Biljana Brankovic
Independent Researcher – Consultant, Member of GREVIO[1]

Barriers to women's access to justice – gaps in meeting the requirements of the Istanbul Convention

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In the first part of the presentation, we will summarize the general aims and crucial contributions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (henceforth: the Istanbul Convention).
Upon reviewing the relevant standards set up by the Convention in the area of victims' access to justice, the second part of the presentation will provide an overview of research studies aimed at analyzing implementation of its provisions on investigation, prosecution and punishment (Brankovic, 2013a; 2013b; 2015; 2016). The research studies have been carried out in Serbia, but we are convinced that the research model may be applicable in other Eastern European countries.

1. Crucial contributions of the Istanbul Convention

The Istanbul Convention is a comprehensive and complex treaty - it is at the same time a human rights treaty, a criminal law treaty and an instrument for greater gender equality. Through its 81 articles, 65 of which are substantive, it makes unprecedentedly detailed provisions for measures that should be taken by State Parties to prevent violence against women and domestic violence, protect the victims and punish the perpetrators (Kelly and Lovett, 2015).
The Convention introduces several groundbreaking features. We will briefly summarize the crucial contributions of the Convention.

- The Convention is the first regional (**European**) legally-binding instrument in the area of violence against women (yet, it is relevant to recognise the importance of previously developed regional legally-binding instruments, i.e. Convention of Belém do Pará and Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa: Maputo Protocol) ;
- The Istanbul Convention offers a comprehensive framework to end violence against women (VAW) and domestic violence and it is the most far-reaching international treaty on this subject;
- **It reaffirms gendered understanding of VAW** on which many other previous (non-binding) international documents on VAW are based:

a) Defines VAW as a form of discrimination against women and a violation of human rights (Art.3a, 3d). Under Article 3d[2] ("gender-based violence against women"), it adopts a crucial part of the definition provided in General Recommendation 19 of CEDAW Committee (1992);

[1] I wrote this paper in my personal capacity as an Independent Researcher – Consultant; not in my official capacity as a member of GREVIO. Attitudes and opinions expressed in this paper should not be, therefore, in any manner attributed to GREVIO as a whole, or understood as a joint opinion of its members.
[2] Art. 3d defines that "gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately.

b) Contains a definition of "gender" (Art.3c[3]);
c) Recognizes the structural nature of VAW;
d) Defines contribution to elimination of all forms of discrimination against women as one of its purposes (Art.1), and contains provisions pursuing this aim as well as empowering women (Articles 4, 6);
e) Has a gender perspective throughout: a clear gendered dimension overlaps its various provisions – the Convention **requires that gender perspective is applied in a process of implementation of its provisions and evaluation of measures** (Art. 6) ;
f) Establishes structural connections between VAW and gender inequality.

- Further, it requires holistic, comprehensive measures for supporting victims; with the ultimate goal of keeping women safe from violence, the Convention provides for the setting up of a range of support services to empower women victims and enable them to recover from various forms of gender-based violence, specifying not only the types of support services that should be made available or supported by states, but also the approach to be taken when providing such service. It specifies that support services should be based on a gendered understanding of violence against women and domestic violence and should focus on the human rights and safety of the victim, and avoiding secondary victimisation (Art.18, para. 3). In addition, it requires multi-agency cooperation and cooperation between institutions and specialist women's non-governmental organisations;
- Integrates due diligence principle (Art. 5), which, through a proper implementation, may have far-reaching implications in practice. Further, it should not be forgotten that due diligence principle may serve as a platform for advocacy;
- Integrates (and builds on) decisions of the European Court of Human Rights (ECHR) and the CEDAW Committee (based on Optional Protocol to CEDAW Convention). In this context, we will mention recent cases in which ECHR made reference to the Istanbul Convention;
- Requires criminalisation of psychological violence (Art. 33), stalking (Art. 34), physical violence (Art. 35), sexual violence, including rape (Art. 36), forced marriage (Art. 37), female genital mutilation (Art. 38), forced abortion and forced sterilisation (Art. 39). It also sets out the principle that State Parties should ensure that sexual harassment is subject to criminal or "other" legal sanction;
- Bans invoking honour, religion, culture or tradition as a justification for VAW (Art. 42);
- Sets clear standards in the areas of: legislation, prevention, measures aimed at legal/institutional protection of victims (including establishment and sustainable development of general and specialist services to victims), efficient prosecution and punishment of perpetrators (but also – requires programmes for them);
- Defines specific "guidelines" for development of legislative and policy framework, as well as for an effective implementation at the national level;
- Calls for significant legislative and policy changes in relation to prevention and protection from VAW in most CoE member states;
- Requires INTEGRATED policies: it specifies that the State Parties should set up or designate national co-ordinated body, ensure effective co-operation between all relevant actors (government institutions, non-governmental organisations…), collect disaggregated data and conduct population surveys, create integrated national action plans;
- Recognizes and reaffirms achievements of non-governmental organisations, and mentions (in Explanatory Report, para. 132) women's non-governmental organisations as important actors in provision of specialist services and partners in co-ordinated actions;

