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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ARMENIA

OPINION

**ON THE CONSTITUTIONAL IMPLICATIONS OF THE RATIFICATION
OF THE COUNCIL OF EUROPE CONVENTION
ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN
AND DOMESTIC VIOLENCE (ISTANBUL CONVENTION)**

**Adopted by the Venice Commission
at its 120th Plenary Session
(Venice, 11-12 October 2019)**

on the basis of comments by

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I. Introduction

1. On 25 July 2019, Mr Rustam Badasyan, Minister of Justice of Armenia, requested an opinion of the Venice Commission on the constitutional implications of the ratification of the [Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence \(Istanbul Convention\)](#) for Armenia.

2. Armenia signed the Istanbul Convention on 18 January 2018 and the process of ratification is pending.

3. For the present opinion, Ms Aurela Anastas, Ms Veronika Bílková, Mr Philip Dimitrov, Ms Regina Kiener and Mr Martin Kuijter were appointed to act as rapporteurs. The present opinion was prepared on the basis of their contributions.

4. This opinion was examined by the joint meeting of the Sub-commissions on Fundamental Rights, National Minorities and Gender Equality on 10 October 2019 and was subsequently adopted at the Venice Commission 120th Plenary Session (Venice, 11-12 October 2019).

II. Scope of the opinion

5. The Venice Commission would like to begin this opinion by reiterating several important points: First of all, the choice to ratify a treaty and to be bound by its obligations¹ is a sovereign act of the State. There is no obligation on States to ratify treaties that stems from international law, although States, which have signed a treaty, are obliged “*to refrain from acts defeat the object a*”²The decision of whether or not to ratify a treaty reflects both the legal assessment of the instrument and various other – political, ideological, economic, social, cultural and other – interests.

6. Second, national solutions with respect to the type of relationship between the international and the domestic legal orders are very diverse. The Venice Commission has examined this question in detail in its previous work, notably in its *Report on the implementation of Human Rights Treaties*³ and in its *Interim Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation*⁴. The choice of the above-mentioned relationship is also a sovereign act of the State⁵. Finally, once a State is bound by an international law instrument, it is required – by virtue of Article 26 of the *Vienna Convention on the Law of Treaties (Pacta sunt servanda)* – to perform/observe the treaty obligations “*in good faith. Article 27 of the Vienna Convention on the Law of Treaties*”⁶ further stipulates that “*[a] party may not invoke the provisions failure to p*” This means that after ratification and entry into force of a treaty, no legal arguments based on national law, including those based on constitutional law, can justify an act or omission in breach of international law.⁶ The effects of international law within a State’s domestic order represent an essential part of the good faith (*bona fide*) observance of international legal provisions.

¹ See Article 12 and 14 of the 1969 *Vienna Convention on the Law of Treaties*.

² Article 18 of the 1969 *Vienna Convention on the Law of Treaties*.

³ See Venice Commission, *Report on the implementation of international human rights treaties in domestic law and the role of courts* (CDL-AD(2014)036); Venice Commission, *The Status of International treaties on human rights* (CDL-STD (2005)042).

⁴ CDL-AD(2016)005, Appendix to CDL-AD(2016)016, paragraphs 81 *et seq.*

⁵ See for example André Nollkaemper, *National Courts and the International Rule of Law*, Oxford University Press, 2012, p. 68-70. Interestingly, research has shown that the character of the constitutional system for the implementation of international law through case-law is much less important in explaining the impact of international law than is often assumed: J. Gerards & J. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in national case-law*, Intersentia 2014, p. 371.

⁶ *Treatment of Polish nationals*, PCIJ Rep. 1932, Ser A/B, No. 44, p. 4.

7. As regards the ratification process of international treaties, set at the national level, the Constitution of Armenia stipulates that “ *i n t e r n a t i o n a l t r e a t i e s c o n t r a v e n t n o t b e* (Article 116(3))”. By virtue of Article 168(3) of the Constitution, the Constitutional Court of Armenia is competent to, “ */ p r i o r t o t h e r a t i f i c a t i o n o f a n y i n t e r n a t i o n a l t r e a t y t o v e r i f y t h e c o n f o r m i t y w i t h t h e C o n s t i t u t i o n*”. By virtue of Article 72(d) of the Organic Law of the Constitutional Court of Armenia,⁷ the Government of Armenia shall request the Constitutional Court to verify the conformity with the Constitution of any international treaty subject to ratification by the National Assembly, prior to its ratification.

8. The assessment of the compatibility of a treaty with the Constitution of Armenia is therefore a matter for the Constitutional Court of Armenia. Views expressed by bodies of international experts, such as the Venice Commission, may help this Court in its task by providing an external legal analysis of the international treaty concerned, but the Venice Commission cannot assess definitively the constitutional implications of the Convention insofar as it is not competent to authoritatively interpret the Armenian Constitution. Nevertheless, these views serve to provide a contribution to the public debate on the ratification of a treaty.

9. In its request for this opinion, the Minister of Justice of Armenia has asked the Venice Commission to assess the constitutional implications of the ratification of the Istanbul Convention, without indicating any specific constitutional implications that it would like the Venice Commission to focus on. The Venice Commission has assessed the constitutional implications of the ratification of a specific treaty in the past. For example, in 1998, it adopted an opinion on the constitutional issues involved in the accession by Estonia to the European Union.⁸ In 2000 and 2008, it assessed the constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court.⁹ And in 2001, it issued an opinion on the ratification of the European Convention on Human Rights at the request of Armenia.¹⁰ This last opinion contains a general section on the relationship between the Constitution of Armenia and international treaties. Although the legal framework has been partly changed pursuant to the constitutional amendments made in 2005 and in 2015, the main principle – namely, that if contradictions between the Constitution and a treaty are found, “ *a c o n s t i t u t i o n a l a m e n d m e n t s b e r e q u i r e d p r i o r t o t h e r a t i f i c a t i o n o f t h e t r e a t y*” (paragraph 3) remains applicable. The same is true for the definition of the term “ *c o n t r a s t a t i s t r i c t i n c o m p a t i b i l i t y p r o v i s i o n s ...i . e . p r o v i s i o n s c o n t r a d i c t o r c o n f l i c t w i t h t h e C o n s t i t u t i o n*” (paragraph 4).

10. Therefore, in this opinion and in line with its previous practice, the Venice Commission will deal with the issues that have been made the object of public (legal) debate in connection with the ratification of this Convention in Armenia or elsewhere, of which the Venice Commission is aware. Also, in assessing the constitutional implications of the ratification of the Istanbul Convention, the Venice Commission relied on the text of the Istanbul Convention and the Explanatory Report to the Istanbul Convention. The analysis is limited to the present state of the law and does not speculate regarding possible future interpretation and application of the Convention.

⁷ “ *1. Before the ratification of an international agreement, the Government shall appeal to the Constitutional Court with the question concerning the conformity of obligations assumed within the agreement with the Constitution of Armenia*” (http://www.concourt.am/english/law_cc/index.htm).

⁸ *Opinion on constitutional issues involved in Estonia's accession to the European Union* (CDL-INF(98)10).

⁹ *Report on constitutional issues raised by the ratification of the Rome statute of the International Criminal Court* (CDL(2000)104); *Second Report on Constitutional Issues raised by the Ratification of the Rome Statute of the International Criminal Court - Supplement to the Report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court* (CDL-AD(2008)031).

¹⁰ *Opinion on the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms under the Constitution of the Republic of Armenia of 1995* (CDL-INF(2001)25).

11. The main issues that have arisen in this context are: a) that the Istanbul Convention is not needed; b) that the Istanbul Convention contains certain terms and concepts that clash with the terms and concepts enshrined in the national constitution of the country under consideration; c) that the Istanbul Convention would result in legislative changes that would contravene the national constitution of the country under consideration; d) that the Istanbul Convention introduces a body with excessive competences; and, finally, e) that the Istanbul Convention introduces new commitments in the field of asylum law.

III. The Istanbul Convention

A. General remarks

12. The Council of Europe's *Convention on preventing and combating violence against women and domestic violence*, also known as the Istanbul Convention, was adopted on 11 May 2011 in Istanbul, Turkey. The Convention aims to "protect women against all forms of violence, and prevent, prosecute and eliminate violence against women (Article 1(1)(a)). It applies to "all forms of violence against women, including domestic violence, which affects women disproportionately"

13. The Istanbul Convention entered into force on 1st August 2014, upon the ratification by 10 States. By August 2019, it had been ratified by 34 Council of Europe member States and signed by all other member States, with the exception of Azerbaijan and the Russian Federation. It has also been signed by one international organisation, the European Union. Reservations to this Convention were made by 22 States Parties pursuant to Article 78. Five States Parties adopted declarations, one of which, Poland, had been objected to by six States Parties.¹¹

14. In two countries, Bulgaria and Slovakia, the ratification process was suspended recently. In Bulgaria, the suspension resulted from the decision of the Constitutional Court finding a contradiction between the Istanbul Convention and the Constitution of Bulgaria,¹² which was referred to in Armenia as an argument against the ratification of this Convention. In Slovakia, on 29 March 2019, the National Council voted by a large majority against the ratification of the Istanbul Convention requesting the government to discontinue the ratification process.¹³

15. Armenia signed the Istanbul Convention on 18 January 2018. While signing, Armenia adopted a reservation, reserving the right not to apply the provisions of the Convention laid down in Article 30(2) – compensation, Article 55(1) – *Ex parte* and *ex officio* proceedings, in respect of Article 35 regarding minor offences, Article 58 – statute of limitation, in respect of Article 37, and Article 59 – Residence status.

B. Scope of application

16. The aim of the Istanbul Convention, as set out in its Preamble, is to "create a Europe free from violence against women. Member States are therefore obliged to introduce a national legal framework to combat, prevent and prosecute all forms of violence against women."¹⁴ Furthermore, the Convention emphasises the interrelationship between the

¹¹ The Declaration reads as follows: "The Republic of Lithuania has adopted very similar declarations, however, in accordance with the principles and the provisions of the Convention, and these have not been objected to by any State Party."

¹² Bulgaria, Constitutional Court, *Решение № 1037, и 2018 г.*

¹³ Slovakia, National Council, *Uznesenie Národnej rady Slovenskej republiky k procesu ratifikácie Dohovoru Rady Európy o predchádzaní násilíu na ženách a domácejmu násilíu a o boji proti nim* (tlač 29. marca 2019).

