

1 The Istanbul Convention in the context of feminist claims

Lorena Sosa

1 Introduction

The normative impact of social movements is particularly visible in the field of violence against women (VAW), including in the human rights instruments addressing this violence. Norms address violence according to the perceptions, considerations and reactions that seem prevalent in certain sectors of society at a given time.¹ Moreover, human rights treaties must take account of developing social conditions and perception of rights.² The adaptation of human rights norms to social claims regarding VAW can contribute to these norms' effectiveness and permanency.

Women's activism has a prominent part in the process of elaboration, implementation and monitoring of norms. It has contributed to defining the scope and meaning of VAW and to triggering and promoting the development of international norms, standards and monitoring mechanisms.³ It contributes to monitoring the implementation of and compliance with norms by pointing out the gaps and flaws in policies.⁴ That said, compliance with norms is most often assessed in relation to the presence of institutional factors, such as abolishing conflicting laws and passing legislation, allocating budget, creating dedicated agencies and including women in decision-making positions. Strategies for the implementation of norms may nevertheless fail to contribute to social transformation "if they lose their relation to women's movements and claims".⁵

1 Mary R Jackman, 'Violence in Social Life' (2002) 28 *Annual Review of Sociology* 387.

2 A Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 154.

3 United Nations Secretary General (2006) p. 13.

4 Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999); Alison Brysk, 'The Persistent Power of Human Rights' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds) (Cambridge University Press 2013); Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009).

5 Dolores Morondo Taramundi, 'Gender Machineries vs Feminist Movements? Collective Political Subjectivity in the Time of Passive Revolution' (2016) *Gender and Education* 1, 16.

The connection between social movements and the effectiveness of norms prompts the question to what extent contemporary feminist claims are addressed by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) and considered by its monitoring mechanism. By “feminist claims” I refer to challenges to systematic gender discrimination and the pursuit of gender equality, expressed through collective actions. These actions can range from spontaneous to organised forms of participation, including general subversiveness in the arts or academia.

Women have mobilised, raised their claims and organised their actions, before and after the adoption of the Convention. In spite of important achievements, recent times have witnessed a “redoing” of feminism and its “resurgence”, with the participation of younger generations,⁶ confirmed by the many organised campaigns against them.⁷ The “revival” of feminism is in part due to the use of social media and the Internet for networking, coordinating actions and disseminating strategies.⁸ A “spontaneous feminism” is emerging, incorporating women who “simply position themselves as the subject of rights and with rights equal to men”.⁹ This feminism is characterised by having “incidental” representatives, who emerge from women’s participation in such different acts of resistance.¹⁰ These “new” forms of feminist participation result in a diverse array of collective actions often originating from submerged, latent, and temporary networks, rather than centralised organisational forms.¹¹

That said, there is great diversity within and among “feminisms” and only the most visible public protests, often by elite groups of women, are noticed, thus missing the activism of marginalised groups.¹² Nonetheless, there is a continuity between generations according to which “new” or emerging feminist elaborations are based on previously elaborated notions. In addition, despite the contemporary transnational character of feminist movements,¹³ their content, structure and demands are heavily inflected by their specific contexts.

- 6 Hester Baer, ‘Redoing Feminism: Digital Activism, Body Politics, and Neoliberalism’ (2016) 16 *Feminist Media Studies* 17, 17; 34; Jonathan Dean and Kristin Aune, ‘Feminism Resurgent? Mapping Contemporary Feminist Activisms in Europe’ (2015) 14 *Social Movement Studies* 375.
- 7 Mieke Verloo and David Paternotte, ‘The Feminist Project under Threat in Europe’ (2018) 6 *Politics and Governance* 1.
- 8 Rachel F Seidman, ‘Who Needs Feminism? Lessons from a Digital World’ (2013) 39 *Feminist Studies* 549.
- 9 María Luisa Femenías, ‘Feminismos Latinoamericanos: Una Mirada Panorámica’ (2011) 6 *La manzana de la discordia* 53, 53; 59.
- 10 Graciela Di Marco, ‘Los Movimientos de Mujeres En La Argentina y La Emergencia Del Pueblo Feminista’ (2010) XIV *Segunda época* 51, 51; 67.
- 11 SM Buechler, ‘New Social Movement Theories’ (1995) 36 *The Sociological Quarterly* 441.
- 12 Nancy A Hewitt, ‘Feminist Frequencies: Regenerating the Wave Metaphor’ (2012) 38 *Feminist Studies* 658.
- 13 Laura Briggs, ‘Transnational’ in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press 2016).

Without attempting an exhaustive historical discussion, this chapter explores the main feminist claims in the European context during the drafting process and after the adoption of the Istanbul Convention, followed by a review of their incorporation into the final text. The chapter concludes with some reflections about the lessons learned.

