

V. VIOLENCE AS RELEVANT FOR SEXUAL HEALTH

Introductory remarks⁴⁷⁰

The types of violence considered in this review include sexual violence, as well as non-sexual violence directed at persons because of their real or imagined sexual practices, expressions, associations, or identities.

Forms of sexual violence include rape, coerced sex, child sexual abuse, sexualized forms of domestic and intimate partner violence, FGM, so-called honour crimes, and trafficking into forced prostitution. Sexual violence can be and is directed at women, men, girls and boys, and at any group in a position of vulnerability, though available data suggests a higher incidence of sexual violence directed against women and girls. Sexual violence in its diverse forms impairs sexual health through physical injury, psychological trauma, transmission of disease through unprotected sex, particularly HIV and STIs, and through unwanted pregnancy and subsequent unsafe abortion or maternal mortality.⁴⁷¹ Victims of sexual violence are often held responsible, in part or in whole, for the violence. The resulting feelings of shame, dishonour, spoiled identity, and guilt make it difficult to report incidents of violence and seek treatment and care for related physical and psychological injuries. Sexual violence is thus responsible for a significant disease burden from the national and global perspective. The extensive social and health system costs stemming from sexual violence, however, may be significantly reduced through prevention and earlier, more effective state intervention.

A comprehensive review of sexual health must also consider violence committed against persons because of their real or imagined sexual characteristics, even though delivered through *non-sexual means* (i.e., non-sexual assault or injury). These real or imagined sexual characteristics or attributes might include sexual behaviour or practices, having a same-gender sexual partner, lack of virginity, having extramarital sex, sexual contact with social 'inferiors' or members of 'enemy' groups, 'bad reputation', 'dishonour' to the kin group, and sexual 'disobedience.' Although the violence may take other forms than rape or sexual injury, the physical and psychological effects are otherwise similar: injury, reduced ability to access health care for these injuries, and increased disease burden.

Violence is an assault on the fundamental rights to life and bodily integrity, and may also be both a sign and consequence of gender discrimination. Sexual violence against women and girls reduces freedom of movement, association, and speech, as well as reducing their access to education, work, the public sphere and political participation. Sexual violence, however, is directed not just at women and girls, but also at men, boys, and transgender persons who are thought to transgress social norms of appropriate masculine or feminine behaviour (in dress, manner, speech, or work). Sexual violence reinforces and stems from other forms of inequality, serving to reinforce hierarchies of power based on class, race, ethnicity, caste, or other important social divisions. Sexual violence thus serves as an extra-legal form of punishment and control, which may be administered informally by state agents or by non-state actors (family members, neighbors, or workmates). It is intended to induce shame and diminish the reputation of the victim of violence, resulting in social exclusion, damaged reputation, and diminished life prospects.

In addition, sexual and non-sexual violence directed at sexually stigmatized persons reduces their capacity to access and enjoy other rights – the right to health and health services, freedom of movement, freedom of expression, political participation, livelihood, and free and unforced marriage. It erodes personal agency, serves as a marker of stigma and subordination and promotes fear and terror, especially in conditions of conflict and ethnic cleansing. National and international law must address ways to effectively prevent, investigate, and respond to sexual and non-sexual violence. The bodies of law that address violence more directly include human rights, humanitarian, refugee, and international criminal law.⁴⁷²

A. DOMESTIC AND INTIMATE PARTNER VIOLENCE

1. Introduction

Violence that occurs in the domestic sphere, between spouses and other intimate partners, has

470 These introductory remarks have been drawn from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.

471 [WHO Multi-country Study on Women's Health and Domestic Violence against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses](#). Geneva: World Health Organization, 2005; Lori Heise, with Adrienne Germain and Jacqueline Pitanguy. [Violence against Women: The Hidden Health Burden](#). Washington: World Bank; 1994.

472 See international law section. Labour law may include some forms of violence in working conditions as well.

serious repercussions for sexual health. Domestic violence is often accompanied by sexual violence, or by threats of sexual violence. Violence or threats of violence are often used by one partner to pressure the other into engaging in sexual activities against his or her will. Because intimate partner violence occurs between partners who normally have a sexual life together, it dramatically affects the victim's sexual life and impairs his or her autonomy. In addition, violence can be used to restrict a person in his or her contacts with the outer world, with work, health services, and friends; all of which affects his or her well-being in fundamental ways.

UN Treaty bodies have on repeated occasions highlighted issues of domestic and intimate partner violence as potential human rights violations – and have stressed state responsibilities to prevent and combat such violence under relevant treaties.⁴⁷³ So-called positive state obligations are key in this regard. As pointed out by the Human Rights Committee, there are circumstances when state failure to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress harm caused by private persons may give rise to violations under relevant treaties.⁴⁷⁴ While the effectiveness of remedies is always crucial in the practical realization of rights of all kinds, it is particularly important to stress this aspect in relation to the prevention and fight against domestic violence, because of the nature of the intimate space in which it takes place, and the closeness between perpetrator and victim.

Best practices in preventing and combating intimate partner violence can be understood as *clarity* in domestic legal provisions regulating the behaviour of individuals, prohibiting intimate violence against anyone, regardless of sex, age, race, sexual orientation, social status and other attributes. *Practical and effective remedies* that apply the law as it was intended by the legislature are necessary, so that *protection* is offered to the victim/survivor of domestic violence, and the *perpetrator is brought to justice* with his/her rights of due process intact. In more practical terms, domestic legal frameworks should offer practical and immediate access to justice by allowing victims, or anyone with knowledge of domestic violence occurring, to stop the violence, obtain protection and/or non-molestation orders where applicable, have these enforced by police and receive timely assistance to cope with the consequences of the violence.⁴⁷⁵

In Europe there is a wide consensus around the need to effectively prevent and combat domestic violence, as reflected by the new Council of Europe Convention on domestic violence (discussed below), and laws have been enacted in most countries in the region. Nevertheless, as forcefully reiterated in the case law of the European Court of Human Rights, implementation of the laws often falls short of complying with relevant human rights standards, regardless of the breadth and rights-focus of the legislation on paper. For that reason, and as will be further discussed in the chapter on sexual violence, it is important to keep in mind that law alone is an insufficient tool to effectively come to terms with the problem of intimate partner violence.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

The Court has in recent years examined several cases involving intimate partner violence, and has repeatedly stressed that states have a positive obligation to protect women from such violence. These cases have given rise to claims under Article 2, 3, and 8 of the Convention. So far, the Court has not examined state obligations when intimate partner violence has occurred in same-sex relationships.

An early case in which the Court addressed domestic violence in relation to the right for the battered spouse to judicial separation from the perpetrator was Airey v. Ireland.⁴⁷⁶ For discussion of this case see Chapter 3B: Termination of marriage.

In Kontrova v. Slovakia,⁴⁷⁷ the applicant was a woman whose husband had killed himself and the couple's two children after having subjected her to violence and threats for years. The applicant had

473 See, *inter alia*, Human Rights Committee, General Comment 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, (2004)), Committee Against Torture, General Comment No. 2 (Implementation of article 2 by States parties (2008)), Committee on Economic, Social and Cultural Rights, General Comment 14 (The right to the highest attainable standard of health, Art. 12 of the ICESCR (2000)) and General Comment 16 (The equal right of men and women to the enjoyment of all economic, social and cultural rights, Art. 3 of the ICESCR (2005)) and CEDAW Committee, General Recommendation 19 (Violence against women (1992)).

474 Human Rights Committee, General Comment 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004)), at [8].

475 See for instance CEDAW Committee, General Recommendation 19 (Violence against women (1992))

476 Application no. 6289/73, decided on 9 October 1979.

477 Application no. 7510/04, decided on 31 May 2007.

filed two complaints about her husband's violence and threats with the local police, but the response from the police had been inadequate and led to no interference. The applicant complained that the Slovakian state had failed to protect the life of her two children and had therefore violated Article 2 of the Convention, guaranteeing the right to life.

The Court reiterated that Article 2 not only requires the state to abstain from the unlawful taking of life, but also to take appropriate steps to safeguard the lives of the persons within its jurisdiction. This positive obligation includes the primary duty to secure the right to life by putting in place effective criminal-law provisions to deter offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. For this positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (para 50).

In the present case, the applicant had communicated to the police department serious allegations of violence and threats that she and her children had been subjected to by her husband. These included long-lasting physical and psychological abuse, beatings with an electric cable, and threats with a shotgun. Thus, the authorities were well aware of the situation. Under specific provisions of Slovakian police regulations, the police had several obligations to act. These obligations had not been complied with; on the contrary, the police had advised the applicant to modify her complaint so that it would lead to no further action. The direct consequence of this failure to comply with its positive obligations was the death of the applicant's children. The Court therefore found that the Slovakian state had violated Article 2 of the Convention.

In Bevacqua and S. v. Bulgaria,⁴⁷⁸ the issue of domestic violence was brought under a claim that there had been a violation of Article 8, the right to respect for family and private life. The applicants were a woman and her son. The woman had suffered domestic abuse on repeated occasions from her husband and had left the family home with her son. When she complained to the prosecutor's office about the violence, the prosecutor refused to institute criminal proceedings against her former husband. The reason was that the injuries fell into the category of light bodily injuries, for which only private prosecution proceedings were available. The applicants complained that the Bulgarian authorities had failed to take necessary measures to secure respect for their family life, and had failed to protect the mother against the violent behaviour of her former husband. This, they claimed, constituted a violation of, *inter alia*, Article 8 of the Convention.

The Court reiterated that states have positive obligations under Article 8 to protect individuals from violence stemming from private parties. The Court also noted that victims of domestic violence are particularly vulnerable, and that several international bodies have emphasized the necessity of active state involvement in their protection. The Court did not agree with the applicants that the Convention requires state-assisted prosecution, as opposed to prosecution by the victim, in all cases of domestic violence. However, it found that in the case under consideration, Bulgarian law did not sufficiently provide for adequate protection, and measures taken by the police and prosecuting authorities had not proven effective. The Court found that

the authorities' failure to impose sanctions or otherwise enforce [the former husband's] obligation to refrain from unlawful acts was critical in the circumstances of this case, as it amounted to a refusal to provide the immediate assistance the applicants needed. The authorities' view that no such assistance was due as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' Article 8 rights. (para 83)

In conclusion, the Court found that Bulgaria had violated its positive obligations to protect respect for the applicants' family and private life that arise under Article 8.

The following year, the Court addressed the issue of serious domestic violence again, in Branko Tomasic and others v. Croatia,⁴⁷⁹ and reiterated its findings that states have positive obligations under Article 2, the right to life. In this case, the Croatian state had failed to take all reasonable steps to protect the lives of a woman and her daughter against the violent partner/father, in spite of knowledge about his violent past. The case shows that the obligation to protect persons from domestic violence extends to situations where the partners are not married.

478 Application no. 71127/01, decided on 12 June 2008.

479 Application no. 46598/06, decided on 15 January 2009.

Two recent decisions have reinforced the Court's findings in the above-mentioned cases. In *A v. Croatia*⁴⁸⁰ the applicant was a woman who for years had been subjected to serious threats and violence by her (former) husband, a man with serious mental illness and war-related trauma. The applicant had brought numerous proceedings against her ex-husband, and while some protective measures were implemented, most were not. Most sanctions imposed on the husband had not been enforced. For a long time, the applicant was forced to live in hiding from her violent ex-husband. The applicant complained that the Croatian state had failed to provide her with adequate protection and thereby failed in its positive obligations under Article 8, among other articles. The Court agreed. It found that the authorities' failure to implement measures ordered by domestic courts – both examining and addressing the husband's psychiatric problems, and providing the applicant with protection – left the applicant for a prolonged period in a position in which her right to respect for her private life was breached. Thus the Court found a violation of Croatia's positive obligations under Article 8.

Circumstances were similar in *Hajduova v. Slovakia*,⁴⁸¹ where the applicant's violent husband also had serious mental health problems. He had attacked the applicant verbally and physically and threatened to kill her, after which she and her children had moved away from the family home. Slovak courts had found the husband guilty of threats, but instead of sentencing the ex-husband to prison had ordered that due to his mental illness he be sent to a hospital for psychiatric treatment. He had, however, quickly been released from the hospital and had continued to subject the applicant to death threats. The applicant complained that Slovakia, by failing to comply with the obligation to order that her husband be *detained* at the psychiatric hospital, had breached its obligations under Article 8. Here, also, the Court found that the lack of sufficient measures in reaction to the husband's behaviour breached the state's obligation to secure respect for the applicant's private life. This failure to provide protection amounted to a violation of Article 8.

The Hajduova case is similar to those mentioned above. However, one distinguishing feature is that the husband's violent behaviour that constituted the basis of the applicant's complaint under Article 8 – that is, his behaviour after his release from the hospital – consisted of threats that did not materialize into concrete physical violence. The Court determined that even though the applicant at that stage was not subjected to violence, her fears were well-founded given the husband's history of physical abuse. This fear, the Court concluded, “would be enough to affect her psychological integrity and well-being so as to give rise to an assessment as to compliance by the State with its positive obligations under Article 8 of the Convention.” This is an important statement that shows an understanding of psychological factors involved in intimate partner violence, and emphasizes the width of the space in which states have clear positive obligations when such violence occurs or may occur.

In the Court's 2009 decision on domestic violence, *Opuz v. Turkey*,⁴⁸² the applicant was a woman who had been subjected to years of serious violence and death threats by her husband, and whose mother had been killed by her son-in-law when she tried to escape the household together with the applicant. Criminal proceedings had been brought against the husband several times, but they had either been dropped (when the applicant and her mother withdrew their charges due to threats from the applicant) or had resulted in fines. The husband had finally been convicted to life imprisonment after the murder of the applicant's mother, but had been released pending the appeal proceedings, during which period he subjected the applicant to new threats. The applicant had requested protection from the authorities, but no such measures were taken until the European Court of Human Rights interfered.

The applicant alleged that the Turkish authorities failed to protect the life of her mother, and that they had neglected her own right to protection from repeated violence, death threats and injury. She supported her claim on, *inter alia*, the right to life (Article 2), the right not to be subjected to torture or inhuman or degrading treatment or punishment (Article 3), and the right to non-discrimination (Article 14).

The Court found that violence, even of lethal character, had been foreseeable for a long time both with regard to the applicant and her mother, given the husband's past violent behaviour. The final attack against the mother had been planned. The authorities had repeatedly decided to discontinue criminal proceedings after the charges had been dropped, refraining to interfere in what they perceived to be a “family matter.” They had also remained passive in spite of clear signs that the violence was escalating. This behaviour on behalf of the authorities, despite the fact that there was a legislative framework in place for domestic violence matters, demonstrated that Turkey had failed to establish a system by which such violence could be effectively counteracted. The response to the husband's conduct had been “manifestly inadequate to the gravity of the offences in question,” and the judicial

480 Application no. 55164/08, decided on 14 October 2010.

481 Application no. 2660/03, decided on 30 November 2010.

482 Application no. 33401/02, decided on 9 June 2009.

decisions revealed a “lack of efficacy and a certain degree of tolerance” to the acts of the husband. In conclusion, the authorities had not shown due diligence, as required under Articles 2 and 3 of the Convention. The Court found that the right to life of the mother and the right not to be subjected to inhuman treatment of the applicant had been violated.

In addition, the Court held that the applicant had been able to show that the great majority of victims of domestic violence in the relevant region of Turkey were women, that the general and discriminatory judicial passivity created a climate conducive to domestic violence, and that the violence suffered by the applicant and her mother therefore could be described as gender-based. Based on those conclusions, the Court ruled that Turkey had also violated Article 14, the right to non-discrimination, taken together with Articles 2 and 3.

In *E.S and Others v. Slovakia*,⁴⁸³ the issue of interest was the level of protection that is required of states in order for them to fulfill their obligations under the Convention to counteract intimate partner violence. In particular, the case addressed the issue of interim protection measures such as requiring the offending party to leave the joint home in case of domestic violence. The applicants were a woman and her three children; all four of them had suffered ill-treatment from the husband/father, and one of the daughters had been subjected to sexual abuse by him. After Mrs. E.S. had filed for divorce she filed a criminal complaint against the husband for ill-treatment and abuse of her and her children. Simultaneously she requested that as an interim measure the husband be ordered to move out of the apartment that they held under joint tenancy. The Slovak courts found that they could not restrict the husband’s right to use the property while the divorce proceedings were pending; on appeal the courts contended that in the meantime Mrs. E.S. could apply for an order “requiring her husband to refrain from inappropriate behaviour.” Instead, Mrs. E.S. moved away with her children from their home, family and friends. The former husband was later convicted of ill-treatment, violence and sexual abuse, and sentenced to four years’ imprisonment. The applicants claimed that the Slovak authorities’ inability to protect them from abuse while the divorce proceedings were pending amounted to a violation of Articles 3 and 8 of the Convention.

The Court found that the alternative measure proposed by the Slovak government – the order restraining the husband from inappropriate behaviour – would not have provided the applicants with adequate protection. The fact that Mrs. E.S. had been barred from having the husband removed from the apartment until the divorce had been finalized – about a year after she had filed criminal complaints against him – implied that there had been no effective remedy by which she could ensure that she and her children would be safe. The nature of the allegations was so serious that they required immediate protection. In conclusion, the Court found that Slovakia had failed to protect the rights of both E.S. and her children from ill-treatment, thereby violating Articles 3 and 8.

Conventions in the Council of Europe Treaty Series

The Council of Europe Convention on preventing and combating violence against women and domestic violence⁴⁸⁴ opened for signature as recently as May 11, 2011, and has thus not yet entered into force. It will enter into force when it has been ratified by at least ten countries, eight of which must be Council of Europe members. It is an ambitious instrument, covering a wide range of aspects of violence against women and domestic violence. It includes detailed provisions on prevention, protection and support, as well as on a multitude of substantive law areas. Among the forms of violence that it defines and criminalizes are physical violence, sexual violence, psychological violence, forced marriages, female genital mutilation, stalking, forced abortion and forced sterilization, sexual harassment, and honour crimes. The Convention specifies that engaging in non-consensual acts of a sexual nature shall always be criminalized, and stresses that this applies also to acts committed by spouses or former spouses (Art. 36). Similarly, when an offence of violence covered by the Convention is committed by a former or current spouse or partner or by a member of the family, this shall be treated as an aggravating circumstance in the determination of the sentence in a legal proceeding (Art. 46a). Furthermore, the Convention provides that victims of gender-based violence whose residence status depends on that of a spouse or partner, shall, “in the event of particularly difficult circumstances”, have access to autonomous residence permits (Art. 59), and that states shall ensure that gender-based violence against women may be recognized as a form of persecution for the purpose of asylum (Art. 60). The Convention establishes a group of experts on action against violence against women and domestic violence to monitor the implementation of the Convention (Arts 66–70).

The Convention stresses that states are obliged to “exercise due diligence to prevent, investigate,

483 Application no. 8227/04, decided on 15 September 2009.

484 Council of Europe Treaty Series No. 210, May 11, 2011.

punish and provide reparation for acts of violence [...] perpetrated by non-State actors” (Art. 5), thus incorporating the notion of due diligence as the standard of care demanded of states.

Interestingly, the Convention encourages parties to apply it to “all victims of domestic violence,” while paying “particular attention to women victims of gender-based violence” (Art. 2.2). In other words, and also by including both “violence against women” and “domestic violence” in the title of the text, it also addresses violence occurring in same-sex couples. It is striking, however, that the Explanatory report accompanying the Convention does not mention violence occurring in same-sex couples, but more vaguely refers to “violence committed against men and children,” in its commentary on Article 2.2.⁴⁸⁵ Regardless of this potential flaw in the intentions behind the text, the new Convention offers a comprehensive legal framework to prevent violence, to protect victims and also to end impunity of perpetrators, and it can be interpreted to apply both to women victims of gender-based violence, and in situations when intimate partner violence occurs in other constellations.

3. European Union

The issue of domestic/intimate partner violence does not fall within the scope of EU binding law.

4. Regional non-binding material

Council of Europe bodies have issued a myriad of non-binding statements on the issue of violence against women (rather than intimate partner violence taken more broadly). An important recommendation in this field is the Recommendation R (2002)5 of the Committee of Ministers to member States on the protection of women against violence,⁴⁸⁶ adopted in 2002. This text treats domestic violence as a human rights violation, and defines it as a structural problem, based on unequal power relations between women and men in society, and contains many specific recommendations on legislative, preventative and other measures to be taken by states in order to combat violence against women.

Similarly, the European Commission and the European Parliament have taken multiple initiatives and issued many non-binding statements on this topic, also focusing on violence against women specifically. Neither the Council of Europe nor the European Union statements address violence in same-sex relationships.

5. Domestic legislation

Most European countries have some kind of domestic violence legislation. Provisions against domestic violence are primarily found in criminal law, but there are also regulations on social measures and prevention, including state responsibilities to detect and respond to situations of intimate partner violence. In the following section, which should be seen as illustrative rather than representative, countries have been selected based on geographical and cultural diversity, where laws cover both criminal law and prevention/social measures, where same-sex partner protection is explicitly included in domestic violence provisions, and where a broad definition of violence has been employed (psychological, physical, sexual, economic).

In **Albania**, the Law no. 9669 of 18.12.2006 on measures against violence in family relations⁴⁸⁷ entered into force on 1 June 2007. The law has considerable strengths, including a broad definition of violence and of ‘family members’ granted protection under the law, and a multi-disciplinary response to domestic violence, involving several different state agencies. It also aims to prevent and reduce domestic violence, and guarantee protection through legal procedures that are both effective and easily accessible to the affected party.

The law defines violence as any act or omission of one person against another, resulting in “violation of the physical, moral, psychological, sexual, social and economic integrity” (Art. 3). It applies to violence committed against, *inter alia*, spouses and former spouses, cohabiting partners and former cohabiting partners, siblings, parents, and children, and close relatives of spouses and cohabiting partners (Art. 3). The law is gender-neutral. Albania does not legally recognize same-sex partnership; it is unclear from the wording of the law if cohabiting same-sex partners are included in the definition of ‘family members’ under the law.

The law takes a holistic view of the problem of domestic violence, considering its legal, social, and health-related aspects. It specifically equips different state organs with different responsibilities. While

485 Explanatory report, para. 37.

486 The Protection of women against violence. Recommendation No. R (2002) 5 of the Committee of Ministers and Explanatory Memorandum. Adopted by the Committee of Ministers on 30 April 2002.

487 Unofficial translation to English available.

the Ministry of Labor, Social Affairs and Equal Opportunities is the primary authority (Art. 5), other agencies with responsibilities under the law include the Ministry of the Interior, the Ministry of Health, the Ministry of Justice, and local authorities (Art. 7). Together, these bodies ensure/oversee activities such as the establishment of special domestic violence units within the police, training of different legal actors, budgeting for free legal assistance to victims, and establishing rehabilitation centres for both victims and perpetrators.

Victims of domestic violence can be granted protection orders or emergency protection orders by a simple procedure; petition for such orders can be presented to the court (or, in urgent cases, to the police station) by the victim, by his/her legal representative, or by the police or prosecutor (Art 13). The petitioner has the right to legal assistance free of charge (Art 14). The court issues the protection order if there is “sufficient basis to believe that the respondent may commit an act of family violence” and if the order is necessary to protect the security, health and well-being of the victim (Art 17). A carefully designed judicial procedure is set up to guarantee due process in the issuance and administration of the orders, including the right to appeal.

In conclusion, Albania has set up a law that both recognizes the complexity of the phenomenon of intimate partner violence and establishes a model by which the state can effectively respond to the problem, while maintaining due process guarantees for the alleged perpetrator.

In the **United Kingdom**, legislation and policy address the problem of domestic and intimate partner violence with a focus on victim’s rights, employing a wide definition of who a victim may be and specifically including same-sex partners in this definition. Focus has been placed on different kinds of judicial orders that can be issued by courts in order to restrict the agency of the perpetrator and expand the agency of the victim or potential victim.

