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HOW THE NEW EUROPEAN UNION  
DIRECTIVE ON VIOLENCE AGAINST WOMEN  
STANDS COMPARED TO THE ISTANBUL  
CONVENTION, AND WHAT ALBANIA COULD  
LEARN FROM IT

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Gender-based violence is a scourge on humanity. It's up there with pressing global issues like climate change, hunger, and peace, with it oftentimes being exacerbated during these disaster settings. Protecting women and girls from all forms of violence, now estimated to affect 1 in 3 women in the EU, requires a multidisciplinary approach, and from the legal standpoint, the international community has set some clear standards in this regard to be followed at the national level.

The first and most comprehensive European standard comes from the Council of Europe Convention on preventing and combating violence against women and domestic violence, this year also marking the 10th anniversary of its entry into force, and it is usually referred to as the Istanbul Convention after the city in which it opened for signature in 2011, despite Türkiye's track record on protecting women and its controversial withdrawal from the Convention in 2021. The Republic of Albania is among the first countries to have signed the Istanbul Convention and later ratified it in the Assembly on 4 February 2013, with no reservations.

The Convention also provides for the accession of the European Union, and while the EU signed it on 13 June 2017, the process was blocked for several years, until more recently when the Council, with Parliament's consent, committed to ratifying the Convention with the two June 2023 decisions, and it entered into force for the EU on 1 October 2023, becoming the 38th Party, but only with regard to matters in the area of judicial cooperation in criminal matters, asylum and non-refoulement, as well as institutions and

public administration of the EU, but not substantive criminal law. Six EU Member States – Hungary, Bulgaria, Czechia, Slovakia, Latvia, and Lithuania – have signed the Convention but have not yet ratified it.

The limited application of the Istanbul Convention for the EU was due to the latter's plans for establishing for the first time its own rules on combating gender-based violence, with negotiations for a directive on violence against women and domestic violence starting in 2022. The Commission proposal text showed great potential in addressing sexual violence by requiring the criminalization of rape based on the lack of consent element and female genital mutilation, similar to the Istanbul Convention, and notably focusing on novel forms of violence like certain types of cyberviolence crimes, which are not specifically addressed by the Convention.

However, the agreed text of Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence (hereinafter "the VAW Directive"), which entered into force on 13 June 2024, fell short of the proposed criminal law standard, mainly by omitting ex Article 5 on rape and the elements of valid sexual consent, which would have had to be transposed by those six states not party to the Istanbul Convention until June 2027.

An opportunity arises for Albania in this regard, whose criminal law is somewhat in line with the Istanbul Convention, to further modernize it by also reflecting the VAW Directive's standards into the current and the new penal code, especially now with the opening of the Fundamentals' Cluster of negotiations.

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## Criminal Law Standards of the Istanbul Convention and the VAW Directive

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### a. The Istanbul Convention

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The landmark Istanbul Convention is known for defining in Article 3 violence against women as a violation of human rights and a form of discrimination against them, as well as for legally recognizing for the first time four types of gender-based and domestic violence: physical, psychological, economic, and sexual violence. [1] The first three are elements of domestic violence per Article 130/a of the 1995 Albanian Penal Code [2], as amended, which was added in 2012 and amended twice.

While the Convention provides many comprehensive social and institutional measures and policies, the focus of this article will be on Chapter V regarding substantive criminal law. The section starts off with Article 33 concerning psychological violence, which aptly defines it as “[...] the intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats,” known for its subtlety yet having a detrimental impact on the women and girl victims, sometimes far greater than that of physical violence (Article 35) alone. Article 130/a clearly uses the Convention’s terminology when referring to “violating their psychological integrity” in the first and second paragraphs, amended in 2020, also noted by the Convention’s main monitoring mechanism, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) in its 2024 first thematic evaluation report on Albania [3].

Stalking, as another form of psychological violence, is addressed in Article 34 of the Convention, which Albania criminalized in 2012 with Article 121/a of the Penal Code, also applying a broader *modus operandi*, not simply causing the victim to fear for their personal safety but alternatively causing them to change their lifestyle due to the harassment, this way going beyond the minimum rules.