2 Feminisms in Europe and the adoption of the Istanbul Convention

Feminisms in Europe seem characterised by three aspects. First, their heterogeneity. Europe has a long tradition of women's activism, addressing issues such as women's political participation, sexual violence, the gendered division of labour, pay equity and sex discrimination. However, the varied histories of feminism in different European countries confirm the diversity of goals among the movements. Feminisms in Europe have ranged from liberalism to materialism, including varying types of "difference" feminisms, some of them becoming more prevalent in some countries. The idea of a traditional flow of first-, second- and third-wave feminism that applies to Europe is also challenged by the historical development of each State.¹⁴ For instance, while British women gained the right to vote in 1918, marking the end of the first wave, Swiss women did so only in 1971. Particularly, post-fascist and post-communist countries' expressions of feminism do not fit the wave framework.¹⁵

Second, the early reception of several feminist claims by the Council of Europe (CoE) is another characteristic. For instance, it recognised the political rights and legal position of women in the seventies,¹⁶ and since the eighties, equality between women and men has been a leading principle of the organisation.¹⁷ Moreover, in many European countries, feminist movements have undergone a process of "institutionalisation", partly as the consequence of the Council of Europe's broad agenda for promoting women's participation in all fields of decision-making.¹⁸ For instance, in 2003, the Council of Europe adopted Recommendation Rec(2003)3 on balanced participation of women and men in political and public decision-making. Although the numbers of women elected and holding strategic positions within the Council

14 On feminism in Europe until the emergence of the Third Wave, see Gisela Kaplan, *Contemporary Western European Feminism* (New York University Press 1992).

15 Jonathan Dean and Kristin Aune, 'Feminism Resurgent? Mapping Contemporary Feminist Activisms in Europe' (2015) 14(3) *Social Movement Studies* 375–395.

16 Resolutions R (72) 22 and R (75) 606.

17 See Second Mid-Term Plan (1981–86).

18 Encouraging what Lovecey calls "the politics of presence". Jill Lovecey, 'Gender Mainstreaming and the Framing of Women's Rights in Europe – the Contribution of the Council of Europe' (2002) 10 *Feminist Legal Studies* 271.

has increased, “parity is still a distant goal for all aspects of political and public decision-making”.¹⁹

Third, activism is channelled in women’s organisations and NGOs, encouraged by the CoE’s strategy for civil society participation. NGOs have become the pillar of civil society in dialogues with the Committee of Ministers, the Parliamentary Assembly and the Congress of Local and Regional Authorities. The European Union has also greatly encouraged the participation of civil society through NGO funding. Such NGO-isation of activism, however, has been criticised by some authors as leading to a “depoliticisation” and “delocalisation” of feminist claims.²⁰ That said, given the strategy to involve NGOs in the discussions of regulation, it is reasonable to expect NGOs participation as observers in the negotiations of the Istanbul Convention, and to convey some of the main feminist claims.

Considering the long history of women’s movements in Europe, the adoption of a legally binding convention on violence against women a decade into the new millennium, may appear as a tardy one. However, several initiatives dating back to the eighties and nineties preceded the adoption of the Istanbul Convention, such as Recommendation No R (85) 4 on violence in the family adopted in 1985 by the Committee of Ministers,²¹ and Recommendation No R (90) 2 on social measures concerning violence in the family in 1990.²² In 1993, the third European Ministerial Conference on Equality between Women and Men focused on “Strategies for the elimination of violence against women in society: the media and other means”, which resulted in the development of an Action Plan to Combat Violence against Women. Finally, recommendation (2002) 5 on the protection of women against violence was adopted.²³ National implementation of this recommendation has been monitored, showing many

19 Factsheets on Gender Equality, ‘Achieving balanced participation of women and men in political and public decision-making: a gender equality and democratic requirement’, available at: Achieving balanced participation of women and men in political and public decision-making. See also: Mercedes Mateo Diaz and Susan Millns, ‘Parity, Power and Representative Politics: The Elusive Pursuit of Gender Equality in Europe’ (2004) 12 *Feminist Legal Studies* 279; Daniel James Keith and Tania Verge, ‘Nonmainstream Left Parties and Women’s Representation in Western Europe’ (2018) 24 *Party Politics* 397.

20 Islah Jad, ‘The “NGOization” of the Arab Women’s Movements’ (2003) 20 *Al-Raida*; Islah Jad, ‘NGOs – between Buzzwords and Social Movements’ (2007) 17 *Development in Practice* 622; William F Fisher, ‘Doing Good? The Politics and Antipolitics of NGO Practices’ (1997) 26 *Annual Review of Anthropology* 439; Jael Silliman, ‘Expanding Civil Society, Shrinking Political Spaces – The Case of Women’s NGOs’ (1999) 96 *Social Politics* 23.

21 Parliamentary Assembly of the Council of Europe, Recommendation No R (85) 4 of the Committee of Ministers to Member States on Violence in the Family (26 March 1985).

22 Parliamentary Assembly of the Council of Europe, Recommendation No R (90) 2 of the Committee of Ministers to Member States on Social Measures Concerning Violence within the Family (15 January 1990).

23 Council of Europe, Recommendation (2002) 5 of the Committee of Ministers to Member States on the Protection of Women against Violence Adopted on 30 April 2002 and Explanatory Memorandum (30 April 2002).

gaps in the provision of services for victims.²⁴ In December 2008, the Council of Europe set up the Ad Hoc Committee for Preventing and Combating Violence against Women and Domestic Violence (CAHVIO), which held nine meetings during the drafting process of the Istanbul Convention.

Following the European approach to civil society participation, several NGOs participated as observers during the meetings of CAHVIO. After the adoption of the Convention, NGOs continue to actively participate in the monitoring process by submitting shadow reports to the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), the independent expert body responsible for monitoring the implementation of the Convention. Such interaction can contribute to keep the Convention receptive to social developments.

3 Contemporary feminist claims and their reception in the Convention

This section explores the theoretical construction of the subject of protection, the conceptualisations of violence and the economic aspects of feminist claims, and their incorporation in the text of the Istanbul Convention.

