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The future of the Istanbul Convention before the CJEU

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I. Introduction

The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) is only the second international human rights treaty that the European Union (Union) has signed. The first was the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).¹ This is by no means the only respect in which it is significant, as the latter is also the first gender-focused and binding instrument on violence against women.² In terms of its substantive contribution, in the words of the Venice Commission,

“[t]he added value of the Istanbul Convention ... 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 [...] and foresees concrete prevention measures [...]; protection measures [...] 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.”³

Accession to the Istanbul Convention has provided the backdrop for considerable tension in both the Member States and the Union. On the one hand, the participation of the

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¹ Council Decision 2010/48 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35. On the process of negotiation, see G de Búrca, ‘The European Union in the Negotiation of the UN Disability Convention’, (2010) 35 *ELRev* 174. On its application, see D Ferri, ‘The unorthodox relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and secondary rights in the Courts in the Court of Justice case law on disability discrimination’, (2020) 16 *European Constitutional Law Review* 275.

² S Preschal, ‘The European Union’s Accession to the Istanbul Convention’ in K Lenaerts, J-C Bonichot, H Kanninen, C Naome P Pohjankoski (eds), *An Ever-Changing Union? Perspectives on the future of EU Law In Honour of Allan Rosas* (Hart Publishing, 2019) 279.

³ Venice Commission Opinion 961/2019 "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) (Armenia)", Council of Europe doc. CDLAD(2019)018, 14.10.2019. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)018-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)018-e).

former has been characterized by divergent approaches, tensions and controversy. On the other hand, there has been inter-institutional conflict about the signature and conclusion of the Istanbul Convention on behalf of the Union. This conflict is about everything a Union external relations lawyer would like to talk about, namely, competences, procedure, and political disagreement. At the time of writing, these issues are examined by the European Court of Justice (the Court) after the European Parliament requested an opinion under Article 218(11) of the Treaty on the Functioning of the European Union (TFEU), that is Opinion 1/19. The Court has not yet ruled on the matter (the hearing took place on 6 October 2020 and the Advocate General Opinion is scheduled for 11 March 2021). This chapter will analyse the issues raised in the Parliament's request for an Opinion and explore their implications for mixed agreements in general and the Istanbul Convention in particular.

II. The Istanbul Convention: an overview

The text of the Istanbul Convention was negotiated by an expert group, the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO).⁴ CAHVIO met nine times and finalized the draft text in December 2010. The Istanbul Convention entered into force on 1 August 2014. In addition to the text of the Istanbul Convention, CAHVIO has produced an Explanatory Report.⁵ It should be emphasized that the CAHVIO reports show that the Commission sent representatives to the Committee,⁶ and the Commission itself stated that the 'Union participated, alongside Member States, as an observer in these meetings'.⁷ The Commission, however, neither requested nor obtained the necessary authorisation to make representations on behalf of the Union in CAHVIO and it is not clear whether the Commission representatives took the floor in the relevant discussions before the Committee.

The purpose of the Istanbul Convention is to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women. It applies to, amongst

⁴ Documents on the negotiations are available here: <https://www.coe.int/en/web/istanbul-convention/cahvio>.

⁵ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul of 11 May 2011. Available: <https://rm.coe.int/16800d383a>.

⁶ COM(2016) 109 final. *Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence* Available: <https://www.europarl.europa.eu/cmsdata/115844/council-decision.pdf>.

⁷ COM(2016) 111 final *Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence.*, p. 2. Available: <https://data.consilium.europa.eu/doc/document/ST-6695-2016-INIT/en/pdf>.

others, domestic violence, which affects women disproportionate. The objectives of the Istanbul Convention are set out in Article 1 as follows:

The purposes of this Convention are to:

- a. protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;
- b. contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;
- c. design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;
- d. promote international co-operation with a view to eliminating violence against women and domestic violence;
- e. provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

In order to achieve its purposes, the Istanbul Convention provides for a wide range of measures that straddle various fields, such as data protection, awareness-raising, education and training, protection and support, civil remedies and the criminalisation of various forms of violence. It includes a specific chapter on asylum and immigration (Chapter VII) and requires, amongst others, that the parties ‘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 the Refugees Convention ‘and as a form of serious harm giving rise to complementary/subsidiary protection’.⁸ It establishes, moreover, a monitoring mechanism operated through, on the one hand, an independent group of experts (GREVIO) and, on the other hand, the Committee of the Parties, composed of the representatives of the parties to the Convention and responsible for issuing recommendations to the individual parties.

While it rules out reservations in principle,⁹ the Istanbul Convention provides that any Union Member States may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, submit reservations for two specific purposes:

⁸ Art 60(1) Istanbul Convention which refers to Art 1,A(2) of the 1951 Convention relating to the Status of Refugees.

⁹ Art. 78(1) Istanbul Convention. On reservations, see Art. 2 (1)(d) of the Vienna Convention on the Law of Treaties.

not to apply or to apply only in specific cases or conditions certain provisions;¹⁰ and to provide for non-criminal sanctions, instead of criminal sanctions, for psychological violence and stalking.¹¹ Such reservations are valid for a period of five years from the day of the entry into force in respect of the party concerned.

