Gap analysis of Armenian criminal law in light of the standards established by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

HUMAN RIGHTS DEFENDER OF ARMENIA

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Gap analysis of Armenian criminal law in light of the standards established by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

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Council of Europe

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List of abbreviations

CCA	Criminal code of the Republic of Armenia
ADB	Asian Development Bank
CAT	Committee against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CPCA	Criminal Procedure Code of the Republic of Armenia
CHR	Commissioner for Human Rights
CSVAW	Coalition to Stop Violence against Women
EC	European Commission
FGM	Female genital mutilation
HRDRA	Human Rights Defender of the Republic of Armenia
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
WHO	World Health Organization
UNDAW	United Nation Division for the Advancement of Women
UNFPA	United Nations Fund for Population Activities
UNGA	United Nations General Assembly

Introduction

Background

Violence against women and girls is a grave violation of human rights. It can take many forms, such as physical violence, sexual abuse, stalking or forcing girls into unwanted marriages. Violence against women is violence directed against a woman because she is a woman or that affects women disproportionately. It leads to serious health damage, and may often end fatally. Apart from physical injuries, it causes fear, distress and a loss of self-confidence and it negatively affects women's general well-being and prevents women from fully participating in society.

Violence against women is a global phenomenon and it exists in all parts of world and at all levels of society, including in Armenia. While measures have been taken by the Armenian government to prevent violence against women, in particular domestic violence, women in Armenia continue to suffer from sex-based discrimination, negative gender stereotyping and different forms of gender-based violence.

Nationwide surveys carried out in recent years provide insight into the scale of violence against women in Armenia. A survey conducted in 2011 revealed that 59.6% of the respondents had been subjected to domestic violence out of which almost 40% had suffered violence during the past two years.[1] Another survey conducted in 2010 showed that 61.7% of the women had experienced controlling behaviour, 25% had been subjected to psychological violence, 8.9% had experienced physical violence and 3.3% had experienced sexual violence by their intimate partner.[2] As regards other forms of violence, a survey by UNFPA (2016) showed that 45.9% of the respondents (women) reported being subjected to psychological violence, 21.3% suffered from economic abuse and 12.5% reported physical violence as the form of violence suffered.

While the existing data on different forms of violence are inconclusive and its collection is adversely affected by under-reporting due to fear or shame or simply by women victims not recognising abusive or controlling behaviour as violence, the reported violence raises concerns for the magnitude of this phenomenon in Armenia. In particular, violence occurring in the domestic unit is still seen as a private matter and raising it outside the family sphere is considered shameful. The international organisations and local NGOs have expressed their concern about the low level of reporting of incidents of violence against women. In its recent concluding observations also the CEDAW Committee "remains concerned about under-reporting of acts of gender-based violence against women by victims and the resulting lack of data" (CEDAW Committee 2016: 5).

While the population surveys are useful for estimating the magnitude of violence in a given country, administrative data provide information on the response of authorities and state institutions to such cases of violence. Armenia lacks comprehensive official data on the number and types of violence against women cases that are brought forward. However, the Armenian Police provide data on the number of cases of domestic violence recorded each year (see page 12).

With regard to violence against women leading to death, the NGO Coalition to Stop Violence against Women (CSVAW 2016) has released a report on "femicide" in Armenia, which documents 30 registered cases from 2010 to 2015. On the other hand, in 2016 the Investigative Committee of the Republic of Armenia, an institution set up in 2014, investigated 16 cases of murder or heavy bodily injury allegedly committed by a family member. Eight of the victims were women and three were minors.[3] Nevertheless, it is important to note that surveys and administrative data should be regarded as only the tip of the iceberg, as most of the cases go unreported.

1. Proactive Society and OSCE (2011)
2. UNFPA (2010).
3. Data presented by the Deputy Chairman of the Investigative Committee in a public event in December 2016. See http://iravaban.net/145999.html#ad-image-0.

Armenia has taken several steps to redress discrimination and prevent violence against women in recent years. For instance, Armenia adopted a Strategic Action Plan Against Gender-Based Violence for 2011-2015[4] and adopted the Law on Social Protection to encompass domestic violence in 2014. Moreover, in 2013 the Police of the Republic of Armenia established a specialised department for the protection of the rights of minors and to fight against domestic violence. An exhaustive account of such efforts was submitted to the CEDAW Committee in the country's combined fifth and sixth periodic reports.[5]

During the last few years Armenia has also undergone a comprehensive legal and judicial reform to enhance access to justice. In fact, the justice system currently benefits from a number of international projects that promote reform in different areas.[6] However, women victims of violence still find it extremely difficult to seek and receive adequate redress. Consequently, international observers such as the Commissioner for Human Rights of the Council of Europe have shown concern over multiple reports of domestic violence cases not being effectively identified or investigated and the perpetrators not properly prosecuted and punished.

Research on violence against women and women's access to justice in Armenia shows that gender inequality and stereotyping constitute a major barrier for access to justice by women victims of violence (Hakobyan 2017; Makaryan 2016). NGOs such as the Coalition to Stop Violence against Women (2016) and international bodies such as the CEDAW Committee (2016) have recently criticised the Armenian justice system for its lack of gender sensitivity. It is not helped by the fact that only 24% of judges are women in Armenia (Hakobyan 2017). The police and other law-enforcement officials have reportedly been reluctant to carry out adequate investigations of cases of violence against women in the family. Moreover, perpetrators and victims' family members often pressure victims of domestic violence to withdraw charges or retract previous testimony.

During the fact-finding mission conducted in preparation for this report, judges and prosecutors acknowledged to actively intervene in cases of intimate partnership violence in order to make the victim reconcile with the perpetrator. The justification for this intervention was based on their perception of family values and women's traditional role in family and society. In the words of the Commissioner for Human Rights of the Council of Europe (2015: 124), "Under the guise of preserving the family, acts of violence, which mostly affect women and children, remain unaddressed."

Besides reported leniency of law-enforcement officials, gender stereotypes also have strong influence on the judiciary and prosecutors in prosecuting and adjudicating cases of violence against women. Preconceptions of women's role in the family and in society supersede evidence and norms, sometimes leading to biased outcomes. For instance, some international observers such as the Commissioner for Human Rights (2015) have expressed concern for the systematic breaches of the presumption of innocence and harsh criminal sanctions in Armenia. However, in the area of violence against women, conviction rates remain low and sanctions are too lenient (Hakobyan 2017). From time to time NGOs and the media uncover paradigmatic cases where stereotypes and distorted traditional family values allegedly result in impunity or mild sentences for violent crimes, like the axe attack against Mrs Taguhi Mansurian (Grigoryan 2016) or the case of Nadia Nahapetyan (CSVAW 2016: 46).

It can be concluded that more efforts are needed to overturn the patriarchal stereotypes which penetrate Armenian society and its institutions, including the justice system, and contribute to the persistence of violence against women. However, enhancing the capacity of law-enforcement agencies and the judiciary to adequately investigate and prosecute cases of violence against women and educating society to condemn violence against women is not enough to make the needed changes for women victims of violence. An effective judicial response to violence against women also depends on vigorous and comprehensive laws. An effective legal framework is essential in order to end impunity and instil an attitude of zero tolerance towards violence against women in society. On many occasions, difficulties in bringing perpetrators to justice result from gaps in the legal definitions of offences or procedural barriers.

This report aims at addressing some of the issues highlighted above by reviewing the Armenian criminal law on the basis of the standards laid out in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, hereinafter "the Convention No. 210". The report serves the purpose of supporting the Armenian authorities in effectively addressing violence against women and in creating a robust legislative framework to protect women and to prosecute this type of violence. The report has been drafted as part of the Council of Europe's Violence against Women Project and in partnership with the Human Rights Defender of Armenia.

4. Available at www.un.am/res/Gender%20TG%20docs/national/2011-.2015_GBV_strategic_plan-Eng.pdf
5. Available at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/TBSearch.aspx.
6. See for instance the project Improving Women's Access to Justice in Five Eastern Partnership Countries. Information available at www.coe.int/en/web/genderequality/women-s-access-to-justice.

Scope of the report

This report reviews the Armenian criminal legislation in the light of the provisions laid out in the Convention No. 210. The analysis addresses all forms of violence against women, including domestic violence, as defined by the Convention No. 210: psychological violence, stalking, physical violence, rape and sexual violence, female genital mutilation, forced marriage, forced abortion and forced sterilisation and sexual harassment. In addition, the report discusses some criminal law standards established in the Convention No. 210, such as unacceptable justification for crimes, aggravating circumstances, aiding or abetting and attempt or the proportionality of sanctions.

The criminal legislation of the Republic of Armenia follows the principle of legality; therefore all criminal responsibility shall be based only on the Criminal Code (Article 1 of the Criminal Code of Armenia). Consequently, the substantive gap analysis will thus be circumscribed to the Criminal Code of the Republic of Armenia (CCA hereinafter). Armenia adopted its current Criminal Code in 2003 and has amended it several times, most recently in 2015.

Moreover, this report reviews some procedural standards such as the *ex officio* prosecution proceedings or the existence of alternative dispute resolution mechanisms within the criminal justice system. To that extend the analysis of the Criminal Procedure Code of the Republic of Armenia falls within our purview. The acting Criminal Procedure Code (CPCA hereinafter), dating from 1998, was also significantly amended in 2016 to introduce valuable improvements with regard to the rights of victims of crimes, among other changes.

Notes on methodology

The Convention No. 210 is the basic benchmark for the purposes of this report. In order to interpret and clarify its provisions, this report will also rely on the Explanatory Report to the Convention No. 210.[7]

The legislative review also takes into account other relevant international norms. Armenia is party to various international instruments related to the protection of women: it acceded to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1993 and to its Optional Protocol in 2006. The country is also a party to the European Convention on Human Rights since 2002 and subject to the jurisdiction of the European Court of Human Rights (the European Court).

Along with international law, this report also takes into account research studies and reports on Armenia prepared by international organisations and international and national NGOs. Accordingly, the analysis and ensuing findings and recommendations draw on the work of other organisations and institutions in the country, such as the Council of Europe, the OSCE, the CEDAW Committee or the NGO Coalition to Stop Violence against Women, among others.[8]

Furthermore, this report also benefits from the information gathered in the course of a fact-finding mission that took place on 17-21 October 2016 in Yerevan in co-operation with the Human Rights Defender of the Republic of Armenia. The fact-finding mission included meetings with judges, prosecutors, police officers and members of the civil society and academia.

This report has been developed by Javier Truchero in collaboration with Ana Urrutia. It also has benefited from the assistance of Lusine Sargsyan, Head of the Human Rights and Education Center at the Human Rights Defender of the Republic of Armenia (HRDRA).

The opinions expressed in this work are the responsibility of the author only and do not necessarily reflect the official position of the Council of Europe, nor does it bind in any way the future work of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) or that of the Committee of the Parties to the Convention No. 210.

This report has been written originally in English and is based on translations to English from Armenian laws. Errors from translation may result.

7. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210) was opened for signature in Istanbul on 11 May 2011, and entered into force on 1 August 2014. Both the convention and its explanatory report are available at www.coe.int/en/web/istanbul-convention/home.

8. See the list of references at the end of the document.

Section I

Prosecution of violence against women in Armenia

Requirements in the Convention No. 210

Definitions

The Convention No. 210 defines violence against women in Article 3(a) as:

> a violation of human rights and a form of discrimination against women and shall mean 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.

According to Article 3(d) gender-based violence against women means "violence that is directed against a woman because she is a woman or that affects women disproportionately".

Article 3 (b) of the Convention No. 210 defines domestic violence as:

> all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.

