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Stoyanova, Vladislava

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PO Box 117
221 00 Lund
+46 46-222 00 00

**ON THE BRIDE'S SIDE?
VICTIMS OF DOMESTIC VIOLENCE AND THEIR RESIDENCE RIGHTS
UNDER EU AND COUNCIL OF EUROPE LAW**

Dr. Vladislava Stoyanova, Associate Professor, Faculty of Law, Lund University, Sweden
vladislava.stoyanova@jur.lu.se

Abstract: Migrant women victims of domestic violence might face a stark choice between leaving an abusive relationship and tolerating the abuses so that they can preserve their residence rights in the host country. EU law suffers from some major limitations in addressing this situation. In view of the EU ratification of the Council of Europe Convention on Preventing and Combating Violence against Women ('the Istanbul Convention'), will the EU be required to take new measures in light of the demands imposed by Article 59 of the Istanbul Convention that addresses the residence rights of migrant women victims of violence? By clarifying these demands and juxtaposing them with the relevant EU law standards, this article shows the divergences and convergences between the two regional European legal orders. It also forwards concrete suggestions as to which EU rules might need to be modified.

1. INTRODUCTION

Immigration law creates power imbalances when one family member derives residence rights through the other.¹ These power imbalances become particularly problematic when the family relationship is characterised by domestic violence, a context within which migrant women face distinctive difficulties.² Under these circumstances, migrant women as dependent parties might face a stark choice between remaining in the abusive relationship so that they can preserve their residence rights in the host country or leaving the relationship to prevent further abuses. The second option, however, might also imply withdrawal of residence rights and an obligation to leave the host country since the initial reasons for the conferral of these rights are not anymore present upon the dissolution of the relationship.

EU law incorporates two provisions that are pertinent to this type of circumstances. The first one can be found in Directive 2003/86/EC of 22 September 2003 that determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in Member States ('the Family Reunification Directive'). Article 15(3) of this instrument stipulates that EU Member States ('MS') 'shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult

¹ Council of Europe ('CoE'), Parliamentary Assembly, *Protecting Migrant Women in the Labour Market*, Resolution 1811 (2011) para 7.2.1; Resolution 1478(2006) *Integration of Immigrant Women in Europe*, para 7.1.11.

² 'Confronted with the language barrier and family pressure, they often end up isolated and unable to express their views and have only limited access to any facilities that exist to protect the victims of domestic violence' see CoE Parliamentary Assembly, *Migrant Women: at Particular Risk from Domestic Violence*, Resolution 1697 (2009), para.1.

circumstances’.³ The second pertinent provision is Article 13 of the Council Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (‘the Free Movement Directive’). Pursuant to this Directive, to encourage free movement, when EU nationals exercise residence rights in another MS, they can bring their third country national family members (e.g. spouses).⁴ The spouse subsequently derives the right to reside in the host MS from the EU national’s right that she has accompanied or joined.⁵ Article 13(2)(c) of the Free Movement Directive, referred to as the ‘domestic violence provision’ that is at the core of the analysis in this article, allows the third country national spouse to retain this right even in case of divorce, if she has been a victim of domestic violence.⁶

As it is evident from the preamble of the Free Movement Directive, the prevention of abuses such as domestic violence was a justification for including the domestic violence provision.⁷ Despite this commendable objective, this article argues that Article 13(2)(c) sits uneasily within the overall logic of the Directive, which renders the achievement of the objective of preventing violence difficult. This will be illustrated by reference to the judgment *Secretary of State for the Home Department v N.A.* of the Court of Justice of the European Union (‘CJEU’ or ‘Court’), the only occasion so far where the Court has been offered the opportunity to interpret the provision.⁸ The achievement of the objective of preventing violence in circumstances where migrant women’s residence rights are dependent on those of their spouses could have been possible in another context, namely the Council of Europe Convention on preventing and combating violence against women and domestic violence (‘the Istanbul Convention’).⁹ This article explores what potential this treaty holds for ensuring that migrant women victims of violence retain their residence rights. It considers the implications this treaty might have for EU law, and more specifically for Article 13(2) of Free Movement Directive, in light of the EU’s intention to ratify it. Will the EU be required to introduce certain modifications in its legislation in light of Article 59 of the Istanbul Convention that addresses the residence rights of migrant women victims of violence?¹⁰

³ The aim of the provision was to protect women who have suffered domestic violence by not withdrawing their residence permit. See COM(1999) 638 final, 21.

⁴ See para 5 of the preamble of the Directive. Article 2(2) of the Directive defines family members. See generally Elspeth Guild, Steve Peers and Jonathan Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford University Press 2014) 166.

⁵ Article 3 of the Directive is clear to the effect that it applies to the circumstances of both family migration and family reunification.

⁶ Since Article 13(2)(c) of the Free Movement Directive applies to third-country national spouses of migrant EU nationals who abuse them, it is not applicable if the EU national has not moved to another EU Member State.

⁷ See Recital 15 of the Preamble of the Free Movement Directive.

⁸ Court of Justice of the EU (First Chamber) Case C-115/15 *Secretary of State for the Home Department v N.A.*, 30 June 2016.

⁹ CETS No. 210.

¹⁰ Instead of using the Istanbul Convention and its Article 59 as an avenue for extending residence rights to migrant women victims of violence, a general EU legal instrument on domestic violence with provisions on residence rights, might be more favorable. This is a possibility that is not explored in this article. The European Parliament has proposed that the EU should adopt a general legal act to establish measures to promote and support the action of MS in the field of prevention of violence. See *European Added Value Assessment. Combating Violence against Women* (PE 504.467 EAVA 3/2013). The Commission has not followed the proposal, which is likely due to the difficulties in finding a suitable legal basis in EU law for the imposition of minimum standards on the MS. See *Feasibility Study to Assess the Possibilities, Opportunities and Needs to Standardise National Legislation on*

The reader will be guided through the following steps. Section 2 will decipher the CJEU's reasoning in *NA* to eventually demonstrate the peculiarity of the domestic violence rule in the Free Movement Directive. Section 3 will clarify the demands imposed by Article 59 of the Istanbul Convention and will juxtapose them with those imposed by the Free Movement Directive and the Family Reunification Directive. The divergences and the convergences between the two regional European legal orders in the area of victims' residence rights will be demonstrated. These convergences and divergences concern the personal scopes of the two legal frameworks (i.e. which categories of migrant women are covered), the meaning of 'particularly difficult circumstances', the possibility for migrant women whose status is already irregular to gain autonomous residence permit, the suspension of already initiated deportation proceedings, and the benefits attached to the autonomous permit if such is extended. When contrasting the EU and the Council of Europe ('CoE') frameworks, the purpose of the Istanbul Convention as enshrined in its Article 1(c) to design a comprehensive framework for the protection of all migrant women, will be specifically highlighted. This is important because in light of its purpose, the relevant provisions from the Istanbul Convention could be susceptible to interpretations that are more favourable for migrant victims. In contrast, EU law might be interpreted in a more technical and formalistic fashion. Having compared EU law and CoE law and showed the potential of the Istanbul Convention, Section 4 will explore the impact of this convention on EU law. This exploration includes a consideration of the limited EU competence and concrete suggestions as to which EU rules might need to be modified.

2. HOW HAS EU LAW FAILED MIGRANT WOMEN VICTIMS OF DOMESTIC VIOLENCE?

The examination of the potential of EU law to offer protection in terms of residence rights to migrant women victims of domestic violence has to start with an analysis of *NA*. The story of the woman in this case exemplified the difficult situation that third country national victims of domestic violence may face. *NA* was a Pakistani woman married to a German national. They moved to the United Kingdom in 2004, where the German husband worked or was self-employed. The couple had two children born in the United Kingdom of German nationality. The husband perpetrated domestic violence against his wife until December 2006 when he left the United Kingdom for Pakistan. *NA* remained in the country with the couple's children kids and in September 2008 initiated divorce proceedings that were finalised in August 2009. *NA* was denied a right to permanent residence in the United Kingdom since, as the national courts reasoned, at the date of the divorce her husband had not exercised free movement rights under EU law (since he had left the United Kingdom as mentioned above) and she accordingly had no derivative rights to reside.¹¹ Once the case reached the national Court of Appeal, the proceedings were stayed and the following question was referred to the CJEU: '[m]ust a third country national ex-spouse of a Union citizen be able to show that their former spouse was exercising Treaty rights in the host Member State at the time of their divorce in order to retain

Violence against Women, Violence against Children and Sexual Orientation Violence (European Commission, 2010).

¹¹ For the national proceedings see *NA v Secretary of State for the Home Department* [2014] EWCA Civ 995; *The Secretary of State for the Home Department v NA (Pakistan)* [2015] EWCA Civ 140.

a right of residence under Article 13(2) of the Directive 2004/38?¹² The CJEU answered in the positive, which ultimately meant that NA could not benefit from the domestic violence rule under EU law. As it will be demonstrated below, the reasoning in the Court's response is formal, but compelling. Remarkably, the Advocate General Wathelet in his opinion had an equally compelling reasoning with the opposite outcome. There are thus two conflicting, but convincing interpretations of EU law that affect migrant women victims of domestic violence. Each one of them deserves an elaborate explanation that will be offered below.