There are currently 34 signatories to the Istanbul Convention¹² 22 of which have made reservations or declarations.¹³ While the Union and its Member States are all signatories, there is considerable divergence in the approach of the latter. Six Member States have not yet ratified the Istanbul Convention (Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania, and the Slovak Republic) while Poland has announced, controversially, its intention to withdraw from it.¹⁴ Most Member States, moreover, have made reservations/declarations concerning part of the Istanbul Convention's provisions (Latvia, Lithuania, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Malta, Netherlands, Poland, Romania, the Slovak Republic, Spain, and Sweden). Reservations are narrow in scope. For example, Latvia's reservation is about the right not to apply Article 55 (1) in respect of Article 35 regarding minor offences whereas Ireland has reserved the right not to apply the provisions of the Istanbul Convention laid down in Articles 30 (2) and 44 (3).¹⁵ There are also declarations of a broad nature: Latvia and Lithuania, for instance, have declared that they would apply the Istanbul Convention in conformity with the principles and provisions of their Constitution.¹⁶

¹⁰ Art. 78(2)(1) refers to Article 30, paragraph 2; Article 44, paragraphs 1.e, 3 and 4; Article 55, paragraph 1 in respect of Article 35 regarding minor offences; Article 58 in respect of Articles 37, 38 and 39; Article 59.

¹¹ Art. 78(3) Istanbul Convention which refers to Articles 33 and 34 respectively.

¹² Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, Sweden, Switzerland and Turkey. Comprehensive information available: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>.

¹³ Serbia, Romania, Poland, North Macedonia, Monaco, Malta, Latvia, Ireland, Andorra Armenia, Sweden, Switzerland, Slovenia Finland, France, Georgia, Germany, Greece, Croatia, Cyprus, Czech Republic, Denmark. Comprehensive information available: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>.

¹⁴ Poland Announces Withdrawal from "Harmful" Istanbul Convention. 28.07.2020. Available: <https://exit.al/en/2020/07/28/poland-announces-withdrawal-from-harmful-istanbul-convention/>. See also <https://www.euronews.com/2020/07/27/istanbul-convention-poland-s-plan-to-quit-domestic-violence-treaty-causes-concern>.

¹⁵ Reservations and Declarations for Treaty No. 210 (Ireland). Available: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=yCy1070P&coeconventions_WAR_coeconventionsportlet_enVigueur=false&coeconventions_WAR_coeconventionsportlet_codeNature=2&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconventionsportlet_codePays=IRE.

¹⁶ Reservations and Declarations for Treaty No. 210 (Latvia). Available: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=yCy1070P&coeconventions_WAR_coeconventionsportlet_enVig

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In addition to the above divergence of approaches, there have been express disagreements between Member States about their respective positions. A case in point is Austria's formal objection to the Polish Declaration mentioned above as being incompatible with the object and purpose of the Istanbul Convention: given its general and indeterminate scope, the Declaration is viewed as not clearly defining the extent to which Poland has accepted the obligations laid down in the Convention.¹⁷ Netherlands,¹⁸ Sweden¹⁹ and Finland have also objected to the Declaration made by Poland on similar grounds and suggest that it casts doubt as to the commitment of Poland to fulfil its obligations under the Convention. Finland in particular has also suggested that the Polish Declaration is incompatible with the general principle that a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations and, therefore, with Article 19 of the Vienna Convention on the Law of the Treaties.²⁰

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¹⁷ Reservations and Declarations for Treaty No. 210 (Austria). Available: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=yCy1070P& coeconventions_WAR_coeconventionsportlet_enVigueur=false& coeconventions_WAR_coeconventionsportlet_codeNature=6& coeconventions_WAR_coeconventionsportlet_searchBy=state& coeconventions_WAR_coeconventionsportlet_codePays=AUS](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=yCy1070P&coeconventions_WAR_coeconventionsportlet_enVigueur=false& coeconventions_WAR_coeconventionsportlet_codeNature=6& coeconventions_WAR_coeconventionsportlet_searchBy=state& coeconventions_WAR_coeconventionsportlet_codePays=AUS).

¹⁸ Reservations and Declarations for Treaty No. 210 (Netherlands). Available: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=yCy1070P& coeconventions_WAR_coeconventionsportlet_enVigueur=false& coeconventions_WAR_coeconventionsportlet_codeNature=6& coeconventions_WAR_coeconventionsportlet_searchBy=state& coeconventions_WAR_coeconventionsportlet_codePays=NET](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=yCy1070P&coeconventions_WAR_coeconventionsportlet_enVigueur=false& coeconventions_WAR_coeconventionsportlet_codeNature=6& coeconventions_WAR_coeconventionsportlet_searchBy=state& coeconventions_WAR_coeconventionsportlet_codePays=NET).

¹⁹ Reservations and Declarations for Treaty No. 210 (Sweden). Available: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=yCy1070P& coeconventions_WAR_coeconventionsportlet_enVigueur=false& coeconventions_WAR_coeconventionsportlet_codeNature=6& coeconventions_WAR_coeconventionsportlet_searchBy=state& coeconventions_WAR_coeconventionsportlet_codePays=SWE](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=yCy1070P&coeconventions_WAR_coeconventionsportlet_enVigueur=false& coeconventions_WAR_coeconventionsportlet_codeNature=6& coeconventions_WAR_coeconventionsportlet_searchBy=state& coeconventions_WAR_coeconventionsportlet_codePays=SWE).