Domestic and intimate partner violence is addressed by several pieces of criminal and civil legislation, including the Offences Against the Persons Act 1861, the Family Law Act 1996 and the Protection from Harassment Act 1997. In 2004, these laws were complemented by the Domestic Violence, Crime and Victims Act 2004. The relevant legislation does not contain a definition of domestic violence. According to the United Kingdom Home Office, however, domestic violence should be understood as

*any threatening behaviour, violence or abuse between adults who are or have been in a relationship, or between family members. It can affect anybody, regardless of their gender or sexuality. The violence can be psychological, physical, sexual or emotional. It can include honour based violence, female genital mutilation, and forced marriage.*⁴⁸⁸

The 2004 Act reinforces the rights of victims and witnesses of domestic violence. It amends existing legislation to make the breach of a non-molestation order a criminal offense (Section 1),⁴⁸⁹ and to make same-sex and non-cohabiting partners eligible for non-molestation and occupation orders (Section 3 and 4).⁴⁹⁰ A non-molestation order prohibits “a person (the respondent) from molesting another person who is associated with the respondent,”⁴⁹¹ the application for which can be made by the “associated person” (that is, the victim or potential victim of violence or harassment) to the court. In determining whether to issue a non-molestation order, the court must regard all relevant circumstances, including the need to secure the health, safety and well-being of the applicant or any relevant child.⁴⁹² An occupation order can enforce the applicant’s right to remain in the common dwelling against the respondent, in practice preventing a violent partner from staying in the shared home.⁴⁹³ Furthermore, the 2004 Act makes it possible to impose restraining orders (preventing the recipient from doing anything specified by the order) on a person who has been acquitted of an offense, if the court considers it necessary to do so to protect a person from harassment by the defendant (Section 12(5)).⁴⁹⁴

Cases of domestic violence are brought by the Crown Prosecution Service to Specialist Domestic Violence Courts, which represent a coordinated approach to the problem of domestic violence and

488 According to UK Home Office, at <http://www.homeoffice.gov.uk/crime-victims/reducing-crime/domestic-violence/>. Last visited on 6 May 2010.

489 Amending Part 4 of the Family Law Act 1996 (c. 27).

490 Amending Part 4 of the Family Law Act 1996 (c. 27).

491 Section 42(1)(a), Family Law Act 1996 (c. 27).

492 Section 42(5), Family Law Act 1996 (c. 27).

493 Sections 33–41, Family Law Act 1996 (c. 27).

494 Amending Section 5 of the Protection from Harassment Act 1997 (c. 40).

in which the police, prosecutors, court staff, the Probation Service and specialist support services for victims are all involved. The specialised courts are not regulated by law: they were initiated by the Home Office and operate in accordance with a Resource Manual.⁴⁹⁵ While there is no single model for how they should be run, they aim to place the victim at the center of all services and to handle domestic abuse cases fast and effectively by efficient coordination between the different agencies. All personnel have received special training on domestic abuse.⁴⁹⁶

Austria provides another example of domestic violence legislation that collects provisions from different regulations in one comprehensive act, seeking to provide victims or potential victims of domestic violence with effective protection. It offers an elaborate scheme of protective measures that are available to a wide group of persons, and emphasizes coordination between different state agencies in order to render the protection effective.

The first Austrian Protection from Violence Act⁴⁹⁷ came into force in 1997. It has been amended several times. The last amendment in June 2009 resulted in the adoption of the Second Protection from Violence Act,⁴⁹⁸ further strengthening the protection awarded to victims as well as regulating sexual crimes against minors. Both the first and second Acts are still in force. The Acts bring together provisions on, *inter alia*, eviction and barring orders (regulated by the Security Police Act), longer term protection by means of a protection order or temporary injunction (regulated by the Enforcement Code), intervention centers that offer free counselling services and support to victims, and various criminal law provisions.

The Security Police Act protects any victim of intimate partner violence who lives in the same residence as the perpetrator. This includes spouses, partners, children and other relatives, as well as other lodgers. Since 2003, Austria grants unregistered cohabitating same-sex couples the same limited set of rights as unmarried cohabitating opposite-sex couples.⁴⁹⁹ This suggests that same-sex partners are included in the scope of protection granted by this law.

A barring order will be issued "if a dangerous assault on a person's life, health or freedom appears imminent."⁵⁰⁰ If a perpetrator threatens or injures a person in the same household, the police shall evict that person from the home and surroundings and bar them from re-entrance. This applies regardless of whether he or she is the owner of the home. The barring order is valid for an initial term of two weeks.⁵⁰¹ The police must then without delay inform the so-called intervention centres of every eviction and barring order. The centres are non-governmental organisations, funded by the Federal Ministries of the Interior and Social Affairs and the Ministry of Women's Affairs.⁵⁰² These centres will proactively contact the victim, offering counselling services and advice. They also act as a link between criminal law agencies, the victim, and the offender in order to provide effective protection. When a barring order has been issued, the victim can apply for longer-term protection by means of a temporary injunction which can keep the offender away from the home, its immediate vicinity and other defined areas, for a fixed period of time.⁵⁰³

495 Specialist Domestic Violence Court Programme. Resource Manual. 2nd edition, March 2008. Available at <http://www.crimereduction.homeoffice.gov.uk/domesticviolence/domesticviolence059a.pdf>. Visited on 6 February 2010.

496 Ibid. See also National Policing Improvement Agency, *Guidance on Investigating Domestic Abuse*, 2008, pp. 103–109. Available at <http://www.acpo.police.uk/documents/crime/2008/2008004CRIIDA01.pdf>. Visited on 6 February 2010.

497 GeSchG (NR: GP XX RV 252 AB 407 S. 47. BR: 5300 AB 5311 S. 619.), 30 December 1996

498 2. GeSchG (NR: GP XXIV IA 271/A AB 106 S. 16. BR: 8072 AB 8085 S. 768.) 8 April 2009. Neither law exists in English translation. However, there is reliable information about the first version of the law with references to relevant provisions in the Austrian Government leaflet, available at http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/Austrian_DV_Law_Leaflet.pdf, in Birgitt Haller et al, "The Austrian Protection against Domestic Violence Act 1996", from *Crime Policy in Europe*, Council of Europe, 2004, and in Council of Europe, *Legislation in the Member States of the Council of Europe in the Field of Violence Against Women*, EG (2004)2, pp. 17–18, and in Birgitt Haller, "The Austrian Legislation Against Domestic Violence", report written in June 2005 for Coordination Action Against Human Rights Violations, p. 3. Available at http://www.ikf.ac.at/english/austrian_legislation_against_domestic_violence.pdf, last visited on 13 May 2010. Information about relevant changes by the second version of the law provided in email correspondence from Dr. Birgitt Haller, Institute of Conflict Research, Vienna, on 8 February 2010.

499 Following the European Court of Human Rights decision in *Karner v. Austria* in 2003 (see Section 1A of this report), according to ILGA Europe, at http://www.ilga-europe.org/europe/advocacy_lobbying/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country#austria. Visited on 8 February 2010.

500 § 38a of the Security Police Act (Sicherheitspolizeigesetz (SPG), BGBl. Nr. 566/1991, as amended), as translated in Council of Europe, *Legislation in the Member States of the Council of Europe in the Field of Violence Against Women*, EG (2004)2, p. 17.

501 Regulated in § 38a of the Security Police Act, as amended by Article XII of 2nd Protection from Violence Act, 2009.

502 According to email correspondence from Dr. Birgitt Haller, Institute of Conflict Research, Vienna, on Feb 8, 2010.

503 Regulated by by § 382b of the Enforcement Code (Exekutionsordnung, RGBl. Nr. 79/1896, as amended).

Worth noting is that in the case of violence, the police have to react without the express consent of the victim or even against the victim's will. The decision to issue a barring order lies exclusively with the police and does not consider the victim's opinion. Even if the victim invites the offender to re-enter the home, this will be treated as a violation of the order and dealt with as an offense. By contrast, the decision to apply for a temporary injunction lies exclusively with the victim. The provision giving the police exclusive discretion to order the measure was introduced to stress that the state as such condemns domestic violence, and to prevent the victim from being pressured by the offender.⁵⁰⁴

The Second Protection from Violence Act also introduces a new offense, called "Continued violence over a longer period of time."⁵⁰⁵

In **Portugal**, on 4 September 2007, the Parliament passed Law 59/2007 which amends the Penal Code, *inter alia*, to expand the category of victims in its domestic violence law. The provision now includes ill-treatment between unmarried, same-sex, and former couples, as well as abuse between parents and children. If the violence takes place within the family home, this will be considered an aggravating factor. Article 152 of the Portuguese Penal Code now sets forth that:

[w]hoever, on repeated occasions or not, inflicts physical or psychological harm, including physical punishment, deprivation of liberty, and sexual offenses:

- a) on a spouse or ex-spouse;*
- b) on a person of the opposite or same sex with whom he/she has or has had a relationship analogous to that of spouses, even without cohabitation;*
- c) on the parent of a common descendant of the first degree, or*
- d) on a particularly defenceless person, on account of age, disability, illness, pregnancy or economic dependency, with whom he/she cohabits;*

*will be punished with imprisonment up to five years [...].*⁵⁰⁶

6. Concluding remarks

The abundance of non-binding statements from the Council of Europe bodies and the European Parliament, as well as the new Council of Europe Convention, show that both regional bodies have a real commitment to the widespread problem of domestic violence. On both the regional and domestic level, such violence is mainly approached in terms of violence against *women*. Domestic violence perpetrated against men, as well as same-sex intimate partner violence, is generally neglected. While it is important to stress the structural and discriminatory nature of violence against women committed by men, the myriad of statements discussing the problem exclusively from one perspective risks making other forms of intimate partner violence invisible.

The European Court of Human Rights has, in a series of cases, examined serious incidents of domestic and intimate partner violence. The common denominator in the Court's findings is that the states have been found responsible for omission or failure to protect the victim(s). What can be drawn from this is that the state under the Convention has the positive obligation to intervene even in one of the most private spheres of individual life. This positive obligation has obvious relevance for sexual health and human rights. Intimate partner violence impedes women and men from leading full and dignified lives and enjoying respectful relationships without fear and intimidation. For the sake of their health and rights, it is crucial that states take seriously the obligation to protect them from such violence, which includes the facilitation of speedy divorce and custody proceedings.

Kontrova was the first case in the European Court that applied the notion of positive state obligations, or due diligence, to cases of domestic violence, when a claim arose under Article 2. The Court had long before established the notion that such a positive obligation exists, but it was important for it to clarify that this obligation also exists in cases of domestic/intimate partner violence. In Bevacqua, this obligation was expanded to also apply in allegations of violations of the right to respect for private and family life under Article 8. These cases make clear that domestic abuse shall no longer be seen as a 'private matter' within the family, but instead as one where the state has a real obligation to intervene. The Tomasic case also shows that for the Court, the state has an obligation to intervene regardless of whether or not the victim

504 Haller et al (2004), p. 42.

505 § 107b of the Austrian Penal Code (Strafgesetzbuch, BGBl. Nr. 60/1974, as amended), as amended by Article V of 2nd Protection from Violence Act, 2009.

506 This translation is author's own. Thanks to Esteban Restrepo for providing advice on the translation.

of the violence and her aggressor were married or not, while the *Hajduova* case showed that states may have a duty to intervene even where threats have not materialized into physical violence.

In *Opuz*, the Court reiterated and strengthened due diligence jurisprudence on intimate partner violence. This was the first time that the Court recognized that the failure to adequately respond to gender-based violence could amount to a violation of Article 14. In so doing, the Court made references to other international instruments and bodies where violence against women has been placed in a context of discrimination against women, notably the Women's Convention (CEDAW), and the Inter-American Convention on violence against women (the Belém do Pará Convention).

On a domestic level, recent legislation in the selected countries show that considerable focus has been placed on effective protection of the victim in cases where domestic or intimate partner violence has occurred or is imminent. The countries have chosen different means of achieving this, but the role of easily available protection orders of different kinds is central, as is the efficient coordination between different state agencies. Albania makes such coordination explicit and obligatory, suggesting a view of domestic violence not only as either a legal, social, or medical problem, but as a combination of these. Furthermore, the broad definition of violence and of who may be granted protection is a commonality of these laws. The United Kingdom and Portugal explicitly include same-sex partners, while the wording of the law in Albania and Austria implicitly suggests that same-sex partners will fall under the scope of protection. Portugal chose to explicitly expand the scope of protected categories by means of a recent legal reform, thereby acknowledging not only that domestic violence is a phenomenon not exclusive to opposite-sex couples, but also that persons living in same-sex relationships deserve exactly the same legal protection as opposite-sex partners. Furthermore, Portugal, as well as the United Kingdom, now defines violence occurring between partners or former partners who do not cohabit, as domestic violence. This demonstrates an understanding that unhealthy relationships can take various forms, and that the special power dynamics of intimate partner violence can be equally strong and damaging when the couple does not share a home.

The power given to the police in Austria to issue and enforce a barring order without the consent of the victim gives rise to several reflections. While the law is based on insight into the complex psychological nature of intimate partner violence, an unintended consequence of the barring order is that the state may violate the victim's right to self-determination. Paternalistic legal options towards adult persons are always complicated and merit special attention; however, in cases of domestic violence particular power dynamics tend to be involved that may justify such state imposition of measures. The fact that only the first barring order is at the discretion of the police is also worth remembering – after the first two weeks, the matter is exclusively in the hands of the victim. The first period can thus be seen as a 'cooling off'-period, where the perpetrator is removed from the vicinity of the victim in order to provide him or her with a safer environment in which to consider options.

B.1 SEXUAL VIOLENCE (ADULTS)

1. Introduction

As noted above, sexual violence violates a number of well-established human rights principles. The state has a direct responsibility to prevent and remedy sexual violence carried out by state actors, but also has an obligation to exercise due diligence with regard to sexual violence committed by non-state actors by developing preventative schemes, by effectively protecting survivors and by bringing those responsible to justice.

International human rights standards on sexual violence include the principle that rape is a crime against the individual, rather than the community, and should be criminalized regardless of whether it was committed within marriage, and regardless of the gender of the perpetrator and survivor. Rape under certain circumstances has been considered torture by various international human rights bodies. According to recent developments in international criminal law, lack of resistance on behalf of the survivor shall not be assumed to imply consent; no elevated corroboration requirements should exist for rape; and the sexual history of the survivor cannot be inferred in defense of the perpetrator.

European legislation and jurisprudence on sexual violence reflect all these issues. Accordingly, this chapter will highlight the criminalization of marital rape, the gender neutrality of rape provisions, the constitutive elements of rape (force/resistance or consent), rape as torture when committed by state officials in detention or police custody, sexual violence as a crime against the self-determination of the individual victim rather than against his or her family's 'honour,' and the abolishment of special procedural requirements for convictions in rape cases. As will be shown, the strongest trend in the region is to increasingly embrace a rights-based approach for the victims of sexual violence, regardless of what form the violence takes.

As is the case with domestic and intimate partner violence, given the abundance of laws and material on sexual violence in the region, the reader is strongly encouraged to keep in mind that the selection of examples is merely illustrative. There are many more examples of laws and jurisprudence in the region where a rights-based perspective permeates norms on sexual violence. Another aspect worth remembering is that sexual violence, perhaps to a larger degree than other human rights violations covered by this project, tends to be severely under-reported in all societies. Issues such as the stigma and shame associated with sexuality, dependency on the perpetrator when violence occurs within an intimate relationship, and lack of trust in the police and other law enforcement authorities, all contribute to the fact that much sexual violence is never reported, and/or ends in impunity. Therefore, while assessing progress made to combat sexual violence, and in designing models to that end, one should bear in mind that laws have a limited reach and other measures must be taken in tandem with legislation.

This chapter will also briefly discuss state responses to sexual violence, by looking at state treatment of sexual offenders. Given the stigma attached to sexual offenses, this group is particularly vulnerable to abuse of their fundamental rights. For the purpose of sexual health and rights, it is important to monitor post-penalty schemes for control over sex offenders, to ensure that such control strikes a reasonable balance between its protective purpose and the rights to privacy, bodily integrity, and reproductive choices of the person subjected to its provisions. Two topics will be addressed here: sexual offender registration, and mandatory surgical or chemical castration of offenders. Most European countries do not keep separate registers, with special requirements, for sex offenders. The United Kingdom is one of the few states that does; one crucial feature of the British system is that the registers are strictly confidential and thus unavailable to the general public for review. With regard to castration of sex offenders, a Council of Europe committee has questioned whether individual rights are violated by a compulsory scheme imposing castration of sex offenders in Poland and in the Czech Republic.

2. Council of Europe

*Jurisprudence of the European Court of Human Rights*⁵⁰⁷

Marital rape – In *C.R. v. the United Kingdom* and *S.W. v. the United Kingdom*,⁵⁰⁸ the applicant was a man who admitted to, in the first case, attempting to force his wife to have sexual intercourse with him and, in the second case, succeeding in doing so, at knife-point. British courts had sentenced him to three years' imprisonment and five years' imprisonment, respectively, for attempted rape, and rape. Relying on a 1736 legal statement declaring that a man cannot be guilty of raping his wife, the applicant contended that this was a general common law principle still effective at the time he attempted to force himself upon his wife. He therefore claimed that his conviction for attempted rape and rape violated Article 7 of the Convention, prohibiting retroactive criminal legislation.

The applicant had been convicted according to the British 1976 Sexual Offences Act (as amended), which states that a man committed rape if he had "unlawful sexual intercourse with a woman who at the time of the intercourse [did] not consent to it." The British courts dismissed the notion that the word 'unlawful' meant only outside of marriage, and found that the 1976 Act presented no obstacle to a ban on marital rape. In 1994, after the events under consideration, the law was reformed and the word "unlawful" was removed.

The Court noted that the crucial issue was related to the definition of rape in the 1976 Act and, in particular, to the word 'unlawful.' The question was whether removal of marital immunity as understood by older common law would conflict with this statutory definition of rape. The Court saw no reason to disagree with the British courts' finding that the word 'unlawful' in the definition of rape did not prevent them from modifying a common law understanding, which had become anachronistic and offensive. The Court repeated the statement from the British Court of Appeals that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim," and stated that British case law had firmly established that rape was a crime regardless of whether committed within marriage. This legal development had been sufficiently foreseeable.

In addition, the Court reiterated the importance of seeing the Convention as a whole and that the application of its principles must be internally consistent. It is contrary to the spirit of the Convention to use it to defend serious violations of the rights of another person. In finding no violation of Article 7, the Court took this opportunity to express its objection to the notion of immunity for marital rape altogether:

507 For other important cases where the Court has examined allegations of sexual violence, see Section 5B.2: Sexual violence (children).

508 Application nos 20166/92 and 20190/92, decided on 22 November 1995.

What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife [is] in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom. (para 44)

Constituent elements of rape and positive state obligations/due diligence

In *M.C. v. Bulgaria*,⁵⁰⁹ the applicant was a young woman who alleged that two different men raped her when she was 14 years old. The two men admitted to having sexual intercourse with the girl, but contended that it had been consensual. The forensic report did not indicate violence or major physical resistance. According to the applicant, she had not resisted the sexual advances more strongly since she had been panicked and fear-struck. In the domestic investigation, Bulgarian prosecutors concluded that there was insufficient evidence that the young woman had been forced to have sex, and the accusations were dropped. The applicant claimed that the Bulgarian interpretation of the law was inadequate, given the complicated psychological factors involved when sexual violence is employed, and in particular with regard to young victims. She complained that Bulgaria had violated its positive obligations under Article 3, prohibiting torture and inhuman and degrading treatment and punishment, and Article 8, the right to respect for family and private life, of the Convention.

The Court stated firstly that in many European countries physical resistance on part of the victim is no longer a necessary requirement for convictions for rape. Instead, focus lies on lack of consent as a constituent element of the offense. As a general statement, the Court affirmed that a broad interpretation of what may constitute rape is necessary in order for states to comply with their positive obligations under the Convention:

[T]he Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim. (para 166)

The issue in the case was not the wording of the Bulgarian rape law – which did not differ significantly from other European legislation – but its application and, in particular, the meaning given to words such as ‘threat’ or ‘force.’ The Court found that the investigation in the present case had serious flaws. Given that there was no ‘direct’ proof of rape – such as evidence of violence or physical resistance – the prosecutors appeared to have adopted the view that they could not exclude the possibility that the alleged perpetrators did not understand that the applicant did not consent to sex. Confusing and contradictory facts undermining the alleged perpetrators’ statements were not sufficiently examined by the prosecutors.

In a case like the present, the Court established, the investigation must be centred on the issue of whether consent to sex had been present. The Bulgarian authorities had not adopted this approach. Thus, the Court held,

the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse. (para 185)

Consequently, the Court found that Bulgaria had violated its positive obligations under Article 3 and Article 8 of the Convention. Worth noting is that the Court did not use the concept ‘due diligence’ – a concept elaborated by the Inter-American Commission on Human Rights – in setting a standard for state obligations when violations have been committed by non-state actors.⁵¹⁰ However, the Court’s discussion about positive state obligations is understood to set a similar standard to that of due diligence; in its later jurisprudence, the Court has started to use the latter term directly.⁵¹¹

Furthermore, the Court referred in this case explicitly to “the effective protection of the individual's sexual

509 Application no. 39272/98, decided on 4 December 2003.

510 In *Velazquez Rodrigueq v. Honduras*, Series C No. 4, Judgment of 29 July 1988, and (applied to domestic violence), in *Maria da Penha v. Brazil*, Case 12.051, Decision of 16 April 2001, Report No. 54/01.

511 See *Opuz v. Turkey*, 2009, above.

autonomy” as part of positive state obligations under the Convention. This is worth paying attention to. The Court appears to suggest that sexual autonomy, while not a right explicitly acknowledged in the Convention, is understood to be part of human dignity and therefore must be protected in the spirit of the Convention.

Sexual violence in detention/rape as torture

In several cases the European Court has found the crime of rape against a (female) detainee to constitute torture, prohibited by Article 3 of the Convention.

In Aydin v. Turkey⁵¹² the applicant was a Kurdish woman who, at the age of 17, had been detained by Turkish security forces. She alleged that she had been ill-treated and raped while in detention, and that her ill-treatment and sexual assault amounted to torture, in violation of Article 3 of the Convention. Furthermore, she contended that the failure of the Turkish authorities to carry out an effective investigation into her complaints was in itself a violation of Article 3, alternatively a violation of Article 6 § 1 (right to a fair trial) or Article 13 (right to an effective remedy before a national authority).

The Court reaffirmed that the prohibition of torture and inhuman and degrading treatment in Article 3 enshrines one of the fundamental values of democratic societies. In finding that the rape of the applicant had amounted to torture (and not ‘only’ to inhuman or degrading treatment), the Court emphasized the special vulnerability of a detainee, as well as the psychological effects of rape, which distinguishes this kind of ill-treatment from other kinds:⁵¹³

Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally. (para 83)

With regard to the failure to effectively investigate the claims of torture, the Court noted that the medical investigations of the applicant following her complaints had serious flaws. The Court emphasized that medical examinations following allegations of rape must be undertaken with all appropriate sensitivity and by properly trained medical professionals. It also criticized the fact that the investigations focused on whether the applicant had lost her virginity, rather than trying to establish whether she was a rape victim.⁵¹⁴

To conclude, the Court found that the rape of the applicant in custody amounted to torture in violation of Article 3, for which the state was responsible. This was the first time that the Court found sexual violence in detention to constitute torture under the Convention. Furthermore, the serious flaws of the investigation following the applicant’s complaint, including the inadequacies of the medical investigations amounted to a violation of the right to an effective remedy under Art. 13.

The holding in Aydin has since been reaffirmed by the Court in two cases against Russia, in which police brutality and rape of young women have been classified as torture, in the first case, and as degrading and inhuman treatment, in the second.⁵¹⁵

Conventions in the Council of Europe Treaty Series

As described above, the Council of Europe Convention on preventing and combating violence against women and domestic violence⁵¹⁶ opened for signature in May 2011. Unsurprisingly, one of the issues it deals with is that of sexual violence. Article 36, on ‘sexual violence, including rape’, states that member parties shall criminalize penetration (vaginal, anal or oral) of a sexual nature and other acts of a sexual nature when they are non-consensual, and emphasizes that “Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.” Importantly, it recognises the necessity to apply these provisions to acts committed against former or current partners.

512 Application no. 23178/94, decided on 25 September 1997.

513 In this regard, the Court can be said to essentialize sexual violence as inherently worse or more damaging and traumatizing than other kinds of violence. Several scholars have noted the potential risks with this approach, see, e.g., the scholarship by Katherine M. Franke, in particular *Putting Sex to Work*, 75 U. Denver L.Rev. 108 (1998) and *Theorizing Yes: An Essay on Law, Feminism, & Desire*, 101 Colum. L.Rev. 181 (2001). This discussion, however, while valid when analyzing a society’s approach to sexual crimes, goes beyond the scope of this study.