2.1. THE ADVOCATE GENERAL'S REASONING IN *SECRETARY OF STATE FOR THE HOME DEPARTMENT V NA*

Advocate General Wathelet reasoned that the specific situations detailed in the first subparagraph of Article 13(2) of the Directive (i.e. when the marriage has lasted at least three years; when the spouse with dependent residence rights has custody over EU citizen's children; when there are 'particularly difficult circumstances' such as domestic violence; and when the spouse with dependent residence rights has a right to access to a minor child) *as such* enable the family member to retain her right to residence in the EU MS after the dissolution of her family relationship with an EU national. Therefore, if one of these conditions, including 'particularly difficult circumstances, such as having been a victim of domestic violence', arises,¹³ this triggers the retention of the right of residence of the third country national. It follows that if the Union citizen departs from the host Member State *after* the materialization of one of the conditions outlined in the first paragraph of Article 13(2), the third-country national retains her residence rights.¹⁴ To simplify, if the Union citizen leaves the host MS after the materialization of 'particularly difficult circumstances', the third country national can use Article 13(2)(c) to retain her residence rights. In other words, she has not lost these rights because of the Union citizen's departure from the MS.

To further support this reasoning, the Advocate General invoked the *telos* of the provision: legally safeguarding the family members' rights in case of divorce and prevention of blackmail by threats of divorce, which is particularly significant in the context of domestic violence.¹⁵ The specific problem of domestic violence also gave the basis for the Advocate General to add the argument that

¹² Three additional questions were included in the request for preliminary ruling. These concerned NA's children from her ex-spouse. Although it is likely that children's interests will be also invoked in circumstances where migrant women lose their residence rights, these are not discussed here. For overall analysis of the judgment see Catherine Briddick, 'Case Comment: Secretary of State for the Home Department v NA' (2016) 30 *Journal of Immigration Asylum and Nationality Law* 366; Helen Oosterom-Staples, 'Residence Rights for Caring Parents who are also Victims of Domestic Violence' (2017) 19 *European Journal of Migration and Law* 396.

¹³ Oosterom-Staples has correctly observed that if the interpretation advanced by the Advocate General were to be adopted, 'domestic violence' would have to be defined for the purpose of retention of residence rights. See Oosterom-Staples (n 12) 410-11. For the difficulties in defining domestic violence see J Niemi and A Verdu, 'The Concept of Domestic Violence in the Istanbul Convention' in Johanna Niemi, Lourdes Peroni and Vladislava Stoyanova (eds) *The Istanbul Convention as a Response to Violence against Women in Europe* (Routledge, forthcoming).

¹⁴ Advocate General Wathelet Opinion in Case C-115/15 *Secretary of State for the Home Department v NA*, 14 April 2016, para. 62.

¹⁵ *Ibid* para 68-70.

[t]he requirement that the Union citizen spouse must actually be present in the territory of the host Member State up until the divorce, or, at the very least, until the commencement of divorce proceedings, could also undermine the application of the aforementioned Article 13(2)(c) of Directive 2004/38, given the risk of criminal penalties attaching to conduct constituting domestic violence.¹⁶

The Advocate General aptly suggested that it was in the interest of the perpetrator to actually leave the host Member State to escape possible criminal proceedings. The incentive that the perpetrator has to leave is an additional argument as to why his presence in this State should not be required at the time of the initiation of divorce proceedings so that the victim can retain her residence rights.

Finally, the Advocate General invoked the principle of effectiveness. To be effective, Article 13(2)(c) should attain the objective of ‘converting the *derived* right of residence of a family member of a Union citizen into a personal right of residence in particular circumstances warranting protection’.¹⁷ It follows that the fact of being a victim of domestic violence should be regarded as a ground for converting a derived right into an individual right. For this conversion to be effective, it cannot be made dependent on whether the perpetrator of domestic violence chooses to remain in the territory of the host Member State.¹⁸ Pursuant to the Advocate General’s approach, it is the occurrence of the domestic violence that triggers the retention of the right of residence of the third country national. The location of the sponsor at the time of the initiation of the divorce proceedings or at the time when divorce is actually granted, is immaterial.

2.2. THE COURT OF JUSTICE’S REASONING IN THE *SECRETARY OF STATE FOR THE HOME DEPARTMENT V NA*

2.2.1. *Loss of rights after departure of the EU citizen*

The CJEU did not follow the Advocate General’s opinion. Its starting point is a very different one and its origins can be found in the earlier judgment of *Sing and Others*.¹⁹ The latter had nothing to do with domestic violence; but rather with another set of circumstances that can be found in the text of Article 13(2)(a) of the Free Movement Directive when a third country national can retain her or her residence rights in the host MS. These circumstances transpire when prior to the initiation of the divorce with the EU national, the marriage had lasted at least three years, including one year in the host MS. In *Sing and Others*, the Court held that if the Union citizen leaves the host Member State *prior to the commencement of the divorce proceedings*, the third country national’s derivative right to reside comes to an end and cannot be retained on the basis of Article 13(2)(a) of the Free Movement Directive.²⁰ In other words, for

¹⁶ Ibid para. 71.

¹⁷ Ibid para. 75, emphasis added.

¹⁸ Ibid para. 76.

¹⁹ Court of Justice (Grand Chamber) Case C-218/14 *Kuldip Singh and Others v Minister for Justice and Equality*, 16 July 2015.

²⁰ *Kuldip Singh and Others*, para. 62.

the third country national to benefit from Article 13(2)(a), divorce proceedings have to be initiated *before* the departure of the EU national from the EU host Member State.²¹

Pursuant to this reasoning, the circumstances in Article 13(2) of the Free Movement Directive cannot revive the right to reside that has already been lost with the departure of the EU citizen from the host Member State. Accordingly, in *Sing and Others* the date of commencement of divorce proceedings was made a crucial factor for the retention of third country nationals' residence rights. If this predates the departure of the EU citizen, his spouse retains her rights under EU free movement law.

The Court transposed the same principle to *NA*,²² in this way following the formalistic argument that for the third country national spouse's right to reside to be *retained* even in circumstances of domestic violence, divorce proceedings ought to have been initiated before the departure of the EU national.²³

2.2.2. *Rights of third country nationals as the exception*

The Court's formalism was much more sophisticated than simple transposition of the principle established in *Sing and Others*. This additional sophistication made its analysis much more compelling and difficult to challenge. More specifically, it took into account the context of Article 13(2)(c) of the Free Movement Directive. This context is characterised by Member States' general entitlement to control the entry and residence of third country nationals.²⁴ Against this context, Article 13(2) of the directive is presented as a derogation and an exception from this general entitlement, whereby a specific group of third country nationals (i.e. family members of EU nationals exercising their EU rights by moving to another EU Member State) are allowed to reside under EU law.²⁵ The exceptionality of Article 13(2) is further highlighted in the reasoning by reference to Article 7(2) in the Directive.²⁶ This provision stipulates that the right of residence extends to some EU nationals' *family members*, who accompany the EU citizen. The condition thus of being a family member of a Union citizen is crucial in the logic of the Directive. In contrast, Article 13(2) regulates circumstances when this condition does not apply anymore because of the dissolution of the relationship,²⁷ which denotes the exceptional

²¹ See Francesca Strumia, 'Divorce immediately, or leave. Rights of third country nationals and family protection in the context of EU citizens' free movement: Kuldip Singh and Others' 53 *Common Market Law Review* (2016) 1373.

²² *N.A.*, para.37

²³ Despite the critique, it needs to be acknowledged that the CJEU's position is more favorable than the UK's position. Pursuant to the latter 'a third country national spouse may only place reliance upon it [Article 13(2)(c) of the Free Movement Directive] once a divorce has been finalized. See *Written Observations on Behalf of the AIRE Centre*, para.15, available at http://www.airecentre.org/data/files/NA_Pakistan.PDF

²⁴ Marie-Bénédicte Dembour, *When Humans Become Migrants* (OUP, 2015) 3; Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP, 2016) 8; Gregor Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Kluwer Law International, 2000) 82; Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (CUP 2017) 380.

²⁵ *N.A.*, para.41.

²⁶ *N.A.*, para. 42.

²⁷ Although, formally, a victim of domestic violence is still a family member of her abuser (who is an EU national) until the completion of the divorce proceedings. See CJEU Case 267/83 *Aissatou Diatta v Land Berlin*, 13 February 1985, para.18-22; CJEU Case C-244/13 *Ewaen Fred Ogieriakhi v Minister for Justice and Equality Ireland*, 10

nature of the circumstances that Article 13(2) aims to regulate given the overall logic of the Directive.

The Court bulwarked its reasoning with an additional contextual argument that is also related to Member States' general entitlement to regulate the residence of third country nationals. In particular, the provision preceding Article 13 regulates precisely the circumstances when family members can retain their residence rights in the event of death or departure of the Union citizen from the host Member State. The text of Article 12 makes a clear distinction between family members who are EU nationals and those who are third country nationals. Pursuant to Article 12(1), the first category can retain their residence rights if the EU national, who they initially moved with or joined, departs.²⁸ In contrast, the second category seems to be offered this possibility only if the EU national dies.²⁹ The text of Article 12 suggests that the EU legislator has made a clear choice not to retain the residence rights of third country nationals when their EU national sponsor leaves the host Member State.

A pertinent question that emerges here is why Article 13 should be made dependent on Article 12 of the Free Movement Directive. True, Article 12 precedes Article 13; but both provisions seem independent from each other. This weakens the argument that since Article 12 does not envision general circumstances where a third country national can retain her residence rights upon her EU national spouse's departure, Article 13 cannot envision this either.³⁰ Rather Article 13 appears to independently regulate specific circumstances when retention might be possible. Catherine Briddick has thus proposed that the correct interpretative approach is to treat Article 13(2) as a special rule that has precedence over Article 12 that incorporates a rule of more general application.³¹ The strength of Briddick's proposal that seeks to gloss over the different approaches to EU nationals as opposed to non-EU national family members is, however, undermined by the very text of Article 13. Article 13 itself treats these two categories of family members differently. More specifically, the personal scope of Article 13(1) of the Free Movement Directive covers family members who are EU nationals. In their case, as long as they fulfil the general requirements to reside in another MS (e.g. being themselves workers, self-employed or with sufficient resources), they do not lose their residence rights even if their relationship with an EU national is dissolved. The reasons for the dissolution might be domestic violence; but, in general, these reasons are not relevant. The approach, however, to family members who are third-country nationals is very different. Article 13(2) of the Free Movement Directive imposes certain *additional* conditions so that the third country national can preserve her residence rights in the host MS after the dissolution of her relationship with an EU national.