The Convention No. 210 undertakes a definition based on two elements: a) the sphere where violence is committed (domestic unit) and/or b) the relationship between victim and perpetrator. Such relationships may be intimate-partner relationships or family kinship (Explanatory Report, para. 41).

Substantive criminal law requirements on violence against women

The Convention No. 210 has a strong emphasis on criminal law. One of its main achievements consists in defining and criminalising the various forms of violence against women. However, neither violence against women nor domestic violence constitutes a criminal offence per se under the Convention No. 210. As professors Chinkin and Nousiainen (2015) put it:

> Unlike war crimes, crimes against humanity, genocide and torture, violence against women is not of itself an international crime. Thus the Convention has to identify and require States Parties to criminalise specific actions within the rubric of violence against women, ensure jurisdiction over these crimes and provide for their prosecution at the domestic level. (p. 43).

Accordingly, with regard to the required criminal law response, chapter V of the convention lays out precise behaviours that member states should criminalise: psychological violence, stalking, physical violence, sexual violence and rape, forced marriage, female genital mutilation, forced abortion and forced sterilisation. Member states should also criminalise or otherwise sanction sexual harassment.

Drafters of the Convention No. 210 aimed at the most detailed and comprehensive description possible of the behaviours that states parties have to penalise. However, the convention does not impose a specific wording of the criminal offences it covers. It is left to the states parties how to frame and phrase each type of offence. In that sense, the Explanatory Report to the Convention No. 210 says:

> The obligations contained in Articles 33 to 39 require parties to the convention to ensure that a particular intentional conduct is criminalised. The drafters agreed on this wording to oblige parties to criminalise the conduct in question. However, the convention does not oblige parties to necessarily introduce specific provisions criminalising the conduct described by the convention. (para. 155).

Besides the offences that constitute violence against women, the convention also calls for a number of criminal law provisions aiming at qualifying certain constituent elements of these offences. Pursuant to Article 41 of the convention:

> parties shall take the necessary legislative or other measures to establish as an offence, when committed intentionally, aiding or abetting the commission of the offences established in accordance with Articles 33, 34, 35, 36, 37, 38.a and 39 of this Convention.

Aiding and abetting include assistance in the commission of a crime or to be an accomplice. Member states' criminal law should also cover attempted offences with regard to the same forms of violence, except for psychological violence and stalking. Furthermore, the convention requires introducing certain aggravating circumstances in the criminal law (Article 46) and the possibility for courts to take into account sentences passed by other member states (Article 47).

Article 45 calls for appropriate sanctions and remedies attached to the instituted crimes. According to this obligation, states should take into account the seriousness of each crime and provide for a proportionate sanction, including the possibility of imprisonment. Furthermore, the second indent of Article 45 calls upon states to ensure the possibility of adopting measures such as supervision of convicted persons and withdrawing parental rights in certain circumstances. Given the historical inequality between women and men, Article 42 underscores the prohibition of certain justifications for crimes, such as tradition or honour. This provision reflects a well-established principle of human rights that the convention enunciates in Article 4. The Convention No. 210 further includes a prohibition of mandatory alternative dispute resolution mechanisms under Article 48.

Additionally, the convention dedicates one chapter to expound the requirements of the principle of due diligence with regard to investigation and prosecution of violence against women. For the purposes of this report we will only deal with the provision on *ex officio* prosecution (Article 55).

Prosecution of domestic violence in the Convention No. 210

Domestic violence is a form of violence against women that encompasses a very wide range of possible unlawful acts. Most of them may be captured under generic offences such as murder, assault, bodily injury, rape and others. The Convention No. 210 obliges states parties to provide for an adequate criminal law response to domestic violence. Hence, the convention institutes the principle that the relationship between the victim and the perpetrator shall not preclude the application of any offence (Article 43). Evidence shows that intimate partners or family members commit most instances of violence against women, yet on too many occasions this relationship justifies exceptions to prosecution or criminal liability. According to the Convention No. 210, kinship shall not mitigate or exclude criminal liability.

The convention also calls for an aggravating circumstance covering cases in which violence is committed within the household or against a close person, current or ex-partner (Article 46). This approach allows for the use of the generic provisions in the criminal law while imposing a higher sentence in cases of domestic violence.

Violence against women in the Armenian legislation

Analysis of the Armenian substantive criminal law framework

The Criminal Code of the Republic of Armenia (CCA) does not specifically cover violence against women and lacks any specific mechanism to take into account the gendered nature or specific dynamics of this form of human rights violation. For instance, the CCA does not contain any definition of violence against women or domestic violence, nor does it take into account the gender of the victim or the kinship between the victim and the perpetrator (except for the crime of rape). However, most forms of violence against women are considered to fall under the generic offences of the CCA.

Furthermore, various reports (Proactive Society and OSCE 2011) have noted that the elements of the offences stipulated in the Armenian Criminal Code are often ambiguous or vague, leaving excessive room for judicial interpretation. As stated above in the introduction, justice officers and legal professionals in Armenia reportedly lack specific knowledge or understanding of violence against women, including domestic violence. Consequently, ambiguous or vague provisions may result in a biased or defective judicial response that further impedes access to justice for women, and results in significant underreporting on the part of victims.

The Armenian Criminal Code does have an explicit provision under Article 143 that penalises acts of discrimination. This offence includes "sex" as a ground for discrimination and is in compliance with the Article 29 of the newly adopted Armenian Constitution.[9] However, the constituent elements of this provision are too vague, as it sanctions "a direct or indirect breach of human rights". Although this article has been amended recently and there is still no record of its application, the way it is crafted casts doubts on its ability to serve as a useful tool to tackle sex-based discrimination.

In the absence of specific criminal law provisions, generic offences apply. The CCA includes a number of offences that cover most forms of violence against women: murder, rape, bodily injuries, trafficking, etc. Pursuant to these legal acts, any violence is criminally punishable and punishment is irrespective of the sex

9. Armenia adopted a new constitution on 6 December 2015.

of the victim, with the aforementioned exception of rape. The next chapter of this report analyses each of the substantive criminal law requirements of the Convention No. 210 in order to assess the compliance of the Armenian criminal law.

The Armenian criminal law also covers inchoate offences under chapters 6 and 7 of the CCA. Article 33 establishes criminal liability for attempt to commit a crime and the preparation for the crime. Furthermore, Article 39 extends criminal liability to different types of accomplices. Consequently, the criminal legislation meets the general requirements of the Convention No. 210 regarding this issue. Specific gaps with regard to the requirements on adding or abetting and attempt will be discussed below throughout the analysis of each offence.

With regard to sanctions, the Armenian Criminal Code lists the types of punishment it envisages under Article 49. Accordingly, sanctions range from fines to life imprisonment. This report will assess the adequacy and proportionality of sanctions when analysing each required offence in the next chapter. However, it is important to note at this point that the assignment of sanctions under the CCA (chapter 10) is extremely flexible. In fact, judges may hand down suspended sentences with no limitation according to Article 70 of the CCA. Given the absence of gender sensitivity in the Armenian justice system, as expounded in the introduction, a wide margin in sentencing might negatively impact on the right of women to an effective redress. A number of well-known cases in Armenia illustrate this point, such as the case of Taguhi. The group of Armenian NGOs "CEDAW Task Force" summarises the case as follows:

> On Friday 8 July 2016 T. [the victim], her mother and father were axed by V. [the perpetrator] – T.'s ex-husband. Throughout years V. subjected her to physical and psychological violence, however, the police and the judiciary failed to protect Taguhi and her parents from the violence, stalking and abuse on the hands of V. On the numerous occasions, T. and her parents reported to the police on the instances of beating and violence. After a while a criminal case was opened in January 2016 and V. was charged under Article 119 of the Criminal Code of the Republic of Armenia for infliction of severe physical pain or severe psychological pain and suffering and should have been imprisoned for the term of 6 months. However, disregard the longstanding evidence of violence and the imminent danger for the life and health of T., the judge of the District court of Shengavit of the First instance decided not to apply imprisonment as the form of punishment and subjecting the perpetrator to the conditional punishment under Article 70 of RA Criminal Code. As a result V. was set free and continued stalking and harassment in respect of T. and her parents. T.'s case represents the "typical" case scenario of the State's failure to protect women from domestic violence and abuse. Inaction of the police and obviously disproportionate sentencing by the court created the atmosphere of impunity for V., motivating him to commit that manslaughter in its gravest form. (CEDAW Task Force 2016: 48)

Finally, the Armenian Criminal Code contains different provisions regarding the circumstances that courts may take into account in adjudicating criminal cases. Consequently, this report includes a chapter on standards related to the application of criminal law: prohibition of unacceptable justification for crimes (Article 42 of the Convention No. 210), aggravating circumstances (Article 46 of the convention) and the possibility to take into consideration sentences passed by other states parties (Article 47 of the convention).

Prosecution of violence against women in Armenia

The Armenian criminal legislation includes procedural rules that distinguish between "private" and "public" prosecution. Accordingly, offences listed in Article 183[10] of the Armenian Criminal Procedural Code (CPCA) can only be prosecuted following a complaint by the victim. For these offences prosecution shall be terminated if the victim reconciles with the perpetrator. Furthermore, pursuant to Article 73 of the CCA perpetrators of a "not grave crime" can be exempted from criminal liability if they reconcile with the victim and mitigate or compensate the damage.

According to the information gathered during the fact-finding mission, most cases of domestic violence are being prosecuted under provisions regarding minor bodily injuries or battery, which are subjected to private prosecution. Investigation and prosecution in these cases may indeed be wholly dependent on a victim's request, thus forcing the victims to bear the responsibility for bringing perpetrators to justice (see also Hakobyan 2017). These offences are also considered "not grave", thus reconciliation exempts criminal liability. Interlocutors from both the judiciary and the prosecutor's office revealed that reconciliation accounts for the cause of termination in more than half of criminal proceedings on domestic violence cases. Many more cases do not even reach criminal proceedings as victims reconcile with their perpetrator or withdraw the complaint at the police stage.

The figures provided by the police and the Investigative Committee of the Republic of Armenia to the Human Rights Defender of Armenia evidence the fact that different forms of domestic violence exist and that there is a growing trend both on the reports of domestic violence to the police and on the criminal proceedings being opened. Despite the

10. CCA Articles 113 part 1, 114 part 1, 115 part 1, 116 part 1, 117, 118, 120 part 1 and 2, 121 part 1 and 2, 124 part 1, 128 part 1, 137 part 1, 158 part 1, 174, 177 part 1, 178 part 1, 179 part 1, 181 part 1, 183 part 1, 184 part 1, 185 part 1, 186 part 1 and 2, 197, 213 part 1, 242 part 1.

positive trend, criminal cases are opened only in a minority of cases and the criminal proceedings are also often terminated.

In 2014 678 cases of domestic violence were reported to the police. In 551 cases the violence was committed against women and out of these cases criminal proceedings were opened in 55 cases. In 10 cases the violence was committed against a child, and criminal proceedings were opened in 2 cases. In 2015 the police registered 784 cases of domestic violence: in 471 cases the violence was committed by the husband towards the wife, in 106 cases by children towards parents, in 65 cases by parents towards children and in 15 cases by the wife towards the husband. In 127 cases the violence was committed by other members of the family. A criminal case was opened in 150 cases. In 2016 the police registered 756 cases of domestic violence: 699 cases of physical violence, 4 of sexual violence and 53 of other types of violence.[11] Criminal proceedings were opened in 311 cases.[12] Indictments were sent before the court in 89 cases. Criminal proceedings were terminated in 206 cases and 7 cases were suspended.[13]

As the Committee against Torture (CAT) noted in its Concluding observations on the fourth periodic report of Armenia:

> cases of domestic violence are subject to private prosecution and investigations can only be initiated upon official complaint by the victim and that such complaints are, with few rare exceptions, withdrawn by victims owing to reconciliation with the perpetrator. (CAT 2016: 8)

This report addresses both *ex officio* prosecution procedures and reconciliation mechanisms in dedicated sections below, within the chapter on the application of criminal law.