¹⁴ Article 1 (1) (c), 12 (2) of the *Istanbul Convention*.

empowerment of women, i.e. gender equality, and the elimination of all forms of violence against women.¹⁵

17. To achieve this aim, the Istanbul Convention builds on other international legal instruments, such as the European Convention on Human Rights law of the European Court of Human Rights (hereinafter, “ECtHR”). Further and constitutes a development of standards enshrined in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁶ Finally, the Istanbul Convention contains principles of the International Covenant on Civil and Political Rights (hereinafter, the “ICCPR”), the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter, the “ICERD”), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, the

18. The Istanbul Convention builds on these instruments, but it is focused specifically on violence against women and domestic violence, which are not explicitly addressed by the older instruments, despite the fact that they have been repeatedly identified as a serious and common human rights violation.¹⁷ It follows the example of the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women* (1994 Convention of Belém do Pará)¹⁸, adopted under the aegis of the Organization of American States (hereinafter, the “OAS”) as well as the 1994 Protocol to the African Charter on the Rights of Women in Africa adopted in 2003, better known as the *Maputo Protocol*¹⁹.

19. States which have ratified the Istanbul Convention are not only obliged to *punish* criminal offences in relation to violence against women and domestic violence via legislative and other sanctions (Articles 29-48 of the Istanbul Convention). They also need to provide a comprehensive set of measures to *protect* all (possible) victims from any (future) acts of violence (Articles 18-28 of the Istanbul Convention). Furthermore, States Parties are obliged to raise awareness and *inform* the public about the prevention of domestic violence and violence against women as well as the enhancement of equality between men and women (Articles 12-17 of the Istanbul Convention).

20. As mentioned above, the Istanbul Convention combats all forms of violence against women and domestic violence. Article 3(a) and (b) of this Convention²⁰ provides a definition of

¹⁵ Preamble, Article 1(b), Article 12 of the *Istanbul Convention; Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence* (hereinafter, the “*Explanatory Report to the Istanbul Convention*”), paragraphs 25, 31.

¹⁶ Preamble of the *Istanbul Convention; Explanatory Report to the Istanbul Convention*, paragraphs 40, 44, 50, 52; Grans, *The Istanbul Convention and the Positive Obligation to Prevent Violence*, 18 *Human Rights Law Review* (2018), 136.

¹⁷ For the UN level, see UN Doc. A/47/38, *CEDAW General Recommendation No. 19, Violence Against Women*, 1992; UN Doc. A/RES/48/104, *Declaration on the Elimination of Violence against Women*, 23 February 1994; UN Doc. A/61/122/Add.1, *In-depth study on all forms of violence against women, Report of the Secretary-General*, 7 July 2006; UN Doc. CEDAW/C/CG/35, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, 14 July 2017; etc. For the Council of Europe level, see *Recommendation No. R (2002) 5 of the Committee of Ministers to member States on the protection of women against violence*, 30 April 2002.

¹⁸ <https://www.oas.org/juridico/english/treaties/a-61.html>

¹⁹ https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf

²⁰ “Article 3 – Definitions

For the purpose of this Convention:

a - “*violence against women*” is understood as a violation of women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, 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;

b - “*domestic violence*” is physical, sexual, psychological or economic violence that occurs 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

“*violence against women as well as of domestic violence*” in order to promote a better understanding of the two terms and to distinguish them from one another.

21. The definition of “*violence against women*” in Article 3(a) of the Istanbul Convention refers to all acts of gender-based violence such as physical, sexual or psychological harm as well as coercion or arbitrary deprivation of liberty. The term emphasises that every act of violence against women constitutes a human rights violation and a form of discrimination.²¹

22. The gendered nature of violence against women, as set out in the Istanbul Convention, results from the established fact that many forms of violence are directed against women because they are women, or because these acts affect women disproportionately.²² By “*recognising the structural gender-based violence*”, the Istanbul Convention is adopting the standard set out by the CEDAW Committee, which acknowledges that “*gender-based violence against women constitutes discrimination against women under Article 1 (CEDAW)*” (i.e. being female), is the primary motive for committing acts of violence described under the Istanbul Convention and therefore constitutes a discrimination against women.²⁵

23. By defining the term *gender* in Article 3(c)²⁶, the Istanbul Convention recognises that violence against women does not only originate from biological differences between men and women, i.e. sex, but mainly from “*socially constructed roles, behaviours and attributes that are given society considers appropriate for women and men*”²⁷ Such stereotyped gender roles contribute to the subordinate status of women in society and may result in making harmful practices and violence against women acceptable in the private and public spheres.²⁸

24. The prohibition of discrimination of women on the basis of *sex* and *gender* has been recognised by many human rights treaties. As a result, the term *gender* as well as the harm generated by gender stereotypes has been addressed by a number of UN treaty bodies as well as by the ECtHR.²⁹ According to the CEDAW Committee, the term *gender* refers to “*socially constructed identities, attributes and roles for women and men and in the distribution of power and rights favouring men and disadvantaging women*”.³⁰

25. To combat harmful gender stereotypes, Article 5 CEDAW and – to a lesser extent – Article 2(f) CEDAW create explicit obligations for States Parties to take appropriate measures to eliminate such social and cultural patterns.³¹ Similarly, the Committee of Economic, Social and

²¹ Article 3(a) of the Istanbul Convention: “*“ violence against women ” is understood and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, 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 private life.*”

²² Article 3 (d) of the *Istanbul Convention; Explanatory Report to the Istanbul Convention*, paragraph 44.

²³ Preamble to the *Istanbul Convention*.

²⁴ CEDAW Committee, General Recommendation 35: Gender-based violence against women, updating recommendation 19, 26 July 2017, paragraph 21; CEDAW Committee, General Recommendation 19: Violence against women (1992), paragraphs 1, 6.

²⁵ *Explanatory Report to the Istanbul Convention*, paragraph 44.

²⁶ “*“ gender ” shall mean the socially constructed roles, behaviours and attributes that are given society considers appropriate for women and men ; ”*

²⁷ Article 3 (c) of the *Istanbul Convention; Istanbul Convention, Questions and Answers* (hereinafter: Council of Europe, Q&A), 6.

²⁸ *Idem*.

²⁹ European Union Agency for Fundamental Rights and Council of Europe, Handbook on European non-discriminatory law (2018), 170 – 171.

³⁰ CEDAW Committee, General Recommendation 28: The core obligations of States parties under Article 2 CEDAW, 16 December 2010, paragraph 5.

³¹ OHCHR Commissioned Report (2013), Gender Stereotyping as a Human Rights Violation, 21 – 22.

Cultural Rights (has stressed that gender also “affects CESCR” the equality of men and women to the³² In the words of the CESCR, the notion of gender includes “cultural expectations and assumptions, personality traits, and physical and intellectual capacities of men and women, based solely on their identity.”³³ A similar approach is found in the Human Rights Committee General Comment on Equality between Men and Women, in which it emphasises that “inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religion.”

26. The ECtHR has found that a difference in treatment between men and women cannot be justified by reference to traditional distribution of gender roles in society.³⁵

27. In addition to the definition of the term *violence against women*, Article 3(b) of the Istanbul Convention also provides for a definition of the notion of *domestic violence*. Accordingly, domestic violence refers to “all acts of physical, sexual, psychological or bet³⁶ occur within the family or domestic unit” or bet³⁶. The gender-neutral definition of *domestic violence* acknowledges that men, children and elderly people may be victims of domestic violence.³⁷ However, it is generally recognised that the majority of victims affected by domestic violence are women.³⁸ Therefore, domestic violence constitutes another form of violence which is distinctly gendered.³⁹

28. The Istanbul Convention combats domestic violence irrespective of the family or domestic setting in which it occurs. Domestic violence can result in *intimate-partner violence* between current or former spouses and cohabiting partners as well as in *inter-generation violence* between two or more family members of different generations.⁴⁰ Since its aim is to address violence against women and domestic violence wherever it occurs, the Istanbul Convention does not limit its application to legally married partners, but extends it to all partners, married or not, whether these are of the same or different sex. No groups of victims are excluded from protection on the basis of their marital status or any of the other grounds of discrimination covered by the Convention.⁴¹

C. Personal scope of application

29. As the main aim of the Istanbul Convention is to protect women against all forms of violence (Article 1(1)(a)) and to promote the empowerment of women (Article 1(1)(b)), it applies first and foremost to women and girls (Article 3(f)). Moreover, the limited personal scope of application results from the fact that the Istanbul Convention mainly covers forms of violence that are only experienced by women because they are women (such as forced abortion or female genital mutilation) or that affect women disproportionately (such as rape, stalking, domestic violence or forced marriage).⁴²

³² CESCR, General Comment 16: Article 3 (The Equality of Rights between Men and Women to the Enjoyment of all Economic, Social and Cultural Rights), 11 August 2005, paragraph 14.

³³ Idem.

³⁴ CCPR, General Comment 28: Article 3 (The Equality of Rights between Men and Women), 29 March 2000, paragraph 5.

³⁵ ECtHR, *Khamtokhu and Aksenchik v. Russia* [GC], No. 60367/08 and 961/11, Judgment of 24 January 2017, paragraphs 141 – 143.

³⁶ Article 3 (b) of the *Istanbul Convention*.

³⁷ *Explanatory Report to the Istanbul Convention*, paragraph 41.

³⁸ ECtHR, *Opuz v. Turkey*, No. 33401/02, Judgment of 9 June 2009.

³⁹ *Explanatory Report to the Istanbul Convention*, paragraph 42.

⁴⁰ Idem., paragraphs 41 – 42.

⁴¹ Idem.; Council of Europe, Q&A, 7.

⁴² See, Article 3 (d) of the *Istanbul Convention: Definition of violence against women* 40 of the *Istanbul Convention*; Council of Europe, Q&A, 5.

