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The Impact of Vulnerability on State Obligations in Criminal Proceedings on Domestic Violence: Interpreting the Istanbul Convention and the European Convention on Human Rights

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ABSTRACT

The article discusses how the categorical designation of victims of domestic violence as vulnerable by the European Court of Human Rights compares to the approach taken in the Istanbul Convention. The doctrinal legal analysis is based on the interpretation of the European Convention on Human Rights and the Istanbul Convention by their monitoring bodies, with a focus on criminal proceedings in domestic violence cases. The article concludes that the protection enjoyed under the Istanbul Convention appears relatively similar to that required by the case law of the European Court of Human Rights, regardless of whether the victims are formally designated by the Istanbul Convention as being in a vulnerable position or not. However, already this limited study displays divergence on a central protection issue, meaning more open reflection by the monitoring bodies would be welcome as regards the grounds for and legal consequences of regarding an individual as vulnerable.

KEYWORDS

Criminal proceedings; domestic violence; European Convention on Human Rights; gender-based violence; Istanbul Convention; vulnerability

INTRODUCTION

International human rights bodies, such as the European Court of Human Rights (ECtHR), and legal literature have labeled numerous groups vulnerable, including women subjected to domestic violence (Meyersfeld, 2010). At times, already being a woman has been regarded as causing vulnerability, generally in specific contexts of widespread violations of the rights of women (e.g., *Opuz v. Turkey* 2009, para. 160). However, despite the wealth of research on the topic of vulnerability, it remains disputed not only on what factors this classification is based but also what the legal effects are in international law when a person or group of persons is classified as vulnerable. In international human rights law vulnerability is increasingly held to lead to special obligations for public authorities (e.g., Inter-American Commission on Human Rights, 2011; *Dorđević v. Croatia*, 2012). This article will focus on one aspect of this discussion, namely the legal effect in criminal proceedings of being a victim of domestic violence. The main issues addressed are firstly, what makes these victims vulnerable and secondly, which concrete considerations vulnerability has led to in criminal proceedings under the two conventions studied.

Domestic violence, or violence within the family or domestic unit or between former or current partners (the Council of Europe Convention on preventing and combating violence against

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women and domestic violence, or Istanbul Convention, Article 3), is a form of gender-based violence. Gender-based violence is understood to entail violence that is directed against a person based on gender or that affects one gender disproportionately (Istanbul Convention, Article 3). The victims of domestic violence are predominantly women, with WHO statistics indicating that over 25% of all ever-married or -partnered women have been subjected to physical and/or sexual violence by a current or former husband or male intimate partner at least once in their lifetime since the age of 15 (WHO, 2021). Domestic violence may take many forms, some of which do not result in physical injury, such as psychological or economic abuse, or controlling or coercive behavior (*Volodina v. Russia*, 2019, para. 81). In addition to being gendered, domestic violence is characterized by the use of violence to control and exert power, a continuum of violence (Kelly, 1988), escalation over time (but see Boxall & Lawler, 2021) and low reporting percentage to the authorities (Voce & Boxall, 2018, p. 2). The COVID-19 pandemic has sadly demonstrated the increased risk of violence posed to women confined to their homes (Inter-Agency Statement on Violence against Women and Girls in the Context of COVID-19 2020).

The article explores the interpretation of the vulnerability of victims of domestic violence through an analysis of recent case law of the ECtHR, the text of the Istanbul Convention and its Explanatory Report (Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011), and the practice of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) monitoring the implementation of the Istanbul Convention. The approaches toward vulnerability in the specific setting of criminal proceedings are then compared for the purpose of finding out if they can be reconciled. Until now, legal research has not paid much attention to the possible divergence between the European Convention on Human Rights (ECHR), as interpreted by the ECtHR, and the Istanbul Convention as regards the vulnerability of victims of domestic violence as well as the legal implications of any such divergence. Differing interpretations of the two European conventions would be problematic as the states that have ratified them largely overlap (although the Istanbul Convention has not yet been ratified by all states bound by the ECHR).

The analysis sets off with an overview of the vulnerability concept. It then turns to a discussion of what vulnerability does in the criminal proceedings setting in these conventions. Finally, it looks at whether the outcomes of the approaches to vulnerability can be reconciled, a question of interest from the perspective of the harmonization of international law, a topic explored by e.g., Hamilton and Buyse (2018) and Burchardt (2017). In doing so, the author remains conscious of the fact that the ECHR and usually also its interpretation by the ECtHR are formulated in a general manner, while the provisions of the Istanbul Convention and its Explanatory Report are rather detailed. Furthermore, the monitoring tasks under the two conventions differ considerably. The ECHR is a general human rights convention interpreted through individual cases by the ECtHR. Meanwhile, the Istanbul Convention is a thematic treaty dedicated to setting out the minimum measures needed to ensure victims of violence against women and domestic violence effective protection (and in this sense *lex specialis* in regard to the ECHR), which is interpreted by GREVIO mainly through state reports, although it can also adopt General Recommendations. To date, one General Recommendation, dealing with digital violence, has been adopted. Individual complaints cannot be submitted to GREVIO, meaning it is not able to comment in any depth on individual cases in ratifying states, even if it occasionally mentions prominent national cases in its state reports. GREVIO is thus able to address violations mainly in a general manner, while the ECtHR is confined to addressing the specific circumstances in the cases submitted to it. The Istanbul Convention does not list the specific human rights underlying its provisions, although it expressly mentions nondiscrimination and remedies. Only parts of the Istanbul Convention introduce special protection standards not indicated by the ECtHR prior to the adoption of the Convention. These factors affect the manner in which the bodies address vulnerability.

