

THE EU ACCESSION TO THE ISTANBUL CONVENTION: THE ARGUMENT FROM THE ‘COMMON ACCORD’ PRACTICE

*KAROLINA KAJA KUBACKA**

KEYWORDS

European Union law, Istanbul Convention, common accord, Council of Europe, violence against women, international agreements

ABSTRACT

The main purpose of this article is to analyse the Council’s practice of ‘common accord’ as the argument behind the tardiness of accession to the Istanbul Convention by the European Union. It presents how political and legal factors condition the accession of the Istanbul Convention by the European Union. In light of the Court of Justice Opinion 1/19, there are no legal obstacles to the accession; therefore, the tardiness of ratification arose from the political context, which consists of the EU’s constitutional crisis, populists in power, and liberal decision-makers succumbing to them. Based on the sociological assumption, the case study confirms the existence of the practice of ‘common accord’ as an effect of the conditions mentioned above. Nevertheless, the social need to access the Istanbul Convention is urgent.

I. INTRODUCTION

The Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter: Istanbul Convention) is an international treaty signed on the 6th of April 2011. It entered into force on the 1st

* University of Wroclaw, Wroclaw, Poland; Email: kubacka.karolinakaja@gmail.com

of August 2014. Its purpose is to protect women against all forms of violence.¹ 34 members of the Council of Europe have ratified it, while 12 have signed it.² The Istanbul Convention is a far-reaching international legal instrument based on four pillars: prevention, protection, prosecution and co-ordinated policies.³ Decisions on a signature by the European Union (hereinafter: EU) were upheld in 2017,⁴⁵ but the Istanbul Convention is still in the process of being adopted.⁶ Officially, as of February 2023,^{7,8} the Council, under Swedish presidency, requested the consent of the European Parliament to adopt the decisions on the conclusion of the Istanbul Convention. Therefore, for now, it is almost certain that the accession will come to fruition, as it is very desirable within the Members of the European Parliament, as confirmed at the plenary session in February 2023.⁹

This article aims to analyse the Council's practice of 'common accord' as the argument behind the tardiness of the accession to the Istanbul Convention by the EU and the reasons for its existence. The 'common accord' is that all member states must agree to be bound by an international agreement, even if it is an act

¹ Council of Europe Convention (CETS) 210 on preventing and combating violence against women and domestic violence [2011] (Istanbul Convention)

² 'Chart of signatures and ratifications of Treaty 210' <www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210> accessed 6 May 2023

³ Council of Europe, 'The four pillars of the Istanbul Convention' <www.rm.coe.int/coe-istanbulconvention-brochure-en-r03-v01/1680a06d4f> accessed 26 November 2022

⁴ Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement [2017] OJ L 131/13

⁵ Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters [2017] OJ L 131/11

⁶ Council of the EU, 'Combating violence against women: Council requests the consent of the European Parliament to conclude the Istanbul convention' [2023] <www.consilium.europa.eu/en/press/press-releases/2023/02/21/combating-violence-against-women-council-requests-the-consent-of-the-european-parliament-to-conclude-the-istanbul-convention> accessed 1 March 2023

⁷ Council Decision (EU) 5523/1/23 of 13 February 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against woman and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement [2023] (not yet published in the Official Journal)

⁸ Council Decision (EU) 5514/23 of 9 February on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against woman and domestic violence with regard to institutions and public administration of the Union [2023] (forthcoming)

⁹ European Parliament, 'Interim report on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence' [2023] A9-0021/2023

where the EU has exclusive competence. In the case of the Istanbul Convention, in 2021, the European Parliament decided to ask about the legality of the practice of 'common accord' by submitting a request for an Opinion under Article 218(11) of the Treaty on the Functioning of the European Union (hereinafter: TFEU). In the first part, in order to examine why the practice existed for such a long time, I place the Istanbul Convention in the public international law system and within the EU legal order. Then, in the second part, the article presents the Council's practice of 'common accord', which existed for such a long time because political and legal conditions allowed it to exist. The Court of Justice of the EU (hereinafter: CJEU) examined the requirement of that practice within the Council concerning the conclusion of international agreements. In the third part, I conduct a case study, which consists of a scrupulous collection of qualitative data, its presentation, and an analysis. I chose this research method because this is an empirical study that helps us to understand a phenomenon — in this case, the accession of the Istanbul Convention by the EU in a political and legal context.¹⁰ In analysing the data, I refer to the sociological assumption (as a theoretical assumption)¹¹ and the theoretical basis which are legal ideas, that have already been interpreted sociologically by many scholars.^{12,13} In the present article, I also study the impact of populists in power and the EU's constitutional crisis on the conceptual recognition of the 'common accord'. I propose that European right-wing populists oppose ratification of the Istanbul Convention and liberals succumb to them. Therefore, the Istanbul Convention has not been acceded six years after the Council's decisions on the signature,^{14,15} despite the fact that the Council, the Commission, the European Parliament agreeably assumed for the whole time that the Convention should be concluded. The social need also requires that the Convention will finally apply to all member states.

¹⁰ R Yin, *Studium Przypadku w badaniach naukowych: Projektowanie i metody* (Joanna Gilewicz tr, Wydawnictwo Uniwersytetu Jagiellońskiego 2015) 48

¹¹ R Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25(2) *Journal of Law and Society*, 171

¹² M Weber, *Economy and Society* (Roth G, Wittich C trs, University of Chicago Press 1968)

¹³ E Ehrlich, K Ziegert, *Fundamental Principles of the Sociology of Law* (Routledge 2001)

¹⁴ Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement [2017] OJ L 131/13

¹⁵ Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters [2017] OJ L 131/11

I. THE ISTANBUL CONVENTION: A SYSTEMIC OVERVIEW

1.1. The Istanbul Convention as a Source of Public International Law

Understanding the position of the Istanbul Convention as a source of public international law is necessary to understand the legal context and reflections on the ‘common accord’ practice. The Istanbul Convention, as a document of the Council of Europe, is an international agreement under Article 2(1)(a) of the Vienna Convention on the Law of Treaties.¹⁶ The Council of Europe is an international organisation of European states; under its auspices, all 47 states have signed the European Convention on Human Rights (hereinafter: ECHR)¹⁷ and many other international agreements. The European Union is not a member of the Council of Europe by definition,¹⁸ as only countries can be members. For the parties that already ratified the Istanbul Convention, it entered into force following its 10th ratification.¹⁹ Therefore, it would be binding for member states of the EU and the EU itself from the day of accession.

