PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE IN UKRAINE

- Project funded by SIDA
and implemented by the Council of Europe -

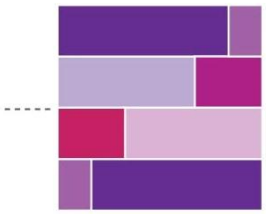
GOOD INTERNATIONAL PRACTICES AND STANDARDS ON VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

Report prepared and edited by

Javier Truchero Cuevas and Ganna Khrystova

for the Council of Europe

May 2015



ВІЛЬНІ ВІД СТРАХУ
ВІЛЬНІ ВІД НАСИЛЛЯ

http://www.coe.int/web/stop-violence-against-women-ukraine

SAFE FROM FEAR
SAFE FROM VIOLENCE

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

CONTENTS

I. INTRODUCTION

Over the last three decades, violence against women, including domestic violence, has received increasing attention by the International Community and subsequently in international law. During this period, several crucial steps have been taken: the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW hereinafter) in 1979, and the resolutions and recommendations adopted by its Committee[1]; the UN Declaration on the Elimination of Violence Against Women, 1993; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 1994; the Beijing Declaration, 1995; or the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003; to name only a few. Hence there is a solid international legal *acquis* in the area of violence against women.

The Council of Europe has also adopted several resolutions and actions on violence against women, most notably the 1995 Action Plan, the Recommendation (2002)5 of the Committee of Ministers to member States on the protection of women against violence and finally the Council of Europe Convention on Preventing and Combating Violence Against Women and Violence, also known as the Istanbul Convention. In fact, the Istanbul Convention is the most comprehensive and far-reaching treaty in the field, as it has benefited from previous standards and good practices. It also epitomizes modern human rights thinking, which has expanded to recognise that addressing violence against women is a state responsibility. The Istanbul Convention entered into force on August 1st 2014 following 10 ratifications.

THE VIOLENCE AGAINST WOMEN IN UKRAINE PROJECT

This report is part of the Preventing and Combating Violence against Women and Domestic Violence in Ukraine Project ("the Project" hereinafter). The Project, through legislative review, seeks to assist the Ukrainian authorities in improving the legal framework on violence against women and to bring it into compliance with the obligations of the Istanbul Convention.

In order to fulfil their commitment, States Parties have the primary duty to enact and implement legislation to prohibit all forms of violence against women as well as providing justice, support, protection and remedies to victims. Without a solid legal foundation, no rights or policies will prosper. Accordingly, a significant part of the Council of Europe Project has been devoted to legislative analysis.

[1] The most important opinion of the CEDAW Committee with regard to violence against women is *General Recommendation nº 19*, 1992.

However, as stated in the report itself, international obligations and recommendations in the area of violence against women go well beyond the Istanbul Convention. Thus legal measures adopted to prevent and combat this form of violence need to take into account the international legal system already in place. From this perspective, this report provides insight into the international legal context for some of the most important measures embodied in the Istanbul Convention. It is not intended to provide a detailed historical or analytical account of international law in the area but to offer useful complementary information, resources and comparative law examples in order to better understand the requirements of the Istanbul Convention and to improve the Ukrainian legislation in the field.

It is important to note that the opinions expressed in this report are the responsibility of the authors 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 Istanbul Convention.

II. GENERAL PRINCIPLES

A. Human rights

Over the past two decades, violence against women, including domestic violence, has come to be understood as a form of discrimination and a violation of women's human rights. This is clearly expressed in international legal and policy instruments related to the prevention and combating of domestic violence and violence against women as well as in the case law of the European Court of Human Rights and the opinions adopted by the CEDAW Committee under the Optional Protocol to the CEDAW Convention.

This idea was first stated in the UN human rights protection framework. Thus, the CEDAW Committee, in its General Recommendation on violence against women No. 19 (1992), helped to ensure the recognition of gender-based violence against women as a form of discrimination against women. The United Nations General Assembly, in 1993, adopted a Declaration on the Elimination of Violence against Women that laid the foundation for international action on violence against women. In 1995, the Beijing Declaration and Platform for Action identified the eradication of violence against women as a strategic objective among other gender equality requirements. In 2006, the UN Secretary-General published his in-depth study on all forms of violence against women, which summarises the UN legal and policy instruments declaring and proving that *violence against women is a form of discrimination and human rights violation*.[2] These

[2] Secretary-General's in-depth study on all forms of violence against women, para.30-37 http://www.un.org/womenwatch/daw/vaw/v-sg-study.htm

instruments, which encompass the legally-biding human rights treaties and the so-called "soft-law" are deeply and exhaustively analyzed in the numerous and comprehensive pieces of research provided by the leading international human rights organizations, experts and Ukrainian NGOs and experts as well.

The Council of Europe also considers violence against women, including domestic violence, as one of the most serious forms of gender-based violations of human rights in Europe in a number of its documents. Since the 1990ies, the Council of Europe, in particular its Steering Committee for Equality between Women and Men (CDEG), has undertaken a series of initiatives to promote the protection of women against violence. In 2002, the Council of Europe Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence was adopted. This recommendation represents a milestone in that it proposes, for the first time in Europe, a comprehensive strategy for the prevention of violence against women and the protection of victims in all Council of Europe member States.

At the same time, the Parliamentary Assembly has also adopted a number of resolutions and recommendations on the various forms of violence against women; in particular Resolution 1247 (2001) on female genital mutilation, Resolution 1582 (2002) on Domestic violence against women, Resolution 1327 (2003) on so-called "honour crimes", Recommendation 1723 (2005) on forced marriages and child marriages, Recommendation 1777 (2007) on sexual assaults linked to "date-rape drugs", Resolution 1654 (2009) on Feminicides and Resolution 1691 (2009) on rape of women, including marital rape[3].

It has also repeatedly called for legally-binding standards on preventing, protecting against and prosecuting the most severe and widespread forms of gender-based violence and has expressed its support to the drafting of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) that came into force on 1 August 2014.

The Preamble of the Istanbul Convention clearly states that the member States of the Council of Europe recognise:

- that the realization of de jure and de facto equality between women and men is a key element in the prevention of violence against women;
- that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women;
- the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men;

[3] See Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Para. 7-21.

- that women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called "honor" and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men;
- that women and girls are exposed to a higher risk of gender-based violence than men;
- that domestic violence affects women disproportionately, and that men may be victims of domestic violence.

According to the Explanatory Report to the Istanbul Convention, the Preamble of the Convention establishes the link between achieving gender equality and the eradication of violence against women. Based on this premise, it recognises the structural nature of violence against women and that it is a manifestation of the historically unequal power relations between women and men. *Consequently, the Preamble sets the scene for a variety of measures contained in the Convention that frame the eradication of violence against women within the wider context of combating discrimination against women and achieving gender equality in law and in fact.*

The Istanbul Convention stresses that *violence against women seriously violates and impairs or nullifies the enjoyment by women of their human rights*, in particular their fundamental rights to life, security, freedom, dignity and physical and emotional integrity, and that it therefore cannot be ignored by governments. Moreover, some groups of women, *such as women and girls with disabilities,* are often at greater risk of experiencing violence, injury, abuse, neglect or negligent treatment, maltreatment or exploitation, both within and outside the home. In addition to affirming that violence against women, including domestic violence against women, is a distinctly gendered phenomenon, the Istanbul Convention clearly *recognises that men and boys may also be victims of domestic violence and that this violence should also be addressed* [4].

B. Integrated approach

In recent times, governments around the world have adopted various approaches to tackling domestic violence, as a result of the recognition that domestic violence is a problem requiring urgent intervention. One of the most common approaches has been internal reform of different agencies and institutions, including law enforcement, judiciary, health care, shelter agencies and others with the objective of creating a systemic response. However, because these reforms are often initiated within each individual implementing agency, in reality the cohesion between agencies is not optimal. This does not solve the problem for survivors of domestic violence who still have to approach multiple forums to get support and justice. Therefore, victims who face domestic violence often continue to face extreme difficulties when seeking redress and support.

Hence, the need for one "official response" grounded on strong State-community partnership has been reiterated time and again. Under this approach, while each agency provides a different service to a survivor of domestic violence, a system of communication and coordination established between the agencies will ensure that each is aware of what kind of service the other is providing. This coordinated, but not necessarily uniform, approach to dealing with domestic

[4] Id. Para. 25-27.

violence by the State is referred to as the **"Domestic Violence Response System" (or "multi-agency coordination" and "inter-agency response system").**

A brief examination of the history of the reform process that led to the evolution of Domestic Violence Response Systems in many countries tells us that this initiative was the contribution of the women's movement to the campaign against domestic violence. In its earliest stages, community-based shelters and counselling centres run by women's organizations and survivors of domestic violence were linked and streamlined. The success of these initiatives gradually led governments and state institutions to recognize the need for broader coordination between various agencies, both state and community-based, involved in implementation and law enforcement. As part of this larger strategy of intervention, the first sector to be targeted was the justice system. The mode of intervention focused on developing protocols and guidelines for each component of the justice system, and providing trainings and sensitization on dealing with cases of domestic violence. Gradually, however, other agencies and sectors, the health sector in particular, were linked to this response system (e. g. reforms to the Swedish Penal Code regarding violence against women, introduced by the "Kvinnofrid" package in 1998, emphasize the importance of collaboration between the police, social services and health-care providers[5]).

Coordinating bodies were formed to ensure proper communication between the justice system and other essential service providers.

The more recent trends of "multi-agency co-ordination" ("inter-agency response system") are:

- close cooperation of actors, not limited to government or public agencies but also those at private and community levels.

- shifting from "coordination" between the agencies as the chief characteristic of the system to the quality of "response" that this coordinated system provides to a survivor of domestic violence. **Therefore, the survivor of domestic violence becomes the centre of this coordinated system.**

- these responses must be tailored not only to provide preventive, but also protective and restorative measures. In the majority of instances, laws, and criminal laws in particular, are designed to prevent further crimes from taking place. However, a truly coordinated response system must not only prevent further acts of domestic violence but ensure that protection as well as restoration to a situation of stability is provided to the victim[6].