To provide an insight into the vulnerability reasoning of the ECtHR, the *Kurt v. Austria* (2021) case, in which the ECtHR is uncharacteristically detailed as to the requirements of the ECHR, is given a prominent place in the discussion. This is not to imply that the case is without its flaws. The analysis also includes all Baseline Reports by the GREVIO Committee adopted by the time of writing (3 October 2023), while in terms of the jurisprudence of the ECtHR it relies in particular on the three most recent domestic violence cases selected as “key cases” in the Court’s HUDOC database, namely *Buturugă v. Romania* (2020), *Tërshana v. Albania* (2020) and *Kurt v. Austria* (2021). The recent key case *Galović v. Croatia* (2021) where the crime in question was domestic violence, but which centered on the issue of duality of proceedings, has not been included in the analysis. The case *J.I. v. Croatia* (2022), in which the Court mainly repeated its argumentation on vulnerability, will only be mentioned briefly. The choice of “key cases” as a sample is based on the fact that these have been selected by the President of the Court, the Vice-Presidents of the Court and the Section Presidents (“the Bureau”) as the most important cases dealt with by the Court (Rules of Court 3 October 2022). The key cases will be complemented by the case of *Levchuk v. Ukraine* (2020), as it raises several points relevant to our vulnerability analysis. The sample seeks to provide examples of how the ECtHR has approached vulnerability in domestic violence cases rather than a more extensive examination of ECtHR practice on domestic violence, which has been undertaken for example by Herring (2020).

The possible stigmatizing effect of vulnerability labeling has been explored elsewhere, with e.g., Peroni finding that “the exclusive focus on female victims of violence has recreated old stereotypes of women as intrinsically vulnerable and in need of protection,” in particular when it comes to “other” women (Peroni, 2016, p. 52). So has the prioritizing function of vulnerability reasoning, that is, the prioritization of the protection of those in most need of it (e.g., Engström, Heikkilä & Mustaniemi-Laakso, 2022, p. 120). These issues will not be elaborated upon here.

THE POPULAR, YET ELUSIVE, VULNERABILITY CONCEPT

Vulnerability can be said to mean actual or potential exposure to physical or emotional harm (Nifosi-Sutton, 2017, p. 15), but the term is also used in the wider meaning of risk of exposure to violations of human rights. From a legal point of view, vulnerable groups can correspondingly be understood to mean persons who risk human rights violations to a greater extent than others in a comparable situation, and often applies to groups subjected to discrimination (Nifosi-Sutton, 2017, p. 270). Vulnerability can be inherent when based on innate or physical characteristics, such as in the case of children (Ippolito, 2015), in which case discrimination may or may not be present. Meanwhile, situational vulnerability refers to persons in a vulnerable situation, often resulting from deliberate human conduct that turn an individual into a victim (Ippolito & Sánchez, 2015, p. 6), which applies to women subjected to domestic violence. Situational vulnerability can be structural, that is, enduring and originating from laws, policies or institutions (compare Mackenzie et al., 2014, p. 8). It is thus pertinent to ponder whether to employ the term vulnerabilized rather than vulnerable. Molenaar and Van Pragg indeed propose that we regard vulnerability “as the dynamic outcome of a process of ‘vulnerabilisation’ shaped by social order and power relations” (Molenaar & Van Pragg, 2022, p. 1).

Fineman’s argument that vulnerability is a universal condition that we are all susceptible to during different times in our lives has had a large impact on the general thinking in vulnerability theory (Fineman, 2008, pp. 12–13), which has shifted away from considering vulnerability as a set characteristic inherent to specific groups, such as women, and instead stresses building resilience (Fineman & Gear, 2013). In this theory, the focus is moving toward the circumstances that render certain groups vulnerable, instead of which groups are vulnerable (Peroni & Timmer, 2013, pp. 1073–1074). The lack of a uniform definition and understanding of vulnerability has the consequence that the concept can be used to prop up existing systems. Timmer et al. suggest that if

you define specific groups as vulnerable, rather than finding that everyone can be vulnerable, you accept as status quo that some groups are worse off and allow the concept of vulnerability to be used to provide those groups with certain limited entitlements without challenging larger underlying issues (Timmer et al., 2021, p. 195).

The term “vulnerability” is thus by no means uncontroversial, with both pros and cons associated with its use in relation to specific individuals, groups or contexts, and with vulnerable persons often portrayed as dependent and passive objects of protection (Mustaniemi-Laakso et al., 2022). It has *inter alia* been suggested that one should refrain from using the term vulnerable groups altogether and rather refer to “disadvantaged groups” in order to create distance to the stereotyped preconception that vulnerability is an inherent characteristic notably of women (The European Institute for Gender Equality). However, a person can arguably be vulnerable without being disadvantaged or marginalized, as in the case of (some) crime victims (similarly, Bernardes & Martins, 2023, p. 119). While conscious of the pitfalls of the vulnerability concept, this article, which deals exclusively with the legal understanding of vulnerability, employs the term vulnerable as it is more established in legal discussions.

The concept of vulnerability is employed by an increasing number of international bodies, including the ECtHR, most often in relation to Articles 3 and 8 (Besson, 2014, p. 66), the UN human rights bodies (e.g., Committee on the Elimination of Discrimination Against Women, 2014, para. 9.4), and the Inter-American human rights bodies (e.g., Inter-American Court of Human Rights, 2009, para. 408). None of them have provided an explicit explanation of what they mean by vulnerability, although inferences can be made from their jurisprudence. The key factor in assessing individual vulnerability appears to be dependency based on either circumstances or individual characteristics, with ensuing defenselessness, while the key factor in group vulnerability generally is discrimination, often in combination with social exclusion (Zimmermann, 2015, pp. 540–541). A fundamental question is whether the dependency—and/or subjection to control and fear—experienced in domestic violence cases render the victims as a group vulnerable *per se* from a legal point of view. In other words, is vulnerability linked in European human rights law with factors that are not typically associated with group vulnerability? The author recognizes that dependency and subjection to control and fear may be present also in the context of other groups of individuals, such as irregular migrants. The question is of interest as it would explain the ECtHR’s lumping together of all victims of domestic violence as a vulnerable group.