514 See more on this topic in section 2F: Virginity testing.

515 Menesheva v. Russia, Application no. 59261/00, decided on 9 March 2006, final judgment on 9 June 2006, and Maslova and Nalbandov v. Russia, application no. 839/02; decision on 24 January 2008.

516 Council of Europe Treaty Series No. 210, May 11, 2011.

The Convention also mandates “legislative or other measures” for the establishment of rape crisis or sexual violence referral centres to provide medical and forensic examination, trauma support and counselling for victims.” (Art. 25)

3. European Union

The issue of sexual violence does not fall within the scope of binding EU law.

4. Regional non-binding material

There are many non-binding statements condemning sexual violence from various Council of Europe and European Union bodies, most addressing sexual violence and domestic and intimate partner violence together. Here will only be mentioned a few of these statements.

In 2009, the Parliamentary Assembly of the Council of Europe passed several statements specifically addressing the issue of sexual violence against women.⁵¹⁷ While these documents offer forceful language against sexual violence and urge member states to take measures to effectively combat the problem, in civil life or in armed conflict, they only address sexual violence committed against women, and not sexual violence as something that affects men and women, regardless of sexual orientation.

Worth reiterating here is also the Council of Europe’s Recommendation No. R (2002) 5 of the Committee of Ministers on the protection of women against violence. Paragraph 35 of its appendix, referred to directly by the European Court of Human Rights in M.C. v. Bulgaria (above), provides that member states should:

penalise sexual violence and rape between spouses, regular or occasional partners and cohabitants; penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance; [and] penalise sexual penetration of any nature whatsoever or by any means whatsoever of a non-consenting person.

5. Domestic legislation and case law

Progressive legal reform and abolishing sexual crimes as crimes against morals

In several European countries, recent criminal law reforms have abolished references to morals and family honour in provisions against sexual violence. One example is **Turkey**. The Turkish Penal Code was reformed in 2004 and introduced major changes in its laws on sexual crimes. These changes included removal of patriarchal concepts, different classification and more progressive definitions of sexual crimes, and longer sentences for sexual crimes.

For example, while sexual crimes were earlier classified as “crimes against society/crimes against public morality and family,” indicating familial and societal ownership over women’s bodies and sexualities, they are now considered under the category “crimes against sexual inviolability.” All references to concepts such as ‘morality,’ ‘chastity,’ ‘decency,’ ‘honour,’ ‘shame,’ and ‘public customs’ have been eliminated. Earlier, crimes of rape and sexual abuse were defined as “forced seizure of chastity and attack on honour”; the perpetrator of rape or abduction could avoid punishment by marrying the victim; and killing by the mother of an infant born out of wedlock received a reduced sentence, with the pretext that this crime was committed in order to cleanse the woman’s honour.⁵¹⁸ All such elements have been removed.

The new code defines sexual assault as “violat[ing] the physical integrity of another person, by means of sexual conduct,” and is gender neutral (Art. 102).⁵¹⁹ The marital rape exemption has been abolished. Sexual abuse or assault of children can no longer occur with the consent of the child (Art. 103) and sexual harassment in the workplace has been included as a crime (Art. 105). The code also provides for aggravated sentences for so-called honour crimes.⁵²⁰

As discussed in other chapters of this report, women’s and human rights groups have criticized

517 These are, *inter alia*, Resolution 1670 (2009) and Recommendation 1873 (2009), on sexual violence against women in armed conflict, both adopted on 29 May, 2009, and Resolution 1691 (2009) and Recommendation 1887 (2009), on rape of women, including marital rape, both adopted on 2 October, 2009.

518 See Pinar Ilkcaracan and Liz Ercevik Amado, “Good Practices in Legislation on Violence against Women in Turkey and Problems of Implementation,” Expert Paper prepared for Expert group meeting organized by UNDAW and UNODC, May 2008, available at http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAV%20Paper%20Pinar%20Ilkcaracan%20and%20Liz%20Ercevik%20Amado_.pdf, and information from Women for Women’s Human Rights – New Ways, at http://www.wvhr.org/penalcode_reform.php. Both sites last visited on 10 March 2010.

519 Turkish Penal Code, Law No. 5237, passed on 26 September 2004.

520 See for a more detailed discussion of this Chapter 5E: Honour crimes.

certain provisions in the new code for not fully embracing sexual and bodily rights of women and others. For example, critical voices have underlined that honour crimes have been framed narrowly, that the new Penal Code falls short of criminalizing all cases of non-consensual genital examinations of women, that discrimination based on sexual orientation has not been included as a crime, and that consensual sexual relations between 15 and 18 are still unlawful.⁵²¹

Italy offers another example in the category of countries that have reformed their criminal laws in order to frame sexual crimes as offenses against the person instead of against the society or community. The Act of 15 February 1996 no. 66⁵²² reformed the old criminal law section on sexual crimes, labelled 'crimes against morals,' and instead placed sexual crimes under the category 'crimes against the person.' With this legislation, penalties for sexual violence increased, a new provision was created for sexual violence committed by a group of individuals, and sexual assault (that is, sexual violence without penetration) was made a crime of sexual violence.

Case law: sexual violence includes sexual coercion within a couple

In the Italian Supreme Court decision no. 26345 of 25 June 2009,⁵²³ the Court established that since there is no right to sex within a couple (married or unmarried), sexual coercion that occurs among spouses or partners shall be classified as sexual violence. In the case under consideration, the man had previously threatened his wife on several occasions. He admitted to having assaulted his wife, but not that he had raped her, since she had not physically resisted his sexual advances. The Court found that her lack of physical resistance to sexual acts could not serve as justification for the coercion, in particular as it had been proven that the husband was well aware of the implicit lack of consent on behalf of his wife.

Constituent elements of rape and gender neutral rape legislation

While earlier domestic European rape legislation often required proof of physical resistance on behalf of the victim, several European countries have reformed their laws in order to emphasize *lacking consent* as a constitutive element of rape. In the application of these laws, physical force and resistance can be seen as *evidence* of lack of consent, rather than legal requirements in their own right.

In **Belgium**, the Criminal Code, as amended in 1989, stresses lack of consent as the main constituting element of rape. The provision is gender neutral; rape can accordingly be committed against a man or a woman, by a man or a woman. The provision now reads:

Any act of sexual penetration, of whatever nature and by whatever means, committed on a person who does not consent to it shall constitute the crime of rape.

*In particular, there is no consent where the act is forced by means of violence, coercion or ruse or was made possible by the victim's disability or physical or mental deficiency.*⁵²⁴

Similarly, in **Ireland**, criminal law provisions on rape specify that failure to resist on behalf of the victim does not have to imply consent:

*A man commits rape if (a) he has sexual intercourse with a woman who at the time of intercourse does not consent and (b) at the time he knows she does not consent or is reckless as to whether or not she is consenting. (1981),*⁵²⁵ and

*It is hereby declared that in relation to an offence that consists of or includes the doing of an act to a person without the consent of the person, any failure or omission by that person to offer resistance to the act does not of itself constitute consent to that act. (1990)*⁵²⁶

The Irish rape legislation, while commendable in its emphasis on consent rather than on resistance, is

521 See, for example, Pinar Ilkharacan and Liz Ercevik Amado (2008) and information from Women for Women's Human Rights – New Ways. For more detailed discussion of these aspects of Turkish criminal law, see Chapters 5E: Honour crimes, 2F: Virginity testing, and 2C: Age of consent.

522 Only available in Italian; content explained by Stefano Fabeni.

523 Corte di Cassazione Sezione III penale, sentenza 25.06.2009 n. 26345. Only available in Italian; content explained by Stefano Fabeni.

524 Belgian Criminal Code, Article 375, § 1 and 2. Translation provided by Interrights, intervening in M.C. v. Bulgaria before the ECtHR, and referred to in the decision. I have used the translations referred to by the Court.

525 Section 2(1), Criminal Law (Rape) Act, 1981, no. 10/1981.

526 Section 9, Criminal Law (Rape) (Amendment) Act, 1990, no. 32/1990.

not yet fully gender neutral, and therefore not completely in line with international human rights norms. The 1981 Act only recognizes rape by a man against a woman. In the 1990 Act, the definition of rape has been expanded to include “penetration (however slight) of the anus or mouth by the penis,” (thus committed against a woman or a man, by a man), and “penetration (however slight) of the vagina by any object held or manipulated by another person” (thus committed against a woman, by a man or a woman).⁵²⁷ Penetration of the anus with an object other than with a penis does not constitute rape.

The 1990 Amendment also explicitly abolishes the marital exemption in relation to rape. Nevertheless, marital rape is not yet fully equalized with other sexual offenses, as criminal proceedings in such cases only can be instituted with the consent of the Director of Public Prosecutions.⁵²⁸

Case law: consent as a state of mind

In the **United Kingdom** appeals case Regina v. Olugboja,⁵²⁹ (1981), the issue was what meaning ‘consent’ had in the context of rape law. Two teenage girls had been given a ride home with the defendant and his friend. The friend raped one of the girls, who was 16 years old, in the car. When they were later indoors, the defendant asked the same girl to take off her pants, which she did. She alleged that she did so because she was frightened and the room was dark. She said to him “Why can’t you leave me alone,” after which he pushed her to a sofa and had sexual intercourse with her. She did not fight back, scream, or cry. The defendant was convicted of rape.

The appeals court dismissed the appeal against the judgment. In the appeal, Lord Justice Dunn declared that “consent is a state of mind.” He said:

[The jury] should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent. [...] [Members of the jury] should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances; and in particular, the events leading up to the act and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place.

The case illustrates that while it may in cases be difficult to determine what the victim’s state of mind was, it is nevertheless important to establish that consent by nature has this subjective character to it. The Olugboja case emphasizes that such factors as resistance and signs of distress may serve as supporting evidence to the state of mind of the victim, but do not substitute for lack of consent as the main constitutive element of the crime. The case clarifies this distinction between legal requirement and supporting evidence.

In **Russia**, the Supreme Court has provided guidance as to how rape shall be understood, and has stressed the victim’s rights in the criminal procedure. The Criminal Code of the Russian Federation defines rape as “...sexual relations with the use of violence or with the threat of its use against a victim or other persons, or in taking advantage of the victim’s helpless condition.”⁵³⁰ In Directive no 11 of 15 June 2004, the Russian Supreme Court emphasizes a uniform application of the criminal law in cases of sexual assault.⁵³¹ This includes that every criminal investigation into the allegations of rape shall be conducted with due regard to the victims’ rights and to the prevention of re-victimization. The Directive underlines that the offense of rape may be committed against a woman as well as against a man, and that when the victim voluntarily has intoxicated herself/himself with alcohol, the perpetrator can still be convicted of rape.

In this context, it should be mentioned that in **Kyrgyzstan**, Article 129 of the Penal Code (‘On rape’) provides that rape can only be committed against a woman. There is no legal recourse for a man who has been raped. At least one case has been documented where a man-to-woman transgendered individual was gang-raped and subsequently denied the right to report the crime because the police

527 Section 4 (a) and (b), Criminal Law (Rape) (Amendment) Act, 1990.

528 Section 5(1) and (2), Criminal Law (Rape) (Amendment) Act, 1990.

529 [1982] Queen’s Bench 320, [1981] 3 All England Law Reports 443, decided on 17 June 1981.

530 Article 131 of the Russian Penal Code (1996). Unofficial translation available; checked by Ukrainian lawyer and researcher Oksana Shevchenko.

531 Only available in Russian. Content explained by Ukrainian lawyer and researcher Oksana Shevchenko.

refuse to acknowledge her gender identity as a woman.⁵³² Another example of rape-law which falls short of complying with international human rights standards is the **Romanian** provision on sexual assault, which exempts the rapist from criminal liability if he, before the ruling becomes final, marries his victim.⁵³³

In **Spain**, the Supreme Court case 105/2005⁵³⁴ addressed the requirements for a conviction in a rape trial when no eyewitnesses could corroborate the alleged incident. The complainant was a woman who alleged to have suffered several counts of marital rape. The husband, who denied the charges, had been convicted to seven years imprisonment for rape. He appealed to the Supreme Court, contending *inter alia* that there was not sufficient corroborative evidence to support the claim and that his wife had not demonstrated resistance to his advances.

The Court discussed at length the balance that had to be struck between, on one hand, the right to justice for victims of sexual violence and, on the other, the right to due process for the alleged offender and the importance of the presumption of innocence. It determined that with regard to crimes that tend to occur in private, such as crimes against sexual liberty, courts have to closely examine three aspects of the accusation. These are, first, the absence of circumstances suggesting underlying motives on behalf of the victim, such as a desire for revenge, retaliation, confrontation, or similar interests; second, believability of the accusation, of a kind that meets the standard of proof required in civil cases; and, third, internal coherence of the accusation over time, without ambiguities and inconsistencies. These criteria were not to be seen as preconditions that had to be met for a conviction in a sexual crimes case, since, for example, the existence of sentiments of revenge on behalf of the victim will not necessarily mean that the crime has not occurred. However, close attention must be paid to these three aspects.

In the case under consideration, the Court established that the complainant's account was credible and sufficiently coherent, and also supported by a forensic report. With regard to the claim that she had not demonstrated sufficient resistance, the Court stated that lack of resistance by itself does not mean that the crime of rape has not been committed. It noted that if sufficiently strong and clear force is being employed, then resistance is unnecessary, since what constitutes the crime is the action of the perpetrator, not of the victim. The Court established that consent or lack of consent of the victim is what matters for the determination of the existence of the crime. In conclusion, it upheld the conviction and dismissed the appeal.

Procedural matters:

(a) Abolishing the corroboration warning in sexual violence cases – The so-called corroboration warning, previously frequent in common law systems, requires the judge to instruct the jury in cases of sexual assault that they must be careful not to convict the defendant on the victim's uncorroborated evidence. This warning – not required with regard to other crimes that are frequently committed in private, without eyewitnesses – is based on an idea that women for whatever reason may invent stories of rape and that it therefore is important to corroborate the allegations in order not to convict innocent men. The required corroboration warning has been widely criticized for its discriminatory and misogynist nature, and is expressly banned in modern international criminal law.⁵³⁵ The two common law countries in the region, United Kingdom and Ireland, have both recently abolished or restricted the obligatory corroboration warning in cases of sexual violence.

In the **United Kingdom**, the mandatory corroboration warning in trials on sexual and other offenses was abolished in 1994.⁵³⁶ However, only the *mandatory* nature of the corroboration warning was repealed; the provisions do not *prohibit* the judge from 'warning' the jury in accordance with the old rule, if the judge finds it appropriate in the individual case. Given that defendants in sex trials, like all other defendants, are protected by general criminal law principles that establish that guilt must be

532 According to shadow report to the CEDAW Committee from Kyrgyz LGBT organization Labrys, submitted for the 42nd CEDAW session, 20 October-7 November 2008. Available at http://www.iwraw-ap.org/resources/pdf/42_shadow_reports/Kyrgyzstan_SR_Labrys.pdf, last visited on 14 December 2009.

533 Article 197(5) of the Romanian Criminal Code reads: "The crimes [of rape] shall be dismissed if, before the ruling has been declare definitive, the marriage intervened between victim and the perpetrator." Information, including English translation, from International Helsinki Federation for Human Rights, *Women 2000: An Investigation into the Status of Women's Rights in Central and South-Eastern Europe and the Newly Independent States* (9 November 2000), p. 364. Romanian-speaking Moldovan researcher and lawyer Doina Ioana Straisteanu confirms that this provision is still valid.

534 Supreme Court, Penal Division, Madrid. Application no. 812/2004, decision no. 105/2005. Decided on 29 January 2005.

535 See Susan Power, "Legal Studies and the Potential for the Reform of Irish Rape Law" 2 *Galway Student L. Rev.* 77, 83-85 (2007) and Kathy Mack, "Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process." 4 *Crim. L.F.* 327 (1993). See also Rule 63(4), International Criminal Court, Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1 (2000).

536 Sections 32 and 33, *Criminal Justice and Public Order Act 1994*.

proven beyond all reasonable doubt, one may question why there would ever be a need for a specific warning. According to commentaries, the British Court of Appeal has showed strong support for the legislative reform, and stated that in most cases there is no need for a warning.⁵³⁷

In **Ireland** a similar legal reform took place in 1990.⁵³⁸ While the Irish provision also abolishes the obligatory nature of the warning, it conveys more strongly than its British counterpart that judges may still be required to give warnings about the uncorroborated testimony of the victim in rape trials. From the point of view of equality before the law, and considering the essentially offensive underlying assumptions of the corroboration warning, this failure to fully abolish the use of the corroboration warning raises certain concerns.

(b) Limiting the possibility of bringing up the sexual history of the victim – In both **Ireland** and the **United Kingdom** the right of the defense counsel to bring up the sexual history of the complainant in a sexual assault trial has been limited. According to both the Irish Criminal Law (Rape) Act 1981,⁵³⁹ and the British Youth Justice and Criminal Evidence Act 1999,⁵⁴⁰ the complainant's sexual history can only be brought up with the leave of the court. According to the British statute, such leave may be given if, *inter alia*, the question relates to a relevant issue in the case, and a refusal to give such leave might result in rendering unsafe conclusions of the jury or the court. In Ireland, a judge shall give leave

*if, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the court might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied.*⁵⁴¹

The Irish legislature thus allows the defense to plead that the victim's sexual history can be included, thereby placing the sexual past of the victim in the spotlight. The purpose of the regulation was to emphasize that such information is irrelevant and as a general rule should be banned; the caveat risks having the opposite effect. According to news reports, the British provision limiting the right to use sexual history evidence has also proven ineffective. It is often circumvented by the counsel of the defendant, and the government is looking into tightening the provision.⁵⁴² For the purposes of both procedural rights and the sexual health of victims of sexual crimes, the development of these rules merits close attention.

The issue of whether the sexual history or behaviour of the victim should be allowed came up in the **United Kingdom** Court of Appeals case R v. Bahador,⁵⁴³ in which the complainant was a woman who had been sexually assaulted. The defendant alleged that he had earlier that evening seen her on stage at a nightclub taking part in a competition which involved exposing her breasts and simulating oral sex. The trial court was asked to accept that her alleged behaviour on stage was relevant to the defendant's 'honest belief' that she would consent to having sex with him, under the exceptions provided by Section 41 of the Youth Justice and Criminal Evidence Act 1999 (see above). The trial judge refused leave to the defendant to mention the complainant's alleged behaviour or to cross-examine her about it.

In the Court of Appeal, defence counsel argued that the conviction was unsafe as a result of this evidence not being admitted. The counsel for the Crown argued that pushed to its logical conclusion the argument of the defendant would mean that every stripper who performed at a club would convey the message that she was thereby also consenting to be touched in a sexual manner by a complete stranger. The Court of Appeal, in looking purely at the question of relevance (as understood by the Youth Justice and Criminal Evidence Act), declared that "we feel compelled to conclude that as the appellant's defence was one based on his honest belief, it is difficult to say that what he contended to

537 Temkin, Jennifer, *Rape and the Legal Process*, Oxford, 2002, p. 263.

538 Section 7, Irish Criminal Law (Rape) (Amendment) Act 1990.

539 Section 3.

540 Sections 41–43.

541 Criminal law (Rape) Act 1981, section 3(2)(b).

542 See, for example, The Telegraph, "Rules on sexual history of rape victims tightened", *The Telegraph*, 21 June 2006, available at <http://www.telegraph.co.uk/news/uknews/1521849/Rules-on-sexual-history-of-rape-victims-tightened.html> and The Independent: "Rape law change has failed to boost convictions", *The Independent*, 21 June 2006, available at <http://www.independent.co.uk/news/uk/crime/rape-law-change-has-failed-to-boost-convictions-404864.html>. Both sites visited on March 11, 2010.

543 [2005] EWCA Crim 396, England and Wales Court of Appeal, decided on 15 February 2005. See also the paper "Sexual Offences Act 2003/ Vulnerable witnesses/ S41 Youth Justice and Criminal Evidence Act 1999", Updated to September 2005 by Peter Rook QC.

have taken place on the stage could not be relevant.” However, there were several factors in the case that indicated that the complainant’s alleged behaviour on stage had not had any determining effect on the actions taken by the defendant. For those reasons, it could not be said that the exclusion of the evidence had rendered his conviction unsafe. The appeal was dismissed.

Responses to sexual violence: sexual offender registration and surgical or chemical castration

Although most European countries have databases for criminal records, these contain records of all criminal offences. Few countries have specialized registration for sexual offenders. A system similar to that employed in the USA – with special sex offender registries that follow separate rules from other databases for criminal records – has recently been discussed in **Germany**. However, the constitutionality of such procedure has been called into question, and so far no legal measures in that regard have been taken.⁵⁴⁴

Nevertheless, separate sexual offender registries exist in Europe. The main difference between these and their US equivalents is that the European registries are not open for public inquiry. In the **United Kingdom**, the Violent and Sex Offender Register (ViSOR) is a UK-wide database of records of convicted sex offenders, convicted perpetrators of serious violent crime, and so-called ‘potentially dangerous persons.’⁵⁴⁵ The database, which is designed to enhance the protection of the public and reduce risk of serious harm, stores and shares information about the individuals registered in it, but is confidential and can only be accessed by a limited number of categories of people: police, probation and prison personnel (including private companies running prisons).⁵⁴⁶

Registry of sex offenders is regulated in accordance with the Sexual Offences Act 2003.⁵⁴⁷ All persons convicted under Schedule 3 of the Act – including a long list of sexual offences – are subject to notification requirements, as well as persons not found guilty of such an offence by reason of insanity (Section 80). This implies that they must register with the police and notify them of their names, address, date of birth, national insurance number and passport details within three days of their conviction or release from prison (Section 83). Registrants must inform the police, within three days, of any changes of address, as well as plans to spend seven days or more away from their home or to travel abroad (Sections 83 and 84). Failure to do so is an offence that can carry a term of imprisonment (Section 91). The length of the required notification period depends on the gravity of the crime for which the individual has been convicted; it varies from two years to “an indefinite period” (Section 82).

Case law: indefinite sex offender registration violates right to privacy

In 2008, the indefinite registration period for sexual offenders was challenged in court. In the case E. and Angus Aubrey Thompson v. Secretary of State,⁵⁴⁸ the claimants were two individuals who on the basis of their convictions under the Sexual Offences Act were subject to the notification requirements for an indefinite period. The result was that they would remain on the Sex Offenders Register for the rest of their lives, without possibility of review. One of the applicants was 11 years old at the time of the offense and 16 when the case was decided. The claimants argued that the indefinite notification requirement without the opportunity for review violated the right to respect for their private and family life under Article 8 of the European Convention on Human Rights.

The High Court of Justice, in focusing on the absence of the right of review, found such absence incompatible with Article 8 of the European Convention. It stressed that the notification requirement was not intended to have a punitive purpose; instead, its objective was to protect potential victims. Therefore, the notification was no longer called for when the relevant offender no longer posed a risk of re-offending. Denying a person, who believed that he had ceased to be a danger to the public, the opportunity to seek to show that he no longer presented a risk of re-offending, was found to run contrary to the rights under Article 8.

544 See Deutsche Welle, 13 October 2006, at <http://www.dw-world.de/dw/article/0,,2203141.00.html>. Last visited on 11 March 2010.

545 ViSOR was created as part of the Multi-Agency Public Protection Arrangements (MAPPA), formed under the Criminal Justice and Court Services Act 2000. Registry under ViSOR is required for “violent and sexual offenders” as defined by Section 68 of the Criminal Justice and Court Services Act 2000, and for “potentially dangerous persons” (non-convicted persons “whose behaviour gives reasonable grounds for believing that there is a present likelihood of them committing an offence or offences that will cause serious harm;” see MAPPA Guidance 2009, at http://www.lbhf.gov.uk/Images/MAPPA%20Guidance%20%282009%29%20Version%203%200%20_tcm21-120559.pdf. Last visited on 11 March 2010. The application of ViSOR to sexual offenders is regulated by the Sexual Offences Act 2003, which will be the focus here.

546 Information from the Home Office National Policing Improvement Agency; the agency managing the database. See <http://www.npia.police.uk/en/10510.htm>, visited on March 11, 2010.