On the axiological dimension, the Istanbul Convention presents tools to achieve goals such as countering domestic violence. The Istanbul Convention values regarding equality between men and women are the same as European Union values, with which the Council, the Commission and the European Parliament agree. Moreover, accessing the Istanbul Convention would lead to the realisation of the Union’s goals. The axiological dimension, which is the most controversial and troublesome factor contributing to political context, results in the existence of the ‘common accord’ practice, which will be proven in the last part of this article.

On the systemic dimension, the formal party would be liable for improper performance to the Council of Europe, and therefore, the European Union. However, the Commission could initiate an infringement procedure (Article 258 TFEU) against a specific member state for failing to meet the standards of the Istanbul Convention. The risks that can be seen at the systemic level are that if there were no unanimity, procedures against the EU or within the EU against a

¹⁶ Vienna Convention on the Law of Treaties 1969 (adopted 23 May 1969 entered into force 27 January 1980) 1155 UNTS 331

¹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) ETS 5

¹⁸ The Council of Europe creates an element of the European human rights protection system, along with the United Nations, the European Union and European countries, each on different levels and with different scope.

¹⁹ Istanbul Convention, art. 75(3)

member state would be more frequent and probable. Nevertheless, this should not be an argument against the 'common accord' as a whole.

The interpretative and problem-solving approach to the Istanbul Convention is a matter hard to find an answer to at this point, although the Convention would not have been the first human rights international agreement concluded by the EU (The European Union concluded the United Nation Convention on the Rights of Persons with Disabilities on the 23 December 2010). It would, however, be the first human rights agreement concluded under the Council of Europe regime. The failure of the accession of the ECHR because of the implications on the autonomy of EU law indicated by the CJEU²⁰ could be an obstacle for the European Court on Human Rights to have jurisdiction over the European Union. Therefore, it affects the supremacy of the CJEU by giving the European Court of Human Rights the power to examine cases that had been under its jurisdiction. This shows that the interpretative issue would be hypothetical because the CJEU is reluctant to give up any interpretative power. Nevertheless, this could be a problem conditioned by political practice. Potentially, if the accession comes to fruition, interpretation will be able to modify the consent given by countries. Politicians lobbying in favour of 'common accord' practice (therefore unanimity) can use this argument, expressing their concerns about subsequent changes in their understanding of the text.

The factors such as potential interpretation, the axiological dimension, and the systematic dimension contribute the political and legal context which is extremely relevant in conducting the case study and assessing the 'common accord' practice as a whole.

1.2. The Istanbul Convention within the EU legal order

The European Union, according to Article 47 of the Treaty on European Union²¹ (hereinafter: TEU), has a legal personality and is allowed to be a part of international treaties. According to Article 216(1) TFEU²², the EU can conclude an agreement if the Treaties provide it, where the conclusion of an agreement is necessary to achieve one of the objectives referred to in the Treaties, or it is likely to affect common rules. Article 216(2) explains the binding force of international agreements concluded by the Union²³, which is a symptomatic manifestation of respect for international law, but in a manner that is, however, autonomous, taking

²⁰ Opinion 2/13 [2014], paras 194-200

²¹ Consolidated version of the Treaty on European Union [2012] OJ C326/13, art. 47

²² Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 216(1)

²³ *ibid*, art. 216(2)

into account the specificity of the EU system.²⁴ The procedure for concluding an international agreement is contained in Article 218 TFEU, providing that the Council is the institution authorising the opening of negotiations and concluding them²⁵.

If the accession comes to fruition, according to the CJEU, the agreement becomes an integral part of ‘community law’²⁶ as it comes into force. Therefore, if the accession goes through, the Istanbul Convention will be binding to member states.²⁷ In the context of the treaty regime and the EU’s human rights protection standard, the Istanbul Convention would exist next to the Charter of Fundamental Rights of the European Union, the CJEU case law and EU values. Despite direct application, some provisions would be additionally implemented or clarified by the EU in Regulations and Directives, and then, in the case of Directives, additionally implemented by the member states to their national legal orders. The Convention as a source of EU law would undoubtedly increase the work of the Commission, which would have to propose draft Directives and Regulations and monitor their implementation and execution.

The European Union has the resources and competencies to become a party to this Convention. Firstly, from a formal point of view, the Istanbul Convention is open for signature and ratification by the EU in Article 75(1) of the Convention. Despite the fact that some authors²⁸ use the word ‘ratification’ in the case of EU’s accession, in this article that phrase will not be used, as the EU is purely not a state and does not use ratification as an instrument for expression of consent to an international agreement. Secondly, the Istanbul Convention’s provisions (which are the subject of this article and will be explained further below) fall within the EU’s exclusive competences. Therefore, the EU will be competent to legislate in this regard.

According to the principle of conferral,²⁹ the EU only has the competencies conferred on it by the Treaties. The Istanbul Convention covers matters within

²⁴ A Cieśliński, ‘Umowy międzynarodowe jako źródło prawa Unii Europejskiej’ (2017) 8 Wrocławsko-Lwowskie Zeszyty Prawnicze 125

²⁵ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 218

²⁶ Case C-181/73 *R. & V. Haegeman v Belgian State* [1974] ECR 1974 - 00449, para 5

²⁷ There is still a vivid discussion about the place that international agreements occupy within EU law - they have much in common with primary and secondary law. I would assume that it is above secondary law because it has to be compliant with the ratified international agreement, while at the same time not being as high in the hierarchy as primary law.

²⁸ S De Vido, ‘The ratification of the Council or Europe Istanbul Convention by the EU: A step forward in the protection of women from violence in the European Legal System’ (2017) 9(2) European Journal of Legal Studies 69

²⁹ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art. 5

the EU's competencies (notably procedural criminal law, migration and asylum) and its member states. Therefore, if accession comes to fruition, the EU will be a party to the Convention alongside the member states, this being the so-called 'mixed agreement', as previously mentioned. Such cases have occurred in the past,³⁰ so no one should claim that this is an argument for not adopting the Istanbul Convention. Moreover, member states, as subjects of international law, have the right to withdraw from the agreement in the sphere falling within their competencies, which is a convincing argument in terms of the EU's accession. Such withdrawal will not change the EU being a party to the Istanbul Convention; therefore, *a fortiori*, there should be no obstacle in accessing the Convention even if not all member states are party to it. Neither the Council nor the Parliament envisages an accession of the EU to the parts of the Convention, which do not fall within the EU competencies.³¹ Therefore, the situation here is clear: the accession of the Istanbul Convention, referred to in this article, concerns only the joining of the Union within the scope of its exclusive competences.

