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Who is a Victim? The Concept of Victim in the Victims' Rights Directive

A human rights analysis of the concept of victim from a gender-specific perspective

The article deals with the concept of victim as used in the Victims' Rights Directive (Directive 2012/29/EU), subjects it to a human rights analysis, and casts light on it from a gender perspective. Violence and victim are categories that are socially constructed and recognised through social processes. Over recent decades, politics and science have increasingly engaged with the needs of victims and with the development and structuring of victims' rights. Who is recognised as a victim and what is defined as violence plays a role in this. Depending on this, people affected by violence have a right to protection and support, and are able to assert specific rights in civil or criminal proceedings. However, the manner in which the concepts are couched as well as the legal definitions, including with respect to human rights, vary depending on the perspective. As (human) rights are always an expression of social reality, a differentiated examination of various forms of violence and victimisation appears relevant given the background of socially constructed images of masculinity and femininity. After analysing the origins of the concept of victim and the application of the Victims' Rights Directive in selected European Member States, the article concludes with considerations on the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) by the EU and its possible legal and political implications.

1. INTRODUCTION

The concepts of victim and violence are socially constructed and reflect social realities that are politically negotiated and laid down in law and legal texts. Only in the age of the Enlightenment in the 18th century did people begin to engage with criminology, which focuses on punishing the offender. States and politics have for a long time suppressed the concerns and needs of victims. Only since the middle of the last century have those affected by violence received political and scientific attention, and victims' rights as well as support programmes begun to develop. The United Nations and

the Council of Europe played a pioneering role in this, whereas the EU started rather late in demonstrating responsibility for protecting victims' rights. With the EU's Victims' Rights Directive¹, the EU, however strongly emphasises the importance of an enhanced protection of victims' rights. The present article², which was written within the scope of the EU project "Rights of Victims of Survived Bodily Harm and Improved Access to Clinical Forensic Examinations"(RiVi), deals with the development of the concept of victim from both an international and European perspective and



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explains which definitions have found their way into the Victims' Rights Directive. The section on a gender-sensitive consideration also refers to the importance of taking a differentiated view.

2. GENDER-BASED VIOLENCE AND ITS VICTIMS – AN APPROACH

Before we look more closely at the human rights framework and the development of the Victims' Rights Directive, an attempt should be made to contextualise violence and victimisation from a differentiated, gender-sensitive perspective. Only in the middle of the last century did the victim become the focus of criminological research and victim protection programmes. Victims' rights were also introduced in criminal proceedings.³ In this period victimology emerged, which places the interaction and social fabric between the offender and his or her victim at the centre of its research interest. Hentig classified especially susceptible victim categories, such as “young and old people, women, mentally disabled⁴, and migrants”.⁵ The focus of the state's crime prevention continues to be on taking a target group-specific approach, by sensitising people from victim groups in particular. Conventional victimology, which considers the possible contribution of the victim, opens itself up to the criticism of failing to appropriately take into consideration the different power relationships that arise from the interconnected variables of gender, age, class and ethnicity. The 1970s therefore saw a rise in the influence of feminist researchers, who, in particular, revealed male violence in the private domain and pointed to the problem of male supremacy and the associated social suppression of women as being its causes.⁶ Not only feminist researchers, but also women's organisations and female activists focused on domestic violence, with the latter demanding the prosecution of

offenders, whether male or female, and protection for women affected by violence. These developments had a big impact on violence against women being qualified as a human rights violation for the first time in 1993 in the “Vienna Declaration”, the concluding document of the human rights conference.⁷ The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which was adopted in 1979, contains a very extensive approach to anti-discrimination and equality, but the term “violence” does not appear in the convention's text. In 1992, the CEDAW committee finally noted in its General Recommendation No. 19 (GR 19) that violence against women is covered by the definition of discrimination in Article 1 CEDAW and is thus part of the convention.⁸ The Council of Europe's Istanbul Convention 2011⁹ requires contracting states to pursue a comprehensive and effective policy of protection against violence. Article 3(a) of the Convention defines violence against women in very broad terms: “violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Additionally, further contexts of violence that disproportionately affect women and girls are listed: forced marriage (Article 37), female genital mutilation (Article 38) and forced abortion and forced sterilisation (Article 39). In order to meet this broad definition of violence and the legal standards developed in the Istanbul Convention, the CEDAW committee updated GR 19 and adopted the new General Recommendation No. 35¹⁰ in 2017.