547 Enacted 20 November 2003.

548 [2008] EWHC 3170 (QB), England and Wales High Court of Justice, decided on 19 December 2008.

As for surgical or chemical castration imposed on convicted sex offenders, there are worrying signs in Europe that practices that run contrary to accepted human rights standards are gaining popularity. In the **Czech Republic**, those who have committed serious sexual offenses are encouraged to undergo surgical castration. According to the 1996 Law on the care for the people's health,⁵⁴⁹ such an operation should only be performed at the request of the person concerned, and only with free and informed consent. Nevertheless, the Council of Europe body the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁵⁵⁰ issued a report in 2009 strongly criticizing the practice of surgical castration in the Czech Republic. The report suggested that in practice, information given to patients about the effects of the procedure was limited, and that in most cases, the application of the procedure was "at least partially instigated by fear of long-term detention." These factors, the Committee concluded, put into question the concept of free and informed consent. The Committee stressed that surgical castration is "a mutilating, irreversible intervention [that] cannot be considered as a medical necessity in the context of the treatment of sex offenders," and recommended that the Czech Republic bring to an immediate end the application of the practice.⁵⁵¹

In **Poland**, a law was adopted in November 2009, making chemical castration compulsory for adults who had raped children or immediate family members.⁵⁵² The practice of chemical castration for sex offenders has been offered on a voluntary basis elsewhere, but Poland is the only country in Europe where it is mandatory. From a human rights perspective this practice raises serious concerns, as it violates a host of recognized human rights principles, such as the right to bodily integrity, the right not to be subjected to inhuman or degrading treatment or punishment, and the right to private and family life. EU politicians have proposed that the Polish policy be challenged by bringing a case to the European Court of Human Rights.⁵⁵³

6. Concluding remarks

Legal responses to sexual violence in the European region show conflicting trends. On one hand, fighting sexual violence against women is high on the agenda of the regional organizations. These organizations have issued powerful statements calling for, *inter alia*, the immediate criminalization of marital rape and the abolition of required evidence of force or resistance in rape trials. Many countries have also incorporated these principles into their domestic legislation, and there are signs that the perception of sexual violence as something committed against the family's 'honour' – rather than against the bodily and psychological integrity of the victim – is fading. The recent reform of the Turkish penal code, where archaic references to 'honour,' 'shame,' and 'chastity' have been abolished, is an illustration of this – even though problematic aspects still prevail.

On the other hand, several countries resist these rights-based approaches to sexual violence. This is not only true in the extreme cases where, for example, a sex-offender can avoid criminal responsibility by marrying his victim (Romania) or where there is no recourse for men who have been raped (Kyrgyzstan). The case law of the European Court of Human Rights shows that a number of countries may have sufficiently clear laws on paper but inadequate mechanisms for implementing these laws, or resistance within police and prosecutorial sectors to the application of more modern and rights-based approaches to sexual self-determination. Here should be reiterated that the lack of clarifying case law and reports from many countries, despite the existence of modern and inclusive laws, is a sign that sexual violence is still a significant and under-reported problem. This is even truer when it occurs within the home. The stigma attached to sexual violence in many countries and power relations between perpetrator and victim make the law insufficient to bring the phenomenon to the surface and to deal effectively with it.

Considering the vast number of laws and variances in practices in the region, special attention should be given to the jurisprudence of the European Court of Human Rights as a guiding tool for human rights

549 Section 27a. Information gathered from Council of Europe, *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment Report (2009) to the Czech Government on the Visit to the Czech Republic of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment from 25 March to 2 April 2008*, CPT/Inf (2009) 8, paras 15–16.

550 The Committee is the monitoring body established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment (Council of Europe, ETS No. 126), Art 1.

551 *Ibid*, paras 43–44.

552 According to news reports, see *inter alia* BBC News, "Polish president signs chemical castration law," 27 November 2009. Available at <http://news.bbc.co.uk/2/hi/europe/8383698.stm>, last visited on 11 March 2010.

553 See Spiegel Online, "EU Politicians Angered by Polish Chemical Castration Plan," 25 September 2008, available at <http://www.spiegel.de/international/europe/0,1518,580284,00.html>. Last visited on 11 March 2010.

standards related to sexual violence. The Court has elaborated important principles in this area that have strong bearing on sexual health. Its condemnation of immunity for marital rape in C.R. and S.W. v. the United Kingdom leaves little room for interpretation. In M.C. v. Bulgaria, the Court addressed how the concepts of ‘resistance’ and ‘consent’ shall be interpreted in order for state compliance with the Convention to occur, and set the standard for positive state obligations in response to sexual violence. For the purpose of sexual health and rights, it is of particular importance that the Court referred to the applicant’s ‘sexual autonomy’ as a protected value under the Convention. Finally, in Aydin v. Turkey the Court establishes that rape in custody is a particularly cruel and degrading form of ill-treatment which under certain circumstances qualifies as torture – and expresses concern over the employment of virginity testing as a means of investigating rape claims.

Several European countries are increasingly focusing on the absence of consent rather than force and, in the case of the common law countries in the region, restricting corroboration requirements and the right to bring up the sexual history of the victim. It is true that a too strict emphasis on the lack of consent on behalf of the victim has its own dangers from a rights-based perspective. In practice, if the prosecution is forced to prove beyond reasonable doubt that the complainant did not consent, this could lead to a process of re-victimization. The conclusion in R. v. Bahador, that the appellant’s defense was “based on his honest belief” about the complainant’s consent to his sexual advances, illustrate this point, although in the case this so-called honest belief did not affect the outcome.

As for state responses to sexual violence, in regard to how sexual offenders are treated after they have served their sentences, two topics merit attention. The first is separate sexual offender registration, which is rare in the region. Of the few countries that do have separate registries, the United Kingdom provides an illustrative example. Its requirements are fairly limited – they mainly consist of the obligation of the sex offender to notify the police of his or her whereabouts – and the registries are strictly confidential, available only to the police, probation, and prison administration. However, the possibility of subjecting a sex offender to indefinite notification requirements raises concerns from a human rights standpoint. The failure to provide the person subjected to such requirements with an opportunity for review was recently struck down by a British court.

The second issue in this regard that has strong bearing on sexual health is the mandated castration – surgical or chemical – of sex offenders. Both the recent Polish initiative to impose chemical castration on a category of sex offenders and the Czech practice of surgical castration with limited possibilities to reject the procedure, have attracted international attention and have adequately been described as serious infringements on basic human rights.

B.2 SEXUAL VIOLENCE AND EXPLOITATION OF CHILDREN

1. Introduction⁵⁵⁴

As explored above, sexual violence and sexual exploitation have many negative repercussions on sexual health. Children and teenagers are particularly vulnerable to sexual violence and exploitation, not only because of their limited ability to protect themselves, compared to adults, but also because sexual violence may have wider-reaching long-term negative consequences on a person who has not fully developed physically, psychologically and emotionally. In order to protect the sexual health of children, states have an obligation to prevent sexual violence and exploitation from taking place, protect and provide rehabilitation to children when such violence has occurred, and establish effective law enforcement against perpetrators.⁵⁵⁵

Within a sexual health and human rights framework, it is also crucial that measures against sexual exploitation of children not be framed or implemented in a way that hinders young people from engaging in consensual sexual activities and exploring their sexuality. Provisions against sexual exploitation of children must be framed in a fashion that is sufficiently broad to target violence, exploitation, and coercion, but also sufficiently narrow, non-moralistic, and non-discriminatory to leave room for youths’ healthy expressions of sexuality.⁵⁵⁶

554 Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.

555 See, *inter alia*, Art 1, 19, and 34 of the Convention of the Rights of the Child (CRC), Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, [A/RES/54/263 25 May 2000], Committee on the Rights of the Child, General Comment No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child (U.N. Doc. CRC/GC/2003/4 (2003)), and numerous concluding observations from the Committee on the Rights of the Child. See for more details International law section.

556 The Committee on the Rights of the Child recommend that the minimum age for sexual consent should “closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity.” General Comment 4, CRC/GC/2003/4 (2003), at 9. See further Chapter 2C: Age of consent.

This chapter will also address state regulation of what is called ‘child pornography,’ an area handled differently by different regimes.⁵⁵⁷ Photographs, videos, or other depictions of sexual behaviour or sexualized poses of actual minors are not permitted, and many states have adopted criminal statutes toward this end. As noted above, the freedom from sexual abuse or exploitation of persons less than 18 years of age is of paramount importance and an obligation of the state. Bearing in mind fundamental rights to freedom of expression, however, it is also important that such provisions not be over-inclusive. A rights-based approach to child pornography focuses on coercion of, and harm to, *actual children*, regardless of the sex and gender of the minor. Many current criminal law regimes, aiming at discouraging any market for child pornography and in light of the alleged relationship between such a market and incentives for actual abuse of minors, criminalize possession of such images, as well as their production and distribution. Criminalization of possession is an emerging topic in international criminal law, although the rights standards are also evolving, and many international agreements may not pass national constitutional or international rights review.⁵⁵⁸ As an element of contemporary rights evolution, however, some regions have exempted material with a sexual content made by adolescents by and for their own private use from penalization, as will be shown below.

The European region shows strong commitment to the fight against sexual exploitation of children, both on regional and domestic levels. This chapter will address regional and domestic criminal provisions on sexual violence against children and regulation of child pornography. It overlaps in part with Chapter 2C: Age of consent, Chapter 5F: Sexual exploitation and trafficking, as it has relevance for persons under the age of 18, and Chapter 7B: Sexual expression.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

Sexual violence towards children/positive obligations of states:

In *X. and Y. v. the Netherlands*,⁵⁵⁹ the applicants were a 16-year old mentally disabled young woman and her father. The girl had been sexually assaulted in the family home where she lived, and the father reported the incident to the police. Because of her mental condition, the young woman was unable to sign the complaint herself, and so her father signed it on her behalf. For the legal provision that would be most appropriate for the crime – ‘indecent assault by the abuse of dominant position’ – Dutch criminal law required that action be taken by the victim personally. Thus, the father’s signature was not accepted. Other provisions were found not to be applicable for other reasons, and regulations related to age of consent could not be used since the young woman was over 16. Hence, the case exposed a gap in the law, and the complaint was not proceeded with. The applicants complained that the failure of the state to provide a criminal law remedy against the perpetrator violated their right to respect for private and family life under Article 8.

The Court acknowledged that there are many ways for states to ensure the right to respect for private life in accordance with the Convention, and that criminal law may not be the only appropriate path. Still, the Court found that in the present case, the Dutch law offered no effective protection of a person in the applicant’s position. Given the seriousness of the crime, it was not sufficient to provide for civil law provisions, under which the applicants could have brought a claim for damages:

The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated. (para 27)

The Court found that, “taking account of the nature of the wrongdoing in question,” the applicant had been the victim of a violation of Article 8.

It is worth noting that the Court found a violation under the right to respect for family and private life, in a case of sexual violence, rather than under Article 3 (prohibition of inhuman and degrading treatment). This finding is surprising, and innovative, while also troubling as this outcome can have

557 CRC, Optional Protocol on the Convention on the Sale of Children, which is contributing to the development of specific attention in the law on ‘child pornography’, albeit one with great variability.

558 CRC Optional Protocol above, Preamble and article 3 of the Optional Protocol.

559 Application no. 8978/80, decided on 26 March 1985.

the effect of minimizing the seriousness of the crime.⁵⁶⁰ It may in part be explained by the early date by which the decision was made; this was before the Court had developed its doctrine on 'positive state obligations' under Article 2 and 3 in regard to violence committed by private actors.⁵⁶¹ However, the Court emphasized that the case involved "fundamental values and essential aspects of private life," suggesting that within the scope of Article 8 some issues are more fundamental than others, and that sexual violence would be among the more serious breaches under the article.

Seven years later violence committed against children by a non-state actor was instead raised under Article 3. In E. and Others v. United Kingdom,⁵⁶² the applicants were four siblings who for years had suffered sexual and physical abuse from their stepfather. The stepfather had been convicted by UK Courts on two occasions, but only subjected to lenient sentences that allowed him to continue to live at home, where the abuse continued. The applicants claimed that the local authorities had failed to protect them from the abuse, which they argued constituted a violation of Article 3.

The Court recognized that the abuse for which there had been criminal convictions was known to the authorities and thus, the authorities should have been aware that the children remained at risk. Yet, the social services failed to carry out a thorough investigation into the situation in the household. In finding a potential causal relationship between the inaction on behalf of the authorities and the continued abuse in the home, the Court held that the United Kingdom had failed to live up to its obligations under Article 3. It stressed in particular the failure to thoroughly investigate the suspected ill-treatment.⁵⁶³ It is noteworthy that the Court, in discussing the effect of the government omission, clarified what the test for such omission is – which is of relevance for other cases of violence in the home and closely related to the standard of 'due diligence':⁵⁶⁴

The test under Article 3 does not require it to be shown that "but for" the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State. (para 99)

Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse and Convention on Cybercrime

The 2007 Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse,⁵⁶⁵ has three main purposes: to prevent and combat sexual exploitation and sexual abuse of children, to protect child victims, and to promote national and international cooperation against sexual exploitation and sexual abuse of children (Art 1).

Article 2 contains a non-discrimination principle, including non-discrimination on the basis of sex, sexual orientation, state of health (which includes HIV status), and disability. The list is not exhaustive but indicative.⁵⁶⁶ The Convention contains preventative measures (Chapter II), protective measures and assistance to victims (Chapter IV), establishment of intervention programmes for alleged offenders (Chapter V), and substantive criminal law (Chapter VI). It is permeated by a child-rights perspective, encouraging child participation (according to their evolving capacity) in the design and implementation of preventative state policies, and stressing that assistance to victims shall take due account of the child's views, needs and concerns and always take into account the best interest of the child. The Convention also stresses that intervention programmes and measures for alleged offenders

560 The Court has repeatedly held that Article 2 and 3 contain principles of more fundamental character than Article 8. This is clearest in its case law on asylum, when the question arises as to whether deportation to a non-state party would invoke responsibilities for the deporting state party. See, *inter alia*, Bensaid v. United Kingdom (Application no. 44599/98, decided on 6 February 2001), and F v. United Kingdom (Application no. 17341/03, *Admissibility decision*, decided on 22 June 2004).

561 See, for example, M. C. v. Bulgaria, 2003 (with regard to Art. 3 and Art. 8), Kontrova v. Slovakia, 2007 (with regard to Art. 2), and Bevacqua and S. v. Bulgaria, 2008 (with regard to Art. 8).

562 Application no. 33218/96, decided on 26 November 2002.

563 See also cases that do not address sexual health but that underline the obligation of authorities to conduct investigations in potential situations of abuse and ill-treatment. This obligation is highly relevant in situations of sexual violence committed by third parties. See, for example, Kaya v. Turkey, 1998, Jordan v. the United Kingdom, 2001, Finucane v. the United Kingdom, 2003, Isayeva v. Russia, 2004, and Adali v. Turkey, 2005.

564 A concept elaborated by the Inter-American Commission for Human Rights, as discussed above. See IACHR Velazquez Rodriguez v. Honduras, Series C No. 4, Judgment of 29 July 1988, and (applied to domestic violence), in Maria da Penha v. Brazil, Case 12.051, Decision of 16 April 2001, Report No. 54/01.

565 Council of Europe Treaty Series – No. 201. Open for signature on 25 October 2007. As of April 2010 it had been ratified by Albania, Denmark, Greece, Netherlands, and San Marino. It will enter into force on 1 July 2010.

566 According to the Explanatory Report, para 43, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm>.

must be applied with respect for the principle of innocence and with due process guarantees intact, and that no such programme can be imposed on anybody.⁵⁶⁷

As for constituent elements of rape and other kinds of sexual abuse, the Explanatory report to the Convention stresses the importance of keeping in mind the case law of the European Court of Human Rights, and in particular *M.C. v. Bulgaria* where the Court established that physical resistance on behalf of the victim should not be a requirement for a conviction of rape.⁵⁶⁸

The Convention states that for the purpose of establishing when child abuse is present, each party shall determine the legal age of consent (18(2)). The same article determines that the prohibition of sexual activities with children younger than the age of consent is not intended to govern consensual sexual activities between minors. This last clarification is important for the purpose of sexual health and rights of adolescents. In the words of the Explanatory Report:

*It is not the intention of this Convention to criminalise sexual activities of young adolescents who are discovering their sexuality and engaging in sexual experiences with each other in the framework of sexual development. Nor is it intended to cover sexual activities between persons of similar ages and maturity.*⁵⁶⁹

Article 19, addressing child prostitution, makes no mention of whether the minor in question has reached the legal age of consent or not. The assumption underlying this provision is that a person younger than 18 cannot consent to sex work, regardless of whether he or she can consent to sex without remuneration – or that the risk of exploitation in these situations is simply too serious.

The Convention mandates states to criminalize all dealings with child pornography (Article 20). 'Child pornography' is understood as "any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes," and thus includes images with sexual content of children even when no actual child was involved in the production of the material, for instance images with a person appearing as, or realistic images representing, a minor engaged in sexually explicit conduct. However, states parties can decide to exclude from criminal liability the production and possession of such material when it consists exclusively of simulated representations or realistic images of a non-existent child (Art 20(2)). Furthermore, as discussed above, the same article provides for an exception for consensual and private production and possession of pornographic material of children who have reached the legal age of consent (Art 20(3)).⁵⁷⁰ States parties can also opt not to criminalize access to child pornography which has been knowingly obtained (Art 20(4)).

The Convention prohibits recruiting a child into participating in pornographic performances or causing a child to participate in such performances without, again, providing for the exception when children have reached the legal age of consent (Art. 21.1(a)). There is no definition of 'pornographic performances,' but according to the Explanatory Report, the provision is intended to deal "essentially with organised live performances of children engaged in sexually explicit conduct."⁵⁷¹ One can imagine difficult issues of interpretation arising under this article. Corruption of children (defined as the intentional causing of a child to witness sexual abuse or sexual activities, without having to participate), applies only to children who have not reached the age of consent (Art 22).

In conclusion, the Convention strongly condemns sexual exploitation of children, while also acknowledging that persons who are technically under-age (that is, under 18) but over the age of consent have a legitimate right to explore their sexuality in a consensual manner. However, this does not apply when money or any other kinds of remuneration are involved.

The Council of Europe Convention on Cybercrime⁵⁷² includes a provision on child pornography. Its Article 9 obliges states parties to make the production, provision, distribution, procurement and possession of child pornography a criminal offense. Child pornography includes pornographic material that visually depicts a minor engaged in sexually explicit conduct, a person appearing to be a minor engaged in sexually explicit conduct, and realistic images representing a minor engaged in

567 Ibid, para. 104.

568 Ibid, para. 121.

569 Ibid, para 129. See also Chapter 2C: Age of consent.

570 See also Chapter 2C: Age of consent.

571 Ibid, para. 147.

572 Council of Europe Treaty Series – No. 185. Open for signature on 23 November 2001, in force 1 July 2004.

sexually explicit conduct. The term 'minor' shall include all persons under 18 years, but states parties may set a lower age-limit (not lower than 16 years). States parties may opt out of the penalization of the procurement and possession of child pornography, as well as of the penalization of images where no real children were involved in the production of the images.

Worth mentioning is also the Council of Europe Convention on Action against Trafficking in Human Beings⁵⁷³ – explored in Chapter 5G: Sexual exploitation and trafficking. This Convention targets human trafficking of both adults and children.

European Social Charter and the European Committee of Social Rights

Article 7.10 of the European Social Charter provides:

With a view to ensuring the effective exercise of the right of children and young persons to protection, the Contracting Parties undertake:

(...)

*to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.*⁵⁷⁴

This, according to the Committee, includes protection against sexual exploitation, child prostitution, child pornography, and trafficking of children. Under the Charter, states must criminalize all acts of sexual exploitation, adopt a national action plan combating the sexual exploitation of children, and protect children against the misuse of information technologies.⁵⁷⁵ In concluding remarks on a Polish report in 2005, the Committee asked for clarification on whether purchasing sexual services from those between 15 and 18 was criminalized in Poland. According to the Committee, buying sex from persons under 18 should always be a crime. At the same time, the Committee stressed that the minor selling sex should not be criminalized and that programmes should be in place to assist the reintegration of child sex workers.⁵⁷⁶

3. European Union

The Council of the European Union Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography⁵⁷⁷ contains similar definitions to the Council of Europe Convention, but has a clearer focus on law enforcement. Its primary purpose is to establish the responsibility of member states to make acts of sexual exploitation of children and child pornography punishable.

Similar to the Council of Europe Convention, its definition of child pornography includes both material with sexual content where real children have been involved, and realistic images of non-existent children or those over 18 who appear to be children (Art 1), but just as in the Council of Europe Convention member states can under certain circumstances opt to exclude from criminal liability images that do not depict real children. Otherwise it shall be punishable to produce, distribute, disseminate, transmit, supply or make available, acquire or possess child pornography (Art 3).

Article 2 defines the offenses concerning sexual exploitation of children that are covered by the Framework Decision. They include coercing or recruiting a child into prostitution or into participating in pornographic performances, profiting from such activities, and engaging in sexual activities with a child where coercion or abuse of trust have been involved, or where money or other kinds of remuneration has been given in exchange for the child engaging in sexual activities.

As of February 2010, a new Framework Decision addressing sexual abuse, sexual exploitation of children and child pornography has been proposed, which would repeal the 2004 Framework Decision.⁵⁷⁸ The proposed decision mandates the penalization of possession of child pornography, and does not contain any possibilities to exclude criminal liability for child pornography whose production did not involve real children.

573 Council of Europe Treaty Series – No. 197, open for signature on 16 May 2005, in force on 1 February 2008.

574 This wording is identical in the 1961 and the 1996 revised version of the Charter.

575 According to the fact sheet on children's rights under the Charter, prepared by the Secretariat of the Social Charter. It is an explanatory document but not binding on the Committee. Available at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetChildren_en.pdf.

576 Conclusions XVII-2 06/30/2005, available at <http://hudoc.esc.coe.int/esc2008/document.asp?item=441>.

577 2004/68/JHA, adopted on 22 December 2003.

578 Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA. Com (2009) 135 final, 25 March 2009. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0135:FIN:EN:PDF>. Visited on February 4, 2010.

4. Domestic legislation

Sexual violence and abuse of children

Criminal law provisions prohibiting sexual violence and sexual abuse against children exist in most legal systems, and demonstrate the near-consensus around the heightened state responsibility to protect minors against sexual abuse. As has been shown in Chapter 2C, all states set an age-limit under which sexual contact with a minor will always be considered a crime, due to the child's presumed lack of ability to consent. Here will only be mentioned a couple of examples of what different sexual activities states have chosen to penalize, and how they have approached the issue of abuse of minors who are over the age of consent but in a situation of particular vulnerability, and therefore deemed to be in need of special protection.

In **Sweden**, the age of consent is 15 years. The crime 'rape of a child' includes having sexual intercourse or carrying out another sexual act comparable to sexual intercourse with a child under 15. The same rubrication applies if the act is committed with a child who is between 15 and 18, if the perpetrator is the child's parent or guardian or in any other way responsible for the child's care or supervision.⁵⁷⁹ Furthermore, the Penal Code includes the prohibitions to "sexually touch" a child under the age of 15, which also applies to a person who "exposes himself or herself to another person in a manner that is likely to cause discomfort."⁵⁸⁰ The same chapter of the Penal Code also addresses sexual exploitation of a child; sexual abuse of a child; sexual intercourse with an offspring or a sibling; exploitation of a child for sexual posing, and purchase of a sexual act from a child.⁵⁸¹

Age of consent in **Germany** is 14 years of age.⁵⁸² A person over 18 who abuses a person under 16, will be liable for 'sexual abuse of youths.' To 'abuse' in this context is defined as committing sexual acts on the person by exploiting a coercive situation or for compensation; or allowing such acts to be committed on the perpetrator by the younger person; or to induce the younger person to commit sexual acts on a third person by means of coercion.⁵⁸³ When the age difference is even larger, in that the perpetrator is over 21 and the child under 16, the coercive element is absent in the definition of the crime. In those situations it will suffice that sexual acts take place and that the older person "thereby exploits the victim's lack of capacity for sexual self-determination."⁵⁸⁴ It is unclear from the wording of the provision whether the age difference will presume that such exploitation takes place, or whether the prosecution will have to show that there was an exploitative element for liability to arise. The fact that these latter cases will only be prosecuted upon complaint, unless there is a "special public interest" in prosecuting the case *ex officio*, suggests that exploitation will have to be shown. Finally, in all cases of sexual abuse of youth under the provision, punishment can be dispensed if, "in consideration of the conduct of the person against whom the act was directed, the wrongfulness of the act is slight."