²⁰ Reservations and Declarations for Treaty No.210 (Finland). Available: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=yCy1070P& coeconventions_WAR_coeconventionsportlet_enVigueur=false& coeconventions_WAR_coeconventionsportlet_codeNature=6& coeconventions_WAR_coeconventionsportlet_searchBy=state& coeconventions_WAR_coeconventionsportlet_codePays=FIN](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=yCy1070P&coeconventions_WAR_coeconventionsportlet_enVigueur=false& coeconventions_WAR_coeconventionsportlet_codeNature=6& coeconventions_WAR_coeconventionsportlet_searchBy=state& coeconventions_WAR_coeconventionsportlet_codePays=FIN). On Art 19 VCLT, see O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties. A Commentary* (OUP, 2011), pp 443–445.

A clear sense of discord, therefore, emerges from the approach of the Member States to the conclusion of the Istanbul Convention. This is in stark contrast to the UNCRPD where no Union Member State had made a declaration or a reservation.

III. The background to and the subject-matter of the request for an Opinion

It is settled case law that “the rules regarding the manner in which the Union institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves”.²¹ The general procedure for negotiation, signature and ratification of international agreements is set out in Article 218 TFEU. The legal dispute in Opinion 1/19 is about the decision to sign and conclude the Istanbul Convention. In accordance with Articles 218(5) and (6) TFEU, it is for the Council, following a proposal by the Commission, to adopt the decisions authorizing the signing and concluding the Agreement respectively. The Council does so, in principle, by a qualified majority pursuant to Article 218 (8) TFEU subparagraph 1 TFEU.²²

The Commission had not submitted a recommendation that the Council decide to open negotiations, nominate the Commission to negotiate on behalf of the Union and allow it to participate in the negotiations. On 4 March 2016, it adopted two proposals for Council decisions on the signing²³ and conclusion²⁴ of the Istanbul Convention on behalf of the Union. The former cited Article 218(5) TFEU and the latter Article 218(6)(a) TFEU as the procedural legal basis. As for the substantive legal bases, the Commission relied upon the judicial cooperation in criminal matters Chapter of the TFEU (Title V, Chapter 4) and cited Articles 82 (2) and 84 TFEU. The former provision is about “facilitat[ing] the mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension”, whereas the latter is about “establish[ing] measures to promote and

²¹ Case C-28/12 *Commission v Council*, EU:C:2015:282, paragraph 42 and case law cited.

²² Under Art. 218(8) subparagraph 2 TFEU, unanimity is required for agreements covering a field for which unanimity is required for the adoption of a Union act, for association agreements, for the agreements referred to in Article 212 TFEU with the States which are candidates for accession, and for the Union’s accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. For an analysis of these procedures, see A Dashwood in A Dashwood, M Dougan, B Rodger, E Spaventa and D Wyatt, *Wyatt and Dashwood’s European Union Law* (6th ed., 2011) 936 et seq and P Koutrakos, *EU International Relations Law* (2nd ed, 2015) Ch. 4.

²³ COM(2016) 111 final, n7 above. p. 9-10.

²⁴ COM(2016) 109 final, n6 above.

support the action of the Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States”.

The Council departed from the Commission’s proposal in two respects. First, on 11 May 2017 it adopted two, rather than one, separate decisions on the signing of the Convention on behalf of the Union.²⁵ Second, the legal basis of these measures differed from those proposed by the Commission: Decision 2017/856 is based on Articles 82(2) and 83(1) TFEU, the latter providing for “establish[ing] minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis”; Decision 2017/866 is based on Article 78(2) TFEU which provides for the adoption of measures for a common European asylum system.

The Istanbul Convention was signed on behalf of the Union on 13 June 2017 but has not yet been ratified. It was in the light of the Council’s approach, however, that the Parliament applied for an Opinion under Article 218(11) TFEU and raised two issues. The first is about the substantive legal basis: should the Union conclude the Istanbul Convention under Articles 82(2) and 84 TFEU (as proposed by the Commission) or Articles 78(2), 82(2) and 83(1) TFEU (as decided by the Council)? The Parliament also asked whether it was necessary or possible to separate the decisions concerning the signature and the conclusion of the convention as a consequence of that choice of legal basis. The second issue is about the adoption of the Council Decision to conclude the Istanbul Convention on behalf of the Union: is it compatible with Article 218(6), given the absence of mutual agreement between all the Member States regarding their consent to be bound by that Convention? These will be examined in turn.