Particular attention should be given to Article 36 of the Convention titled “Sexual violence, including rape,” with which the Albanian Penal Code’s alignment is questionable. This provision emphasizes the “non-consensual” element of sexual violence and rape, requiring that valid sexual consent be freely given and that no coercive circumstances be present [4], with some reference also to the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention), which Albania has also ratified. Paragraph 3 requires that the *modus operandi* be also applied to sexual acts committed against former or current spouses or partners, recognizing the prevalence of intimate partner sexual violence.

In Albania’s case, Section VI of the Penal Code titled “Sexual Crimes” (hereinafter “the Sex Crimes Section”) still mostly uses a force-based element for rape rather than a consent one, along with the outdated term “homosexual relations,” also noted by GREVIO, urging reforms in this section in alignment with the Convention [5]. After its ratification, two amendments were made in the Sex Crimes Section in May 2013. The consent element now only appears in spousal rape based on Article

36(3) of the Convention, provided in Article 102, “Forcible sexual relations with female adults,” though as if privileging married and cohabitating people using a higher standard of protection as opposed to “regular” adult females with the force element, in the same paragraph and sentence. The other amendment was the addition of Article 107/a, vaguely titled “Sexual violence,” which criminalizes “committing sexual violence, through acts of a sexual nature on the body of another person with objects [...]” [6], which seems like a redundant addition, especially considering that there has only been a single criminal proceeding registered under Article 107/a in over a decade [7].

Forced marriage in Article 37 of the Convention was transposed after ratification in Article 130 of the Penal Code, currently titled “Forcing or preventing cohabitation or entering or dissolving a marriage,” which before this amendment only punished the forced dissolution of a marriage but not the entering, and it additionally includes “preventing” in its *modus operandi*. The Istanbul Convention also addresses sexual and reproductive harm vis-à-vis female genital mutilation, forced abortion and forced sterilization. The first is generally covered by Article 88 of the Penal Code, “Intentional grievous bodily harm,” and the others are specifically criminalized in Articles 93-95 [8]. Sexual harassment of women and girls is addressed in Article 40 of the Convention, defining it as “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.” [9]

Its characteristic lies with the fact that it’s a form of sexual violence that not only violates a person’s sexual rights [10], but their sense of dignity as well, and the unwanted behavior is often discriminatory in nature or gender-based. [11] Sexual harassment was criminalized in 2013 following the Convention’s ratification, with Article 108/a of the Penal Code. It uses nearly the same definition, although the term “unwanted,” which implies lack of consent, is not used, and it only includes the effect of the violation and not the purpose or intent. The second paragraph provides aggravating circumstances like cooperation, recidivism, multiple victims, and when the victim is a child, per the obligations of Articles 41 and 46 of the Convention.

Lastly, an interesting provision is Article 42, which prohibits the justification of gender-based violence in criminal proceedings on the basis of culture, custom, religion, tradition, or so-called “honor,” none of which are currently recognized by the Albanian Penal Code.

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## b. The VAW Directive

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Drawing on previous experience with the standards of the Child Sexual Abuse Directive (2011/93/EU) and the Human Trafficking Directive (2011/36/EU), the newly adopted VAW Directive, *inter alia*, establishes minimum rules regarding the definition of criminal offenses concerning sexual exploitation of women and girls, and more notably, cybercrimes. [12] The VAW Directive in Article 2 provides practically the same definitions for violence against women and domestic violence as the Istanbul Convention does, and in Chapter 2 it provides model criminal offenses for them.

Starting off with female genital mutilation in Article 3, which is defined verbatim as the Convention's, but in Recital 15 of the VAW Directive's, Member States are urged to specifically address this abusive behavior in their criminal laws. [13] The same goes for Article 4 on forced marriage. However, unlike the Convention, the VAW Directive doesn't provide definitions for forced abortion and forced sterilization.