According to Article 3(2) TFEU, the EU has exclusive competence insofar as the international agreement 'may affect common rules or alter their scope'.³² The significant literature does not doubt that the mere potential impact of an agreement on common rules is sufficient for the EU's exclusive competence to apply.³³ The EU has already enacted provisions remaining in the scope of the Istanbul Convention.³⁴ Therefore, there is an exclusive external competence arising from exercising its internal power.³⁵ Moreover, the subject matter of the

³⁰ Council Decision (EU) of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities OJ L 23/35

³¹ Opinion C-1/19 *Istanbul Convention* [2021], para 279

³² Even before the article 3(2) TFEU came into force there was the so-called ERTA judgement (C-22/70 ECR [1971] I-00263 '17. *In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.*" BUT 'since the entry into force of the Lisbon Treaty, the exclusive external competence of the European Union is viewed in a more restrictive manner (C-114/12, Broadcasting Organisations, para 72)

³³ P Saganek, Artykuł 3 [in:] D Miąsik N Półtorak A Wróbel (eds), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom I* (Wolters Kluwer 2012)

³⁴ Example texts that have already been adopted by the EU: Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251/12; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16/44; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348/98

³⁵ P Craig, G de Búrca, *EU Law Text, Cases, and Materials* (6 edn, Oxford University Press 2015) 80-81

Convention relates also to education, justice, and safety, which fall under the competencies shared by the EU with the member states, which additionally confirm that the Convention is intended to be concluded by the EU and member states as ‘a mixed agreement’³⁶.

At this point, it should be analysed, from a substantial law perspective, which provisions of the Istanbul Convention fall within the EU’s and member states’ competencies. The Council, having signed the decisions on the of signing the Istanbul Convention^{37,38} indicated the EU’s competencies on the basis of the certain provisions of the Istanbul Convention derived from judicial cooperation in criminal matters, and the provisions of the Convention relating to asylum and the principles of *non-refoulement*.³⁹ The CJEU⁴⁰ concluded that the following provisions fall within the EU’s competencies. Firstly, Articles 44, 47, 48, 49, 50, 54-58, and 62-65 of the Istanbul Convention concern territorial jurisdiction of the criminal prosecution of offences referred to the Convention.⁴¹ The Union has the ability to conclude an agreement based on Article 82(2) TFEU, undertaking itself and its member states to comply with the above-mentioned provisions. Secondly, using Article 84 TFEU to conclude an agreement by the Union, Articles 7, 8, 10, 11, 12-16, 18-28, 51-53, 62, and 63 of the Convention oblige the parties to implement effective, comprehensive and coordinated national policies to prevent and combat all forms of violence.⁴² Thirdly, referring to Article 78(2) as a legal basis to conclude an agreement, the Union has the ability to commit itself to Articles 59-61 of the Istanbul Convention.⁴³ These provisions provide obligations relating to granting autonomous and renewable residence permits. Moreover, the European Union should ensure its obligations are fully satisfied regarding its public administration.⁴⁴ Sara De Vido points out that the legal basis for the

³⁶ A Dashwood and others, *European Union Law* (Hart Publishing 2011) 939-941

³⁷ Council Decision [EU] 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement [2017] OJ L 131/13

³⁸ Council Decision 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters [2017] OJ L 131/11

³⁹ *ibid*

⁴⁰ When ruling on the legal grounds in its 1/19 Opinion, which is going to be discussed further below.

⁴¹ Opinion C-1/19 *Istanbul Convention* [2021], para 295

⁴² *ibid* para 297

⁴³ *ibid* paras 302-303

⁴⁴ *ibid* para 307

decision of the Council concluding the agreement shall not be restricted to Article 82 in relation to Article 84 TFEU, but Articles 19 and 168 TFEU shall be applied as well.⁴⁵

The legal context presented above clearly indicates that the EU is able to become a party of the Istanbul Convention, and the law here does not create any obstacles, yet creates significant background for the case study, which is going to be analysed and presented in the last part of this paper.

1.3. The Istanbul Convention as a Potential Source of EU Law

If the EU enters into international agreements, such agreements bind the member states by virtue of their duties under EU law, and not within the operation of public international law.⁴⁶ If the EU ratifies the Istanbul Convention, the EU and its member states will be obligated to take measures such as education about gender-based violence, including teaching material on gender equality. The Convention is a long and complex instrument. It provides a detailed approach to fundamental rights, substantives such as procedural law, indicating how public authority should behave in certain situations. It has 81 articles, while the ECHR, even though much more extensive in its scope, has 59 articles (without protocols). Member states and the EU will be obliged to provide easily accessible shelters for victims and relevant regional and international complaint mechanisms. The vast majority require implementation on a regional level; therefore, preparing proper procedures, mechanisms of control, and a fair judicial and administrative system is necessary. The accession would, *inter alia*, put in place prevention measures and put the EU in a strong position regarding monitoring the Istanbul Convention's enforcement. In this regard, the Commission would be responsible for monitoring how member states fulfil their requirements. Does the complexity and precision of the provisions create an obstacle in the form of the practice of the 'common accord'? Certainly, the more precise the regulations, the less room for margin and interpretation might be viewed as unpleasant by some member states.

The limited volume of this article allows for identification of only a few consequences of the potential coming into force of the Convention. For example, Articles 59-61 require parties to the Convention, *inter alia*, to take measures to ensure that migrant victims whose residence status is conditional on marriage (a relationship) are granted an autonomous residence permit of limited validity in the event of the dissolution of the marriage due to particularly difficult

⁴⁵ De Vido (n 28)

⁴⁶ Craig, de Búrca (n 35), 356-357

circumstances.⁴⁷ Furthermore, the Istanbul Convention provides the possibility of claiming gender-based asylum. It also imposes an obligation that gender-based violence is regarded as a form of persecution justifying granting international protection.⁴⁸ Article 3 of the Istanbul Convention legally defines concepts such as ‘gender’ or ‘gender-based violence against women’ to unify and provide adequate protection.