Child pornography

The other area where sexual exploitation of children is addressed in domestic legislation relates to prohibition of child pornography. As shown above, all EU member states are mandated to prohibit the coercion or recruitment of a child for the purpose of the production of child pornography, as well as the production, distribution, dissemination, transmission, or supply of such pornography.

There are variations on how the prohibition of child pornography has been framed. Many European countries ban the production and dissemination of child pornography even when no real child was involved in the making of the image. This can take two forms: prohibiting images of a person who appears as a child but who in fact was older than 18 at the time of the production, or prohibiting drawings, paintings, or other simulated images of children involved in sexual activities. An example of the former model is **Ireland**, whose Child Trafficking and Pornography Act prohibits a visual representation "that shows or, in a case of a document, relates to a person who is *or is depicted as being* a child and who is engaged in *or is depicted as being engaged* in explicit sexual activity" (emphasis added).⁵⁸⁵ **Sweden** is an example of the latter model. According to its Penal Code, a person who "portrays a child in a pornographic picture," or who handles such pictures in different

579 Swedish Penal Code (1962:700), as amended, Chapter 6, Section 4. Official translation.

580 "Sexual molestation", *ibid*, Chapter 6, Section 10.

581 *Ibid*, Sections 5, 6, 7, 8, and 9, respectively.

582 German Criminal Code, Section 176. Official translation.

583 *Ibid*, Section 182.

584 *Ibid*.

585 Section 2, Child Trafficking and Pornography Act, 1998, No 22/1998.

ways, will be liable for a child pornography offense.⁵⁸⁶ To 'portray' means to depict using any method, not only photography. The law provides for an exception for drawings, paintings, or similarly hand-crafted pictures, but only as regards depiction and possession; even with such images, it is illegal to disseminate, transfer, grant use, exhibit, or make them available to others.⁵⁸⁷

In contrast, **Finland** only prohibits images where real children were involved in the making of the image. Its Penal Code prohibits the distribution of sexually obscene pictures or visual recordings "depicting children, violence or bestiality."⁵⁸⁸ Distribution in this context means to manufacture, offer for sale or for rent, export, import, or distribute by other means. According to subsection (4) of the same article, a child is understood to be a person under 18 or a person whose age cannot be determined, but who can justifiably be assumed to be under 18. Aggravating circumstances are, *inter alia*, if the child was particularly young or if the picture also depicts severe violence. The legal text does not define the terms 'pictures' and 'depicting' to clarify whether these include only photographic images or also images produced without the involvement of a real child (paintings, drawings, computer-produced images, etc.). However, the legislative history of the provision addresses these issues. The government proposal establishes that the purpose of the provision is to protect children against harmful activities with an obscene content. For that reason, it is not necessary to extend the prohibition to also cover painted, drawn or otherwise simulated images.⁵⁸⁹ The provision will only be applied to such images if a real child has been the model of the image in a way similar to when a photograph is taken, and the result clearly depicts the child in a sexually offensive way.

5. Concluding remarks

At the European level, there are strong binding and non-binding statements against sexual violence and exploitation of children. These documents tend to focus primarily on criminal law measures. During the last decades internet-related crimes such as online child pornography have drawn increasing attention from a law enforcement point of view.

The 2007 Council of Europe Convention and the 2005 EU Framework Decision attempt to strike a balance between forceful responses to sexual exploitation and abuse of children, on one hand, and permissiveness of the exploration of sexuality for young people, on the other. This is particularly clear in the 2007 Convention, which in its explanatory report specifically expresses the undesirability of over-inclusive penal provisions that may result in bans on young persons' consensual sexual activities. In this regard, the Convention sets a good example from a sexual health and rights point of view.

The European Court of Human Rights has addressed state responsibilities to take action when sexual abuse of children occurs. The Court acknowledged, as early as 1985 in X and Y v. the Netherlands, that the state must make remedies available when sexual violence against children is perpetrated by private actors. It is true that the Court in the case did not use the language of 'positive obligations,' and that it found a breach of the right to respect for private life rather than a breach of the prohibition of cruel treatment. Still, the case is an early example of the doctrine of positive obligations in cases of violence by non-state actors, which the Court has later elaborated. Similarly, in E. v. United Kingdom, the Court discussed the nature of states obligations to interfere in incidences of private violence, and underlined in particular the duty to perform thorough investigations when abuse is suspected.

Domestic criminal law provisions penalizing sexual violence against children are intrinsically linked to domestic principles about the sexual autonomy of children/age of consent. The German and Swedish examples illustrate how states grapple in different ways with the 'grey zone' of sexual activity of and with minors who are close to the legal age limit, and, in particular, when the other party is substantially older. The German example shows an insight into potentially destructive power dynamics between older and younger sexual partners, on one hand, while also recognizing that such relationships can be fully consensual and should, in those instances, not be penalized.

In regard to child pornography, there is a strong consensus in the region that the production and handling of such pornography should be criminalized. The primary rationale for this strong stance is the need to protect children from harm, presumed to result from the production as well as the dissemination of material with sexual content involving minors. Variations exist between different laws, however,

586 Swedish Penal Code (1962:700), as amended, Chapter 16, section 10. Official translation.

587 Ibid.

588 Finnish Penal Code (39/1889), as amended. Chapter 17, Section 18a. Unofficial translation, provided by the Finnish Ministry of Justice.

589 Government proposal RP 6/1997 rd, s. 146/l, available in Swedish at Finnish Parliament website, <http://www.eduskunta.fi/triphome/bin/akxhref.sh?{KEY}=RP+6/1997++&{KIELI}=ru>. Last visited on 4 February 2010.

primarily in relation to penalization of the production of child pornography where no actual child has been involved. In these cases, the rationale for protection of a real child is less obvious. The regional instruments make it optional for states to penalize the production and possession of such images. On the domestic level, states have opted for different paths. The Finnish legislature discussed the issue in the legislative history of the relevant provision, and concluded that because the main objective of the law was protection of the well-being of children against exploitation and abuse, there was no need for criminalization when no child had in fact been involved. The Finnish solution attempts to address the dilemma that arises when it is difficult to determine whether simulated images of children or youth in sexual situations have artistic and informational value, or whether they are to be classified as child pornography and banned. From the point of view of freedom of expression, the Finnish model has advantages, requiring that interferences with this right be as narrow and clearly defined as possible.⁵⁹⁰

C. FEMALE GENITAL MUTILATION

1. Introduction

Female genital mutilation (FGM) is a practice that has been strongly condemned in various international human rights documents and by several human rights bodies.⁵⁹¹ The practice can be extremely painful and have long-term negative effects on the sexual and reproductive well-being of women and girls. Its aim also tends to be to control the sexuality and/or reserve the virginity of girls, based on notions of the essentially different nature of male and female sexuality and on a perceived right of the family and/or community to exercise control over women's sexual life. Such a view is contrary to an understanding of the right to sexual self-determination for all. Some versions of FGM may also hinder women from experiencing sexual pleasure.

However, blanket bans on all versions of FGM for all women, including adult women who may consent to the procedure, is problematic. While such an approach – predominant in the European region – stems from an understanding of power dynamics involved that may make the issue of consent irrelevant even for adult women, it simultaneously raises concerns from the viewpoint of women's right to self-determination and bodily integrity.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

The European Court of Human Rights has, as of December 2009, addressed only one case involving FGM,⁵⁹² in which the application was found inadmissible. In the case, *Collins and Akaziebie v. Sweden*,⁵⁹³ the applicants were mother and daughter, nationals of Nigeria who had sought asylum in Sweden. The issue was whether Sweden would violate its obligations under Article 3 of the Convention by returning the applicants to Nigeria, where they claimed that they ran the risk of being subjected to FGM. The Court found the application manifestly unfounded, as the applicants failed to demonstrate that they would face a real and concrete risk of being subjected to FGM upon return. Nevertheless, the Court took the opportunity to express its general stance on FGM as a practice in violation of Article 3:

It is not in dispute that subjecting a woman to female genital mutilation amounts to ill-treatment contrary to Article 3 of the Convention. Nor is it in dispute that women in Nigeria have traditionally been subjected to FGM and to some extent still are. (para 12)

Conventions in the Council of Europe Treaty Series

The Council of Europe Convention on preventing and combating violence against women and domestic violence⁵⁹⁴ (discussed primarily in Chapter 5A: Domestic and Intimate Partner Violence, above) includes FGM as a form of violence against women. Article 38 states that parties shall criminalize all forms of FGM as well as any coercion or incitement of a woman or girl to undergo the procedure.

590 See further Chapter 7B: Sexual expression.

591 See *inter alia* CEDAW, arts 5, 10, and 12 (as interpreted by the CEDAW Committee in General Recommendations 14, 19, and 24), ICESCR, art 12 (as interpreted by the Committee on Economic, Social and Cultural Rights in General Comment 14), and CRC, arts 19 and 24(3) (as interpreted by the Committee on the Rights of the Child in General Comment 4). See International law section for details.

592 Another case involving the threat of deportation of an asylum seeker who alleges that her daughters will risk FGM upon return to Nigeria is currently pending before the Court; *Izevbehai v. Ireland* (application no. 43408/08, lodged on 11 September 2008).

593 Application no. 23944/05, *Admissibility decision*, decided on 8 March 2007.

594 Council of Europe Treaty Series No. 210, May 11, 2011. Opened for signature in May 2011; not yet in force as of July 2011.

3. European Union

Issues related to FGM fall outside of the scope of binding EU law.

4. Regional non-binding material

There are multiple statements from both the Parliamentary Assembly of the Council of Europe and the European Parliament, strongly condemning the practice of FGM. In these declarations, member states are encouraged to either describe FGM as torture or as a “fundamental violation of human rights,” and to take strong measures – primarily by the means of criminal law – to combat the practice. They consistently describe FGM as a practice where consent will not exempt the practitioner from criminal liability, not even when performed on adult women.⁵⁹⁵

5. Domestic legislation and case law

Domestically, legislation in most European countries subjects those who perform FGM to heavy penalties under criminal law provisions. An increasing number of European countries have laws specifically prohibiting FGM. In other countries, FGM can be prosecuted under existing criminal law provisions on assault. Laws differ as to, *inter alia*, whether the prohibition of FGM has extraterritorial application, and as to what degree health care and child care providers have a duty to report suspected FGM regardless of policies on confidentiality.⁵⁹⁶

Norway has one of the strongest anti-FGM legislations in Europe. According to the Act N° 74 of 15 December 1995 on the prohibition of genital mutilation,⁵⁹⁷ anybody who intentionally performs an operation on a woman's genital organs that damages or permanently changes them will be sentenced to three, six, or eight years of imprisonment, depending on how serious the consequences of the procedure are (§ 1). Aiding and abetting, as well as reconstruction of the procedure after childbirth, will be punished similarly. The girl or woman herself will not be penalized. However, consent from the woman or girl in question does not exempt the person who performed the procedure from punishment (§ 1). Professionals in childcare, education, after-school programmes, health professions, social services, and religious organizations who intentionally abstain from trying to assist a person who is in danger of undergoing FGM – for instance by omission to file a report – will be punished with a fine or with a short prison sentence. This obligation to report a risk of FGM is in effect regardless of whether the professional has an obligation of confidentiality (§ 2). The act applies in Norway and extraterritorially. The extraterritorial application means that a person who is a national or resident of Norway and who has performed or aided or abetted in the performance of FGM, will not be exempted from punishment even if the procedure took place abroad. The provision has been included to hinder children from being taken from Norway to other countries to have the procedure performed there.⁵⁹⁸

According to the Norwegian Child Protection Act,⁵⁹⁹ when child protection services have been informed about the risk of FGM being performed on a girl, they have an obligation to take action to protect her. Protection can include the withholding of passports or other documentation, or, as a last resort, the removal of the girl from her home.⁶⁰⁰

The **United Kingdom Female Genital Mutilation Act 2003**,⁶⁰¹ targets FGM committed on ‘girls’ only, but clarifies later that “[g]irl includes woman” (Section 6). A person is guilty of the offence of female genital mutilation if “he excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris” (Section 1(1)). No offense is committed if an approved person performs “a

595 See, for example, Council of Europe Parliamentary Assembly Recommendation 1371 (1998) on abuse and neglect of children (Adopted on 23 April 1998), Resolution 1247 (2001) on female genital mutilation (adopted 22 May 2001) and Resolution 1662 (2009): Action to combat gender-based human rights violations, including abduction of women and girls (adopted on 28 April 2009), Council of Europe Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence (adopted on 30 April 2002), and EU European Parliament resolution of 24 March 2009 on combating female genital mutilation in the EU (2008/2071(INI)).

596 For an analysis of the implementation of FGM laws in the EU countries, see Els Leye et al, “An analysis of the implementation of laws with regard to female genital mutilation in Europe,” *Crime Law Soc Change* (2007) 47:1–31.

597 LAW-1995-12-15-74, as amended. Unofficial translation to English available.

598 According to information at Norwegian Health Department website, http://www.helsedirektoratet.no/seksuellhelse/publikasjoner/lov_om_forbud_mot_kj_nnslemlestelse_bokm_l_341164. Last visited on 5 March 2010.

599 LAW-1992-07-17-100, as amended.

600 Chapter 4 and 6 of the Child Protection Act, according to information from Norwegian Child and Equality Department, available in Norwegian at <http://www.helse-og-velferdsetaten.oslo.kommune.no/minoritetsarbeid/kjonnslemlestelse/>. Visited on March 5, 2010.

601 Enacted 30 October 2003.

surgical operation on a girl which is necessary for her physical or mental health,” or surgery related to childbirth, for purposes connected with labour or birth (Section 1(2)). The Act also expressly penalizes a person who helps a girl mutilate her own genitalia (Section 2). It makes it an offense to assist a non-UK national or resident to mutilate a girl’s genitalia overseas, if this is done in relation to a UK national or resident (Section 3), and it penalizes FGM outside of the UK by a UK national or a permanent UK resident (Section 4). The act provides for the penalty of imprisonment up to 14 years (Section 5).

The British Act is silent on the issue of whether consent of the woman exempts the act from punishment. However, it specifies that in order to determine whether the operation is necessary for the girl’s mental health, in Section 1(2), “it is immaterial whether she or any other person believes that the operation is required as a matter of custom or ritual” (Section 1(5)). This suggests that there are indeed limited possibilities to consent to the procedure, and that the exception provided for the girl’s mental health requires medically indicated rather than subjective elements of mental ill-health.

As for child protection, local authorities have responsibilities when FGM has taken place or may occur under the Children Act 1989.⁶⁰² These include general duties to safeguard and promote the welfare of the child by providing a range of services (Section 17), but also the duty to investigate when there is a suspicion that a child is suffering or is likely to suffer harm (Section 47). In extreme cases, authorities may issue a non-authorization to leave the country, withhold passports of parents or of the girl, suspend parental authority or, as a last resort, remove the child from the family (using a ‘Prohibited steps order’ (Section 8), ‘Supervision orders’ (Section 35), ‘Emergency protection order’ (Section 44), or Care and supervision orders (Section 31)).

In **France**, by contrast, there is no specific legislation on FGM. According to articles 222-9 and 222-10 of the French Penal Code,⁶⁰³ violence involving mutilation is an offence that carries heavy penalties. Where the victim is a child under 15, the maximum penalty is 15 years’ imprisonment; if committed by the parents or grandparents, it is 20 years.⁶⁰⁴ The term ‘female genital mutilation’ does not appear in the legislation. However, according to a Cassation Court judgment in 1983, removal of parts of the clitoris that results from wilful violence constitutes mutilation in the meaning of then Article 312-3 of the Penal Code (now Article 222-9). Since then, FGM cases have been understood to fall under this provision.⁶⁰⁵

With regard to prevention of FGM in France, an official circular on the integration of immigrant communities includes guidelines for action to be taken by the districts (*départements*) where relevant communities live, in order to prevent FGM from being performed.⁶⁰⁶

Case law: damages for FGM and imprisonment for practitioner and parents

France is the country of Europe where most legal cases have been brought following suspicion of FGM. Until 2009, at least 37 criminal cases had been brought before the highest criminal court in the country (Assize Court of Paris).⁶⁰⁷ In one of those, the case of Hawa Gréou, decided on 17 February 1999, a young woman reported the excision-practitioner who had performed FGM on her and her sisters in the 1980s. During the investigation the address book of the excision-practitioner was seized, which allowed 48 other child victims to be identified, and 25 parents to be put on trial. The practitioner was sentenced to eight years of prison, and the mother of the girls to two years of prison; the other parents were sentenced to suspended prison penalties. The 48 victims were granted 80.000 Francs each in damages.⁶⁰⁸

602 Enacted 16 November 1989.

603 In force since 1994, as amended. Unofficial translation available.

604 According to Council of Europe, Legislation in the Member States of the Council of Europe in the Field of Violence Against Women, EG (2004)2, p 126.

605 Information from Anika Rahman and Nahid Toubia, *Female genital mutilation: a guide to laws and policies worldwide*, 2000, p. 152.

606 Circular DPM 94/42 of 19 December 1994, according to Council of Europe, Legislation in the Member States of the Council of Europe in the Field of Violence Against Women, EG (2004)2, p 127.

607 Information from International Centre for Reproductive Health, *Responding to female genital mutilation in Europe. Striking the right balance between prosecution and prevention* (2009). Available at http://www.icrh.org/files/ICRH_rapport%202009_def%20-%20high%20resolution.pdf. Last visited on 5 March 2010.

608 The author has been unable to locate the case but the facts have been confirmed through various sources. See, e.g., Linda Weil-Curiel, “Female Genital Mutilation in France: a Crime Punishable by Law,” in Susan Perry & Celeste Marguerite Schenk (eds), *Eye to Eye: Women Practicing Development Across Cultures* (2001), pp. 193–195, and BBC News, “Woman jailed for 48 circumcisions,” 17 February 1999, at <http://news.bbc.co.uk/2/hi/europe/281026.stm>. Last visited on 5 March 2010.

6. Concluding remarks

European laws express strong condemnation and zero-tolerance of the practice of female genital mutilation in the European region. While there is also in some instances preventative work to hinder FGM from taking place, and child protection laws to protect children who run the risk to be subjected to the practice, the bulk of anti-FGM efforts are to be found in criminal law. The methods chosen to outlaw the practice vary: either by the passing of specific criminal laws (such as in Norway and the United Kingdom) or by the application of general criminal law provisions (such as in France). Common features of these provisions are that whoever subjects a woman or a girl to genital mutilation will face harsh prison sentences; that the girl or woman herself will not be liable; and that aiding and abetting is punished equally harshly. In some countries, such as Norway, inaction when a girl or woman is about to be subjected to FGM is also criminalized, including for professionals who operate under an obligation of confidentiality. This last provision, which can have troublesome effects in practice, illustrates how seriously the practice of FGM is taken in European countries. Both the Norwegian and the British laws also explicitly apply extraterritorially, in order to curb incentives to go abroad to perform the operation on a child.

A common feature of both the FGM-specific laws and the Council of Europe and European Parliament resolutions is that consent of the woman undergoing the surgery will not matter – or at least, consent will not exempt criminal liability for those executing it. This approach has clearly been taken in order to prevent the victim from being pressured to give her consent, also based on the fact that young girls are at the greatest risk of being subjected to the procedure. A general criminal law principle is that children under a certain age cannot consent to such things as sex, or marriage. Nevertheless, the surveyed laws do not distinguish between FGM performed on adult women and children. While the recognition of the power structures and cultural pressure often involved is commendable, as is the intention to outlaw a very harmful practice, this blanket notion that no consent is possible raises concerns, given that consent in other areas is generally acknowledged for persons over the age of 18.

Another aspect of the strong European stance against FGM, that may have significant negative effects, are calls for mandatory health check-ups of asylum seekers or of certain immigrant groups, in order to ensure that women from so-called risk groups be protected.⁶⁰⁹ As shown in other chapters of this report, mandatory health check-ups always have problematic aspects, as their mandatory nature may undermine the agency and self-determination of the person they are aimed to protect, and risk making certain groups go underground and/or refuse contact with health services altogether. In addition, in the context of FGM in Europe, since FGM is a phenomenon that largely appears in immigrant communities, such mandatory examinations may have a heavily stigmatizing effect, further exposing certain immigrant communities to prejudice and exclusion.

In conclusion, many countries of the European region – primarily those with large immigrant communities – have taken strong and forceful measures to combat FGM. This is praiseworthy from a human rights standpoint, considering the harmful and discriminatory effects of the practice, as shown by strong statements by several UN treaty bodies. However, while international human rights bodies have not recommended that the practice be combated by criminal law measures first and foremost, this is the route most forcefully chosen by Western European governments. Precisely because the targeted populations in Europe are almost exclusively of immigrant background, the blanket statements and the strong emphasis on criminal law may have negative side-effects – and may not be the most effective means by which to combat the practice of FGM.

D. HATE CRIMES, POLICE BRUTALITY AND FAILURE TO RESPOND

1. Introduction

Governments have an obligation under domestic law to combat all crime. The concept of hate crimes – crimes that express or are motivated by biases towards a particular group in society – is a recognition that governments consider crimes more serious when they are rooted in religious, ethnic, or other hatred that spread harm and fear among whole communities. Hate crime legislation also serves as a complement to non-discrimination legislation, as a means to further underline that the state does not tolerate negative treatment on discriminatory grounds. This chapter will cover violent

⁶⁰⁹ See, for example, [European Parliament resolution of 24 March 2009 on combating female genital mutilation in the EU, 2008/2071\(INI\)](#), which states that women and girls who are granted asylum in the EU because of the threat of FGM should, as a preventative measure, “have regular check-ups by health authorities and/or doctors, to protect them from any threat of FGM being carried out subsequently in the EU” (para 4). See also information about a recent debate in Norway, where a parliamentarian has suggested that all women and girls of specific immigrant communities undergo regular health check-ups: http://www.fgmnetwork.org/gonews.php?subaction=showfull&id=1183060956&archive=&start_from=&ucat=1&. Last visited on 5 March 2010.

crimes that target persons on the basis of real or perceived non-conforming sexual behaviour and/or sexual identities. Closely linked to so-called hate crimes is police brutality based on homophobia or transphobia, as well as action or inaction on behalf of the police in response to such violence committed by non-state actors.

In the European region, there is a growing recognition that hate crimes occur not only because of contempt for certain racial, ethnic or religious groups, but also in relation to individuals who belong to sexual minorities or who are perceived as transgressing sexual norms. As will be shown, this recognition comes across in recent legislation where sexual orientation has been added to lists of protected grounds in hate crimes legislation, and in non-binding condemnation of homophobia and homo- and transphobic crimes on a regional level. Gender identity as an explicit protected ground is still largely absent in the region.

Hate crimes are often addressed in conjunction with hate speech – forms of expression spreading, inciting, promoting or justifying hatred based on intolerance, which may effectively lead to the commission of hate crimes. Nevertheless, hate speech falls outside of the scope of this study; other aspects of legitimate limitations to freedom of expression for the purpose of sexual health will be addressed in Chapter 7B: Sexual expression.

Issues of police brutality and failure to respond by the police to violent crimes linked to hatred for sexual behaviour or identity merit separate attention. In these cases, the state is directly responsible – by action or by direct omission – for the violation. However, while it is easy to find ‘bad’ practices in this regard, responses to such practices are mainly covered by hate crimes legislation and implementation, on one hand, and by (non-legislative) schemes to monitor police activity and provide models for accountability in the event of police abuse, on the other. Here only a few examples of state responses to police brutality or failure to respond will be mentioned.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

The Court has not directly addressed the issue of *hate crime* or *police brutality* based on sexuality-related biases. Nevertheless, its case law on other, but related, matters gives an indication of how it would respond, were such issues to arise before it.