[5] See UN Handbook on Violence Against Women, p. 24.

[6] See different approaches and good practices in Domestic Violence Legislation and its Implementation An analysis for ASEAN countries based on international standards and good practices. Revised 2nd edition 2011 by UN Women. – P.35-55.

C. *Victim's rights orientated approach*

Current international standards place the survivor of domestic violence at the centre of the domestic violence response system. They require:

- the prioritisation of the survivor of domestic violence. Hence there is a need to understand her particular circumstances and needs in this context,
- attention be paid to all women irrespective of race or caste, class and ethnicity,
- recognition of her rights and entitlements. Her self-worth and dignity must be respected,
- recognition of the fact that survivors of domestic violence can overcome their problems with some support even though they may seem overwhelmed and confused when approaching the actor,
- a non-judgmental attitude towards her behaviour and the choices made by her,
- confidentiality and shared confidentiality,
- that the woman facing domestic violence determines the time, space and pace of how she can be assisted and how she wants to proceed. Immediate crisis intervention is essential. There is need to create documentation by all stake holders and agencies[7].

UN model legislation on domestic violence (1996) provides the most concrete statement of the victim's rights among all other international standards in the field of domestic violence prevention and response. It affirms that the purpose of the statement of the victim's rights is to acquaint the victim with the legal remedies available to her during the initial stage when she complains of an infringement of her legal rights. It also outlines the duties of the police and the judiciary in relation to the victim.

A good example of acknowledgment of the broad scope of the rights of victims of violence is *the Spanish Organic Act on Integrated Protection Measures against Gender Violence (2004).* Title II of the Act includes a list of rights, recognising that the situation of violence they are experiencing affects diverse aspects of their lives which means victims are in need of a range of support, irrespective of the social status of the victim (employee or self-employed women, civil servants, unemployed women or women, that due to their social, personal or economic circumstances are not able to participate in employment integration programmes):

a) Labour rights: to adapt the situation of the working women to the circumstances they are living in, with measures such as justification of absenteeism or unpunctuality, reduction or rearrangement of working hours, possibility of geographic mobility or change of work place, as well as indefinite leave/suspension with the right to return or without termination of the employment contract. In the legal framework these regulations have resulted in changes to the Worker's Statute, the Social Offences and Sanctions Act and some collective bargaining agreements which include provisions of the Integral Act.

b) Social Security rights: associated to the previous measures, the Act includes Social

[7] Excerpted from Lawyers Collective Women's Rights Initiative; Ending Domestic Violence Through Non-Violence: Manual for Protection Officers (2008)

Security rights, such as unemployment benefits, the consideration of the suspension period as an effective contribution, the suspension of the contribution obligation for self-employed female workers or an employment and professional training policy (to promote self-employment, employment trainings and support for employment). These are complemented by the necessary amendments to the General Social Security Act and by additional provisions of the National Budget Act.

c) Economic support measures: for those women who cannot participate in labour integration programmes and do not receive an income, there are economic support schemes equivalent to six months of unemployment benefits paid for a maximum of 24 months. These programs are developed by the autonomous communities, which are responsible for the provision of social services and the budget forecasts s. This kind of aid is compatible with any other received as a result of the Act 35/95 on Aid and Assistance to Victims of Violence and Offences against Sexual Freedom. Once a protection order is issued, or a report by the Public Prosecutor's Office, or a sentence handed down for acts of gender based violence, victims are officially recognised and may benefit from assistance. Women victims of violence are eligible for additional economic support schemes, such as grants, economic support and loans to promoting persons with dependant family members and victims of gender violence. Likewise, the National Housing Plan includes provisions to promote the priority access to housing for women with dependant family members.

d) Civil rights, which have resulted in the amendment of the Civil Code, facilitating the separation and divorce procedure, and introducing "the obligation of each spouse to share domestic responsibilities and the care of children and grandparents as well as other persons included under their care. Likewise, another amendment was to include a prohibition of granting to the violent parent the shared custody in cases of gender violence.

e) Right to full social assistance: Every woman victim of gender violence requires multiple forms of social assistance, irrespective of the stage of the victimisation process. The social assistance currently granted in Spain include the following: emergency resources for victims of abuse (legal support, healthcare and psychological support, economic support, emergency accommodation, support for dependent sons and daughters), accommodation in specialist shelters that offer multi-disciplinary assistance, assistance for victim during criminal and civil proceedings (legal aid, specialised forensic-medical services, psychological assistance). Likewise, every autonomous community has developed its own assistance system through public or private resources, such as: advice and information centres, emergency centres, shelters, protected flats and mobile tele-assistance services. In practice, it is important to consider the degree to which the professionals are really prepared to attend to the particular needs of women in acute situations of vulnerability and dependence, including the needs of women belonging to vulnerable such as migrant women (especially those that are undocumented), disabled women, women from ethnic minorities etc.

f) Specialised legal aid to victims. The Integral Act recognises the right of all victims to receive specialised and immediate legal assistance, including free legal aid to litigate in all administrative and judicial processes and procedures directly and indirectly associated with the violence suffered[8]. However, difficulties in implementing this legal provision have been reported.

[8] See *Spanish Legislation on Violence against Women: Challenges and Facts* Expert Paper prepared by: Carmen de la Fuente Méndez, Pueblos Unidos Madrid, Spain – P. 5-7

D. Comprehensiveness

In last decades all over the world many laws on violence against women and domestic violence have focused primarily on criminalization. It is, however, important that legal frameworks move beyond this limited approach to make effective use of a range of areas of the law, including civil, criminal, administrative and constitutional law, and address prevention of violence, and protection and support of survivors.

This international standard in the field of violence against women and domestic violence demands that *legislation must be comprehensive and multidisciplinary, criminalizing all forms of violence against women, and encompassing issues of prevention, protection, survivor empowerment and support (health, economic, social, psychological), as well as adequate punishment of perpetrators and availability of remedies for survivors.*

For example, the Spanish Organic Act on Integrated Protection Measures against Gender Violence (2004) incorporates provisions on sensitization, prevention and detection and the rights of survivors of violence; creates specific institutional mechanisms to address violence against women; introduces regulations under criminal law; and establishes judicial protection for survivors. It is also important that legislation incorporate a multidisciplinary approach to addressing violence against women[9].

The Istanbul Convention explicitly requires the adoption and implementation of comprehensive and coordinated policies that offer a *holistic response to violence against women, including domestic violence* (Article 7) through: prevention, protection and support, prosecution and integrated policies and data collection.

One of the general law principles that aims to ensure such a comprehensive legislative approach is the "due diligence principle".

In the broadest sense, due diligence refers to the level of care or activity that a duty-bearer is expected to exercise in the fulfilment of their duties. For various areas of law, standards of due diligence have been developed in order to provide a sort of "measuring stick" with which to assess if a State or other actor is meeting the obligations that they have assumed. Using the language of a rights-based approach, a due diligence standard serves as a tool for rights-holders to hold duty-bearers accountable by providing an assessment framework for ascertaining what constitutes effective fulfilment of the obligation, and for analyzing the actions or omissions of the duty-bearer. This is especially important where the potential infringement comes through a duty-bearer's failure to act, as it can be difficult for rights-bearers to assess if an omission constituted a violation of their right without some normative basis for the appraisal[10].

The due diligence standard for violence against women, including domestic violence, was for the first time laid out in the Declaration on the Elimination of Violence against Women (1993) in Article 4(c), where States Parties are urged to "*exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."* The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) noted in its General Comment No. 19 that "States may

[9] See UN Handbook on Violence Against Women, p. 14.

[10] The Due Diligence Standard for Violence against Women. Summary paper. – http://www2.ohchr.org/english/issues/women/rapporteur/docs/SummaryPaperDueDiligence.doc

also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence"[11].

Historically, the violence against Women due diligence analysis has tended to focus on the State's response to acts of violence that have already occurred, using tools such as legislation reform, access to justice, and the provision of care services. In 2006, however, the previous Special Rapporteur on Violence against Women (Yakin Ertürk) published a report on using the due diligence standard as a tool for the elimination of violence against women.[12] It sets up a framework of analysis under the principles of **(1) prevention, (2) protection, (3) punishment and (4) reparations,** and details ways the due diligence standard could be expanded to solidify obligations to prevent and compensate victims of violence against women, and include non-State actors as duty-bearers in the due diligence framework.

The Istanbul Convention builds on these developments and frames the due diligence principle as a legal obligation - state responsibility for violence against women perpetrated by public authorities but also by private actors. Article 5 requires Parties to: "exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that is perpetrated by non-State actors" (paragraph 2).

It is important to note that this is not *an obligation of result, but an obligation of means*. Parties are required to organise their response to all forms of violence covered by the scope of this Convention in a way that allows relevant authorities to diligently prevent, investigate, punish and provide reparation for such acts of violence. Failure to do so incurs state responsibility for an act otherwise solely attributed to a non-state actor. In this sense, Article 5 reflects the case-law of the European Court of Human Rights as well. In its judgment *Opuz v. Turkey*, the Court has adopted the obligation of due diligence. It has established that the positive obligation to protect the right to life (Article 2 European Court of Human Rights) requires state authorities to display due diligence, for example by taking preventive operational measures, in protecting an individual whose life is at risk[13].

III. PREVENTION

A. Focus on prevention

At first, legislative responses to violence against women tended to focus solely on criminalization and thus did not attempt to address the root causes of violence against women. Over time, however, the importance of including preventive measures in legislation has been increasingly emphasized.