The legal understanding of the notion of vulnerability has largely been based on case law and doctrine, as the concept is relatively new and therefore absent from most international treaties. However, in the Istanbul Convention the notion of vulnerability has uniquely been incorporated into the provisions of a human rights treaty. This relatively hands-on treaty goes into unusual detail in proscribing the manner in which it should be implemented. Notably, the convention explicitly requires states to criminalize certain forms of violence against women and domestic violence and to adopt a range of criminal law measures in the areas of investigation, prosecution and procedural law as well as specific preventive and protective measures. Furthermore, Article 5(2) of the Convention sets out a general requirement to exercise due diligence in preventing, investigating, punishing and providing reparation for acts of violence. However, this provision makes no reference to vulnerability. Vulnerability is mentioned in a few substantial articles of the Istanbul Convention, to which we will return below.

A pertinent question is to what individuals and groups are regarded as vulnerable. The wording of the Istanbul Convention and the Baseline Reports issued so far by the GREVIO Committee appear to view vulnerability above all as vulnerability to violence, or a heightened risk to be subjected to violence, resulting in a (potential) need for particular measures to address their specific protection needs (e.g., GREVIO, 2020a, p. 21). Studies show that domestic violence tends to be of a repeat nature (Walby & Towers, 2017, p. 15). While the Convention and the Baseline Reports do foresee special protection in procedural matters such as investigations, prosecution

and court proceedings, this applies to every crime victim within the scope of the Istanbul Convention, with no additional procedural safeguards being foreseen for individuals formally designated as vulnerable by the Convention. In Chapter 3, we will return to what this means for the reasoning on the vulnerability of domestic violence victims. Here, suffice it to note that the ECtHR appears to have taken a wide view to vulnerability of victims of domestic violence, treating these individuals as vulnerable to human rights violations of a broad spectrum. Its case law displays a tendency to view victims of domestic violence as requiring protection from further rights violations of both substantive and procedural aspects notably of the rights to life, private and family life, and nondiscrimination (e.g., *Kurt v. Austria*, 2021; *Buturugă v. Romania*, 2020). Meanwhile, GREVIO is confined to the narrower scope of the Istanbul Convention. In the following, we will turn to what considerations this has led to in practice.

In doing so, it should be kept in mind that although significant, vulnerability is only one factor that is taken into account in criminal proceedings, and it will depend on the circumstances of the case and the kind of vulnerability at hand how much weight is accorded to the vulnerability factor over other considerations (Timmer, 2013, p. 165). As will be discussed below, the ECtHR has started to allocate certain weight to the vulnerability of victims of domestic violence in assessing the handling of such cases by national authorities.

INTERPRETATION OF THE VULNERABILITY OF VICTIMS OF DOMESTIC VIOLENCE UNDER THE ECHR AND THE Istanbul Convention

The Approach of the European Court of Human Rights

The ECtHR regularly refers to the particular vulnerability of victims of domestic violence and the need for active State involvement in their protection. It has not gone into any detail in explaining on what factors this vulnerability is based, although it has made frequent reference to other international instruments in framing victims of domestic violence as vulnerable. However, the Court has taken into account past violence, threats and fear of further violence as well as social background, which it has understood as the existence of community attitudes tolerant of violence against women and a pattern of impunity for violence against women (e.g., *Opuz v. Turkey*, 2009, para. 160; *Tkheldidze v. Georgia*, 2021). Besson has pointed out that in contexts where the Court repeatedly has found that individuals belonging to a particular group are vulnerable based on the circumstances, it has tended to find that the entire group in question is categorically vulnerable (Besson, 2014, p. 70). This goes against its own finding that “(p)rotection of vulnerable individuals should be based on their individual characteristics rather than on a formal group classification” (*Tomov and Others v. Russia*, 2019, para. 189). It appears that vulnerability is consistently allocated by the Court only to a few groups, one of which is victims of domestic violence (al Tamimi, 2016, pp. 6–7). In addition, vulnerability is also allocated on an individual basis, for example due to health conditions in combination with detention (*Rooman v. Belgium*, 2019).

It is to be noted that this group approach to the vulnerability of victims of domestic violence exists also elsewhere in Europe. A similar approach of regarding all victims of domestic violence as vulnerable is taken by Article 22 of the EU Crime Victims Directive, which specifically mentions victims whose relationship to and dependence on the offender make them particularly vulnerable, such as victims of gender-based violence and violence in a close relationship (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).

Certain interaction between the ECHR and the Istanbul Convention, which is widely ratified among Member States of the Council of Europe, is to be expected, including in relation to the interpretation of vulnerability. In *M.G. v. Turkey*, which was decided in 2016, the ECtHR for the

first time explicitly referred to the Istanbul Convention in its reasoning on merits, including in order to justify its finding that victims of domestic violence are vulnerable. The Court has since then repeatedly emphasized that special diligence is required in dealing with domestic violence cases and that the specific nature of domestic violence as recognized in the Preamble to the Istanbul Convention must be taken into account in the context of domestic criminal proceedings (e.g., *Buturugă v. Romania*, 2020, para. 67). Recently, it would appear that the approach of the ECtHR to the vulnerability of victims of domestic violence is becoming increasingly nuanced in the sense of what is expected of the state in order to address domestic violence so that the vulnerability of the victim is properly taken into account. Although in terms of adopting a gender-sensitive approach, the ECtHR still has some way to go (e.g., van Leeuwen, 2020), the entry into force of the Istanbul Convention is likely to have contributed to this development.