[3] Art. 3c specifies that "*gender"* shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.

- Promotes and integrates good practice examples in victims' protection from some EU/CoE countries, including: multi-sectoral co-operation, as well as overarching principles and standards of service provision (developed by global and European women's movement), such as empowerment of victims;
- Incorporates theoretical framing of "**intersectionality**" (although it makes no specific reference to this term): recognizes specific problems of women and girls exposed to multiple or intersectional discrimination, including refugees, migrants, asylum seekers, etc.;
- Establishes an independent international mechanism: an independent expert body responsible for monitoring its implementation (GREVIO) ;
- Contains specific provisions aimed at promoting international cooperation.

The Istanbul Convention sets clear standards in the area of access of VAW victims to justice. Only the most relevant cross-cutting aspects of the Convention will be summarized here. The Convention requires that State Parties should:

- Ensure that investigations and judicial proceedings are carried out without undue delay;
- Ensure that law enforcement agencies respond promptly and appropriately;
- Ensure that risk assessment is done and managed properly;
- Ensure that victims are protected at all stages of investigations and judicial proceedings.

Therefore, the Convention recognises that women victims of gender-based violence are particularly vulnerable during investigations or criminal proceedings, e.g. when they may have to face the perpetrator, in a confined space. The Convention requires that measures should be taken to support victims of gender-based violence through the legal process. Art. 55, para. 2 foresees "the possibility for governmental and non-governmental organisations and domestic violence counsellors to assist and/ or support victims, at their request, during investigations and judicial proceedings". Furthermore, State Parties should "provide victims with appropriate support services so that their rights and interests are duly presented and taken into account" (Art. 56, para. 1(e)). In some member states of the Council of Europe, such support services are provided in the form of independent domestic violence advisors, for example (Kelly and Lovett, 2015). **We are convinced that the model of independent domestic violence advisors may be seen as a good practice example, but (possible) applicability of such a model in various Eastern European countries should be (yet) tested and verified.**
Furthermore, the Convention introduces the provision, which is extremely relevant in the context of victims' access to justice – it specifies (Art. 55) that investigations or prosecution shall not be wholly dependant upon report or compliant filed by the victim in cases of physical violence, sexual violence including rape, forced marriage, FGM, forced abortion and forced sterilization (the proceedings may continue even if the victim withdraws statement or complaint).

2. "News from the future": Implementation of the Istanbul Convention in practice - research studies on victims' access to justice

The second part of the presentation addresses findings of the research studies on the implementation of certain provisions of the Istanbul Convention. More specifically, the studies were aimed at **operationalizing the principle of due diligence in the national context** (Brankovic, 2013a; 2013b; 2015; 2016), in the areas of: protection of victims, prevention, as well as investigation, prosecution and punishment of the acts of VAW.

The issue of compensation was not considered thoroughly, as data on that topic were scarce; besides, Serbia made reservations on specific provisions of the Istanbul Convention related to compensation, inter alia. The forms of VAW covered in the research were domestic/intimate partner violence, rape and other sexual offences, and to a lesser extent, forced marriage and harmful practices (such as, "selling brides").