IV. The issue of competence

The division of competence between the Union and the Member States is based on the principle of conferral (Article 5(2) TEU) and the assumption that competences not conferred upon the Union remain with the Member States (Articles 5 (2) and 4 (1) TEU). In the context

²⁵ Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, [2017] OJ L 131/11; Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement, [2017] OJ L 131/13.

of the Istanbul Convention, the issue was not whether the Union had exclusive competence over the entirety of the Istanbul Convention. In fact, the Commission had acknowledged in its proposal that the Member States “remain competent for substantial parts of the Convention, and particularly for most of the provisions on substantive criminal law and other provisions in Chapter V to the extent that they are ancillary”.²⁶ It was, instead, the implications of its position that was contentious, namely that the Union has competence “for a considerable part of the provisions of the Convention”²⁷ or, as it put it in the preamble to the Decision it proposed, for “most of the provisions of the Istanbul Convention”.²⁸

It is settled case-law that the choice of legal basis is a matter of constitutional significance²⁹ and must be made on objective factors that are amenable to judicial review, including the aim and the content of the measure.³⁰ It is also settled case-law that,

“if an examination of a European Union measure reveals that it pursues a twofold purpose or that it comprises two components and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component. Exceptionally, if it is established, however, that the act simultaneously pursues a number of objectives, or has several components, which are inextricably linked without one being incidental to the other, such that various provisions of the Treaty are applicable, such a measure will have to be founded on the various legal bases corresponding to those components”.³¹

While the choice of legal basis may be a complex exercise at the best times,³² the wide-ranging scope of the Istanbul Convention makes it even more so. This is further complicated by the different types of the Union competence that cover different provisions of the Istanbul Convention, namely exclusive, shared, and supporting, coordinating or supplementary.

In its proposal, the Commission referred to various Treaty provisions that pertain to areas covered by the Istanbul Convention: Article 16 TFEU (data protection), Article 19(1)

²⁶ COM(2016) 111 final, n7 above, p. 7.

²⁷ Ibid.

²⁸ Ibid, p. 11-2, para. 5.

²⁹ Opinion 2/00 (*Cartagena Protocol on biodiversity*), EU:C:2001:664, para. 5.

³⁰ Case C-263/14 *European Parliament v Council (EU-Tanzania Transfer Agreement)*, EU:C:2016:43, para. 43.

³¹ Ibid, para. 44.

³² See, for instance, P Koutrakos, ‘Legal Basis and Delimitation of Competence in EU External Relations’ in M. Cremona and B. De Witte (eds), *EU Foreign Relations Law – Constitutional Fundamentals* (Hart Publishing, 2008) 171.

TFEU (sex discrimination), Article, 23 TFEU (consular protection for citizens of another Member State), Articles 18, 21, 46, 50 TFEU (free movement of citizens, free movement of workers and freedom of establishment), Article 78 TFEU (asylum and subsidiary and temporary protection), Article 79 TFEU (immigration), Article 81 TFEU (judicial cooperation in civil matters), Article 82 TFEU (judicial cooperation in criminal matters), Article 83 TFEU (definition of the Union-wide criminal offences and sanctions for particularly serious crimes with a cross-border dimension), Article 84 TFEU (non-harmonising measures for crime prevention), and Article 157 TFEU (equal opportunities and equal treatment of men and women in areas of employment and occupation). The main thrust of the Commission's position, however, is that the predominant purpose of the Convention "lies in the prevention of violent crimes against women, including domestic violence, and the protection of victims of such crimes."³³ It was for this reason that it proposed Article 84 TFEU as a legal basis (along with Article 82(2) TFEU, which was uncontroversial).

In some ways, the Commission's approach is somewhat narrow. It is striking, for instance, that non-discrimination is not considered a main component of the Istanbul Convention and that Article 19 TFEU is not relied upon.³⁴ This is all the more so, given the prominent place of non-discrimination in the Istanbul Convention itself.³⁵ In this vein, it is interesting that, back in 2015, the Commission itself would have stressed the contribution of the ratification of the Istanbul Convention to its commitment to gender equality and to the Union's commitments in the context of the UNCRPD,³⁶ the latter having also been concluded under Article 13 EC (now Article 19 TFEU).³⁷ Viewed from this angle, the Commission's proposal is somewhat sweeping in its assumption that the matters not covered by its proposed legal bases are ancillary in nature.

Whilst narrow in its choice of legal basis, the Commission's proposal is broad in terms of the scope of the Union's competence. In fact, its approach is based on the assumption that

³³ Ibid, p. 9.

³⁴ See also Preschal, n2 above, at 283 and De Vido, 'The ratification of the Council of Europe Istanbul Convention: A step forward for the protection of women from violence in the European legal system', (2017) 9 *European Journal of Legal Studies* 69 at 85-6.

³⁵ See, for instance, the prominent position in the preamble to the Convention of the '[r]ecogni[tion] that the realisation of *de jure* and *de facto* equality between women and men is a key element in the prevention of violence against women'.

³⁶ EU Commission, Roadmap A (possible) EU accession to the CoE Convention on preventing and combating violence against women and domestic violence (October 2015, 2015/JUST/010 and EU Commission), p1 (https://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf).