30. However, as indicated above, the Istanbul Convention recognises that men and boys as well can be victims of domestic violence.⁴³ Men experience some forms of violence covered by the Convention, although less often and frequently in less severe forms. The Istanbul Convention recognises this and encourages States Parties to apply its provisions to all victims of domestic violence, including men, children and the elderly.⁴⁴

31. The prohibition of discrimination enshrined in Article 4(3) of the Istanbul Convention⁴⁵ ensures the equal protection of all victims of (domestic) violence, regardless of any characteristic they might have. The right to non-discrimination is a fundamental element on which the whole international human rights system is based.⁴⁶ The principle of non-discrimination guarantees that “*everyone is entitled to all rights without distinction*”⁴⁷ It is found in all major human rights conventions such as Article 2(1) and Article 26 of the ICCPR, Article 2(2) of the ICESCR and Article 14 of the ECHR. The Istanbul Convention provides protection against discrimination based on an open-ended list of criteria, including gender identity and sexual orientation.⁴⁸ By applying the provisions of the Istanbul Convention without any discrimination on the grounds of gender identity and sexual orientation, the Convention acknowledges that anyone can be a victim of domestic violence. Furthermore, the Istanbul Convention ensures that every person, irrespective of his or her sexual orientation or gender identity, is protected from domestic violence and has access to corresponding support and protection.

32. The Istanbul Convention does not set new standards by including the two aforementioned grounds into the list of prohibited distinctions i.e. gender identity and sexual orientation. Rather, it “*builds on legal obligations*”⁴⁹ such as the ECHR and its corresponding case law, CEDAW, ICCPR, ICESCR and UNCAT.

33. The ECtHR, for instance, in its interpretation of the ECHR, allows applicants subjected to discrimination based on their sexual orientation and/or gender identity to claim a violation of Article 14 ECHR in conjunction with another substantive right of the ECHR.⁵⁰

34. Other human rights bodies have also raised the issue of sexual orientation and gender-identity-related discrimination. The CEDAW Committee, for example, has released two *General Recommendations*, in which it recognises that “*inextricably linked*” with other factors that affect women⁵¹ such as

35. The Human Rights Committee, in turn, has found that the reference to sex in Article 2(1) and Article 26 ICCPR also includes sexual orientation.⁵² According to its jurisprudence, the Human Rights Committee considers that States Parties need to ensure that all individuals on

⁴³ Council of Europe, Q&A, 5; *Explanatory Report to the Istanbul Convention*, paragraphs 41, 45.

⁴⁴ *Idem*.

⁴⁵ “*Article 4 - Fundamental rights, equality and non-discrimination*”

3 - The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migration

⁴⁶ Moeckli, Equality and Non-Discrimination, in: Moeckli / Shah / Sivakumaran, *International Human Rights Law* (2018), 148, 152.

⁴⁷ Article 1 of the *Universal Declaration of Human Rights*.

⁴⁸ *Explanatory Report to the Istanbul Convention*, paragraph 53.

⁴⁹ Council of Europe, Q&A, 9.

⁵⁰ ECtHR, *X and Others v. Austria* [GC], No. 19010/07, Judgment of 19 February 2013; ECtHR, *Taddeucci and McCall v. Italy*, No. 51362/09, Judgment of 30 June 2016; ECtHR, *Sousa Goucha v. Portugal*, No. 70434/12, Judgment of 22 March 2016, paragraph 27.

⁵¹ CEDAW Committee, General Recommendation 27: Older women and protection of their human rights, 16 December 2010, paragraph 13; CEDAW Committee, General Recommendation 28: The core obligations of States Parties under Article 2 CEDAW, 16 December 2010, paragraph 18.

⁵² HRC, *Toonen v. Australia*, No. 488/1992, 31 March 1994, paragraph 8.7.

their territory benefit from the rights enshrined in the ICCPR as well as the enjoyment of equal protection before the law without distinctions on any grounds, including sexual orientation (Article 2(1) and Article 26 ICCPR).⁵³

36. The CESCR has adopted a *General Comment on non-discrimination in economic, social and cultural rights*, in which it recognised that a person's be restricted on the basis of his or her sexual orientation or gender identity. The CESCR explicitly recognised that, under Article 2(2) ICESCR, the criteria "other status" include sexual orientation and gender identity. As a consequence identity is among the prohibited grounds of discrimination enshrined in Article 2(2) ICESCR.⁵⁴

37. Finally, regarding the implementation of the obligations arising under UNCAT, States Parties must ensure that UNCAT applies to all persons, irrespective of their sexual orientation or transgender identity.⁵⁵

IV. International obligations

38. The obligation to protect any individual against gender-based violence results from the ratification of the following human rights treaties:

1. The European Convention for the Protection of Human Rights and Fundamental Freedoms – ECHR (TIF⁵⁶: 1953);⁵⁷
2. The International Covenant on Civil and Political Rights – ICCPR (TIF: 1976);⁵⁸
3. The International Covenant on Economic, Social and Cultural Rights – ICESCR (TIF: 1976);⁵⁹
4. The Convention on the Elimination of All Forms of Discrimination against Women – CEDAW (TIF: 1981);⁶⁰ and
5. The Convention on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – UNCAT (TIF: 1987)⁶¹.

39. First and foremost, the failure to protect an individual from domestic violence as well as to prevent gender-based violence against women may result in the violation of the right to life or the right to be free from torture and/or other ill-treatment enshrined in Articles 2 and 3 of the ECHR as well as in Articles 6 and 7 of the ICCPR.⁶²

40. With regard to Articles 2 and 3 ECHR, the ECtHR has decided that member States may have a positive obligation to protect individuals from deprivation of life as well as ill-treatment, if these acts are committed by a private person.⁶³ Moreover, member States are obliged to take adequate measures in order to criminalise acts of violence and harassment. In other words, in case of domestic violence, member States must take all (legislative) measures to protect

⁵³ HRC, *X v. Colombia*, No. 1361/2005, 13 January 2001, paragraph 7.2; HRC, *Young v. Australia*, No. 941/2000, 29 June 1999, paragraph 10.2.

⁵⁴ CESCR, General Comment 20: Article 2 (2) (Non-discrimination in economic, social and cultural rights), 2 July 2009, paragraph 32.

⁵⁵ CAT, General Comment 2: Implementation of Article 2 by States Parties, 24 January 2008, paragraph 21.

⁵⁶ TIF = Treaty In Force.

⁵⁷ Year of Armenia's ratification: 2002.

⁵⁸ Year of Armenia's ratification: 1993.

⁵⁹ Year of Armenia's ratification: 1993.

⁶⁰ Year of Armenia's ratification: 1993.

⁶¹ Year of Armenia's ratification: 1993.

⁶² Joseph/Dipnall, Scope of Application, in: Moeckli/Shah/Sivakumaran, *International Human Rights Law* (2018), 115; ECtHR, *Opuz v. Turkey*, No. 33401/02, Judgement of 9 June 2009; CCPR, General Comment 28: Article 3 (The Equality of Rights between Men and Women), 29 March 2000, paragraphs 10, 11.

⁶³ ECtHR, *Osman v. UK*, No. 23452/94, Judgement of 28 October 1998, paragraph 115; ECtHR, *Case of Z and others v. UK*, No. 29392/95, Judgement of 10 May 2001, paragraph 73.

(possible) affected individuals.⁶⁴ If domestic violence does not yet result in violence, but in repeated threats against an individual, the right to physical and psychological integrity enshrined in Article 8 ECHR of the person concerned may be violated.⁶⁵ As a result, member States may have an obligation to protect individuals against such interferences by third parties.⁶⁶ Finally, the ECtHR has acknowledged that in member States where victims affected by domestic violence are mostly women, domestic violence may be regarded as gender-based violence and may therefore constitute a violation of Article 14 ECHR in conjunction with Articles 2 and 3 ECHR.⁶⁷

41. In order to comply with Articles 6 and 7 ICCPR, States Parties must protect women from practices that violate their right to life and/or expose them to cruel, inhuman or degrading treatment.⁶⁸ Therefore, States Parties need to prosecute and penalise domestic and other types of violence against women. Furthermore, the Human Rights Committee emphasises that the adoption of measures to protect women itself is not enough to comply with the ICCPR. The obligation of the ICCPR extends to putting in place measures to achieve effective and equal empowerment of women.⁶⁹

42. As seen above (see III.B), the CEDAW Committee has interpreted gender-based violence as a form of discrimination against women, which is prohibited under Article 1 CEDAW.⁷⁰ Consequently, violence “*directed against a woman because she is a woman*”⁷¹ ~~disproach~~ *disproach* ~~is not only the right to life of women and their right not to be subjected to cruel, inhuman or degrading treatment, but also Article 1 CEDAW.~~ ⁷¹ The CEDAW Committee has further found that the prohibition of gender-based violence (Article 1 CEDAW) as well as the prohibition of discrimination against women in family relations (Article 16 CEDAW) results in positive state obligations to protect women against domestic violence.⁷² Therefore, States Parties’ obligations in relation to domestic violence in general must contain measures enshrined in Article 2 CEDAW.⁷³ Accordingly, States are required to adopt legislation prohibiting and criminalising all forms of gender-based violence against women, to ensure access to medical and counselling services for female victims as well as to establish awareness-raising programmes in order to promote an understanding of gender-based violence against women.⁷⁴

43. The CESCR recognises that gender-based violence “*is a form of discrimination on the basis of sex*”⁷⁵ ~~As a result, the approach taken by CESCR regarding the States Parties’ obligation to prevent violence against women is similar to that of the ECtHR, the Human Rights~~

⁶⁴ Grabenwarter, European Convention on Human Rights: Commentary (2014), Article 3 ECHR, paragraph 18.

⁶⁵ Grabenwarter, European Convention on Human Rights: Commentary (2014), Article 8 ECHR, paragraph 74.

⁶⁶ ECtHR, *A v. Croatia*, No. 55164/08, Judgement of 14 October 2010, paragraph 57.

⁶⁷ ECtHR, *Opuz v. Turkey*, No. 33401/02, Judgement of 9 June 2009, paragraph 198 *et seq.*

⁶⁸ CCPR, General Comment 28: Article 3 (The Equality of Rights between Men and Women), 29 March 2000, paragraphs 8, 10, 11; CCPR, General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, paragraph 13.

⁶⁹ CCPR, General Comment 28: Article 3 (The Equality of Rights between Men and Women), 29 March 2000, paragraph 3.