According to the report of the Special Rapporteur on Violence Against Women on The Due Diligence Standard as a Tool for the Elimination of Violence Against Women (see footnote 12),

[11] CEDAW General Recommendation 19, Para. 19, U.N. Doc. A/47/38 (1992).

[12] Special Rapporteur on Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, Para. 35, U.N. Doc. E/CN.4/2006/61 (2006)

[13] See para. 58, 59 of the Explanatory Report to the Istanbul Convention.

the general methods of seeking to fulfil prevention obligations as the first pillar of the due diligence principle are:

- Development of awareness-raising campaigns, including large-scale media campaigns
- National days of action on gender violence
- "Zero tolerance" campaigns
- Efforts to involve men and boys in prevention activities
- Provision of training for specified professional groups including police, prosecutors, and members of judiciary
- Development of national action plans to coordinate Violence Against Women activities[14].

In a similar vein, the *UN Handbook on Violence Against Women* recommends that legislation should *prioritize the prevention of violence against women* and should include provisions on the following measures to prevent violence against women:

• Awareness-raising activities regarding women's human rights, gender equality and the right of women to be free from violence;

• Use of educational curricula to modify discriminatory social and cultural patterns of behaviour, as well as derogatory gender stereotypes; and

• Sensitization of the media regarding violence against women.

Regarding *the awareness-raising,* legislation should mandate government support and funding for public awareness-raising campaigns on violence against women, including general campaigns sensitizing the population about violence against women as a manifestation of inequality and a violation of women's human rights; and specific awareness-raising campaigns designed to heighten knowledge of laws enacted to address violence against women and the remedies they contain.

As to the *educational curricula,* legislation should provide for compulsory education at all levels of schooling, from kindergarten to the tertiary level, on the human rights of women and girls, the promotion of gender equality and, in particular, the right of women and girls to be free from violence; that such education be gender-sensitive and include appropriate information regarding existing laws that promote women's human rights and address violence against women; and that relevant curricula be developed in consultation with civil society.

Regarding *sensitization of the media* it is recommended that legislation should encourage the sensitization of journalists and other media personnel regarding violence against women[15].

This area of intervention is essential to any long-term policy on violence against women.

B. Overview of good practices

Notwithstanding the aforementioned comments, it is useful to provide a general overview of different approaches from around the world to the prevention of violence against women.

[14] See Special Rapporteur on Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, Para. 35, U.N. Doc. E/CN.4/2006/61 (2006), para. 38-46.

[15] UN Handbook on Violence Against Women p. 28-30.

The *Law against Femicide and other Forms of Violence against Women* (2008) adopted in Guatemala states that the government is responsible for interagency coordination, the promotion and the monitoring of awareness-raising campaigns, generating dialogue and promoting public policies to prevent violence against women.

Article 8 of the *Brazilian Maria da Penha Law* (2006) provides for integrated prevention measures, including measures to encourage the communications media to avoid stereotyped roles that legitimize or encourage domestic and family violence, to conduct public educational campaigns, and to place an emphasis on human rights and the problem of domestic and family violence against women in educational curricula at all levels.

The *Mexican Law on Access of Women to a Life Free of Violence* (2007) requires the development of educational programmes at all levels of schooling that promote gender equality and a life free of violence for women.

Chapter I of the *Spanish Organic Act on Integrated Protection Measures against Gender Violence* (2004) focuses on the promotion of gender equality and peaceful conflict resolution at different levels of education, including through the training of educational professionals. Article 6 of the Act requires that education authorities ensure that sexist and discriminatory stereotypes are removed from all educational materials. As a result of this provision, many books included in educational curricula have been revised. Article 3 of this Spanish Organic Act provides for the launch of a National Sensitization and Prevention Plan regarding Violence against Women targeting both men and women in order to raise awareness of values based on respect for human rights and the equality of men and women. It provides in article 14 that "[t]he communications media shall work for the protection and safeguarding of sexual equality, avoiding any discrimination between men and women" and that "reports concerning violence against women, within the requirements of journalistic objectivity, shall do the utmost to defend human rights and the freedom and dignity of the female victims of gender violence and their children"[16].

IV. DOMESTIC VIOLENCE

One of the most common forms of violence against women is that performed by a husband or an intimate male partner. Both prevalence data and the distinct elements of domestic violence have resulted in dedicated laws, policies and measures. For instance, most European countries have now enacted framework legislation on domestic violence, although with different scopes and approaches. The "domestic" factor calls for a discussion on the issue also in the context of the Council of Europe Violence against Women in Ukraine Project.

[16] See also UN Handbook on Violence Against Women, p. 28-30.

A. Definition

The Istanbul Convention provides the first legally binding international definition of domestic violence (Art 3.b) which it sets out to cover: *"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 concept of domestic violence covers two main points of discussion: **the types of domestic violence and the types of relations protected by law which are closely interrelated.**

For a long time legislation regarding domestic violence has tended to address physical violence only. However, as a more nuanced understanding of the nature of domestic violence has emerged, a number of countries have enacted and/or amended legislation to adopt definitions which include some or all of the following types of violence: physical, sexual, emotional and/or psychological, and patrimonial, property, and/or economic violence[17].

According to the section II "Definitions" of the *UN model legislation on domestic violence*, it is urged that States adopt the broadest possible definitions of acts of domestic violence and relationships within which domestic violence occurs, bearing in mind that such violations are not as culture-specific as initially observed, since increasing migration flows are blurring distinctive cultural practices, formally or informally. Furthermore, the broadest definitions should be adopted with a view to compatibility with international standards.

The UN Secretary-General's "In-depth study on all forms of violence against women" (2006) shows that the **range of forms of violence a woman** may experience within the family across her life cycle may extend from violence before birth to violence against older women. Commonly identified forms of violence against women in the family include: battering and other forms of intimate partner violence including marital rape; sexual violence; dowry-related violence; female infanticide; sexual abuse of female children in the household; female genital mutilation/cutting and other traditional practices harmful to women; early marriage; forced marriage; non-spousal violence; violence perpetrated against domestic workers; and other forms of exploitation. There is more research and data available on intimate partner violence and on some forms of harmful practices than on many other forms and manifestations of violence against women[18].

Regarding the relationships to be regulated by the Law on Domestic Violence, the *UN model legislation on domestic violence states that "the relationships which come within the purview of legislation on domestic violence must include: wives, live-in partners, former wives or partners, girl-friends (including girl-friends not living in the same house), female relatives (including but not restricted to sisters, daughters, mothers) and female household workers".* States should offer this protection to non-national women and hold non-national men accountable to the same standards as men of their nationality. There shall be no restrictions on women bringing law suits against spouses or live-in partners. Evidence laws and criminal and civil procedure codes shall be amended to provide for such contingencies.

[17] *UN Handbook on Violence Against Women* p. 24.

[18] Report of the United Nations Secretary-General "In-depth study on all forms of violence against women", para. 111. - http://www.un.org/womenwatch/daw/vaw/v-sg-study.htm

In order to be in compliance with UN and European standards, national legislation shall include a comprehensive definition of domestic violence, including physical, sexual, psychological (emotional) and economic violence, and an extensive scope of persons to be covered by the definition.

Legislation shall apply at a minimum to individuals who are or have been in an intimate relationship, including marital, non-marital, same sex and non-cohabiting relationships; individuals with family relationships to one another; and members of the same household[19].

B. Good practices defining domestic violence

The definitions of domestic violence contained in the laws include a range of acts that result in physical, mental or sexual injury. Some laws have adopted broad definitions that can be interpreted to take into account any illegal act that results in harm or injury. For example, the Malaysian law includes in its definition of domestic violence threats of physical injury, intentional causing of injuries, coercion to engage in any conduct or act that is sexual or otherwise, confining and detaining the survivor against his/her will, and causing destruction or damage to property. Article 5 of the Brazilian Maria da Penha Law (2006) states that *"domestic and family violence against women is defined as any action or omission based on gender that causes the woman's death, injury, physical, sexual or psychological suffering and moral or patrimonial damage".* Others provide specific examples of acts that constitute domestic violence. In this regard, the most comprehensive definition of domestic violence is contained in the Philippine law that separately defines acts that result in physical, sexual, and psychological harm, battery, assault, coercion, harassment or arbitrary deprivation of liberty, stalking, etc.

In practice, however, definitions of domestic violence that include *psychological and economic violence may be problematic.* 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.* The expertise of relevant professionals, including psychologists and counsellors, advocates and service providers for complainants/survivors of violence, and academics should be utilized to determine whether behaviour constitutes violence.

UN Women in their publications also agrees that this consequence may be avoided if the law is gender specific. They illustrate it by the Lao law that is a good example in this regard as it has a provision on **"impact on assets"** caused by domestic violence, which includes aspects such as the non-performance of alimony obligations, causing women to lose inheritance rights and the destruction of house and property.

Another significance of gender-neutral legislation is also evident in **"self-defence"** exemptions contained in domestic violence legislation. Only some countries exempt violence committed in self-defence from other acts of violence (e. g. Singapore). While the inclusion of this clause may protect women who perpetrate acts of violence in self-defence, it may provide a justification to men committing domestic violence. Instead, the Philippine law provides a definition of "battered

[19] See also UN Handbook on Violence Against Women, p. 23-25.

women's syndrome" that can be used by women perpetrating acts of violence in self-defence.

As to the scope of person, protected by law, national legislation on domestic violence has often applied only to persons in intimate relationships and, in particular, to married couples. Over time, there has been an expansion of legislation to include other complainants/survivors of domestic violence, such as intimate partners who are not married or in a cohabiting relationship, persons in family relationships and members of the same household, including domestic workers.

The Spanish Organic Act on Integrated Protection Measures against Gender Violence (2004) defines domestic relationships broadly to include relationships with a spouse or former spouse, non-marital relationships, non-cohabiting relation-ships, romantic and sexual relationships, as well as relationships between family or household members, such as ascendants, descendents, persons related by blood, persons residing together and minors or disabled individuals under guardianship or custody.