Assuming that the Istanbul Convention becomes the source of EU law, it will contribute, *inter alia*, to the EU’s commitments in the framework of the Convention on the Rights of Persons with Disabilities (hereinafter: CRPD).⁴⁹ The accession will contribute to the realization of the Union’s goals on many levels. This position is not only supported by NGOs⁵⁰ and experts⁵¹, but also by the Council⁵² itself, the Commission⁵³ and the European Parliament.⁵⁴ The accession would also have an impact on EU policies, for example, it would require the adoption of new EU directives to protect women against violence.⁵⁵

Issues with implementation on the member state level could also occur. Statistics, in this matter, are far from satisfactory — in only 2021, the Commission opened 847 infringement cases, 571 of which were launched for late transposition of EU directives, and 276 of which were launched because of wrongful application

⁴⁷ Explanatory Memorandum on Council of Europe Convention on preventing and combating violence against women and domestic violence 2011, paras 301-302

⁴⁸ Istanbul Convention, art. 60 (3)

⁴⁹ (A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence 2015/JUST/010 <https://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf> accessed 26 November 2022

⁵⁰ 5 reasons why the EU should ratify the Istanbul Convention <<https://www.edf-feph.org/newsroom-news-5-reasons-why-eu-should-ratify-istanbul-convention/>> accessed 7 May 2023

⁵¹ International Women’s Day 2023 A new sense of urgency: global and regional women’s human rights experts call on all actors to unite to preserve hard-fought gains and combat rollbacks

⁵² Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement OJ L 131/16 and Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, OJ L 131/11

⁵³ Political Guidelines for the next European Commission 2019-2024 published on <https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf> and Gender Equality Strategy 2020-2025 COM(2020)

⁵⁴ European Parliament resolution (EU) of 28 November 2019 on the EU’s accession to the Istanbul Convention and other measures to combat gender-based violence [2019] OJ C 232/48

⁵⁵ De Vido (n 28)

of EU law or non-conformity of national rules with EU law.⁵⁶ Nevertheless, this is another problem regarding the whole system of the EU, and as such, it should not be an obstacle to accession. In the case of the Istanbul Convention, the document established an independent expert body, the Group of Experts on Action against Violence against Women and Domestic Violence (hereinafter: GREVIO), and a political body, the Committee of the Parties. Therefore, GREVIO would draw up and publish evaluation reports on the measures taken by parties and initiate a special inquiry procedure to prevent any acts of violence covered by the Convention.⁵⁷

II. PRACTICE OF 'COMMON ACCORD'

2.1. Practice of 'Common Accord'

This practice of 'common accord' has been the practice within the Council, where concluding an international agreement, every country must agree, even when the matter falls within exclusive EU competence. It is the perspective of the political will of member states in the institutional decision-making process, creating *de facto*⁵⁸ unanimity. The practice derives from the EC treaty^{59,60}, as regards certain 'mixed agreements' in the Common Commercial Policy, yet, importantly, it does not exist anymore in the legal texts. If an agreement is mixed, as it is in the case of Istanbul Convention, the EU is a party to the Convention alongside the member states. 'Mixed agreements' often present procedural challenges, as it was with the CRPD.⁶¹ In this case, we are dealing with 'incomplete mixity', meaning that the EU accedes to a treaty even if not all member states are party to it.⁶²

Currently, there is nothing provided in the Treaties about the 'common accord' practice. According to Article 218(8) TFEU, the Council acts by the

⁵⁶ Application of EU law: Upholding rights, fundamental freedoms and the rule of law <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4145> accessed 26 November 2022

⁵⁷ De Vido (n 28)

⁵⁸ Treaty provides that a qualified majority is sufficient, in practice the unanimity has been required.

⁵⁹ Treaty establishing the European Community (Nice consolidated version), art. 133

⁶⁰ European Community Treaty (Maastricht consolidated version), art. 113

⁶¹ J Reiss, 'The Convention on the Rights of Persons with Disabilities in the Post-Lisbon European Union' (2012) 19(2) Human Rights Brief, 18

⁶² J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Brill 2021), 206

qualified majority concluding international agreements. Nevertheless, as the European Parliament and previous authors had stated, the practice of ‘common accord’ has been living on.⁶³ The practice existed simply because political and legal conditions allowed it to exist; this will be explained further below. *De facto* unanimity was the consequence of paradigms of public international law (mainly sovereignty, but also principles such as the principle of non-intervention) and European Union law, which are values enshrined in Article 2 TEU and case law related to values. Article 2 TEU indicates a range of values: human dignity, freedom, equality, respect for human rights, non-discrimination, tolerance, solidarity and equality between women and men. According to case law, the respect of fundamental rights was recognised as the general principle of EU law protected by the CJEU.^{64,65}

When the EU was accessing the CRPD, it originally wanted to wait for ratification from all the member states before depositing the instrument of accession to the United Nations Secretary General.⁶⁶ To be clear, when it comes to the EU’s ‘mixed agreement’, the practice of ‘common accord’ within the Council is a completely different procedure than the member states’ ratification within their competencies. This example illustrates how paradigms of sovereignty remain important even in the existence of ‘common accord’ in the case of the CRPD.⁶⁷

2.2. Legality of the Practice of ‘Common Accord’ in the Light of the Opinion 1/19

In the case of the Istanbul Convention, the European Parliament had decided to ask about the legality of the practice of ‘common accord’ by submitting a request for an Opinion under Article 218(11) TFEU.⁶⁸ The Parliament is generally more progressive (as a supranational institution) than the Council (as an intergovernmental institution). It is essential for the political context of the CJEU’s Opinion 1/19. By definition, decisions made by unanimity are weaker

⁶³ G Kübek, Analysis: ‘Opinion 1/19, the practice of ‘common accord’, and incomplete mixity: paving a way for concluding the Istanbul Convention?’ <<https://eulawlive.com/analysis-opinion-1-19-the-practice-of-common-accord-and-incomplete-mixity-paving-a-way-for-concluding-the-istanbul-convention-by-gesa-kubek/>> accessed 26 November 2022

⁶⁴ Case C-29/69 *Stauder v City of Ulm* [1969] ECR I-00419

⁶⁵ Case C-11/70 *International Handelsgesellschaft* [1970] ECR I- 01125

⁶⁶ M Chamon, ‘Negotiation, ratification and implementation of the CRPD and its status in the EU legal order’ (2020) Research Handbook on EU Disability Law 52

⁶⁷ In the end, the Union ratified the CRPD while some Member States had not yet ratified it.

⁶⁸ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47

than the effect of compromise, the lowest common denominator agreed by all member states.⁶⁹ The Parliament asked three questions. The first two referred to the legal basis, and split each of the two decisions on the signing and the conclusion of the agreement, which will not be discussed further. In the third question related to 'common accord' practice, the European Parliament asked whether the conclusion of the Convention is 'compatible with the Treaties in the absence of a "common accord" of all the member states giving their consent to being bound by the Convention?'⁷⁰

The European Parliament, having submitted the request, assumed that the Council wanted to make the adoption of such a decision dependent on securing the prior 'common accord' of all the member states.⁷¹

Even when it comes to a 'mixed agreement', during negotiating and concluding an agreement, each party must act within the limits of their competencies⁷² and according to the procedure set up in the Treaties. The issue arises because the Council, concluding an international agreement, acts by a qualified majority under the TFEU. Nevertheless, the Council waits for consensus, i.e. 'common accord', between member states.