³⁷ Along with Art. 95 EC (now Art. 114 TFEU): Council Decision 2010/48 [2010] OJ L 23/35.

the Union may exercise its competences “over the entirety of the Convention and excluding elements over which it would have no competence”.³⁸ The broad accession of the Union in the Istanbul Convention has also been supported by the Parliament.³⁹

Another aspect of the Commission’s proposal is about the exclusive nature of the Union’s competence. The Commission argues that there is “abundant legislation in most” of the areas of the Istanbul Convention covered by the Union competence⁴⁰ and that the latter is exclusive to the extent that the Istanbul Convention might affect those rules or alter their scope in the meaning of Article 3(2) TFEU.⁴¹ It is recalled that, in order to ascertain whether the Union’s competence is exclusive, “a comprehensive and detailed analysis of the relationship between the envisaged international agreement and the Union law in force” is required which “must take into account the areas covered by the Union rules and the by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions in order to determine whether the agreement is capable of undermining the uniform and consistent application of the Union rules and the proper functioning of the system which they establish”.⁴² For this assessment to be carried out, it is not necessary for the Union rules and the provisions of the agreement in question to coincide fully.⁴³ Instead, they need to be covered to a large extent.⁴⁴

A detailed analysis of the extent to which each provision of the Istanbul Convention corresponds to Union competence is beyond the scope of this chapter.⁴⁵ At this juncture, suffice it to point out that the broad scope of the Istanbul Convention and the varying intensity of the duties it imposes makes this exercise quite complex. Take, for instance, the issue of minimum standards. Article 73 of the Istanbul Convention allows the parties to introduce more favourable

³⁸ COM(2016) 111, n7 above, p. 9-10.

³⁹ European Parliament Resolution of 14 March 2017 on equality between women and men in the European Union in 2014-2015 ([2016/2249\(INI\)](#)), para. 33.

⁴⁰ *Ibid*, p. 7.

⁴¹ Art. 3(2) TFEU reads as follows: ‘The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope’.

⁴² Opinion 1/13 (*Hague Convention*) EU:C:2014:2303 at para. 74, as well as Opinion 1/03 (Lugano) EU:C:2006:81 at paras 126, 128 and 133, and Case C-114/12 *Commission v Council (neighbouring rights)*, EU:C:2014:2151 para. 74.

⁴³ Opinion 1/13 (*Hague Convention*), *ibid*, para. 72.

⁴⁴ Opinion 1/03 (Lugano Convention), n42 above, para 126, and Case C-114/12 *Commission v Council (neighbouring rights)*, n42 above, para. 70.

⁴⁵ See K Nousiainen and C Chinkin (eds), *Legal implications of EU accession to the Istanbul Convention* (European network of legal experts in gender equality and non-discrimination, 2015).

rights. In this vein, a number of measures mentioned in the Commission's proposal, such as the Victim's Rights Directive⁴⁶ and Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children,⁴⁷ expressly state that they set minimum standards and allow Member States to adopt higher standards. The Commission does not deal with this issue in any detail: in its proposal, it argues that '[e]ven if many of the existing provisions referred to above are minimal rules, it cannot be ruled out that, in the light of recent case law, some of them may also be affected or their scope altered'.⁴⁸ And yet, the Court has held that an agreement allowing its parties to introduce stricter requirements would not affect the Union common rules in the meaning of what is now Article 3(2) TFEU.⁴⁹

The Council's approach to the issue of legal basis reflects a narrow understanding of the exercise of the Union's competence. It provides for the signing of the Istanbul Convention only with regard to matters related to judicial cooperation in criminal matters⁵⁰ and with regard to asylum and non-refoulement.⁵¹ The Council's view is based on the premise that the Union should accede to the Istanbul Convention "as regards matters falling within the competence of the Union insofar as the Convention may affect common rules or alter their scope."⁵² This statement is not accompanied by a reference to either 3(2) TFEU on the exclusivity of the Union competence or Article 216(2) on the existence of the Union competence (the wording of these two provisions is almost identical).⁵³ The approach adopted in the two Council Decisions in question also deviates from the prevailing practice that decisions by the Council on the signature or conclusion of international agreements on behalf of the Union do not, in

⁴⁶ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57.

⁴⁷ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] JO L 335/1.

⁴⁸ COM(2016) 111 final *Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence*, p. 9, where no reference to case-law is included. Available: <https://data.consilium.europa.eu/doc/document/ST-6695-2016-INIT/en/pdf>.

⁴⁹ Opinion 2/91 (ILO Convention n° 170) EU:C:1993:106 as clarified in Case C-114/12 *Commission v Council*, n42 above, para 91.

⁵⁰ Art. 1 Council Dec. 2017/865.

⁵¹ Art. 1 Council Dec. 2017/866.

⁵² Recital 6 of preamble to Council Dec. 2017/865 and Dec. 2017/866.

⁵³ On the conceptual difficulties raised by the formulation of Arts 3(2) and 216(1) TFEU, see G de Baere, *Constitutional Principles of EU External Relations* (OUP, 2008) 70 and P Koutrakos, *EU International Relations Law* 2nd ed (Hart Publishing, 2015) 126-130.

principle, refer expressly to the provisions of the agreements in relation to which the Union exercises its competence.⁵⁴

This narrow reading of the Union's competence raises questions. First, it illustrates a one-dimensional understanding of the exercise of the Union's competence in the context of mixed agreements. While it may be underpinned by a concern that the powers of the Member States in the areas covered by the Convention might be impinged upon, this view appears to ignore the different guises of mixity which aim to facilitate the coexistence of the EU and the Member States on the international scene. Second, the Council's approach is difficult to reconcile with the acknowledgement that the EU competences and the powers of the Member States in the context of the Convention are 'interlinked'.⁵⁵ Third, it may undermine effective application further, all the more so given that the Council itself refers to the coherent exercise of rights and fulfilment of obligations laid down in the Convention.⁵⁶ In this vein, it is worth-noting that that narrow construction of the exercise of the Union's competence entails a territorial limitation on the application of the Convention by the Union, given the AFSJ (area of freedom, security and justice) context of the Union's accession.