Alongside the development of specific protective standards, the combating of violence against women was also embedded as a cross-cutting obligation in the more recent UN human rights conventions, so that women-specific (protective) needs are to be given special consideration within the scope of the respective material scope of application.¹¹ Article 6 (1) of the UN Disability Rights Convention¹², for example, emphasises that women and girls with disabilities are exposed to multiple types of discrimination and in this regard contracting states must take measures to ensure that all human rights and fundamental freedoms can be enjoyed fully and equally.

Regarding the question of whether women are more frequently affected by violence than men, there is no clear answer. On the basis of police crime statistics and victims surveys, which focus on crime-related issues¹³, men experience more violence overall. However, if social science studies are used which are based on the subjectively experienced violence by individuals, women are disproportionately more affected by domestic and sexual violence perpetrated by (former) partners. In contrast, men mostly experience violence in the public space from people they know and from strangers.¹⁴ What matters in this context, however, is what the victims themselves define as violence. A German study reveals that men tend to classify physical altercations in the public space as quarrels between men, as part of their male normality and not as violence. Moreover, sexual violence is extensively considered taboo, because it is experienced as unmanly.¹⁵ Violence against men has thus far been insufficiently researched to have valid data on its prevalence or on how men are personally affected. It would require a (new) consciousness and a language that could reveal the violence experienced by men

beyond normalisation and taboos. Moreover, people with communication difficulties and multiple disabilities, for example, often lack the ability to report on their violent experiences. Many people with disabilities also live in facilities where structural violence frequently and disproportionately restricts their autonomy and self-determination, and promotes interpersonal violence. Violent attacks, injuries and insults are often part of their everyday lives and are not defined as violence. This can lead to the extent of violence they experience being under-represented, as the study on experiences and prevention of violence against people with disabilities in Austria (2019) demonstrates. In a gender-specific respect, this study also confirmed that women with disabilities – like women without disabilities – are affected significantly more frequently by sexual violence than men with and without disabilities.¹⁶

The attributes associated to victims differ sharply from those accorded to offenders. Accordingly, the image of a victim is most frequently characterised by weakness, inferiority, defencelessness and passivity, while offenders are associated with dominance, strength, independence, the power to act and assertiveness. In parts of Austria's youth culture, the term "victim" is often used as a derogatory swearword against other people.¹⁷ This means that offenders are frequently associated with positive connotations – in line with the social norm – and victims with negative ones – deviating from the norm. This results in social values which also determine gender practices, whereby victims are thought of as having more female attributes and offenders as having male attributes. The male dominance expressed by this makes use of structures of suppression, which can lead to exclusion and marginalisation. Connell sees the concept of hegemonial

masculinity and the associated male dominance as based in patriarchy. The diversity of masculinity and femininity and how they relate to each other are reflected in it, allowing power relationships, dominance and submission to be revealed not only between men and women, but also amongst men.¹⁸ Men experience violence from men and from women, and women can also be exposed to violence from women. Apart from gender, other social categories, such as age, disability, ethnicity and sexual orientation or combinations of the above, also frequently play a role. Gender and inequality have developed historically, are socially constructed and reflected in legal norms and political patterns of action. As explained, the concept of victim and the associated attributes and different dimensions of violence are highly varied and therefore hardly graspable and (re-)constructable. Depending on the perspective, there is either a really narrow understanding of violence (based in criminal law), as from the point of view of criminology and victimology, or there is a very wide range of reports about injuries, attacks, restrictions and consequences that are formulated from the affected person's perspective. What matters here is that the terms victim and violence always have an inherently gender-specific dimension.

3. THE HUMAN RIGHTS FRAMEWORK FOR THE CONCEPT OF VICTIM

The following sections present how the increasing recognition of the gender-specific aspect impacts the legal framework in connection with the terms "violence" and "victim". Special attention is paid to the definition of the term "victim" in the Victims' Rights Directive and information provided about the impact that the broad definition of violence against women in the Istanbul Convention may have on

the definitions in the Victims' Rights Directive.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹⁹ represents the first tool at international level for defining the rights of victims with regard to their access to justice and fair treatment, compensation and restitution.²⁰ The basic principles of 1985 are therefore often described as the Magna Carta of victims' rights²¹ and define "victims of crime" and "victims of abuse of power".²² While the first group of victims refers to crimes under national criminal law, victims of abuse of power meet the definition when harm occurs through acts or omissions "that do not yet constitute violations of national criminal laws but of internationally recognised norms relating to human rights."²³ The further development of the rights of the two groups differs and is characterised by vagueness with regard to victims of abuse of power.²⁴ What both definitions of victim have in common is that victims are defined as persons "who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions [...]."