Moving on to the novelty brought by the VAW Directive, which are cyberviolence crimes, Article 5, aptly titled "Non-consensual sharing of intimate or manipulated material," addresses two growing phenomena that often result in significant psychological and/or economic harm for the victims, who are mostly women and girls, colloquially known as "revenge porn" and "sextortion" [14]. The first refers to the internet dissemination of private sexually explicit photos or videos of one or more people without their knowledge and consent, usually by former or current intimate partners, and the second is simply the threat of doing so unless the victim fulfills the sextortionist's demands. Paragraph 1(b) also addresses manipulated sexual materials, or "deepfakes," which depict the victim as though they are engaged in sexually explicit activities [15], usually through sophisticated generative artificial intelligence programs. None of these behaviors are specifically criminalized in the 1995 Albanian Penal Code.

While the Istanbul Convention addresses stalking, the VAW Directive addresses "cyber stalking" in Article 6, or stalking using information and communication technologies (ICT). The *modus operandi* includes repeatedly or continuously placing a person under surveillance using ICT, as well as tracking or monitoring that person's movements and activities, with the effect being "where the

conduct is likely to cause serious harm to that person," as opposed to "fear for personal safety." The cyber element is a standard that greatly complements the Istanbul Convention's counterpart provisions since it doesn't specifically address it, although through broad interpretation the Convention's explanatory report and GREVIO's General Recommendation No. 1 on the digital dimension of violence against women affirm that the provisions cover cyberviolence as well [16], which aren't binding.

Article 7 of the VAW Directive addresses different forms of cyberharassment, including online threats to commit criminal offenses (para. a); multiple people publicly threatening or insulting a person (para. b); sending unsolicited images or videos of genitals to a person (para. c), which is a form of online sexual harassment known as "cyberflashing" [17]; and the public dissemination of a person's personal data, without their consent, for the purpose of inciting other people to cause physical or serious psychological harm to that person (para. d), a phenomenon known as "doxing." [18] Definitions conclude with Article 8, titled "Cyber incitement to violence or hatred," which targets a group of people or a member of such a group on the basis of gender, by publicly disseminating such inciting materials using ICT. This is the second international instrument to address this kind of behavior, after the 2003 Additional Protocol to the Budapest Convention concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, which has been ratified by the Republic of Albania in 2004 and transposed into the Penal Code.

Chapter 2 of the VAW Directive ends with provisions on aiding and abetting, penalties, as well as aggravating circumstances, similar to the ones in the Istanbul Convention.



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## Missed Opportunities in the VAW Directive

Despite the positive standards established with the adopted VAW Directive, especially regarding cyberviolence, one would hope that even more inspiration was taken from the Istanbul Convention in order to reinforce the European standard a decade later. Apart from the general “dilution” of the text, this article refers to certain provision proposals for the Directive that ultimately didn’t make the final cut.

One of them would be the first ever definition for cyberviolence, which in the promising 2022 Commission proposal was defined as “[...] any act of violence covered by this Directive that is committed, assisted or aggravated in part or fully by the use of information and communication technologies.” [19] It’s not clear why this simple definition was excluded from the adopted text of the VAW Directive, especially considering that the term is mentioned several times throughout and that the offenses provided are all types of cyberviolence.

A major missed opportunity for the VAW Directive was the omission of the harmonized rape provision, which ultimately was blocked in the Council by France and Germany [20]. This is quite unfortunate since the rape provision took the Istanbul Convention standard a step further by also including elements of valid sexual consent like its revocability as well as the concept of the “capacity to consent” and its factors or coercive conditions. [21] [22]

Sharing the disappointment, 13 civil society organizations are already pushing for amendments to the VAW Directive in order to extend its scope [23], making it live up to its ambitious aim of combating violence against women and domestic violence. Valid proposals include adding back the harmonised definition of consent-based rape, harmonised definitions of forced abortion, forced sterilization, and sexual harassment [24] like the Istanbul Convention, as well as the exploitation of prostitution [25]. Some reassurance, however, comes from the application of the non-regression clause in Article 48 of the VAW Directive, which prohibits Member States from reducing the minimum level of protection afforded by the Directive.