In Austria, the requirement that complainants/survivors prove their relationship with the perpetrator in order to be protected under the law has sometimes resulted in the secondary victimization of the complainant/survivor. Perpetrators have denied the existence of a relationship in order to avoid being the subject of a protection order. In response, complainants/ survivors have been requested to prove that a relationship existed, which has led to questions regarding what constitutes a "relationship", including whether the complainant/survivor must prove she had sex with the perpetrator in order to qualify for protection[20].

C. Protection and support for the victims of domestic violence

The comprehensive legislative approach requires that victims of domestic violence receive adequate protection from further violence, support and assistance to overcome the multiple consequences of such violence and to rebuild their lives.

According to the report of the Special Rapporteur on Violence Against Women on The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, *the general methods of seeking to fulfil protection obligations* as the second pillar of due diligence principle are[21]the provision of services[22], including:

- Telephone hotlines
- Health care
- Counselling centres
- Legal assistance
- Shelters
- Restraining/Protection orders
- Financial aid to victims.

[20] See *UN Handbook on Violence Against Women* p. 24, 25. See also Domestic Violence Legislation and its Implementation. An analysis for ASEAN countries based on international standards and good practices, UN Women p. 17-18.

[21] Id. See Special Rapporteur on Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, Para. 35, U.N. Doc. E/CN.4/2006/61 (2006), para. 46-49.

[22] These services are often provided in conjunction with NGOs, and may be funded by the State or external donors. Id. Para.47.

According to UN standards, legislation should include measures for the **protection, assistance and support of complainants/survivors**, including **comprehensive and integrated** support services, and rights to support in her **employment** and **housing** and **financial** assistance. These elements are turned into a legal obligation in the Istanbul Convention.

To ensure *comprehensive and integrated support services* legislation should:

• oblige the State to provide funding for, and/or contribute to establishing, comprehensive and integrated support services to assist survivors of violence;

• state that all services for women survivors of violence should also provide adequate support to the women's children;

• state that the location of such services should allow equitable access to the services, in particular by urban and rural populations; and

• where possible, establish at least the following minimum standards of availability of support services for complainants/survivors:

- one national women's phone hotline where all complainants/survivors of violence may get assistance by phone around the clock and free of cost and from where they may be referred to other service providers;

- one shelter/refuge place for every 10, 000 inhabitants, providing safe emergency accommodation, qualified counselling and assistance in finding long-term accommodation;

- one women's advocacy and counselling centre for every 50, 000 women, which provides proactive support and crisis intervention for complainants/survivors, including legal advice and support, as well as long-term support for complainants/survivors, and specialized services for particular groups of women (such as specialized services for immigrant survivors of violence, for survivors of trafficking in women or for women who have suffered sexual harassment at the workplace), where appropriate;

- one rape crisis centre for every 200,000 women (that provides for immediate access to comprehensive and integrated services, including pregnancy testing, emergency contraception, abortion services, treatment for sexually transmitted diseases, treatment for injuries, post-exposure prophylaxis and psychosocial counselling, for complainants/survivors of sexual violence at the expense of the State. Access to such services should not be conditional upon the complainant/survivor reporting the violation to the police.)

- access to health care, including reproductive health care and HIV prophylaxis[23].

D. Prosecution of domestic violence

Domestic violence poses a challenge for criminal law. There is a long-standing debate as to the best way to tackle this form of violence, which involves discussions on the threshold for a criminal response and the characteristics of such response. International comparative law and practice show that the treatment of domestic violence as a serious crime ought to reach a satisfactory level of legal alignment. In most criminal statutes around the world there is no dedicated offence, thus generic criminal provisions apply. Domestic violence encompasses a very wide range of

[23] UN Handbook on Violence Against Women, p. 31, 32.

possible unlawful acts and most of them may be captured under offences such as murder, assault, bodily injury, rape and others. However, this approach usually fails to provide a comprehensive response and allows for important lacunae. Being acts of violence excluded from its purview, this at the very least condones and certainly does not prevent perpetration.

The World Health Organization (WHO) pins down the aforementioned "domestic" factor as follows: "*The fact that women are often emotionally involved with and economically dependent on those who victimize them has major implications for both the dynamics of abuse and the approaches to dealing with it.*"[24] The analysis of the elements and dynamics of domestic violence falls outside the scope of our work. Yet, to the purpose of framing and devising legal measures, we can summarise some of such implications:

- Domestic violence often involves repetition of aggressions or patterns of abusive behaviour. Violence turns a commonplace.
- Acts of aggression or abuse, if taken isolated, are often minor or do not cause physical injuries, thus they may not meet the criminal law yardstick.
- Social tolerance of domestic violence and stigmatization of victims act as barriers to seek help and escape from violence.
- In many cases, violence escalates over time and so does the risk for the victim.

An appropriate response to domestic violence in realm of criminal law should take into account these elements, yet there are different ways to go about them in each particular context. Comparative experiences show that there are different routes to penalisation, including integrated framework laws, definition of specific offences and specification of aggravating circumstances. The variety of approaches brings about many questions related to effectiveness and selection of good practices. Answers largely depend on local institutional and legal culture as well as on professional attitudes of officials enforcing the law. Nevertheless, the international minimum standard underpins the need for specific legal measures, which should be able to target the particularities of domestic violence. According to UN Women, States must put in place legal measures "*which take into account the dynamics of domestic violence, including repeat, low level injuries, and the need for urgent protective remedies.*"[25] There are two basic approaches to introducing domestic violence in criminal law:

1) Dedicated 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

[24] Krug, E. G.; Dahlberg, L. L.; Mercy, J, A.; Zwi A. B.; and Lozano, R. (Eds). *World Report on Violence and Health*, WHO, Geneva, 2002, p. 89 (hereinafter *WHO World Report On Violence).*

[25] UN Women, Virtual Knowledge Centre to End Violence Against Women and Girls, (web site) http://www.endvawnow.org/en/articles/395-specific-legislation-on-domestic-violence.html (hereinafter *UN Women Virtual Knowledge Centre website*)

abusive patterns of behaviour and isolated acts of violence do not reach the criminal threshold. In such cases, specific criminal offences might be the only way to comply with the goals of the Istanbul Convention.

2) **Aggravating circumstance.** This is another option for criminal statutes to get a grip of the complex dynamic of domestic violence. States may define some relevant offences as aggravated if they are committed within the household or against a close person, current or ex-partner. This approach allows for the use of all provisions of criminal law while imposing a higher sentence in cases of domestic violence. Interestingly enough, the last Analytical Study on Rec(2002)5 of the Council of Europe[26] shows that two thirds of the member States of the Council of Europe have a legal provision allowing a higher sentence when the acts are committed against a former or current spouse or partners.

Both options are compatible. In fact, many international organizations encourage national authorities to adopt specific criminal offences on domestic violence as aggravating circumstances and as a distinct element of the crime. For instance, the appendix to Recommendation (2002)5 of the Council of Europe calls on member States to *"revise and/or increase the penalties, where necessary, for deliberate assault and battery committed within the family, whichever member of the family is concerned" (*Paragraph 56).

While the Istanbul Convention leaves it to the States Parties to decide whether adopting specific or general offence, it calls for aggravating circumstance (art. 46).

Institutions within the UN framework have been even more precise. The *UN Women Virtual Knowledge Centre* website urges, *"to specify that penalties for crimes involving domestic violence should be more severe than similar non-domestic violence-related crimes. This sends the important message that the state will treat a domestic violence crime as seriously, if not more seriously, than a crime against a stranger*."

The European Court of Human Rights has a well-established jurisprudence on domestic violence, although most of it focuses on due diligence as we will spell out in following chapters. However, the Court does take into consideration the existence of dedicated provisions in ascertaining States responsibility. In the recent case of *Eremia v. The Republic of Moldova*, the Court noted, *"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."*[27]

[26] Hagemann-White, C., Analytical study of the results of the fourth round of monitoring the implementation of Recommendation Rec(2002)5 on the protection of women against violence in Council of Europe member States, CoE, 2014, p. 14 (hereinafter Analytical study of Rec(2002)5).

[27] European Court of Human Rights, Eremia v. The Republic of Moldova , App. Nº 3564/11, judgement 28/05/2013, Para. 57.

In relation to the content of the suggested dedicated offence on domestic violence, drafters of the law should bear in mind that the *UN Handbook for Legislation on Violence Against Women* recommends the following scope: "*individuals who are or have been in an intimate relationship, including marital, non-marital, same sex and non-cohabiting relationships; individuals with family relationships to one another; and members of the same household" (Id.* Paragraph 3.4.2.2) According to a EU study,[28] ten EU member States have defined domestic violence as a specific criminal offence. Four out of those defined the offence with reference to an intimate partner relationship, while the others referred to any person with whom there was a family or household relationship.

We can bestow yet another argument to uphold the adoption of specific offences. Despite the risk of overlapping and struggle with the principle of *ultima ratio*, 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.

From a different perspective, domestic violence victims often require distinctive measures that should be available within the criminal procedure in order to avoid re-victimization.

1) Alternative remedies. Parental rights are a very sensitive issue. The Istanbul Convention does not seek to impose strict obligations in this area. However, it does set two main principles to guide judicial decisions on contact orders and other measures concerning the parental rights of the perpetrator: 1) Incidents of violence should be taken into account and; 2) The rights and safety of the victims of violence against women, including domestic violence, and their children should not be endangered. The Explanatory Report to the Istanbul Convention deepens the content of this obligation: "*For many victims and their children, complying with contact orders can present a serious safety risk because it often means meeting the perpetrator face-to-face. Hence, this paragraph lays out the obligation to ensure that victims and their children remain safe from any further harm*." On the other hand, Article 45.2 provides for other measures States may adopt. In particular, the second indent of the provisions refers to, "*withdrawal of parental rights, if the best interest of the child, which may include the safety of the victim, cannot be guaranteed in any other way."* Besides its implications in family/civil law this rule, construed in conjunction with the aforementioned Article 31, calls on parties to provide for the possibility of withdrawing parental rights, either as a distinct criminal law sanction or as part of a protection order.