3.1 The feminist subject and the subject of protection in the Convention

At the time of adoption of the Istanbul Convention, feminist theories had dwelt for decades upon who was the subject of their claims. Naffine argued that law's construction of its subjects follows a set of characteristics – rational, in control of its cognitive capacities, inhabiting the public sphere – suggesting that the legal subject is implicitly a man, excluding and silencing women. Feminism thus points out such bias in the law and brings attention to “women”. Yet the view of “men” and “women” as stable categories (“enduring bodies”) with a fixed and “natural” content was also challenged by feminist theory.²⁵ Moreover, the idea of women as a constant and homogenous category, promoted by mainstream European feminism, was soon criticised for promoting issues that affected “white heterosexual middle class women” almost exclusively. Dissenting perspectives derived from critical race theory, postcolonial, chicana, and queer studies, emerged in the early eighties and approached a mature shape by the new millennium. Postcolonial feminism – critiquing colonial images of non-Western women as oppressed by their cultures – has been prevalent in

24 The analytical report of the fourth monitoring round is available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680465f71>.

25 Joan W Scott, ‘Reflections on Women and Gender in Twentieth-Century Mexico Introduction’ (2008) 20 *Gender & History* 149.

Europe, due to its colonialist past.²⁶ In addition, “intersectionality”, highlighting the qualitatively different experience of discrimination that results from the intersection of gender with other socially constructed categories of distinction,²⁷ was quite widespread in European academic circles by the time the Convention was adopted,²⁸ while the European Union was engaged in tackling multiple discrimination. Intersectionality seemed particularly appealing to “young feminists”.²⁹

Similarly, the heterosexual assumptions that the notion of “woman” normally entails was also challenged.³⁰ The category of women was then reconfigured in Queer theory,³¹ emphasising that sex is a cultural construct, regulated by a heteronormative discourse.³² Discrimination against lesbian, gay, bisexual, trans and intersex persons (LGBTI) gained much attention in the so-called “Europeanization of social movements”.³³ For instance, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), founded in 1978, gained access to the European Union (EU) in the nineties, and managed to get sexual orientation and gender identity issues on the EU agenda.³⁴ These claims gained momentum in 2006, following the adoption of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, and contributing to the “normalisation” of homosexuality in Europe.³⁵ In September 2009, ILGA Europe, submitted a petition to CAHVIO recommending that the non-discrimination clause made explicit reference to sexual orientation, gender identity and gender expression, and the

26 Lourdes Peroni, ‘Violence Against Migrant Women: The Istanbul Convention Through a Postcolonial Feminist Lens’ (2016) 24 *Feminist Legal Studies* 49.

27 Kimberlé Williams Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies’ (1989) *The University of Chicago Legal Forum* 139.

28 See the special issue on Intersectionality of the *European Journal of Women’s Studies* 13(3) (2006) and the *International Feminist Journal of Politics* 11(4) (2009).

29 See, for instance, Flavia Dzodan’s blogpost ‘My feminism will be intersectional or it will be bullshit’ <http://tigerbeatdown.com/2011/10/10/my-feminism-will-be-intersectional-or-it-will-be-bullshit/>; *The Guardian* ‘Are you too white, rich, able-bodied and straight to be a feminist?’ www.theguardian.com/commentisfree/2013/apr/18/are-you-too-white-rich-straight-to-be-feminist; ‘In defence of intersectionality’: www.theguardian.com/commentisfree/2013/dec/23/in-defence-of-intersectionality.

30 Monique Wittig, *The Lesbian Body* (William Morrow, 1975).

31 Michel Foucault, *The History of Sexuality: An Introduction: Volume I* (1990); Michel Foucault, *The History of Sexuality, Vol. 2: The Use of Pleasure* (1985); Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990); Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 1990).

32 Judith Butler, *Bodies That Matter* (Routledge 1993).

33 Donatella Della Porta and Manuela Caiani, *Social Movements and Europeanization* (Oxford University Press 2009) 225.

34 Joke Swiebel, ‘Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy’ (2009) 15 *Contemporary Politics* 19.

35 Kelly Kollman and Matthew Waites, ‘The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction’ (2009) 15 *Contemporary Politics* 1.

obligation of States to prevent and combat violence against LBT women, including trans women who have not undergone gender reassignment.³⁶ “Without specific references in the Convention”, ILGA Europe argued, “it remains all too possible that its measures will not be used to combat violence against LBT women”.³⁷ The UN High Commissioner for Refugees also recommended to include sexual orientation as a ground for asylum, understood as a prevention and protection measure against violence.³⁸ In addition, ILGA asked CAHVIO to include LBT women as a “vulnerable group”.³⁹

The feminist claims and developments described above show that, at the time of drafting the Convention, the conceptualisation of women as a fixed category with certain characteristics was being challenged, recognising women’s diversity, including their sexual orientation and gender identity, and parting from biological understandings of sex and heteronormative discourses. CAHVIO reports confirm the discussions about these issues during the process of negotiation of the Convention.⁴⁰

The adopted text explicitly recognises the diversity of women through the equal treatment principle promoted in non-discrimination clauses, and to some extent, in the recommendation of certain policies. Article 4.3. states that the Convention provisions

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, migrant or refugee status, or other status.

Although postcolonial views are somehow considered throughout the Convention,⁴¹ this is the only reference suggesting that women can be discriminated against on multiple grounds, potentially resembling intersectionality.