With regard to family members of victims of crime, the basic principles define that immediate family members or dependants of the actual victim as well as persons who have themselves suffered harm when intervening to assist victims in distress or to prevent victimisation are also to be considered as victims.²⁵

While the basic principles of 1985 primarily focus on victims of national crimes, the focus of the basic principles adopted 20 years later is on victims of international crimes. The "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations

of International Human Rights Law and Serious Violations of International Humanitarian Law”²⁶ considerably expand the rights of the victims of abuse of power mentioned in the basic principles of 1985. Work on the basic principles of 2005 began in 1989 with a study on the right to restitution, compensation and rehabilitation of victims of gross human rights violations.²⁷ Basic principle 8 defines victims of gross violations of international human rights standards and of serious violations of humanitarian international law, with the definition overlapping to a large extent with the definition in the basic principles of 1985. Four categories of victim are defined: (1) individual persons who have suffered direct harm, (2) family members of dependant of the immediate victim, (3) persons who have suffered harm when attempting to prevent victimisation, and (4) groups of victims (“collective victims”), such as, for example, population groups or organisations.²⁸ However, the definition of the 2005 Basic Principles does not cover legal persons, although attempts were made in the course of the negotiations to add this.²⁹

At European level, the Council of Europe played a pioneering role with regard to the rights of victims of crime.³⁰ Already in 1983, a definition of victim – albeit it a narrow one – is given in the preamble to the European Convention on the Compensation of Victims of Violent Crimes.³¹ The Convention covers victims of “intentional violent crimes who have suffered bodily injury or impairment of health” as well as dependants of victims who have died as result of such crimes.³² The definition was expanded and already Recommendation R(85)11³³ notes that the criminal justice system should also take psychological harm, amongst others, into consideration.

Only in Recommendation R(2006)8 on assistance to crime victims³⁴ or economic

loss are mentioned alongside emotional suffering or economic loss mentioned alongside physical injuries as being the possible effects of a crime.

Groenhuijsen shows that despite developments and advances in the area of victims’ rights, it seems unlikely that there will be a general convention on victims’ rights at United Nations level due to “convention fatigue”. It can, however, be observed that both at international level and at the level of the Council of Europe numerous conventions have been developed that envisage specific measures for “particularly vulnerable victims”.³⁵

For example, certain rights for victims of trafficking in human beings were defined in 2000 in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, in particular trafficking in women and children.³⁶ The Council of Europe Convention on Action against Trafficking in Human Beings defines “victims” as any natural person who is subject to trafficking in human beings.³⁷ Another example of a convention for a specific group of victims is, as already mentioned above, the Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence. The next section analyses how the framework at the level of the United Nations and the Council of Europe influences the concept of victim in the Victims’ Rights Directive.

4. THE DEVELOPMENT OF THE CONCEPT OF VICTIM IN THE VICTIMS’ RIGHTS DIRECTIVE

Compared with the United Nations and the Council of Europe, the EU engaged rather late with the victims of crimes and their rights.³⁸

However, the 2001 Council Framework Decision on the standing of victims in criminal proceedings³⁹ is described as a milestone in victims’ rights because it is

the first hard-law instrument in this area. As the EU in the 1990s held the view that it did not have any competence in the area of criminal justice, the EU later changed its position, in particular due to the situation of so-called “cross-border victims”, i.e. people who were victims of a crime outside their country of residence. However, exclusively regulating the situation for this specific group of victims could have led to these persons receiving different or more rights than persons who become victims within their country of residence. In turn, this would have led to a conflict with the EU’s basic freedoms. Therefore, a Framework Decision has been chosen that can be applied to all victims.⁴⁰

The European Commission’s (EC) proposal for the Victims’ Rights Directive took over the exact wording of the Framework Decision’s definition of victim.⁴¹ The concept of “particularly vulnerable victims” is already mentioned in the Framework Decision as is the obligation that this group “can benefit from specific treatment best suited to their circumstances”.⁴² However, the framework decision does not specify how particularly vulnerable victims should be defined and leaves this up to the EU Member States.⁴³

The EC published two implementation reports on the Framework Decision (2004 and 2009) and came to the conclusion in 2009 that the implementation of this Framework Decision is “not satisfactory”.⁴⁴

The lack of implementation – probably caused in part by the very loose formulation and therefore the very large scope for implementation⁴⁵ – initiated the issuing of the Victims’ Rights Directive.⁴⁶