The divergences between the Union's institutions that emerge from the above illustrate the contested nature of the Union's external competence and the politically charged of competence disputes. While not surprising in themselves, it is noteworthy that they should persist with such ferocity even though the Union is positively mature in age and, more importantly, against the emphasis on the clarification of competence in the Lisbon Treaty and the development of a solid body of case-law purported to introduce clarity in the area. What makes the above divergences even more noteworthy, however, is their striking contrast. The vague and sweeping manner in which the Commission substantiated its proposal was followed by the Council's narrow and somewhat strident in its implications approach. There is a factor that has highlighted the divergences about competence further, namely the strong disagreement amongst Member States about the content of the Convention and its application. This is examined in the following section.

⁵⁴ There are exceptions: for instance, Council Decision 94/69/EC of 15 Dec. 1993 on the conclusion on behalf of the Union of the United Nations Framework Convention on Climate Change [1994] O.J. L 33/11, Council Decision 94/800/EC of 22 Dec. 1994 on the conclusion of the Agreement establishing the World Trade Organization [1994] O.J. L 336/1.

⁵⁵ Recital 8 of the preambles to to Council Dec. 2017/865 and Dec. 2017/866.

⁵⁶ *Ibid.*

V. The issue of mutual agreement

As the analysis in Section II illustrated, the process of the accession of the Member States to the Convention has been far from smooth. There has been considerable divergence about the scope of the obligations the Member States are prepared to assume, legal objections to the practice of certain Member States, and even a Member State that has expressed its intention to withdraw. It is against this background that the second question raised by the Parliament before the Court needs to be understood. In particular, how may the absence of mutual agreement amongst Member States about their consent to be bound by the Istanbul Convention be reconciled with the qualified majority voting requirement required under Article 218(6) TFEU?⁵⁷

The starting point for our analysis is the procedure laid down in Article 218(6) TFEU. Described as “the procedural code” of the Union’s treaty-making,⁵⁸ Article 218 TFEU has been viewed by the Court to “constitute..., as regards the conclusion of treaties, an autonomous general provision, in that it confers specific powers on the [Union] institutions ... [w]ith a view to establishing a balance between those institutions ...”.⁵⁹

While the political context within which mixed agreements are approached by the Union institutions is never far from the practice of mixity, the Court has not been sympathetic to legal formulas that deviate from the procedural rules set out in Article 218 TFEU. This was illustrated clearly in the case of hybrid decisions, that is, decisions adopted both by the Council and the Representatives of the Governments of the Member States meeting within the Council dealing with issues of both Union and national competence. In Case C-28/12 *Commission v Council*, the Court held that such measures may not be adopted for the signature and provisional application of mixed agreements as they violate Article 218(2), (5) and (8) TFEU (and, therefore, Article 13(2) TEU).⁶⁰ It was the conflation of different procedures and the ensuing deviation from that required under Article 218 TFEU that was found objectionable.⁶¹ Viewed from this angle, to render mutual agreement between Member States about the consent

⁵⁷ The unanimity requirement provided for in Art. 218(6) TFEU does not apply to the Conclusion of the Istanbul Convention.

⁵⁸ A Dashwood in A Dashwood, M Dougan, B Rodger, E Spaventa and D Wyatt, *Wyatt and Dashwood’s European Union Law* (6th ed., 2011) at 936.

⁵⁹ Case C-327/91 *France v Commission*, EU:C:1994:305 para 28.

⁶⁰ Case C-28/12 *Commission v Council*, n21 above.

⁶¹ See the analysis in Joni Heliskoski, *The procedural law of international agreements: A thematic journey through Article 218 TFEU*, (2020) 57 CMLRev, 113 at 90-4 and P Koutrakos, ‘Institutional Balance and Sincere Cooperation in treaty-making under EU law’, (2019) 68 ICLQ 13-16.

to be bound by a mixed agreement a requirement for the conclusion of that agreement by the Union under Article 218(6) TFEU would be tantamount to altering the procedure for the conclusion of the latter. It may also prevent the Union from exercising even its exclusive competences.

While this may be the position as a matter of principle, it may have practical implications difficult to manage. A case in point is the effect of the Istanbul Convention in the light of the failure of certain Member States to ratify it. Would the latter be bound by it as a matter of Union law in so far as the Convention covers areas of Union competence but not in so far as it covers areas of national powers?⁶² If so, how would this work, given the interlinked nature of the Union and national competences pertaining to the Istanbul Convention and the wide-ranging scope of the provisions of the latter? If not, would the absence of mutual agreement not impede the fulfilment of the Union's obligations under the Istanbul Convention, in which case the further question of compatibility with Article 27 of the Vienna Convention on the Law of Treaties might be raised? The dynamic nature of the Union's competence raises an inherent difficulty in approaching the question of the Union's ratification of an agreement in the absence of national ratification. As the division of competence under a mixed agreement is subject to constant redefinition, the ratification by the Union only may amount gradually to the imposition of duties on non-ratifying Member States which were not covered by the provisions ratified originally by the Union.