The depiction of women, however, is not completely in line with the feminist claims previously outlined. Specifically, the challenges to cisnormative and heteronormative assumptions are captured superficially. For instance, although Article 4.3. reflects ILGA’s recommendation to include sexual orientation and

36 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680594272>.

37 ILGA EUROPE Report to the Council of Europe Ad Hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence (ILGA Report), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680594272>.

38 UNHCR comments to the first Meeting of the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (6–8 April 2009), paras 3 and 4.

39 ILGA Report, p. 21.

40 Reports available at: www.coe.int/en/web/istanbul-convention/cahvio.

41 Peroni (n 26).

gender identity in the non-discrimination clause, there is no consideration of the ways in which lesbian and trans women are affected by violence. Lesbian and trans women are not considered as vulnerable groups, which has consequences for the provision of services, especially shelter, and in relation to granting refuge status. The special vulnerability of lesbian and trans women has also been pointed out in shadow reports to GREVIO:

Sexual orientation and gender identity are not recognized in Turkey and there exist discriminatory practices against LGBTIQs in the admission to shelters, just as in all spheres of social services. There is no legal arrangement to prevent this discrimination, on the contrary, discriminatory discourse of service providers further cultivates it. Lesbian women are forced to hide their sexual orientation in shelters. LGTIs are subjected to discrimination on the ground of their outlook, attire, attitudes and behaviours etc. even when they do not make their sexual identities and orientations public. As such, they are easily subjected to mistreatment from both shelter staff and other women staying in the institution.⁴²

The shadow report also provides a detailed account of the vulnerable position of LGBTIQ refugees, who are arbitrarily kept in deportation centres, charged with prostitution and later deported.⁴³ In its evaluation report, GREVIO recommended to “review existing laws and regulations to remove restrictions preventing access to shelters for certain groups of victims”, yet lesbian and trans women were not explicitly mentioned among them.⁴⁴ It appears that the lack of explicit reference to lesbian and trans women in the provisions about shelters impacts on the interpretation of the norms.

Second, the Convention text and the Explanatory Report make no references to sexual orientation and gender identity as aggravating circumstances, disregarding the prevalence of domestic violence or sexual harassment against lesbian and trans women. Hate speech, which also affects them disproportionately, is not considered as a form of violence against women.⁴⁵ The cisnormative perspective toward violence also seems reinforced in the manner that bodily interventions are included in the Convention. Female genital mutilation implies having female

42 Contribution from the İstanbul Convention Monitoring Platform to the First Baseline Evaluation of Turkey, September 2017, p. 37. Available at: <https://rm.coe.int/turkey-shadow-report-2/16807441a1>.

43 *Ibid.*, pp. 60–65.

44 1st Evaluation Report by Grevio on Turkey, October 2018, p. 64, para 180. b. Available at: <https://rm.coe.int/eng-grevio-report-turquie/16808e5283>.

45 See Recommendation No R (97) 20 of the Committee of Ministers on “hatespeech”; Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity. See also *Vejdeland and Others v Sweden* App no1813/07 (ECHR, 9 February 2012).

genitalia and forced sterilisation does not explicitly refer to trans women, although many forcibly undergo sterilisation before sex reassignment surgery.⁴⁶

3.2 Violence against women: feminist and Convention's conceptualisations

This subsection discusses feminist claims on gender-based violence that particularly resonated in European women's movements during the negotiations and after the adoption of the Convention.

3.2.1 Domestic violence

Domestic violence is one of the types of violence with the longest presence in the feminist agenda, with most of its aspects explored and addressed by women's organised responses within many European States. The battered women's movement, which gained particular strength in the United Kingdom in the seventies, effectively mobilised resources to aid battered women by launching feminist actions at all levels, from grassroots to federal governments, and by adopting strategies that ranged from institutional to confrontational.⁴⁷ At the time of negotiation of the Convention, the European Women's Lobby (EWL) and the European Policy Action Centre on Violence against Women (EPAC VAW) submitted a petition (EPAC-EWL Statement) supporting that

the convention should be a human rights instrument with an independent monitoring mechanism focusing on violence against women, including domestic violence, and that the core of the convention would thus cover a wide range of forms of violence typically experienced by women.⁴⁸

The notion that "the home is the most dangerous place for women",⁴⁹ however, may not resonate with many women, particularly when we consider their class, race, sexual orientation and gender identity. Women's diversity impacts directly on their realities and experiences of violence, yet the Convention seems to focus on domestic violence at the expense of other forms of violence experienced by

46 See, for instance, *Y.T. v Turkey* App no 14793/08 (ECHR, 10 March 2015).

47 Myra Marx Ferree and B Hess, *Controversy and Coalition: The New Feminist Movement across Four Decades of Change* (Routledge 2002) 126; Kathleen J Tierney, 'The Battered Women Movement and the Creation of the Wife Beating Problem' (1982) 29 *Social Problems* 207.

48 'Women's NGOs call on the Council of Europe to Move towards a Strong Instrument on Violence against Women', available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680594273>.

49 *Ibid.*

many women whose main exposure is outside the home/family, such as migrant women,⁵⁰ lesbians and trans women.⁵¹

Nevertheless, the definition and scope of domestic violence has broadened through the years. The “women battering” language, used in the seventies, was replaced in the eighties by the less political language of “domestic violence”. Nonetheless, feminists continued to emphasise men’s responsibility for these assaults and the structural nature of violence affecting women.⁵² In addition, the profile of the victims of domestic violence has also changed, becoming more inclusive. ILGA’s submission to CAHVIO described that regarding domestic violence, LBT women usually face violence committed by family members after disclosing their sexual orientation or gender identity. Their submission also pointed out that LBT women may face same-sex intimate partner violence.