4.1 Analysis of how the term victim was defined in the Victims’ Rights Directive

The EC’s proposal for defining the term

“victim” differs only slightly from the final definition in Article 2 of the Victims’ Rights Directive. The proposal defined “victim” as “natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss directly caused by a criminal offence” as well as “the family members of a person whose death has been caused by a criminal offence”.⁴⁷ While the Committee of the Regions noted that the term victim is defined too broadly and that victims of “minor offences” thus would also receive “access to [...] procedural rights”, which would lead to high costs⁴⁸, the European Economic and Social Committee (EESC) had concerns that the term “natural person” would exclude companies and organisations from the definition of victims.⁴⁹ The final text of Directive 2012/29 remained unchanged and therefore does not cover legal persons, which is assessed as being an oversight.⁵⁰

Although the proposal does envisage that a victim has suffered harm, “including physical or mental injury, emotional suffering or economic loss”, the final text of the Directive uses the wording of physical, mental or emotional harm. As highlighted by Hilf, the German version of the Directive is missing the reference to a demonstrative list by the term “including”. For example, sexual integrity is not explicitly listed and must therefore be subsumed under the broad categories of physical, mental or emotional harm.⁵¹

During the drafting process, various stakeholders noted that the definition of family members of a person whose death was directly caused by a criminal offence as victims was too narrow. The impact assessment carried out in preparing the EC’s proposal for the Directive shows different policy options, including one option using a broader definition of family members, which would have also met the Declaration

of Basic Principles of Justice for Victims of Crime and Abuse of Power.⁵² However, the option that provides a narrow definition of family members has been chosen for the proposal for costs reasons.⁵³ Recital 9 of the proposal of the EC stated that “[f]amily members of victims are also harmed as a result of the crime, in particular the family of a deceased victim [...]”.⁵⁴ Supported by the European Parliament⁵⁵, the formulation underwent only a few changes and in the final version of the Directive, Recital 19 states: “In particular, family members of a person whose death has been directly caused by a criminal offence could be harmed as a result of the crime. Such family members [...] should therefore also benefit from protection [...]”.⁵⁶ The text in Article 2 shows that the expression “such family members” only refers to family members of a victim who has lost their life.⁵⁷ Remarks made later in the process of drafting the Directive did not lead to any changes to the text. The EESC noted in its opinion that many surviving victims would be so badly injured “that they need a very high level of support in exercising their legal capacity when conducting the complaint or judicial process for justice and compensation, which therefore falls to family members or other support persons.”⁵⁸ The United Nations also notes that in light of the 1985 Basic Principles and the Recommendation of the Council of Europe R(2006)8 on the Support of Victims of Criminal Offences⁵⁹, the definition of family members should be defined more broadly and that family members should also be defined as victims, not only in the event of a person’s death.⁶⁰ In the final text of Directive 2012/29, a narrow definition of family members is used for the definition of victims, however, family members have rights, such as, for example, to protective measures or measures to protect their privacy.⁶¹

In order to be able to limit the number of family members of victims, Member States may establish procedures that determine the number of family members taking into account the individual circumstances of each case.⁶² This was also proposed by the European Parliament.⁶³ The questions as to which victims are “particularly vulnerable”⁶⁴ or which victims have “specific protection needs”⁶⁵ took up a lot of space in the drafting of the directive. In the proposal of the EC, Article 18 (“Definition of special vulnerability”, Article 22 Directive 2012/29) paragraphs 1 and 2 identified four groups of particularly vulnerable victims: children, persons with disabilities, victims of sexual violence and victims of human trafficking. Paragraph 3 stated that all other victims should “receive a timely and individual assessment, in accordance with national procedures, to determine whether they are vulnerable [...]”.⁶⁶ Several statements on the proposal criticised the structure of the article, the definitions used as well as the absence of a list of further groups of victims. The structure and chosen formulation led to a lack of clarity as to whether the list of indicated groups of victims is final or not.⁶⁷

The EESC also noted that the structure of Article 18 in the proposal could encourage the creation of a hierarchy of victims. The article should therefore clarify that all victims should have access to special measures by means of an individual assessment on their vulnerability.⁶⁸ As proposed by the European Parliament⁶⁹, the relevant article should therefore begin by stating that victims should “receive a timely and individual assessment”. The individual paragraphs of Article 18 (Article 22 in Directive 2012/29) were reversed and instead of listing four groups of victims, Article 22 (3) instead refers to certain groups of victims receiving “particular attention”. Children are defined per se as victims requiring special protective measures.⁷⁰