⁷⁰ CEDAW Committee, General Recommendation 19: Violence against women (1992), paragraph 7; CEDAW Committee, General Recommendation 35: Gender-based violence against women, updating recommendation 19, 26 July 2017, paragraph 1.

⁷¹ CEDAW Committee, General Recommendation 19: Violence against women (1992), paragraph 7.

⁷² CEDAW Committee, General Recommendation 35: Gender-based violence against women, updating recommendation 19, 26 July 2017, paragraph 16; Otton, *Women and Gender-Based Violence*, International Human Rights Law (2018), 319.

⁷³ CEDAW Committee, General Recommendation 35: Gender-based violence against women, updating recommendation 19, 26 July 2017, paragraph 21.

⁷⁴ *Idem.*, paragraphs 26, 29, 30.

⁷⁵ CESCR, General Comment 16: Article 3 (The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights), 11 August 2005, paragraph 27.

Committee and the CEDAW Committee. The CESCR emphasises the need of implementing appropriate measures to prevent, investigate, punish and redress acts of violence against women by private actors.⁷⁶ Furthermore, the CESCR underlines the fact that domestic violence primarily affects women and triggers protection obligations under Article 10(1) ICESCR (the rights of the family) in conjunction with Article 3 ICESCR (equal rights of men and women).⁷⁷ These protection issues include the creation of a specific offence of domestic violence as well as the establishment of crisis centres or shelters for victims and the running of awareness-raising campaigns.⁷⁸

44. Finally, the UNCAT emphasises that States Parties must pay special attention to protecting marginalised groups or individuals when implementing UNCAT's core obligations, prevention of torture and ill-treatment.⁷⁹ Due to their gender, women and girls are especially vulnerable to torture and ill-treatment.⁸⁰ The Committee against Torture notes that one of the contexts in which females are at risk include violence by private actors in homes. Therefore, States Parties' failure to prevent, investigate, prosecute gender-based violence such as domestic violence, breach UNCAT provisions.⁸¹

45. The added value of the Istanbul Convention to this collection of important international instruments is that it is the first European instrument to deal with violence against women and domestic violence in a comprehensive manner. It introduces new provisions requiring a specific institutional setup (including national co-ordinating bodies, data collection and research, NGO involvement and multi-institutional co-operation) and foresees concrete prevention measures (from education, training of professionals to participation of the private sector and the media); protection measures (from general to specialised services, services for child witnesses, information to victims) and – under substantive law – civil, administrative and criminal law measures, as well as procedural safeguards for victims. It is also the first European instrument that links these phenomena expressly to harmful gender stereotypes. Finally, it establishes a new international body (GREVIO – see V.D, below) to monitor the implementation of such measures.⁸² The ratification of the Istanbul Convention, in addition to expressing normative commitment to values protected by this instrument, therefore also entails the obligation on States Parties to implement certain new measures and subject the State to GREVIO's monitoring elements that have been the object of the other debates related to the Istanbul Convention.

⁷⁶ Idem.

⁷⁷ Idem.; Saul/Kinley/Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (2014), Article 10 ICESCR, 733 – 734.

⁷⁸ Saul/Kinley/Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (2014), Article 10 ICESCR, 734 – 735.

⁷⁹ CAT, General Comment 2: Implementation of Article 2 by States Parties, 24 January 2008, paragraph 21.

⁸⁰ Idem., paragraph 22.

⁸¹ Idem., paragraph 18.

⁸² See also the *Legal Opinion on Istanbul Convention Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No 210) – scope of obligations* <https://www.coe.int/en/web/dlapil/-/legal-opinion-on-istanbul-convention>. The Istanbul Convention is also mentioned in the *UN Progress of the Women 2020*, p. 185: “The most recent and advanced legally binding instrument is the Council of Europe Convention on preventing and combating VAW and domestic violence (the ‘Istanbul Convention’), which entered into force in 2014. It obliges States Parties to prevent and respond to VAW, prosecute those accused of perpetrating VAW and enact integrated policies to prevent and respond to VAW.” <https://www.unwomen.org/en/digital-library/progress-of-the-worlds-women>

V. Assessment

A. The Istanbul Convention: does Armenia need it?

46. It is sometimes argued that the Istanbul Convention is not really needed, for the following reasons:

- a. because the problem it addresses does not exist in the country at hand; or
- b. because the problem is already sufficiently covered by existing international legal instruments; or
- c. because there already is a satisfactory national (legislative) framework in the country at hand to combat all forms of violence against women.

47. It should be stressed from the very outset that none of these three arguments represents a constitutional hurdle. They do not relate to the *possibility* of ratifying the Istanbul Convention, but rather to the *desirability* of doing so.

48. The *first assertion* is primarily of a factual nature. The Istanbul Convention seeks to prevent, prosecute and eliminate all forms of violence against women, including domestic violence which affects women disproportionately, and to contribute to the elimination of all forms of discrimination against women and promote substantive equality between men and women.

49. Domestic violence is a widespread and extensive phenomenon. One of the most comprehensive studies was conducted in Europe by the EU Fundamental Rights Agency in 2014. It presented data on the extent, nature and consequences of violence against women in all 28 member States of the EU. The outcome of the study was shocking. One in three women (33%) had experienced physical and/or sexual violence since the age of 15. One in five women (18%) had experienced stalking and every second woman (55%) had been confronted with one or more forms of sexual harassment. While these numbers are alarming in themselves, they become all the more so when one takes into consideration that women generally do not report this to the police nor to a number of other services that could provide support, including victim-support organisations. While these statistics do not relate to Armenia, there are reasons to believe that the extent of the phenomenon in Armenia would not merely be a marginal one.⁸³ The OSCE has also released a new study, in March 2019 (which also does not cover Armenia) that confirms the most alarming findings on the wide scale of the phenomenon.⁸⁴

50. As the ECtHR noted in the Case of *Opuz v. Turkey*⁸⁵ “ [...] *t h e i s s u e o f d o m e s t i c v i o l e n c e [...] i s a g e n e r a l p r o b l e m w h i c h c o n c e r n s a l l m e m b e r S t a t e s s i n c e i t o f t e n t a k e s p l a c e w i t h i n p e r s o n a l r e l a t i o n s h i p s*”

51. The *second assertion* pertains to the alleged lack of new elements introduced by the Istanbul Convention, with the object being already adequately addressed in other international legal instruments. As seen above, it is indeed true that there are various human rights instruments, both at the universal and regional level, which have been ratified by Armenia and which deal with some of the issues covered by the Istanbul Convention. For instance, the prohibition of discrimination between women and men is enshrined in general human rights

⁸³ See for example the Global Database on Violence against Women (<http://evaw-global-database.unwomen.org/en/countries/asia/armenia>) and Human Rights Watch 2018 (<https://www.hrw.org/news/2018/01/12/armenia-little-protection-aid-domestic-violence-survivors>); 2016 CEDAW Concluding observations on the combined fifth and sixth periodic reports of Armenia (<https://www.refworld.org/docid/583863b34.html>); Gap analysis of Armenian criminal law in light of the standards established by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (<https://rm.coe.int/gap-analysis-armenian-law-eng/168075bac2>).

⁸⁴ <https://www.osce.org/secretariat/413237>

⁸⁵ ECtHR 9 June 2009, *Opuz v. Turkey*, Application No. 33401/02, paragraph 132.

instruments (ICCPR – Article 3, ECHR – Article 14 and Protocol 12) and elaborated upon by sectoral human rights treaties (CEDAW). These instruments also contain other guarantees important to the promotion of factual equality and the protection of human dignity. However, as already stated, the Istanbul Convention builds on these instruments and is focused specifically on violence against women and domestic violence, which are not explicitly addressed by the older instruments, and provides a specific monitoring mechanism. The Istanbul Convention therefore presents a specific added value as compared to the previously ratified international treaties in this area.

52. The *third assertion* is that the Istanbul Convention is not needed because there already is a satisfactory national (legislative) framework in Armenia to combat all forms of violence against women. In the Venice Commission's opinion, the presence of a sound internal infrastructure to safeguard human rights does not detract from the desirability of external scrutiny. Both are complementary, not contradictory elements. It is evident that the protection of human rights should be effected primarily within the domestic legal order. It is up to each individual State to assess, in the light of factual data,⁸⁶ what the best means of tackling a phenomenon are at the national level. This does not mean, however, that subsidiary external oversight by international instruments should be considered redundant: (a) ratification of an international instrument carries with it symbolic significance (the State authorities send a strong signal that they are serious about protecting fundamental rights of citizens/fighting a particular societal phenomenon), (b) the international level may provide a forum on which to share good practices and national authorities' approaches to tackling to discuss alleged deficiencies on the domestic level and to actively contribute to the definition of shared approaches for action at the international level, and (c) the international instrument may provide additional safeguards in comparison to the national framework.

53. In conclusion, as regards whether there is an actual need to ratify the Istanbul Convention, the Venice Commission stresses that this is not a matter of compatibility with the Constitution of Armenia, but a matter of desirability/opportunity. It is not the Venice Commission's task to provide an exhaustive analysis of the situation in Armenia and of the Armenian national law and practice. An assessment of the situation should be carried out by the Armenian authorities, taking into account expert reports such as the 2016 *CEDAW Concluding observations on the combined fifth and sixth periodic reports of Armenia*⁸⁷ and the 2017 Council of Europe Report on the *Gap analysis of Armenian criminal law in light of the standards established by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*⁸⁸.

B. The Istanbul Convention: does it contain problematic terms and concepts?

54. The Istanbul Convention uses certain terms and concepts that, according to some opinions, might clash with terms and concepts enshrined in national constitutions. This is primarily the case for *gender, gender identity, family, marriage and sexual orientation*.

55. The term *gender*, which is used in the Istanbul Convention, was already used by another previous treaty that deals with violence against women, the 1994 Convention of Belém do Pará, which defines violence against women in a similar manner to the Istanbul Convention.

56. The Istanbul Convention invokes this concept in various instances (with 25 references altogether). First, it includes a definition of the term *gender* (see above, Article 3(c)) and of

⁸⁶ See, for instance, the European Observatory on Femicide, launched by the University of Malta in 2018 (online at <https://www.um.edu.mt/research/femicide>).