July 2014. See also Charlotte O'Brien, *Unity in Adversity. EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing, 2017) 130; Strumia (n 21) 1388.

²⁸ This group of EU nationals still have to comply with the general condition of being economically active.

²⁹ *N.A.*, para.43; Guild, Peers and Tomkin (n 4) 158.

³⁰ Advocate General Kokott explained in her opinion in *Singh* (para. 26) why Article 13 of the Free Movement Directive had to be read together with Article 12 of the same directive. She argued that Article 12 and 13 created 'a complicated and interlocking system.' An argument can be, however, made that Kokott's reasoning does not have the same power in the context of Article 13(2)(c) that regulates the specific circumstances of domestic violence. In particular, 'a victim of such violence cannot be expected to accompany the abusive spouse abroad and it might be wholly unreasonable to expect her to initiate divorce proceedings before, or even immediately after, the violence occurs.' See *Written Observations on Behalf of the AIRE Centre* (n 23) para.15.

³¹ Briddick (n 12) 370.

One of these conditions, as enshrined in Article 13(2)(c) refers precisely to having been a victim of domestic violence.

2.2.3. *The specific context of domestic violence is irrelevant*

How did the Court of Justice approach the *telos* of Article 13(2)(c) that is expressed in paragraph 15 of the preamble of the Free Movement Directive and that played a crucial role in the Advocate General's reasoning? Overall, the objective of assisting victims of domestic violence is irrelevant in the reasoning of the Court.³² So is the objective of severing the link between their residence rights and those of their abusers as a possible method of preventing violence.

Rather, when the Court invoked the purpose of the provision, it consulted the drafting history of the Directive. Based on this history, it concluded that safeguards against blackmail accompanied by threats of divorce were 'necessary only in the event of final divorce, since, in the event of *de facto* separation, the right of residence of a spouse who is a third-country national is not at all affected'.³³ This demands an explanation. In *Aissatou Diatta v Land Berlin*,³⁴ it was established that where a couple is *de facto* separated, but not divorced, the third country national spouse continues to have residence rights as a family member as long as the EU citizen spouse continues to exercise free movement rights. This rule is very beneficial for third country nationals when their EU national spouses remain in the host Member State. The rule, however, has nothing to do with circumstances when *de facto* separation implies that the EU national spouse leaves the host Member State. The drafters of the Directive simply did not think about these circumstances. Therefore, the Court of Justice's suggestion that safeguards against blackmail accompanied by threats of leaving the host country are not necessary, seems inapt.

The Court then makes the general conclusion that the application of Article 13(2)(c) is 'dependent on the parties concerned being divorced'.³⁵ Then it goes on to contradict itself in the following paragraph by holding that a third country national can rely on this provision when her Union citizen spouse has resided in the host state *until the date of the commencement of the divorce proceedings*.³⁶ It is not thus the divorce, but rather the commencement of the divorce proceedings that matters.³⁷ As a consequence of this interpretation, N.A. could not benefit from Article 12(2)(c) of the Free Movement Directive because at the time of the commencement of the divorce proceedings, her former spouse was no longer in the United Kingdom and was not exercising EU free movement rights.

Although N.A. was not entitled to residence rights in her capacity as a victim of domestic violence, the outcome of the case was still positive for her since she was granted the

³² This also implies that the Court was not sufficiently sensitive to the objective of protecting the human rights of victims, including the right to be free from violence that can be covered by, for example, Article 2 or 4 of the EU Charter of Fundamental Rights OJ C 326/391.

³³ *N.A.*, para.47.

³⁴ CJEU Case 267/83 *Aissatou Diatta v Land Berlin*, 13 February 1985, para.18-22.

³⁵ *N.A.*, para.48.

³⁶ *N.A.*, para.49. Emphasis added.

³⁷ Oosterom-Staples argues that since the word 'divorce' is not used in Article 13(2)(c) of the Free Movement Directive, the use of divorce proceedings as a reference point by the Court is flawed. Oosterom-Staples (n 12) 410-11. The weakness of this argument lies in the fact that the word 'divorce' appears in the first paragraph of Article 13(2).

sole custody over her two children who had a right to remain in the United Kingdom. Extending to her a right to reside in the United Kingdom thus served the purpose of ensuring the effectiveness of her children's rights to reside in the host Member State.³⁸

2.3. THE PECULIARITY OF THE DOMESTIC VIOLENCE RULE IN EU LAW: THE MARKET AND THE BORDER

Contrary to the Advocate General's opinion, the Court of Justice in *N.A.* rejected the occurrence of domestic violence as the relevant event that triggers the application of Article 13(2)(c) of the Free Movement Directive. Instead, two other events were made relevant: the commencement of the divorce proceedings and the departure of the EU citizen from the territory of the host Member State. Pursuant to this judgment, the second has to pre-date the first so that the victim can benefit from Article 13(2)(c).

A careful assessment of the implications is due here. The victim arguably has control over the first event since she herself might initiate divorce proceedings.³⁹ Admittedly, it might be unreasonable to expect such a step immediately after the violence and, more generally, migrant women might need legal assistance to initiate such proceedings. The commencement of divorce proceedings might be an important formal step that could be regarded as an indicator of the violence. It is important to acknowledge at this point that proving that domestic violence has occurred or providing 'the date on which the domestic violence occurs'⁴⁰ might be fraught with complications (e.g. the affected woman might not have contacted the police or she might not have a medical record to certify any wounds). In any case, the heading of Article 13 and the first sentence of Article 13(2) of the Free Movement Directive refer to divorce, which does imply that divorce proceedings are of clear relevance here and cannot be simply ignored by forwarding an argument that the *mere* occurrence of domestic violence triggers Article 13(2)(c).⁴¹

The victim most likely does not have any control over the departure date of her abusive spouse from the host Member State, which makes the interpretation of Article 13(2)(c) unfair and raises serious questions about the nature of the rights of third country nationals in the EU.⁴² In particular, the Free Movement Directive is intended to serve the interests of the EU free

³⁸ For an outline of the relevant ECJ judgments concerning the residence rights of caring parents, see Oosterom-Staples (n 12).

³⁹ If other events different from the initiation of divorce proceedings (e.g. filing a domestic violence complaint, triggering of criminal proceedings for domestic violence or conviction for domestic violence) trigger the application of the domestic violence rule, complications could arise. For example, the initiation of criminal proceedings for domestic violence might lead to the loss of Union citizen's residence rights (C-482/01 Orfanopoulos [2004] ECR). As a consequence and since the victim's status is derivative, his victim might also lose her residence rights because of the domestic violence that she has suffered.

⁴⁰ This is the formulation used by the Advocate General Wathelet in his opinion in *N.A.*

⁴¹ The reason as to why circumstances of divorce were specifically regulated in the Directive can be traced back to *Diatta v Land Berlin* C-267/83 [1985] ECR 00567, where it was established that where a couple is separated, but not divorced, the third country national spouse continues to have residence rights as a family member as long as the EU citizen spouse continues to exercise treaty rights.

⁴² This also raises questions about the effectiveness of criminal investigations of domestic violence. In particular, the EU citizen might leave because he might fear prosecution for domestic violence. True, he might be extradited back to the Member State where the violence occurred; but in the meantime, the victim might have been compelled to leave this very Member State since she has lost her residence rights.

market, including the freedom of movement of EU nationals, whereby third country nationals are instrumentalized.⁴³ The Court of Justice's reasoning in *N.A.* confirmed this instrumentalisation.

The interests of the market have another manifestation. Besides the technical requirement that the EU national abuser must still be in the host Member State and exercise free movement rights at the time of the initiating of the divorce proceedings,⁴⁴ an additional condition needs to be fulfilled. For a victim to benefit from the 'particular difficult circumstances' rule, she must be economically active, self-sufficient, or already a family member of an economically active person to retain her residence rights. Whereas initially the third country national victim's rights 'were parasitic on the E.U. family member's rights – i.e., dependent on the E.U. family member's whereabouts and activities – they are now dependent on her'.⁴⁵ She can compete in the labour market. This seemingly empowering gesture, however, might be of little value. Migrant women who are victims of domestic violence are not likely to fulfil these conditions.⁴⁶ Even more so, if they are single mothers since child care duties might reduce women's chances to undertake an occupation or to be compatible in the labour market. In sum, the requirement that the victim pursues an economic activity sits uneasily with the overall context of domestic violence.

Notably, this requirement is also baffling given the circumstances when normally immigration law extends protection statuses to certain categories of vulnerable individuals. Typical examples to this effect are persons eligible for international protection and victims of trafficking in human beings.⁴⁷ The protection framework built to help these categories first aims to ensure residence rights and once these rights are granted, the beneficiaries can access the labour market and social support services.⁴⁸ This logic is reversed under Article 13(2)(c) of the Free Movement Directive in relation to victims of domestic violence. The victim has to be economically self-sufficient to gain her residence rights.

