonise at EU level measures of prevention and protection of victims of domestic violence, and women victims of all forms of violence. The EU action would be monitored by the mechanism of compliance established by the Convention (GREVIO), which can address the points of strengths and weaknesses of the measures adopted.

The positive impact of the Istanbul Convention is not limited to EU policies and legislation. I have argued in this article that one of the provisions of the Convention has direct effect in the EU Member States' legal systems; hence it directly governs the legal position of the individuals. Accordingly, a woman victim of violence who has suffered serious impairment of health can ask the national judge for a compensation directly from the State, if this compensation cannot be provided by the perpetrator of the violence. Nonetheless, even assuming that Article 30(2) would not have direct effect, if the Istanbul Convention were in force in the EU, secondary legislation – the directive regarding compensation for victims of violence, for example – can be interpreted in a manner consistent with the Convention. By virtue of consistent interpretation, the directive could indeed provide wider protection than the one expressly enshrined in its provisions. To achieve this scope, I have suggested that the EU should not append reservation to Article 30(2) of the Convention – a reservation that I deem to be contrary to the spirit of the EU, and its practice undertaken so far.

It might be counter-argued that a decision by the Council, requiring EU Member States to ratify the Convention, would be enough without raising questions of EU competence. However, I agree with a commentator stressing the fact that ratification could 'address the argument that the EU

has double standards as regards human rights, insisting that Member States, would-be Member States and associated countries should uphold human rights standards that the EU does not apply itself.¹⁰⁰

Another objection could be related to the worrying data regarding violence against women: the number of women victims of violence has not diminished notwithstanding the increasing number of acts addressing the issue adopted at international and national level. However, even though law is not enough to determine a cultural change, which is fundamental to eradicate the 'structural' violence against women, I am convinced that it is a necessary instrument to – at least – reflect on and promote this change.

¹⁰⁰ Peers (n 98).