⁸⁷ <https://www.refworld.org/docid/583863b34.html>

⁸⁸ <https://rm.coe.int/gap-analysis-armenian-law-eng/168075bac2>

gender-based violence (see above, Article 3(d)). Secondly, it invites States to take a gender-sensitive approach when dealing with violence against women and domestic violence.

57. It has been argued that, by introducing the concept of *gender*, the Istanbul Convention denies the existence of the natural, biological differences between women and men.⁸⁹ Article 12(1) of the Istanbul Convention would thus be the Trojan horse of the so-called gender ideology that seeks to completely change the culture of national States and force them to deny the biological differences between men and women. The Istanbul Convention would allegedly contravene national constitutions that recognise the existence of two sexes (men and women). This interpretation, however, is not warranted.

58. It might, to a large extent, stem from the confusion between sex and gender or, rather, from the fact that many languages do not use different words to denote these two different concepts. The two authentic languages of the Istanbul Convention, English and French, however, both make the difference between *sex/sexe* and *gender/genre*. Whereas the former term relates to a biological reality, the latter, in accordance with the definition quoted above, relates to the social expectations linked to this reality. This “social” ~~has~~ ^{means} intended to replace the biological definition. In addition, although the Istanbul Convention provides a definition of “gender”, it does not require States Parties to rather serves States Parties as a tool to interpret, better understand and therefore apply the provisions of the Istanbul Convention.

59. As the Explanatory Report to the Istanbul Convention sets out, “*the purpose of provision is to reach the hearts and minds of individuals who, through their behaviour, contribute to perpetuate the forms of violence*”⁹⁰ The provision is thus directed against those gender stereotypes and prejudices that stimulate and nurture violence against women, for instance the idea that women are inferior to men and, as such, have to be disciplined by means of beating. The choice of the measures necessary to bring about a change in such harmful stereotypes is left to individual States.

60. The Istanbul Convention does not suggest that all violence against women, let alone all violence as such, is gender-based. It suggests that the social expectations about what men and women are (or are not) expected to do, or refrain from doing, in their life are among the sources of violence against women and of domestic violence. Due to what the Preamble to the Istanbul Convention describes as “*historically unequal power relations have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women*” (paragraph 9), women are particularly vulnerable to violence, because violence against women, especially in the domestic setting, has traditionally been seen as socially acceptable. For instance, the laws permitting, or even requiring, husbands to “discipline” their wives, including were historically in force in most countries of the world and have only relatively recently been abolished.⁹¹ Similarly, so called *honour crimes*, when a member of a family kills, injures or otherwise harms a relative who is supposed to have brought shame or dishonour upon the family, are in most cases directed against women.⁹²

⁸⁹ See, for instance, Roxana Stanciu, Gender is not a social construct, even if the Istanbul Convention says so, *European Dignity Watch*, 8 June 2018.

⁹⁰ *Explanatory Report to the Istanbul Convention*, paragraph 85.

⁹¹ J. C. Campbell, Beating of wives: a cross-cultural perspective, *Victimology*, Vol. 10, 1985, pp. 174-85; David Peterson, Wife Beating: An American Tradition, *The Journal of Interdisciplinary History*, Vol. 23, 1992, pp. 97-118; Lorna McLean, Deserving Wives and Drunken Husbands: Wife Beating, Marital Conduct, and the Law in Ontario, 1850-1910, *Histoire sociale/Social History*, Vol. 35, 2002, pp. 59-81.

⁹² See Hossein, Sara, Welchman, Lynn (eds), *'Honour': Crimes, Paradigms and Violence Against Women*, Zed Books, 2005.

61. Greater tolerance of violence against women, especially in the domestic setting, reflected the fact that in most traditional societies, women were considered inferior to men. They were banished from many areas of public life and confined to their private circles. And they were to be shown their place by their male relatives or other male members of society. Over the past century, this strict gender division has been largely overcome in Council of Europe member States, the legal orders of which now consider men and women to be legally equal (e.g. Article 30 of the Constitution of Armenia). Yet, those committing violence against women, especially domestic violence, may still adhere to the gender patterns inherited from the past or benefit from the environment in which these patterns are not yet completely overcome.

62. In reflection of this situation, the Istanbul Convention recognises that, although violence against women is a multicausal phenomenon, it has a structural dimension, as it is often linked to the discrimination against women and their legally distinct and inferior position in society. It thus encourages States not to overlook this aspect and to take a gender-sensitive perspective. It also encourages States to address the structural causes of violence against women by taking *“ the necessary measures to promote changes in the women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men ”* (Article 2(1)).

63. The Constitution of Armenia does not refer to gender. However, it guarantees the equality of men and women (Article 30) and provides for *“ the promotion of factual women and men ”* (Article 36(4)) as one of the objectives of State policy. The elimination of violence against women, including gender-based violence, and the promotion of measures aimed at achieving this, including measures seeking to change harmful gender stereotypes, is fully in line with this constitutional regulation.

64. Another allegedly controversial concept is that of *gender identity*. According to the most commonly used descriptions of this concept, *the gender identity could be considered* as encompassing not only individuals such as transsexual persons who changed their sex, but also persons who choose other means to express their gender.⁹³ This includes transvestites, transgender and cross-dressers as well as other groups of persons who do not fit into the binary *male* or *female* categories, *of the third gender*.⁹⁴ However, in the Istanbul Convention, there is no definition of *gender identity*, which only appears once, in Article 4(3), which enshrines the non-discrimination clause, stating that *“ / t / h e i m p l e m e n t of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination ”*. The Explanatory Report to the Istanbul Convention merely makes it clear that *gender identity* in this context refers to the situation in which *“ the individuals identify with this is not in conformity with the sex assigned ”*⁹⁵

65. It is important to note that the Istanbul Convention does not require States Parties to take any measures to recognise these various categories of persons or to grant them any special legal status. It simply confirms that gender identity ranks – alongside sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, age, state of health, disability, marital status, migrant or refugee status, or other status – among the prohibited grounds of discrimination. This means that an individual may not be denied the protection against violence or the status of victim, and the rights stemming from this status, because of his or her gender identity. Non-

⁹³ European Union Agency for Fundamental Rights and Council of Europe, Handbook on European non-discriminatory law (2018), 171.

⁹⁴ Idem.; *Explanatory Report to Istanbul Convention* (2011), paragraph 53.

⁹⁵ Ibid.

binary, transgender, transsexual and other persons have the same right in this respect as anyone else (not more or fewer rights).

66. This regulation seems to be fully compatible with the Constitution of Armenia. It confirms that, as Article 28 of the Constitution states, "everyone shall be equal before the law", and, by virtue of Article 29 of the Constitution, " / a / n y d i s c r i m i n a t i o n b a s e d o n e t h n i c o r s o c i a l o r i g i n , g e n e t i c f e a t u r e s , l a n g u a g e , r e l i g i o n , w o r l d v i e w , p o l i t i c a l o r a n y o t h e r v i e w s , b e l o n g i n g t o a n a t i o n a l m i n o r i t y , p r o p e r t y s t a t u s , b i r t h , d i s a b i l i t y , a g e , o r o t h e r p e r s o n a l o r s o c i a l c i r c u m s t a n c e s " . Although gender identity is not explicitly mentioned among the prohibited grounds, the Constitutional Court of Armenia could reasonably consider it to fall under " o t h e r p e r s o n a l c i r c u m s t a n c e s " e h o w discrimination based on gender identity in the area of the protection against violence, and probably in virtually all other areas as well, could be considered unconstitutional. It is much easier to see how this could be the case in the opposite situation (if the protection against violence were not granted to certain individuals due to their gender identity).

67. One of the main concepts, with respect to the Istanbul Convention, that has given rise to controversies, is the concept of the *family*. The Istanbul Convention allegedly provides definitions of partner relationships that might be incompatible with the definitions contained in certain national constitutions.⁹⁶ The Istanbul Convention, however, does not contain any definition of the family nor of partner or same-sex relationships for that matter, nor does it promote any particular form of such relationships (see under C, below).

68. The notion of family in Armenia is dealt with by Article 16 of the Constitution, which sees the protection of the family as being a fundamental element of the constitutional order: "*Family — being the natural and basic unit of the society, the basis for the preservation and reproduction of the population, as well as motherhood and childhood — shall be under special protection and care of the State .*"

69. The notion of family is closely linked to the notion of *marriage*. In Armenia, the freedom to marry is set out in Article 35 of its Constitution, as follows:

- " 1 . A w o m a n a n d a m a n h a v i n g a t t a i n e d t h e m a r r i a g e a b i l i t y s h a l l f r e e l y c h o o s e t o m a r r y a n d f o r m a f a m i l y w i t h f r e e e x p r e s s i o n o f t h e i r w i l l . T h e m a r r i a g e a b l e a g e a n d t h e p r o c e d u r e f o r m a r r i a g e a n d d i v o r c e s h a l l b e p r e s c r i b e d b y l a w .
- 2 . A w o m a n a n d a m a n a r e e n t i t l e d t o e q u a l r i g h t s a s t o m a r r i a g e , d u r i n g m a r r i a g e a n d a t i t s d i s s o l u t i o n .
- 3 . F r e e d o m t o m a r r y m a y b e r e s t r i c t e d o n l y b y l a w w i t h t h e a i m o f p r o t e c t i n g h e a l t h a n d m o r a l i t y . "

70 . It follows that Article 35 of the Constitution of Armenia stipulates that marriage constitutes a union between a man and a woman, who have attained the marriageable age. They shall have the right to form a family which, according to Article 16 of the Constitution of Armenia, " s h a l l b e u n d e r s p e c i a l p r o t e c t i o n a n d c a r e o f t h e S t a t e " . This means that the current Constitution of Armenia does not allow same-sex marriage.

71. The Istanbul Convention only mentions marriage in the context of forced marriage (Article 37). It does not create an obligation for States Parties to legalise same-sex marriage (see under C, below) or to adopt any other measure with respect to LGBT persons (apart from not excluding them from the protection granted by the Convention to victims of violence against

⁹⁶ This was one of the arguments used to stop the ratification process of the Istanbul Convention in Slovakia, see Istanbulský dohovor rozpútal v parlamente diskusiu, poslanci sa v názoroch rozchádzajú, *WebNoviny*, 28. marca 2019.

⁹⁷ <https://www.president.am/en/constitution-2015/>

women and domestic violence). The Istanbul Convention therefore in no way contradicts national constitutions that define marriage as a union between a woman and a man – which is the case of Armenia, as seen above.