It follows that the domestic violence rule in the Free Movement Directive is eroded from the very outset due to the purpose of the Directive where the rule is located. In particular, this Directive seeks to facilitate the free movement of EU citizens. True, under some circumstances, this might benefit some third-country national migrant women (i.e. they are allowed to move to

⁴³ The residence rights offered to third country nationals are designed to uphold the effectiveness of the EU citizens' free movement rights. As the CJEU has reasoned, 'a refusal to allow such rights [derived rights for third-country family members to follow or join] would be liable to interfere with the Union citizen's freedom of movement by discouraging him from exercising his right of entry into and residence in the host-Member State.' *Kuldip Singh*, para.50; CJEU (Grand Chamber) Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigrati,e Integratie en Asiel v B*, 12 March 2014, para.36 and 45; Case C-40/11 *Iida* [2012] ECR, para 68; Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] ECR, para 35; and Case C-86/12 *Alokpa and Others* [2013] ECR, para 22.

⁴⁴ For this reason, *N.A.* has been criticized. See H Oosterom-Staples (n 12); Steve Peers, 'Domestic Violence and Free Movement of EU Citizens: a Shameful CJEU Ruling' (*EU Law Analysis*, 25 July 2016) <<http://eulawanalysis.blogspot.com/2016/07/domestic-violence-and-free-movement-of.html>> 19 September 2019.

⁴⁵ Adam Weiss, "'Transnational Families in Crisis' An Analysis of the Domestic Violence Rule in E.U. Free Movement Law' (2009) 30(3) *Michigan Journal of International Law* 841, 852.

⁴⁶ The characteristics that 'leave the third-country national vulnerable to domestic abuse will also likely leave her unable to participate effectively in the labour market'. Weiss (n 45) 874.

⁴⁷ See Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (CUP 2017) 131.

⁴⁸ *Ibid* (n 47) 117; James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 730.

another EU Member State and take up employment);⁴⁹ however, overall the rule sits uneasily within the context of the Directive whose objective is not protection of vulnerable migrant women. The Directive is rather anchored in the effective functioning of the free market. Social and protective aspects for EU nationals that encourage them to actively participate in the market by moving across EU Member States might be introduced within this context.⁵⁰ Third country nationals might benefit from this as a proxy.⁵¹ However, when the EU national stops exercising free movement rights in the market (e.g. by leaving the host EU Member State), there is no interpretative anchor that could justify extension of protection for third country nationals. In other words, the market aspect of free movement cannot justify the protective and social aspects of free movement, even less so for third country nationals.

Besides the market, there is another crucial factor: EU Member States' interest in controlling the ingress and stay of third country nationals. At this junction, it is pertinent to mention that the Free Movement Directive is not an immigration law instrument; it is rather a market instrument. It is, therefore, intended to serve the imperatives of the market, which explains the requirement that victims of domestic violence have to be also economically self-sufficient to retain their residence rights. When the imperatives of the border (i.e. EU Member States' migration control interest) also intervene, the extension of protection to third country nationals in the form of residence rights is not a measure that Member States will be easily willing to undertake.

In sum, given the nature of the Free Movement Directive as an economic instrument that serves the market, the inclusion of the domestic violence rule therein appears peculiar. Perhaps, the peculiarity can be explained with the drafters' bad conscience that EU law itself creates situations of vulnerability that foster violence. Rectifying these situations with a market-based solution, however, seems inapt. Can a remedy be expected from another source? Namely, can the Istanbul Convention, adopted within the CoE framework with the primary objective of protecting women against all forms of violence,⁵² offer a better solution? How could this solution affect EU law in light of the EU's intention to ratify this Convention?

3. THE IMMIGRATION STATUS OF VICTIMS UNDER THE COUNCIL OF EUROPE CONVENTION ON VIOLENCE AGAINST WOMEN

Article 59 of the Istanbul Convention provides an immigration relief to migrant women victims of violence by carving out exceptions in the immigration control prerogative of host states.⁵³ Its personal scope is wider than that of Article 13(2)(c) of the EU Free Movement Directive

⁴⁹ Article 23, EU Free Movement Directive.

⁵⁰ See Daniel Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 *Common Market Law Review* 17; Francis G Jacobs, *Citizenship of the European Union – A Legal Analysis* (2007) 13 *European Law Journal* 591; Jessica Guth and Sanna Elfving, *Gender and the Court of Justice of the Europe Union* (Routledge 2019) 144.

⁵¹ Francesca Strumia, 'European Citizenship and EU Immigration: A Demoi-cratic Bridge between the Third Country Nationals' Right to Belong and the Member States' Power to Exclude' (2016) 22(4) *European Law Journal* 417.

⁵² Article 1(a), Istanbul Convention.

⁵³ For detailed analysis, see Vladislava Stoyanova 'A Stark Choice: Domestic Violence or Deportation? The Immigration Status of Victims of Domestic Violence under the Istanbul Convention' (2018) 20 *European Journal of Migration and Law* 53.

since Article 59 of the Istanbul Convention applies not only to third country nationals whose spouses are EU citizens. Rather, it applies to any migrant woman with dependent residence status. Under EU law, the latter will be covered by the ‘particularly difficult circumstances’ rule under Article 15(3) of the EU Family Reunification Directive that applies to circumstances where the abuser and the victim are third country nationals. Therefore, there are no divergences between EU law and CoE law in terms of the personal scope of victims who might need autonomous permits.

Prior to any engagement with the substance of Article 59 of the Istanbul Convention, it needs to be highlighted that it can be an object of reservations.⁵⁴ Some EU Member States have taken advantage of this,⁵⁵ which implies diversity of national standards and preservation of a wide scope of State discretion as to when immigration relief could be extended to victims. This can shape the potential impact that the Convention might have upon its ratification by the EU, a point to which will be turned to below. As will also emerge below with better clarity, generally Article 59 of the Istanbul Convention allows States wide discretion in various aspects.

A careful scrutiny of Article 59 of the Istanbul Convention demands dissecting all aspects of the provision and juxtaposing them with the standards raised by the corresponding EU law norms. Article 59 contains three relevant paragraphs and the below analysis will clearly distinguish the meaning and the implications from each one of them.

3.1. ‘PARTICULARLY DIFFICULT CIRCUMSTANCES’

Article 59(1) of the Istanbul Convention stipulates that victims whose residence status depends on that of their spouse ‘are granted in the event of particularly difficult circumstances’ an autonomous residence permit. The meaning of ‘particular difficult circumstances’ is not clarified in the Treaty. This formulation is identical to the one used in Article 13(2) of the Free Movement Directive and Article 15(3) of the Family Reunification Directive. While the latter provision does not offer illustrations of such circumstances, the former is clear to the effect that domestic violence is an example of such difficult circumstances. In contrast, the first paragraph of Article 59 of the Istanbul Convention is not explicit to this effect. As a consequence, it could be interpreted in a way that implies that in addition to being a victim of domestic violence (as defined in Article 3(e) of the Convention)⁵⁶ some other difficult circumstances are required for the issuance of autonomous residence permit.⁵⁷ It is left to the State Parties to determine these circumstances.⁵⁸

⁵⁴ See Article 78(2), Istanbul Convention. See generally Wojciech Burek, ‘Reservations and Declarations under the Istanbul Convention’ in Johanna Niemi, Lourdes Peroni and Vladislava Stoyanova (eds) *The Istanbul Convention as a Response to Violence against Women in Europe* (Routledge forthcoming).

⁵⁵ Such EU Member States are Cyprus, Germany, Romania and Slovenia. See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=J3Utp3c7

⁵⁶ Article 3(a) defines ‘violence against women’ in the following way ‘a violation of human rights and a form of discrimination against women’ and ‘all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life’.

⁵⁷ Explanatory Report, para 303: ‘Parties should consider being a victim of the forms of violence covered by the scope of this Convention committed by the spouse or partner or condoned by the spouse or partner as a particular difficult circumstance.’

⁵⁸ For a proposal how the State Parties’ discretion in this area can be limited, see Stoyanova (n 53) 62.

In comparison, Article 59(2) of the Convention, which intends to ensure suspension of expulsion proceedings to enable the filing of an application for an autonomous residence permit, simply refers to victims without raising any outstanding conditions regarding their circumstances. However, this provision ensures only suspension of expulsion proceedings;⁵⁹ in contrast, Article 59(1) and Article 59(3) of the Convention regulate residence permits.

As to Article 59(3) of the Convention, it envisions two circumstances when residence permits can be granted. Both of them imply that in addition to being a victim of violence, other conditions need to be present. The first one is vaguely framed as ‘personal situation’, which arguably and in contrast to ‘particularly difficult circumstances’ implies a lesser severity threshold; similarly, however, to ‘particularly difficult circumstances’, ‘personal situation’ implies a wide scope of state discretion for determining what ‘personal’ situations will be encompassed as worthy for extension of permits.⁶⁰ As to the second condition captured by Article 59(3)(b) of the Convention, the victim needs to cooperate in criminal proceedings to be issued with a residence permit. The contours of ‘cooperation’ are not defined more precisely in the text of the treaty, which implies that the State Parties have discretion to determine the forms and the levels of cooperation expected from the victim.

To recap, the formulation used in Article 13(2)(c) of the EU Free Movement Directive appears to be more straightforward to the effect that being a victim of domestic violence is in itself a particularly difficult circumstance. The Istanbul Convention is vaguer in this respect.

3.2. THE MIGRATION STATUS OF THE VICTIM AT THE TIME OF APPLYING FOR A PERMIT AS A VICTIM

As clarified in Section 2 above, the irregular residence status of the victim at the time she tries benefit from the ‘particularly difficult circumstance’s rule in the EU Free Movement Directive, has turned out to be a stumbling stone. More specifically, if she has already lost her residence rights due to the departure of her EU national spouse from the EU host MS, she cannot benefit from the rule. How has this issue been addressed in Article 59 of the Istanbul Convention?