Other relevant legislation

Armenia lacks a comprehensive law on gender-based violence or even on domestic violence. A few years ago a working group of non-governmental representatives developed a draft law on domestic violence. However, the government turned down this draft law on the grounds that some provisions were inconsistent with the Criminal Code and other relevant legal acts. At the time of writing, an inter-ministerial working group was concluding another draft law on domestic violence.

Another recent legal development is the adoption of the Law on Equal Rights and Equal Opportunities of Women and Men in 2013. The law immediately encountered strong opposition and spurred an intense debate in Armenia about the concept of "gender" (OSCE 2013). As a result, the law has not been further developed and most observers refer to its lack of applicability in practice (CEDAW Committee 2016).

Finally, it should be noted that in 2014 the government adopted the Law on Social Protection which also embraces victims of domestic violence within its purview. To that effect, the law now contains a definition of domestic violence: "violent actions of physical or sexual or psychological character (violence) inflicted by one member of a family against another, or deprivation of means of subsistence". Furthermore, "family" is defined for the purposes of this law as:

> a small social unit of persons with an actual common place of residence, affiliated by consanguinity or affinity, that have a joint household, budget, interests; are joined by principles of mutual assistance, moral and legal responsibility; as well as a person residing alone.

The definition includes an array of acts of violence, which are overall in line with the definition of Article 3 of the Convention No. 210. However, the scope of persons covered by the definition does not include partners who are not in cohabitation, as required by the treaty (see also the Explanatory Report, para. 42). Consequently, the requirement of cohabitation in order to obtain protection under the Law on Social Protection does not comply with the standards of the Convention No. 210. In any case, the Law on Social Protection does not create or affect criminal liability for any of the acts it defines.

Findings

Recent legislative amendments in the CCA, introducing for instance Article 143 on human rights violations, or the inclusion of a definition of domestic violence in the Law on Social Protection are valuable and positives steps. However, the legal framework on violence against women in Armenia still presents a number of significant shortcomings. Armenia needs to provide for a comprehensive legal framework to prevent violence against violence, protect the victims and prosecute the perpetrators.

With regard to substantive criminal law, it follows from the foregoing analysis that Armenia should specifically consider amending its criminal law in order to address gender-based violence. Along the same lines, in its concluding observations the CEDAW

11. Three of the mentioned cases were conducted by victims' partners; 471 cases were conducted by women's spouses; 20 acts were directed against men by their wives; in 66 cases violation occurred in families by parents against their children and in 99 cases the act of violence was directed against parents by their children and 97 acts were committed against other family members.
12. The cases were opened under Articles 104-106, 109-114, 117-121, 124, 131-133, 137-142, 144, 165-174, 185-186 and other articles of the CCA.
13. In 40 cases the proceedings were terminated on acquittal grounds and in 166 cases the termination was based on non-acquittal grounds. Six cases were suspended as the perpetrators are under investigation.

Committee (2016) urged the country to "Expedite the adoption of a comprehensive law specifically criminalizing gender-based violence against women, including femicide and marital rape." The Special Representative of the OSCE on Gender Issues (2013) also suggested that Armenia

> should revise the penal code to specifically make violence against women and domestic violence a crime. This is a critical step in building a societal norm that domestic violence is unacceptable and will not be tolerated by the society. This can lead to more effective implementation of laws and policies to combat domestic violence.

This report will provide a specific analysis with regard to each of the criminal law requirements of the Convention No. 210.

Armenia should pay special attention to gender-based violence occurring within the family. The introduction of a definition of domestic violence in the Law on Social Protection is a positive step, which could be a source of inspiration for a better criminal law response in this area. However, the definition should be expanded to encompass non-cohabitating partners.

The Armenian criminal law needs to specifically tackle domestic violence with the use of aggravating circumstance and to ensure that all offences apply irrespectively of the relationship between the victim and the perpetrator. This will send the important message that the state will treat domestic violence crimes as seriously, if not more seriously, than crimes against a stranger. In addition, Armenia should review its legal practice with regard to applying private prosecution and reconciliation for cases of domestic violence. These findings will be expounded in the relevant sections of this report.

Finally, Armenia may consider the possibility of addressing domestic violence with a dedicated criminal offence. This is not a requirement in the Convention No. 210, which leaves to the states parties to decide whether to adopt a specific offence on domestic violence. Dedicated offences offer an optimal response to domestic violence, in particular when dealing with cases that involve courses of conduct or abusive patterns of behaviour in which isolated acts of violence do not reach the criminal threshold. Moreover, the Committee against Torture has also shown concern for the lack of specific legislation criminalising domestic violence in Armenia (CAT 2016).

It should also be noted that the European Court of Human Rights has a well-established jurisprudence on domestic violence that does take into consideration the existence of dedicated provisions in ascertaining state responsibility. In the recent case of *Eremia and Others v. The Republic of Moldova*, the Court noted that "Moldovan law provided for specific criminal sanctions for committing acts of violence against members of one's own family" and concluded "that the authorities had put in place a legislative framework allowing them to take measures against persons accused of family violence".

We can bestow yet another argument to uphold the adoption of specific offences. Dedicated criminal law provisions make it clear that domestic violence is a crime and will not be tolerated in society. Bringing it into the open is also a way to dispel the idea that violence is a private, family matter.

With regard to implementation of this recommendation there are several good practices in Europe. In fact, 10 EU member states have defined domestic violence as a specific criminal offence (EC 2010). There are various forms to construct a specific crime on domestic violence. Sweden, for instance, introduced a new offence in 1998 (section 4º): "gross violation of a woman's integrity" to target certain criminal acts "committed by a man against a woman to whom he is or has been married or with whom he is or has been cohabiting under circumstances comparable to marriage".[14] Interestingly enough, the statute also contains the same offence crafted as gender neutral and with the same sanction.

Spain provides another good example, as its criminal law tackles the element of repetition that characterises most cases of domestic violence. Article 173.2 of the Spanish Criminal Code15 finds criminally liable "Whoever habitually uses physical or mental violence against the person who is or has been his spouse or the person who is or has been bound to him by a similar emotional relation, even without cohabitation". The offence also covers the same acts committed against relatives.

Key findings

Armenia needs to provide for an effective legal framework to prevent violence against women, protect the victims and prosecute the perpetrators. This legal framework shall include a comprehensive criminal law addressing all forms of gender-based violence, with special attention to domestic violence:

- The Armenian criminal law needs to ensure that all offences apply irrespectively of the relationship between the victim and the perpetrator and tackle domestic violence with the use of an aggravating circumstance.
- Armenia should review its legal practice with regard to private prosecution and reconciliation in cases of domestic violence.
- Armenia may consider the possibility of addressing domestic violence with a dedicated criminal offence.

14. The Swedish Penal Code is available at www.opbw.org/nat_imp/leg_reg/sweden/Penalcode.pdf.
15. The Spanish Criminal Code is available at www.mjusticia.gob.es.

Section II

Criminal offences

Psychological violence

Requirements of the Convention No. 210

Article 33 of the convention requires parties to criminalise psychological violence, which is described as the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats. In this respect, several epidemiological studies (Krug et al. 2002), consider psychological abuse to be the most prevalent form of domestic violence and show that victims perceive this form of violence as more severe and harmful than physical violence. It is also often considered a precursor to physical violence.

The obligation to prosecute psychological violence also derives from other sources of international law. The European Court, for instance, has indicated that parties to the European Convention on Human Rights are under a positive obligation to effectively investigate cases of domestic violence, even if the victim has not suffered from physical injury.[16] The CEDAW Committee adopted a similar conclusion in *V.K. v. Bulgaria* (2011) stating that "gender based violence is not limited to inflict physical harm but also covers actions that inflict mental suffering".

Constituent elements. The Convention No. 210 does not define the notion of "serious impairment", but the Explanatory Report spells it out: "This provision refers to a course of conduct rather than a single event. It is intended to capture the criminal nature of an abusive pattern of behaviour occurring over time – within or outside the family" (para. 181).

The Convention No. 210 does not limit the application of Article 33, thus psychological violence should be sanctioned irrespectively of the relationship between the victim and the perpetrator. This obligation does not preclude states from addressing each specific context, such as domestic violence, with a dedicated offence.

Conduct. Psychological violence responds to a controlling behaviour which may develop in a wide range of forms: intimidation through insults, humiliation, threats of any kind, isolation from the victim's inner circle/ immediate family, etc. Psychological violence may also be linked to forms of economic violence such as deprivation or restriction of financial resources.

Reservation. Pursuant to Article 78 paragraph 3, the convention allows parties to reserve the right to provide for non-criminal sanctions, instead of criminal sanctions, in relation to psychological violence. It is important to note that that the system of reservations[17] under the Convention No. 210 seeks to work towards the gradual lifting of reservations over time by introducing a time limit to all reservations.

Assessment of the Armenian criminal law

The section on background above in this report shows that psychological violence, at least within the domestic unit, is the most pervasive form of violence against women in Armenia. The survey conducted with the support of UNFPA (2010) reveals that 61.7% of the women refer to having experienced controlling behaviour and 25% had been subjected to psychological violence. The recent UNFPA survey shows that 45.5% of women in Armenia are victims of this form of violence (Osipov and Sargizova 2016).

16. See for instance *Opuz v. Turkey or Hajduovà v. Slovakia*.

17. According to Article 79.3 of the convention reservations are only valid for a period of five years, upon which the party seeking to uphold its reservations has to justify its continuance to the GREVIO (the convention's monitoring mechanism).

The CCA did not include any specific offence on psychological violence or on other related behaviours such as coercion or duress until 2015. The recently amended offence on torture embodied in Article 119 of the CCA includes "mental suffering" as a constituent element. In fact, the offence has been renamed as "Infliction of strong physical pain or mental suffering". However, the Criminal Code does not define mental suffering and Article 119 lacks any reference to the means or acts the perpetrator may employ to achieve the resulting suffering. Such vagueness hinders the application of this provision and makes it also more difficult to tackle attempts to commit this crime under Article 34 of the CCA. It should be noted that the Criminal Code does not provide for criminalisation of coercion, which usually works as a catch-all offence in criminal law.

Article 119 of the CCA apparently covers to its full extent the requirements of the Convention No. 210. The attached sanction is up to three years of imprisonment, which is also flexible enough to comply with the requirements of the Convention No. 210. However, the wording of Article 119 of the CCA leads to taking into account only isolated events. The convention aims at also capturing patterns of behaviours over time, which becomes relevant especially in cases of intimate partnership violence.

On the other hand, the new provision includes an aggravated form that includes *inter alia* discriminatory motives. Surprisingly enough, sex-based discrimination is not included here as a ground for aggravation. The omission seems inconsistent with the aforementioned Article 143 of the CCA, discussed above.

Given the fact that Article 119 of the CCA was adopted only in 2015, there is very little information on its application. For instance, during the fact-finding mission no case of domestic violence prosecuted under this new provision was identified. According to meeting with judges and prosecutors, cases of domestic violence are usually prosecuted as cases of battery, and psychological violence against women in the domestic unit is rarely prosecuted.