These claims, however, are not fully captured by the Convention. While the preamble addresses violence as the result of the historical unequal position of men and women, recognising its gender-based and structural nature, this view varies depending on the type of violence being addressed. The gender dimension of domestic violence was one of the main points of contention during the negotiations. Since the first meeting in 2009, some of CAHVIO members agreed that most victims of domestic violence are women and that the gender dimension of domestic violence needed to be reflected in the instrument, while other members argued that domestic violence should be applicable to all victims irrespective of their gender or age.⁵³ Clarifying this aspect was not a minor one, considering that at the time of drafting, the European Court of Human Rights (ECtHR) was yet to interpret domestic violence as a form of gender discrimination for the first time. Hence, the Convention had the potential to guide the Court in its interpretation on the issue.

In a compromised position, reached by consensus, CAHVIO finally agreed that the Convention should deal with domestic violence “which affects women disproportionately”,⁵⁴ as proposed by the Belgian delegation. Article 2.2 further calls State Parties to pay “particular attention to women victims of gender-based violence”. This compromised position is also reflected in the preamble, which points out that “women and girls are exposed to a higher risk of gender-based violence than men”, although it adds that “men may also be victims of domestic violence”. Lesbian and transgender women facing domestic violence against women due to their sexual orientation or gender identity, despite the clear depiction of the problem made by ILGA during the

50 See Violence against women migrant workers – Report of the Secretary-General (A/72/215) [EN/AR].

51 See European Union Agency for Fundamental Rights, EU LGBT survey – European Union lesbian, gay, bisexual and transgender survey – Results at a glance.

52 Marx Ferree and Hess (n 47).

53 Report of the 2nd meeting, para 6.

54 Ibid.

negotiations, were not included in the final definitions nor recalled in the Explanatory Report. Ironically, the Convention includes men in the context of domestic violence, contrary to the claims and theoretical elaborations of the feminist movement.

While these negotiations were taking place, the European Court finally considered domestic violence as gender-based discrimination in *Opuz v Turkey*, understanding that the general and discriminatory judicial passivity in Turkey was conducive to domestic violence and thus affected mainly women.⁵⁵ That said, the judgment also stated that “men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly”.⁵⁶ The Court shows the same ambivalence toward the gender-dimension of domestic violence that we find in the Convention. Since *Opuz*, the Court has not consistently addressed violence against women as gender-based discrimination, and when it does, it is based on the authorities’ passivity towards a woman’s experience of domestic violence.⁵⁷

Regarding the provision of services, since the seventies, the shelter movement in Europe was concerned with providing women with a safehouse for temporary protection and support. In relation to the protection measures needed in cases of violence, the Convention falls in line with feminist claims. It establishes the obligation of States to provide shelter to victims,⁵⁸ which in some States remained scarce as indicated in monitoring reports, despite decades of feminist claims and organisation on this matter and previous documents recommending it. As mentioned above, although the need to provide suitable shelter to LBT women was voiced by ILGA, no reference is made in the Istanbul Convention provisions to their vulnerability.⁵⁹

More recently, women’s movements have called for issuing protection orders and for keeping the woman at home and excluding the batterer. The Convention contemplates this possibility.⁶⁰ The Explanatory Report clarifies the reasoning behind the provision, echoing feminist claims:

55 *Opuz v Turkey* App no 33401/02 (ECHR 9 June 2009).

56 *Opuz v Turkey* para 132.

57 Cases recognising the gender-dimension of the violence: *Eremia and Others v The Republic of Moldova* App no 3564/11 (ECHR, 28 May 2013); *Valiulienė v Lithuania* App no 33234/07 (ECHR, 26 March 2013); *B. v the Republic of Moldova* App no 61382/09 (ECHR, 16 July 2013) and *Mudric v the Republic of Moldova*, App no (ECHR, 16 July 2013); *N.A. v the Republic of Moldova* App no 13424/06 (ECHR, 24 September 2013); *T.M. and C.M. v the Republic of Moldova*, App no 26608/11 (ECHR, 28 January 2014); *Durmaz v Turkey* App no 3621/07 (ECHR, 13 November 2014); *M.G. v Turkey* App no 646/10 (ECHR, 22 March 2016); *Halime Kılıç v Turkey* App no 63034/11 (ECHR, 28 June 2016); *Bâlşan v Romania* App no (ECHR, 23 May 2017).

58 Article 23, the Istanbul Convention.

59 ILGA statement, 25.

60 Article 52, the Istanbul Convention.

Rather than placing the burden of hurriedly seeking safety in a shelter or elsewhere on the victim, who is often accompanied by dependent children, often with very few personal affairs and for an indefinite period of time, the drafters considered it important to ensure the removal of the perpetrator to allow the victim to remain in the home.⁶¹

The exclusion of the batterer is complemented by the issuing of protection and restraining orders,⁶² aiming to prevent further acts of violence. The clarity of these measures has the potential to ensure that Europe moves toward a consistent system of protection across State Parties.