3.2.1. *A REQUIREMENT FOR A REGULAR MIGRATION STATUS UNDER ARTICLE 59(1) OF THE ISTANBUL CONVENTION?*

To define the scope of victims who in the event of marriage or relationship dissolution are granted an autonomous residence permit, Article 59(1) of the Convention uses the following formulation: ‘victims whose residence status depends on that of the spouse or partner’. The present tense in the sentence seems to imply that at the time the victim applies for autonomous residence permit her migration status is still regular in the host country. Accordingly, Article

⁵⁹ As the Explanatory Report clarifies, the suspension of deportation proceedings under Article 59(2) is limited to circumstances when in light of the victim’s dependent status, she faces deportation because of the deportation initiated against her spouse (para. 306). The objective of Article 59(2) is to prevent the continuation of violence after deportation in the country where both spouses are deported.

⁶⁰ The Explanatory Report (para 307) might be useful here since it refers to ‘the victim’s safety, state of health, family situation, or the situation in their country of origin among other.’ To define ‘personal circumstances’, the Explanatory Report more generally refers to circumstances where ‘it would be unreasonable to compel them [victims] to leave the national territory’.

59(1) might exclude victims whose migration status is already irregular at the time they try to benefit from the possibility of being granted an autonomous residence permit as victims in 'particularly difficult circumstances'.⁶¹ Their status might have become irregular for various reasons, including departure of the sponsor from the host country.

Article 59(1) of the Convention can be further contrasted with EU law on this point. Pursuant to the EU Free Movement Directive, as interpreted by the CJEU, the departure of the perpetrator from the EU MS before the commencement of any divorce proceedings, renders the domestic violence rule inapplicable. In contrast, the application of Article 59(1) of the Istanbul Convention *does not* depend on the location of the perpetrator. However, his location might be a relevant factor for assessing the immigration status of the victim in the host State, which in turn might negatively influence her possibility to take advantage of Article 59(1).

The last sentence of Article 59(1) also strengthens the possibility of excluding victims with irregular migration status. It says that '[t]he conditions relating to the granting and duration of the autonomous residence permit are established by internal law'. This sentence grants State Parties discretion to determine the conditions relating to the granting of autonomous residence permits to the victim. One such possible condition might be regular migration status at the time of application.⁶² A different interpretation might imply that host States have to regularize the migration status of the victim upon her application. Generally, States are wary of such regularization measures.⁶³

In sum, on the point concerning the migration status of the victim at the time of her application for an autonomous permit as a victim of violence, CoE law is open to interpretations that might converge with the lower EU law standard.⁶⁴ This will be an unfortunate development because it will imply that victims whose residence status is already irregular, might be excluded from the possibility to gain an autonomous permit in their capacity as victims of domestic violence. However, in contrast to EU law, CoE law might be susceptible to less technical and formal interpretations and to readings that are more advantageous to victims in light of the Treaty's general objective to design a comprehensive framework and measures for assistance of *all* victims of violence against women and domestic violence.⁶⁵ An interpretation in line with this objective should imply that the location of the perpetrator is of immaterial consideration, even if his departure might lead to rendering the victim's status in the host country irregular.

3.2.2. *NO REQUIREMENT FOR A REGULAR MIGRATION STATUS UNDER ARTICLE 59(2) OF THE ISTANBUL CONVENTION*

⁶¹ The State Parties can always apply more beneficial standards than the minimum standards demanded by the Treaty.

⁶² See *SSHD v SP*, IA/01347/2015, 3 February 2016 and *Mirza Hafifjur Alis v SSHD*, IA/33899/2013, 23 July 2014 (ineligibility to benefit from the domestic violence rule since at the time of the application the victims' migration status in the country had been already irregular).

⁶³ See Regularisation programmes for irregular migrants (Council of Europe Committee on Migration, Refugees and Population, 2007), available at <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11614&Lang=EN>

⁶⁴ As to Article 15(3) of the Family Reunification Directive, it provides states with a wide margin what conditions to impose for granting autonomous permits in the event of particularly difficult circumstances.

⁶⁵ Article 1(c), Istanbul Convention.

Article 59(2) of the Istanbul Convention that aims to suspend deportation proceedings applies to circumstances when the status of the victim is already irregular (otherwise, there will be no deportation proceedings in the first place). The purpose of the suspension is that the victim is enabled to apply for an autonomous residence permit. At the point in time when she applies, Article 59(1) or 59(3) of the Treaty become relevant. Therefore, the flaw in Article 59(1) as discussed in the previous subsection, i.e. a requirement that the victim's migration status has to be still regular so that she can apply for an autonomous permit, might be remedied by Article 59(2) of the Convention. Upon this interpretation, CoE law goes further than EU law since the former does envision an intermediate condition where the victim's deportation is suspended so that she can apply for a permit. In contrast, EU law does not contain a provision that can enable to the victim to obtain suspension of already initiated removal proceedings in order to apply for a permit as a victim.⁶⁶

The drafting history as explicated in the Explanatory Report to the Convention, however, seems to destabilize the above argument.⁶⁷ The Explanatory Report limits the application of Article 59(2) to victims who face deportation *because* their spouse faces deportation also and there is a danger that the victim will be deported *together* with the abuser and continue to be abused. This limitation is unfortunate because it implies that the relevance of Article 59(2) of the Istanbul Convention is restricted to circumstances where the victim might be deported together with her abuser.

Based on the text of the provision, an argument can be made in favour of overcoming this limitation. More specifically, it can be argued that the expression 'initiated in relation to a residence status dependent on that of the spouse or partner' reflects wider circumstances. These circumstances cannot be limited to cases where the victim will be deported together with the abuser, as suggested by the Explanatory Report. There might be circumstances where the victim might be at risk of deportation, while her sponsor is not or the whereabouts of her sponsor are unknown. Again, the overall purpose of the Convention can support an interpretation that is more favourable for migrant victims to the effect that under all circumstances and irrespective of any removal proceedings against the sponsor or his location, the victim can benefit from suspension of removal proceedings.

3.2.3. *NO REQUIREMENT FOR A REGULAR MIGRATION STATUS UNDER ARTICLE 59(3) OF THE ISTANBUL CONVENTION*

Article 59(3) of the Istanbul Convention describes two circumstances as to where the State Parties are under the obligation to issue renewable residence permit to victims. These two circumstances are where the national authorities consider that victims' stay is 'necessary owing to their personal situation' or for the purpose of cooperation in investigation or criminal proceedings. The text of the provision does not imply any contingency between the migration status of the victim and her possibility to benefit from the two circumstances for being granted a permit. It follows that State Parties are prevented from requiring regular migration status so

⁶⁶ Here we should also remind ourselves that pursuant to Article 6(1) of Directive 2008/115/EC of 16 December 2008 on common standards and procedures in MS for returning illegally staying third-country nationals, MS are under the obligation to issue a return decision to any third country national staying illegally on their territory.

⁶⁷ Explanatory Report to the Convention, para 306.

that the victim can benefit from these two circumstances. In sum, the formulation in Article 59(3) of the Istanbul Convention is more helpful for victims than EU law since it benefits victims whose status has become irregular before they apply for a permit as victims of domestic violence.⁶⁸

3.3. BENEFITS ATTACHED TO THE PERMIT

As already mentioned in Section 2.2.3 above, EU law makes the retention of the victims' right of residence dependent on the requirement that they are economically active (as workers, self-employed person etc.) and 'have comprehensive sickness insurance cover in the host Member State'.⁶⁹ This relates to the nature of the EU Free Movement Directive as a market instrument. In stark contrast, Article 59 of the Istanbul Convention as a purely protective measure does not impose such a dependency. In this respect, therefore, there is a clear discrepancy between CoE and EU law. As to the EU Family Reunification Directive, it does not regulate the issue as to whether the granting of an autonomous residence permit 'in the event of particularly difficult circumstances', is contingent on the victim being economically active. Nor is it clear as to whether the victim must be entitled to access employment or self-employed activity.⁷⁰

In a similar way, the Istanbul Convention has left the issue unregulated since it does not clarify what benefits it attaches to the autonomous permit once granted. This leaves the question open as to whether the extension of the permit as a victim of domestic violence implies extension of the right to have unconditional access to the labour market. The question as to the type of social assistance benefits and services that victims might have right to, is also left unresolved at the level of the Istanbul Convention. These questions will have to be tackled by the national legislators.

In this context, the general provisions in the Convention regulating support services and shelters for victims might be useful.⁷¹ For example, Article 20 stipulates that victims shall have access to services facilitating their recovery from violence, including legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment. It also adds that the State Parties shall ensure that victims have access to health care and social services. The anti-discrimination provision in the Istanbul Convention is also of clear relevance here since it ensures that the measures for protecting the rights of victims are secured without discrimination on the ground of migration or other status.⁷² When it comes, however, to access to the labour market and to social assistance, States can generally introduce

⁶⁸ The weakness of Article 59(3) of the Istanbul Convention might rather lie in the discretion granted to the State Parties to possibly ignore the first circumstance that refers to the 'personal situation of the victim' and their discretion as to how to interpret 'personal situation.' For further discussion, see Stoyanova (n 53).

⁶⁹ Article 13(2), second sentence, EU Free Movement Directive.

⁷⁰ Article 14(2) of the Family Reunification Directive allows MS to restrict access to the labour market for period not exceeding 12 months. If a victim receive an autonomous permit pursuant to the second sentence of Article 15(3) before the expiration of these 12 months, the directive does not oblige the MS to lift the restriction.