Indications to this effect are provided for example by the *Volodina v. Russia* (2019) case, where the Court indirectly addressed the threshold of severity for investigating domestic violence cases. Until now, it has remained somewhat unclear what level of severity is required in domestic violence cases for an obligation to investigate to arise under the ECHR. The Court has stressed that in Article 3 cases, the assessment of this minimum level of severity is relative and depends on all circumstances in the case (*Valiulienė v. Lithuania*, 2013, para. 65). While the threshold of severity is lower for domestic violence to fall under Article 8, also in relation to this article it should reach a minimum level (*Costello-Roberts v. the United Kingdom*, 1993, para. 36). It should be noted that the Istanbul Convention foresees no minimum level of severity for domestic violence, implying that all acts are covered by the Convention. However, certain provisions such as Articles 33, 46(h) and 55(1) foresee different treatment depending on the gravity of the crime (Explanatory Report, 2011, paras. 180; 243; 280). In *Volodina v. Russia*, the ECtHR importantly stated that the prohibition of ill-treatment under Article 3 covers all forms of domestic violence without exception, and that every such act triggers the obligation to investigate, noting that even a single blow may arouse feelings of fear and anguish in the victim, and seek to break her moral and physical resistance. The Court further noted that a vulnerable victim might experience fear regardless of the objective nature of such intimidating conduct. A plausible conclusion is that the Court's reasoning confirms the view that victims of domestic violence are vulnerable due to their constant proximity to and/or their dependence on the perpetrator. One might draw partial parallels to the special due diligence that pertains in relation to violence against individuals such as detainees or conscripts who are within the direct control of the authorities, presuming that the reason for stricter due diligence in the latter cases is not limited to the fact that those in control are agents of the state but also relates to the more general fact of being under the control of others (e.g., *Premninny v. Russia*, 2011, para. 73).

The Approach of the Istanbul Convention and the Practice of GREVIO

The Preamble to the Istanbul Convention recognizes that women and girls are exposed to a higher risk of gender-based violence than men are and that also in the case of domestic violence, women are disproportionately affected. However, interestingly, neither the Istanbul Convention nor its Explanatory Report explicitly state that victims of domestic violence against women are vulnerable, although this was the conclusion of the ECtHR already prior to the adoption of the Convention (*Bevacqua and S. v. Bulgaria*, 2008, para. 65). As a rule, the Istanbul Convention and GREVIO are guided by the case law of the ECtHR (Explanatory Report, 2011, para. 29). It can of course be argued that the very spirit of the Istanbul Convention, including its Preamble, could be read to recognize the vulnerability of all victims of violence against women and domestic violence, as could Article 4(4) in providing for special measures, but this vulnerability is not spelled out.

The Explanatory Report to the Istanbul Convention provides a non-exhaustive list of circumstances leading to vulnerability. Being subjected to domestic violence is not among these. The list is provided in the context of Art. 12(3) of the Istanbul Convention, which requires positive measures to ensure that any preventive measures specifically address and take into account the needs of vulnerable persons. The list is referred to also in the context of other articles mentioning vulnerable persons, namely Article 18(3), which requires states to ensure that protection and support services are made available to vulnerable persons and address their specific needs, and Article 46(c) (discussed further below). The wording of these provisions could be interpreted as suggesting that not all victims of domestic violence are vulnerable. The Explanatory Report's indicative list include the following groups: pregnant women and women with young children; persons with disabilities (including those with mental or cognitive impairments); persons living in rural or remote areas; substance abusers; prostitutes; persons of national or ethnic minority background; migrants (including undocumented migrants and refugees); LGBT persons; HIV-positive persons; homeless persons; children; and the elderly. The Explanatory Report notes that perpetrators often choose to target persons in the circumstances listed due to the knowledge that because of their situation, these vulnerable persons are less likely to be able to defend themselves or seek prosecution or reparation. The vulnerability of persons in these categories is not entirely clear-cut. For example, it has been suggested that not all immigrant women are vulnerable, although they often have vulnerabilities linked to social, structural and individual variables that determine whether women regard certain acts as abusive or not, and their ability to escape violent relationships (Graca, 2017). Whether or not one agrees with the choice of these specific groups as vulnerable, the very existence of the list implies that victims of domestic violence may need to fall within these circumstances in order to be regarded as vulnerable. In the following, we will explore if this actually is the proper interpretation of the Istanbul Convention.

Some clues can be found in Article 46 of the Convention, which lists aggravating circumstances for criminal offenses. One of the circumstances expressly mentioned is the close relationship between the victim and the perpetrator, but in addition the article mentions “the vulnerability of the victim due to particular circumstances,” implying that being in a close relationship with the perpetrator does not as such make the victim vulnerable. The Explanatory Report to the Istanbul Convention does not shed any further light on this point. The requirement that national courts are able to consider this aggravating circumstance appears to be the main consequence in the criminal process of belonging to the groups regarded as vulnerable. For the rest, it remains unclear what these specific vulnerable groups concretely gain in terms of procedural protection in criminal proceedings by being classified as vulnerable.

The manner in which GREVIO has applied the concept of vulnerability in practice is revealing. Few of the 32 baseline evaluation reports adopted by GREVIO so far directly or indirectly refer to a close relationship with perpetrators as creating vulnerability (situation by 3 October 2023). However, in the report on Bosnia and Herzegovina (GREVIO, 2022, para. 191), GREVIO noted that in mandatory mediation procedures, victims of domestic violence are particularly vulnerable due to power imbalances. Instead, the reports mainly confine themselves to pointing out that domestic violence affects women disproportionately (e.g., GREVIO, 2017b, p. 12) and mention the need to pay special attention to particularly vulnerable groups such as women with disabilities or immigrant background in line with the indicative list in the Explanatory Report. Several reports for example refer to the vulnerability of victims of gender-based violence in the context of asylum processes, but it appears that the vulnerability is conditional on these individuals being asylum-seekers (GREVIO, 2020b, p. 70).