In the Opinion 1/19, the CJEU has ruled that requirement of consensus between the member states 'results in the addition to that procedure of a step which is not provided for in the Treaties', therefore it cannot be required.⁷³ According to paragraph 247 of the judgment, if the 'common accord' was required, 'mixed agreements' would be wholly dependent on each member state's willingness to be bound by the agreement, even in a sphere of exclusive external competence of the EU. In my opinion, this leads to a paradoxical situation, showing that Treaty provisions are meaningless. According to the previous case law, the EU and the member states in the field of 'mixed agreements' cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU.⁷⁴ It strengthens the conclusion that requiring unanimity in the Council in such cases is contrary to the nature of competencies within the EU legal order.

⁶⁹ E Lannon, 'Reappraisal of the European Neighbourhood Policy' [2016] IEMED Mediterranean Yearbook 233

⁷⁰ Opinion C-1/19 *Istanbul Convention* [2021], para 1

⁷¹ *ibid*, para 51

⁷² Case C-28/12 *Commission v Council* [2015], para 47

⁷³ Opinion C-1/19 *Istanbul Convention* [2021], para 245

⁷⁴ Case C-28/12 *Commission v Council* [2015]

As Thomas Verellen stated, it would also violate the autonomy of EU law.⁷⁵ Case law seems to confirm that statement, as the CJEU has provided that the member states, by having joined the EU, have accepted that relations between them in areas in which competence has been transferred from the member states to the Union shall be governed by EU law.⁷⁶ As mentioned above, the CJEU stated that the Council cannot require unanimity but it can extend its discussion to achieve ‘closer cooperation between the member states and the EU institutions in the process of concluding that agreement, which may involve waiting for the “common accord” of the member states’.⁷⁷ According to Friedrich Erlbacher, with whom I fully agree, ‘a stronger and more united EU cannot, however, be achieved without accepting the effective exercise of power at the supranational level instead of a – more or less – coordinated concert of 28 national policies’.⁷⁸ He added that ‘this can only be achieved if there is consensus that the Union is allowed to fully exercise the external competences that it has been granted by the Treaties’.⁷⁹ Therefore, the Council is allowed to wait for consensus, but in my opinion, it is a kind of limitation of the EU’s supranational, exclusive external competence. The CJEU reminded that any member state or the Commission is allowed to require the closure of discussions and the adoption of the decision concluding the international agreement,⁸⁰ which I will discuss in Part 3.2.

2.3. ‘Common accord’ as a political practice

The practice of ‘common accord’ is important from the public international law paradigm of sovereignty. All countries, especially in sensitive issues, can retain power. The relation between legal and political context created by phenomena derived from the paradigm of sovereignty resulted in the existence of the ‘common accord’ practice, which leads to the fact that the Istanbul Convention has still not been concluded by the EU. The Istanbul Convention is associated with controversy, especially in Eastern Europe. According to the Bulgarian

⁷⁵ Verellen T, ‘Opinion 1/19: no common accord among the Member States required for the Council to conclude a mixed agreement’ (2021) <<https://europeanlawblog.eu/2021/12/16/opinion-1-19-no-common-accord-among-the-member-states-required-for-the-council-to-conclude-a-mixed-agreement/>> accessed 26 November 2022

⁷⁶ Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014], para 193

⁷⁷ Opinion C-1/19 *Istanbul Convention* [2021], para 253

⁷⁸ F Erlbacher, ‘Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty’ (2017) T.M.C. Asser Institute for International & European Law, CLEER Paper Series 2017-02, 1

⁷⁹ *ibid*

⁸⁰ Opinion C-1/19 *Istanbul Convention* [2021], para 255

Constitutional Court, the Convention promotes a concept of gender which is contrary to Bulgarian law in terms of clear distinction between biological males and females.⁸¹

The member states which are in favour of the ratification of the Istanbul Convention could potentially not be in favour of departing from the practice of 'common accord' because one day their own *veto* might be overridden in other cases. Recently, member states are more willing to exercise veto powers than in the past.⁸² For example, in Common Commercial Policy, Austria and France threatened not to ratify the EU-Mercosur deal, and in Common Foreign and Security Policy, according to Thomas Verellen, polarization increased further, which could be why member states did not want to vote on the accession.⁸³ Furthermore, the issue of the rule of sincere cooperation has arisen in the CJEU's Opinion 1/19. Some member states argued that if they decide by a qualified majority, they would not be loyal to other member states. It has to be remembered that once a 'mixed agreement' has been signed on behalf of the EU, member states are obliged to assist the EU in the implementation of the agreement. This significant argument justifies the Council's past inaction. The CJEU also expressed that as many member states agreeing to accession as possible is desirable. Nevertheless, the rule of sincere cooperation, in the Republic of Finland's opinion, with which I fully agree, precludes 'common accord' from being required.⁸⁴

Considering the above-mentioned arguments, the CJEU refused that the conclusion of the Istanbul Convention in the absence of a 'common accord' would lead to a breach of the rule of sincere cooperation,⁸⁵ with which I agree.

As I indicated above, achieving unanimity is very difficult, and leads to the lowest common denominator in every compromise. The practice of 'common accord' threatens the achievement of ambitious goals, especially in times of crisis, where decisive and robust steps are required. From the very assumption of the Union, values shared by member states should be the same. From the doctrinal approach's view, there should be no differences in the perception of core values.⁸⁶

⁸¹ Bulgaria stated that it would infringe the principle of sincere cooperation if the Republic of Bulgaria has to implement measures contrary to its Constitution - but CJEU did not agree with that.

⁸² T Verellen, 'Opinion 1/19: no common accord among the Member States required for the Council to conclude a mixed agreement' <<https://europeanlawblog.eu/2021/12/16/opinion-1-19-no-common-accord-among-the-member-states-required-for-the-council-to-conclude-a-mixed-agreement/>> accessed 26 November 2022

⁸³ *ibid*

⁸⁴ Opinion C-1/19 *Istanbul Convention* [2021], para 172

⁸⁵ *ibid*, para 265

⁸⁶ Craig, de Búrca (n 35) 382

That is why the qualified majority protects the essence of the EU, which is enshrined in Article 2.