The Armenian Criminal Code also prohibits threats to murder, to inflict severe damage or to destroy property (Article 137 of the CCA). This definition is too narrow to capture all relevant forms of threat. For instance, it does not encompass blackmail or threats to reveal personal secrets. Moreover, Article 137 of the CCA also necessitates proof of real danger that the threat would be carried out. This requirement may set too high a threshold to enable effective prosecution.

Finally, Armenia criminalises inducement to suicide. Article 110 of the CCA punishes causing somebody to commit suicide and Article 111 encompasses abetment of suicide.

Findings

The regulation addressing psychological violence in the Armenian Criminal Code is a positive step. However, the Armenian criminal law may fail to capture to their full extent the behaviours described in Article 33 of the convention, as some forms of threat and mental suffering resulting from a conduct over a period of time may not accommodate to Articles 119 and 137. On the other hand, there is neither a clear definition of mental suffering nor any records of its judicial application at this point. Hence the new provision on causing mental suffering may well be ineffective in cases of domestic violence, where sustained intimidation, economic violence or coercion might be interpreted as not suitable to generate the required result (mental suffering). From the foregoing it follows that the constituent elements of the offences covered under Article 119 could be clarified.

In the Explanatory Memorandum to the resolution on psychological violence adopted by the Committee on Equal Opportunities for Women and Men of the Parliamentary Assembly of the Council of Europe in 2011 Ms Elvira Kovács collects expert opinions on psychological violence and concludes that "A good legal definition of psychological violence is one which strikes a balance between being precise enough for the victims to recognise themselves and flexible enough to cover such a variety of individual experiences" (Kovács 2011: 32).

On the other hand, unless Armenia opts for introducing a dedicated offence on domestic violence in the Criminal Code, the provision embodied in Article 119 should include a specific reference to domestic violence as an aggravating circumstance.[18] This offence may also benefit from the inclusion of sex-based discrimination as an aggravating element.

Nevertheless, criminalising and prosecuting psychological violence is not an easy task. The UN Handbook for Legislation on Violence against Women, prepared by the Division for the Advancement of Women (UNDAW 2010) warns against possible misuse of psychological violence when occurring in the family:

> Experience has shown that violent offenders may attempt to take advantage of such provisions by applying for protection orders claiming that their partner psychologically abuses them. Further, many women may not expect a strong justice system response to so-called acts of psychological or economic violence against them. In addition, psychological violence is very difficult to prove. It is therefore essential that any definition of domestic violence that includes psychological and/or economic violence is enforced in a gender-sensitive and appropriate manner. (UNDAW 2010: 25)

18. See the section on aggravating circumstances below.

On the same point, UN Women recommend the term "coercive control", shifting the focus from the damaging result to the aim of the unlawful behaviour.[19] "Coercive control" includes psychological and economic violence but does so in a way that links these concepts to a pattern of domination. It refers to extreme control through intimidation, isolation or degradation and directs legal measures to target truly harmful behaviours that affect the victim's autonomy and dignity.

A recent good practice in this area comes from the UK. The country adopted a new Serious Crime Act on 3 March 2015[20] that creates a new offence of controlling or coercive behaviour in intimate or familial relationships (section 76). The new offence criminalises repeatedly or continuously engaging in behaviour towards another person that is controlling or coercive and has a serious effect on the victim. According to this provision, a controlling or coercive behaviour has a serious effect if it causes the victim to fear on at least two occasions that violence will be used against him/her, or if it causes serious alarm or distress in the victim, affecting his/her day-to-day activities. The offence carries a maximum sentence of five years' imprisonment, a fine or both.

Finally, with regard to the offence on threats, more constituent elements should be added in order to capture the full extent of this form of violence.

Key findings

- The offence embodied in Article 119 CCA should be interpreted (or amended) in order to encompass mental suffering caused by a course of conduct over time.
- Article 119 CCA may also benefit from a specific reference to domestic violence and to sex-based discrimination as aggravating elements.
- The definition of threat in Article 137 CCA should expand its scope.

Stalking

Requirements of the Convention No. 210

The Convention No. 210 provides the first international definition of stalking. Article 34 mandates criminalisation of "the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety". The European Court has repeatedly held states responsible for failing to respond to stalking-like behaviours. For instance, in *Hajduovà v. Slovakia*, the applicant suffered repeated threats, which constituted the basis of the complaint under Article 8 of the European Convention on Human Rights.

Constituent elements. Article 34 provides for two main constituent elements: a) intention on the part of the perpetrator and b) the effect of instilling a sense of fear to the other person. Notwithstanding the diverse range of threatening behaviours targeted, the relevant component of the offence refers to the intention or the effect of instilling in the victim a sense of fear. The perpetrator must have intentionally aimed at a certain outcome or at least known or should have known that certain negative consequences for the victim could ensue. Legal measures revolving around the intent of the perpetrator make it possible to consider a large number of behaviours of the stalker.

Furthermore, stalking entails a course of conduct of repetitive and significant incidents. In other words, isolated acts do not qualify as stalking. As the Explanatory Report clarifies, this provision is "intended to capture the criminal nature of a pattern of behaviour whose individual elements, if taken on their own, do not always amount to criminal conduct" (para. 185), using the same logic as with psychological violence.

Conduct. The convention leaves to national laws the definition of the threatening conduct that may amount to stalking, whereas the Explanatory Report gives some examples:

> repeatedly following another person, engaging in unwanted communication with another person or letting another person know that he or she is being observed. This includes physically going after the victim, appearing at her or his place of work, sports or education facilities, as well as following the victim in the virtual world … vandalising the property of another person, leaving subtle traces of contact with a person's personal items, targeting a person's pet, or setting up false identities or spreading untruthful information online. (paras. 182 and 183)

Reservation. As in the case of psychological violence, Article 78(3) of the Convention No. 210 allows state parties to provide for non-criminal sanctions, instead of criminal sanctions for stalking.

Assessment of the Armenian criminal law

Armenia does not have any specific criminal provision addressing stalking. Some generic offences such as infliction of strong physical pain or mental suffering (Article 119), extortion (Article 182) or threats (Article 137) may target some behaviours captured under stalking. Yet they fail to grasp its full extent. Several courses of conduct that fall within stalking are not currently addressed, such as constantly following the victim or engaging in unwanted communication. In

19. See www.endvawnow.org/en/articles/398-definition-of-domestic-violence.html?next=399.
20. Available at www.legislation.gov.uk/ukpga/2015/9/section/76/enacted.

fact, the component missing in the Armenian Code is the ability to target a course of conduct, rather than single events.

Findings

From the foregoing it follows that the current legal framework of Armenia does not comply with the Convention No. 210 with regard to stalking. The Convention No. 210 and best international practices recommend implementing dedicated criminal law provisions on stalking, as generic offences have proved to be ineffective in addressing the course of conduct involved. However, most forms of psychological violence may overlap if not carefully crafted.

The latest available Analytical Study on the implementation of Recommendation Rec(2002)5 of the Council of Europe suggests that at least 35 member states now penalise stalking (Hagemann-White 2014). Legal systems differ in how they deal with crimes that involve a course of conduct that causes harm. Most countries use broad terms such as harassment in order to expand the variety of acts. The alternative involves carefully listing possible stalking tactics, albeit the catalogue should not be exhaustive.

A EU-wide study on stalking conducted by the Modena Group on Stalking of the University of Modena (2007) provides some examples and good practices. The study concludes that the two approaches just mentioned have positive and negative aspects that should be considered in the framework of each national legal system. A good example of a detailed definition of stalking can be found in the German Criminal Code[21] (section 238), which is particularly careful to indicate the behaviours of the stalker: 1) seeking out physical proximity; 2) using telecommunications or other instruments of communication or using third parties to get in contact; 3) using her personal data improperly to order goods or services in her name or prompting third parties to get in contact with her; 4) threatening life, physical integrity, physical health of freedom of hers or of persons close to her; 5) acting in a comparable way and impacting her personal freedom in a severe way. It is noteworthy that this last clause shifts the focus from a behaviour-based definition to a result-base one, thus significantly enlarging the grip of the provision.

Other criminal statutes craft their provision on stalking with regard to the intent of the perpetrator. Belgium for instance was among the very first EU member state to introduce a crime on stalking and opted for a broad definition based on the intent of the perpetrator. According to current wording of Article 442.bis of the Belgian Penal Code,[22] a person "who has belaged (harassed) a person, while he knew or should have known that due to his behaviour he would severely disturb this person's peace" is guilty of stalking.

Finally, Denmark provides an interesting criminal regulation on stalking whereby the police impose a warning or a restraining order before the person is liable to punishment. Section 265 of the Criminal Code of Denmark[23] states:

> Any person who violates the peace of some other person by intruding on him, pursuing him with letters or inconveniencing him in any other similar way, despite warnings by the police, shall be liable to a fine or to imprisonment for any term not exceeding 2 years. A warning under this provision shall be valid for 5 years.

Key findings

- Stalking should be criminalised in Armenia. Best international practices recommend introducing a dedicated offence in the Criminal Code. Alternatively Armenia may amend an existing offence in order to capture this behaviour to its full extent.

Physical violence

Requirements of the Convention No. 210

Article 35 of the convention requires parties to ensure that "the intentional conduct of committing acts of physical violence against another person is criminalised".

Constituent elements. Criminalising physical violence does not entail significant technical problems. Indeed, most criminal statutes around the world already prohibit and sanction most forms of physical violence, taking into account the result: death or different degrees of bodily injuries. This provision criminalises any infliction of bodily harm caused by the application of immediate and unlawful physical force.

Assessment of the Armenian criminal law

The Criminal Code establishes a wide range of offences encompassing different forms of physical violence. Chapter 16 of the CCA offers a comprehensive criminal response to "crimes against life and health" ranging from murder to minor bodily injuries.

The code contains up to six provisions on murder. Article 104, first indent, deals with basic murder. Punishment has been enhanced recently and now

21. The German Criminal Code is available at www.gesetze-im-internet.de/englisch_stgb/.

22. The Belgian Penal Code is available at www.legislationline.org/documents/section/criminal-codes.

23. The Criminal Code of Denmark is available at www.legislationline.org/documents/section/criminal-codes.

ranges from 8 to 15 years. The second indent defines aggravated forms of murder listing up to 16 aggravating components including murder of a pregnant woman or out of discrimination. With murder committed on grounds of discrimination, sub-indent 13 includes national, race or religious hate or fanaticism but does not refer to sex or gender. As discussed above with regard to Article 119 CCA, both the new Armenian Constitution and the new offence on violations of human rights (Article 143) do foresee sex as a ground for discrimination.

Besides the basic form of murder, the CCA defines five attenuated crimes involving deprivation of life: Article 105 (murder in the state of strong temporary insanity), Article 106 (murder of a newly born child by the mother), Article 108 (murder by exceeding necessary defence) and Article 109 (causing death by negligence). The code also establishes parallel provisions for mitigated assault offences. For our purposes here, this report will only deal with the ones referring to strong temporary insanity. Article 105 deals with a set of circumstances that mitigate criminal liability, such as immoral behaviour on the part of the victim, mockery or heavy insults. A similar provision covers damage to health in the state of temporary insanity. Given the nature of these elements, both articles will be discussed below in the section on unacceptable justification for criminal liability.

Assault offences under this chapter of the CCA are further categorised according to the level of severity of damage: grave (heavy) damage, medium-gravity damage, and light damage. The criteria for deciding the level of injury include time required to heal and loss of ability to work suffered as a result of the injury. Usually, a forensic expert is requested to establish the level of seriousness of injuries.

These categories have implications in terms of prosecution as medium and light injuries are prosecuted under private prosecution rules (e.g. Article 183 of the Criminal Procedural Code). This report will discuss this issue in particular below in the section on *ex officio* prosecution.