Furthermore, it emerges from GREVIO's reports that in certain national criminal law systems, for example in Austria and Portugal, victims of domestic violence as such qualify for the special status of vulnerable victim, triggering additional protective measures during criminal proceedings (GREVIO, 2017a, para. 186; GREVIO, 2019, para. 11). GREVIO has not commended or otherwise

commented on this approach. This means that to qualify for a heightened level of due diligence as compared to other victims of violence against women under the Istanbul Convention, victims of domestic violence may need to be made vulnerable by particular circumstances.

These considerations could be seen as pointing toward the conclusion that under the Istanbul Convention, victims of domestic violence are not regarded as vulnerable *per se*. Another possible line of interpretation is that under this convention there is an implicit understanding that all domestic violence victims are in a vulnerable position and among those individuals, there are particularly vulnerable individuals, whose specific needs must be catered to. This would be in line with the ECtHR's view of vulnerability as summarized by O'Boyle: "[...] even within a particular category of vulnerability there may exist a further subset of that category that are [sic] deserving of even greater protection" (O'Boyle, 2016, p. 4). However, as the concept of particular vulnerability is not explicitly mentioned in the Istanbul Convention or the Explanatory Report, and GREVIO has not explicitly taken this view, this interpretation is still to be corroborated.

The Argument that All Victims of Domestic Violence are Vulnerable

Taking into account the factors widely regarded as adding to a person's vulnerability discussed further below, is there cause to consider all victims of domestic violence vulnerable *per se* as the ECtHR does? Or should one rather seek to identify if there are factors causing vulnerability in victims of domestic violence in each individual case? Arguably, there might exist individual victims of such violence who are not particularly vulnerable, due to empowering factors such as economic independence, access to social support and similar. This could of course also apply to other forms of group vulnerability. It has been pointed out that the ECtHR adopting a group vulnerability approach may seem economical and in certain instances factually justified, but results in moving the focus away from the necessary contextual evaluation of an individual's situation (Baumgärtel, 2020, p. 17). It is indeed questionable whether a group approach is desirable.

This would speak for the validity of the approach of the Istanbul Convention not to (explicitly) ascribe vulnerability to all victims of domestic violence. However, also the list of persons made vulnerable by particular circumstances elaborated for the purposes of the Istanbul Convention effectively lumps individuals together as groups. The list focuses on distinct groups of individuals rather than typical intrinsic features of abusive relationships that can render any individual particularly vulnerable. Although the list includes for example pregnant and elderly women, the grounds listed largely tilt toward "other" women, or women with immigrant backgrounds, disabilities or engagement in prostitution, rather than recognizing that any victim of domestic violence may be in a very difficult position because of a combination of fear, being under the control of the perpetrator, and perceived shame and guilt. These factors may in general distinguish domestic violence victims from other victims of violence against women, and are discussed for example in the 1996 Report of the Special Rapporteur on violence against women (UN Special Rapporteur on Violence against Women, 1996). Fear, control and dependency may also effectively hinder victims of domestic violence from seeking help or reporting violence to the authorities. Due to these factors, the author finds that in most, if not all, cases of domestic violence the circumstances will be such as to give rise to vulnerability.

The victims of domestic violence in a row of ECtHR cases have referred to fear of continued or future violence, with the Court bestowing this legal relevance, notably by regarding the fear as contributing to the conclusion that the violence has reached the level of severity required for being dealt with under Article 3 (e.g., *M. G. v. Turkey* 2016, paras. 104–106; *Bâlşan v. Romania* 2017, para. 60; *Hajduová v. Slovakia* 2020, para. 49; *Volodina v. Russia* 2019, para. 75). The Istanbul Convention and the Explanatory Report foresee several measures to take into account fear, control and dependence. The Explanatory Report notably points out that provision of services shall not depend on the victim's willingness to press charges or testify (para. 121); foresees a

possibility for national authorities to limit the ability of the perpetrator to thwart attempts of the victim to seek protection by taking the necessary measures to ensure that restraining and protection orders may not be issued against the victim and perpetrator mutually (para. 276); and requires law enforcement authorities to investigate in a proactive way in order to enable *ex officio* proceedings (para. 280).

From the viewpoint of the victim, the fact that the Istanbul Convention does not explicitly name victims of domestic violence as a vulnerable will in practice only be relevant if the legal protection offered to (all) victims of domestic violence is weaker under the Istanbul Convention than under the case law of the ECtHR. We will therefore next move on to examine whether that is the case.

RECONCILING THE VIEWS OF THE TWO BODIES

As concluded above, judging by the case law of the ECtHR, already the fact that a case concerns a victim of domestic violence in itself means that it must be handled with particular diligence. In *Talpis v. Italy* (2017, para. 129) the Court for example stated:

The Court again emphasises that special diligence is required in dealing with domestic violence cases and considers that the specific nature of domestic violence as recognised in the Preamble to the Istanbul Convention [...] must be taken into account in the context of domestic proceedings.

This obligation to exercise special diligence in proceedings on domestic violence could perhaps be seen as essentially corresponding to the requirement in Article 49 of the Istanbul Convention for all relevant investigations and court proceedings to be carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings. This chapter will look into how these stances have played out in practice and whether there are other considerations in criminal proceedings that are specific to domestic violence cases.