72. Another concept that has given rise to controversies is the concept of *sexual orientation*. This term can be seen as referring to individuals, who are members of a sexual minority, such as lesbians, gays, bisexuals and transsexuals (LGBT) as well as individuals who consider themselves to be heterosexual.⁹⁸

73. It must be made clear that, if a treaty (or any other legal text for that matter) does not oppose the existence under domestic law in some States of a certain legal entitlement or claim – that does not mean *per se* that the treaty imposes a positive obligation on States, which do not acknowledge the existence of that legal entitlement, to actively introduce such a notion in their own domestic legal order. In that regard the judgment of the ECtHR in the Case of *Pretty v. the United Kingdom*⁹⁹ may serve as an example. The applicant was paralysed and in the advanced stages of a motor neurone disease. She claimed that the blanket prohibition on assisted suicide in English law violated her right to life. The Court held that it was “ *n o t persuaded that the right to life guaranteed by Article 2 [could] be interpreted as involving a negative that Article 2 [could not], without a distinction conferring the diametrically opposite right, to whether at the hands of a third person or with the assistance of a public authority, [could] be derived from Article 2 of the Convention*” . The ECtHR that domestic legal systems which acknowledge assisted suicide would be contrary to the requirements of the Convention. It ruled that one could not use the ECHR to impose a positive obligation on States which have not acknowledged the concept of assisted suicide to introduce such a notion into their legal systems.

74. A treaty text is, by definition, intended to be applicable to various, very diverse, legal systems. During the negotiations of such a treaty, the drafters will therefore often choose such a formulation to allow it to be applied in different legal systems. For example, the Istanbul Convention applies equally to countries that legally acknowledge and to countries that do not acknowledge same-sex marriage and/or the adoption of a child by homosexuals. The Istanbul Convention does not oppose such legal systems, but that does not mean that the Istanbul Convention would call upon States Parties, which have not accepted such legal notions, to introduce them into their own domestic legal order.

C. The Istanbul Convention: does it require specific legislative changes?

75. In addition to containing problematic terms and concepts, it is claimed that the Istanbul Convention requires certain legislative changes that could contravene national constitutions. The main changes foreseen in this context relate to *same-sex marriage, education and reporting by professionals*.

76. On the issue of *same-sex marriage*, discussed under B above, it should be added that it has been repeatedly argued that the ratification of the Istanbul Convention would result in the legalisation of same-sex marriage. This argument played a role in the rejection of the government’s proposal to ratify and it has been quite prominent in the public debate in other countries as well.¹⁰⁰ It is unclear on which legal provision it is based on, as the Istanbul Convention does not refer to homosexuals at all, sexual

⁹⁸ O’Flaherty, *Sexual Orientation and Gender Identity*, in: Moeckli / Shah / Sivakumaran, *International Human Rights Law* (2018), 298; European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discriminatory law* (2018), 176.

⁹⁹ ECtHR, Application No. 2346/02, 29 April 2002.

¹⁰⁰ Jan Čulík, Top official of the Catholic Church in Czechia opposes human rights, *Britské listy*, 6 October 2018.

orientation is only referred to in the non-discrimination clause (Article 4(3)) and marriage is invoked in connection to forced marriage (Article 37).

77. As stated under B above, there is no obligation for States Parties to the Istanbul Convention to legalise same-sex marriage, hence there is no contradiction with the Constitution of Armenia.

78. In this respect, the Venice Commission adds that the question of same-sex marriage has been repeatedly dealt with by the European Court of Human Rights. The Court has expressed the view that “ *a l t h o u g h t h e i n s t i t u t i o n o f m a r r i a g e h a s u n d e r g o n e m a j o r s o c i a l c h a n g e s s i n c e t h e a d o p t i o n o f t h e C o n v e n t i o n , / .. / t h e s e x e i s n o t m a r r i e d .*”¹⁰⁴ This question remains “ *s u b j e c t t o t h e n a t i o n a l*”¹⁰² laws of Armenia. The Istanbul Convention does not alter this situation.

79. The Venice Commission also draws attention to the decision of 22 February 2002 regarding the ratification of the ECHR:

“ *1. T h e o b l i g a t i o n s d e c l a r e d i n t h e C o n v e n t i o n o n F u n d a m e n t a l F r e e d o m s s i g n e d o n 4th N o v e m b e r 1 9 5 0 a t R o m e , i n t h e P r o t o c o l t o t h e C o n v e n t i o n f o r t h e P r o t e c t i o n o f H u m a n R i g h t s a n d F u n d a m e n t a l F r e e d o m s s i g n e d o n 2 0th M a r c h 1 9 5 2 a t P a r i s , i n P r o t o c o l N o . 4 “ O n c e r e a d y i n c l u d e d i n t h e c o n v e n t i o n a n d i n t h e f i r s t P r o t o c o l t h e r e t o , a s a m e n d e d P r o t o c o l N o . 1 1 ” , s i g n e d o n 1 6th S e p t e m b e r 1 9 6 3 a t S t r a s b o u r g , i n P r o t o c o l N o . 7 t o t h e C o n v e n t i o n f o r t h e P r o t e c t i o n o f H u m a n R i g h t s a n d F u n d a m e n t a l F r e e d o m s , s i g n e d o n 2 2nd N o v e m b e r 1 9 8 4 a r e i n c o n f o r m i t y w i t h t h e C o n s t i t u t i o n o f t h e R e p u b l i c o f A r m e n i a .*

*2. A c c o r d i n g t o P a r a g r a p h 2 o f A r t i c l e 1 0 2 t h i s D e c i s i o n s h a l l b e f i n a l , i s n o t s u b j e c t t o r e v i e w , a n d s h a l l e n t e r*¹⁰³ [emphasis added] *e f f e c t u p o n p u b l i c*

This still holds true today.

80. With respect to education in Armenia, “ *t h e r i g h t a n d o b l i g a t i o n / o f / .. / e d u c a t i o n*”¹⁰⁴ is enshrined in Article 36(1) of the Constitution¹⁰⁴ and the right to education is granted under Article 38 of the Constitution¹⁰⁵. These rights and obligations of Armenian parents pertaining to the education of their children are clarified and enhanced by a variety of international instruments mandating that parents have a right to choose a religious and moral education for their children in accordance with the dictates of their consciences.¹⁰⁶

¹⁰¹ ECtHR, *Schalk and Kopf v. Austria*, Application No. 30141/04, 24 June 2010, paragraph 58.

¹⁰² ECtHR, *Chapin et Charpentier v. France*, Application No. 40183/07, 9 June 2016, paragraph 36.

¹⁰³ Decision CCD – 350 of the Constitutional Court of the Republic of Armenia of 22 February 2002, in the case on deciding the question of conformity of obligations stated in the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4 November 1950 in Rome, in the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 20 March 1952 at Paris, in Protocol No. 4 “ On c e r e a d y i n c l u d e d i n t h e c o n v e n t i o n a n d i n t h e f i r s t P r o t o c o l t h e r e t o , a s a m e n d e d P r o t o c o l N o . 1 1 ” s i g n e d o n 1 6 S e p t e m b e r 1 9 6 3 i n S t r a s b o u r g , a n d i n P r o t o c o l N o . 7 t o t h e C o n v e n t i o n f o r t h e P r o t e c t i o n o f H u m a n R i g h t s a n d F u n d a m e n t a l F r e e d o m s , s i g n e d o n 2 2 N o v e m b e r 1 9 8 4 w i t h t h e C o n s t i t u t i o n o f t h e R e p u b l i c o f A r m e n i a .

¹⁰⁴ “ *A r t i c l e 3 6 . R i g h t s a n d O b l i g a t i o n s o f P a r e n t s*
1. P a r e n t s s h a l l h a v e t h e r i g h t a n d o b l i g a t i o n t o t a k e c a r e o f t h e r e a r i n g , e d u c a t i o n , h e a l t h , a n d c o m p r e h e n s i v e a n d h a r m o n i o u s d e v e l o p m e n t o f t h e i r c h i l d r e n .”

¹⁰⁵ “ *A r t i c l e 3 8 . T h e R i g h t t o E d u c a t i o n*
1. E v e r y o n e s h a l l h a v e t h e r i g h t t o e d u c a t i o n . T h e p r o g r a m s a n d d u r a t i o n o f c o m p u l s o r y e d u c a t i o n s h a l l b e s t i p u l a t e d b y l a w . S e c o n d a r y e d u c a t i o n i n s t a t e e d u c a t i o n a l i n s t i t u t i o n s i s f r e e o f c h a r g e .
2. E v e r y o n e s h a l l h a v e t h e r i g h t t o r e c e i v e , i n t h e c a s e s a n d m a n n e r s t i p u l a t e d b y l a w , f r e e e d u c a t i o n i n s t a t e h i g h e r a n d o t h e r v o c a t i o n a l e d u c a t i o n i n s t i t u t i o n s o n t h e b a s i s o f c o m p e t i t i o n .
3. T h e i n s t i t u t i o n s o f h i g h e r e d u c a t i o n s h a l l , w i t h i n t h e f r a m e w o r k s t i p u l a t e d b y l a w , h a v e t h e r i g h t t o s e l f - g o v e r n a n c e , i n c l u d i n g t o a c a d e m i c a n d r e s e a r c h f r e e d o m .”

¹⁰⁶ Kelly, James P., “ Human Rights Education” (May 2005), and Pa

81. Education is dealt with by Article 14 of the Istanbul Convention, which stipulates that “Parties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and (paragraph 1). This provision allegedly gave e d u c a t i o n a rise to fears regarding the right of parents to educate their children according to their own preferences as well as to the obligation of the State to include courses on gender identity or sexual orientation to the school curricula.