Theoretical/methodological framework of the research was created relying on:

1. Interpretation of provisions of the Istanbul Convention;
2. In-depth analysis of the **due diligence principle** in the area of VAW - its origins and development in international law (e.g., GR 19 of CEDAW Committee, 1992; GR 13 of CRC, 2011), as well as a review of its limitations and potential (Chinkin, 2009; Edwards, 2010; Pentikäinen, 1996), with a focus on the inspiring work of former UN Special Rapporteurs on VAW (Ertürk, 2006; Manjoo, 2013);
3. **Case-law** analysis, including, but not limited to, landmark decisions of international courts (ECHRt, Inter-American Court of Human Rights) and quasi-judicial instances (OP CEDAW) with respect to application of due diligence principle (e.g. Velásquez Rodríguez v. Honduras, Maria Penha v. Brazil, Opuz v. Turkey, Fatma Yildirim (deceased) v. Austria, etc);
4. **Cross-national research** on how the states understand and apply due diligence principle (e.g., Ertürk, 2006; EWL, 2012; Delgado & Facio,2014; Endut & Kapai, 2014; Goldscheid & Liebowitz, 2014);
5. Review of UN recommendations on **internationally-comparable indicators for measuring VAW and state response** (UN DAW, 2005a; 2005b; Walby, 2005; Economic Commission for Europe, Statistical Commission, Conference of European Statisticians - Group of Experts on Gender Statistics, 2006; Walby, 2006; Kelly, Kennedy and Horvath, 2006; UNECE, 2006; Walby, 2007; Ertürk, 2008; UN Statistical Commission, 2009; UN Statistical Commission and UN Statistics Division, 2010), with a particular focus on process and outcome indicators. The idea was to create links between these recommendations and **studies on attrition** (Kelly and Regan, 2001; Regan and Kelly, 2003; Kelly, Lovett & Regan, 2005; HMCPSI, 2002; Lovett & Kelly, 2009);
6. Desk review of the **official statistics** (sources of Statistical Office) **and administrative evidence** of the police, judiciary, and Centres for Social Work **in the last 10-15 years** in Serbia, as well as research studies on legal practice (e.g., Konstantinović-Vilić & Petrušić, 2004; 2007; 2010; Djurdjić et al, 2008).

In this context, it should be highlighted: although attrition studies cannot be fully replicated in Serbia (and, possibly, in other countries of Eastern Europe), due to shortcomings in data collection systems in institutions, such studies served as inspiration in a process of defining indicators of state obligations in line with due diligence principle in the national context.

Eventually, relying on relevant sources indicted above, a methodological framework of the studies was designed: a comprehensive set of indicators of practical implementation of the due diligence principle in the areas of protection, prevention, prosecution/punishment was created and tested against available data obtained from official statistical sources and administrative records of public institutions. In total, **around 70 indicators were created**, aimed at analyzing response of state institutions (the police, Centres for Social Work, prosecution offices and courts) to acts of VAW, such as domestic/intimate partner violence, sexual violence including rape, forced marriage, etc.

The main challenge of the research studies was to create indicators that would be **both internationally comparable and adapted to the national context**. Therefore, taking into account specificities of legislative framework and institutional procedures, general obligations

of institutions were defined (in line with due diligence provisions of the Istanbul Convention), and further, reactions, interventions and measures undertaken by institutions were reviewed.
The general aim of the studies was to analyse **trends** related to a) protection of victims, and b) investigating/prosecuting/punishing acts of VAW **in the last 10-15 years**, based on combining data from the above-indicated official sources and research studies/analyses of legal practice. In addition, we highlighted shortcomings and gaps in official data-collection models in responsible institutions.

To put it simply - in line with interpretations of the due diligence principle, a methodological decision was made to avoid a **"trap of ticking boxes**": while some studies of institutional/judicial response to VAW often rely on "check-lists" of measures and interventions, these studies (Brankovic, 2013a; 2013b; 2015; 2016) analysed what institutions do, but also focused on what institutions fail to do (although they should be doing, in line with the due diligence principle).

Specific objectives of the parts of research that dealt with investigation/prosecution and punishment[4] were the following:

1) To analyse victims' access to justice, including problems in investigation, prosecution as well as punishment of perpetrators, and to review the penalizing policy of the courts;
2) Further, an attempt was made to analyse **how many (reported) cases** of domestic violence and rape were not prosecuted (and thus **remained "invisible" to criminal justice system**), through comparing administrative records of the police (and/or Centres for Social Work) with official statistical data on criminal charges, indictments and convictions.