To conclude, the practice of ‘common accord’ protects member states’ sovereignty, the EU’s liability before the Council of Europe for improper performance and member states’ liability before the Commission under infringement procedure.⁸⁷ (Art. 258 TFEU). What does the practice of ‘common accord’ threaten? Seeing the EU’s resistance to the crisis, the quick response to global and local challenges increases polarisation and hostility between member states. In my opinion, threats regarding the practice supersede the benefits. However, the reality seems to be the opposite. At the moment, as the CJEU’s 1/19 Opinion reveals, the legal possibility to access to the Convention exists and is accessible even today. Still, there has been a lack of political will for the past 6 years, which will be explained further in Part 3.

III. LEGAL CONDITIONING AND POLITICAL OBSTACLES: A CASE STUDY

3.1. Populists in Power and the EU Constitutional Crisis

In this part, the citizens of the EU member states’ proneness to electing populists in power and the constitutional crisis in the post-Lisbon EU will be analysed. Populism in power needs to be distinct from populism in general because when populists win elections, they, logically, become ‘corrupt elites’, the very ones they had been talking so much about before the elections. Populists in power continue to polarise and moralise. They eagerly frame situations as a crisis, because such a crisis then serves to legitimate their governance.⁸⁸ Reflecting on the Istanbul Convention, the accession of the Convention is on the ‘immoral, worse side’ and lack of it is ‘moral and appropriate’⁸⁹. I have taken the perspective of the member states and their impact on the EU political and legal order and sociological assumption, which indicates that the law does not operate in a vacuum and is a response to social phenomena. Then I will reconstruct the case study of the phenomenon that in the Council, *de facto* unanimity has been required in the event of the ratification of the Istanbul Convention by the European Union. The case study will also answer the question of why the practice of ‘common

⁸⁷ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 258

⁸⁸ J Müller, *What Is Populism?* (University of Pennsylvania Press 2016), 42-43

⁸⁹ ‘Polish official: Istanbul Convention could impose ‘leftist ideology’ <<https://www.euractiv.com/section/non-discrimination/news/polish-official-istanbul-convention-could-impose-leftist-ideology/>> accessed 7 May 2023

accord' is an impedimental issue in the context of the EU values' paradigm. Legal ideas are the outcome of historical, cultural, political and professional conditions.⁹⁰ Their result that we can see — tardiness of the EU's accession of the Convention by the EU — is the result of certain phenomena existing in the political and legal context. As Cotterrell indicated, the law has to be seen as an entirely social phenomenon, and this must be understood empirically and systematically. Legal ideas must be interpreted sociologically because legal ideas structure the social world, as Cotterrell stated, because that is the way to recognise their power and limits. Moreover, when legal thinking is understood sociologically, the distinction is made between legal participant views of law and, for example, social science observers' views.⁹¹ Other perspectives — for example the economic one — cannot assess legal ideas as a whole as sociology does.

Populists are increasingly coming to power, and men predominantly lead this phenomenon.⁹² It started with the failure of the EU's constitution in 2004, the crisis in Greece in 2010, through the migrant crisis in 2015, Brexit, COVID-19 and Russia's aggression against Ukraine and economic consequences. That is not the case only in Eastern and Southern European countries, as elections for example in France⁹³ in 2022 have shown that populism is an increasing or even well-established phenomenon. Nevertheless, nowadays, right-wing populist parties exist throughout Europe. Populists usually juxtapose 'the real people' against 'the corrupted elite'. Contemporary populists do not always act in the same way. The core is that the complexity of the world can be divided into two categories.⁹⁴ In the case of the Istanbul Convention, there will be 'we, traditional and moral Christians' and 'they, deprived of values feminists and homosexuals'. Populists' distillation is often overdrawn and the effect of propaganda, but they do not see anything in between. It is worth mentioning that populism does not only create a right-wing-oriented polity. In Latin America, populists in power are usually left-wing.⁹⁵ In Central and Eastern Europe, populists gain power through emancipating 'traditional family values'.

⁹⁰ Cotterrell (n 11)

⁹¹ *ibid*

⁹² C Mudde, C Rovira Kaltwasser, 'Vox populi or vox masculini? Populism and gender in Northern Europe and South America' (2015) 49(1–2) *Patterns of Prejudice*, 16

⁹³ Finally, Macron was reelected but Jean-Marie Le Pen had 41.5% in the second presidential election round <<https://www.france24.com/en/france-2022-presidential-election-second-round-results>> accessed 26 November 2022

⁹⁴ A Śledzińska-Simon, 'Populists, gender, and national identity' (2020) 18(2) *International Journal of Constitutional Law*, 447

⁹⁵ Mudde, Rovira Kaltwasser (n 92)

After the failure in 2004 of the Constitutional Treaty in referendums in France and the Netherlands, the process of de-constitutionalisation started.⁹⁶ Even though the Treaty of Lisbon is almost the same as the Constitutional Treaty, they differ at a symbolic level. The Annex 1 to the Treaty of Lisbon exposes that this act does not have a constitutional character. There is no European anthem or flag. The failure of the Constitutional Treaty damaged the federalist cause, and supranational powers were constrained in the post-Lisbon EU.⁹⁷ Supranationalism is strictly connected to qualified majority voting, which did not prevail in terms of ‘common accord’ within the Council in the case of the Istanbul Convention.

The significant difference between the Constitutional Treaty and Lisbon is an issue of EU legal supremacy. Even though the principle of supremacy of the EU law over national law has been existing since *Costa v. ENEL* judgement,⁹⁸ it is still not codified. On the one hand, member states recognise the fact that EU law is supreme. Nevertheless, on the other hand, they did not include it in the Treaty of Lisbon.⁹⁹ The lack of codified supremacy does not directly impact the practice of ‘common accord’, but with other elements, creating a regime where national and political interests are more important than protective EU values, allegedly, common for all member states.

3.2. Political and Legal Consequences of the ‘Common Accord’ Practice

Political factors mainly conditioned the practice of ‘common accord’. Nevertheless, legal conditions have been giving tacit approval to this practice. On the one hand, the CJEU prohibited requiring ‘common accord’, but on the other hand, allowed it to be expected. It was predictable that member states and the Commission would not want to expose themselves to what is purely political. From a legal point of view, if the qualified majority is achieved, the Istanbul Convention shall be concluded by the EU. We needed to wait 6 years from the Council’s decisions of signature, and only when under Swedish presidency, it requested the consent of the European Parliament to adopt the decisions on the conclusion of the Istanbul Convention.