2) Protection of victims. Victims of domestic violence have even a greater need for protection, as research shows that intimate male partners are the perpetrators of the majority of cases of violence against women. Furthermore, the fact that in many cases of domestic violence the perpetrator and the victim live together requires specific mechanisms for protection. The Istanbul Convention establishes a number of such mechanisms, the most important being the

[28] European Commission (EC), Feasibility study to assess the possibilities, opportunities and needs to standardise national legislation on gender violence and violence against children, Publication Office of the European Union, 2010 (hereinafter EU Feasibility Study).

emergency barring order and the protection order. Article 53 of the Istanbul Convention calls for, *"effective, proportionate and dissuasive criminal or other legal sanctions."* With regard to this issue, Recommendation (2002)5 of the Council of Europe states that States Parties should envisage the possibility of penalising all breaches of the measures imposed on the perpetrators by the authorities. The *UN Handbook on Violence Against Women* includes a similar recommendations and states, *"In countries where legislation does not criminalize the violation of a civil protection order, prosecutors and police have expressed frustration about their inability to arrest the perpetrator"* (Sec. 3.10.9). Finally, a well-known expert in this field affirmed the following: *"recent experience confirms that criminalization of a violation of an order for protection is a vitally important component of an effective law and one that is frequently excluded from new legislation."*[29]

E. Good practices on criminalization of domestic violence

A **dedicated criminal offence** on domestic violence will strengthen the penal response to this form of violence and convey a clear message to society that domestic violence is a serious crime. There are various forms to construct a specific crime on domestic violence and some key innovative models for criminalisation have stimulated debate. 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."* Punishment for this offence ranges from six months to six years. Interestingly enough, the statute also contains the same offence crafted as gender – neutral and with the same sanction.

Spain provides another internationally recognised good practice. Article 173.2 of the Spanish Criminal Code 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, or against descendents, ascendants or biological, adopted or fostered siblings, against that person or the spouse or cohabitating partner, or against minors or the incapacitated who live with him or who are subject to the parental rights, guardianship, care, fostership or safekeeping of the spouse or cohabitating partner, or against a person protected by any other relation by which that person is a member of the core family unit, as well as against persons who, due to their special vulnerability are subject to custody or safekeeping in public or private centres."* The punishment for this offence includes imprisonment up to three years, but also deprivation of the right to own and carry weapons and special barring from exercise of parental rights if it is in the best interest of the minor. This offence is also compatible with the other penalties imposed in other offences that may have been materialised.

[29] Cheryl A Thomas, Legal Reform on Domestic Violence in Central and Eastern Europe and the Former Soviet Union, EGM/GPLViolence Against Women/2008/EP.01, UN, 2008.

The Spanish criminal provision contains a comprehensive definition that captures both the course of conduct or repetition element and all relevant contexts of violence, including intimate relationships, family and dependence. Further, this provides an example of other measures such as the withdrawal of parental rights and/or the right to carry weapons. It is also noteworthy that Article 153 of the Criminal Code of Spain defines a very similar offence encompassing "*mental damage or an injury not defined as a felony in this Code or who hits or abuses another by action, without causing such person an injury*," yet it only applies when the victim is a women related to the perpetrator. It is one of the very few examples of gender specific criminal legal measures.

Finally, Article 184 of the Polish Criminal Code also includes an offence of violence within the family which does not tackle the element of repetition but nevertheless provides a good example: "*Anyone who inflicts physical or psychological ill treatment on a family member, a person temporarily or permanently in his or her charge, a minor or a vulnerable person shall be liable to a term of imprisonment of between six months and five years.*"

Alternatively to a dedicated provision or even along with it, the existence of an intimate or marital relationship between a perpetrator and a victim could be considered as an **aggravating circumstance.**

For instance, the Criminal Code of France establishes higher penalties for certain acts of torture and assault resulting in body injury when committed against the spouse, ascendants, direct descendants or cohabitant (Arts. 222.3.4°bis, 222.8.4° bis, 222.10.4° bis, 222.12.4°bis). Similar approach can be found in the criminal statute of Moldova, among many others.

A provision with this purview might be general or specific to some offences. For instance, the *UN Handbook on Violence Against Women* (Sec. 3.4.3.1) recommends legislators to include the following provision with regard to sexual violence: "*No marriage or other relationship shall constitute a defence to a charge of sexual assault under this legislation.*"

Some States have merged both aggravating circumstances on repetition and on grounds of relationship. For instance, section 215.a) of the Czech Republic Criminal Code provides for enhanced penalties in cases of repeated domestic violence.

Finally, it has already been said that the use of protection orders is a key component of an effective legal framework to address violence against women, including in particular domestic violence. Good international practices show that this important mechanism works better if there is criminal liability attached to infringements. For instance, the Spanish Criminal Code in article 468 provides penal sanction for such acts. Other examples of countries that criminalize the violation of protection orders are Serbia and Georgia.

V. CRIMINALIZATION OF VIOLENCE AGAINST WOMEN

The Istanbul Convention has a strong emphasis on criminal law. One of its main achievements consists in defining and criminalizing the various forms of violence against women laid down in the treaty. It is also the first time that a treaty embodies specific criminal law obligations in the area of violence against women.

The drafters aimed at the most detailed and most comprehensive description of the behaviours that Parties have to penalize. As a result, the Istanbul Convention includes all forms of violence against women and domestic violence. However, it does not impose specific provisions criminalising the conduct described. Generally, the Istanbul Convention sets up prosecution goals while it remains flexible on the means States put into effect for their accomplishment. The diversity of approaches to legislation demonstrates that there is no simple linear path from treaty obligations to national law, which is particularly true in the area of criminal law.

In addition, the Istanbul Convention's far-reaching scope also intertwines with the purview of other Council of Europe treaties such as the Convention on Action against Trafficking in Human Beings or the Convention on Protection of Children against Sexual Exploitation and Sexual Abuse. Implementation of the Istanbul Convention should take into account the standards set forth in these two instruments.

A. Psychological violence

Most international recommendations consider psychological violence as a definite form of violence against women, including, in particular, domestic violence. In fact, the CEDAW Committee has issued a number of recommendations and resolutions highlighting the impact of psychological violence on women victims' rights:

- Since CEDAW Committee *Recommendation nº 19*, definitions of violence against women include psychological violence. The UN General Assembly Declaration in 1993 also referred to this form of violence. [30]

- In *VK v Bulgaria*[31] the CEDAW Committee concluded that Bulgarian courts had neglected the victim's emotional and psychological suffering. In its conclusions, the Committee recalls that gender-based violence *"is not limited to acts that inflict physical harm, but also covers acts that inflict mental or sexual harm or suffering, threats of any such acts, coercion and other deprivations of liberty."*

[30] CEDAW, *General Recommendations Nos. 19 and 20*, adopted at the Eleventh Session, 1992, A/47/38; UN General Assembly (UNGA), *Declaration on the Elimination of Violence against Women*, 1993, A/RES/48/104.

[31] *VK v Bulgaria*, Communication No. C/49/D/20/2008, CEDAW Committee, 2011.

The European Court of Human Rights has also dealt likewise with cases involving psychological violence in the context of intimate or family relationships, finding this form of violence a violation of article 8 of the European Convention on Human Rights.

- In *Opuz v Turkey*,[32] a landmark case on domestic violence, the European Court of Human Rights made it clear that domestic violence, *"[…] can take various forms ranging from physical to psychological violence or verbal abuse."*

- In *Hajduovà v. Slovakia*[33] the Court observed that, even though her former husband's repeated threats had never materialised, they were enough "*to affect the applicant's psychological integrity and well– being*," so as to give rise to the State's positive obligations under Article 8.

- In *A v. Croatia*[34] the Court stated that: "*is no doubt that the events giving raise to the present application pertain to the sphere of private life within the meaning of Article 8 of the Convention. Indeed, the physical and moral integrity of an individual is covered by the concept of private life*."

The Parliamentary Assembly of the Council of Europe (PACE) also recommends criminalizing psychological violence. Its report on the issue, produced by the Committee on Equal Opportunities for Women and Men[35] notes, "*there is scope for further strengthening the legal framework applicable to psychological violence, in particular in those States Parties where it is not considered a crime, and for addressing the existing obstacles to the effective implementation of the relevant law, including a poor understanding of the phenomenon of psychological violence and of its impact on the victims on the part of law enforcement official*" (Paragraph 6). Furthermore, the Assembly in its *Resolution 1963 (2013) on Violence against Women* in Europe calls on the States to "*refrain from making declarations and reservations to the Istanbul Convention" (*Paragraph 7.2).

States may comply with their obligation to criminalise psychological violence in many different ways, but they should take into consideration the required minimum standards along with good practices.

1) Prohibited behaviour. Psychological violence responds to a controlling behaviour which may develop in a wide range of forms, like victims' intimidation through insults, humiliation, and threats of any kind, isolation from their inner circle/ immediate family, or restriction of financial resources as well as those related to employment, education or medical care. In this respect,

---

[32] *Opuz v. Turkey*, nº 33401/02 Para. 132, European Court of Human Rights, 2009.

[33] *Hajduovà v. Slovakia*, nº 2660/03, European Court of Human Rights, 2010.

[34] *A. v. Croatia,* nº 55164/08, Para. 56, European Court of Human Rights, 2010. See also *X and Y v. the Netherlands*, 26 March 1985, European Court of Human Rights 1990.

[35] Parliamentary Assembly of the Council of Europe (PACE), *Psychological Violence*, Doc. 12787, CoE, 2011 (hereinafter *PACE Report on Psychological Violence)*

several epidemiological studies[36] consider psychological abuse to be the most prevalent form of domestic violence and show that victims perceive psychological violence as more severe and harmful than physical violence.