Feminist organisations have also highlighted the woman's right to self-defence when society fails to protect her.⁶³ This absence of state intervention is often the result of the lack of appropriate prosecution policies,⁶⁴ and other times the result of a biased perception of women's response to violence, regarding women's response as constitutive of "bidirectional" violence.⁶⁵ These complaints about the difficult access to justice and the deficient state response have undoubtedly contributed to the adoption of detailed provisions in the Convention. Although the Convention does not explicitly contemplate the right to self-defence, it calls for the prompt and efficient response of agents, systematically assessing the seriousness of the situation and the risk of repeated violence.⁶⁶

Finally, feminist movements claim that an appropriate and effective prosecution of violence against women challenges the sense of impunity rooted in society and upsets the patriarchal order. The United Nations Special Rapporteur on Violence against Women also suggests this:

[P]rosecutors working on cases of domestic violence have the potential and the obligation to change the prevailing balance of power [between men and women] by taking a strong stance to disempower patriarchal notions. Interventions at this level may have both consequential effects in that condemnations of patriarchy can lead to changes in socio-cultural norms, as well as intrinsic effects, in that prosecutors ... can be considered to be the 'mouth-pieces' of society, and strong statements condemning violence against women

61 Explanatory Report, Article 52, para 264.

62 *Ibid.*, Article 53.

63 Myra Marx Ferree and B Hess, 'Two Steps Forward, One Step Back: Defending Gains, 1983–92', *Controversy and Coalition: the New Feminist Movement across Four Decades of Change* (Routledge 2000) 170.

64 Michelle Madden Dempsey, 'Toward a Feminist State: What Does "Effective" Prosecution of Domestic Violence Mean?' (2007) 70 *The Modern Law Review* 908.

65 Renée Römken, 'Ambiguous Responsibilities: Law and Conflicting Expert Testimony on the Abused Woman Who Shot Her Sleeping Husband' (2000) 25 *Law and Social Inquiry* 355.

66 Articles 50 and 5, the Istanbul Convention.

made on behalf of society through the ... prosecutorial services will make that society less patriarchal.⁶⁷

In this respect, the Convention has taken a significant step toward meeting feminist claims for a more proactive State. Yet it does not require public prosecution of violence against women. Instead, it establishes that investigations and prosecution of physical violence, sexual violence, forced marriage and female genital mutilation should not be “wholly dependent” on the complaint of the victim and that the proceedings may continue even if the victim withdraws the complaint.⁶⁸ This approach is meant to address procedural differences in legal systems, yet making clear that ensuring the investigation or prosecution of offences is the responsibility of the State and its authorities,⁶⁹ who need “to ease the burden of lengthy criminal investigations and proceedings”.⁷⁰

3.2.2 *Sexual harassment*

Sexual harassment has been conceptualised by feminist theories as part of the general pattern of gender discrimination and as a way of obstructing women from work.⁷¹ It is thus no surprise that the European Union’s attention to employment issues highlighted early on sexual harassment in the workplace, addressing it at first with soft-law measures such as the Council Declaration of 19 December 1991 on the protection of the dignity of women and men at work. By the time of drafting the Istanbul Convention, sexual harassment was addressed by binding EU law.⁷²

Since 2006, women all over the world have organised and shared their experiences of sexual harassment using the hashtag #MeToo, showing that

67 Yakin Ertürk, ‘Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women – The Due Diligence Standards as a Tool for the Elimination of Violence Against Women’ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, to the United Nations Commission on Human Rights, E/CN.4/2006/61, 20 January 2006, 20. On this, Madden-Dempsey, ‘Toward a Feminist State, What Does Effective Prosecution Mean?’ (2007) 70(6) *The Modern Law Review* 908–935.

68 Article 55, the Istanbul Convention.

69 Explanatory Report, para 280.

70 Explanatory Report, para 279.

71 Anita M Superson, ‘A Feminist Definition of Sexual Harassment’ (1993) 24 *Journal of Social Philosophy* 46; Jane Gallop, ‘Sex and Sexism: Feminism and Harassment Policy’ (1994) 80 *Academe* 16.

72 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002 L 296; OJ 2006 L 204; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

sexual harassment is a pervasive form of violence affecting women.⁷³ The EPAC-EWL Statement, submitted to CAHVIO after its first meeting, pointed out worrying statistics on sexual harassment. The submission by ILGA-Europe also pointed out that LBT women suffer sexual harassment because of their sexual orientation and gender identity both in the community and the private sphere.⁷⁴ After the adoption of the Convention, statistics have continued to show a very significant number of cases of sexual harassment, including on the grounds of sexual orientation and gender identity.⁷⁵ Recently, the #MeToo movement has gained yet more visibility and strength, with cases reported even within European Union and Council of Europe institutions.⁷⁶

The CAHVIO meetings reports indicate that some members had expressed concern about the criminalisation of sexual harassment, while others called for criminal law sanctions for this behaviour. The co-chairs seemed inclined to limit the criminal scope of the issue, and called for a definition of sexual harassment that covers all types of situations where women are in a position of weakness – beyond the area of employment and education.⁷⁷ The Convention defines sexual harassment as any verbal, non-verbal and physical conducts of a sexual nature, carried out in a context of abuse of power, promise of reward or threat of reprisal, not limited to the field of employment. In this regard, it calls for the adoption of legal measures that allow for a criminal “or other” legal sanction against this type of violence.⁷⁸ Considering the specific nature of this conduct, the Explanatory Report points out that:

While generally considering it preferable to place the conduct dealt with by this article under criminal law, the drafters acknowledged that many national legal systems consider sexual harassment under civil or labour law. Consequently, parties may choose to deal with sexual harassment either by their criminal law or by administrative or other legal sanctions, while ensuring that the law deals with sexual harassment.⁷⁹

In addition, the Explanatory Report argues that Article 17.1, referring to policies, guidelines, and self-regulatory standards to prevent violence against

⁷³ <https://metoomvmt.org/about/>.