82. It must be underlined that Article 14 of the Istanbul Convention does not interfere with the right of parents to educate their children according to their own preferences. This matter, in fact, remains outside the scope of the Istanbul Convention. Article 14 of this Convention merely requires States Parties, when deemed appropriate, to include teaching materials on issues mentioned in the provision in school curricula. It does so in reflection of the fact that, as noted, violence against women and domestic violence often stem from harmful gender stereotypes and prejudices that are a p a r t o f p e o p l e ’ s a t t i t u d e s , c o n v i c t i o n s a n d b e h a v i o u r a l p a t t e r n s “ a r e s h a p e d v e r y e a r l y o n

83. In its Law on Education,¹⁰⁸ Armenia declares that “ t h e h u m a n i t a r i a n n a t u r e a n d p r i o r i t y o f u n i v e r s a l v a l u e s , h u m a n l i f e a n d h e a l t h , f r e e a n d c o m p r e h e n s i v e d e v e l o p m e n t o f a n i n d i v i d u a l , f o s t e r i n g o f c i v i l c o n s c i o u s n e s s , n a t i o n a l d i g n i t y , p a t r i o t i s m , l e g a l i t y a n d e n v i r o n m e n t a l (A r t i c l e 5 (1)) a s o n e o f t h e o n a i r ’ p r i n c i p l e s o f s t a t e p o l i c y i n t h e f i e l d o f e d u c a t i o n . T h i s i n d i c a t e s t h a t , w h e r e a s e d u c a t i o n t h e p r i n c i p l e o f s u b j e c t d e m o c r a c y ” (A r t i c l e 5 (3) o f t h e L a w o n t h e v a l u e s o n w h i c h i t r e l i e s) , i n t h e c o n s t i t u t i o n a l o r d e r o f t h e c o u n t r y r e l i e s . H u m a n d i g n i t y , r e s p e c t f o r h u m a n r i g h t s a n d f u n d a m e n t a l f r e e d o m s a n d e q u a l i t y o f a l l c i t i z e n s , i n c l u d i n g e q u a l i t y b e t w e e n m e n a n d w o m e n , a r e a m o n g s u c h v a l u e s (A r t i c l e s 3 , 2 8 a n d 3 0 o f t h e C o n s t i t u t i o n o f A r m e n i a) .

84. Article 14 of the Istanbul Convention does not set out any specific manner in which education related to the matters covered by the Istanbul Convention should be implemented. In fact, the expression “ w h e r e a p p r o p r i a t e ” i n t h e p r o v i s i o n i n d i c a t e s t h a t t h e I s t a n b u l C o n v e n t i o n d e f e r s t h i s t o t h e S t a t e s P a r t i e s n o t o n l y a s t o t h e m a n n e r o f e d u c a t i o n , b u t a l s o a s t o i t s e x t e n t . I t i s u p t o S t a t e s P a r t i e s “ t o d e c i d e w h i c h t y p e o f s c h o o l i n g a n d w h e t h e r t h e y c o n s i d e r s u c h t e a c h i n g m a t e r i a l s a p p r o p r i a t e a n d , i n f a c t , w h e t h e r t h e y d e e m i t a p p r o p r i a t e t o h a v e s u c h t e a c h i n g m a t e r i a l s a t a l l .

85. The Venice Commission concludes that, as the values promoted by the Istanbul Convention are in line with the constitutional values of Armenia and that States Parties have a large discretion in deciding how (to what extent and in which manner) they will educate their population about the matters covered by the Istanbul Convention, there seems to be no contradiction between Article 14 of the Istanbul Convention and the Constitution of Armenia.

86. Reporting by professionals is covered by Article 28 of the Istanbul Convention, which stipulates that “ P a r t i e s s h a l l t a k e t h e n e c e s s a r y s t e p s t o e n s u r e t h a t r u l e s i m p o s e d b y i n t e r n a l l a w o n c e r t a i n p r o f e s s i o n a l s d o n o t c o n s t i t u t e a n o b s t a c l e t o t h e p o s s i b i l i t y , u n d e r a p p r o p r i a t e c o n d i t i o n s , o f t h e i r r e p o r t i n g t o t h e c o m p e t e n t o r g a n i s a t i o n s o r a u t h o r i t i e s i f t h e y h a v e r e a s o n a b l e g r o u n d s t o b e l i e v e t h a t a s e r i o u s a c t o f v i o l e n c e c o v e r e d b y t h e s c o p e o f t h i s C o n v e n t i o n , h a s b e e n c o m m i t t e d a n d f u r t h e r s e r i o u s a c t s o f v i o l e n c e a r e t o b e e x p e c t e d . I n s o m e c o u n t r i e s , t h e p r o v i s i o n h a s s t i r r e d f e a r s a m o n g c e r t a i n p r o f e s s i o n a l

¹⁰⁷ Explanatory Report to Istanbul Convention, paragraph 94.

¹⁰⁸ Law of the Republic of Armenia on Education, adopted by the National Assembly on 14 April 1999.

¹⁰⁹ Explanatory Report to the Istanbul Convention, paragraph 95.

groups, notably bar associations,¹¹⁰ that it could result in the abolition of professional confidentiality and the introduction into national law of the obligation to report. In Armenia, the confidentiality of communication, in the general sense, is granted by Article 33 of the Constitution and the rules related to specific professions are contained in ordinary legislation and professional codes.

87. This interpretation, however, is not warranted. The main purpose of Article 28 of the Istanbul Convention is not to incite States to do away with professional confidentiality, but to incite them to open the way for certain professionals, primarily in the health sector, to report on suspected cases of serious acts of violence against women or domestic violence, without running the risk of being sanctioned for breaching confidentiality. In a similar way to Article 14, Article 28 of the Istanbul Convention leaves the discretion to States Parties to decide which measures to take and under which “ *a p p r o p r i d a i t t e m a k e* reporting by professionals possible. It is important to add that, as the Explanatory Report makes clear, the Istanbul Convention does not foresee mandatory reporting;¹¹¹ “ *l t o n l y g r a n t s t h e s e possibility of doing so without any r i s k o f b r e a*”¹¹² The Istanbul Convention *e n c e .* ” therefore does not require States Parties to legislate in a manner that might be seen as incompatible with the constitutional provisions on confidentiality of communication.

D. The Istanbul Convention: does it establish a body with excessive competences?

88. The Istanbul Convention requests States Parties to take measures to implement policies aimed at preventing and combating all forms of violence against women as well as domestic violence. It also incites States Parties to cooperate in this area with one another. To monitor the state of implementation, it establishes a new international body, the Group of experts on action against violence against women and domestic violence (GREVIO). It is an expert body composed of a minimum of 10-15 members, elected by the Committee of Parties. It shall consider national reports (questionnaire) submitted by States Parties and issue reports and conclusions. It may also adopt general recommendations. Under Article 68(9) and 68(14), GREVIO may organise country visits, during which its members, as well as other members of the delegation, enjoy – by virtue of Article 66(7) – certain privileges and immunities. These privileges and immunities are listed in the Appendix to the Istanbul Convention and include:

- immunity from personal arrest or detention and from seizure of their personal baggage, and immunity from legal process of every kind in respect of words spoken or written and all acts performed by them in their official capacity;
- exemption from any restrictions on their freedom of movement on exit from and return to their country of residence, and entry into and exit from the country in which they exercise their functions, and from alien registration in the country which they are visiting or through which they are passing in the exercise of their functions;
- the same facilities in the matter of customs and exchange control as those accorded to representatives of foreign governments on temporary official duty;
- inviolability of all documents relating to the evaluation of the implementation of the Convention.

89. The privileges and immunities are granted “ *i n o r d g u a r d t h e i n d e p e n d e n t e x e r c i s e o f t h e i r f u n c t i o n s i n t h e i n t e r e s t s* (paragraph 66) GREVIO a n d The immunity from legal process in respect of words spoken or written and all acts done by

¹¹⁰ I s t a n b u l s k á ú m l u v a v a d í B o j j é n s e í p k v o i l , o m a k h é u n l 2 8 O k t o b r á t o ú s r n i , 2018.

¹¹¹ Some States introduce mandatory reporting in their legal order, which is the case for Armenia. Article 335 of Armenia’s Criminal Code criminalises particularly serious crime, to report subjecting it to a sanction of up to two years’ imprisonment.

¹¹² Explanatory Report to the Istanbul Convention, paragraph 147.

them in discharging their duties shall continue to be accorded after the persons concerned are no longer engaged in the discharge of their duties.

90. The competences of GREVIO, and especially the privileges and immunities granted to its members, have at times been criticised as a *de facto* surrender of national sovereignty to an external non-elected body.¹¹³ Yet, there are no grounds for such an assessment. GREVIO does not have any unusual competences for an international body. In fact, its competences are rather limited, as they do not include, for instance, the right to receive inter-state or individual petition. Moreover, GREVIO may not issue binding conclusions and the recommendations based on its reports are to be issued by the Committee of the Parties, not by GREVIO itself. The presence and extent of the privileges and immunities is also not unprecedented. The Appendix builds on the *General Agreement on Privileges and Immunities of the Council of Europe*, in force since 1952, taking over some of its provisions to make them directly applicable to States, which are not members of the Council of Europe (and States Parties to the General Agreement), but may decide to accede to the Istanbul Convention. There is thus no *de facto*, let alone *de jure*, surrender of national sovereignty to an external body involved in the ratification of the Istanbul Convention.

E. The Istanbul Convention: does it introduce gender-based asylum?

91. Chapter VII of the Istanbul Convention deals with migration and asylum and contains a number of positive obligations for States Parties, notably in its Article 60, which states that:

“ *Article 60 – Gender-based asylum claims*

1. *Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection.*
2. *Parties shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.*
3. *Parties shall take the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international*

92. Paragraph 310 of the Explanatory Report makes it clear that Article 60 of the Istanbul Convention intends to codify developments in (*inter alia*) the case law of the ECtHR acknowledging that some forms of violence against women can call for protection. A notable example in the case law of the ECtHR is the case of *N. v. Sweden*¹¹⁴ in which the Court noted that, according to reports, around 80% of Afghan women were victims of domestic violence, acts which the authorities regarded as legitimate and therefore did not prosecute. Paragraph 55 of the *N. v. Sweden* judgment notes that:

“ 55. The Court firstly observes ~~treatment in women~~ *in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system. The UNHCR thus observed that Afghan women, who have adopted a less culturally conservative lifestyle, such as those returning*

¹¹³ Tomáš Zdechovský, *Proč Istanbulskou úmluvu kritizují právníci*, *iDnes.cz*, 19 October 2018.

