



UNICA

UNIVERSITÀ
DEGLI STUDI
DI CAGLIARI



Università di Cagliari

UNICA IRIS Institutional Research Information System

This is the Author's *accepted* manuscript version of the following contribution:

Laura Candiotta (2023), "The Preamble". In *Preventing and Combating Violence Against Women and Domestic Violence. A Commentary on the Istanbul Convention*, eds. S. De Vido, M. Frulli, pp. 75-83. Cheltenham: Elgar Commentaries in Human Rights.

The publisher's version is available at:

<https://doi.org/10.4337/9781839107757.ch06>

It is deposited under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way.

Without limiting the author's and publisher's exclusive rights, any unauthorised use of this work to train generative artificial intelligence (AI) technologies is expressly prohibited.

When citing, please refer to the published version.

The Preamble to the Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence

**Laura Candiotta, University of Pardubice, Centre for Ethics; Free University of Berlin,
Institute of Philosophy
laura.candiotta@upce.cz**

Introduction

In this chapter, I analyse the functions, structure, and main topics of the Preamble to the European Convention on preventing and combating violence against women and domestic violence. Framing the analysis into the role of the preambles in international treaties, I stress the narrative and aspirational functions of the Preamble to the Istanbul Convention in section 1. Then, exploring the main topics and their discussion in the Explanatory Report to the Convention, I describe the preamble's structure as made of four components (context, motivation, definition of the problem, aspiration) in section 2. Finally, I discuss the core conceptualisation of violence against women as structural in section 3. In doing so, I provide a philosophical interpretation of violence against women as essentially framed within power relations' dualistic structures.

1. The Preamble's functions

A preamble is a short introduction to the articles that expresses the motivations at the ground of the treaty-making process. Although preambles do not carry normative force in international law,¹ they still play fundamental functions. As it has been highlighted by Kent Roach,² preambles can have narrative, aspirational, and professional uses. The narrative use is when preambles explain why treaties have been adopted or the facts that prompt their drafting. The aspirational use expresses the goal that the treaties aim to achieve. The professional use is when preambles provide guidance to the interpretation of the law.

Conventions usually have preambles as well. A convention is the set of rules for the parties agreeing to the Convention to deal with an issue of common interest, in our case, violence against women and domestic violence. It is drafted and executed under an international or regional body, as, in our case, the Council of Europe. Since a convention is an agreement among different countries, it

¹ See on this Laura Candiotta & Sara De Vido, "The persuasive force of ancient and contemporary preambles. From Plato to International Law" (2016), *Rivista di Filosofia del diritto*, 145- 146.

² Kent Roach, "The Uses and Audiences of Preambles in Legislation" (2001), *McGill Law Journal* 47, 1: 129-159.

is pivotal to express the common problem that the states want to solve thanks to the adoption of the Convention. The Preamble to the Istanbul Convention plays precisely this role in making explicit the common issue, developing a shared understanding of the problem, and asserting the joint resolution of solving the problem. As it is said in the Explanatory Report, section 25:

The Preamble sets out the basic aim of the Convention: the creation of a Europe free from violence against women and domestic violence. To this end, it firmly establishes the link between achieving gender equality and the eradication of violence against women. Based on this premise, it recognises the structural nature of violence against women and that it is a manifestation of the historically unequal power relations between women and men. Consequently, the Preamble sets the scene for a variety of measures contained in the Convention that frame the eradication of violence against women within the wider context of combating discrimination against women and achieving gender equality in law and in fact.

In addressing the problem, the Preamble thus assumes narrative and aspirational functions. It explains why the Convention is needed and makes clear what its aims are. As we will see in more detail in the next section, the motivation is to acknowledge the structural dimension of the violence against women in Europe. The aspiration is the one of making Europe free from violence against women and domestic violence. The motivations and aspirations are expressed with “-ing” form verbs, thus making explicit, also from a stylistic point of view, the active, continuous, and progressive commitment of the Council of Europe’s member states and the other signatories.