The implications of the joint participation of Member States and the failure of some to ratify the Convention create a legal knot of considerable complexity. To what extent may the duty of cooperation help approach it?⁶³ It is settled case-law that, in the case of mixed

⁶² See G Van der Loo and R Wessel, 'The non-ratification of mixed agreements: legal consequences and solutions', (2017) 54 CMLRev 735.

⁶³ From the voluminous literature on the duty of cooperation, see F Casolari, 'Like a bridge over troubled water: the 2/15 Opinion through the lens of EU loyalty' in I Bosse-Platière and C Rapoport (eds), *The Conclusion and Implementation of EU Free Trade Agreements – Constitutional Challenges* (Cheltenham: E Elgar Publishing, 2019) 85, M Clamert, *The Principle of Loyalty in EU Law* (Oxford: OUP, 2014), M Cremona, 'Defending the Community Interest: The Duties of Cooperation and Compliance' in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart Publishing, 2008) 125, C Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the Duty of Cooperation' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited – The EU and its Member States in the World* (Oxford: Hart Publishing, 2010) 87, J Larik and A Delgado Casteleiro, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations', (2011) 36 ELRev 524, P Van Elsuwege, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations' in M Varju (ed.), *Between Compliance and Particularism – Member State Interests and European Union Law* (Springer: 2019) 283, E Neframi, 'The Duty of Loyalty: Rethinking Its Scope through Its Application in the Field of EU External Relations', (2010) 47 CMLRev 323.

agreements, the Union institutions and the Member States are under a duty to ensure close cooperation in the process of negotiation, conclusion and application of these agreements.⁶⁴ How far, however, does this duty take us when it comes to the ratification of international treaties? Article 51 of the Vienna Convention on the Law of Treaties attaches great importance to the independent decision of Member States to ratify international agreements, and the Venice Commission points out 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.”⁶⁵ Viewed from this angle, extending the scope of the duty of cooperation so that it covers the ratification of an international agreement would interfere with a fundamental right of Member States as sovereign subjects of international law in so far as this concerns provisions of the Convention that fall within their competence.

The non-ratification of the Convention by certain Member States may have implications for the relationship of the latter not only with the Union but also with the Member States that have ratified it. May it be argued that the refusal to ratify would amount to a change of the Convention which would distinguish it from that to which the latter Member States assumed their ratification referred? This question becomes all the more relevant in the light of the strong responses by Member States to declarations submitted by other Member States that limited considerably the scope of application of the Convention. There are, therefore, policy implications amongst Member States. In legal terms, however, whilst pertinent to international agreements with a strong element of reciprocity (such as the Energy Charter Treaty or the World Trade Organisation Agreements), this point become less strong in the context of an agreement such as the Istanbul Convention which is not a package deal and the *raison d'être* of which does not depend on the establishment of reciprocal arrangements.

The process of accepting the Istanbul Convention in the domestic legal order of the Member States has been far from smooth. The recent Latvian experience is indicative. On 3 August

⁶⁴Opinion 1/94, EU:C:1994:384, para 108, Opinion 2/00 (*Cartagena Protocol*), n29 above, para 18, Case C-246/07 *Commission v Sweden*, EU:C:2010:203 para 73, Case C-28/12 *Commission v Council*, n21 above, para 54.

⁶⁵ Venice Commission Opinion 961/2019 "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) (Armenia)", Council of Europe doc. CDLAD(2019)018, p3.

2020, the Constitutional Court of the Republic of Latvia started proceedings⁶⁶ on an application by twenty-one members of the Latvian Parliament (Saeima). The applicants argue that Article 12(1) of the Istanbul Convention,⁶⁷ along with the general obligation of Article 4(3),⁶⁸ require the State to take the necessary measures to promote changes in the mentality and attitude of society and would not allow discrimination with respect to persons who do not self-identify with their biological sex but self-identify with another sex (gender). The applicants argue that the contested provisions are incompatible with the family and Christian values that form the constitutional identity of the State of Latvia and are included in the Latvian Constitution, the right to freedom of thought and conscience,⁶⁹ as well as with the protection for the traditional family.⁷⁰ The applicants also point out the potential incompatibility between Article 4(4) of the Istanbul Convention with the constitutional prohibition on discrimination, as the special measures for prevention of violence could cause differential treatment on the basis of sex. They also point out that Article 14 of the Istanbul Convention requires the State to include in its education curriculum issues pertaining to persons who do not self-identify with their biological sex and argue that that would be incompatible with the constitutionally protected right of the child's parent to ensure the compatibility of their children education with their religious convictions and philosophical views. Date of the hearing of the case: 05.05.2021.