The groups of victims listed in the Article 22 (3) “victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities” and child victims go far beyond the four groups mentioned in the proposal. The proposal, for example, did not contain any reference to victims of gender-based violence or violence in close relationships, which was required, amongst others, by the European Parliament.⁷¹ Further groups of victims requiring special consideration within the scope of an individual assessment and not explicitly mentioned in the proposal are victims of terrorism, organised crime, sexual exploitation and hate crime.⁷² La Strada International and PICUM (Platform for International Cooperation on Undocumented Migrants) refer, for example, to the special situation of migrants with an insecure residence status, which should also be taken into account in Article 18.⁷³ This proposal and the proposal to also consider victims of torture⁷⁴ were not included in the Directive. However, in the EU strategy on victims’ rights published in June 2020, reference is made to the specific situation of migrants with insecure residence status and the strategy emphasises that the Victims’ Rights Directive is applicable independently of their residence status.⁷⁵

The proposal defined certain groups of victims as “particularly vulnerable”⁷⁶, which, for example, was criticised by the European Parliament because “[m]any victims, including victims of gender-based violence, do not wish to be associated with vulnerability”.⁷⁷ The parliament’s proposed “vulnerable victims” turned into victims with “specific protection needs” in the final text of the directive.

4.2 Use of the term “victim” in the Member States

Implementation of the term “victim” at national level is patchy in several Member States.⁷⁸ Some countries lack a definition of “victim”; elsewhere, the fact that family members of persons deceased as a result of crime are also to be defined as victims has not been implemented in national laws. Gaps in implementing the rights of those family members of victims who have not deceased as a result of crime are also evident.⁷⁹ Finland and Spain are mentioned as examples for using a definition of the term “victim” that goes beyond the scope of the Directive. In Finland, persons who are either insulted or endangered by a crime are also defined as victims.⁸⁰

The implementation of an individual assessment pursuant to Article 22 of Directive 2012/29 is seen as a major challenge, which has led to a lack of implementation in several states.⁸¹ In a report of the European Parliament on the parliament calls on Member States to “interpret the term ‘family members’ – and other key terms, such as ‘particularly vulnerable’ – broadly, so as not to restrict the list of potential rights holder unnecessarily”.⁸²

In the following, it will be analysed under which circumstances a victim can be considered a victim in the sense of Directive 2012/29. In general, there has to be a physical, mental or emotional harm or economic loss which was directly caused by a criminal offence.⁸³ Thus the Directive chooses the concept of victim as an affected person (“Betroffenheitskonzept”) over the concept of a victim being the holder of legal interests protected by the specific offence (“Rechtsgutskonzept”).⁸⁴ Being considered as a victim should not require an offender to have been identified, apprehended, prosecuted or convicted.⁸⁵ However, this is “without prejudice to any national administrative procedures

required to establish that a person is a victim".⁸⁶ This addendum in Recital 19 of Directive 2012/29 has been added based on a suggestion of the European Parliament.⁸⁷ The European Parliament refers in a study to four countries (Belgium, France, Lithuania, Poland) in which victims have to apply for victim status.⁸⁸

Access to victim support services must also not be made dependent on whether a victim has formally reported a crime to a competent authority,⁸⁹ a requirement that has not been implemented accordingly in some EU Member States. In one EU Member State, for example, exclusively victims of domestic violence have access to support services without filing a complaint.⁹⁰ In its research, the European Union Agency for Fundamental Rights (FRA) shows that access to support services is essential in the period prior to making a formal complaint in order to support victims in filing a complaint. Victims are more likely to file a complaint if they have been given full information and support by a specialist centre beforehand.⁹¹

With regard to victims of gender-based violence, the definition of the term victim in Directive 2012/29 could be challenging as it is based on a harm that is a direct consequence of a crime. In case certain forms of gender-based violence are not defined as crimes at national level, victims of these form of violence might not fall under the Directive's definition of the term victim.⁹² In contrast, the Istanbul Convention pursues a broader approach to the definition of victim, as a victim status is not necessarily linked to a criminal law offence.⁹³

It requires the criminalisation of psychological violence and stalking⁹⁴, however several EU Member States have so far not defined stalking as a form of gender-based violence as an offence.⁹⁵

4.3 Considerations on the ratification of the Istanbul Convention with regard to the Victims' Rights Directive

Article 75 of the Istanbul Convention allows ratification of the Convention by the EU. The related process of the EU has been kicked-off in 2015 with publication of a roadmap of the European Commission.⁹⁶ The European Parliament has supported the process from the very beginning.⁹⁷ On 13 June 2017, the EU signed the Convention, but has not yet ratified it. In the event of ratification, all Union institutions would be obliged under international law to fully implement the Convention within the EU competency framework.⁹⁸ It is assumed that in the event of ratification by the EU, more specific directives will need to be issued in order to meet all Convention's obligations. While Directive 2012/29 makes reference to violence against women, it has a broader scope and is therefore not specific enough with regard to victims of violence against women.⁹⁹ It would therefore be necessary to check whether or not the EU would have to issue further directives that deal more specifically with certain forms of violence against women.¹⁰⁰