Once again, it should be mentioned that aggravated forms of assault (Articles 112 and 113 of the CCA) refer to discriminatory motives but omit those based on sex or gender.

In the absence of a specific offence on domestic violence, the provisions regarding bodily injuries remain the primary criminal offence for which perpetrators of domestic violence against women can be held accountable. However, information gathered during the fact-finding mission suggests that most cases of domestic violence are prosecuted under Article 118 on battery. Battery is defined as the commission of other violent actions, which have not brought to consequences envisaged by Article 117 (light injuries). This offence is the most lenient form of physical violence and the sanction is quite low: "a fine in the amount of up to 100 minimal salaries" or "arrest for the term of up to 2 months". Moreover, punishment for battery has recently been reduced, as the sanction of correctional labour up to one year has been removed. Moreover, battery can only be prosecuted as a private offence. Accordingly, it appears that the absence of a specific offence or, at least, an aggravating circumstance on domestic violence results in disproportionately low sanctions in many cases of domestic violence.

It is worth mentioning that judges and prosecutors interviewed during the fact-finding mission observed that for a conduct to qualify as battery it has to involve more than two or more acts of violence; two or more blows, so to speak. In fact, the Cassation Court held in the case of Arevik and Tsovinar Sahakyans that: "It flows from the content of Article 118 of RoA Criminal Code that battery is infliction of multiple (more than one) beats to the victim resulted in physical pain" (as quoted in Hakobyan 2017). This construction of the actus reus fails to capture the elements that characterise most cases of domestic violence, typically involving series of acts over long periods of time, each of which may in itself not be penalised (e.g. one slap). The Armenian legal response to violence relies on a traditional perception of the criminal action, focused on isolated events causally related to consequences. This approach makes it very difficult to effectively prosecute behaviours such as those comprised in the definition of domestic violence. For instance, back in 2015, in Vanadzor, a man reportedly received a fine of 150 000 drams (315 euros) for beating his wife, who claimed that she had been subjected to 16 years of abuse.[24]

Findings

As the foregoing analysis shows, applicable criminal laws do not provide a solid ground for prosecution of physical violence in the domestic sphere. As stated above in previous sections, Armenia needs to significantly improve its criminal prohibition of domestic violence.

One way of going about it is to improve Article 119 on infliction of strong physical pain or mental suffering in order to make it specifically applicable to cases of domestic violence. The article should also be extended in order to comprise courses of conducts, not only isolated events. Furthermore, the CCA needs to include an aggravating circumstance targeting crimes committed against partners, family members or cohabitants, as required by Article 46 of the convention. Aggravating circumstances will be discussed later in this report.

24. See Grigoryan (2016).

Armenia could also specifically criminalise domestic violence and introduce the possibility of *ex officio* prosecution for this offence. This implies that all elements of domestic violence, including physical violence, are recognised as a specific crime and all forms of domestic violence leading to any degree of bodily injury are prosecuted *ex officio*.

Finally, it would be advisable to bring aggravated murder and assault based on discriminatory motives in line with the constitution and with Article 143 of the CCA.

Key findings

- Armenia should improve its criminal law response to domestic violence, especially in cases of light physical damage or without injuries. The Armenian criminal law should at least ensure that battery (Article 118 CCA) is not used as the standard response to most cases of domestic violence. Accordingly, the Armenian criminal law may benefit from a specific reference to domestic violence in Article 119 CCA.
- Armenia could also introduce a dedicated offence on domestic violence.

Sexual violence

Requirements of the Convention No. 210

Article 36 of the Convention No. 210 mandates parties to criminalise all forms of non-consensual acts of a sexual nature, including rape. This comprehensive and long provision is the most detailed offence in the convention and provides a "catch-all" definition for sexual violence.

In penalising sexual violence states should have regard to the case law of the European Court of Human Rights. The Explanatory Report refers in particular to the case of *M.C. v. Bulgaria* (2003), where the Court concluded that states' positive obligations under the European Convention on Human Rights "must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim" (*M.C. v. Bulgaria*, para. 166).

Finally, sexual violence should encompass domestic sexual violence. Historically, the laws of many countries implicitly or explicitly have condoned marital rape. Under Article 43 of the convention the criminalisation of sexual offences applies irrespective of the relationship between perpetrator and victim.

Constituent elements. The Explanatory Report refers to the notion of acts of a "sexual nature" as "an act that has a sexual connotation. It does not apply to acts which lack such connotation or undertone" (para. 190). However, the central element in the way the convention frames sexual violence is consent. As defined under the second paragraph of Article 36, consent must be given voluntarily as a result of the person's free will, as assessed in the context of the surrounding circumstances. Both the definition of rape and the provision on other forms of sexual violence revolve around the lack of consent.

According to this definition of sexual violence, elements such as violence, force or coercion are not the only constitutive element of the offence. The convention follows once again the European Court and its landmark case in this area, *M.C. v Bulgaria*:

> A rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risked leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. (*M.C. v. Bulgaria*, para. 166)

From the foregoing it follows that, as regards to minimum standards, both the European Court of Human Rights and the Convention No. 210 establish that a narrow, force-based definition of sexual violence, including rape, with a resistance requirement fails to protect women's right to bodily integrity and sexual autonomy.

Conduct. The first paragraph of Article 36 defines the targeted conducts. Indent (a) includes acts commonly referred to as rape. The Convention No. 210 provides a broad definition that includes all forms of penetration of bodily parts carried out with bodily parts or objects. Under indent (b), the article makes it clear that all other non-consensual sexual acts falling short of rape should also be criminalised. Indent (c) also criminalises the causing of another person to undergo the previous acts with a third person. Article 36 does not require a specific provision for each type of sexual violence, but it does require that all of them are criminalised.

Evidence. Courts' practices and rules of evidence become crucial in enforcing criminal laws on sexual violence and legislation should ensure that gender stereotypes do not taint judicial decisions. In *V.K. v. Bulgaria* the CEDAW Committee stated that "Stereotyping affects women's right to a fair trial and the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence."

The requirement of lack of consent should be assessed in light of the surrounding circumstances (Explanatory Report, para. 193). Accordingly, legislation may consider a broad range of circumstances in which consent is immaterial, such as sexual assault by an individual in a position of authority. The CEDAW Committee further spells out the standards in proving absence of consent. In the case *Karen Tayag Vertido v. The Philippines*, (2010) the committee established that

the accused must give evidence of the steps taken to ascertain whether the victim was consenting.

Moreover, with regard to rules of evidence, the Convention No. 210 includes yet another relevant provision. Article 54 requires parties to ensure that evidence relating to the sexual history and conduct of the victim "shall be permitted only when is relevant and necessary". According to the Explanatory Report, "Presenting this type of evidence may reinforce the perpetuation of damaging stereotypes of victims as being promiscuous and by extension immoral and not worthy of the protection provided by civil and criminal law" (para. 277). Consequently, the admissibility of these evidences should be restricted.

Assessment of the Armenian criminal law

The Criminal Code of Armenia devotes chapter 18 to crimes against sexual immunity and sexual freedom.

Rape is a criminal offence in Armenia under Article 138 of the CCA. The definition of rape only covers "sexual intercourse of a man with a woman" and requires that the act be performed against the will of the victim. Moreover, the offence includes another constituent element, out of three possibilities: either the perpetrator uses violence, threat or takes advantage of the woman's helpless situation. Article 139 covers other types of sexual assault and includes the same constituent elements and sanction as in rape.

Originally, Article 138 provided for heterosexual rape while other forms of sexual intercourse are stipulated under Article 139. However, Article 139 has been amended and with the current wording there is no apparent justification for a gender-specific definition of rape.

Articles 138 and 139 also incorporate parallel aggravated forms of sexual assault, thus the second indent of both articles includes the same set of eight aggravating circumstances. The main difficulty with these two provisions on sexual assault is the use of a force-based definition. The absence of consent is not the qualifying element. Accordingly, the victim has the burden of proving concurrent violence, threats or her own helpless situation. Furthermore, a charge of rape also requires proof of penetration. If courts adopt a narrow interpretation of the aforementioned constituent elements, a significant number of non-consensual acts of a sexual nature may go unpunished under these provisions, leaving those victims who are unable or unwilling to show resistance unprotected. The CCA does not include rules on evidence to ascertain how courts interpret and apply these requirements, yet during the fact-finding mission both prosecutors and judges acknowledged that proof of resistance is required.

Article 140 criminalises forced violent sexual acts. Despite the title, this provision seems to differ from the previous ones in the absence of violence. Constituent elements here are blackmail, threats against property or abuse of position. The definition is broad enough in order to encompass most instances of sexual violence. However, wording is vague and may overlap with previous offences on rape and violent sexual actions with regard to threats. Despite recent legal amendments, the corresponding sanction for violent sexual acts is still quite low, up to three years' imprisonment. It should be noted that given the resistance requirement implicit in Articles 138 and 139, this provision might apply to most cases of sexual violence.

Armenian criminal law does not specifically disallow marital rape or any other form of sexual assault in the context of an intimate or family relationship. Conversely the relationship between the victim and the perpetrator does not constitute a defence or mitigating circumstance and therefore domestic sexual violence is prosecuted under the general sexual assault statutes. Even though there is no theoretical impediment to prosecute this form of violence, there are not many cases investigated and prosecuted. In fact, during the fact-finding mission, none of the interlocutors from the justice sector was able to refer a single case of intimate partnership sexual violence (see also Amnesty International 2008 or the Commissioner for Human Rights 2015). As the Commissioner points out in his report on Armenia: "Women who voice complaints or attempt to escape a violent situation are generally perceived as endangering family unity and stability" (p. 29).

The Armenian Criminal Code addresses sexual violence against children under Articles 141 and 142. Pursuant to Article 141 acts of a sexual nature against a person under 16 that do not qualify as sexual assault under previous provisions carry a punishment of up to two years' imprisonment. The article includes two aggravated offences with different constituent elements. Article 142 prohibits lecherous acts against minors, with different degrees of punishment depending on the age of the victim and the perpetrator.

Despite the fact that recently these two provisions underwent a significant modification, there are still some gaps. For instance, sexual solicitation of minors or failure to report sexual assault of a minor is not a crime. Besides, there is no definition of "lecherous acts".

Finally, the CCA does not expressly criminalise the act of coercing another person to engage in non-consensual acts of a sexual nature with a third person. General rules on aiding and abetting may apply (CCA 37, 38), but the particularities of sexual violence and the Convention No. 210 require specific criminalisation.

Findings

The Armenian criminal law on sexual violence lags behind the convention's standards and international practices. From the foregoing analysis it follows that Armenia does not criminalise all non-consensual acts of a sexual nature. Existing sexual assault offences do not cover all possible coercive circumstances nor is there any evidence of broad interpretation of constituent elements in courts, leading to significant barriers in access to justice for victims. Coercion can cover a wide range of behaviours, including intimidation, manipulation, threats of negative treatment and others that are not prima facie included in the definitions of Articles 138, 139 or 140. Moreover, if Article 140 is interpreted in a broad sense to grasp all other forms of sexual violence not covered by the other two provisions, corresponding sanction is too low to comply with the requirements of Article 45 of the Convention No. 210.

International best practices suggest that sentencing should be graded based on harm, but criminal liability should solely depend on the absence of consent assessed in the context of the surrounding circumstances. To ensure a broad application of the lack of consent even in the absence of physical resistance by the victim as the Convention No. 210 requires, it would be preferable if Articles 138 and 139 did not refer to "force" and "threat" but would focus solely on whether the consent to the sexual act was the result of the person's free will, in light of all the circumstances of the case, as required by Article 36 of the Convention No. 210. Moreover, the Armenian criminal law may introduce aggravating circumstances based on use of force or harmful results. This approach would render Article 140 unnecessary.