Unfortunately, as mentioned before, due to shortcomings in domestic data-collection models in institutions and/or official statistics (the lack of systematized gender-disaggregated data on reported cases at the national level); it was not possible to fully replicate attrition studies.
Yet, through adapting framework of preferred analyses to available data, **serious gaps in implementation of legal provisions were revealed**.
A lack of harmonisation of institutional/judicial policies and practices with the requirements of the Istanbul Convention was also identified. Only several findings will be highlighted here.

1) Rates of criminal prosecution in cases of domestic violence (as defined in the Criminal Code) have been decreasing in the period for which data were available (2004-2013). Practice of prosecutors has not been harmonized with the Convention (Art.55): for 10 consecutive years, prosecutors have been more and more inclined to dismiss criminal charges for domestic violence; e.g., in 2013, they dismissed as much as 45% (out of the total number of criminal charges). The main reasons for dismissal, as revealed in the previous research on legal practice, were the following. When a victim decides to withdraw her statement, prosecutor automatically dismisses the charges (instead of gathering other evidence, testimonies of witnesses, etc; Konstantinović-Vilić i Petrušić, 2007), and secondly, upon receiving a criminal charge, prosecutors avoid hearing victims' testimonies, but rather – rely on police evidence/data (Konstantinović-Vilić & Petrušić, 2007; Jovanović et al., 2012).

2) Genuine and significant improvements in the institutional policies and practices of the police were identified in numerous research studies (Brankovic, 2013a, 2013b, 2015, etc). Still, many domestic violence acts have been punished as misdemeanours. Numerous weaknesses in judicial response to domestic violence were revealed – only a limited proportion of domestic violence cases reported to either police or Centres for Social Work

[4] Having in mind the topic of the regional conference, only those findings related to investigation and punishment will be presented.

resulted in filing criminal charges. Consequently, the proportion of cases that remained invisible to the criminal justice system can be estimated as high. Further, based on available official data/statistics, it is not possible to follow up the particular case from reporting to the police (or Centres for Social Work) to conviction.

3) We identified encouraging trends - reporting of domestic violence incidents to institutions (the police, Centres for Social Work) has dramatically increased in the last 10-12 years; further, the number of criminal charges for domestic violence at the annual level also significantly increased in the indicated period. The latter findings, most likely, imply an increased trust of survivors in the justice system (the police, judiciary), while the police officers seem to become more responsive to victims' claims. On the other hand, the total numbers of imprisonment sentences have not increased proportionately. Furthermore, the tendency of the courts to impose suspended sentences has increased dramatically (e.g., the total number of convicted perpetrators who were sentenced to probation increased more than 6 times in the period 2004-2014). In addition, penalizing policy of the courts with respect to domestic violence perpetrators has remained extremely mild (in comparison to other violent crimes), as revealed in research on legal practice; e.g., Djurdjic et al., 2008; Konstantinović-Vilić & Petrušić, 2004; 2007; Jovanović et al., 2012; Judicial Academy, 2013). (Unjustifiably) mild penalising policy is not in line with the Convention, in particular, the provisions specifying that the offences established in accordance with the Istanbul Convention should be punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness (Art. 45). Through comparing various official data sources and findings of previous research, we also came to the following conclusions:

a) Suspended sentences were the most common, while imprisonment was often imposed at the prescribed minimum (in some cases, imposed sanctions were even below the minimum prescribed in legislation!), while mitigating circumstances that were mentioned in courts' judgments clearly indicated prejudices towards victims. For example, the research of Judicial Academy (2013) implied: perpetrators who were sentenced to imprisonment (only 30% of all the total number of those who were convicted) received mild penalties: the imposed sanctions were at the minimum prescribed in legislation, and were (even) mitigated.

b) Perpetrators of violence against (female) partner/wives were more likely to receive a suspended sentence than perpetrators of violence against parents (implying that judicial professionals do not recognise the seriousness of intimate partner violence?).

A sharp increase in annual numbers of suspended sentences raises serious questions:

a) Do perpetrators get a message that they should not repeat the offence?

b) Does the justice system actually discourage domestic violence victims to bring cases to court?