Although a preamble is not binding, the aspiration function establishes a fundamental commitment. A commitment effectively links the present and the future in setting a plan of action in order to attain what the signatories aspire. The commitment of the Istanbul Convention is grounded in the recognition of a problem (recognising that...³) and in the motivation and resolution to change (“condemning all forms of violence against women and domestic violence”). Therefore, the narrative and the aspirational uses are strictly interlaced in serving the fundamental function of building a joint commitment among the signatories,⁴ emphasizing the need for action in favour of the protection of women.⁵ The Preamble expresses a “commitment”, not mere “intentions”. In a “joint commitment”

³ “Recognising that the realisation of *de jure* and *de facto* equality between women and men is a key element in the prevention of violence against women”; “Recognising that violence against women is a manifestation of historically unequal power relations between women and men”; “Recognising the structural nature of violence against women as gender-based violence”; “Recognising, with grave concern, that women and girls are often exposed to serious forms of violence such as domestic violence”; “Recognising the ongoing human rights violations during armed conflicts that affect the civilian population”; “Recognising that women and girls are exposed to a higher risk of gender-based violence than men”; “Recognising that domestic violence affects women disproportionately”; “Recognising that children are victims of domestic violence”.

⁴ “The Preamble reaffirms the commitment of the signatories to human rights and fundamental freedoms”, *Explanatory Report*, 22.

⁵ The protection of women is in fact the first purpose stated in the first article of the Istanbul Convention.

the members need to fully endorse their obligations and fully align their joint action.⁶ What really matters in international law are the obligations clearly accepted by states; the preambles explain why treaties have been adopted. But the recognition of a problem (the narrative use) also implies the need for its resolution and thus the signatories' commitment to working for it. Precisely, this is what the aspiration behind the law does. The aspiration is effectively remarked at the end of the Preamble and before the enunciation of the articles: “aspiring to create a Europe free from violence against women and domestic violence”, the member states of the Council of Europe and the other signatories have agreed to the Convention.

The Preamble to the Istanbul Convention frames this commitment within the context of precedents international legal instruments as Conventions, Protocols, and Recommendations. This can serve a professional use, but it also highlights the historical commitment to combating and preventing violence against women. In particular, it is essential to mention the explicit reference to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979), the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, ETS No. 5, 1950), and the recollection of the basic principles of international humanitarian law. These three references stress that the problem is not new (the CEDAW has been adopted in 1979, and the ECHR in 1950), that the scope of the issue is well beyond Europe, that the fight against women violence is a fundamental human right, and that the human rights protection is guaranteed by international law.

Finally, the Preamble can play a civic purpose as well. Being written in plain language, the Preamble to the Istanbul Convention can catalyse the attention of people to the need to combat violence against women and domestic violence. The Istanbul Convention's direct recipients are not the individuals - the fundamental role of changing power relations that bring structural violence belongs to the state members in their many and different institutional bodies. Nevertheless, preambles can persuade the persons (as natural persons and as members of associations) of the Convention's importance and thus implement the individuals' acceptance and understanding of the law. Eventually, they can contribute to changing their attitude toward the issue.⁷

⁶ For a philosophical distinction between “commitment” and “intention” and for the analysis of “joint commitments”, see Margaret Gilbert, *Joint Commitments. How We Make the Social World* (OUP 2013).

⁷ On the persuasive role of preambles states to implement treaty provisions and to justify the adoption of a treaty to citizenships, see Laura Candiotta & Sara De Vido, “The persuasive force of ancient and contemporary preambles. From Plato to International Law” (2016), *Rivista di Filosofia del diritto*, 127-150.

2. The contents of the Preamble

The Preamble to the Istanbul Convention can be divided into four sections. In the first part, the Convention's context is delineated. Then, there is the declaration of the motivation that prompted the Convention-making process, along with the definition of the problem. Finally, the Convention's aspiration is remarked.

As for the context, the Istanbul Convention is framed within those legal instruments that prevent and condemn women's discrimination. These instruments are recalled ("recalling the Convention for the Protection...", "Recalling the following recommendations..."), taken into account ("Taking account of the growing body...") and regarded ("Having regard to the Rome statute..."). So they constitute the legal basis of the Convention and the context in which the Convention brings new instruments and improvement. As specified in section 22 of the Explanatory Report, the preamble "recalls only the most important international legal instruments that directly deal with the scope of this Convention in the framework of the Council of Europe and the United Nations". As I have already said in the previous section, the CEDAW and the ECHR are among them and thus,

the Preamble sets the scene for a variety of measures contained in the Convention that frame the eradication of violence against women within the wider context of combating discrimination against women and achieving gender equality in law and in fact. It should also be noted that the term "discrimination against women" should be interpreted as constituting "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" as provided in Article 1 of CEDAW.⁸

It follows a declaration of strong impact about the motivation at the ground of the Convention: "Condemning all forms of violence against women and domestic violence". In doing so, the Preamble envisages the Convention's law-biding character, thus building the scene for the articles exposed afterward. But the coercive force of the Convention should also be justified, and the Preamble pursues this aim in the third part dedicated to the definition of the problem. Violence against women is "recognised"⁹ with "grave concern" as widespread but still unseen.