¹¹⁴ ECtHR, *N. v. Sweden*, Application No. 23505/09, 20 July 2010. See also among many other relevant precedents ECtHR, *R.H. v. Sweden*, Application No. 4601/14, 10 September 2015, paragraph 70 as to the difficult situation of women in Somalia.

from exile in Iran or Europe, continue to be perceived as transgressing entrenched social and religious norms and may, as a result, be subjected to domestic violence and other forms of punishment ranging from isolation and stigmatisation to honour crimes for those accused of bringing shame to their families, communities or tribes. Actual or perceived transgressions of the social behavioural code include not only social behaviour in the context of a family or a community, but also sexual orientation, the pursuit of a professional career, and mere disagreements as

93. In the same vein, the Istanbul Convention calls upon States Parties to recognise that violence such as rape, female genital mutilation, dowry related violence, serious domestic violence, or trafficking, may amount to persecution or serious harm, and lead to the granting of a residence status. Ratification of the Istanbul Convention does not imply that all gender-based violence is automatically considered as “serious harm” or *t-sensitive* adopt i approach means that all women will automatically be entitled to refugee status. It merely acknowledges that women may face certain types of persecution that specifically affect them. Paragraph 313 of the Explanatory Report explicitly stipulates that St extend the interpretation to individuals who are gay, lesbian, bisexual or transgender, who may also face particular forms of gender-related persecution and violence. However, “ (...) it is n the intention of this paragraph [paragraph 311] to overrule the provisions of the 1951 Convention [Geneva Convention Relating to the Status of Refugees] in particular with regard to the conditions of granting refugee status imposed by Article 1 Tbe/Istanbul a t Conv Convention therefore does not amend the 1951 Geneva Convention Relating to the Status of Refugees.

94. The obligations under the Istanbul Convention, therefore, do not go any further than those stemming from the ECHR and the case law of the ECtHR. Fears that the ratification of the Istanbul Convention would introduce new commitments in the field of asylum law do not seem warranted.

95. Hence, the introduction of a gender-sensitive understanding of violence against migrant and asylum-seeking women and girls seems to be in line with the Constitution of Armenia – creating two sub-categories of particularly vulnerable people to gender-based and domestic violence, needing protection from the State, which is inspired by the protection of basic human rights, notably the right to life, the right to health and the right to human dignity and complies with Article 30 and Article 86(4) of the Constitution of Armenia.

VI. Conclusion

96. The Venice Commission reiterates that the ratification of a treaty is a sovereign act of the State, which means that the State is entirely free in its choice of whether or not to ratify a treaty and, as a result, be bound by its obligations. It is also a sovereign act of the State to choose the type of relationship it would like to establish between its domestic and the international legal order i.e. what status a treaty will have within the domestic legal order, once it is ratified.

97. The assessment of the compatibility of a treaty, i.e. the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence – the Istanbul Convention, with the Constitution is, according to the Constitution of Armenia, the task of the Constitutional Court of Armenia, upon request by the Government of Armenia, before the treaty is ratified. Hence, the views expressed by the Venice Commission may serve this Court in its task by providing an external legal analysis of the Istanbul Convention. It may also contribute to public debate on the ratification of this Convention.

98. The conclusions reached on the main issues that have arisen in the context of this opinion are as follows:

A. With respect to the allegation that the Istanbul Convention is not needed:

99. There are three assertions to take into consideration. The *first assertion* is of a factual nature. As domestic violence is a widespread and extensive phenomenon in Europe and affects all member States of the Council of Europe, including Armenia, ratifying this Convention would greatly benefit victims of such phenomena.

100. The *second assertion* relates to the alleged lack of new elements introduced by the Istanbul Convention, with the object being already adequately addressed in other international legal instruments. There are various human rights instruments, both at the universal and regional level, which have been ratified by Armenia and which deal with some of the issues covered by the Istanbul Convention. However, the Istanbul Convention builds on these instruments and is focused specifically on violence against women and domestic violence, which are not explicitly addressed by the older instruments, by introducing new provisions and adopting a comprehensive approach to the phenomenon, and provides a specific monitoring mechanism. The Istanbul Convention therefore presents a specific added value as compared to the previously ratified international treaties in this area.

101. The *third assertion* is that the Istanbul Convention is not needed because there already is a satisfactory national (legislative) framework in Armenia to combat all forms of violence against women. While it is up to each individual State to assess – in the light notably of factual data – what are the best means to tackle the phenomena covered by the Istanbul Convention at the national level, the presence of a sound internal infrastructure to safeguard human rights does not detract from the desirability and value of external scrutiny. Both are complementary, not contradictory elements. The subsidiary external oversight by international instruments brings with it the following positive aspects: (a) ratification of an international instrument has a symbolic significance (the State authorities send a strong signal that they are serious about protecting fundamental rights of citizens/fighting a particular societal phenomenon), (b) the international level provides a forum to discuss alleged deficiencies on the domestic level, share good practices and national authorities' approaches to domestic violence, and (c) the international instrument may provide additional safeguards in comparison to the national framework.

B. With respect to the allegation that the Istanbul Convention contains certain terms and concepts that clash with the terms and concepts enshrined in the national constitution of the country under consideration

102. This assertion primarily concerns the terms of *gender, gender identity, family, marriage and sexual orientation*.

103. *Gender*. The Constitution of Armenia does not refer to gender, but guarantees the equality of men and women (Article 30) and provides for “*the promotion of fact between women* (Article 86(4)) as one of the objectives of State policy. The elimination of violence against women, including gender-based violence, and the promotion of measures aimed at achieving this, including measures seeking to change harmful gender stereotypes, is fully in line with this constitutional regulation.

104. *Gender identity*. The Istanbul Convention does not require States Parties to take any measures to recognise these various categories of persons or to grant them any special legal status, but simply confirms that gender identity ranks among the prohibited grounds of discrimination. This regulation seems to be fully compatible with Article 28 (general equality before the law) and Article 29 (prohibition of discrimination) of the Constitution of Armenia.

105. *Family*: It is sometimes alleged that the Istanbul Convention provides definitions of partner relationships that might be incompatible with the definitions contained in certain national

constitutions, notably the definition of the family. The Istanbul Convention, however, does not contain any definition of the family nor of partner nor same-sex relationships, nor does it promote any particular form of such relationships. The Istanbul Convention therefore does not collide with national constitutions' definition

106. *Marriage*: The Istanbul Convention only mentions marriage in the context of forced marriage (Article 37) and therefore does not contradict national constitutions that define marriage as a union between a woman and a man – which is the case of Armenia.

107. *Sexual orientation*: This term refers to individuals, who are members of a sexual minority, such as lesbians, gays, bisexuals and transsexuals (LGBT) as well as individuals who consider themselves to be heterosexual. The Istanbul Convention only refers to sexual orientation in the non-discrimination clause (Article 4(3)). It does not oppose the existence under domestic law in some States to legal entitlement or claim to this category – this does not *per se* mean that the Convention imposes a positive obligation on States, which do not acknowledge the existence of that legal entitlement, to actively introduce such a notion in their own domestic legal order.

C. With respect to the allegation that the Istanbul Convention would result in legislative changes that would contravene the national constitution of the country under consideration

108. The main changes foreseen in this context relate to *same-sex marriage, education and reporting by professionals*.

109. *Same-sex marriage*: The Istanbul Convention does not refer to homosexuals at all nor does it refer to marriage, except in connection with forced marriage (Article 37). Therefore there is no obligation for States Parties to the Istanbul Convention to legalise same-sex marriage. Hence, there is no contradiction with the Constitution of Armenia.

110. *Education*: The Istanbul Convention does not interfere with the right of parents to educate their children according to their own preferences. This matter, in fact, remains outside the scope of the Istanbul Convention, which merely encourages States to include teaching materials on issues mentioned in the provision in school curricula. In this respect, the Istanbul Convention gives States Parties a large discretion in deciding how (to what extent and in which manner) they will educate their population about the matters covered by the Istanbul Convention. Therefore, there seems to be no contradiction between Article 14 of the Istanbul Convention and the Constitution of Armenia.

111. *Reporting by professionals*: The Istanbul Convention does not get rid of professional confidentiality, but urges States Parties to facilitate certain professionals, primarily in the health sector, to report suspected cases of serious acts of violence against women or domestic violence, without running the risk of being sanctioned for breaching confidentiality. The Istanbul Convention leaves States Parties the discretion to decide which measures to take and under which “ *a p p r o p r i a t e* to make reporting by professionals possible and does not foresee mandatory reporting. The Istanbul Convention therefore does not require States Parties to legislate in a manner that might be seen as incompatible with the constitutional provisions on confidentiality of communication.

D. With respect to the allegation that the Istanbul Convention introduces a body with excessive competences

112. The Istanbul Convention establishes a new international body, the Group of experts on action against violence against women and domestic violence (GREVIO) to monitor the state of implementation.

113. GREVIO does not have any unusual competences for an international body and its competences are rather limited. It does not, for instance, have the right to receive inter-state or individual petition, it may not issue binding conclusions and the recommendations based on its reports are to be issued by the Committee of the Parties, not by GREVIO itself. There is thus no *de facto*, let alone *de jure*, surrender of national sovereignty to an external body involved in the ratification of the Istanbul Convention.

E. With respect to the allegation that the Istanbul Convention introduces new commitments in the field of asylum law

114. With respect to asylum law, the ratification of the Istanbul Convention does not imply that all gender-based violence is automatically considered gender-sensitive approach means that all women will automatically be entitled to refugee status. It merely acknowledges that women may face certain types of persecution that specifically affect them.

115. The introduction of a gender-sensitive understanding of violence against migrant and asylum-seeking women and girls seems to be in line with the Constitution of Armenia – creating two sub-categories of particularly vulnerable people to gender-based and domestic violence, needing protection from the State, which is inspired by the protection of basic human rights, notably the right to life, the right to health and the right to human dignity and complies with Article 30 and Article 86(4) of the Constitution of Armenia.

116. In conclusion, while it belongs to the Constitutional Court of Armenia to rule on the compatibility of the Istanbul Convention with the Constitution of Armenia, the Venice Commission is of the view that there are no provisions in that Convention that could be said to “contradict” the Constitution. On the contrary, the main obligation of the Istanbul Convention, namely to prevent and combat any form of violence against women and domestic violence, already follows from the Constitution and from other human rights treaties to which Armenia is a State Party.