The Council’s practice of ‘common accord’, which was the effect of political and legal conditions such as populists in power, EU crisis in the post-Lisbon regime, and lack of supremacy in the Treaties, permits that behaviour in CJEU’s

⁹⁶ N Scicluna, ‘When Failure isn’t Failure: European Union Constitutionalism after the Lisbon Treaty’ (2012) 50(3) *Journal of Common Market Studies*, 441

⁹⁷ *ibid*

⁹⁸ Case C-6/64 *Costa v. ENEL* [1964] ECR I-00585

⁹⁹ It is worth mentioning that judgements can be perceived as primary law, next to the Treaties, therefore they are equally important.

1/19 Opinion. The next key factors are the paradigm on which the European Union is based. Therefore, Article 2 and CJEU's judgements regard values and paradigms of public international law, such as sovereignty. The clash of these two paradigms leads to problems in reaching an agreement, particularly in politically sensitive situations such as migration. Having used this example, I present that on the one hand, we have Article 2 TEU, so member states have to respect human rights; on the other hand, some of them have broken basic rights¹⁰⁰ in the name of rule of sovereignty and independence.¹⁰¹ The political and legal aspects that just have been outlined do not facilitate the EU's accession of the Istanbul Convention.

The fact that political aspects influence taking the decision on (non)accession of the Istanbul Convention, which makes the EU meet its obligations under the Treaties to citizens and international agreements, was worrisome. The political and legal factors that made up the practice of 'common accord' answer not only the question of why it is so difficult to conclude an agreement unanimously, but also why those who could at least initiate the procedure did not do so. The CJEU has ruled straight out that the practice of 'common accord' cannot be required by any means, but neither member states nor the Commission started the procedure. However, both previously mentioned institutions could have done it under Article 11 of the Council's Rules of Procedure.¹⁰²

Importantly, unanimity is not necessary to initiate the voting procedure. Therefore, according to Article 11(1) of the Council's Rules of Procedure, any state or the Commission is allowed to initiate the voting procedure. The voting procedure had to be carried out if 14 out of 27 members had agreed. One must therefore wonder what the reason for the lack of action on the part of the Commission and the member states was. There may be many answers. On the one hand, Ursula von der Leyen's Political Guidelines for the Next European Commission 2019-2024¹⁰³ stated that the EU accession to the Istanbul Convention is a key priority for the Commission. Moreover, the Commission has promised — in the Gender Equality Strategy 2020-2025¹⁰⁴ — to propose measures within the limits of EU competence to achieve the same objectives as the Convention if the

¹⁰⁰ ACAPS Thematic Report, Belarus/Poland Migration crisis on the Poland-Belarus border 2022

¹⁰¹ Die Here or Go to Poland" Belarus' and Poland's Shared Responsibility for Border Abuses <<https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>> accessed 6 May 2023

¹⁰² Council Decision of 1 December 2009 adopting the Council's Rules of Procedure [2009] L 325/35

¹⁰³ Political Guidelines for the next European Commission 2019-2024 A Union that strives for more My agenda for Europe By candidate for President of the European Commission Ursula von der Leyen [2019] <https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf> accessed 26 November 2022

¹⁰⁴ Gender Equality Strategy 2020-2025 (n 53)

EU's accession remains blocked. However, the Commission had not even used the opportunity provided in Article 11(1) in the Council's Rules of Procedure. One of the reasons could have been the issue of liability, the formal party always bears the responsibility. Therefore, the EU would be liable if even one member state does not fulfil the Istanbul Convention's requirements.¹⁰⁵ The European Commission, as an executive body, is not interested in the EU's responsibility towards third parties.

The European institutions, responsible for the decision-making process, for 6 years, have been in agreement all this time that the Istanbul Convention has to be ratified by the EU. Yet, for six years, neither the Commission nor the Council had initiated any real procedure that would have led to the accession of the Convention. The European Parliament had expressed the necessity to ratify the Convention by the EU, calling on the Council to conclude the Convention urgently.¹⁰⁶ What we saw in the Council's decisions on the signature^{107,108} was that the accession 'will contribute to the realisation of equality between women and men in all areas, which is a core objective and value of the Union to be realised in all its activities in accordance with Articles 2 and 3 TEU, Article 8 TFEU and Article 23 of the Charter of Fundamental Rights. It will allow the European Union to confirm its engagement in combating violence against women within its territory and globally and reinforces its current political action and existing substantial legal framework in the area of criminal procedural law, which is of particular relevance for women and girls'.

Therefore, after 6 years, the Council, under the Swedish presidency, started the procedure. According to the Organisation for Economic Co-operation and Development, the Nordic Countries are leaders on gender equality.¹⁰⁹ It confirms the thesis that the Council's practice of 'common accord' existed for such a long time because political and legal conditions allow it to exist. A country like Sweden had to come and make this politically controversial decision. Since the CJEU

¹⁰⁵ Craig, de Búrca (n 35), 251-263

¹⁰⁶ 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] OJ C 232/48

¹⁰⁷ Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement [2017] OJ L 131/16

¹⁰⁸ Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters [2017] OJ L 131/11

¹⁰⁹ Is the Last Mile the Longest? Economic Gains from Gender Equality in Nordic Countries The Nordic countries – Denmark, Finland, Iceland, Norway and Sweden – have moved further along the path to gender equality than most OECD countries.

judgment in October 2021, there were French and Czech presidencies. While the French presidency may not have addressed the topic, due to Russia's attack on Ukraine, the Czech presidency should not have left the topic unaddressed. And yet, it did. Only a country propitious to feminist politics was eager to start the procedure.

Unfortunately, there is no public information to know which countries voted against and which in favour. That would significantly facilitate this case study. For six years, 21 out of 27 member states ratified the Convention (March 2023). Therefore, the qualified majority should have been reached without complications. Nevertheless, the matter has been more complex. For example, in the case of Poland, which is a party to the Istanbul Convention, the chance that it would vote in favour of EU accession of the Convention in the Council seems impossible. The Convention was ratified by Poland when the more liberal and pro-democratic party was in power. The current government (and also the parliamentary majority) is regarded as populists in power that are constantly restricting the scope of women's rights.¹¹⁰

The Istanbul Convention, in a simplified way, is about gender equality. Right-wing, conservative populist parties are reluctant to implement feminist policies.¹¹¹ The case study of Law and Justice - the ruling party in Poland — shows that its illiberalism is linked to populist claims and results in anti-gender lawmaking.¹¹² The main objection of European populists concentrates on the non-binary concept of gender, on which the Convention is based, and the obligation of state parties to change social and cultural norms regarding the roles of women and men.¹¹³ Studies have shown that ideology is more relevant than the region for the position on gender issues of populists.¹¹⁴ This seems logical in terms of European populist politicians who stick to 'traditional' gender roles. Feminism is regarded as posing a threat to national traditions, the majority religion, and the family model.¹¹⁵