In order to discern whether the approaches of the ECtHR and the Istanbul Convention can be reconciled, we will attempt to extract what the Court has called upon states to do to reflect the vulnerability of victims of domestic violence in three so-called key cases. The latest relevant key cases on domestic violence are *Buturugă v. Romania* (2020), *Tërshana v. Albania* (2020) and *Kurt v. Austria* (2021). Also the key case *J.I. v. Croatia* (2022) will be discussed briefly. These cases will be complemented by the case of *Levchuk v. Ukraine* (2020), which raises several points relevant to our analysis. Although all five states involved in these cases have ratified the Istanbul Convention, the cases relate to events taking place prior to the entry into force of this convention for the states. At the time of the events, the states were thus bound only by ECHR standards, which likely limited the direct references made by the Court to the Istanbul Convention. The measures called for by the Court will then be mirrored against those required by the Istanbul Convention and its Explanatory Report or recommended in GREVIO practice. It should be kept in mind that the ECtHR is guided also by other principles than taking due note of the possible vulnerability of the victim, and it does not always spell out which of its conclusions are influenced mainly by vulnerability.

Already in earlier cases, the ECtHR has indicated that when a victim of a violation of the ECHR is vulnerable, this has legal consequences. It affects the required level of due diligence (*Hajduová v. Slovakia* 2010, para. 50) by requiring states to take measures that are specifically tailored to protect their rights, at times including resort to criminal proceedings (Heri, 2021, p. 136), and it limits the margin of appreciation of national authorities in the sense that specific measures might be required (*Đorđević v. Croatia* 2012, para. 148). It also lowers the threshold for the level of severity required to constitute a violation of physical and mental integrity (*T.M. and C.M. v. the Republic of Moldova* 2014, para. 41). The sample of cases throw some light on what this entails in practice. It has been suggested that the vulnerability reasoning of the ECtHR in

Article 3 cases, which include domestic violence cases, provides an emerging form of minimum content to the state's positive obligations under that article (Heri, 2020, p. 97). In domestic violence cases, the Court has indeed at times used the vulnerability of the victim as a reason to elaborate on the measures required from the state in unusual detail.

In *Tërshana v. Albania*, the Court referred to the findings of GREVIO regarding the prevalence of domestic violence in the country and stated that “whenever there are any doubts about the occurrence of domestic violence or violence against women, special diligence is required of the authorities to deal with the specific nature of the violence in the course of the domestic proceedings.” In this case, vulnerability was not mentioned in the Court's reasoning on due diligence, but it was arguably implicit. The Court added that whenever there is a suspicion that an attack (in this case outside the home but suspected to be committed by the victim's former husband) might be gender motivated, it is particularly important that the investigation is pursued with vigor. By comparison, while Article 5(2) of the Istanbul Convention requires States to exercise due diligence for example in investigating domestic violence, it does not require an elevated level of diligence. This case thus aptly demonstrates the main apparent gap between the two approaches, with one explicitly stressing that a higher level of due diligence applies to domestic violence cases, while the other one does not. Nonetheless, the Explanatory Report to the Istanbul Convention stresses that the term due diligence is understood in line with the case law of the ECtHR (Explanatory Report, para. 58).

The key case *Buturugă v. Romania* adds to our analysis of the consequences of vulnerability in criminal proceedings on the issue of digital violence. The Court held that acts such as illicitly monitoring, accessing or saving a partner's correspondence can constitute forms of domestic violence and therefore be taken into account by the domestic authorities when investigating cases involving other forms of domestic violence. Also the Istanbul Convention treats digital violence as a form of violence against women (Explanatory Report, 2011, paras. 182, 183), and Article 46(b) expressly enables judges to take into account related forms of violence by the same perpetrator against the same victim notably as an aggravating circumstance in sentencing. The Explanatory Report clarifies that this provision aims to emphasize the particularly devastating effect on a victim who is repeatedly subjected to the same type of criminal act.

In the case *Kurt v. Austria*, the ECtHR was exceptionally elaborate in terms of the measures required from the state. The case concerned the murder of a child by a husband accused of domestic violence against his wife and two children and barred from the home. The murder took place in the child's school. The Court noted that children who are victims of domestic violence are particularly vulnerable individuals and that violence against children can be used by perpetrators of domestic violence “as the ultimate form of punishment against their partner” (para. 163). The Court presented a clarification of what it concretely means when it says that the specific context and dynamics of domestic violence should be taken into account or, more specifically, how the so-called *Osman* test should be applied in domestic violence cases (*Osman v. the United Kingdom* 1998). The *Osman* test establishes an obligation for domestic authorities to ensure the existence of effective criminal law provisions as well as appropriate preventive measures to protect individuals whose life is at risk. It has rightly been questioned whether this test, which requires an immediacy of risk, is suitable in domestic violence cases (e.g., Separate Opinion by Judge Pinto de Albuquerque in *Volodina v. Russia* 2019). The Court set out several key principles of relevance to our analysis. Firstly, domestic authorities must respond immediately and with special diligence to complaints of domestic violence. The Court listed the measures taken by the national authorities (accompanying the applicant home after the police report, informing her of the possibility to apply for a temporary restraining order, confiscating the home keys of the husband as he was taken to the police station for questioning and allocating a specially trained police officer to the case), and held that these display the required special diligence required in this domestic violence case. These measures largely mirror the provisions of the Istanbul Convention, which

stipulates a prompt and appropriate response offering adequate and immediate protection to victims (Article 50); provision of information to victims about available legal measures (Article 19), emergency barring orders applicable to the victim's home (Article 52), and training of professionals (Article 15).