Violence against women, including domestic violence, is one of the most serious forms of gender-based violations of human rights in Europe that is still shrouded in silence. Domestic violence – against other victims such as children, men and the elderly – is also a hidden phenomenon which affects too many families to be ignored.¹⁰

⁸ *Explanatory Report*, 25.

⁹ This is the core action verb of the third part; it is used 7 times, always at the beginning of a new sentence.

¹⁰ *Explanatory Report*, 1.

The narrative is built upon many and different elements. The first recalls the need for the recognition *de jure* and *de facto* of the equality between women and men. This is seen as the key element for the prevention of violence against women. The equality between women and men is pursued because “violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women”. These unequal power relations are recognised as having a structural nature, which means that they are expressed in the society’s making of and its institutions. Structural violence is thus a social mechanism that forces women “into a subordinate position compared with men”. Structural violence against women is said to be “gender-based”. This means that this violence is directed to women as women, as in the extreme case of femicide where the motive of the murder is precisely the gender of the victim.¹¹

Then, there is a list of the many faces of violence against women. This list serves the function of bringing concreteness to the problem that can erroneously seem distant in its structural dimension.¹² It is also recalled that these violent actions are serious violations of women and girls’ human rights, thus establishing a connection to the first section of the Preamble. It is also specified that violence against women is not only perpetrated in ordinary life, but also during armed conflicts that affect the civilian population.¹³ This does not limit the structural character of the violence against women that, as we will see better in the next section, is rooted in the society’s power relations. On the contrary, it adds items to the list, thus also including “systematic rape and sexual violence and the potential for increased gender-based violence both during and after conflicts”.

Finally, it is clarified why the Convention is primarily directed to the violence against women and not to violence indiscriminately. The reason is that “women and girls are exposed to a higher risk of gender-based violence than men” and that “domestic violence affects women disproportionately”. It is not denied that domestic violence can also be directed to other victims (men, children, elderly¹⁴). But it is highlighted that women are the most numerous victims. This is not just a phenomenological or data-based recognition but, again, a way to express the structural dimension of the violence against

¹¹ The need of considering not only women, but homosexual, bisexual, trans and non-binary individuals as the victims/survivors under this Convention can emerge from article 4.3. where it is said that the implementation of the provisions of the Convention should be secured without discrimination on any ground - explicitly mentioning sexual orientation and gender identity too. See Sara De Vido, *Donne, violenza e diritto internazionale. La Convenzione di Istanbul del Consiglio d’Europa del 2011 (Mimesis 2016)*.

¹² “(...) serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called “honour” and genital mutilation.”

¹³ This is also a reason for requesting asylum. See Siobhan Mullally, “Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?” (2011), *International Comparative Law Quarterly* 60, 459-484.

¹⁴ It should be noted that the elderly is mentioned in the Explanatory Report, but not in the Preamble.

women. It is the very same structure of the society built upon the asymmetric dualism between men and women that produces this specific type of violence that is gender-based. The narrative ends with the fourth part that shortly but effectively asserts the aspiration “to create a Europe free from violence against women and domestic violence”.

3. The structural nature of violence against women

In this section, I dive into the Preamble's core topic, namely the recognition of the structural nature of violence against women. This acknowledgement is a fundamental step in ascribing to the problem its paramount importance since it explains that it is not merely by accident that women are victims of violence more than men. On the contrary, structural violence stresses that the cause should be seen in the society's arrangement as essentially dualistic. I employ the notion of “dualism” for expressing the fundamental dichotomic structure of patriarchal society where power relations between men and women are conceived as an ongoing set of domination relations of men over women.¹⁵

Recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.

Dualism is here taken as a hermeneutical tool for disclosing the main feature of power relations between men and women, namely the one of conquest, domination, and subjugation in the name of men self-affirmation:

Recognising the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.

Dualism inevitably turns into the victory of one gender (male) over the other (female). In the identity struggle, dualism negates differences and becomes the domination of the One.¹⁶ In the same

¹⁵ See on this, Laura Candiotta “Il dualismo strutturale e la natura-cultura della violenza contro le donne. Una lettura filosofica del preambolo alla Convenzione di Istanbul”, in Laura Candiotta, Sara De Vido (eds.), *Home Made Violence* (Mimesis 2016).