⁷¹ Articles 20-26, Istanbul Convention.

⁷² Article 4(3), Istanbul Convention. This provision requires the Parties to refrain from discrimination in the implementation of the provisions of the Convention. Explanatory Report, para.54.

distinctions based on migration and residence statuses; such distinctions might be proportionate and thus not necessarily discriminatory and contrary to human rights law.⁷³

In sum, the EU does not ensure that *wives of third country nationals* are entitled to access the labour market if they receive autonomous residence permits ‘in the event of particularly difficult circumstances’.⁷⁴ In contrast, *wives of EU nationals* have to be active in the labour market as a precondition for the extension of the autonomous permit under EU law. Such a precondition is not imposed by the Istanbul Convention. Nevertheless, and without prejudice to the possible benefits of the social assistance measures generally envisioned by the Convention for victims, its failure to guarantee victims’ access to the labour market is unfortunate. Such access in combination with the above mentioned support services can facilitate victims’ self-sufficiency and feeling of self-worthiness. CoE law has left the issue to the State Parties to decide without imposing any concrete obligations.

4. THE POTENTIAL IMPACT OF THE COUNCIL OF EUROPE CONVENTION ON EU LAW

Having juxtaposed the two European frameworks and clarified the divergences, an assessment can be made as to the impact of the Istanbul Convention on EU law in the area of migrant women’s residence rights. First, however, some background information as to the EU’s approach to ratification is indispensable.⁷⁵

4.1. LIMITED EU COMPETENCE

The EU can bind itself only to the extent of its competence.⁷⁶ In light of this limitation, the Council adopted two decisions thereby authorizing the signing of the Convention. The first decision has as its legal basis Articles 82(2) and 83(1) of the Treaty on the Functioning of the EU (‘TFEU’) that concern judicial cooperation in criminal matters and minimum rules concerning the definition of criminal offences, in conjunction with Article 218(5) of the TFEU that concerns the procedure for signing of international treaties by the EU.⁷⁷ The second decision’s legal basis is Article 78(2) of the TFEU that concerns measures for the development

⁷³ ‘The meaning of discrimination is identical to that given to it under Article 14 of the ECHR.’ Explanatory Report, para.54.

⁷⁴ Article 14(2), the Family Reunification Directive.

⁷⁵ For a useful general overview of the EU measures in the area of domestic violence and the legal basis invoked, see Ruth Lamont, ‘Beating Domestic Violence? Assessing the EU’s Contribution to Tackling Violence against Women’ 50 *Common Market Law Review* (2013) 1787; See also Violence against Women and the EU Accession to the Istanbul Convention (European Parliament, 2017) available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596815/IPOL_STU\(2017\)596815_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596815/IPOL_STU(2017)596815_EN.pdf); see also Sara de Vido, ‘The Ratification of the Council of Europe Istanbul Convention by the EU: A Step Forward in the Protection of Women from Violence in the European Legal System’ 9(2) *European Journal of Legal Studies* (2017) 69, who argued that the Istanbul Convention once ratified by the EU can be used to interpret EU law.

⁷⁶ The EU is not generally competent in all matters of human rights protection. See Edouard Dubout, ‘The Protection of Fundamental Rights and the Allocation of Competences in the EU: A Clash of Constitutional Logics’ in Loic Azoulay (ed) *The Question of Competence in the European Union* (Oxford University Press 2014) 193.

⁷⁷ 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.

of the Common European Asylum System, in conjunction with Article 218(5) of the TFEU.⁷⁸ The first decision says that the Council authorises the signing of the Istanbul Convention ‘with regard to matters related to judicial cooperation in criminal matters’. The second decision says that the Council authorizes the signing of the Convention ‘with regard to asylum and non-refoulement’. The second decision also explicitly says that ‘it concerns only Articles 60 and 61 of the Convention’, provisions that regulate gender-based asylum claims and *non-refoulement*. In contrast, the first decision does not refer to some specific provisions of the Convention; it rather clarifies that it ‘concerns the provisions of the Convention on judicial cooperation in criminal matters insofar as those provisions may affect common rules or alter their scope’. This implies that any provision of the Convention (including potentially Article 59) that concerns the rights of victims of crime and the rights of individuals in criminal procedure is of relevance for EU law and EU law might have to be modified so that compliance with the Convention can be ensured after accession. This is important and will be returned to below.

Given the invoked legal basis in the two decisions by the Council and the references therein that imply limitations in the authorization for signing the Convention, it appears that the EU will accede to the Convention within limited areas since it might not consider itself competent for other parts of the Treaty that regulate other areas.⁷⁹ The limitations implied by the Council’s decisions are currently an object of legal contestation,⁸⁰ an issue that will not detain us further here. Rather, this article assumes that the limitations will be applicable and assesses their implications.

At first glance, Article 59 of the Convention does not seem to fall within any of the competence areas indicated in the two Council decisions. It would then follow that this provision cannot be part of EU law and that the EU would not be required to adopt legislative

⁷⁸ Council Decision 2017/866 of 11 May 2017 on the signing on behalf of the EU of the CoE Convention on preventing and combating violence against women and domestic violence with regard to asylum and *non-refoulement* OJ L 131/13.

⁷⁹ This position is contrary to the initial proposal for a Council decision for signing the Convention where it is stated that ‘[...] the Union has competence covering most of the provisions of the Convention and has adopted an extensive set of rules in these areas’. Proposal for a Council Decision on the signing of the Convention, 6695/16, Interinstitutional File 2016/0063(NLE), 4 March 2016. After the adoption of the two decisions by the Council, the European Parliament regretted ‘that the limitation to two areas, i.e. matters related to judicial cooperation in criminal matters and asylum and non-refoulement, raises legal uncertainties as to the scope of the EU accession, as well as concerns regarding the implementation of the Convention.’ European Parliament Resolution of 12 September 2017 on the proposal for a Council decision on the conclusion, by the EU, of the CoE Convention on preventing and combating violence against women and domestic violence (COM(2016)0109 – 2016/0062(NLE)) P8 TA(2017)0329, para.2 http://www.europarl.europa.eu/doceo/document/TA-8-2017-0329_EN.pdf

⁸⁰ In April 2019 the European Parliament adopted a resolution seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposed accession of the EU to the Istanbul Convention and the procedure for the accession. In the resolution, the Parliament ‘[t]akes the view that there is legal uncertainty as to whether the accession to the Istanbul Convention as proposed by the Council is compatible with the Treaties, in particular as regards the choice of the appropriate legal basis for the decisions on the signing and on the conclusion by the EU of the convention, and as regards the possible split into two decisions on the signing and on the conclusion of the convention as a consequence of that choice of legal basis.’ European Parliament Resolution of 4 April 2019 seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposals for the accession by the EU to the CoE Convention on preventing and combating violence against women and domestic violence and on the procedure for that accession (2019/2678(RSP)) P8 TA-PROV(2019)0357 http://www.europarl.europa.eu/doceo/document/TA-8-2019-0357_EN.pdf

and other measures to implement it.⁸¹ Neither would the EU be required to align its legal framework with Article 59 of the Convention. Any measures would be left to MS to adopt simply as State Parties to the Istanbul Convention.⁸² In other words, MS would not be required to adopt any measures to implement the Convention *by virtue of their duties under EU law*.⁸³ Neither could the CJEU interpret Article 59 of the Convention.

4.2. THE POSSIBILITY OF USING THE EU COMPETENCE UNDER ARTICLE 82(2) TFEU

This first glance might be however misleading. True, Article 59 of the Istanbul Convention implies primary immigration measures by offering immigration relief, which falls outside the competence boundaries imposed by the two Council decisions. However, the provision also concerns the rights of victims of crime and the rights of individuals in criminal procedure. This relationship is particularly strong in light of Article 59(3)(b) of the Convention that stipulates that victims shall be issued with residence permits ‘where the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings’. This potentially places the measures envisioned by Article 59 of the Istanbul Convention within the scope of Article 82(2) of the TFEU.⁸⁴

Article 82(2) of the TFEU provides a legal basis for harmonizing EU legislation and EU measures predicated on their relevance to mutual recognition of judgments and limited to crimes with a cross-border dimension.⁸⁵ Three sets of questions need to be asked at this point to clarify whether and how the measures envisioned by Article 59 of the Istanbul Convention fall within the ambit of Article 82(2) of the TFEU. No conclusive answers might be available; however, possible lines of argumentation will be offered below.

The first question is: How is the implementation of Article 59 of the Istanbul Convention necessary to facilitate mutual recognition of judgments and cooperation in criminal matters? To respond, it can be useful to look at other EU legal instruments where Article 82(2) of the TFEU was used as a legal basis and, accordingly, facilitation of mutual recognition of judicial decisions and police and judicial cooperation in criminal matter were used as justifications for the adoption of these legal instruments.

⁸¹ See Article 216, TFEU (agreements concluded by the EU are binding on both the EU and its MS). The CJEU has also confirmed that once international agreements concluded by the EU enter into force, they form an integral part of EU law. Case 181/73, *Haegeman v Belgian State* [1974], ECR 1974 – 00449.

⁸² In this sense the Istanbul Convention is a ‘mixed agreement’ since both the EU and the Member States are contracting parties and the competence over its subject matter is shared between the Member States and the EU. Paul Craig and Grainne De Burca, *EU Law, Text, Cases and Materials* (6th edition, OUP) 352.

⁸³ Article 258, TFEU. Craig and De Burca (n 82) 362-3.