The case of Baczowski and others v. Poland⁶¹⁰ deals mainly with freedom of expression and assembly, and is discussed in Chapter 7B: Sexual expression. However, the reasoning of the Court is interesting because it indicates that states have a positive obligation to protect participants in gay rights demonstrations from attacks. The Court stated that

[g]enuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms. [...] This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation. (para 64)

This, it can be argued, does not only include removing obstacles to assembly, but also to providing active protection to participants. According to one commentator, this quote “could be interpreted as a duty of the government to protect the participants of gay pride marches from hate motivated acts committed against them while enjoying freedom of assembly.”⁶¹¹

In Nachova and others v. Bulgaria,⁶¹² the issue was violence on ethnic grounds, and the Court concluded that biases on the ground of race/ethnicity had affected the response of the authorities. Among other things, the Court declared that the authorities had a positive obligation under the procedural aspect of Article 14 to investigate possible racist motives. The obligation to conduct an effective investigation into the deprivation of life must always be employed without discrimination. In addition, states have a duty to “take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.” This reasoning, it may

610 Application no. 1543/06, decided on 3 May 2007.

611 Human Rights First, *Violence Based on Sexual Orientation and Gender Identity Bias*, 2008, p. 12, available at <http://www.humanrightsfirst.org/our-work/fighting-discrimination/2008-hate-crime-survey/2008-hate-crime-survey-lgbt/>. Last visited on 6 May 2010.

612 Applications nos. 43577/98 and 43579/98, decided on 6 July 2005. Decided by the Grand Chamber of the Court.

be argued, could be equally applied to a situation where the real or perceived sexual orientation or gender identity of the victim motivated a crime. .⁶¹³

3. European Union

The issues of hate crimes based on sexuality biases and police brutality/failure to respond to such crimes have not been addressed by binding EU law. In 2008, a new Framework Decision was adopted on the combat of racism and xenophobia by means of criminal law, according to which states are obligated to ensure that racist or xenophobic motivation is considered an aggravating circumstance in the application of criminal law.⁶¹⁴ So far no similar initiative has been taken to address crimes motivated by homophobic or transphobic biases.

4. Non-binding regional documents

On the regional level, there are strong statements against hate crimes on the grounds of sexual orientation or gender identity. Here should be reiterated the recently adopted Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.⁶¹⁵ This document urges governments, *inter alia*, to conduct effective, prompt and impartial investigations into allegations of crimes where the sexual orientation or gender identity of the victim is suspected to have constituted a motive for the perpetrator; pay particular attention to crimes in this category committed by law enforcement personnel; make bias motives aggravating circumstances in sentencing; and take special measures to protect lesbians, gays and transgender persons in prison against bias-motivated crimes related to their sexual orientation or gender identity.⁶¹⁶

5. Domestic legislation and case law

Here will be addressed criminal laws whose sentencing guidelines take into account aggravating circumstances such as motives, or characteristics of the crime, that are based on contempt for specific groups, traditions or behaviours. This means that when the prosecution can show that the crime either expressed itself in or was motivated by (this varies by legislation) hatred or biases towards those groups, the perpetrator will receive a harsher sentence. There are also countries that have created specific offences for violence motivated by certain biases, rather than making such motivation a general aggravating factor. As far as this researcher knows, no such legislation exists with regard to sexuality-related biases in Europe.⁶¹⁷

Historically, the first grounds to be addressed by hate crimes legislation were racial, ethnic and religious stereotypes or biases. Lately, however, sexuality-related biases have been included; some penal codes in the region have been amended to explicitly include hatred for real or perceived sexual orientation as an aggravating factor in sentencing of violent crimes.⁶¹⁸ **Greece** illustrates this trend. In 2009, the country adopted a new law that stipulates that a crime committed on the basis of national, racial or religious hatred, or hatred on the ground of sexual orientation, constitutes an aggravating circumstance for sentencing.⁶¹⁹ Similarly, a new **Norwegian** Penal Code, which comes into force in 2012, stipulates harsher sentences for hate crimes in general and mentions as aggravating circumstances crimes that have their origin in *inter alia*, "homosexual or lesbian orientation, disability

613 See for similar findings Angelova and Iliev v. Bulgaria (application no. 55523/00, decided on 26 July 2007), and Stoica v. Romania (application no. 42722/02, decided on 4 March 2008).

614 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328/55, Article 4.

615 Adopted on 31 March 2010.

616 See for earlier regional statements on this issue the European Parliament resolution on homophobia in Europe (P6_TA(2006)0018, adopted on 18 January 2006), and the European Parliament resolution of 26 April 2007 on homophobia in Europe (P6_TA(2007)0167).

617 See, for example, Human Rights First, Overview: Hate Crime Report Card, December 2007, p. 36. Available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/071217-discrim-hc-report-card-overview-2007.pdf>. Last visited on 14 May 2010.

618 According to European Union Agency for Fundamental Rights (FRA), Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part 1- Legal Analysis (2008) p. 121, available at http://fra.europa.eu/fraWebsite/material/pub/comparativestudy/FRA_hdgso_part1_en.pdf, and Human Rights First, Violence Based on Sexual Orientation and Gender Identity Bias (2008) p. 11, available at <http://www.humanrightsfirst.org/our-work/fighting-discrimination/2008-hate-crime-survey/2008-hate-crime-survey-lgbt/>. Both sites last visited on 8 March 2010.

619 Law 3719/2008, entered into force in November 2008. Information from the Greek Permanent Mission to the OSCE in 2009, as described in OSCE, Office for Democratic Institutions and Human Rights (ODIHR), Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2008 (November 2009). Available at <http://www.osce.org/odihr/40203>. Last visited on 8 March 2010.

or other circumstance related to groups of people requiring a special level of protection.”⁶²⁰

The most common model in European hate crimes legislation is to let the aggravating element apply generally, that is, to all penalized action under criminal law, though there are also countries where the aggravating factor only applies in a defined set of criminal offences.⁶²¹

Sex/gender and health status of the victim are also sometimes included in the list of protected grounds, as in the **Netherlands** and **Spain**, respectively (see below). To explicitly include health status implies that contempt for a person’s real or perceived HIV status can be an aggravating circumstance similar to other bias-motivated crimes, which has relevance for sexual health. While gender is included in some provisions, there is so far no European law that explicitly includes hatred for a person’s gender identity in the list of biases that may render harsher punishment, though several countries make their lists of biases non-exhaustive.⁶²² The general **Serbian** anti-discrimination law (which is not a criminal law statute), includes gender identity as one of the “personal characteristics” that are protected by the law.⁶²³ Its Article 13 lists “severe forms of discrimination” and specifies that discrimination is to be considered severe if it “involves an act punishable by law, predominantly or solely motivated by hatred or enmity towards the aggrieved party on the grounds of a personal characteristic of his/hers.”⁶²⁴ This suggests that crimes motivated by gender identity biases (as well as biases towards real or perceived sexual orientation) will indeed be judged more severely than if the motive had been absent. However, the author has not been able to obtain information on Serbian responses to hate crimes more generally and, specifically, whether the biases can be considered aggravating factors and thus result in elevated sentences.

In the **Spanish Penal Code**, crimes motivated by the sexual orientation, sex, and illness/health status of the victim (alongside with ideology, religion or faith, ethnicity, race, nationality, and disability) will receive a harsher punishment than if that motivation had been absent. The Spanish provision requires that the bias *motivated* the crime: according to Article 22, aggravating circumstances are “the commission of a crime *due to* [...] the sex or sexual orientation, or the illness or disability” of the victim (emphasis added).⁶²⁵

In the **Netherlands**, criminal law does not establish bias motivations as aggravating circumstances. Instead, every four years, the Public Prosecution’s Department issues a so-called Discrimination Directive, the latest of which was issued in 2007.⁶²⁶ The Directive establishes guidelines for the investigation, prosecution, and sentencing of crimes involving acts of discrimination. Dutch law provides protection against discrimination on grounds of race, religion, nationality, personal beliefs, gender, sexual orientation, handicap, age, or similar grounds – a non-exhaustive list. When discrimination on one of those same grounds motivates a crime, the Directive establishes that the prosecutor shall request a 25 percent penalty enhancement.⁶²⁷

In the **United Kingdom**, since 2003, biases on the grounds of presumed or real sexual orientation will serve as an aggravating circumstance in the application of criminal law. On the Home Office’s website explaining what hate crimes are, ‘transgender’ is also found on the list among the grounds that can motivate such crimes.⁶²⁸ However, the laws specifying what kind of bias types that are covered by

620 According to information in Norwegian on Norwegian Department of Justice, available at <http://www.regjeringen.no/nb/dep/jd/tema/lovarbeid/faktaark-strengere-lovbestemmelser-om-fo.html?id=499724>. Last visited on 8 March 2010. Translation is author’s own.

621 According to FRA 2008, p. 121.

622 See, *inter alia*, Swedish Penal Code, Chapter 29, §2(7), stating that aggravating circumstances are when the motive of the crime was to aggrieve a person or a group of people “by reason of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance,” and the Finnish Penal Code, Chapter 6, § 5, which, while not mentioning neither sexual orientation nor gender identity, states that the punishment will be more severe when the crime has been committed against a person “belonging to a national, racial or ethnic population group or any other such group and it has been committed due to the membership of the group.” Translation of both statutes (from Swedish) is author’s own.

623 *Zakon protiv diskriminacije*, the Law on the Prohibition of Discrimination, unofficial translation by Labris Serbia. See for more information about this law Chapter 1A: Non-discrimination on account of sex, sexual orientation, gender identity, marital status, and HIV status.

624 *Ibid*, Article 13, p. 7.

625 Article 22 of the Spanish Penal Code, only available in Spanish. The translation is author’s own.

626 According to Human Rights First, in *Overview: Hate Crime Report Card (2007) and Violence Based on Sexual Orientation and Gender Identity Bias (2008)*.

627 *Ibid*.

628 UK Home Office, information about hate crimes, available at <http://webarchive.nationalarchives.gov.uk/20100418065544/http://www.homeoffice.gov.uk/crime-victims/reducing-crime/hate-crime/>, last visited on 14 May 2010.

provisions on aggravating circumstances list religion, race, sexual orientation, and disability, but not gender or gender identity.⁶²⁹ The relevant provision of the Criminal Justice Act 2003 reads:

Article 146

Increase in sentences for aggravation related to disability or sexual orientation

(1) *This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).*

(2) *Those circumstances are—*

(a) *that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—*

(i) *he sexual orientation (or presumed sexual orientation) of the victim, or*

(ii) *a disability (or presumed disability) of the victim, or*

(b) *that the offence is motivated (wholly or partly)—*

(i) *by hostility towards persons who are of a particular sexual orientation, or*

(ii) *by hostility towards persons who have a disability or a particular disability.*

(3) *The court—*

(a) *must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and*

(b) *must state in open court that the offence was committed in such circumstances.*

(4) *It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph [...].*⁶³⁰

Here should be noted that the provision, unlike its Spanish counterpart, covers both actual motivation (crime being *motivated* by hostility towards persons of a particular sexual orientation; 2(b)), and what may be called presumed motivation (*demonstrated* hostility at the time of the crime or immediately after the crime; 2(a)). In other words, actual intent of the perpetrator to commit the crime *because of* the sexual orientation of the victim does not have to be shown. Furthermore, it is noteworthy that the court has no discretion in whether to treat the bias-motivation as an aggravating factor or not: it must do so.

Local policy

The London Metropolitan Police have developed an Equalities Scheme (2006–2010), aiming at guaranteeing fair and equal treatment to all, and specifically addressing age, disability, gender (including marital status), race, religion, and sexual orientation as “strands of diversity” covered by the scheme.⁶³¹ If implemented correctly, the scheme will also serve to prevent police brutality, and ensure that the police respond accurately to hate crimes based on biases against, *inter alia*, a person's sexual orientation or gender identity. The scheme provides a framework for monitoring, consulting, engaging and reviewing all existing policies, procedures and practices. The scheme takes as its point of departure legal obligations to respect diversity and combat discrimination, for example, with regard to sexual orientation, the Civil Partnership Act 2004, the Employment Equality (Sexual Orientation) Regulations 2003, the Human Rights Act 1998, and the Protection from Harassment Act 1997.⁶³²

An express objective of the Equalities Scheme is to work to build trust between the LGBT communities and the police, so that victims will come forward and report homophobic and transphobic crimes. The scheme stresses the need to ensure that such matters are dealt with sensitively by maintaining

629 This conclusion is also supported by the Human Rights First systematization about laws and practice regarding hate crimes in Europe, see. Last visited on 14 May 2010.

630 Enacted on 20 November 2003.

631 London Metropolitan Police, Equalities Scheme (2006–2010), available at http://www.met.police.uk/dcf/files/equality_stm/EqualitiesSchemeFullversionPDFFormatnew.pdf. Last visited on 5 February 2010.

632 *Ibid.*, p. 3.

confidentiality.⁶³³ It also explicitly addresses the fact that homophobic crimes have sometimes not been recorded, particularly in the area of low-level/volume and public transport-related crimes.⁶³⁴

Case law: police brutality based on sexual orientation as persecution

A British court addressed the issue of police brutality in the asylum appeals case Andrei Ivanov v. The Secretary of State for the Home Department.⁶³⁵ The petitioner was a Moldovan gay man whose application for asylum was based on the police brutality he had suffered in his home country due to his sexual orientation. After having demonstrated openly that he had a relationship with another man, he had repeatedly been beaten, assaulted and threatened by the police. He had been arrested on repeated occasions and harassed while in detention. The initial application for asylum had been rejected; the Scottish Court of Sessions reviewed the decision to deny the petitioner leave to appeal.

The bulk of the Court's decision examined whether it had been correct to assume that there was a safe internal flight option in Moldova for the petitioner, as argued by the immigration judge. The Court found that the enclosed background material supported the argument that homophobia is widespread in Moldova and that police brutality against homosexuals was not limited to the petitioner's home area. For those reasons, the Court granted the petitioner leave to appeal the denial of his asylum claim.

The case is relevant in that the Scottish court recognized that police brutality on the grounds of sexual orientation can be a serious enough violation of both sexual self-determination and physical integrity to justify an extreme form of protection: political asylum in another country.

6. Concluding remarks

State responses to police brutality or hate crimes, or crimes motivated by hatred for a specific group or for specific non-conforming individual characteristics or behaviours, can take many different forms. Preventative work is key to increasing tolerance generally in society. For such work, social and educational initiatives, on multiple levels of society and carried out by a multitude of actors, play important roles. Such initiatives often take non-legislative forms, as shown by the diversity scheme of the London Metropolitan Police that, if implemented correctly, may curb police brutality and effectively prevent and respond to hate crimes. However, when looking at legal measures (as is the main objective of the present study), the focus tends to be on the forms criminal law responses to hate crimes have taken. In recent years, several European states have included crimes based on hatred for perceived or real sexual orientation as aggravating circumstances in criminal law. This illustrates that there is a growing recognition that such motivations should be perceived on equal terms with hate crimes based on racial or ethnic biases – biases that have long been recognized as justifying a harsher response on behalf of the state than other crimes. So far, no state has entered gender identity explicitly as a protected ground under hate crimes legislation, though one may argue that in several countries such biases would fall under existing provisions that offer non-exhaustive lists of protected grounds, or that include gender.

The European Court of Human Rights has not expressly addressed hate crimes or police brutality rooted in sexuality or sexual behaviour. However, its reasoning in both Baczowski and Nachova suggests that under the Convention there are wide-reaching state responsibilities to combat such crimes. This probably includes a positive duty to protect participants in demonstrations in support of LGBT rights from hate motivated acts (Baczowski), and a responsibility to examine possible sexuality-related biased motives behind violent crimes (Nachova). The finding in Nachova that Article 14 has a procedural aspect is important, and would apply equally to cases where protected grounds other than ethnicity were examined, such as sexual orientation or gender identity. Not only must the state carry out its investigations without discrimination – it also must take proactive steps to investigate evidence of discriminatory motivations behind crimes. In the words of the Court, this is of utmost importance “to secure the enjoyment of the right to life without discrimination” – any kind of discrimination, and not only racial, one might add.

E. HONOUR CRIMES

1. Introduction

Practices commonly referred to as honour crimes have clear negative consequences for the sexual

633 Ibid, p. 7.

634 Ibid, p. 67, and Action Plan C8, p. 82.

635 Scottish Court of Sessions, [2008] ScotCS CSOH_15, judicial review of a case decided by the Immigration Appeal Tribunal, 31 January 2008.

health of those subjected to them. Honour crimes can take various forms – from direct violence to more subtle control – and are usually a means by which the community attempts to exercise control over an individual's sexuality and her sexual choices. While honour crimes tend to be committed by non-state actors, the state becomes complicit if, in the application of criminal law, the honour element leads to immunity for the perpetrator, serves as a mitigating circumstance in sentencing, or in any other form results in the crime being addressed more leniently than other crimes of similar gravity.

Honour crimes tend to be discussed mainly with regard to women who transgress (or are perceived to transgress) social mores related to their sexuality, such as notions of chastity, virginity, and fidelity. It is however important to bear in mind that honour crimes illustrate more generally how non-conforming sexualities, gender/gender expressions and sexual behaviours – *especially* by women – expose individuals to extreme punishment. These individuals may be lesbians, in some cases gay men, transgendered individuals, sex workers, or women who do not live according to culturally or socially appropriate standards. The pressure to which they are exposed, because of their sexuality or because of sexual decisions others make on their behalf, and the fear of consequences if they do not conform, are hugely detrimental to their psychological and physical sexual health. These pressures and threats either force them to adjust to conventional situations and behaviours against their will, or expose them to extreme violence.

The international community has forcefully condemned honour crimes in recent decades. There are clear international human rights standards obliging states to suppress all gender-based killings justified by reference to custom, tradition or religion.⁶³⁶ In particular, international human rights bodies have condemned the so-called honour defense – blanket affirmative defenses to homicide or assault when these have been committed 'in the name of honour' of the family or community.⁶³⁷

In Europe, honour crimes have been discussed widely over the last years, as instances of honour killings have occurred within immigrant communities in Western Europe. Furthermore, honour crimes occurring in Turkey, and lenient state responses to such crimes, have stirred much attention both internationally and within Turkey. The new Turkish Penal Code has forcefully addressed the problem, as part of a significant reform of Turkish criminal law. While problems remain, the new code has been commended for not only removing the honour defense but also for making the honour element of a crime an aggravating factor in sentencing.

This chapter covers both legal responses to honour crimes and, briefly, the notion of 'crimes of passion.' There are still laws in Europe that allow for reduced sentences on the grounds of 'passion,' or allow for other provocation defenses, including in cases where a violent act or murder has been committed against a woman following supposedly 'provocative' behaviour such as alleged infidelity. There are similarities between 'honour crimes' and 'crimes of passion,' but also significant differences.⁶³⁸ The honour element of a crime, socially speaking, responds to a perceived duty to restore the honour of a family or community, which has supposedly been broken or harmed by the behaviour of a member of that family or community. The way to repair the honour is to kill or severely injure the person who allegedly has brought dishonour upon the family. In some legal contexts the honour element serves as immunity for the perpetrator (or as a mitigating factor). In passion crime defenses, the emotion that triggered the crime is considered to have diminished the capacity of the person to act in a balanced way and may, therefore, be perceived as a mitigating circumstance or, in extreme cases, as temporary incapacity. These are generally offered to excuse the perpetrator for having acted in response to a 'provocation' of the victim. There are similarities between the two types of defenses, in that circumstances that trigger the crime may be similar (extra-conjugal relationships or notions of unacceptable sexual behaviour, for instance). Furthermore, in both cases the law offers a certain level of indulgence for the violent reaction, thereby in part serving to uphold moral codes that the non-conforming behaviour of the victim has challenged. However, the dynamics in the two kinds of crimes are very different. Honour crimes are not caused by a wave of 'passion' or 'rage,' but are extra-judicial solutions, sometimes sanctioned by the legal system, to restore the respectability of the family.

While these important differences exist, the two notions also overlap. For instance, passion defenses are used to justify honour crimes. The Turkish and the Italian legislatures and courts have attempted

636 See CEDAW, Art 5(a); CERD, Art 7, ICCPR, Arts 6, 14 and 26, CEDAW Committee General Recommendation 19 (1992), at [24], Human Rights Committee, General Comment 28 (2000), at [31], and numerous concluding observations from the CEDAW and the CRC Committee. See for more detailed information the International law section.

637 See *inter alia* CEDAW Committee, General Recommendation 19 (1992), at [24].

638 For a thorough discussion about these two concepts and how they intersect and differ, see Lynn Welchmann and Sara Hossain, "Honour', rights and wrongs," pp. 10–13, and Purna Sen, "Crimes of honour', value and meaning," pp. 53–55, both essays in Sara Hossain and Lynn Welchmann (eds), *Honour: Crimes, paradigms and violence against women*, London, 2005.

to address this problem, as will be discussed below.

Finally, among feminists and other activists in Europe, a lively debate is taking place around the question of whether honour crimes should be treated as fundamentally different from other kinds of violence against women, or whether they should be framed in the same terms, illustrating the same power dynamics. There are arguments in favor of both positions.⁶³⁹ Suffice to state here that regardless of how honour crimes are framed conceptually, they are a serious violation of human and sexual self-determination, and the state has a corresponding obligation to combat them without stigmatizing immigrant communities or increasing racial tension.

2. Regional material

The European Court of Human Rights has not addressed the issue of honour crimes. On the non-binding level, both Council of Europe bodies and the European Parliament of the EU have forcefully condemned honour crimes. For example, the Parliamentary Assembly of the Council of Europe has called on member states to “amend national asylum and immigration law in order to ensure that immigration policy acknowledges that a woman has the right to a residence permit, or even to asylum, in order to escape from ‘honour crimes,’”⁶⁴⁰ and to make sure that honour crimes are offenses that result in punishment commensurate with the gravity of the acts, “either by creating a specific offence or by making provision for penalties to be aggravated.”⁶⁴¹ The new Council of Europe Convention on preventing and combating violence against women and domestic violence⁶⁴² (discussed primarily in Chapter 5A: Domestic and Intimate Partner Violence, above) emphasizes that “culture, custom, religion, tradition or so-called ‘honour’ shall not be considered as justification” for any acts of violence covered by the scope of the Convention, both in its General Obligations (Art. 12) and in a dedicated Article (Art 42, ‘Unacceptable justifications for crimes’). Article 42 also addresses the incitement of a child to commit acts of violence in the name of “honour”.

3. Domestic legislation and case law

Honour crimes

In most European countries, honour crimes are penalized under general criminal law provisions on murder or assault, or under legislation on violence against women. Consanguinity between victim and perpetrator, as well as premeditation of the crime, can serve as aggravating factors, depending on circumstances.⁶⁴³

In **Turkey**, honour crimes are addressed directly. As mentioned elsewhere in this report, the Turkish Penal Code⁶⁴⁴ was reformed in 2004 and a number of provisions dealing with women’s sexuality were changed.⁶⁴⁵ The reform has been praised as an important step in recognizing women’s rights to bodily integrity and sexual independence, although parts of the new code still raise concerns in this regard. Before the reform, honour killings were considered crimes of extreme provocation and the Penal Code allowed sentence reductions to perpetrators. In the reformed code, so-called custom killings are instead defined as ‘qualified cases’ of murder, or aggravated homicide.

Article 81 of the Penal Code provides that intentional killing will result in life imprisonment. Article 82, ‘Qualified cases’ (according to some commentators, ‘aggravated homicide’), lists a number of circumstances that will serve as aggravating factors in a murder trial. This list includes, *inter alia*, when the killing has been committed “with premeditation” (Art. 82 a), “against a direct ascendant, direct descendant, spouse or sibling” (Art. 82 d)), “with the motive of a blood feud” (Art. 82 j)), and “with the

639 See, *inter alia*, Purna Sen, “‘Crimes of honour’, value and meaning,” pp. 55–58, and Hannana Siddiqui, “‘There is no ‘honour’ in domestic violence, only shame!’ Women’s struggles against ‘honour’ crimes in the UK,” pp. 275–279, in Hossain and Welchmann (2005).

640 Resolution 1327 (2003) on honour crimes (adopted on 4 April 2003).

641 Resolution 1681: Urgent need to combat so-called honour crimes (adopted on 26 June 2009).

642 Council of Europe Treaty Series No. 210, May 11, 2011. Opened for signature in May 2011; not yet in force as of July 2011.

643 See U.N. General Assembly Report of the Secretary-General: Working towards the elimination of crimes against women in the name of honour, A/57/169, 2 July 2002.