¹¹⁰ The Polish ministry of health resolution setting up the so-called register of pregnancies; cf. Rozporządzenie Ministra Zdrowia z dnia 3 czerwca 2022 r. zmieniające rozporządzenie w sprawie szczegółowego zakresu danych zdarzenia medycznego przetwarzanego w systemie informacji oraz sposobu i terminów przekazywania tych danych do Systemu Informacji Medycznej (Dz.U. 2022 poz. 1296)

¹¹¹ A Gwiazda, 'Right-wing populism and feminist politics: The case of Law and Justice in Poland' [2021] 42(5) *International Political Science Review*, 580

¹¹² *ibid*

¹¹³ A Śledzińska-Simon (n 94)

¹¹⁴ Mudde, Rovira Kaltwasser (n 92)

¹¹⁵ A Śledzińska-Simon (n 94)

3.3. Towards the social need for the accession

I have presented why unanimity is extremely difficult to achieve under the current political context, but the social need to conclude the Istanbul Convention is urgent. Violence against women is estimated to affect 1 in 3 women in the EU.¹¹⁶ Amnesty International¹¹⁷ considers the Convention as a ‘gold standard’ for preventing and combating violence, and it can save the lives of millions of women and girls. These perspectives confirm the urgency of the social need for this accession. Anna Gwiazda confirmed the precise relationship between claims and policies in her case study. Therefore, having confirmed that right-wing populist parties voice anti-gender claims,¹¹⁸ one should state that the tardiness of the accession to the Istanbul Convention arises from the current political context. The EU’s accession is of great discursive importance in the context of the EU’s Article 2 based paradigm. The case study of the practice of ‘common accord’ shows that the essence of the problem is the fact that political conditions supersede legal conditions. As I stated above, a country that is propitious to feminist politics like Sweden had to come into the picture and start the procedure to conclude the Convention. In my opinion, Sweden’s action was the last call to protect EU’s values. It showed that the Union can protect its own values and be coherent in its actions. The EU’s accession of the Istanbul Convention is a huge test for every member state, EU institutions and the EU itself. As Nicole Scicluna and Stefan Auer stated, in the EU, the emergency regime has evolved over the last years, undermining the rule of law, and producing a crisis of law itself.¹¹⁹ The authors added that the law that supports the crisis response is a poor imitation of the law.

The EU constitutional crisis has resulted in an increasing amount of Eurosceptics (like in one very distinct situation, Brexit);¹²⁰ therefore, politicians are reluctant to take controversial steps, which results in a vicious circle. Not taking firm steps now and not defending the EU’s values could have severe consequences. The practice of the ‘common accord’ was dangerous, as it gives every country a *veto*, thereby exposing all EU citizens to insufficient protection

¹¹⁶ International Women’s Day 2022: Commission proposes EU-wide rules to combat violence against women and domestic violence <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1533> accessed 26 November 2022

¹¹⁷ Here’s why the Istanbul Convention Saves Lives’ <<https://www.amnesty.org/en/latest/news/2021/05/heres-why-the-istanbul-convention-saves-lives/>> accessed 26 November 2022

¹¹⁸ A Gwiazda (n 111)

¹¹⁹ N Scicluna, S Auer, ‘From the rule of law to the rule of rules: technocracy and the crisis of EU governance’ (2019) 42(7) West European Politics, 1420

¹²⁰ Hanspeter Kriesi, ‘Backlash politics against European integration’ (2020) 22(4) The British Journal of Politics and International Relations, 693

and a sense of security. Despite the success associated with the Istanbul Convention and the start of the accession procedure by the Council under the Swedish presidency, the system is still inconsistent, with political factors determining more and more whether EU values are protected or not (despite the fact that values are enshrined in the Treaties, as a purely legal factor, that should uphold them). It seems dangerous to rely on the EU values of whichever country happens to be chairing the Council in a given six-month period. The EU should protect and pursue the values enshrined in Article 2 TEU regardless of who is holding the presidency at the moment. If that is the case, then legal factors cease to matter, and all that matters is who has the power to decide, what policy they pursue and what decisions they will make. Although the 1/19 Opinion has greatly facilitated and contributed to the start of the accession procedure, it is dangerous insofar as it always provides the opportunity to wait for the acceptance of as many states as possible, which in the future may lead to similar tardiness and omissions as in the case of the Istanbul Convention. The Commission and the member states, by succumbing to populists, showed that the European Union is unable to fulfil its commitments. The situation is paradoxical because there were, for 6 years, no legal obstacles that would have prevented the EU from ratifying the Istanbul Convention.

The Council and Commission should remember that populism fails to respond to global challenges which have to inevitably come.¹²¹ It is not only climate change but also the crisis of values within the EU. In the face of this change, nation states may become irrelevant,¹²² which is why a qualified majority derived from Article 218(8) should be fully respected, and bodies indicated in Article 11 Council Rules of Procedure should fulfil their commitments under Article 13(2) TFEU.

IV. CONCLUSIONS

Having analysed the ongoing accession to the Istanbul Convention by the EU within the public international law and European Union regime, there were no legal obstacles to the accession for six years, which the CJEU has confirmed in Opinion 1/19. The practice of 'common accord' arose from the political context, which is dangerous to the future of the EU values and the European Union itself. The EU constitutional crisis has resulted in an increasing amount of Eurosceptics, while liberal politicians are often reluctant to take decisive steps, which results in a vicious cycle. This case study showed that this vicious cycle

¹²¹ A Śledzińska-Simon (n 94)

¹²² *ibid*

must be stopped to satisfy the EU's paradigm (Article 2 TEU) and social needs. The 'common accord' practice is a perfect example of this phenomenon. The solution lies in the decision-makers who have the courage to protect the EU values and oppose the populists. The complete rejection of the 'common accord' practice can also be associated with some complications, such as reluctance to implement acts protecting EU law in particular member states, especially those who voted against them. Nevertheless, a qualified majority benefits outbalance regarding, mainly, EU core values — the values on which member states agreed facultatively, and on which there should be no differences in perception. The qualified majority facilitates achieving goals that are common for the whole European Union and strengthens stability in times of crisis. As pointed out above, achieving unanimity is difficult and leads to the lowest common denominator in every compromise. That is why the qualified majority protects the EU essence, which is enshrined in Article 2.

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