⁸⁴ Article 83(1) TFEU referred to Council Decision (EU) 2017/865 concerns substantive criminal law and cannot be related to residence rights of victims. Article 78(2) TFEU referred to in Council Decision 2017/866 concerns issues of asylum and thus assessment of prospective risk of harm. Victims of violence can be entitled to residence rights due to risk of *non-refoulement* and thus prospective risk of future harm upon return. However, the focus of this article is on the possibility to receive residence rights due to past harm of domestic violence that has materialized in the host country. For further elaboration on these distinct possibilities, see Stoyanova (n 53).

⁸⁵ See generally Steve Peers, *EU Justice and Home Affairs Law: Vol II EU Criminal Law, Policing, and Civil Law* (Oxford University Press, 2016); Valsamis Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing 2016).

Examples of such legal instruments are the Victims of Crime Directive,⁸⁶ whose objective is to ‘ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings’ and the Trafficking in Human Beings Directive⁸⁷ whose objective is *inter alia* to introduce common provisions for the protection of victims. In its proposal for a Victims of Crime Directive, the Commission invoked the promotion of trust among MS.⁸⁸ In its proposal for a Trafficking in Human Beings Directive, the Commission also observed that ‘[d]ifferences in legal treatment in the different MS hinder coordinated efforts and hamper international law enforcement and judicial cooperation’.⁸⁹ Similar general justifications could be invoked in the context of domestic violence. In particular, the differences in the national conditions under which residence status might be extended to victims of domestic violence might hinder law enforcement and judicial cooperation, which might undermine the trust among MS.

The second question that needs to be answered for improving the understanding whether and how the measures envisioned by Article 59 of the Istanbul Convention fall within the ambit of Article 82(2) of the TFEU, can be formulated in the following way: Does Article 59 of the Istanbul Convention relate to criminal matters with cross border dimension? The following observation made by the EU Commission in its proposal for a Victims of Crime Directive is a relevant starting point for engaging with the question:

there is large scale cross-border element of victimization with significant number of EU citizens living, working and travelling around the EU and falling victims of crime whilst abroad. [...]. Citizens should be able to rely on having access to a minimum level of rights across the EU.⁹⁰

As the quoted paragraph suggests, the Commission’s concern was restricted to EU nationals. The same concern, however, equally applies to third country nationals: they should be able to rely on having access to a minimum level of rights across the EU when they become victims of crime, including the crime of domestic violence. A reasonable argument can therefore be forwarded that the measure of extension of residence rights, as a protective measure for crime victims,⁹¹ has a cross border dimension.

Admittedly, EU citizens have a privileged position in the EU legal order and access to a set of rights, including free movement rights within the EU, which explains the concern about divergent levels of protection in different MS if EU citizens become victims of crime.

⁸⁶ Directive 2012/29 of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime OJ L 315/57.

⁸⁷ Directive 2011/36 of 5 April 2011 on preventing and combating trafficking in human beings and protection of victims OJ L 101/1.

⁸⁸ Proposal for a Victims of Crime Directive, COM(2011) 275 final, 18 May 2011, page 11. See also Rianne Letschert and Connie Rijken, ‘Rights of Victims of Crime: Tensions between an Integrated Approach and a Limited Legal Basis for Harmonisation’ 4(3) *New Journal of European Criminal Law* (2013) 226; Steve Peers, *EU Justice and Home Affairs Law: Vol II EU Criminal Law, Policing, and Civil Law* (Oxford University Press 2016) 153.

⁸⁹ Proposal Trafficking in Human Beings Directive COM(2010)95 final, 29 March 2010, page 8.

⁹⁰ Proposal for a Victims of Crime Directive, COM(2011)275 final, 18 May 2011, page 11.

⁹¹ An argument can be anticipated that extension of residence rights is not a necessary protective measure for victims of crime. See Section 4.3 below.

Ultimately, however, and despite the fact the third country nationals do not enjoy the same free movement rights as EU citizens, the personal scope of the final version of the Victims of Crime Directive is not limited to EU nationals.⁹² It follows that the concern about divergent levels of protection of victims of crime across different MS is as much pertinent to third country nationals.

The justifications advanced by the Commission for the adoption of the Child Sexual Abuse Directive, whose objective is *inter alia* to strengthen the protection of victims, are also pertinent and can be invoked by analogy: '[...] the need to ensure that children in all MS should be protected from offenders from all MS, who can travel easily'.⁹³ Similar justifications can be invoked in the context of domestic violence: victims should be able to rely on similar conditions for extension of residence rights across the EU and should be protected from offenders from all MS including by preventing victims' deportation.

In sum, arguments analogous to the ones forwarded for the adoption of the Victims of Crime Directive, the Trafficking in Human Beings Directive and the Child Sexual Abuse Directive, can be advanced in the context of domestic violence. More specifically, in light of the free movement of EU citizens, who might also happen to be perpetrators of violence, the cross-border dimension is evident. The mere factual substratum of the *N.A.* case discussed in Section 2 exposes this cross-border aspect.

Finally, it should also be kept in mind that the exercise of EU competence under Article 82(2) TFEU is conditional on the principles of subsidiarity and proportionality. Therefore, the third set of questions revolves around these two principles. These questions can be formulated in the following way: Can the objective of establishing minimum standards on the residence rights of victims of domestic violence be better achieved at the Union level? Are EU measures necessary in this area? In light of the current divergent state practice in the area and the cross border aspect of the problem, affirmative answers are possible.⁹⁴

4.3. IMMIGRATION LAW MEASURES UNDER ARTICLE 82(2) TFEU?

A question that remains pending is whether Article 82(2) TFEU can be used as a legal basis for adopting immigration law measures, such as the extension of residence permits. None of the three above-mentioned EU directives adopted under Article 82(2) TFEU has gone in this direction. The Trafficking in Human Beings Directive has been explicit in this respect. Its preamble says that '[...], this Directive does not deal with the conditions of the residence of the

⁹² Paragraph 10, Preamble; Article 1(1), third sentence, Victims of Crime Directive.

⁹³ Proposal for Child Sexual Abuse Directive, COM(2010)94 final, 29 March 2010, page 8.

⁹⁴ For an useful overview of the divergent state practice see *Legal Implications of EU Accession to the Istanbul Convention* (European Network of Legal Experts in Gender Equality and Non-discrimination, 2015), 130, available at <https://www.equalitylaw.eu/downloads/3794-legal-implications-of-eu-accession-to-the-istanbul-convention>; For example, in Austria an autonomous residence permit is issued to third country nationals victims of domestic violence only if protection orders have been issued against the sponsoring spouse. GREVIO *Baseline Evaluation Report Austria*, 27 September 2017, para.192, available at <https://rm.coe.int/grevio-report-austria-1st-evaluation/1680759619>; In Denmark, such a permit is issued on the basis of the 'alien's ties to the Danish society.' Report submitted by Denmark pursuant to Article 68, paragraph 1 of the CoE Convention on preventing and combating violence against women, GEVIO/Inf(2017)2, 19 January 2017, page 56, available at <https://rm.coe.int/16806dd217>

victims of trafficking in human beings in the territory of the MS.’⁹⁵ So has been the more recently adopted Victims of Crime Directive that also contains a specific paragraph in its preamble to this effect:

This Directive does not address the conditions of the residence of victims of crime in the territory of the Member States. Member States should take the necessary measures to ensure that the rights set out in this Directive are not made conditional on the victim’s residence status in their territory or on the victim’s citizenship or nationality. Reporting a crime and participating in criminal proceedings do not create any rights regarding the residence status of the victim.

Despite this limitation, paragraph 18 of the preamble of the Victims of Crime Directive acknowledges the special protection needs and the special situation of migrant women victims of ‘violence committed in a close relationship’: ‘[w]omen are affected disproportionately by this type of violence and the situation is worse if the woman is dependent on the offender economically, socially or as regards her right to residence.’ Article 1 of the Victims of Crime Directive is also adamant to the effect that ‘[t]he rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status’. At the same time, however, paragraph 51 of the preamble of the Directive is also clear to the effect that if the victim has left the territory of the MS where the offence was committed, that MS is not anymore obliged to provide assistance.

Pulling the threads together, all victims including those with uncertain residence rights are entitled to all the rights in the Victims of Crime Directive (e.g. the right to receive information, the right to receive formal acknowledgment of formal complaints, the right to interpretation and translation, the right to access victim support services etc.). However, the scope of these rights does not include extension of residence permits.⁹⁶ If a victim cannot be deported for some reason and is simply tolerated on the MS territory because, for example, her removal might amount to *refoulement* or her country of origin refuses to issue her with travel documents, she is still entitled in her capacity as a victim to the rights under the Victims of Crime Directive. However, this Directive cannot help her in securing residence permit. If she can be deported, she cannot have access to the above-mentioned list of rights since she is not anymore within the territory of the MS where the violence was perpetrated. In its review of the

⁹⁵ See para 17 of the preamble of the Trafficking in Human Beings Directive. There is a separate EU instrument that deals with the conditions under which victims of trafficking in human beings can be granted residence rights. This is Directive 2004/81 of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

⁹⁶ In its Guidance Document, the EU Commission has suggested that for MS to ensure that the rights in the Directive are not made conditional on the victims’ residence rights, MS can adopt appropriate immigration rules, ‘for example, by suspending deportation orders and/or issuing temporary residence permits in relation to on-going criminal proceedings.’ DJ Justice Guidance Document related to the transposition and implementation of the Victims of Crime Directive, December 2013, p. 9 https://victimsupport.eu/activeapp/wp-content/uploads/2014/04/EC-Guidance-Document_Feb201411.pdf

implementation of the Victims of Crime Directive, the EU Parliament strongly deplored this situation.⁹⁷

Certainly, an argument can be formulated that the failure of the Directives adopted so far under Article 82(2) TFEU to require immigration law measures, does not mean that in general this provision can never be used to this effect. There is a clear interplay between the residence rights of victims, including when they have a formal role in criminal proceedings, and the effectiveness of these proceedings. The success of any criminal proceedings can be dependent on victims' participation and extension of support services, all of which could be guaranteed if the victim has secure residence rights. This can open a venue for using Article 82(2) TFEU as a legal basis for the implementation of Article 59 of the Istanbul Convention.