644 Turkish Penal Code, Law No. 5237, passed on 26 September 2004. Content corroborated through Turkish women’s rights organization Women for Women’s Human Rights, *Turkish Civil and Penal Code Reforms from a Gender Perspective: the Success of Two Nationwide Campaigns*, February 2005, available at <http://www.wwhr.org/images/CivilandPenalCodeReforms.pdf>. Last visited on 12 April 2010.

645 See also Chapter 2F: Virginity testing, and Chapter 5B: Sexual violence.

motive of tradition" (Art. 82 (k)).⁶⁴⁶ In those cases, punishment will be "aggravated life imprisonment."

Furthermore, an article in the old Penal Code that regulated cases of 'unjust provocation' – which was often misinterpreted by judges to cover honour killings and result in reduced sentences – has been modified. The new article provides for reduced sentences if the crime was committed under the effect of severe emotional distress caused by an 'unjust act' (as opposed to 'unjust provocation') (Article 29). This means that the perpetrator of an honour killing will not benefit from the reduced sentence, since the provocation he has experienced will not qualify as an 'unjust act.' This new wording was motivated in the legislative process to prevent its application to honour killing cases.⁶⁴⁷

Finally, a new provision has been included to ensure that members of the family who conspired with the killer will be punished, independently of whether the act was committed by a minor. It is not unknown for the so-called family assembly, formed by the men of the extended family, to pick an under-aged boy from the family to commit the crime, so that he receives a reduced sentence or no sentence at all (if under 11 years old). The other family members would have no charges pressed against them.⁶⁴⁸ According to the new Article 38, anyone who forces another to commit a crime will receive the same punishment as the perpetrator or, if the perpetrator is a minor, the punishment appropriate to the crime. Using one's power arising from a family relationship in the ascending or descending line will increase the punishment, as well as if the perpetrator is a minor, regardless of family relationship. The relevant parts of the provision read:

Article 38: Incitement

(1) A person who incites another to commit an offence shall be subject to the penalty appropriate to the offence that is committed.

(2) Where there is incitement to offend by using influence arising from a direct-descendent or direct-antecedent relationship, the penalty of the instigator shall be increased by one-third to one half. Where there is incitement of a minor, a direct-descendent or direct-antecedent relationship is not necessary for the application of this section.

Women's rights groups have criticized the terminology of Article 82(k), which uses the term killings "with the motive of tradition" (or, in some translations, "custom killings," or "killings in the name of customary law"),⁶⁴⁹ 'Killings with the motive of tradition' is a narrower term than 'honour killings,' and in Turkey is primarily associated with practices prevalent in eastern and south-eastern regions of Turkey, among a predominantly Kurdish population. Referring to 'tradition' hence suggests that the crime only occurs in regions of the country where traditional customs prevail, and by one ethnic group in particular. The term is not understood to include so-called crimes of passion among other populations.⁶⁵⁰ The women's rights movement in Turkey pressed hard for the use of the term 'honour killing,' but any connection between the term 'honour' and criminal penalty was vehemently opposed by members of the conservative party AKP in the parliament.⁶⁵¹ The result of the legislative compromise was to instead use the term 'tradition,' which, according to women's rights groups, is unfortunate as it limits the scope of the provision and also has certain overtones of ethnic and racial prejudice.

In 2008, there was a judicial setback to the new more progressive Turkish regime on honour killings. According to a draft 2008 EU Commission progress report on Turkey, the Turkish Cassation Court ruled that sentences for honour killings (or, with the terminology of the code, killings with the motive of tradition) will only be given if there is evidence showing that a decision of the family assembly had preceded the murder.⁶⁵² The NGO shadow report from Kurdish Human Rights Project to the Committee on the Elimination of Racial Discrimination, 2009, describes the same court case:

646 In some versions of the code, subparagraph (h) (concealing of an offence or destroying evidence) is missing; thereby making "with the motive of a blood feud" subparagraph (i), and "with the motive of tradition" subparagraph (j). The researcher has been unable to corroborate which version is correct; here has been used the published translated version.

647 According to a summary outcome report by Women for Women's Human Rights – NEW WAYS, available at http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/Summary_Outcome_Penal_Code_WWHR_.pdf. Last visited on 10 March 2010.

648 According to Women for Women's Human Rights, *Turkish Civil and Penal Code Reforms from a Gender Perspective: the Success of Two Nationwide Campaigns*, February 2005.

649 Ibid, p. 63.

650 Pinar Ilkkaracan, *Deconstructing Sexuality in the Middle East*, Hampshire, 2008, p. 53.

651 Ibid, pp 54–55.

652 EU Commission staff working document, *Turkey 2008 Progress Report*, 5 November 2008, SEC(2008)2699, p. 20, available at http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/turkey_progress_report_en.pdf. Last visited on 6 May 2010.

*Despite [the reform of the Penal Code], the Court of Cassation has established a new condition which can only be described as a backward step in the prevention of honour killings. The 1st Criminal Department of the Court of Cassation has decided that "if there is no proof showing that the crime is committed by the decision of family council it can not be defined as an 'honour killing.'" This condition will result in the acquittal of potential perpetrators who encouraged the committing of honour killing if it is not proved that the crime was committed following a decision by the family council.*⁶⁵³

*On the other hand, in July 2006, the Turkish Prime Minister issued a circular⁶⁵⁴ on combating honour killings and domestic violence which, according to EU sources, has had some effect by improving cooperation between public institutions tackling the issue.*⁶⁵⁵

Case law Sweden: honour killing resulting in life imprisonment

In the **Swedish** appeals court case B 4651-02 of May 2002,⁶⁵⁶ a father who had killed his daughter was sentenced to life imprisonment. The family was of Kurdish background, and the daughter had been subjected to repeated threats and violence from her father and brother for having adopted a 'western' lifestyle and, primarily, for having a Swedish boyfriend. The daughter had in the media openly discussed the threats she was subjected to in order to raise awareness of honour-related violence, and in 2001 she spoke before the Swedish parliament. In January 2002, her father murdered her with a gun at point-blank range; according to police reports he claimed that he killed her for having brought dishonour upon the family. The father was sentenced to life imprisonment by the lower court. The appeals court confirmed the sentence, despite the fact that the accused had at that point withdrawn his confession. The appeals court concurred in the reasoning of the lower court, which stated that the way by which the woman was killed "can be equated with a regular execution." The honour motive was not directly explored by the courts.

Crime of passion defenses

The notion of crime of passion or provocation defense still exists in several European criminal laws. These are related to the idea that certain (sexual or otherwise) behaviour on behalf of the victim that stirs up a sense of rage or jealousy in the perpetrator would in part justify his (criminal) act. As such, this 'passion' or 'provocation' can serve as a mitigating circumstance in the following trial. This defence has frequently been used in cases of murder or violence committed against women, using the idea that a woman's (sexual or otherwise) behaviour offends the honour of a man, or her family, and thus partially justifies violent action against her. However, as pointed out above, there are important differences between crimes committed out of rage or 'passion' and the more deliberate honour crimes.

In the **United Kingdom**, criminal law allows for a 'partial provocation defense' in cases of murder. This legal construct has traditionally been used to mitigate punishment for murder in so-called crimes of passion. The Homicide Act 1957⁶⁵⁷ has the following provision:

Provocation

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man. (section 3)

This provision was criticized for allowing perpetrators of murder of women, when 'provoked' to kill based on something the victim has said or done, to be convicted for manslaughter instead of murder – and comparisons have been made to the legal response of honour crimes in other countries. The

653 Report available at www2.ohchr.org/english/bodies/cerd/docs/ngos/KHRPTurkey74.doc. Reference made to a document in Turkish at. Last visited on 6 May 2010.

654 Prime Minister's Circular on Violence against Women 2006/17.

655 EU Commission staff working document, *Turkey 2008 Progress Report*, 5 November 2008, SEC(2008)2699, p. 19, available at http://ec.europa.eu/enlargement/pdf/press_corner/key_documents/reports_nov_2008/turkey_progress_report_en.pdf. Last visited on 6 May 2010.

656 Svea Court of Appeal B 4651-02, decided on 31 May 2002. Available only in Swedish, translation is author's own.

657 Enacted 21 March 1957.

British government declared its intention to abolish the provision in July 2008 and in October 2010 Section 3 (the provocation provision) of the Homicide Act was repealed and replaced with Sections 54 and 55 ('Partial Defence to Murder') of the [Coroners and Justice Act 2009](#). The new clauses state that loss of self-control will constitute a partial defence to murder in certain circumstances, including if the act had a 'qualifying trigger'. Qualifying triggers include "fear of serious of violence" (applicable *inter alia* in cases of domestic violence), and words and/or conduct which caused the defendant to have a "justifiable sense of being seriously wronged." An act of sexual infidelity is not to be considered such exceptional circumstance.⁶⁵⁸

Italian criminal law provided for an explicit honour crime defense until 1981. Article 587 of the former criminal code established that whoever discovered unlawful sexual relations on part of his spouse, daughter or sister, and "in the fit of fury occasioned by the offense to their or their family's honour" caused her death, would be punished with imprisonment from three to seven years.⁶⁵⁹ Personal injury caused under the same circumstances was subjected to one third of ordinary penalties. This provision was repealed by the [Act no. 442 of 5 August 1981](#),⁶⁶⁰ after which no legal distinction exists between honour-related and other homicides or assaults.

Presently, Italian law provides for a provocation defense when a crime has been committed following a wrongful act. According to the [Italian Penal Code](#), "having reacted in a state of rage induced by the wrongful act of another" may serve as a mitigating circumstance (Article 62.2). Mitigation of the sentence can thus follow from a particular subjective emotional state of the perpetrator of the crime. Recently, in [Decision no. 37352 of 10 October 2007](#),⁶⁶¹ the Italian Supreme Court had the opportunity to examine the reach of this provision, in a case where a man had killed his wife upon learning that she had an extra-conjugal relationship. The Court upheld the lower court's decision, denying the possibility that honour could constitute a mitigating circumstance under Article 62. The Court held:

The homicide, committed by the husband to defend his honor – which was supposedly offended by his wife's alleged romantic relationship – and dictated by a misunderstood sense of male pride, was the expression of an emotional state that is valued negatively by the common ethical conscience, insofar as it is a manifestation of a reprehensible and excessive sense of male superiority.

4. Concluding remarks

Honour crimes have been widely debated in Europe in recent years. Some western European countries have seen honour crimes occur within sections of their immigrant communities, which has stirred public debate both about failed integration policies and women's rights more generally. In Turkey, a country where honour crimes were previously viewed as less severe by the state, recent legislative changes illustrate a positive trend. According to the most recent Penal Code, the so-called honour element of a killing will now be perceived as an *aggravating* instead of a *mitigating* factor in a criminal trial, thereby signaling that the notions on which such elements are based are not accepted in a modern society and run contrary to individual rights. There are, however, still problematic aspects of the Turkish regulations and their application in court, which is why the legal developments in this field should be monitored carefully.

Several European countries still allow for so-called provocation or passion defenses, used traditionally to reduce the seriousness of a crime committed in a moment of passion stirred by provocative behaviour on the part of the victim. The classic case is that of a man who kills or assaults his wife upon finding that she has had an extra-conjugal affair or that she is leaving him for another man, and whose violent reaction is received by a certain degree of indulgence by the legal system. As pointed out above – these crimes are different from honour crimes in that the former originate in emotional blindness, the latter in careful premeditation based on notions of honour that must be repaired. The state response to the two kinds of crimes are related, nevertheless, when the honour and the passion element are seen as mitigating circumstances: in both cases the state condones a certain violent reaction that is strongly gendered and based on archaic notions of 'appropriate' male and female sexual behaviour. In this context the recent British legislative reform, emphasizing that the provocation

658 <http://www.legislation.gov.uk/ukpga/2009/25/part/2/chapter/1/crossheading/partial-defence-to-murder-loss-of-control>. Last visited on 3 August 2011.

659 Article 587 of the so-called Rocco Code of 1931. See for a discussion of this provision Maria Gabriella Bettiga-Boukerbout, "'Crimes of honour' in the Italian Penal Code: an analysis of history and reform," in Hossain and Welchmann, pp. 230–244. Translation of the provision is from Bettiga-Boukerbout's article. Common homicide rendered imprisonment between 21 and 24 years, according to Art. 575 of the Rocco Code.

660 [Act of 5 August 1981, no. 442, repealing the relevance of honour in criminal matters](#). Only in Italian, content explained by Stefano Fabeni.

661 Only available in Italian; private translation.

defense cannot be used to excuse violence in reaction to infidelity, is interesting. Italian legislation allows for a provocation defense under certain circumstances, but the Supreme Court has made clear in strong language that this article does not provide defenses for emotional states such as a perception of harmed honour or “a misunderstood sense of male pride.”

F. SEXUAL EXPLOITATION AND TRAFFICKING

1. Introduction

Trafficking is detrimental to sexual health in multiple ways, and has in recent decades received much attention as a serious problem that must be fought by means of international cooperation. Trafficking violates the rights of the trafficked person in a host of ways; among these can be mentioned the right not to be subjected to forced labour or to inhuman or degrading treatment; the right to privacy and bodily integrity; the right to the highest attainable standard of health, and freedom of movement. From a sexual health perspective, it is especially important to emphasize the risk of sexual abuse and vulnerability to sexually transmitted infections. While trafficked persons who end up in the sex industry are particularly exposed to these perils, these risks are prevalent in all kinds of trafficking, given the repressive working conditions and the coercive and violent nature that are characteristic of this crime.

Trafficking and sexual exploitation must be forcefully prevented and combated. In this process, whether trafficking has occurred for sexual exploitation or for any other reason, it is paramount that a human rights framework be employed. This is true with regard to preventative measures against trafficking – making sure that these do not restrict fundamental rights such as the right to movement, the right to seek asylum, or the right to make a living. It is further imperative that human rights standards be applied in the field where anti-trafficking measures meet immigration policies; a complicated intersection of international policies that has to be closely monitored.⁶⁶²

Furthermore, for the purpose of sexual health and human rights, it is critical to safeguard the rights of sex-trafficked persons – or alleged sex-trafficked persons. They should be granted confidentiality to make sure that their personal data is not dispersed. When a border has been crossed and the trafficked person has arrived in the host country illegally, she or he should be treated with respect and not forcefully expelled. Possibilities for trafficked persons to stay in the host country, temporarily or permanently, should be considered.⁶⁶³ It is also of the utmost importance that the rights of sex workers or migrants are not violated under the pretext of anti-trafficking measures. For the purpose of this report it is of special relevance that the rights to medical, psychological and other services for trafficked persons be respected – regardless of how they have come to be in exploitative situations (non-discrimination)⁶⁶⁴ and regardless of whether they are able or willing to cooperate with law enforcement authorities.⁶⁶⁵ Special attention should be given to those who have been subjected to sexual abuse. Here it should be reiterated that all trafficked persons, regardless of what kind of trafficking they have been exposed to, should be granted sexual health care and counselling services.

In the European region, the issue of human trafficking is intrinsically linked to immigration policies, as trafficking has been perceived as a problem not only in regard to human rights but also as a potential source of illegal immigration. Therefore, much of the regulatory material on trafficking is concerned with the status of the trafficked person in the host country; including conditions for temporary residence permits, and responsibilities of the host country for the fate of the trafficked person upon return to the country of origin.

The response to trafficking from the criminal justice system, while relevant in the combat against trafficking, falls outside of the present study.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

662 See, *inter alia*, OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/ 2002/68/Add. 1 (2002), in particular Guidelines 1.5, 1.6, 2.5, 2.6, and 2.7. See also Article 14 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (UN 2000) [hereinafter the Palermo Protocol], making references to the obligations of states under the 1951 Convention and 1967 Protocol relating to the status of refugees.

663 Articles 7 and 8 of the Palermo Protocol. See also OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/ 2002/68/Add. 1 (2002), in particular Guideline 6.7.

664 See, *inter alia*, Article 14.2 of the Palermo Protocol.

665 See Article 6(3) of the Palermo Protocol, Article 25 of the Transnational Crime Convention, and OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/ 2002/68/Add. 1 (2002), in particular Principle 8.

In January 2010,⁶⁶⁶ for the first time ever, the European Court of Human Rights decided a case involving allegations of human trafficking in Rantsev v. Cyprus and Russia.⁶⁶⁷ The applicant was the father of a young Russian woman, Ms Rantseva, who had died under mysterious circumstances in Cyprus. She was in Cyprus on a so-called *artiste* visa, but had only worked in a cabaret for three days when she tried to leave her employment. It is unclear from the facts of the case if her work involved sexual services or not, although the Court, making references to various reports, states that “it is widely acknowledged that trafficking and sexual exploitation of cabaret artistes is of particular concern.” The applicant was found dead after having fallen or jumped out of the window of an apartment where she was held. The criminal investigations concluded that her death had been an accident and found no evidence to suggest criminal liability for it. The father alleged that Ms Rantseva had been trafficked to Cyprus for sexual or other exploitation, that the Cypriot authorities had failed to protect her while she was still alive, and that they had failed to take steps to investigate and punish those responsible for her death. He claimed that Cyprus had violated its obligations under numerous articles of the Convention, including Article 2 (right to life), Article 3 (right not to be subjected to inhuman or degrading punishment or treatment), and Article 4 (prohibition of slavery and forced labour). He also claimed under Article 2 and Article 4 that Russia had failed to protect his daughter against trafficking and to investigate her alleged trafficking and death.

Cyprus conceded unilaterally that it had violated Articles 2, 3, 4, 5 and 6 of the Convention, and declared that it had appointed experts to independently investigate her death. This declaration notwithstanding, and with reference to scarce case law on the application of Article 4 to cases of trafficking in human beings, the Court decided to examine the case on its merits.

The Court found that Cyprus had violated Article 2 in its procedural aspect, when failing to effectively investigate Ms Rantseva’s death. The different allegations related to trafficking were examined under Article 4, prohibition of slavery and forced labour. The Court concluded that trafficking in human beings, by its very nature and aim of exploitation, is prohibited under Article 4 of the Convention. It found that Cyprus had violated its positive obligations under Article 4 in two main ways. Given the regime of *artiste* visas in Cyprus (*inter alia* making the *artiste* dependent on her employer for her immigrant status), Cypriot authorities had not afforded Ms Rantseva practical and effective protection against trafficking and exploitation. This was illustrated by the fact that Cyprus had failed to put in place a legal and administrative framework to combat human trafficking. Furthermore, the Court found that Cyprus had failed to take measures to protect Ms Rantseva despite clear signs, which were known to the authorities, that she might have been trafficked. The Court also found Russia in violation of Article 4, with reference to its failure to investigate how and where Ms Rantseva had been recruited.

The case is relevant for the purposes of sexual health and rights firstly in that it makes clear that human trafficking falls under the scope of Article 4 of the Convention and, secondly in that it establishes an obligation for states to take positive steps to protect potential victims of human trafficking and to investigate once there are allegations of trafficking having taken place. Regardless of whether trafficking involves sexual or non-sexual exploitation, these findings are important for the well-being of trafficked persons. The Court chose not to explore specifically whether Ms Rantseva had been exploited sexually; in that regard, the Court accepted that trafficking is not only for sexual purposes, which corresponds with understandings of the phenomenon in international law.

Conventions in the Council of Europe Treaty Series

The Council of Europe continued, for much longer than many other international bodies, to employ a definition of trafficking that was confined to sexual exploitation and thereby mostly targeted towards women and girls.⁶⁶⁸ Its most important document, the Council of Europe Convention on Action against Trafficking in Human Beings,⁶⁶⁹ adopted in May 2005 and entered into force in February 2008, finally abandoned this definition.

666 In Siliadin v. France (application no. 73316/01, decided on 26 July 2005) the Court examined a case where a teenage Togolese girl had been brought to France to work as a domestic servant, without remuneration and without possibility to leave. The Court concluded that France had violated its obligations under Article 4, prohibition of slavery and forced labour (finding that the treatment of the applicant had amounted to servitude and forced and compulsory labor), but fell short of establishing whether she had been trafficked and, if so, whether trafficking was prohibited under Article 4.

667 Application no. 25965/04, decided on 7 January 2010. At the time of writing the judgment had not yet become final; it will become final at the latest three months after the date of the judgment, unless reference of the case to the Grand Chamber will be requested (Article 44 § 2 of the Convention).

668 Anne Gallagher, ‘Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention’, *European Journal of Migration and Law* 8 (2006) 163–189, p. 171.

669 Council of Europe Treaty Series – No. 197, open for signature on 16 May 2005, in force on 1 February 2008.

The Convention is intended to be a supplement to the UN Palermo Protocol, aiming particularly at strengthening the rights of trafficked persons.⁶⁷⁰ It covers sexual trafficking and other kinds of trafficking (forced labour/servitude, removal of organs), national as well as transnational. Guaranteeing gender equality is at the core of its purpose, as well as “to protect the human rights of victims of trafficking.” (Art. 1a and b). Its definition of human trafficking is identical to that of the Palermo Protocol, including *action* (recruitment, transportation, transfer, harboring or receipt of persons), *means* (threat or use of force or other forms of coercion, abduction, fraud, of deception, abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person), and *intent/goal* (for the purpose of exploitation) (Art. 4a).⁶⁷¹ Recruitment, transportation, transfer, harboring or receipt of *children* will be considered trafficking regardless of whether any of the coercive means were used (Art 4c).

The Convention mandates contracting states to promote a human rights-based and a child-sensitive approach in their preventative programmes, and to use gender mainstreaming (Art. 5.3). What qualifies as a human rights-based approach has not been defined. Instead, in the Explanatory Report, the drafters confuse a human rights-based approach with gender mainstreaming, suggesting that as long as gender mainstreaming has been used, this will also satisfy the criteria for a rights-based approach.

Chapter III of the Convention is titled “Measures to protect and promote the rights of victims, guaranteeing gender equality.” In contrast with the Palermo Protocol, it provides for a process by which victims can be identified correctly (Art. 10). In this process, the special situation of women and child victims must be taken into account. States parties shall ensure that a person who is believed to have been the victim of trafficking shall not be removed from the territory to which he or she was taken until the identification process has been completed (Art. 10.2). There is also a special clause providing for the protection of the private life and identity of victims (Art. 11). The minimum requirements for assistance to victims include (*inter alia*; here only those with bearing on health) standard of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance, and access to emergency medical treatment (Art. 12.1). Victims *who are lawfully resident* within the territory of a Party and who do not have adequate resources shall be provided with necessary medical or other assistance (Art. 12.3). This means that only victims who legally reside in the country have the right to full medical assistance, beyond emergency care. Examples of such non-emergency medical assistance can be assistance to a trafficked person during pregnancy or to a trafficking victim with HIV/AIDS.⁶⁷²

Of importance is the clause which states that “[e]ach Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness” (Art. 12.6). The Convention makes clear that for the implementation of the provisions on assistance to victims of trafficking, services must be provided on a consensual and informed basis (Art. 12.7). In this process, due account shall be taken into the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care. This provision prohibits, for example, forced HIV tests on trafficking victims.⁶⁷³

According to Article 13, victims or suspected victims of trafficking shall be granted a “recovery and reflection period” of at least 30 days during which expulsion cannot be enforced against them. During this period, presumed victims shall be entitled to minimum assistance according to Article 12.1, and safety and protection according to Article 12.2. Furthermore, Article 14 obliges States Parties to issue a renewable residence permit if the competent authority “considers that [his or her] stay is necessary” either owing to the personal situation of the trafficked person, or for his or her cooperation in the legal process. For child victims, the residence permit shall be issued in accordance with the best interests of the child.

Repatriation to the country of origin of a trafficking victim shall be conducted “with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary” (Art. 16.2). This wording means that forced repatriation is allowed, though not recommended, under the Convention. It is for the authorities in the host country to assess the victim’s needs and, based on this assessment, to determine whether

670 Explanatory Report – Action against Trafficking in Human Beings, 16.V.2005, I.a.6.

671 The fact that the definition is identical to the definition in the Palermo Protocol means that the European Convention has the same weaknesses and ambiguities as its UN equivalent (confusion about the meaning of sexual exploitation and exploitation of prostitution, undefined status of sex work, etc). According to the Explanatory Report, these terms have intentionally been left vague, in order for the Convention to be without prejudice to how sex work is regulated in domestic legislation. Explanatory Report, para 88. For a discussion of the definition of trafficking in the Palermo Protocol, see the International law section.