Secondly, the ECtHR held that states must conduct autonomous, proactive and comprehensive risk assessments of the potentially lethal risks faced by victims of domestic violence as soon as authorities receive a complaint. The Court clarified that the concepts autonomous and proactive mean that authorities should complement the victim's perception of risk with their own assessment, including by obtaining relevant information from other authorities. It noted that GREVIO holds that states should ideally use standardized, internationally recognized and research-based tools with pre-established questions in the risk assessments. The Court added that there should be clear guidelines and criteria for dealing with these sensitive situations, and training on their use and on the dynamics of domestic violence for the relevant authorities. Furthermore, the conduct of the risk assessments should be documented, and the conclusions of the assessment shared with the persons at risk. In ensuring protection, authorities should coordinate with other stakeholders, not only between agencies but also with civil society. Similar stipulations regarding standardized risk assessment, training and coordination can be found in the Istanbul Convention, notably in Articles 15, 18(2) and 51, as interpreted by the Explanatory Report. The other detailed requirements regarding risk assessment listed by the Court in *Kurt*, regarding documentation of the assessment and sharing conclusions with the person at risk, do not explicitly emanate from the Istanbul Convention but would appear to follow from the context of Articles 51 (which deals with risk assessment and risk management) and 56 (which deals with measures of protection). In addition, according to the Court, authorities should inform the persons at risk of available legal and operational protection measures, an obligation also found in Articles 19 and 56(c) of the Istanbul Convention. In practice, the particular vulnerability specifically of child victims of domestic violence did not lead the Court to demand risk assessments also for the children. Article 56(2) of the Istanbul Convention states that a child victim shall be afforded, where appropriate, special protection measures taking into account the best interests of the child.

Regrettably, the majority of the Court in *Kurt* regarded the risk of domestic violence as linked specifically to the home. They found that the violence until the murder of the applicant's child had taken place in the home and therefore the children were not at risk in other locations, disregarding the specific traits of this form of violence such as spiraling escalation and indeed the facts of the case. This was criticized in a Dissenting Opinion by Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel. The Court in this respect ignored the view expressed in GREVIO's third party intervention, as well as the Explanatory Report to the Istanbul Convention, which foresees vulnerability to violence "both within and outside the home" (Explanatory Report, 2011, para. 26). Although the Istanbul Convention was not in force in Austria at the time of the events, domestic violence taking place outside the home is not a new development. This part of the judgment is emblematic of the lack of clarity regarding who is to be treated as vulnerable and in what situations, leading to the risk of a certain randomness in protection of domestic violence victims in criminal proceedings. The Court's approach to acts of domestic violence outside the home in *Kurt* is indeed hard to reconcile with its findings in *Tërshana v. Albania*, where the fact that the violence under scrutiny took place in the street was not seen as decisive to the vulnerability reasoning.

In addition to these key cases on domestic violence, the need to take into account the specific nature of domestic violence and the vulnerability of its victims has been raised also in other cases. One prominent domestic violence case is *Levchuk v. Ukraine* (2020). In this case, the Court noted that due to the specificity of domestic violence, withdrawal of complaints by victims is a recurrent phenomenon. It held that automatic reliance on withdrawal of complaints, without a comprehensive risk analysis, is incompatible with the state's duty to take into consideration the vulnerability

of the victims of domestic violence when discharging its positive obligations under Articles 3 and 8. Here, one might discern similarities with Article 55 of the Istanbul Convention. This provision states that Parties shall ensure that investigations into or prosecution of physical violence, sexual violence, forced marriage, female genital mutilation, forced abortion and forced sterilization shall not be wholly dependent upon a report or complaint filed by a victim, and that the proceedings may continue even if the victim withdraws her or his statement or complaint. This means that law enforcement authorities should conduct proactive investigations in order to gather evidence, which ensures that the proceedings may be carried out even if the victim withdraws her or his statement or complaint, at least with regard to serious offenses such as physical violence resulting in bodily harm or death (Explanatory Report, 2011, para. 280). In the Istanbul Convention, this duty of *ex officio* investigations and proceedings is not explicitly related to the vulnerability of victims but to “the particularly traumatizing nature of the offenses” in question (Explanatory Report, 2011, para. 279).

In the same case, the Court also developed its interpretation of the legal effects of vulnerability in domestic violence cases further. It noted that where an individual makes a credible assertion of having been subjected to repeated acts of domestic violence, however trivial the isolated incidents might be, domestic authorities should assess the situation in its entirety, including the risk that similar incidents would continue, when deciding on the measures to take. Importantly, this assessment should take due account of the particular vulnerability of victims (who, the Court noted, are often dependent on their assailants emotionally, economically, or otherwise) and the psychological effect that the risk of repeated harassment, intimidation and violence may have on their everyday life. The Court’s requirement that states take into account the victim’s vulnerability and the psychological effects of violence in risk assessments and choice of measures is not reflected in the Istanbul Convention itself but in a piecemeal manner in the Explanatory Report in the context of different articles, such as Article 53. The reference to the need to take also minor acts of violence into account in deciding on measures sits well with the lack of a minimum level of severity in the Istanbul Convention.

In *Levchuk v. Ukraine* and *J.I. v. Croatia* (2022), which concerned the sufficiency of investigations into death threats against a person made particularly vulnerable “on account of her sex, ethnic origin and past traumas,” the ECtHR furthermore called for protection from intimidation, retaliation and repeat victimization of victims of domestic violence. Such protection measures are also required by Article 56(1)(a) of the Istanbul Convention. According to this provision, states shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and court proceedings, including by providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimization. A key issue in *Levchuk* was the authorities’ response to the victim’s claim regarding eviction of the perpetrator. The Court indicated that in domestic violence cases, eviction of the perpetrator of violence could be justified to protect the health and rights of the victim. Although the Court did not suggest that an emergency barring order should have been issued, this is in line with the reasoning behind Article 52 of the Istanbul Convention on emergency barring orders. Its rationale is that rather than placing the burden of hurriedly seeking safety in a shelter or elsewhere on the victim, who is often accompanied by dependent children, the perpetrator should be removed to allow the victim to remain in the home (Explanatory Report, 2011, para. 264). In *J.I. v. Croatia*, the Court was sensitive to the intersectionality of the victim’s vulnerability, but focused narrowly on investigations, while ignoring to discuss the sufficiency of protection measures, which would have been a relevant issue from a vulnerability perspective.