4.4. ARTICLE 82(2) TFEU AS A LEGAL BASIS AND THE CRIMINAL LAW APPROACH

It follows from the above that despite the competence constraints imposed by the two Council decisions discussed in Section 4.1 above, the EU is competent to take measures to implement Article 59 of the Istanbul Convention. Given the limitations of Article 82(2) of the TFEU that imply that any implementation measures have to serve the objective of mutual recognition of judgments and of addressing crimes with a cross-border dimension, as discussed in Section 4.2 above, there is still uncertainty however as to what measures more concretely the EU is competent to undertake. Article 82 of the TFEU is limited to judicial cooperation in *criminal matters*, which might be used for restricting the circumstances when victims could be entitled to residence permits. Under this restriction, victims might have to 'win' their permit by being useful in criminal proceedings. As opposed to the Free Movement Directive where victims have to participate in the market so that they gain an autonomous permit, as explained in Section 2.3, under Article 82(2) of the TFEU, if used as a legal basis for implementing Article 59 of the Istanbul Convention, another form of participation would be required as a precondition for a residence permit; namely, participation in criminal proceedings against the abuser. This implies a criminal law approach.

Under this approach, will the EU be under an obligation to change its legislation or to adopt new measures to comply with the Istanbul Convention? At this point, Article 59(3)(b) of the Convention is particularly pertinent since it is very adamant to the effect that victims are entitled to a 'a renewable residence permit' 'where the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation of criminal proceedings'. None of the conditionalities envisioned by the Free Movement Directive (see Section 2.2) can be applied for this purpose. Modifications in the Directive might not be attempted; yet, certainly new EU rules are imperative for ensuring that migrant women victims of violence and regardless of whether their abusive spouse is a EU or a third country national, are entitled to a permit when they cooperate in the criminal proceedings.

⁹⁷ Report on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (European Parliament, A8-0168/2018) 14 May 2018, p. 12 and 13, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2018-0168+0+DOC+PDF+V0//EN>

Crucially, Article 59(3)(b) of the Istanbul Convention formulates an entitlement to a permit once the victim cooperates.⁹⁸ Accordingly, the statement in the preamble of the Victims of Crime Directive that '[r]eporting a crime and participating in criminal proceedings do not create any rights regarding the residence status of the victim' is in violation of the Convention and the EU will have to act accordingly by changing the Directive. The limitation in the Directive that it 'does not address the conditions of the residence of victims of crime in the territory of the MS' will have to be overcome by new legislative measures at EU level.

4.5. ARTICLE 82(2) TFEU AS A LEGAL BASIS FOR MEASURES INDIRECTLY LINKED TO CRIMINAL PROCEEDINGS

The weakness of the above-described criminal law approach is that the extension of permits is constrained to circumstances where there are criminal proceedings and victims participate in these proceedings.⁹⁹ In light of how Article 82(2) TFEU has already been used before as a legal basis for legislative measures, could this weakness be overcome? A positive answer is possible given that the measures envisioned by the Victims of Crime Directive, whose legal basis is Article 82(2), extend much further than measures directly related to criminal proceedings. For this purpose, the Directive has introduced two terms: 'victim in the criminal justice system' and 'victim'. The first term is defined with reference to the person's active participation in the criminal proceedings (e.g. by acting as a witness).¹⁰⁰ In contrast, the second term is defined as 'a natural person who has suffered harm [...] which was directly caused by a criminal offence'.¹⁰¹ A person can be a 'victim' regardless of whether 'an offender is identified, apprehended, prosecuted or convicted'.¹⁰² A person can be a victim notwithstanding her role in the national criminal justice system.¹⁰³ The advantage of this distinction is that victims are conferred certain entitlements even though they do not have a formal role in the criminal proceedings.¹⁰⁴ This resolution vehemently supports an argument that EU measures that are *indirectly* linked to criminal proceedings can have Article 82(2) TFEU as a legal basis. The possibility of the EU to legislate for such indirect measures by using Article 82(2) TFEU as a

⁹⁸ Stoyanova (n 53) 78.

⁹⁹ Victims might be reluctant to engage with the criminal justice system for various reasons. See Matthew Hall, 'The Relationship between Victims and Perpetrators: Defending Victims' Rights' *Criminal Law Review* (2010) 31; Marianne Hester, 'Making it through the Criminal Justice System: Attrition and Domestic Violence' (2005) 5(1) *Social Policy and Society* 79.

¹⁰⁰ Para 20 of the preamble of the Victims of Crime Directive defines 'the role of victims in the criminal justice system'. It says that their role is determined by one or more of the following criteria: 'whether the national system provides for a legal status as a party to criminal proceedings whether is victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness; and/or whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings.'

¹⁰¹ Article 2(a)(i), Victims of Crime Directive.

¹⁰² Para 19 of the preamble of the Victims of Crime Directive.

¹⁰³ *DJ Justice Guidance Documented related to the transposition and implementation of the Victims of Crime Directive* (European Commission, 2013) 10.

¹⁰⁴ V Stoyanova, *Human Trafficking and Slavery Reconsidered* 87. Victims irrespective of their role in the criminal proceedings, are entitled to the measures envisioned by, for example, Articles 3, 4, 5, 6(1), 7(1), 8 and 9 of the Victims of Crime Directive. In contrast, victims 'in accordance with their role in the relevant criminal justice system in criminal proceedings' are entitled to the measures envisioned by, for example, Articles 6(2), 7(3), 11(1), 13 and 14 of the Victims of Crime Directive.

legal basis, can facilitate the incorporation in EU law of Article 59 of the Istanbul Convention in its entirety.

Under this wider approach, will the EU be under an obligation to change its legislation or to adopt new measures to comply with Article 59 of the Istanbul Convention? In light of the analysis in Sections 3.2 and 3.3 that exposed the gaps in the currently applicable EU law and its divergences from CoE standards, an affirmative answer seems appropriate. More specifically, the Convention is prone to less formalist and more purposive interpretations given its objective to assist all victims of violence. In contrast to EU law whose interpretative anchor is effective functioning of the market (see Section 2.3), the Istanbul Convention changes the perspective. Pursuant to this change, whether and when (before or after the initiation of divorce proceedings) the perpetrator has left the host State cannot be relevant factors that precondition the possibility for the victim to receive an autonomous residence permit. In contrast to EU law, the Istanbul Convention also enables victims to obtain the suspension of already initiated removal proceedings. The Convention entitles victims to certain forms of social assistance and support that extend beyond those envisioned more generally by the Victims of Crime Directive.

5. CONCLUSION

The bride's side was not the bright side in the CJEU reasoning in *N.A.*, a judgment that has exposed the weaknesses of EU law in addressing the insecurity that migrant women victims of domestic violence face in relation to their residence rights in the host State. Not only was EU law not on the bride's side, but the domestic violence rule in the Free Movement Directive appeared anomalous given the overall objective of this instrument (i.e. to serve the market imperatives). Brighter prospects might be however in sight given the planned ratification of the Istanbul Convention by the EU. Admittedly, Article 59 of this Treaty that specifically addresses the possibility for extending autonomous residence permits to victims, is beleaguered with its own deficiencies. In particular, it can be an object of reservations and it has left many issues to the discretion of the State Parties. It could have been more explicit that being a victim of domestic violence in itself is a particular difficult circumstance. It could have been more robust in its wording that even victims whose migration status is already irregular can benefit from the possibility of being granted an autonomous permit as victims of violence. It could have explicitly ensured that the permit entitles victims to access the labour market. Yet, given its objective to protect and assist all victims, the Istanbul Convention can generate an interpretative leverage that can benefit migrant women.

The operationalization of this leverage in the context of EU law could be hampered by the constraints imposed by the limited competence with which the EU has chosen to ratify the Convention. Despite these constraints, Article 82(2) of the TFEU that addresses cooperation in criminal matters, including the rights of victims and the rights of individuals in criminal proceedings, could be used as a legal basis for the implementation of Article 59 of the Istanbul Convention. There is still, however, uncertainty as to whether Article 82(2) of the TFEU can be used for adopting immigration law measures, such as extension of residence permits. The EU has explicitly refused to adopt such measures in the context of the Trafficking in Human Beings Directive and the Victims of Crime Directive, both of which are based on Article 82(2) of the TFEU.

There is, however, a clear interplay between the residence rights of victims and the effectiveness of criminal proceedings. This effectiveness can be dependent on victims' participation and extension of support services, all of which could be guaranteed if the victim has secure residence rights. This can open a venue for using Article 82(2) TFEU as a legal basis for the implementation of Article 59 of the Istanbul Convention. Drawing from the approach under the Victims of Crime Directive whose legal basis is Article 82(2) TFEU, it can be convincingly argued that EU measures that are more indirectly linked to criminal proceedings might also have this provision as their legal basis. In this way, autonomous residence rights that indirectly service criminal proceedings against abusers, can be extended to victims. This will deliver on the EU strategy for gender equality that has made combating violence against women a priority.¹⁰⁵

¹⁰⁵ Strategic Engagement for Gender Equality 2016-2019 (European Commission, 2016).