Therefore, according to the Istanbul Convention, all behaviours that amount to serious impairment of a persons psychological integrity should be criminalized. The Istanbul Convention does not define the notion of "serious impairment," but as the Explanatory Report to the Istanbul Convention spells 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"* (Paragraph 181).

The vast majority of criminal statutes contain provisions on threat, duress, coercion, intimidation, etc., that somehow address forms of psychological violence. This legal framework could meet the obligations under the Istanbul Convention if sufficiently comprehensive. However, generic provisions do not tackle the course of conduct but tend to focus on single incidents. We have already referred to this issue with regard to domestic violence and comments made there apply to offenses under discussion here. Evidentiary issues may arise when prosecuting a pattern of behaviour that involves a range of repeated abusive acts using traditional models of criminalization. And psychological violence already presents many evidentiary issues to officials in charge of enforcing the criminal law.

The *PACE Report on Psychological Violence* says, "*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"* (Paragraph 32). Since most definitions are not precise enough, it is important to spell out the various actions that may amount to criminal sanction.

2) The range of persons to whom the offence applies. Wherever dedicated criminal provisions on psychological violence exist, they are usually enclosed in the wider notion of domestic violence. Despite the fact that this form of violence often occurs in the family or in intimate relationships, it may also take place in other settings, such as the workplace. The Istanbul Convention 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 with a dedicated offence. Some criminal statutes, for instance, contain provisions on psychological violence in the workplace or referred to persons being in a state of dependence of the perpetrator.

3) Gender perspective. The Istanbul Convention mandates a gendered approach to violence against women, including domestic violence in article 6. On the other hand, the *UN Handbook on Violence Against Women* warns against possible misuse of psychological violence, "*Experience has shown that violent offenders may attempt to take advantage of such provisions by applying for*

[36] See WHO World Report on Violence, chapter IV.

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" (p. 25).

Echoing these three factors just discussed, the third one in particular, UN Women recommends generally the term "coercive control," shifting the focus to the aim of the behaviour. "Coercive control" includes psychological and economic violence but does so in a way that links the 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. Whilst this approach is nowadays the international best standard in other legal areas, it is not easy to couple broad terms such as "coercive control" with the overarching principles and technicalities of criminal law. However, this approach calls upon legislators to base legal measures combating psychological violence on the intent of the perpetrator.

Good practices

Despite the notable increase in attention to psychological violence, diversity in the response persists. Accordingly, good practices and comparative law examples presented here do not intend to summarize all possible alternatives but to bestow grounds for discussion.

Most States rely on generic criminal provisions to address different types of psychological violence. For instance, the French Criminal Code generally prohibits *"A threat to commit a felony or a misdemeanour against persons"* (Article 222-17).

As explained above, such generic provisions may not be enough to meet the requirements of the Istanbul Convention. In any case, good practices usually refer to dedicated provisions, which may apply generally or restrictively to cases of domestic violence. In fact, all three examples from Sweden, Spain and Poland provided in the section on domestic violence encompass in particular psychological violence. Moreover, provisions in the Swedish and Spanish statute specifically refer to the repetition element.

On the other hand, specific forms of psychological violence may find their way into criminal law. Definitions may take into account the particular dynamic of the behaviour (i.e. stalking or sexual harassment) or refer to the context of the violence, as forms of psychological domestic violence. An example of the latter approach can be found in France, where Parliament passed a law in 2010 making it a crime to inflict psychological violence in the domestic sphere. The law prohibits, *"Harassing one's spouse, partner, or co-habitant by repeated act that 'degrade one's quality of life and cause a change in one's physical or mental state of health"* (Article 222-33-2-1 of the French Criminal Code).

To our knowledge, there are no criminal law provisions encompassing the idea of coercive control. Nonetheless, the Spanish Criminal Code has been brought closer. Article 172.2 introduced in 2004 describes a crime whereby "*whoever lightly coerces his wife or former wife or woman to whom he is or has been bound by a similar emotional relation, even without cohabitation*" will be criminally sanctioned.

Moreover, the Supreme Court of Canada offers promising practice and already in 1990[37] recognized the following as central elements of domestic violence in a criminal law context: a) the imbalance of power "*wherein the maltreated person perceives himself or herself to be subjugated or dominated by the other";* b) the dependency and lowered self-esteem of the less powerful person; c) the periodic, intermittent nature of the associated abuse; e) the clear power differential between battered women and perpetrators that combine with the intermittent nature of physical and psychological abuse to produce cumulative consequences.

B. Stalking

The Istanbul Convention provides the first legally binding international definition of stalking. Still, as highlighted in the previous section, the European Court of Human Rights has repeatedly held States responsible for failing to respond to cases of psychological violence, some of which involve stalking-like behaviours. For instance, in *Hajduova v. Slovakia,* quoted in the previous section, the applicant suffered repeated threats, which constitute the basis of its complaint under Article 8 of the European Convention of Human Rights. Such violence was enough to trigger the State's positive obligation.

Stalking is a specific form of psychological violence that commonly occurs in the context of post-separation. As regards to internal criminal law, the Istanbul Convention and good international practices recommend implementing dedicated criminal law provisions. However, most forms of psychological violence may overlap if not carefully crafted, yielding uncertainty. In order to address adequately stalking, legislators should consider the following aspects.

1) Acts of stalking. Most legal definitions use terms such as harassment or obsessive pursuit in an attempt not to limit the variety of stalking tactics. Consequently, courts may have to interpret these definitions further, which might give rise to lack of effective response. Another option is to include non-exhaustive lists of possible stalking behaviours in order to give guidance for implementation. The Istanbul Convention leaves to national laws the definition of the threatening conduct that may amount to stalking, whereas the Explanatory Report to the Istanbul Convention 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*

[37] *R. v. Lavallée*, Supreme Court of Canada, 1990.

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).

2) Intention of the perpetrator. 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.

3) Impact on the victim. Whilst it is important to take into account the harm or distress the stalker causes, the need to prove the negative impact on the victim might set the threshold too high. Alternatively, the result upon the victim may be an aggravating circumstance.

4) Course of conduct. According to the Istanbul Convention, the offence of stalking aims at prohibiting a course of conduct or repetitive behaviour. As pinned down in the previous section, forms of violence involving a course of conduct that undermines the integrity of the victim over time require specific measures. Stalking would be very difficult to persecute under general provisions, as single incidents may escape the grip of criminal law.

5) Protected persons. The definition of the offence in the Istanbul Convention only covers behaviours directed at the victim. However, in many cases stalkers target the victim's relatives or other persons within her or his social environment. Parties may extend their description of stalking to encompass these acts.

Good practices

There is a clear trend towards specific laws on stalking, as generic criminal law has proved ineffective in addressing the course of conduct involved. If opting for a dedicated offence, legislators have to take into account that stalking is a very difficult phenomenon to define because it is characterised by a pattern of different repeated and persistent behaviours, not necessarily illegal. The adoption of a broad and general definition or the classification of the behaviours of stalking in one list of prohibited acts although not limited, are the two techniques used by most States. The European Commission has funded an EU wide research on stalking[38] which provides some examples and good practices in both legislative alternatives. The study concludes that the two approaches have showed positive and negative aspects that have to be considered in the framework of each national legal system.

[38] EC, *Protecting women from the new crime of stalking: a comparison of legislative approaches within the European Union*, Daphne Project 05-1/125/W, 2007.

The German Criminal Code provides a detailed definition of stalking (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 sifts 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 one of the very first EU member States to introduce a crime on stalking and to opt for a broad definition based on the intent of the perpetrator. This provision has been subsequently amended. According to the current article 442 bis of the Belgian Penal Code, is guilty of stalking: *"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."*

Finally, Denmark provides an interesting criminal regulation on stalking whereby a warning or a restraining order must be imposed by the police before the person is liable to punishment. Section 265 of the Criminal Code of Denmark 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". "Violating peace of some other person" may imply threatening, dishonouring, intruding, but it may also imply continuous unwanted attention, e.g. frequently sending unwanted flowers)."*

C. Sexual violence

Criminal law provisions pertaining sexual violence around the world differ significantly, yet most of them have been subject to intense criticism for the past 30 years. Some experts identify three areas of concern pegged to three waves of reform in international comparative law: 1) expansion of the definition of rape; 2) criminalization of marital rape and; 3) focus on consent and on rules of evidence.[39] Taking stock of this ongoing process of reform, the Istanbul Convention calls for a comprehensive approach and whilst Article 36 does not require a specific definition of each type of sexual violence, it does require that all of them find their way into the criminal code. In order to conduct our analysis, we can differentiate each constituent of the offence.

1) Definition of sexual assault and scope of application. With regard to rape, the Istanbul Convention provides a broad definition that includes all forms of penetration carried out with

[39] See, for instance, the *EU Feasibility Study,* p. 50.

bodily parts of objects. Almost all criminal statutes comprise the act of penetration with force or threat, yet not all of them cover the full range of acts accounted for in Article 36.1.a) of the Convention. In fact, the Analytical Study on Rec(2002)5 shows that all 46 respondent States of the Council of Europe criminalise rape, but numbers decrease as the questionnaire descends to other forms of sexual violence.