The term "victim" in the Istanbul Convention is, as already mentioned, defined more broadly than it is in the Victims' Rights Directive. The Directive requires harm or an economic loss which was directly caused by a criminal offence, while the Convention describes a natural person as a victim who is the object of domestic violence or violence against women.¹⁰¹ However, the offences listed under Article 3 (a) and (b) of the Convention, such as, for example, psychological or economic violence, need not necessarily also be criminal offences.¹⁰² Since these acts need not necessarily be criminal offences, the Convention also requires protection of victims that is not tied to criminal proceedings.¹⁰³

The definition of the term “victim” in the Istanbul Convention is in a further regard broader than the one in the Directive 2012/29. The Directive defines “victim” as a natural person who “has suffered harm [...] or economic loss”.¹⁰⁴ The Convention, on the other hand, uses the wording of acts of gender-based violence that “result in, or are likely to result in [...] harm or suffering to women”.¹⁰⁵ The monitoring mechanism of the Convention GREVIO refers to an example of a restrictive definition of the term “victim” in its evaluation report on Portugal. The Portuguese law refers to harm or loss that is directly caused by an action or omission in connection with the crime of domestic violence. This would exclude those conduct that was likely to result in harm. This would not encompass those actions that could lead to harm or distress.¹⁰⁶ In addition, in Portugal, the attribution of the status of “victim of domestic violence” requires the prior submission of a complaint or a report by a law enforcement official, which means that victims who do not want to report are therefore prevented from receiving the status. GREVIO stresses the importance of ensuring that all victims have access to support and protection, regardless of whether or not they have been conferred the formal status of victim.¹⁰⁷

CONCLUSION

The development of the term “victim” and the associated forms of violence demonstrate that the narrow understanding of violence in purely physical forms, which still dominated in the 1980s, has been expanded to cover further aspects, such as psychological and economic harm. Whereas the Victims’ Rights Directive does not mention explicitly sexual violation, sexual violence (Article 36) and sexual harassment (Article 40) are prominently placed in the Istanbul Conven-

tion. State Parties are specifically obliged under Article 25 to provide specialised support structures for victims of sexual violence.

There are clear differences in the definition and weighting of sexual violence in the Victims’ Rights Directive in comparison to the Istanbul Convention.

The Victims’ Rights Directive refers for instance to victims of sexual violence as “victims with specific needs”, however, it does not refer specifically to sexual harm when defining the term “victim” (Article 2).

Different approaches of countries defining when a person is granted a “victim status” could lead to a possible tension in relation to the implementation of the Istanbul Convention and the Victims’ Rights Directive, as the above example concerning Portugal has shown. GREVIO stresses the importance of ensuring that all victims have access to support and protection, regardless of whether or not they have been conferred the formal status of victim.¹⁰⁸ However, as the Victims’ Rights Directive “is without prejudice to any national administrative procedures required to establish that a person is a victim”¹⁰⁹, it might be unclear whether all victims are able to access the rights as defined in the Directive.

The report of the European Commission on the implementation of the Directive of 2020 shows that compliance with the “victim” definition was found lacking in several Member States. There is either no definition of victim or it is not specified that family members of a deceased victim are classified as victims, which leads to a limitation of the rights of family members.

In terms of implementing the Directive in practice, shortcomings in the implementation of a number of important provisions of the Directive were identified in most Member States, concerning for instance access to information, access to support

services and the individual assessment of a victim's protection needs. There seem to be fewer shortcomings concerning the implementation of the procedural rights.¹¹⁰ In the event of the ratification of the Istanbul Convention by the EU, probably specific directives would need to be issued in order to cover the concept of violence in the Istanbul Convention and oblige Member States to establish adequate protection and support structures to fill gaps in the protection from violence.

¹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

² Further information on the EU project (financed by the Justice Programme of the European Union 2014–2020), under: <https://bim.lbg.ac.at/de/rivi>.

³ Kersten 2015, 30 f.

⁴ Von Hentig used the term “mental disability”, which is still found in legal texts. According to the definitions of the UN Convention on the Rights of Persons with Disabilities, of Disability Studies and of self-advocates, designations such as mental or cognitive disability and people with learning disabilities are to be preferred.

⁵ Von Hentig 1948, 404–419.

⁶ Scraton 1990, 10–25.

⁷ Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Online: <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>.

⁸ Kartusch 2015.

⁹ Convention of the Council of Europe on Preventing and Combating Violence Against Women and Domestic Violence, signed in Istanbul on 11.05.2011, hence Istanbul Convention, entered into force on 01.08.2014.