4) Further, research revealed other gaps in implementation of legal provisions on domestic violence (as compared to requirements of the Convention) and indicated that ex officio prosecution of domestic violence cases had not reached proper results in practice. Judicial professionals do not meet requirements of the due diligence principle in a process of prosecution and punishment; legal mechanisms are not efficient in preventing further victimization (as the Istanbul Convention requires); judicial system does not use legal mechanisms to prevent secondary victimization of the victims during court proceedings (Konstantinović-Vilić & Petrušić, 2004; 2007; Jovanović et al., 2012; Judicial Academy, 2013). Other research also identified that victims of domestic violence were exposed to traumatization due to lengthy proceedings (on average, app. two years; Judicial Academy, 2013). Furthermore, in cases of rape, the criminal proceedings lasted even longer - from two to four years, on average (ibid.).

5) Gender-neutral definitions of domestic violence in the Criminal Code and the Family Law (which lack dimension of „coercive control“) lead to deficiencies in protection of victims, prosecution and data collection.

6) Analysis of judicial response to cases of rape (and other sexual offences, as defined in the criminal legislation) indicated even more serious gaps. In addition to legislative gaps (definitions of rape in the Criminal Code have not been harmonized with the Convention), other disturbing trends were identified. Data on reporting rape and other sexual offences to the police were not available. Though, it was revealed that the total numbers of criminal charges for rape at the annual level remained very low (app. 150 per year) throughout the period of 13 years (2002-2014); even, in recent years, numbers of criminal charges for rape dropped (to only 60 in 2014, for example). Due to deficiencies in data collection models, data are not comparable to those obtained in cross-national studies on rape (Lovett and Kelly, 2009); still, it can be estimated that Serbia has an extremely low rate of reported rapes. Mostly, convicted perpetrators of rape in Serbia were sentenced to imprisonment, but penalizing policy should be viewed as mild: 50% of perpetrators were sentenced to one, or up to 2-3 years imprisonment (Djurdjic et al., 2008). Situation regarding criminal charges and convictions for 9 other sexual offences (excluding rape), as defined in criminal legislation, can also be described as troubling.

7) Findings also implied that forms of VAW such as forced marriage were mostly neglected or overlooked by institutions.

We will conclude by “giving a voice” to survivors. In the recent study (Brankovic, 2015), we analysed common problems faced by women survivors of intimate partner violence, and factors that contributed to a process of recovery, using qualitative methodology (case studies). The focus was on the survivors’ perception of how the interventions of institutions (social work, law enforcement, judiciary, etc.) have influenced their struggle to protect themselves and their children, both before and upon separation, as well as their efforts to create foundations for “a new life.” One woman provided the following account.

- “I have lived for three years in the shelter and I want to get out, but I can’t. I can’t pay the rent, can’t get social housing. When I tell somebody that I live in a shelter, they treat me as a second-class citizen. Institutions have not done enough for me.
- The police officers are not yet good enough, but they are better than they used to be. Before, they only warned him, and that was it… They even used to say ‘OK, you will reconcile later.’
- Prosecutors – some prosecutors are good, but only some. I was lucky once. The problem is that prosecutors do not process several criminal charges against one perpetrator simultaneously, but separately, and that leads to endless delays.
- Prosecutors also often apply deferred prosecution. When my ex-husband was prosecuted for violence the first time, the prosecutor applied deferred prosecution. My ex paid 30 000 dinars to some humanitarian fund, and 50 000 as compensation to me. He repeated the offence 1.5 months after that. Only then was he sentenced to nine months imprisonment, since he repeated the offence.
- The courts… that’s a terrible story. Trials last for ages... When I was at court for the first time, I refused a lawyer. The judge wanted to give me a court-appointed lawyer in a criminal trial on domestic violence, and I said that I knew that too well, since I had suffered domestic violence for 13 years, so I didn’t need a lawyer.

- The state should protect women from violence, the verdicts should be brought fast, but courts do the opposite – trials last endlessly. Further, children should not testify at court. My children were asked to testify so many times. That should not be done.
- Judges… I can tell you much about judges. Once, during proceedings for domestic violence, a judge told me that I have no right to property acquired during marriage, because I was not employed, and I replied 'Why do you mention the issue of property in a criminal trial? That's a matter of civil law, which should be raised in civil procedure, but this is a criminal trial for domestic violence.' I also told the judge that she couldn't take the testimony from my ex, because he was drunk at the trial. She then asked me about my education, and I told her that I have completed primary school. Yes, I became an expert on this. Unfortunately."