672 Explanatory Report, para 165.

673 Explanatory Report, para 171.

a residence permit should be issued. The Convention does not provide any guidance as to what principles this assessment will be based on. The host country must conduct a risk assessment before returning children (Art. 16.7) but not in other cases. As pointed out by commentators, this suggests that in practice contracting parties are not obliged to take on any legal or moral responsibility for the safety and security for trafficked persons returned against their will.⁶⁷⁴ However, interestingly, the Explanatory Report mentions that the drafters considered that it was “important to have in mind” European Court of Human Rights jurisprudence on states’ responsibility to conduct a risk assessment in cases of extradition and deportation as regards risk of torture upon return.⁶⁷⁵ While not elaborating this further, this comment suggests that even if there is no requirement for a full risk assessment, states still cannot fully escape responsibility for the fate of the returned victim.

Finally, according to Article 26, states parties must ensure that there is no possibility of imposing penalties on trafficking victims for illegal activities in which they have engaged. This is relevant in particular with regard to persons trafficked for sexual purposes in countries where sex work is illegal.

3. European Union

Human trafficking is mentioned explicitly in the Treaty of the European Union as one of the crimes that will be prioritized in the police and judicial cooperation of the EU. In this context, there is no mentioning of the rights of trafficked persons.⁶⁷⁶

In 2004, the Council of the European Union adopted the Council Directive 2004/81/EC on Residence Permit for Trafficking Victims.⁶⁷⁷ The Directive defines the conditions for the granting of temporary residence permits to third-country nationals who have been the victims of human trafficking and who are willing to cooperate with the authorities in fighting trafficking. It applies to trafficked persons who have entered the Union legally as well as illegally (Art. 3.1). The Directive provides for a reflection period for the victim of human trafficking, the duration of which will be determined according to national law, and during which victims cannot be deported and will have access to emergency medical treatment (Art. 6.1). The member states must make sure that during the reflection period victims will be granted “standards of living capable of ensuring their subsistence” (Art. 7.1). For the most vulnerable, and “where appropriate and if provided by national law,” there shall also be psychological assistance available (Art. 7.1). After the expiry of the reflection period, a temporary residence permit can be granted to victims whose cooperation is clearly beneficial to the law enforcement authorities (Art. 8).

While focusing on trafficked persons and giving them an incentive to cooperate, this document is troublesome from a human rights point of view. It provides for no protection of persons who are not required to give testimony or who for some reason cannot cooperate with law enforcement officials – or of those who have given testimony, benefited from the regime, and then have been repatriated against their will. As pointed out by a commentator, the purpose of the Directive was to facilitate law enforcement against traffickers while also concerned with the risks of illegal immigration into the Union: “Clearly, the overwhelming concern of the Commission was to ensure that the proposed visa regime was not open to opportunistic abuse or to aggravating the problem of illegal migration into the Union.”⁶⁷⁸

The European Council adopted Joint Action 97/154/JHA in 1997,⁶⁷⁹ concerning action to combat trafficking in human beings and sexual exploitation of children. In the preamble of this document, the Council establishes *first* that the fight against trafficking “is likely to contribute to the fight against certain unauthorized immigration and to improve judicial cooperation in criminal matters,” and *later* that trafficking in human beings and the sexual exploitation of children “constitute serious infringements of fundamental human rights, in particular human dignity.” This, again, suggests a prioritization of the fight against illegal immigration over the concern for the rights of trafficked persons, which raises concerns from a human rights standpoint.

674 Gallagher, p. 180.

675 Cases mentioned are Soering v. United Kingdom (1989), Cruz Varas and Others v. Sweden (1991), and D. v. United Kingdom (1997). Explanatory Report, para 203.

676 Article 29 of the Treaty of the European Union (as amended by the Amsterdam Treaty).

677 EU Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261.

678 Gallagher, p. 169.

679 Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children [1997] OJ L 63. On the status of ‘Joint Actions,’ which now have been replaced in EU law by Framework Decisions, see Appendix 1 of this report.

The definition of trafficking in human beings for the purposes of the Joint Action only refers to sexual trafficking and requires border crossings. The definition of trafficking is vague; it basically only refers to the movement between states, for the purpose of sexual exploitation (Title I Aims). Measures that member states are required to take are almost exclusively related to law enforcement. Title II.F(b) requires states to ensure “appropriate assistance to victims and their families,” including enabling them “to return to their country of origin, or any other country which is prepared to accept them, with the full rights and protections accorded to them by the national law of the Member States.” No mention is made of the possibility for a trafficked person to get a residence permit in the host country.

In 2002, the Council of the European Union adopted a Framework Decision on trafficking, the [EU Framework Decision on Combating Trafficking in Human Beings](#).⁶⁸⁰ The definition of human trafficking used in the Framework Decision is very similar but not identical to that of the Palermo Protocol, with the main difference that the EU Framework Decision makes explicit that pornography can be one form of sexual exploitation. The Framework Decision has a clear focus on criminal law cooperation and does not approach trafficking through a human rights lens. Its victim protection regime is close to non-existent: its only reference to victims’ rights regards children, and is vague in content: “Where the victim is a child, each Member State shall take the measures possible to ensure appropriate assistance for his or her family” (Art. 7.3).⁶⁸¹ No mention is made of a right for a trafficking victim to stay in the host country. The Framework Decision has strongly influenced member states’ policies, and has been widely criticized for not protecting the rights of trafficked persons nor addressing the root causes of the phenomenon.⁶⁸²

4. Non-binding regional material

There is an abundance of non-binding material from both the Council of Europe and the European Union on the issue of trafficking.⁶⁸³ While the Council of Europe documents are fairly consistent with the Convention, discussed above, the statements from the European Parliament and the EU Expert group report are significantly different from binding EU policies. Roughly speaking, the non-binding material tends to be less concerned with law enforcement and focuses more on the human rights of trafficked persons.

5. Domestic legislation and case law

Services to trafficked persons and possibility of residence

Legislation of many European states provides for the reflection/recovery period for trafficked persons as called for by the Council of Europe and EU mechanisms. In addition, many also offer temporary residence permits after the expiration of the reflection period. The terms of these vary, however.

In **Ireland**, the [Criminal Law \(Human Trafficking\) Act 2008](#) was passed in response to the EU Framework Decision, the Palermo Protocol, and the Council of Europe Convention, discussed above.⁶⁸⁴ Its definition of trafficking is slightly different from the definition in the Council of Europe Convention in that the coercive element is not part of the definition. To ‘traffic’ is defined only as procuring, recruiting, transporting, etc. a person, causing a person to enter or leave the state, taking custody of a person, or providing a person with accommodation or employment (Section 1). However, a person who traffics another will be guilty of an offence, if the trafficker, “for the purpose of exploitation,” coerced, threatened, abducted, used forced against, deceived, etc., the trafficked person (Section 4). In other words, the coercive element and the exploitative purpose are constitutive of the crime but not inherent to the definition of trafficking as such.

680 [Council Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings \[2002\] OJ L 203](#). On the status of Framework Decision, see Appendix 1 of this report.

681 There is also a reference to Art. 4 the [Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings](#); this article refers to victims’ right to receive information during a criminal process.

682 According to Gallagher, p. 167.

683 See, for instance, the Council of Europe Committee of Ministers [Recommendation No. R \(2000\) 11 to member states on action against trafficking in human beings for the purpose of sexual exploitation](#) (adopted on 19 May 2000), and the European Parliament resolution [Combating the trafficking of women and children: strategies to prevent the trafficking of women and children who are vulnerable to sexual exploitation](#) (2004/2216(INI), adopted on 17 January 2006), the European Parliament recommendation [Fighting trafficking in human beings: recommendation to the Council on fighting trafficking in human beings – an integrated approach and proposals for an action plan](#) (2006/2078(INI), adopted on 16 November 2006), the EU [Report of the Expert Group on trafficking in human beings](#) (22 December 2004), and the [European Council EU plan on best practices, standards and procedures for combating and preventing trafficking in human beings](#) (OJ 2005/C 311/01, adopted on 9 December 2005).

684 No. 8 2008. The Act is entitled: An act to give effect to Council Framework Decision of 19 July 2002 on combating trafficking in human beings; to give effect, in part, to the United Nations Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime, done at New York on 15 November 2000, and the Council of Europe Convention on action against trafficking in human beings done at Warsaw on 16 May 2005; for those purposes to amend certain enactments; to amend section 3 of the sex offenders act 2001; and to provide for matters connected therewith. Passed 7 May 2008.

The practical difference between this definition and the internationally accepted definition is minimal; however, it is worth noting that the Irish legislature has decided to neutralize the term 'trafficking' and make it only about the *action* without also including *means* and *intent* in the definition.

The Human Trafficking Act is primarily concerned with criminal enforcement, and has few provisions on the protection and rights of trafficked persons. However, simultaneously with the Human Trafficking Act 2008, the Government passed the secondary legislation Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking.⁶⁸⁵ This notice provides, *inter alia*, for a 45-day recovery and reflection period for suspected victims of human trafficking, regardless of whether they agree to assist law enforcement agencies in the investigation or prosecution of the traffickers (paras 5–7). During this period, the person cannot be subject to removal. Nevertheless, the recovery and reflection period can be terminated if the trafficked person voluntarily renews his or her contacts with the alleged traffickers, if it is in the interest of national security, or if victim status was claimed improperly (para 8). Paragraph 9 clarifies that the granting of the recovery and reflection period does not of itself create any entitlement for the person to assert a right to residence in Ireland, once the 45 days have passed. However, temporary residence permission for six months can be granted to the person, on condition that he or she has cut off all relations with the alleged traffickers, and that his or her collaboration is necessary for the investigation or prosecution against the perpetrators (para 11).

Similar to the recovery and reflection period, the granting of temporary residence permission can be revoked. The permission may be revoked, *inter alia*, when the person no longer wishes to assist the police or the prosecution, in the interest of national security, or when the investigation or prosecution has been terminated (para 13). When the trafficked person is under 18, attention should be paid to the best interest of the child in the granting and revocation of temporary residence permission.

The **Moldovan Law on Preventing and Combating Trafficking in Human Beings**⁶⁸⁶ covers both trafficking (the definition of which is similar to the European Convention definition), and other kinds of abusive practices, such as the exploitation of persons, compulsion to perform work or service by use of force, threat or coercion, slavery, compulsion to engage in prostitution or to participate in pornographic performances, compelled harvesting of organs or tissues, using a woman as a surrogate mother, abusing children with a view to illegal adoption, etc.

The Moldovan law provides for extensive assistance to trafficked persons, unconditional on their collaboration with law enforcement agencies. They shall be offered, *inter alia*, assistance in physical, psychological, and social recovery through specialized services; a minimum package of social and medical assistance including free health care, and protection and assistance by the public administration authorities (Art. 20). Foreign citizens will be offered a reflection period of 30 days, during which expulsion is prohibited, and during which they are entitled to psychiatric and psychological counselling and to medical and social assistance. During the same period, they have the right to legal assistance free of charge, and to pursue civil claims and lawsuits against their traffickers (Art. 24(4)). It is unclear from the wording of the law what happens when a lawsuit has not been terminated within the 30 days and whether this affects expulsion proceedings against trafficked persons.

The law also guarantees trafficked persons from other countries assistance with their voluntary return to their home states. Importantly, a risk assessment shall be carried out; no repatriation may take place if there are reasons to believe that their safety would be endangered upon their return:

The Republic of Moldova shall grant assistance to foreign citizens and stateless persons who are victims of trafficking in human beings upon their voluntary repatriation to their country of origin on an emergency basis and shall ensure their transportation in completely safe conditions to the state border of the Republic of Moldova, unless otherwise provided in international treaties. The victim of trafficking in human beings may not be repatriated or expelled to his/her country of origin or to a third state if, upon estimating the risk and safety, reasons are found to presume that his/her personal safety or the safety of his/her family will be endangered. (Art. 24(1))

However, there is no special provision in this law to grant the trafficked person permanent residency in Moldova.

In the **Netherlands**, human trafficking is defined in the Criminal Code, where liability for trafficking

685 Came into operation on 7 June 2008.

686 No. 241-XVI of 20 October 2005, unofficial translation of excerpts available.

carries heavy prison sentences.⁶⁸⁷ The definition is similar to the internationally accepted definition and includes trafficking both for the purpose of sexual and other kinds of exploitation. According to reports, in 2009 a new description of target groups appeared in implementing guidelines to the Alien's Act (see below), in order to state more clearly that immigration benefits to trafficked persons apply identically to those who have been trafficked for work in the sex industry and those who have been exploited for other reasons.⁶⁸⁸

The rights of victims of human trafficking to a reflection period and temporary residence permit are regulated in the so-called B9-regulation,⁶⁸⁹ as part of the Aliens Act Implementation Guidelines 2000. This regulation applies to foreign nationals; thus not to Dutch trafficked persons or victims who are legally resident in the Netherlands as EU citizens. If there is suspicion that a person residing illegally in the Netherlands has been trafficked, he or she is given the opportunity to use a three-month reflection period. During this period, he or she resides legally in the country and has the right to medical care and basic social services. Residence beyond the reflection period is conditioned on the willingness and ability to file a formal complaint or otherwise cooperate with law enforcement authorities, and like in Ireland, the temporary residence permit will last for the duration of the investigation and trial. The possibilities for residence permit have been gradually expanded. For example, a victim can, since 2006, be offered the right to continued residence in the Netherlands if the criminal prosecution results in a conviction. Continued residence can also be possible if the trial ends in acquittal but the trafficked person has been in the Netherlands on the basis of a B9-permit for over three years. Since 2007, the B9-regulation also provides for a temporary residence permit for trafficked persons who do not necessarily report a case of human trafficking but who cooperate in some other way with the investigation and prosecution, *inter alia*, by providing witness testimonies. Finally, since January 2008, a victim can ask the immigration authorities to assess if he or she is eligible for continued residence beyond the termination of the proceedings, even if the criminal case is still pending, if she has resided in the country for over three years on a B9-permit.⁶⁹⁰ In particularly distressing cases there is also a possibility to grant victims of human trafficking a residence permit on purely humanitarian grounds, *inter alia* when it is obvious that the person has been trafficked but is too frightened to cooperate with the investigation.⁶⁹¹

Case law: status of former trafficked persons under asylum law – 'social group' and risk of being re-trafficked

In the 2007 **United Kingdom** immigration appeals case of SB v. Secretary of State for the Home Department,⁶⁹² a young woman, national of Moldova, appealed against the decision to refuse her application for asylum and humanitarian protection. She had been trafficked into United Kingdom for the purposes of sexual exploitation. She subsequently gave evidence against the person responsible for her sexual exploitation ("Z"), which resulted in his successful prosecution. Z received a term of imprisonment, but at the time of the immigration hearing, he was at large. SB feared harm at the hands of Z, Z's family and Z's associates if returned to Moldova.

The Tribunal determined that for asylum purposes "former victims of trafficking for sexual exploitation" can be considered members of a 'particular social group' in the understanding of the Refugee Convention. In allowing the appeal, the Tribunal concluded that

the Appellant is at a heightened risk of ill-treatment in Moldova which [...] is at least in part related to her experience of having been trafficked for the purposes of sexual exploitation in the past, that is, it is at least in part related to the fact that she is a member of a particular social group (comprised of "former victims of trafficking for sexual exploitation"), although this does not mean that there is insufficient protection

687 Dutch Criminal Code, Article 273f, in force since 1 January 2005. Unofficial translation available in *TRAFFICKING IN HUMAN BEINGS, Supplementary figures, Sixth report of the Dutch National Rapporteur* (2008), available at <http://english.bnrm.nl/reports/sixth/index.aspx>. Visited on 29 December 2009.

688 *Seventh Report of the Dutch National Rapporteur on Trafficking in Human Beings* (2009), summary, pp. 6–7, available at <http://english.bnrm.nl/reports/seventh/>. Last visited on 22 April 2010.

689 Guidelines to the implementation of the Aliens Act (2000). The author has not found these guidelines in English translation. Information from *Replies to the list of issues (CCPR/C/NLD/Q/4) to be taken up in connection with the consideration of the fourth periodic report of the Netherlands (CCPR/C/NET/4; CCPR/C/NET/4/Add.1; CCPR/C/NET/4/Add.2)*, Human Rights Committee, 5 May 2009.

690 *Ibid.*, and *TRAFFICKING IN HUMAN BEINGS, Supplementary figures, Sixth report of the Dutch National Rapporteur* (2008), p. 2. Available at <http://english.bnrm.nl/reports/sixth/>. Last visited on 29 December 2009.

691 *Ibid.*

692 SB (PSG – Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 00002, Asylum and Immigration Tribunal, 26 November 2007.

in general from the state in Moldova. Accordingly, we are satisfied that there is the necessary causal nexus between the Appellant's membership of her particular social group and an effective reason for the future acts of persecution. (para 111).

In the 2009 case of PO v. Secretary of State for the Home Department⁶⁹³ before the Asylum and Immigration Tribunal, the appellant was a citizen of Nigeria who appealed against the decision to remove her as an illegal entrant. She had entered the United Kingdom in 2005, brought by a person for the purposes of working as a prostitute. After months of repeated rape by the trafficker and his acquaintances, the woman escaped and applied for asylum. She feared return to Nigeria because, she claimed, she was at risk to be re-trafficked, either by the same people or by a different gang. She also feared retribution from members of the gang who had trafficked her, who would not have been reimbursed for the role they played in her transportation to the United Kingdom. Additionally, the appellant believed that she would have difficulty in obtaining accommodation and employment and this would increase the risk of re-trafficking.

As general conclusions, the Tribunal held that

[t]here is in general no real risk of a trafficking victim being re-trafficked on return to Nigeria unless it is established that those responsible for the victim's initial trafficking formed part of a gang whose members were to share in the victim's earnings or a proportion of the victim's target earnings in circumstances where the victim fails to earn those target earnings. It is essential that the circumstances surrounding the victim's initial trafficking are carefully examined.

The Tribunal went on to find that there was no evidence that the trafficker and his acquaintances belonged to a trafficking gang or network. Upon return to Nigeria, the appellant would be offered protection; there were medical and counselling facilities available, and, if she was willing to cooperate, Nigerian authorities would also attempt to track down and prosecute her trafficker. In conclusion, it found that there was no real risk of re-trafficking. The appeal was dismissed.

Monetary compensation for trafficked persons

In the **United Kingdom**, a trafficked person may pursue compensation through several different mechanisms. First, the individual may receive compensation under a compensation order made by a criminal court upon the conviction of an offender.⁶⁹⁴ Second, he or she may receive a compensation award through an application to the Criminal Injuries Compensation Authority (CICA).⁶⁹⁵ The scheme provides for two types of compensation: personal injury awards to victims of crime, and fatal injury awards to immediate family members of a victim who has died as a result of a violent crime. Third, the individual may pursue a civil suit directly against her trafficker in court. These mechanisms are not designed to apply particularly to trafficked persons, but have been successfully used in that regard. According to reports, in July 2007 the first successful compensation awards were made to two young Romanian women who had been trafficked for sexual exploitation, and at least three additional applications have since resulted in successful outcomes for several other women trafficked for sexual exploitation.⁶⁹⁶

6. Concluding remarks

Regarding the response to the phenomenon of human trafficking in the European region, there is one trend that is clear and uniform: the sense that the phenomenon has to be urgently counteracted. Anti-trafficking pronouncements and measures have exploded in the last decade, on regional as well as on domestic levels. In relation to what action to take, however, there are different approaches.

As seen, binding instruments of the European Union so far have favoured law enforcement measures and immigration control, with a strong focus on prosecution of responsible traffickers rather than prevention or protection of trafficked persons. This approach is problematic from a sexual health and human rights point of view. It makes trafficked persons' residence in the country, and, to some extent, their well-being, conditional upon their willingness and ability to cooperate with the law enforcement authorities. This

693 PO (Trafficked Women) Nigeria CG [2009] UKAIT 00046, Asylum and Immigration Tribunal, 23 November 2009.

694 Section 130(1), Power of Criminal Courts (Sentencing) Act 2000.

695 The official website of the Criminal Injuries Compensation Authority, which administers the scheme, is found at www.cica.gov.uk. Northern Ireland has its own compensation scheme (Northern Ireland Criminal Injuries Compensation Scheme) for victims of violent crimes.

696 "Groundbreaking scheme pursuing Criminal Injuries Compensation for female victims of trafficking," Changemakers, available at <http://www.changemakers.net/node/8451>, last visited on 29 December 2009.

policy does not take into account the multitude of reasons why such cooperation may be problematic or dangerous for the individual. Also in cases where a trafficked person chooses to cooperate, this approach is complicated; the knowledge that he or she can stay only for as long as the investigation continues may serve as an incentive not to cooperate as effectively as they otherwise could. This kind of conditioning creates a sense of uncertainty, which is detrimental to health under the best of circumstances, but in particular when an individual has suffered hardship and abuse. The EU policies on trafficking are also closely linked with immigration policies. Such link entails an inherent risk that emphasis will be placed on the fight against illegal immigration into the Union rather than on a true rights-focused approach serving to prevent the phenomenon and to provide protection to those suffering under it.

The Council of Europe Convention, by contrast, has a clearer victim-focused approach and expresses more explicitly that human trafficking is a question of violation of rights. While not ignoring the need to take criminal law measures to fight the phenomenon, the Convention balances those with strong provisions on prevention and the rights of victims. Nevertheless, a clearer statement on what obligations flow from the application of a so-called human rights-approach would be desirable. By blurring the boundaries between a 'human rights approach' and 'gender mainstreaming,' the drafters fail to acknowledge that a rights-based approach is a richer concept requiring, *inter alia*, participation of trafficked persons in decisions of concern to them, non-discrimination (not only between men and women) and accountability as regards rights claims. It seems particularly important that the human rights-based approach be given substantive meaning in an area like trafficking which traditionally has implied risks for paternalism towards the victims.

Minimum requirements for assistance, according to the Convention, include medical and psychological care, and the victim's right to privacy is strongly emphasized. Similarly, services shall be provided on a consensual and informed basis. It is problematic, however, that those in the territory illegally are guaranteed only emergency care. In this way a trafficked person – who by nature of the crime will often be present illegally in the host country – can easily be denied the medical and psychological assistance he or she may need, not the least for the recovery of his or her sexual health. It is troubling that medical care related to pregnancy and HIV/AIDS are not deemed 'emergency care.' Similarly, this provision highlights the question of whether health and psychological services that follow from sexual abuse and deprivation of sexual autonomy will be considered 'emergency care.'

The Convention does not link access to services to a willingness to cooperate in the criminal investigation, which is commendable from a rights perspective. Nevertheless, while the Convention favours voluntary repatriation, it does not exclude forceful expulsion of an alien trafficked person. The host country has an obligation to assess the personal needs of the trafficked person before returning him or her, which is not the same as a risk-assessment of the situation in the country of origin. A clear risk assessment is only mandated in relation to trafficked children; nevertheless, comments suggest that the host country must take on at least a minimum of responsibility for the well-being of the trafficked person upon return.

In domestic legislation, as seen, these different approaches appear to varying degrees. Moldova offers a generous package to trafficked persons of protection and assistance during the reflection period, unconditional of legal status or willingness to collaborate. Moldova is also mandated by law to conduct a risk assessment before a trafficked person can be returned to his or her country of origin. Ireland also provides for assistance and support during the reflection and recovery period, but, if temporary residence status is granted, such status can be terminated abruptly once the investigation is finalized. The length of the reflection period varies; in Moldova it is 30 days, in Ireland 45 days, and in the Netherlands three months. After the reflection period, all three countries condition a temporary residence permit on the trafficked person's willingness and ability to cooperate with law enforcement authorities.

Here should be highlighted that according to both regional and domestic laws, the two models for permitted stay in the host country are very different in nature. The entitlement to a recovery and reflection period without special preconditions, and during which medical and psychological services are available, is based on rights-concerns and is in the interest of the trafficked person. The granting of temporary residence permission, on the other hand, tends to be exclusively in the interest of the authorities: it is conditioned by full cooperation with the law enforcement agencies, and can (at least according to EU law and in Ireland and the Netherlands, as discussed above) be revoked as soon as the investigation is over. The Dutch provision, also offering a possibility to grant residence status under particular distressing circumstances to a person on merely humanitarian grounds, deviates from this binary model and provides a solution that better takes into account the complicated psychological and structural dynamics often involved when human trafficking has occurred.