To sum up, under the ECHR, the vulnerability of victims of domestic violence is held to lead to specific legal consequences in criminal proceedings. It notably affects the required level of due diligence, limits the margin of appreciation of national authorities in the sense that specific

measures might be required, and lowers the threshold for the level of severity required to constitute a violation of physical and mental integrity. Meanwhile, the Istanbul Convention and GREVIO practice foresee special protection for all victims of violence falling within the scope of the Convention (thus including victims of domestic violence) in procedural aspects such as investigations, prosecution and court proceedings. No additional procedural safeguards in criminal proceedings are explicitly foreseen for individuals designated as vulnerable by the Istanbul Convention. Therefore, it remains unclear what persons belonging to the groups identified as vulnerable under the Istanbul Convention (which do not include victims of domestic violence as a group) stand to gain from this label in the context of criminal proceedings, except that national courts must be able to consider their vulnerability as an aggravating circumstance.

In domestic violence cases, the ECtHR has notably pinpointed as key elements the necessity of effective investigations on the authorities' own initiative; not according withdrawal of complaints a crucial effect; taking different forms of domestic violence (including digital violence) against the same person into account in the criminal process; protection from intimidation, retaliation and repeat victimization in criminal proceedings; and effective, proportionate and dissuasive sanctions. The requirements for effective investigations, protection from intimidation, retaliation and repeat victimization and appropriate sanctions are not unique to domestic violence cases, but one can interpret the Court as indicating that they are to be implemented with enhanced diligence in these cases by taking into account the particular vulnerabilities created by domestic violence. The Istanbul Convention provides relatively similar protection, although on a few points the Court has adopted an interpretation at variance with the one accorded to the Istanbul Convention in the Explanatory Report or by GREVIO. In terms of protection of victims of domestic violence, the gap between the approach in ECHR case law and the Istanbul Convention may thus be narrower than it might seem at first glance, but there is a gap. In taking the opportunity to explain state obligations in relation to victims of domestic violence more in detail particularly in *Kurt v. Austria*, the interpretation of the Court may have exceeded the protection provided under the Istanbul Convention in some respects but has fallen below it in others.

CONCLUSIONS

When it comes to explicit vulnerability labeling of victims of domestic violence, the drafters of the Istanbul Convention chose a different path than the one staked out by the ECtHR. The article explores if this choice has legal significance and whether the two approaches to vulnerability of domestic violence victims can be reconciled in the specific context of criminal proceedings.

While the concept of vulnerability is used in the context of both conventions in relation to groups of individuals in particular circumstances, neither convention body has been entirely clear regarding the specific underlying factors it regards as causing vulnerability in domestic violence cases. However, the ECtHR has taken some steps in this direction, stressing in particular the victim's dependency on the perpetrator (e.g., *Levchuk v. Ukraine*, para. 80). It thus allocates group vulnerability based on a factor that should perhaps essentially be the object of a contextual evaluation. Meanwhile, the Istanbul Convention does not formally categorize victims of domestic violence as a vulnerable group, instead identifying a set of discriminated and/or marginalized groups as vulnerable. What seems to be common to the understanding of vulnerability in the ECHR and the Istanbul Convention is that vulnerability is related not only to vulnerability to violence, that is, being at a greater risk of being subjected to violence as such, but also to being vulnerable to further rights violations notably in terms of obstacles to seek protection, bring charges and get redress.

Since on the face of it, vulnerability is associated with additional positive obligations, not allocating this status to all women victims of domestic violence in an explicit manner could be seen as a flaw in the Istanbul Convention. The analysis of the sample cases points toward the

conclusion that the measures required by the ECtHR are in several respects very similar to those explicitly required by the detailed provisions of the Istanbul Convention, its Explanatory Report or by GREVIO, regardless of whether these victims are formally designated by the Istanbul Convention as being in a vulnerable position or not. But even in this relatively small sample, there was divergence between the approach to vulnerability of the ECtHR and the Istanbul Convention on concrete points.

This divergence is visible in the Court appearing to regard the risk of domestic violence as linked specifically to the home in *Kurt v. Austria* (2021) due to previous violence having taken place in the home, while GREVIO's third party intervention in the case as well as the Explanatory Report to the Istanbul Convention foresee vulnerability to violence "both within and outside the home" (Explanatory Report, 2011, para. 26). This, of course, is a matter of crucial importance in terms of ensuring protection against domestic violence. The fact that the Grand Chamber of the Court in a "key case" chose an interpretation restricting the locations in which vulnerability was present is in equal measures astonishing and regrettable, not least given the expert advice it had at its disposal in the form of third-party interventions. Here, the Court's formal designation of all victims of domestic violence as vulnerable did not bring with it an interpretation sensitive to the manner of perpetration of domestic violence.

It would seem that what is decisive is not the formal designation of women victims of domestic violence as vulnerable but the understanding of the very concept and its legal consequences. If the interpretations of the two European human rights bodies diverge on concrete matters arising in the criminal process, this might have considerable impact on the protection granted in practice to victims of domestic violence. It would therefore be desirable for these bodies to elaborate further upon their conception of vulnerability, not only regarding the factors on which vulnerability is based but also regarding the additional considerations that vulnerability brings with it in criminal proceedings. Added clarity on these issues would greatly benefit national criminal justice actors struggling with determining what special protection vulnerable crime victims should be ensured. GREVIO on occasion refers to key ECtHR case-law in its evaluation reports and when doing so, it would have the possibility to pick up on points of vulnerability. Meanwhile, the ECtHR already refers to GREVIO reports in respect of states having ratified the Istanbul Convention and could take note of GREVIO's approach to vulnerability. The exchanges of views held between GREVIO and the Court would make for an ideal forum for strengthening the synergy between the monitoring bodies on vulnerability matters.

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