Marital rape has been a long-standing bone of contention for the women's rights movement and international organizations. Historically, the laws of many countries implicitly or explicitly have condoned marital rape or other forms of sexual assault between espouses.[40] However, as the House of Lords blatantly affirms in its long-standing jurisprudence: *"a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim."*[41] Furthermore, In September 2009, the Parliamentary Assembly of the Council of Europe adopted a resolution recognizing rape as a serious criminal violation of women's rights and dignity, asking States Parties to extend their definitions of rape to include sexual violence committed by a spouse or intimate partner. [42]

The Convention extends the application of sexual assault provisions irrespectively of the relationship between perpetrator and victim (Article 43 of the Convention). Sexual domestic violence encompasses all types of sexual assault and legislation should ensure it. The Explanatory Report to the Istanbul Convention illustrates the reasoning behind the drafters' concern with domestic sexual violence stating that: *"Sexual violence and rape are a common form of exerting power and control in abusive relationships and are likely to occur during and after break-up. It is crucial to ensure that there are no exceptions to the criminalisation and prosecution of such acts when committed against a current or former spouse or partner as recognised by internal law"* (Paragraph 194).

2) Consent. Still, the key element in the way the Istanbul Convention frames sexual violence is consent. Both the definition of rape and the provision on other forms of sexual violence revolve around the lack of consent. The Explanatory Report to the Istanbul Convention specifies that parties should have regard to the case-law of the European Court of Human Rights, particularly to the case of *M.C. v. Bulgaria* (2003), where the Court concluded that States' positive obligations under the Convention *"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".* Accordingly, component elements such as coercion, violence, threat or surprise *"should be interpreted in their broad sense"* (Paragraph 160). The Court concluded by establishing that a *"rigid*

[40] As The Advocates for Human Rights put it, "Such laws illustrate clearly the principle that men are assumed to have unlimited sexual access to their wives, thus negating the existence of rape and sexual abuse within marriage," in Stop Violence Against Women (web site) http://www.stopvaw.org/Marital_and_Intimate_Partner_Sexual_Assault.html

[41] See *inter alia S.W. v. UK* and *C.R. v. UK,* House of Lords, 1995. It was Lord Lane writing for the majority of the Court of appeal in *R. v. Roberts* (1986) who convened this principle, which was actually acknowledged by the European Court of Human Rights in the case of *C.R. v. UK*, nº 20190/92, 1995, Para. 14.

[42] PACE, Resolution nº 1691 on Rape of women, including marital rape, CoE, 2009.

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" (Paragraph 166).

From the foregoing it follows that, as regards to minimum standards, both the European Court of Human Rights and the Istanbul Convention 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. This standard already has had its impact and most European States are amending their criminal statutes in order to ensure, at least, a broad definition of sexual violence. According to the *EU Feasibility Study, "Whilst a minority of European States define rape in terms of consent, many have extended force-based definitions to come closer to a consent standard."*

In 2010, the UN General Assembly passed a resolution urging States to enact *"laws on sexual violence adequately protect all persons against sexual acts that are not based on the consent of both parties."*[43]

3) Evidences and burden of proof. The case of *MC v. Bulgaria* also illustrates the importance of monitoring the manner in which legislation is enforced. In this case, the European Court of Human Rights noted as follows: *"Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms ('coercion', 'violence', 'duress', 'threat', 'ruse', 'surprise', among others) and through a context-sensitive assessment of the evidence"* (Paragraph 161). In fact, the merits of the case show that Bulgaria's penal code did not mention any requirement of physical resistance by the victim, yet it appeared to be required in practice to pursue a charge of rape.

Therefore, courts' practices and rules of evidence become crucial. Legislation should ensure that gender stereotypes do not taint judicial decisions. In *V.K. v. Bulgaria* the CEDAW Committee reiterated the links between wrongful gender stereotyping and the freedom from gender-based violence against women as well as the right to a fair trial. Accordingly, the Committee noted, *"States Parties are accountable under CEDAW for judicial decisions that are based on gender stereotypes, rather than law and fact. (…) 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."*

Conversely, the requirement of lack of consent should be assessed in light of the surrounding circumstances. The second paragraph of Article 36 of the Istanbul Convention states that *"Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances."* Pertaining to this paragraph, the Explanatory Report to the Istanbul Convention notes: *"In implementing this provision, parties to the convention are required*

[43] UNGA, Strengthening crime prevention and criminal justice responses to violence against women, A/RES/65/228, 2010.

to provide for criminal legislation which encompasses the notion of lack of freely given consent to any of the sexual acts listed in sub-paragraphs a to c. It is, however, left to the parties to decide on the specific wording of the legislation and the factors that they consider to preclude freely given consent. Paragraph 2 only specifies that consent must be given voluntarily as the result of the person's free will, as assessed in the context of the surrounding circumstances" (Paragraph 193). Accordingly, legislation may consider providing for a broad range of circumstances in which consent is immaterial, such as sexual assault by an individual in a position of authority or in which coercive circumstances occur.

In the case *Tayag Vertido v. Philippines*,[44] the CEDAW Committee spells out the main requirements for the criminalization of sexual violence: 1) *"Review of the definition of rape in the legislation so as to place the lack of consent at its centre"*; 2) *"Remove any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either: requires the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; requires that the act take place in "coercive circumstances" and includes a broad range of coercive circumstances."*

Moreover, with regard to rules of evidence the Istanbul Convention 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."*

Sexual harassment

Article 40 of the Istanbul Convention prohibits sexual harassment, which is a type of behaviour that intersects both sexual and psychological violence. Unlike the other articles, this provision authorises sanctions other than criminal penalties, whose type and nature the parties are free to determine. Nevertheless, most international bodies recommendations call for a specific criminalization of sexual harassment, like for instance, the UN Division for the Advancement of Women (Sec. 3.4) in its *Handbook for Legislation on Violence Against Women*.

Article 40 covers a type of conduct whose individual elements, taken in isolation, would not necessarily lead to a sanction, embracing the three main forms of sexual conduct imposed on the victim without her or his consent: verbal, non-verbal or physical conduct of a sexual nature unwanted by the victim. Such conduct must have the purpose or the effect of infringing the dignity of the victim. However, the *UN Handbook on Violence Against Women* (Sec. 3.4.3.2) calls on States to make it clear that a single incident may also constitute sexual harassment.

[44] Tayag Vertido v. Philippines (2010) CEDAW/C/46/ D/18/2008.

Sexual harassment legislation has developed over the decades with a focus on the setting in which the harassment takes place, mainly the workplace. In fact, most widespread legal measures on the issue pertain to the area of labour law. However, sexual harassment can occur in multiple contexts and legislation should comprehensively address each of them. Additionally, with the emergence of new technologies and the anonymity they provide a new form of "cyber harassment" has appeared which can be even more severe than harassment in "traditional" settings. The Istanbul Convention does not restrict prohibition of sexual harassment to any particular context or mean, therefore legal measures enacted thereof should be comprehensive.

Finally, criminal legislation on sexual harassment should not replace other existing remedies or sanctions. Instead, both criminal and non-criminal redress should be available to victims. UN Women furnishes grounds to support this approach: *1) "Criminal cases usually require a higher standard of proof than civil cases"*; 2) women may be unwilling to report because, *"although they want the harassment to stop, they do not want to subject the harasser to criminal prosecution"*; 3) *"criminalizing sexual harassment may limit a victim's ability to recover damages, because an employer usually will not be liable for an employee's criminal conduct."* For instance, all EU member States have integrated prohibition of sexual harassment into equality and or labour laws, as Directive 2002/72/EC of the European Parliament and of the Council (now recast in Directive 2006/54/EC) requested it. Nevertheless, many EU member States do also have criminal law provisions on sexual harassment.

Good practices

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. For example, English criminal law provides an example of a consent base definition of rape: *"sexual intercourse with a person who at the time of the intercourse does not consent to it, committed by a person who at the time either knows the other person does not consent, or is reckless regarding consent."*

In addition, under the Penal Code of Turkey commits sexual assault *"who violates the physical integrity of another person by means of sexual conduct"* (Article 102.1).

Further, in a well-known landmark case, *Prosecutor v. Akayesu* (1998), the International Criminal Tribunal for Rwanda defined rape as *"a physical invasion of a sexual nature committed on a person under circumstances which are coercive"* (Paragraph 688).

If opting for a new consent-based definition in crimes against sexual integrity, legislators shall address issues of consent in terms of the environment surrounding the decision. UN Women *Virtual Knowledge Centre* notes that 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*." Poof

of lack of consent is very difficult if the complainant is not physically injured and the difficulty increases if he/she knows the perpetrator. Thus, the accused should be required to proof consent or the definition of the offence should rely on the existence of certain circumstances, rather than demonstrating a lack of consent.

The *UN Handbook on Violence Against Women* (section 3.4.3.1.) for instance recommends that definition of sexual offences: *"Requires the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or "Requires that the act takes place in "coercive circumstances" and includes a broad range of coercive circumstances."*

The Criminal Code of Canada 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 assaults 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."*

Alternative to a consent based definition is a broad definition based on force. Germany provides an example in section 177, where sexual assault is defined as follows: *"Whosoever coerces another person 1. by force; 2. by threat of imminent danger to life or limb; or 3. by exploiting a situation in which the victim is unprotected and at the mercy of the offender, to suffer sexual acts by the offender or a third person on their own person or to engage actively in sexual activity with the offender or a third person, shall be liable to imprisonment of not less than one year."* This description also captures the conduct of forcing or coercing someone into sexual acts with a third person.

The Criminal Code of France also defines sexual assault with force, yet with a broad and simple clause: *"Sexual aggression is any sexual assault committed with violence, constraint, threat or surprise"* (Article 222-22).

Finally, there are different comparative examples of sexual harassment. The criminal statutes of France, Hungary and Spain provide three different approaches:

France currently defines sexual harassment in Article 222-33, "*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 or humiliating nature"* or putting him or her in *an "intimidating, hostile or offensive situation."*

The Hungarian Criminal Code prohibits the use *of "an expression suitable for impairing honour or commits another act of such a type, a) in connection with the job, performance of public mandate or in connection with the activity of public concern of the injured party, b) before a great publicity"* (Article 197).

And finally, in Spain, "*Whoever seeks favours of a sexual nature for him/herself or for a third party in the context of an ongoing or steady occupational or educational relationship or one involving the provision of services and with such behaviour objectively and seriously intimidates or places the victim in a hostile or humiliating situation shall be punished as a perpetrator of sexual harassment"* (Article 148).