¹⁶ Luce Irigaray, *Éthique de la différence sexuelle* (Les Éditions de Minuit 1984). For a critical analysis of Irigaray's view, especially regarding its ethical and political significance, see Laura Candiotta, Hanne De Jaegher “Love In-Between” (2021), *Journal of Ethics*, 501/524, and Laura Roberts, *Irigaray and Politics* (Edinburgh University Press 2019).

vein, Val Plumwood has taken hyperseparation as the power structure that uses separation (male/female, culture/nature, man/animal) for overpowering the first object on the second.¹⁷ Hyperseparation leads to objectification: the subordinate is incorporated in the system of reference of the dominant and becomes his tool.¹⁸ Such identarian prevarication is conceived as natural,¹⁹ when, instead, is a historical social mechanism, as recognised by the Convention.

As a social mechanism, structural violence against women determines not only the environments in which individuals interact (for example, the gender pay gap in the job market²⁰) and how groups of people are conscripted and positioned with and against each other. The structural nature of violence does not make it far from the individuals' lives, but it permeates them at different levels. Regarding domestic violence, it can be argued that it penetrates the family affective arrangement, namely the place and manner in which the family members feel each other's and affectively engage in daily routines.²¹ Being family the first institution of society, looking at domestic violence is thus a political matter. Therefore, to be incorporated into the violence structure is not only the woman but also the private sphere, including affectivity and sexuality.

We can no longer think of the political as distinct from the personal²², nor holding the public/private divide.²³ For better or worse, the permeability between these two dimensions has made our actions political. At the same time, the rewriting of gender identity, necessary for the recognition of the differences as a tool to combat gender-based violence, cannot happen between the domestic walls only. Domestic violence is a form of structural violence. So, it is necessary a political work on

¹⁷ Val Plumwood, *Feminism and the Mastery of Nature* (Routledge 1993).

¹⁸ The most discussed case of objectification is pornography. See on this, Andrea Dworking, *Pornography: Men Possessing Women* (The Women's Press 1981), Catherine McKinnon "Sexuality, Pornography, and Method: 'Pleasure under Patriarchy'" (1989), *Ethics* 99, 314-346, and Rae Langton, "Feminism in epistemology: Exclusion and objectification", in Miranda Fricker and Jennifer Hornsby (eds.), *The Cambridge Companion to Feminism in Philosophy* (Cambridge University Press 2000).

¹⁹ "normal and natural social practice", Sally Engle Merry "Constructing a Global Law-Violence against Women and the Human Rights System" (2003). *Law & Social Inquiry* 28: 941-977.

²⁰ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/women-labour-market-work-life-balance/womens-situation-labour-market_en, accessed on 16/11/2020.

²¹ About the notion of "affective arrangement", see Jan Slaby *et al.* "Affective Arrangements" (2017), *Emotion Review*. About violence in intimate relationships, see Bell Hooks "Violence in Intimate Relationships: A Feminist Perspective" (2007) in. Laura L. O'Toole, Jessica R. Schiffman, and Margie L. Kiter Edwards (eds.), *Gender Violence. Interdisciplinary Perspectives* (New York University Press 2007).

²² "The personal is political" has been an important feminist motto in the Seventies, see Carol Hanisch, "The Personal Is Political" in Shulamith Firestone and Anne Koedt (eds.), *Notes from the Second Year: Women's Liberation* (Radical Feminism 1970).

²³ The traditional "public/private" distinction, which considered the domestic sphere outside the range of the sovereign state, has been progressively dismantled, also thanks to the evolution of the jurisprudence of the courts on human rights and the activity of the UN committees. See Bonita Meyersfeld, *Domestic Violence and International Law* (Hart 2012).

the structure itself to combat it. The Explanatory Report specifies that violence against women “affects not only women adversely, but society as a whole and that urgent action is therefore required.” (26) This means that violence against women and domestic violence is not just a “women issue”. On the contrary, it engenders the well-being of the entire society.