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## The Albanian Opportunity

While acknowledging the progress Albania has made throughout the years regarding the compliance of its legal framework with European standards, the above comparative analysis of these standards ultimately serves to benefit the country by highlighting areas for further improvement. In the European Commission’s 2023 screening report for Albania, concerning Chapter 23 on Fundamental Rights and more specifically on Gender Equality and Human Rights, the Commission also confirms that the Albanian legal framework on gender-based violence is

not fully aligned with the Istanbul Convention, urging amendments to the Penal Code by integrating lack of consent as a constitutive element of rape based on the Convention, as well as based on the 2022 Commission proposal [26], and while the rape offense in the VAW Directive has now been removed, the proposal text is still a good model to follow. Ensuring the framework's full alignment with the EU acquis and European standards is especially crucial now with the COREPER's decision for Albania to open the Fundamentals Cluster of accession negotiations with the European Union on 15 October 2024 [27].

An important legal proposal for amendments to the Sex Crimes Section of the Penal Code was submitted in January of last year by a lawmaker in collaboration with civil society on the matter of protecting children from sex crimes. While most of the changes are positive, such as raising the age of sexual consent from 14 to 16 and criminalizing other acts, unfortunately the proposal didn't include the substitution of the force element of rape with the consent one. The draft law has not yet been put on the agenda of the Albanian Assembly, despite a priority request.

On the other hand, a 2023 confidential draft of the new Albanian penal code shows great potential overall in the area of combating gender-based violence. This includes harmonised definitions on domestic violence, cyberstalking, non-consensual intimate image abuse as an aggravating circumstance, as well as the specific criminalization of female genital mutilation. More notably, a complete overhaul of the Sex Crimes Section renamed to "Criminal Offenses against Sexual Integrity [28]," comprising harmonised definitions on

sexual consent, sexual violence, rape, sexual harassment, sextortion, and other related concepts and offenses, with clear inspiration from the 2022 European Commission proposal as well as from the modern penal code of our neighbor, the Republic of Kosovo. Although these reforms to the Albanian criminal law are significant and more than welcome if kept unchanged, it should be noted that the process for the adoption of the new penal code could take several years, while Albania needs to act now by reforming the current Penal Code in line with the EU acquis and European standard recommendations, making combating and preventing gender-based violence a national priority.

As an overview of the comparative analysis presented in this article, strengths and shortcomings can be identified in both the European standards, old and new. While the comprehensive Istanbul Convention has, for the most part, managed to withstand the test of time, serving as the international benchmark on gender-based violence, so much so as to even have warranted the European Union's accession, however limited, it may now require binding amendments to fully embrace the digital dimension of violence against women and not resort to broad interpretations of the existing criminal law provisions.

Regarding the VAW Directive, as with every far-reaching legal development, sometimes the consensus isn't fully there, especially in the international arena. When the Directive was finally adopted in May 2024, it brought innovation with its direct focus on gender-based cyberviolence offenses, in some ways perfectly complementing what the Istanbul Convention lacked. However, I join in the discontent of most researchers and advocates regarding the surprising exclusion from it of the harmonised consent-based rape provision proposed by the Commission, which would have improved upon its counterpart in the Istanbul Convention, and with that, I also join in proposals that would serve to realize the Directive's full potential. Nevertheless, as things stand, the VAW Directive does provide added value in protecting women and girls from violence through criminal law.

Albania's lesson in all of this, now with a clear path to EU membership, is that there are no excuses for not aligning its criminal law fully with the standards of the Istanbul Convention and the VAW Directive. Inspired by these European standards but also aiming to go beyond, Albania should implement immediate and necessary reforms to the current Penal Code regarding sexual violence, primarily by substituting the force-based element of rape with a harmonised consent-based one throughout the Sex Crimes Section, and not wait for the new penal code since gender-based violence will continue to harm Albanian women and girls, be it the old code or the new.

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