⁷⁴ ILGA Report, n 37.

⁷⁵ EU Fundamental Rights Agency, ‘Violence against Women: An EU-wide Survey. Main Results Report’ (2014) 95; EU Fundamental Rights Agency ‘EU Lesbian, Gay, Bisexual and Transgender Survey. Main Results’ (2014); Inter-Parliamentary Union (IPU) study on Sexism, Harassment and Violence against Women in Parliaments in Europe (2018), available at: <http://website-pace.net/documents/19879/5288428/20181016-Women-ParliamentIssues-EN.pdf/7d59e7c5-4a88-4d23-a6cd-7404449fd45f>.

⁷⁶ Sexual harassment plagues the EU body meant to fight it. Multiple complaints show difficulty of putting “zero tolerance” into practice. www.politico.eu/article/sexual-harassment-eu-gender-equality-agency/.

⁷⁷ 3rd Meeting Report, para 7.

⁷⁸ Article 40, the Istanbul Convention. See also Explanatory Report, para 155.

⁷⁹ Explanatory Report, para 207.

women, includes the adoption of protocols or guidelines on how to deal with cases of sexual harassment in the workplace.⁸⁰

Sexual harassment in the public sphere has also gained attention, leading the Parliamentary Assembly to adopt a resolution calling CoE states to “put an end to impunity by prosecuting perpetrators of sexual violence and harassment in public space”.⁸¹ Moreover, “online sexual harassment” and misogynistic behaviour in the digital sphere, such as social media, blogs and other digital platforms, is increasing attention.⁸² These forms of harassment, in addition to being violent, may result in discrimination against women in relation to their use of information and communication technologies, breaching their freedom of expression and in many cases their privacy. The debate on sexual harassment is ongoing, and it is also becoming clear that what used to be a form of violence connected to employment and education, it is also pervasive in a much broader sphere. Beyond the response provided by the Convention – criminal, civil, administrative or through soft measures like protocols – current feminist claims will broaden the scope of this form of violence to include the public space, social media and digital communications.

3.3 Economic dimensions of feminist claims: from labour inclusion to austerity policies

The construction of gender inequality by the economic system has been the target of feminist critique for decades.⁸³ Traditional claims included equal access to all sectors of the labour market and shared care-giving responsibilities,⁸⁴

80 Explanatory Report, Article 107.

81 Parliamentary Assembly, Resolution 2177 (2017) Putting an end to sexual violence and harassment of women in public space, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23977&lang=en>.

82 See, for instance, www.amnesty.org/en/latest/news/2017/11/amnesty-reveals-alarming-impact-of-online-abuse-against-women/; www.forbes.com/sites/michelleking/2017/11/14/how-powerful-women-experience-extreme-online-sexual-harassment-and-what-you-can-do-to-stop-it/#118881e37b73; www.abc.net.au/news/2018-04-18/why-men-abuse-women-online/9666900.

83 C Delphy, ‘The Main Enemy’ (1980) 1 *Feminist Issues* 23; H Hartmann, ‘The Unhappy Marriage of Marxism and Feminism: Toward a More Perfect Union’ in L Sargent (ed.), *Women and Revolution: A Discussion of the Unhappy Marriage of Marxism and Feminism* (South End Press 1981); Nancy Fraser, *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis* (Verso 2013).

84 J Gardiner, ‘Women’s Domestic Labor’ (1975) 69 *New Left Review* 47–58; M Ferber, *Women and Work, Paid and Unpaid* (Garland Press 1987); M Hardt, ‘Affective Labor’ (1999) 26(2) *Boundary* 89–100; Caroline Straub ‘A Comparative Analysis of the Use of Work–Life Balance Practices in Europe: Do Practices Enhance Females’ Career Advancement?’ (2007) 22(4) *Women in Management Review* 289–304; Torben Iversen and Frances Rosenbluth, ‘The Political Economy of Gender: Explaining Cross-National Variation in the Gender Division of Labor and the Gender Voting Gap’ (2006) 50(1) *American Journal of Political Science* 1–19.

underemployment⁸⁵ and precarious contracts.⁸⁶ Past generations achieved maternity leave, improved rights for part-time workers, anti-discrimination laws and legal protections against sexual discrimination. Despite such improvements, it has become clear that women's economic independence is not purely dependent on "getting a job". The economic structure still sustains gender inequality, particularly in some CoE Member States.⁸⁷ For instance, organisations like the "Gender Wage Watchers Network"⁸⁸ highlight persisting issues such as the average gender pay gap,⁸⁹ in spite of the economic improvement in the region, the increasing level of female employment and the adoption of "gender-sensitive" policies.