4. Conclusion

Though not compulsory, the Preamble to the Istanbul Convention plays fundamental functions for implementing international legal instruments in the state members' national systems and justifying the bindingness of the law to its recipients. In this paper, I highlighted the narrative and aspirational functions in particular, framing them within the Istanbul Convention's primary motivation, namely combating violence against women and domestic violence. I also stressed the violence against women's core cause recognised by the Convention, that is its structural nature, and discussed it with dualism as a hermeneutical tool. Almost ten years have passed since the adoption of the Istanbul Convention, and the state members and the signatories have undertaken many important actions.²⁴ Nonetheless, we continue to assist to an increasing violence against women and girls, in terms of murder and rape, almost daily in the news. Our societies are permeated by structural inequalities, from women's access to education and health-care to the job market.²⁵ The Istanbul Convention, although being a very advanced tool in terms of aspiration and commitment to combat violence against women and domestic violence, cannot solve the entire problem. A change in the society as a whole is required, at many levels and not only institutional. Also the unwritten laws of gender inequality that pervade many of humans interactions should change. This requires a multiagential engagement in the promotion of gender equality in all the sectors, from education to labour, passing through the health-care, free-time, and the media industry. The Istanbul Convention can support this radical cultural change, but is necessary the strong commitment of all of us for achieving it.

Acknowledgement

The research for this paper was generously funded by the Alexander von Humboldt Foundation under the Project BOND at the Free University of Berlin. The subsequent revisions have been done while working at the Centre for Ethics of the University of Pardubice.

²⁴ For monitoring the outcomes, also regarding specific countries, see the GREVIO reports: <https://www.coe.int/en/web/istanbul-convention/country-monitoring-work>, accessed on 16/11/2020

²⁵ Especially regarding the violence against women's health, see Sara De Vido, *Violence Against Women's Health in International Law* (Manchester University Press 2020).

Reference List

Sources

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979.

Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 11 May 2011.

Explanatory Report to the Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence.

Secondary Literature

Candiotta, L. 2016. "Il dualismo strutturale e la natura-cultura della violenza contro le donne. Una lettura filosofica del preambolo alla Convenzione di Istanbul", eds. Laura Candiotta, Sara De Vido, pp. 89-103. *Home Made Violence*. Milano: Mimesis.

Candiotta, L., De Jaegher, H. 2021. "Love In-Between". *Journal of Ethics*, 25 (4), special issue "The Ethics of Love", ed. A. Archer, pp. 501-524. <https://doi.org/10.1007/s10892-020-09357-9>.

Candiotta, L., De Vido, S. 2016. "The persuasive force of ancient and contemporary preambles. From Plato to International Law". *Rivista di Filosofia del diritto*, 1: 127-150.

De Vido, S. 2016. *Donne, violenza e diritto internazionale. La Convenzione di Istanbul del Consiglio d'Europa del 2011*. Milano: Mimesis.

De Vido, S. 2020. *Violence Against Women's Health in International Law*. Manchester: Manchester University Press.

Dworkin, A. 1981. *Pornography: Men Possessing Women*. London: The Women's Press.

Engle Merry, S. 2003. "Constructing a Global Law-Violence against Women and the Human Rights System". *Law & Social Inquiry* 28: 941-977.

Gilbert, M. 2013. *Joint Commitments. How We Make the Social World*. New York: Oxford University Press.

Hanisch, C. 1970. "The Personal Is Political", in *Notes from the Second Year: Women's Liberation*, eds. Shulamith Firestone and Anne Koedt. New York: Radical Feminism.

Hooks, B. 2007. "Violence in Intimate Relationships: A Feminist Perspective". In *Gender Violence. Interdisciplinary Perspectives*, eds. Laura L. O'Toole, Jessica R. Schiffman, and Margie L. Kiter Edwards, 269-275. New York and London: New York University Press.

Irigaray, L. 1984. *Éthique de la différence sexuelle*. Paris: Les Éditions de Minuit.

- Langton, R. 2000. "Feminism in epistemology: Exclusion and objectification". In *The Cambridge Companion to Feminism in Philosophy*, eds. Miranda Fricker and Jennifer Hornsby, 127-145. Cambridge: Cambridge University Press.
- McKinnon, C. A. 1989. "Sexuality, Pornography, and Method: 'Pleasure under Patriarchy'". *Ethics* 99: 314-346.
- Meyersfeld, B. 2012. *Domestic Violence and International Law*. Oxford and Portland: Hart.
- Mullally, S. 2011. "Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?". *International Comparative Law Quarterly* 60: 459-484.
- Plumwood, V. 1993. *Feminism and the Mastery of Nature*. London-New York: Routledge.
- Roach, K. 2001. "The Uses and Audiences of Preambles in Legislation." *McGill Law Journal* 47, 1: 129-159.
- Roberts, L. 2019. *Irigaray and Politics*. Edinburgh: Edinburgh University Press.
- Slaby, J., Mühlhoff, R., Wüschner, P. 2017. "Affective Arrangements", *Emotion Review*, <https://doi.org/10.1177/1754073917722214>