¹⁰ General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 26.07.2017.

¹¹ Ulrich/Rössl 2017, 43.

¹² United Nations 2006.

¹³ Such as, e.g., homicide, robbery, assault, threats, extortion, sexual offences and offences against freedom.

¹⁴ Cf. Kapella et al. 2011, 14.

¹⁵ Bundesministerium für Familie, Senioren, Frauen und Jugend 2004.

¹⁶ Mayrhofer et al. 2019, 32 f, *ibid.*, 407 ff.

¹⁷ Strobl 2009, 89–98.

¹⁸ Connell 2006, 92–102.

¹⁹ UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution 40/34, 29 November 1985, hereinafter “1985 Basic Principles”.

²⁰ Bassiouni 2006, 247.

²¹ Groenhuijsen 2014, 34.

²² Article 1 and Article 18 of the 1985 Basic Principles.

²³ Article 18 of the 1985 Basic Principles.

²⁴ Groenhuijsen 2014, 33.

²⁵ Article 2 of the 1985 Basic Principles.

²⁶ UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, 16 December 2005, hereinafter the “2005 Basic Principles”.

²⁷ Kintzel 2007, 49. For a detailed description of the development of the 2005 Basic Principles, see Bassiouni 2006, 247–250.

²⁸ Bassiouni 2006, 247; *ibid.* 256 f.

²⁹ *Ibid.*

³⁰ De Casadevante Romani 2012, 21.

³¹ Council of Europe 1983.

³² *Ibid.*, preamble.

³³ Council of Europe 1985.

³⁴ Council of Europe 2006.

³⁵ Groenhuijsen 2014, 39 f.

- ³⁶ *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, Federal Law Gazette III No. 220/2005.*
- ³⁷ *Article 4 (e) of the Council of Europe Convention on Action against Trafficking in Human Beings, Federal Law Gazette III No. 10/2008.*
- ³⁸ *Hilf 2017, 14.*
- ³⁹ *Council of the European Union 2001, 1–4, hereinafter “Framework Decision”.*
- ⁴⁰ *Groenhuijsen/Pemberton 2009, 44 f.*
- ⁴¹ *See Article 1 (a) of the Framework Decision.*
- ⁴² *Article 2 (2) of the Framework Decision.*
- ⁴³ *However, Groenhuijsen and Pemberton refer to a survey of 13 Member States showing that despite the wide discretion in implementing, persons affected by sexual or domestic violence were defined as “particularly vulnerable victims” in nine States, and that in further 4 States they would have a de facto special status. See *ibid.*, 54.*
- ⁴⁴ *European Commission 2009, 20.*
- ⁴⁵ *Groenhuijsen/Pemberton 2009, 50.*
- ⁴⁶ *Hilf 2017, 16. Hilf describes the milestones on the way to the Directive, beginning with the Stockholm Programme (The Stockholm Programme – An open and secure Europe serving and protecting the citizens, ABL C 115/1 of 04.05.2010), followed by the Communication of the European Commission on strengthening victims’ rights in the EU (COM (2011) 274), the Budapest Roadmap (Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings, 2011/C 187/01 of 28.6.2011) and the Communication of the European Commission (COM(2011) 573).*
- ⁴⁷ *European Commission 2011a, hereinafter “European Commission, proposal for Directive”.*
- ⁴⁸ *European Committee of the Regions 2012, para 21.*
- ⁴⁹ *European Economic and Social Committee 2012, para 4.3.3, hereinafter “EESC, opinion of the EESC”.*
- ⁵⁰ *Hilf 2017, 20.*
- ⁵¹ *Ibid. See Article 2 (1)(a)(i) of the English version of Directive using „including“.*
- ⁵² *See European Commission 2011b, 25. The various options (policy options 2, 3a, 3b, 4) are listed. While options 3a and 3b exclusively define family members of deceased victims as victims, option 4 provides a broad interpretation.*
- ⁵³ *Ibid.*, 43 with reference to option 3a as the preferred option.
- ⁵⁴ *European Commission 2011a.*
- ⁵⁵ *European Parliament 2012, 14 (in reference to Recital 9).*
- ⁵⁶ *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, ABL L 2012/315, Recital 19, hereinafter “Directive 2012/29”.*
- ⁵⁷ *The opinion of the European Parliament also does not contain any proposal for changing the formulation in Article 2 (a) (ii) regarding a widening of the term “family member”. See European Parliament 2012, 32 (with regard to Article 2).*
- ⁵⁸ *EESC, opinion of the EESC, para 4.3.1.*
- ⁵⁹ *Council of Europe 2006.*
- ⁶⁰ *United Nations 2011, 3 f.*
- ⁶¹ *See Article 18 and 21 of Directive 2012/29.*
- ⁶² *Article 2 (2) (a) of Directive 2021/29.*
- ⁶³ *European Parliament 2012, 32 f (with regard the Article 2).*
- ⁶⁴ *European Commission 2011a, Proposal for Directive, Article 18.*
- ⁶⁵ *Article 22 of Directive 2012/29.*
- ⁶⁶ *European Commission 2011a, Article 18.*
- ⁶⁷ *United Nations 2011, 4. Amnesty International 2012, 4.*
- ⁶⁸ *EESC, Opinion of the EESC, para 1.8.*
- ⁶⁹ *European Parliament 2012, 49 (with regard to Article 18).*
- ⁷⁰ *Article 22 (4) of Directive 2012/29.*
- ⁷¹ *European Parliament 2012, 49; *ibid.*, 60 f (with regard to Article 18).*
- ⁷² *Ibid.*
- ⁷³ *LaStradaInternational/PICUM2012, 1; United Nations 2011, 4.*
- ⁷⁴ *Amnesty International 2012, 6.*
- ⁷⁵ *European Commission 2020b, 14.*
- ⁷⁶ *European Commission 2011a, Article 18 (1).*
- ⁷⁷ *European Parliament 2012, 59.*
- ⁷⁸ *Biff et al. 2016, 115.*
- ⁷⁹ *European Commission 2020a, 3.*
- ⁸⁰ *European Parliamentary Research Service 2017, 50 f; Biff et al. 2016, 111.*
- ⁸¹ *European Commission 2020a, 8; Biff et al. 2016, 151 f.*
- ⁸² *European Parliament 2018, para 44.*
- ⁸³ *Article 2 (a) (i) of Directive RL 2012/29.*
- ⁸⁴ *Hilf 2017, 20.*
- ⁸⁵ *Recital 19 of Directive 2012/29.*
- ⁸⁶ *Ibid.*
- ⁸⁷ *European Parliament 2012, 14 (with regard to Recital 9, in the final version of Directive 2012/29 Recital 19).*
- ⁸⁸ *European Parliamentary Research Service 2017, 51.*
- ⁸⁹ *Article 8 (5) and Recital 40 of the Directive 2012/29.*
- ⁹⁰ *European Commission 2020a, 7.*
- ⁹¹ *European Union Agency for Fundamental Rights 2019, 54.*
- ⁹² *Spurek 2016, 21.*
- ⁹³ *Nousiainen/Chinkin 2015, 63. Article 3 (e) of the Istanbul Convention defines victims as natural persons exposed to gender-based or domestic violence.*