The urgency of attending to the economic aspects of women's status in Europe increased in the context of the post-2008 economic crisis, when the disproportionate impact of the austerity policies on women started to show.⁹⁰ The economic hardship that women faced became suddenly more visible, and anti-austerity movements in some CoE Member States were greatly supported by women's movements.⁹¹ In fact, organised action of European women's movements in relation to austerity policies and (structural) economic crisis are gaining ground internationally and in Europe, breathing new life to celebrations for International Women's Day on 8 March. Calls to join an "international women strike" on that date seem particularly strong among Spanish women.⁹²

Feminist theory has long argued that the structural nature of the economic inequalities affecting women constitutes gender-based violence.⁹³ This notion echoes recent feminist claims. Capturing this claim in an instrument dedicated to violence against women is no doubt a challenge. The most evident way to do

85 Hans-Peter Blossfeld and Catherine Hakim, *Between Equalisation and Marginalization* (Oxford University Press 1997); M Marchand and A Runyan, *Gender and Global Restructuring: Sightings, Signs, Resistances* (Routledge 2000).

86 Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy* (Hart Publishing 2006).

87 Elzbieta Matynia, 'Polish Feminism between the Local and the Global: A Task of Translation' in *Women's Movements in the Global Era: the Power of Local Feminisms* (Westview Press 2010) 216.

88 <http://genderpaygap.eu>.

89 Paygap in Europe: <https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tesem180&plugin=1>.

90 Maria Karamessini and Jill Rubery, *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge 2013); JA MacLeavey, "New Politics" of Austerity, Workfare and Gender? The UK Coalition Government's Welfare Reform Proposals' (2011) 4 *Cambridge Journal of Regions, Economy and Society* 355.

91 María José Gámez Fuentes, 'Feminism and the 15M Movement in Spain: Between Frames of Recognition and Contexts of Action' (2015) 14 *Social Movement Studies* 359.

92 See: www.bbc.com/news/world-europe-43324406; www.theguardian.com/world/2018/mar/08/international-womens-day-marked-by-protests-and-celebrations.

93 Rosemary Hennessy, 'Materialist Feminism and Foucault: The Politics of Appropriation' (1990) 3 *Rethinking Marxism* 251; Nancy Fraser, 'Feminism, Capitalism and the Cunning of History' (2012) 56 *New Left Review* 97.

so is including economic inequality in the definition of economic violence. However, the definitions of violence in the Convention do not replicate this broader scenario. “Economic violence” is only considered in the context of domestic violence and, although “economic independence (of the abuser)” appears as a preventive measure, the structural factors that prevent women from becoming “economically independent” are not considered. The notion of “economic harm” is also addressed as the result of domestic violence rather than gender inequality.

There is yet another possibility to address economic claims. The Convention aspires to establish “the link between achieving gender equality and the eradication of violence against women”,⁹⁴ and thus attempts to promote the “substantive equality” of women.⁹⁵ Article 1 b. has the potential to address the underlying aspects of the unequal positioning of women, which leads to gender discrimination and violence. In addition, Article 4.2 calls for the adoption of measures to eliminate discrimination against women, although it requires formal measures to do so, such as enshrining in law the principle of equality between women and men. The Explanatory Report, however, holds that Article 4.2 also entails “the obligation to ensure the practical realisation of equality between women and men addresses the fact that enshrining it in law is often insufficient and that practical measures are required to implement this principle in a meaningful way”.⁹⁶ The combination of Articles 4.2 and 6 on gender sensitive policies, suggests that the scope of “empowering policies” should go beyond domestic violence victims, aiming at substantive women’s equality.⁹⁷

4 Conclusions

From the perspective of past and current feminist claims, the Convention shows some shortcomings. Above all, the category of “women”, as subject of protection under the Convention, calls for reconsideration. Although the diversity of women may appear as covered by the non-discrimination clause, the monitoring rounds have exposed the difficulties of resting the whole system on a non-discrimination clause. The inclusion of sexual orientation and gender identity as grounds for discrimination seems insufficient to provide protection to lesbian and trans women. Instead, it seems that incorporating them as vulnerable groups and specifically considering the types of violence that affect them disproportionately is needed.

Regarding domestic violence, although the Convention has provided a good basis to address the issue not only from a criminal approach but also ensuring the protection and provision of services to victims, it fails to consider the vulnerability of certain groups of women in the context of domestic violence. The

94 Explanatory Report, para 25.

95 Article 1(b), the Istanbul Convention.

96 Explanatory Report, para 52.

97 Explanatory Report, para 62.

vulnerability of some women in relation to sexual harassment is also limitedly recognised, while the expansion of the “public sphere” to include our online and digital existence reaffirms the urgent need of the Convention to adapt and to keep up with social developments.

Another challenging aspect relates to the understanding of economic violence and economic independence. In times of economic upheaval, the need to problematise economic dependency beyond an abusive partner relationship, recognising the economic impact that gender inequality has on women, seems needed if “substantive equality” is to be gained. In this respect, the assessment of gender-sensitive policies needs to enquire into labour policies, salary gap, irregular and part-time employment, the openness of the labour market to women and care activities.

It may be too soon to judge whether the Istanbul Convention has the potential to adapt to new claims. Despite the detailed provisions regarding criminalisation, protection and support of victims, the Convention needs to become highly adaptable to keep up with the rapid formation and fast dissemination of social claims. The adequacy of the Convention to address current feminist challenges will depend on the interpretation of its monitoring body. The interaction of civil society and GREVIO is thus crucial for the sustainability of the Convention. In this regard, one of the most positive aspects of the Istanbul Convention relates to the possibility of interaction of social movements with GREVIO, although it may be limited to NGOs. If all Convention interpreters, including lawyers and academics, remain conscious of the need to pay attention to social movements beyond NGOs and their potentially narrow agenda, we can contribute to pushing the boundaries of the instrument and to broadening its scope and responsiveness.