It should also be ensured that the prosecution of such offences is based on a context-sensitive assessment of the evidence in order to establish on a case-by-case basis whether the victim has freely consented to the sexual act. The analysis should recognise the wide range of behavioural responses to sexual violence and rape which victims exhibit and it should not be based on assumptions of typical behaviour in such situations nor influenced by gender stereotypes and myths about women's and men's sexuality (Explanatory Report, para. 192).

On the other hand, there is no apparent justification for a gender-specific definition of rape. The convention and international best practices also suggest a broad construction of the acts of rape. Articles 138 and 139 may be amended accordingly.

Armenia should make sure that coercing another person to engage in non-consensual acts of a sexual nature with a third person is punishable, for example under the Article 140 CCA. Because intimate partnership sexual violence is often poorly recognised, it would be advisable to ensure that sexual assault provisions apply irrespectively of the relationship between perpetrator and victim, along the lines of Article 43 of the convention.

International good practices and legislative trends move towards broad offences of sexual assault that do not require penetration, are based on absence of consent and are graded on harm, with aggravating circumstances covering force, threat of force and others. However, it is crucial to craft the law carefully, because definitions of sexual assault based only on a lack of consent "may, in practice, result in the secondary victimization of the complainant/survivor by forcing the prosecution to prove beyond reasonable doubt that the complainant/survivor did not consent" (UNDAW 2010: 27).

The lack of consent can be difficult to prove if the complainant is not physically injured and the difficulty increases if he/she knows the perpetrator. Thus, the accused should have the burden to prove consent was given freely and knowingly or the definition of the offence should rely on the existence of certain circumstances, rather than demonstrating a lack of consent.

The Criminal Code of Canada[25] provides an excellent example of an approach based on consent and its assessment, taking into account the surrounding circumstances. Article 273(1) defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question". Sub-paragraph 2 describes circumstances where no consent is obtained:

> (a) the agreement is expressed by the words or conduct of a person other than the complainant; (b) the complainant is incapable of consenting to the activity; (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Furthermore, Article 273.2 of the Canadian Criminal Code states that it is not a defence against charges of sexual assault that the accused believed that the complainant consented if any of the following concur: "self-induced intoxication"; "recklessness or wilful blindness"; or "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting".

25. Available at http://laws-lois.justice.gc.ca/eng/acts/C-46/.

Key findings

Armenia should revise and recast chapter 18 of its Criminal Code in order to ensure a comprehensive criminalisation of all forms of non-consensual acts of a sexual nature. At least, Armenia should:

- extend the scope of the definition of rape;
- clarify or repeal references to "violence" and "threat" in Articles 138 and 139 CCA;
- align the sanction foreseen in Article 140 CCA with Articles 138 and 139 CCA;
- ensure that coercing another person to engage in non-consensual acts of a sexual nature with a third person is covered under the CCA;
- ensure criminal responsibility for marital rape or any other form of sexual assault in the context of an intimate or family relationship.

Forced marriage

Requirements of the Convention No. 210

Article 37 of the Convention No. 210 requires the criminalisation of two types of conduct: 1) forcing an adult or a child to enter into a marriage; 2) luring an adult or a child to a third country with this purpose (even if the marriage has not been concluded).

Constituent elements. The core element of forced marriage is the absence of consent of the victim owing to the use of physical or psychological force. The consent is absent when family members or other person use coercive methods such as pressure of various kinds, emotional blackmail, physical duress, violence, abduction, confinement or confiscation of official papers.

As regards force, the Explanatory Report notes: "The term 'forcing' refers to physical and psychological force where coercion or duress is employed" (para. 196). Accordingly, requirements of force should be interpreted in a broad sense, with due regard to the surrounding circumstances.

Other remedies. Along with a criminal law response, states should ensure appropriate measures pertaining to laws governing marriage including registry of marriage, divorce, child custody, property, and immigration issues. In this regard, the Convention No. 210 in Article 32 guarantees victims the possibility to end a forced marriage without undue financial or administrative burdens.

Assessment of the Armenian criminal law

Article 34 of the Constitution of the Republic of Armenia states the freedom of marriage between men and women of marriageable age (18 years old) as a fundamental right. However, the CCA does not contain a specific provision about forced marriage.

Only some very serious consequences of forced marriage, such as sexual exploitation, forced services, practices similar to slavery, or servitude, could be prosecuted as kidnapping (Article 133 of the CCA). Also the deprivation of freedom of the victim is considered illegal under Article 131 of the CCA. However, these provisions do not address the problem of forced marriage to its full extent and the two conducts identified in Article 37 of the convention cannot be generally prosecuted.

Findings

The current legal framework in Armenia does not protect victims of forced marriage as required by the Convention No. 210. There is no specific offence nor do generic crimes cover these conducts.

One option is to tackle forced marriage as a type of coercion or intimidation. That is the case in Germany, where criminal law provisions hold liable whomsoever unlawfully, with force or threat of serious harm, causes a person to commit, suffer or omit an act.[26] The provision thereof considers it an especially serious case to cause another person to enter into marriage.

On the other hand, Norway's Penal Code offers a good definition of forced marriage as a specific felony against personal liberty (section 222(2)): "Any person who by force, deprivation of liberty, improper pressure or any other unlawful conduct or by threats of such conduct forces anyone to enter into a marriage shall be guilty of causing a forced marriage."[27]

Key findings

- Armenia should criminalise forced marriage.

Female genital mutilation

Requirements of the Convention No. 210

Article 38 of the Convention No. 210 requires criminalisation of mutilation (excising, infibulating or other forms of mutilation) of certain parts of a woman's genitalia and also the conduct of coercing or procuring a girl or a woman, or inciting a girl, to undergo this practice.[28]

26. German Criminal Code, section 237, available at www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.
27. The Penal Code of Norway is available at http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19020522-010-eng.pdf.
28. For a thorough explanation of FGM under the Convention No. 210, see "The Convention No. 210: a tool to end female genital mutilation", Council of Europe and Amnesty International, 2014, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680464e9f.

Conducts. According to the Explanatory Report (para. 199):

> The term "excising" refers to the partial or total removal of the clitoris and the labia majora. "Infibulating", on the other hand, covers the closure of the labia majora by partially sewing together the outer lips of the vulva in order to narrow the vaginal opening. The term "performing any other mutilation" refers to all other physical alterations of the female genitals.

Assessment of the Armenian criminal law

The CCA does not contain any specific offence covering female genital mutilation (FGM). However, Articles 112 and 113 of the code, which regulates the infliction of wilful, heavy or medium-gravity damage to health, apply to most cases of FGM. The conducts of coercing, procuring or inciting a woman to undergo FGM are not covered, only very partially in Article 137 CCA concerning threats to murder or to inflict heavy damage.

According to the information gathered during the fact-finding mission, FGM is not a problem in Armenia for the time being. In fact, no reported cases were identified.

Findings

Provisions on physical assault resulting in bodily injury apply to all cases of FGM. However, Armenia should ensure that FGM is considered a severe injury. It might also consider the possibility of introducing a specific aggravating circumstance covering this behaviour. These measures will ensure that FGM would be effectively prosecuted under the offence of physical assault.

With regard to Article 38(b) and (c) of the Convention No. 210, the Armenian criminal law falls short of the requirements. As said in the section on forced marriage above, the main identified shortcoming refers to the fact that the CCA does not criminalise coercion. Accordingly, Armenia shall adopt the necessary legislative measures to ensure that all conducts described in Article 38 of the Convention No. 210 are criminalised.

Key findings

- Armenia may introduce a reference to FGM within the offence of "heavy damage", Article 112 CCA. FGM might also be construed as an aggravated form of physical assault.
- Armenia shall ensure that conducts of coercing, procuring or inciting to undergo FGM are criminalised.

Forced abortion and forced sterilisation

Requirements of the Convention No. 210

Article 39 of the convention requires criminalisation of two types of acts: 1) terminating the pregnancy of a woman without her prior and informed consent, by whatever means; 2) carrying out of any procedure aiming at terminating a woman's capacity to reproduce naturally without consent.

Constituent elements. Article 39 encompasses two different conducts. The Explanatory Report specifies that the aim of this provision is to emphasise the importance of respecting women's reproductive rights, thus ensuring their access to appropriate information on reproduction and family planning. Accordingly, women's informed consent is a crucial element of these two offences.

Conducts. The Explanatory Report further spells out the acts within the remit of this article. Forced abortion covers any of the various procedures that result in the expulsion of all the products of conception (para. 204). Further, sterilisation includes any procedure that results in the loss of the ability to naturally reproduce (para. 205).

With regard to forced abortion and forced sterilisation, it is important to recall Article 41 of the convention on aiding and abetting. Pursuant to this article, the convention also mandates criminalisation of forcing or coercing a person to undergo an abortion or a sterilisation procedure.

Assessment of the Armenian criminal law

Article 122 of the CCA criminalises illegal abortion. This provision distinguishes between medically trained perpetrators and non-trained perpetrators. However, this provision does not discriminate between consensual and non-consensual abortions. On the other hand, there is no specific reference to forced sterilisation in the Criminal Code of Armenia.

Albeit acts of forced abortion or forced sterilisation may be classified as intended bodily injuries, it should be noted that Armenia has a longstanding problem regarding sex-selective abortion. In its concluding observations, the Committee on Economic, Social and Cultural Rights (CESCR) expressed concern about the fact that Armenia has "one of the highest levels of male births compared with female births observed anywhere in the world, as a result of sex-selective abortions" (CESCR 2014: 22).[29]

29. See also Gasoyan 2016.

The Law on Human Reproductive Health and Reproductive Rights currently embodies the country's abortion legislation dates. It allows for pregnancies to be ended on request by the mother until the twelfth week and for medical and social reasons until the twenty-second week with a doctor's approval (see International Planned Parenthood Federation 2012).

It is noteworthy that the government construes a non-consented abortion as an illegal abortion, following the government decree 1116-N of 16 August 2004.[30] However, this interpretation conflicts with the principle of legality and there is no evidence of judges following it. Moreover, the sanction envisaged in Article 122 on illegal abortion is by all means inappropriate with regard to forced abortion. Performing an abortion on a woman against her consent should be comparable to a severe physical assault in terms of criminal response. Accordingly, the corresponding sanction for illegal abortion is too low to comply with the requirements of Article 45 of the Convention No. 210 if applied to forced abortion.

In any case, usually perpetrators of forced abortion are not those actually practising it. According to the information gathered during the fact-finding mission, in most cases of sex-selective abortions, partners or other family members force women to undergo this practice. A recent UNFPA report also provides evidence of the correlation between sex-selective abortions and forced abortions in Armenia (Gasoyan 2016). This report concludes that in Armenia "women are subjected to gender-based psychological and physical violence to have male children, and are forced to undergo consecutive abortions which may have consequences on their physical and mental health" (p. 82). As the Commissioner for Human Rights (CHR) noted in his report, this practice relates to the following factors: "a deeply-rooted preference for sons, decreasing average family size, and easier access to modern reproductive technologies … [T]his situation is a clear manifestation of the disadvantaged situation of women and gender inequality in the Armenian society" (CHR 2015: 156).

The Law on Human Reproductive Health and Reproductive Rights was amended in August 2016, prohibiting sex-selective abortions, introducing counselling, as well as a three-day period of reflection before abortion. However, most observers, such as the CEDAW Committee (2016), remain concerned by the widespread practice of sex-selective abortion.