⁹⁴ See Article 33 and 34 of the Istanbul Convention. Contracting parties may, however, declare that they reserve the right to provide for non-criminal sanctions with regard to psychological violence and stalking, see Article 78 (3) of the Istanbul Convention.

⁹⁵ See Van der Aa 2018, 319. According to Van der Aa, seven EU member states had no criminal offence for stalking in 2016. Also see European Parliamentary Research Service 2017, 28.

⁹⁶ European Commission 2015.

⁹⁷ See also the European Parliament resolution of 28 November 2019 on the EU's accession to the Istanbul Convention and other measures to combat gender-based violence, 2019/2855(RSP). For a more detail presentation of the steps taken by the EU, including the adoption of two decisions of the Council on the signing of the Convention, see De Vido 2020, 66f.

⁹⁸ Ulrich/Rössl 2017.

⁹⁹ Bonewit/De Santis 2016, 41.

¹⁰⁰ De Vido, 2016, 87.

¹⁰¹ Article 3 (e) in conjunction with Article 3 (a) and (b) of the Istanbul Convention. The explanations stipulate that only women and girls can be victims of violence against women; men, women and children, however, can be victims of domestic violence. See Explanatory Report of the Istanbul Convention, para 45.

¹⁰² Nousiainen/Chinkin 2015, 63.

¹⁰³ *Ibid.*, 133.

¹⁰⁴ Article 1 (a) (i) of Directive 2012/29.

¹⁰⁵ Article 3 (a) of the Istanbul Convention.

¹⁰⁶ Group of Experts on Action against Violence against Women and Domestic Violence 2019, paras 5 und 10(a).

¹⁰⁷ *Ibid.*, paras 7 and 10(b).

¹⁰⁸ *Ibid.*

¹⁰⁹ Recital 19 of Directive 2012/29.

¹¹⁰ European Commission 2020a, 4; *ibid.*, 11.

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