Finally, another layer in this episode is about the enforcement of the Convention and issues of responsibility. As mentioned above, the Istanbul Convention provides for the establishment of a specific independent monitoring body (GREVIO), tasked with ensuring effective implementation of its provisions by the Contracting Parties. This monitoring body's functions and powers are set out in detail in Chapter IX of the Istanbul Convention. Contracting Parties must submit detailed reports on legislative and other measures giving effect to the Convention which would then be evaluated by GREVIO. The latter would define a monitoring procedure

⁶⁶ Decision of the Constitutional Court of 3.08.2020 in the case No. 2020-39-02. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2020/08/2020-39-02_Lemums_par_ierosinasanu-3.pdf#search=.

⁶⁷ Art. 12(1) reads as follows: 'Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of 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'.

⁶⁸ Art. 4(3) reads as follows: '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, migrant or refugee status, or other status'.

⁶⁹ Protected under Art 99 Latvian Constitution.

⁷⁰ Protected under Art 110 Latvian Constitution.

and may execute country visits during which its members enjoy the privileges and immunities set out in the Appendix to the Istanbul Convention. The GREVIO will draw up a report and conclusions, which must be rendered public as soon as they are adopted, together with any comments by the Contracting Party. The GREVIO's report and conclusions may form the basis for the Committee of the Parties' recommendations to the Contracting Party, which may also be required to report back on implementation of the recommendations by a certain date. The GREVIO may also conduct urgent enquiries, the results of which will be submitted to the Contracting Party, to the Committee of the Parties and to the Committee of Ministers of the Council of Europe.

The Union, like any other party to the Convention, will become subject to the above procedure upon accession and all Union institutions, bodies, offices and agencies will be subject to this control/monitoring mechanism.⁷¹ As the Union would not be able to exempt these spheres from the scope of the Istanbul Convention's obligations, it is curious that the Commission's proposals should have overlooked this aspect of accession. This is all the more so given that the question of the obligations that the Union would incur for its own institutions and its public administration had been raised in the context of the UNCRPD, that is the only other human rights convention to which the Union has acceded. The declaration of competence that was eventually made by the Union in regard to the UNCRPD explicitly mentions the matter of the Union's own obligations under that Convention for the Union's own institutions and its own public administration.⁷² It is interesting that the first monitoring report that the Union received under the UNCRPD should have been critical of its institutions and required that the Union address the perceived shortcomings and report back.⁷³ The responsibility, therefore, that the Union might incur for its own institutions and public administration under the Istanbul Convention is worth considering.

VI. Conclusion

The process of the Union's accession to the Istanbul Convention and the pending procedure before the Court provide an intriguing snapshot of the challenges that the conclusion of mixed agreements may raise for both the Union and its Member States. Not only does it raise a range

⁷¹ See recital 7 to the preambles to Council Decision (EU) 2017/865 and Council Decision (EU) 2017/866.

⁷² Annex II to the Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] JO L 23/35.

⁷³ Information regarding United Nations Convention on the Rights of Persons with Disabilities. Available: <https://ec.europa.eu/social/main.jsp?langId=en&catId=1138>.

of issues, both substantive and procedural, that are central to mixity but it brings them into sharp relief. The stark manner in which these issues have emerged may be explained by timing, the current state of Union integration and the wide and diverse membership of the Union. The prevailing climate in the Union is characterised by the emergence of a small but vocal number of Member States the prevailing views of which about how to organise society differ considerably from the liberal mainstream EU norm. In such a climate, the aims and methods of the Convention have attracted greater attention and objections to them have found fertile ground.

There is also the issue of mixity itself. The issues raised by the unfolding episode of the ratification of the Istanbul Convention are so central to mixity that it is surprising that they should have been addressed so far. This is all the more so given the long life of the principle so far and its gradual evolution shaped by the Court's case-law and treaty-making practice. It is a testament to the pragmatism of the Union's institutions and the Member States as well as the dynamism of the Union legal order that mixity should have become central to the Union's international presence even though fundamental principles about its function and implications have been ambiguous at best.

In the light of the above, and given the wide membership of the Union and the diversity amongst Member States, it was only a matter of time before the very limits of this formula would be tested. After all, the dispute about the conclusion of the Istanbul Convention on behalf of the Union touches upon the very function of mixity as a pragmatic solution to the co-existence of Union competence and national powers in the context of a given agreement. There is, therefore, a strong policy dimension against which this episode may be viewed. This was not lost to the Commission, for instance: in its 2015 Roadmap to the accession to the Istanbul Convention, it argued as follows: “[p]rovided that the Union would accede, alongside Member States, to the full extent of its competences, ratification of the Istanbul Convention would put the Union in a strong position as regards monitoring of enforcement of the Istanbul Convention also beyond the Union and would send a firm political message. At the same time, the Union would become internationally accountable for the implementation of those parts of the Istanbul Convention. Union accession would also answer the calls from the European Parliament and stakeholders for binding measures at Union level”.⁷⁴ This view of what the Commission

⁷⁴ Roadmap to the accession to the Istanbul Convention. Available: <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-accession-to-the-istanbul-convention>.

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considers necessary for the effective application of the Convention is set against the intense disagreements between Member States about their own position. Addressing these issues whilst taking into account the constitutionally significant procedure in Article 218 TFEU will be no mean feat.