30. See the "Comments of the Government of Armenia to the report of the Council of Europe Commissioner for Human Rights" following his visit to Armenia on 5-9 October 2014, available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.-instranet.CmdBlobGet&InstranetImage=2701531&SecMode=1&DocId=2243320&Usage=2.

Findings

It is not clear whether forced abortion falls within generic provisions on bodily assault or within the remits of Article 122 CCA on illegal abortion. However, none of these alternatives fulfils the requirements of the Convention No. 210.

Given the prevalence of sex-selective abortion in Armenia, the country may consider introducing a dedicated offence on forced abortion, as a separate provision from the one criminalising illegal abortion. In particular, Armenia should tackle coercion to undergo sex-selective abortion under its criminal law. According to the requirements of Article 45 of the Convention No. 210, sanction for these offences should be appropriate, thus significantly more severe than those envisaged for illegal abortions.

With regard to forced sterilisation, there is no specific offence in the Criminal Code of Armenia. Consequently, this conduct will have to be prosecuted under generic offences of bodily assault. Armenia may consider the possibility of including a specific reference to forced sterility within the offence on severe damage.

For instance, the Spanish Criminal Code covers under Article 149 severe injuries, including sterility, whereby holding criminally liable:

> Whoever causes to another person, by any means or procedure, to forfeit or lose the use of a major organ or limb, or a sense, or sexual impotence, sterility, serious deformity or to suffer a serious physical or mental illness. (Article 149)

Moreover, the Spanish Criminal Law also contains a dedicated offence on forced abortion with the following wording:

> Whoever perpetrates an abortion on a woman without her consent shall be punished with a sentence of imprisonment from four to eight years and special barring from practising any health profession or from providing services of any kind at public or private gynaecological clinics, institutions or surgeries, for a term of three to ten years. (Article 144)

Key findings

- Armenia should clarify its criminal law response to forced abortion and provide for an appropriate sanction to it.
- Armenia may introduce a dedicated offence on forced abortion.
- Armenia may also introduce a reference to forced sterilisation in the offence on severe damage to health.

Sexual harassment

Requirements of the Convention No. 210

Article 40 of the Convention No. 210 prohibits sexual harassment. The convention defines sexual harassment as "unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment".

Constituent elements. The offence of sexual harassment includes: an unwanted behaviour, of a sexual nature, that affects or could affect the dignity of a person. Sexual harassment typically takes place in the workplace, but not only. Accordingly, the context or setting does not constitute an element of the offence. However, sexual harassment can occur in multiple contexts and legislation should comprehensively address all of them.

Many legal systems address sexual harassment under civil or labour law. For this reason, unlike the other criminal law provisions, this one authorises sanctions other than criminal penalties, whose type and nature the parties are free to determine.

Conduct. Article 40 covers three main forms of behaviour: verbal, non-verbal or physical conduct of a sexual nature unwanted by the victim. It is important to note that sexual harassment usually implies a course of conduct whose individual elements, taken in isolation, would not necessarily result in a sanction.

Assessment of the Armenian criminal law

The Armenian criminal law does not address sexual harassment, nor is there any generic provision that may apply.

The Law on Equal Rights and Equal Opportunities for Women and Men, adopted in 2013, defines concepts and terms related to gender equality, including sexual harassment Article 2(21) and Article 6, yet no corresponding sanction is foreseen. The law refers to institutional bodies with the authority to receive and redress alleged violations. These mechanisms and procedures are yet to be implemented.

Findings

The Law on Equal Rights and Equal Opportunities does not currently provide a solid basis for victims to seek redress against this form of violence. In particular, this legal instrument does not comply with Article 45 of the convention, which requires appropriate sanctions.

Armenia could introduce sexual harassment in its Criminal Code. There are many examples of good practices. For instance, France currently defines sexual harassment in Article 222-33 of the Criminal Code as "imposing on someone, in a repeated way, words or actions that have a sexual connotation" and either "affecting the person's dignity because of their degrading and humiliating nature" or putting him or her in an "intimidating, hostile or offensive situation".[31]

Criminal legislation on sexual harassment should not replace other existing remedies or sanctions. Instead, both criminal and non-criminal sanctions may coexist. Given the previous analysis it would be advisable to strengthen significantly the protection of victims of sexual harassment in all relevant laws, including criminal law.

Key findings

- Armenia should criminalise or otherwise prohibit sexual harassment in all spheres.
- Sexual harassment should be sanctioned appropriately.

31. The French Penal Code is available at www.legifrance.gouv.fr/.

Section III

Application of criminal law

Unacceptable justifications

Requirements of the Convention No. 210

Article 42 of the Convention No. 210 includes a clear prohibition of historically used justifications for acts of violence against women, including domestic violence. States parties will need to ensure that culture, religion, tradition or so-called honour are not used to justify any of the offences outlined in the convention. This means that parties are required to ensure that criminal law and criminal procedural law do not permit as justifications claims of the accused justifying his or her acts as committed in order to prevent or punish a victim's suspected, perceived or actual transgression of cultural, religious, social or traditional norms or customs of appropriate behaviour.

Justifications based on the alleged immoral behaviour of the victims can be construed as falling under the remit of Article 42. This approach concurs with that of the UN Women Supplement to the Handbook on Violence against Women (UNDAW 2011), according to which any legal provision that allows the behaviour of the victim to serve as a mitigating factor opens the door for stereotypes among law-enforcement officials.

The Convention No. 210 seeks to seal any way out of impunity and includes a second paragraph in Article 42 to ensure that incitement of a minor with regard to violence against women does not diminish criminal liability. With regard to this second paragraph the Explanatory Report notes the following:

> To avoid criminal liability, these acts are often committed by a child below the age of criminal responsibility, which is instigated by an adult member of the family or community. For this reason, the drafters considered it necessary to set out, in paragraph 2, the criminal liability of the instigator(s) of such crimes in order to avoid gaps in criminal liability. (para. 218)

Assessment of the Armenian criminal law

The Criminal Code of Armenia does not allow for justifications on the grounds of so-called honour or religion, but it does include mitigating circumstances referring to the provocative behaviour of the victim. Under Article 62 the code foresees mitigating circumstances among which the illegal or immoral behaviour of the victim is included. A similar element constitutes a form of attenuated murder (Article 105 of the CCA) and attenuated injuries (Article 114 of the CCA). These two articles refer to the respective offences (murder or injuries) when committed in the state of temporary insanity, which is defined as long depression that might be caused, inter alia, by immoral behaviour of the victim, mockery, heavy insults or other immoral actions. A state of temporary insanity reduces the punishment by more than half.

It is worth noting that references to unlawful actions or violence on the part of the victim should be understood as already covered by general rules on liability and culpability. The CCA contains a general requirement of sanity of perpetrators for criminal liability (Articles 23, 25 and 26) and also foresees the exclusion of criminal liability in cases of self-defence (Article 42). Consequently, there is no need for the aforementioned mitigating circumstances on those grounds.

With regard to these provisions, some observers have noted the ambiguous interpretation of the notion of "heavy insult" or "violence", which are "totally at the discretion of the given law-enforcement officer" (Proactive Society and OSCE 2011: 7). Moreover, during the fact-finding mission, several interlocutors referred to the particularities of violence in the family, making it clear that these cases required judicial examination of the behaviour of the victim in order to ascertain the motives of the perpetrator. In particular, a judge interviewed for the purposes of this report made it clear that it is not the same to commit violence for no reason than to respond violently to someone who, for instance, insulted your daughter. According to these views, some behaviours on the

part of the victim justifies a mitigated criminal liability, thus provocation defence applies. As a result, cases of violence in the family may result in relatively lower sentences compared to other non-domestic cases.

The media and some NGOs have exposed cases where those mitigating circumstances apply. For instance, the case of Diana Nahapetyan has had a significant impact on Armenia's public opinion. The CEDAW NGO Task Force describes the case as follows:

> Diana Nahapetyan was severely beaten with a vase and violently stabbed 21 times with a knife and murdered by her husband in front of their children. As the court recordings quote "[...] in a debate over the adultery issue [...] with the intent to unlawfully and wilfully deprive her life, [the accused] beat her with feet and glass vase, then pulled her hair to the kitchen, where intentionally stabbed her by kitchen knives damaging different parts of her body, the left side of her head, head soft tissues of the inner surface of brain membranes, wounding lungs, liver and causing brain diffusion, internal / 3400 ml / massive bleeding [...] resulting in life-threatening injuries and immediate death". By 24.12.2015 verdict of the 1st Instance Court of Ararat, her husband got off on a mere 3 years and 6 months in prison after the prosecutor and judge, based on the forensic psychiatric re-assessment (based only on the testimony of the defendant) and regardless of initial assessment results and witnesses' testimonies, insinuated that Diana, who initially presented her as a "nearly ideal woman", but her later regular immoral lifestyle and cheating on her husband, naming him "a cow" and threatening to throw out of home, arose to temporary insanity and accused committed the murder "in the state of sudden affect" due to his jealousy. As the trial took 3 years (although the accused admitted his guilt immediately), he has to serve his sentence in prison for 6 months and by the time of this report he is already released (CEDAW Task Force Armenia 2016: 46).

Findings

Some elements of the mitigating circumstances established under Articles 62, 105 and 114 clearly infringes both the spirit and the wording of the first paragraph of Article 42 of the convention. Evidence of judicial behaviour with regard to domestic violence further reinforces this conclusion.

Most criminal laws do account for temporary insanity, mental derangement and other circumstances to exclude or mitigate criminal liability, yet these elements significantly differ from circumstances that refer to provocation, heat of passion or immoral behaviours. The Convention No. 210 requires states to exclude the possibility of justifying violence on the grounds of a moral assessment of the victim's behaviour.

Accordingly, references to the immoral behaviour, mockery or heavy insults on the part of the victim should be removed. Armenia should also consider the possibility of introducing a general provision disallowing any kind of justification on the grounds of culture, religion, tradition, social norms or customs of appropriate behaviour.

Key findings

- Armenia should remove references to the immoral behaviour, mockery or heavy insults on the part of the victim from the Criminal Code.
- Armenia may also consider the possibility of introducing a general provision disallowing any kind of justification on the grounds of culture, religion, tradition, social norms or customs of appropriate behaviour.

Aggravating circumstances

Requirements of the Convention No. 210

Article 46 of the Convention No. 210 calls upon parties to ensure that certain aggravating circumstances may be taken into account in sentencing:

a. the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority;
b. the offence, or related offences, were committed repeatedly;
c. the offence was committed against a person made vulnerable by particular circumstances;
d. the offence was committed against or in the presence of a child;
e. the offence was committed by two or more people acting together;
f. the offence was preceded or accompanied by extreme levels of violence;
g. the offence was committed with the use or threat of a weapon;
h. the offence resulted in severe physical or psychological harm for the victim;
i. the perpetrator had previously been convicted of offences of a similar nature.

The argument behind introducing aggravating circumstances for domestic violence would be that "it could position victims of the same offence by someone not a partner as suffering less serious harm" (Hagemann-White 2014: 17). It should be specified that at least two-thirds of the member states of the Council of Europe recognise this aggravating circumstance *(idem)*.

As the Explanatory Report spells out, a common element in domestic violence cases is "the position of trust which is normally connected with such a relationship and the specific emotional harm which may emerge from the misuse of this trust when committing an offence within such a relationship" (para. 236). Furthermore, as stated above in the section on

prosecution of domestic violence, this aggravating circumstance may function either as an alternative to a dedicated offence or as a flanking measure.

It is important to note that the convention only requires these aggravating circumstances to be available for judges when sentencing perpetrators. There is no obligation on judges to apply them (see the Explanatory Report, para. 235).

Assessment of the Armenian criminal law

Article 63 of the Criminal Code of Armenia refers to available aggravating circumstances. This provision does not provide for the following circumstances:

- crimes committed against spouses, partners, other family members or cohabitants (Article 46(a) of the convention);
- crimes committed in the presence of a child (Article 46(d) of the convention);
- crimes committed with the use or threat of a weapon (Article 46(g) of the convention).

The CCA envisages all the other aggravating circumstances required in Article 46 of the Convention No. 210.

Findings

Armenia should introduce in its Criminal Code a circumstance that aggravates crimes when committed against a spouse or ex-spouse, even without cohabitation, or against partners or ex-partners bound by a similar relationship, even without cohabitation. Such an aggravating circumstance aims to ensure better safety within the domestic sphere. The aggravating circumstance will also complement existing aggravating circumstances that protect children, pregnant women and dependent persons.

It is also important to note that an aggravating circumstance on domestic violence will also improve Armenia's criminal law response to this form of violence. This element should qualify generic offences under the CCA, such as physical or sexual assault, thus ensuring application in accordance with Article 43 of the Convention No. 210 and sending the message to law-enforcement officials that domestic violence is no longer tolerated. Moreover, the criminal procedural law should make use of this aggravating circumstance to turn all cases of domestic violence into public offences.

This type of aggravating circumstance does not prevent or conflict with a dedicated offence on domestic violence. As Article 63.4 of the CCA establishes, aggravating circumstances do not apply to offences that already take them into account as constituent elements.

With regard to violence committed in the presence of a child, the fact-finding mission revealed that this circumstance is sometimes qualified as a form of particular cruelty in order to aggravate punishment. However, this approach is not always consistent and a specific reference in the criminal law will cast clarity.

Finally, the use of weapons is a constituent element in the definition of some offences, such as kidnaping (Article 131 of the CCA) or banditry (Article 175 of the CCA). In order for judges to be able to consider this element in all cases it should be introduced as a general element in Article 63 of the CCA.

Key findings

Armenia should ensure that the following aggravating circumstances may be taken into account in sentencing:

- crimes committed against spouses, partners, other family members or cohabitants;
- crimes committed in the presence of a child;
- crimes committed with the use or threat of a weapon.

Sentences passed by another country

Requirements of the Convention No. 210

Article 47 reflects the emphasis the convention places on international co-operation and extends the principle of international recidivism to violence against women. However, as the Explanatory Report clarifies, "this provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts"(para. 250).

Assessment of the Armenian criminal law

The CCA envisages the principle of international recidivism under Article 17. Pursuant to this provision Armenian courts can take into account sentences passed by any other country when adjudicating crimes committed in Armenia by the same convicted person.

Mandatory alternative dispute resolution mechanisms

Requirements of the Convention No. 210

Article 48 of the Convention No. 210 bans mandatory alternative dispute resolution procedures in relation to cases of violence against women. This prohibition includes mediation and conciliation, yet it is limited to mandatory mechanisms. The convention does not undermine the effectiveness of these instruments to solve disputes. In fact, back in 1999 the Council of Europe Recommendation No. R (99) 19 concerning

mediation in penal matters[32] supported mediation in criminal matters. However, these mechanisms require that the parties freely consent and since violence against women is a manifestation of unequal power relations, that inequality limits the freedom of consent. The idea behind this provision is that victims of such violence "can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator" (Explanatory Report, para. 252). Furthermore, this provision serves to avoid reprivatisation of domestic violence and violence against women and to enable the victim to seek justice (Explanatory Report, para. 252).

The second paragraph of Article 48 aims at avoiding unintended consequences that the fines imposed upon perpetrators may have on victims. Consequently, states shall ensure that judges take into account the ability of the perpetrator to assume his financial obligations towards the victim. The Explanatory Report justifies this provision with the fact that most perpetrators are partners or members of the family of the victim and often the sole breadwinners of the family. Ordering the perpetrator to pay a fine can indirectly have a bearing on the family income or on his ability to pay alimony and may result in financial hardship for the victim.

Assessment of the Armenian criminal law

The Armenian criminal law provides for the possibility of reconciliation in case of private prosecution. As stated above, private prosecution applies to lenient cases such as light injuries or battery. Under Articles 35 and 36 of the Criminal Procedure Code, reconciliation between the victim and the accused excludes the institution of a criminal case, prevents its prosecution or allows for termination of proceedings. In accordance with the procedural law, the Criminal Code envisages under Article 73 the exemption of criminal liability in cases of reconciliation with the victim in "not grave crimes".

The Armenian criminal law does not further regulate the procedure for reconciliation nor does it clarify the role of each law-enforcement body. Representatives of the prosecutor's office interviewed during the fact-finding mission stated that the prosecutor "cannot do anything" if the victim and the prosecutor reconcile. Other sources suggested that this approach is not entirely in conformity with the CPCA in force. In any case, it appears that there is no oversight of cases of reconciliation in order to ensure that none of the parties is pressured into it. This absence of control also places victims at a higher risk, as the case of Mrs Siranush illustrates:

> On January 1, 2014, Siranush's husband, Levon Aghabekyan, has intentionally set their jointly owned apartment on fire. It should be noted that he was released from the court hall only 20 days before and faced charges for assaulting and knifing his wife, Siranush Aghabekyan. On her son's request Siranush had agreed to forgive her husband in the court, which was used as grounds for dismissing the case and suspending criminal charges. Following the arson of the apartment, Siranush appealed to the Appeal Court on the knifing case, but once again the case was discontinued. (Media Center 2014)

The regulation of this mechanism suggests that reconciliation is just a possibility at the disposal of the victim and the perpetrator. There is no legal obligation for the victim to enter into a reconciliation process or to accept an offer for reconciliation. However, reconciliation is reportedly commonly used in Armenia. During the fact-finding mission, most members of the judiciary and the prosecutors' office defended reconciliation as the best way to deal with cases of domestic violence, drawing their justification on the need to preserve the integrity of the family and Armenian traditional values.[33]

Findings

The mechanism of reconciliation does not necessarily violate Article 48 of the Convention No. 210. Alternative dispute resolution mechanisms might be a useful tool both in civil and criminal law regimes. However, practices in the Armenian justice system suggest that reconciliation impedes women's access to justice.

Notwithstanding the required measures with regard to training and sensitisation of law-enforcement officers in Armenia, the criminal legal framework should also be amended. The Criminal Procedure Code should preferably exclude reconciliation in cases of domestic violence. Given the close connection between the reconciliation mechanism and private prosecution, the easiest way to implement this recommendation is to refer all cases of domestic violence to public prosecution (see the section on *ex officio* prosecution below).

As a minimum, the Armenian criminal law should impose stricter control over this mechanism, introducing provisions aimed at ensuring that victims freely consent to the reconciliation and that no coercion, duress or intimidation is enforced upon them. In that regard, there is already a good practice in the district of Kentron, Armenia, where the prosecutor oversees cases of reconciliation (Hakobyan 2017).

Key findings

- Armenia should exclude the possibility of reconciliation in cases of domestic violence. At least, Armenia should ensure that reconciliation does not constitute a barrier for women's access to justice.

32. Available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680062e02b.

33. See also Amnesty International 2008, UNFPA 2010 and the Council of Europe Commissioner for Human Rights (2015).

Ex officio prosecution

Requirements of the Convention No. 210

Pursuant to Article 55, states parties undertake the obligation to allow investigations into or prosecutions of at least the more severe forms of violence to go ahead without a report or complaint filed by the victim, and to enable proceedings to continue in the event of withdrawal of such a complaint. This rule aims at sparing victims the sole responsibility for initiating prosecution (Explanatory Report, para. 279).

The provision covers only some offences, thus in cases of psychological violence (Article 33), stalking (Article 34) or sexual harassment (Article 40) *ex officio* investigation and prosecution are not mandatory. Additionally, Article 78.2 of the convention indicates that paragraph 1 of Article 55 is open to reservation, yet only in respect of minor offences under Article 35 (physical violence). With regard to all other forms of violence against women the *ex officio* rule applies, therefore:

> law enforcement authorities should investigate in a proactive way in order to gather evidence such as substantial evidence, testimonies of witnesses, medical expertise, etc., in order to make sure that the proceedings may be carried out even if the victim withdraws her or his statement or complaint at least with regard to serious offences, such as physical violence resulting in death or bodily harm. (Explanatory Report, para. 280)

Pursuant to the second paragraph of Article 55, the convention requires parties to allow governmental and non-governmental organisations and domestic violence counsellors to assist and support victims during investigations and judicial proceedings. This measure intends to make it possible for other stakeholders to provide assistance and support to victims, thus empowering them and facilitating their access to justice. Furthermore, this provision does not only cover legal assistance but also psychological and other kinds of support.

The principle embodied in the convention derives from settled case law of the European Court. The Court, in cases such as *Opuz v. Turkey* or *Bevacqua* and *S. v. Bulgaria* has established that private prosecution does not fulfil states' obligations to prosecute cases of domestic violence with due diligence.

Assessment of the Armenian criminal law

In Armenia, criminal law distinguishes crimes subject to private and crimes subject to public prosecution (Article 33 of the Armenian Criminal Procedure Code). Crimes of private prosecution can only be investigated and prosecuted upon complaint of the victim and shall be terminated if the victim withdraws the complaint or forgives the perpetrator.

Article 183 of the Criminal Procedure Code lists the crimes of private prosecution. For our purposes here, the relevant offences submitted to private prosecution are: Infliction of wilful medium-gravity or light damage to health (Article 113.1; Article 114.1; Article 115; Article 116 and Article 117), battery (Article 118) and threat (Article 137). Evidence shows that most cases of domestic violence are prosecuted under these articles, thus domestic violence is generally referred to private prosecution in Armenia.

This is especially relevant in the Armenian context, where most women are said not to report cases of violence against them, as described in the introduction. On the one hand, the UNFPA survey (2010) reveals that "victims of violence, especially of intimate partner violence and of sexual violence or harassment, seldom come forward, if at all, because if they do, they have to face numerous negative social, economic, psychological and other consequences" (p. 133). On the other hand, the Proactive Society report (2011) shows that "the main reason why domestic violence victims (41.6%) do not report to law-enforcement agencies is to spare a relative (even a violent one) from a risk of facing a criminal liability" (p. 9).

Findings

The Armenian criminal law has the effect of referring most cases of domestic violence to private prosecution. This approach clearly infringes the Convention No. 210 and prevents victims from seeking justice. Expecting victims to bring private prosecution proceedings against perpetrators ignores the distinctive nature and dynamic of domestic violence and increases the risk of secondary victimisation or further violence. Accordingly, Armenia needs to undertake legislative amendments to ensure the possibility to prosecute or investigate *ex officio* cases of physical violence, forced marriage, FGM, forced abortion and forced sterilisation.

The introduction of a dedicated criminal offence on domestic violence and of the possibility of *ex officio* prosecution for such an offence would clearly be of assistance. As indicated earlier, given the background in the country, recognising domestic violence as a stand-alone offence would also serve to reinforce the message that domestic violence is not a private issue and that the justice system bears the responsibility for its prosecution.

Key findings

- Armenia should ensure the possibility to prosecute or investigate *ex officio* cases of physical violence, forced marriage, FGM, forced abortion and forced sterilisation.

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This report reviews the Armenian criminal law on the basis of the standards laid out in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. It serves the purpose of supporting the Armenian authorities in effectively addressing violence against women and in creating a robust legislative framework to protect women from violence and to prosecute this type of violence. The report has been drafted as part of the Council of Europe's Violence against Women Project and in partnership with the Human Rights Defender of Armenia.

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