D. Forced Marriage

Criminalization of forced married links with an existing international consensus around a straightforward notion: that everyone has the right to marry and found a family.[45] Forced marriage breaches this right and entails a serious attack on a person's freedom that usually combines with sexual, psychological or physical violence. Historically ignored in criminal law, forced marriage encompasses many different situations. According to a milestone report[46] on the issue conducted by the Council of Europe, forced marriage is *"an umbrella term covering marriage as slavery, arranged marriage, traditional marriage, marriage for reasons of custom, expediency or perceived respectability, child marriage, early marriage, fictitious, bogus or sham marriage, marriage of convenience, unconsummated marriage, putative marriage, marriage to acquire nationality and undesirable marriage – in all of which the concept of consent to marriage is at issue."* The study offers an excellent approach to the problem, concurring factors and best remedies, including criminal law remedies.

Targeted behaviours usually fall under general provisions on coercion or can be punished by means of the penalties for the criminal behaviour it can involve. Actually, not many countries do have dedicated offences on forced marriage. However, as the Explanatory Report to the Istanbul Convention notes, "*The drafters felt that this act should be covered by the criminal law of the parties so as to take into account the standards established under other legally binding international instruments."*

[45] For instance, article 16.1 Universal Declaration of Human Rights; article 12 European Convention of Human Rights; article 16 CEDAW.

[46] Rude-Antoine, E., *Forced marriages in Council of Europe member States, a comparative study of legislation and political initiatives*, CoE, 2006 (hereinafter CoE Report on Forced Marriage).

Moreover, the Council of Europe system has been concerned about this issue for quite a long time. The Parliamentary Assembly has issued a number of opinions on forced and child marriage: Resolution 1468 (2005) and Recommendation 1723 (2005) are the most recent ones.

Criminal legal measures on forced marriage should pay attention to the following elements:

1) Lack of consent. Legislation should ensure that a definition of forced marriage includes, at a minimum, the absence of free and full consent of one party. The lack of consent of both parties should not be required. Further, legislation has to provide mechanisms to determine a valid consent. For instance, the Explanatory Report to the Istanbul Convention clarifies that consent is absent when family members use "*coercive methods such as pressure of various kinds, emotional blackmail, physical duress, violence, abduction, confinement and confiscation of official papers*."

2) Child forced marriage or "early marriage" implies absence of consent. The offence should clearly define as forced marriage that of a child under the age of 18. As regard to the age, the Convention on the Rights of the Child states that a child is anyone under the age of 18 years, unless the law states that majority is reached at an earlier age (Article 1). Many other several international treaties and recommendations set the minimum age of 18 years for marriage, such as article 16.2 of CEDAW or articles 1 and 2 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. Both instruments define marriage as requiring the free and full consent of both parties.

3) Force. As regards to this article, the Explanatory Report to the Istanbul Convention expresses the meaning of the elements of the offence (Paragraph 196): "*The term 'forcing' refers to physical and psychological force where coercion or duress is employed."* Accordingly, requirements of force should be interpreted in a broad sense, with due regard to the surrounding circumstances.

4) International elements. Forced marriage usually involves a cross-border course of conduct, at least in most European countries. Second paragraph of article 37 aims to target actions by which perpetrators seek to escape jurisdiction. Application of this offence may not be easy. As the Explanatory Report to the Istanbul Convention states (Paragraph 196), "*The intention must cover the act of luring a person abroad, as well as the purpose of forcing this person into a marriage abroad."* Notwithstanding these difficulties, the Council of Europe Report on Forced Marriage notes the technical problems arising from issues of jurisdiction and concludes, "*Research has shown the choice-of-law rule that gives precedence to spouses' national legal systems to be unsatisfactory."* The prohibition established under Article 37.2 offers a good alternative to address such problems.

5) 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 Istanbul Convention in article 32 guarantees victims the possibility to end a forced marriage without financial or administrative burdens.

6) Harmful practices. Finally, it is noteworthy that different international organizations warn against harmful practices intertwined or linked with forced marriage, such as slavery or trafficking practices that allow the transfer of a woman for money or other consideration where the result is a legalized or informal marriage. In addition, States must be aware of growing practices such as "marriage brokering."[47]

Good practices

While some definitions of psychological violence may cover forced marriage, it is advisable to create a specific offence of forced marriage.

One option is to describe forced marriage as an aggravated type of coercion or intimidation. That is the case in Austria and in Germany, whose criminal code holds liable *"whomsoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act."* The provision thereof considers an especially serious case to cause another person to enter into marriage.

Norway's Penal Code offers a good definition of forced marriage as a felony against personal liberty (Sec. 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."*

There are also many other examples of legal measures dedicated to target particular forms of forced marriage particularly prevalent or socially relevant in a given context. For instance, under Article 23 of Georgia's Criminal Code, bride abduction qualifies as a "crime against human rights and freedoms" and a perpetrator can receive a sentence of four to eight years in prison. In this regard, the aforementioned Council of Europe Report on Forced Marriage provides a comprehensive perspective of different legal measures and useful crimes' definitions.

E. Female genital mutilation (FGM)

FGM is a form of discrimination and a clear violation of women human rights. Moreover, a number of international recommendations and initiatives urge to end this practice. General Recommendation Nos. 14, 19 and 24 from the Committee of CEDAW, for instance, convey the severe health and other consequences for women and girls subjected to FGM, identify FGM as a form of violence against women, and recommend that States Parties take measures to eliminate it. A UN General Assembly *Resolution on Intensifying Global Efforts for the Elimination of Female*

[47] For an extensive discussion on forms of forced marriage and associated harmful practices see UN Women, *"Harmful practices" against Women, Supplement to the Handbook for Legislation on Violence against Women*, UN, 2011 (hereinafter *UN Women Supplement to the Handbook on Violence Against Women)*; and *Council of Europe Report on Forced Marriage*.

Genital Mutilation also requires criminalisation of FGM. The PACE Resolution 1247 (2001) follows the same lines.

Other international instruments underpinning these principles include, for instance, the Committee on Economic, Social and Cultural Rights (CESCR) General Comment nº 14[48] whereby States are under a specific legal obligation to adopt effective and appropriate measures to abolish harmful traditional practices including forced marriage and FGM. It also notes that States Parties are obliged to prevent third parties from coercing women to undergo traditional practices, such as female genital mutilation. Finally, a comprehensive overview on FGM and detailed measures to tackle it can be found in the document *"Eliminating Female genital mutilation an interagency statement,"*[49] issued by several international agencies.

Good practices

The main concern of most European countries is to protect victims from suffering FGM overseas or to extend jurisdiction to acts committed thereof. The UK provides an example of a dedicated new offence on luring a woman or a girl for practicing FGM: *"taking a female abroad for the purpose of FGM or of assisting a non-UK national to mutilate a female overseas."*

Belgium also has a different provision permitting the extra-territorial application of the criminal offence of FGM to anybody who commits this crime (regardless of nationality), as long as the offender is found on Belgian territory.

Finally, as regard the instrument to target FGM, the UN Women Supplement to the Handbook on Violence Against Women recommends a stand-alone law: *"Given the unique social dynamics that surround female genital mutilation, the enactment of a comprehensive stand-alone is recommended."* The document presents Italy as a promising example in this issue. Italy's Law No. 7/2006 on the Prevention and the Prohibition of Female Genital Mutilation Practice not only criminalises this harmful form of violence against women, but also establishes a range of preventative and protective measures.

F. Forced abortion and forced sterilisation

Both forced abortion and forced sterilisation are consent based offences. In other words, the element that establishes liability is the lack of prior and informed consent of the victim. As the Explanatory Report to the Istanbul Convention notes, *"the aim of this provision is to emphasise the importance of respecting women's reproductive rights by allowing women to decide freely on the*

[48] CESCR, General comment No. 14 (2000): The right to the highest attainable standard of health, E/C.12/2000/4, 2000

[49] OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO, *Eliminating Female genital mutilation an interagency statement*, WHO, 2008.

number and spacing of their children and by ensuring their access to appropriate information on natural reproduction and family planning."

The standards adopted in the Istanbul Convention align with those of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No.164).

Interestingly enough, a case about forced sterilization has reached the CEDAW Committee. In *A.S. v. Hungary*[50] the Committee reviewed medical protocols and requirements in order to obtain an informed consent and found that the State had violated articles 10, 12 and 16 of the CEDAW.

Good practices

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."* 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).

G. Unacceptable justifications

Under Article 42 of the Istanbul Convention, States Parties to the Convention should remove criminal defences related to adultery, "honour," provocation or other references to the aforementioned grounds of justification. States should also prevent these elements from constituting specific offences with reduced sanctions.

This approach concurs with that of the *UN Women Supplement to the Handbook on Violence Against Women*, which recommends States, 1) "*Eliminate any reduction or exemption in the sentence imposed for murders committed against female intimate partners or family members suspected of, or found in the act of, adultery*"; 2) "*Eliminate any defence based on "honour";* and 3) "*Disallow the partial defence of provocation in cases of so-called "honour" crimes as well as domestic homicide more generally."*

Whilst religion, tradition or honour barely receives any explicit recognition in European criminal statutes, considerations such as adultery, provocation or other references to the victim's

[50] CEDAW Committee, *A.S. v. Hungary*, Communication No. 4/2004, 2006.

inappropriate behaviour are still present in some of them. Such considerations might be implicit in the law or in the rules of evidence or even explicitly stated as mitigating circumstances or constituting elements of specific offences. Any legal provision that allows the behaviour of the victim to serve as a mitigation factor opens the door for stereotypes among law enforcement officials. It is important to ensure that legal provisions do not allow victim-blaming attitudes.

Within the remit of this provision also fall justifications around the model of loss of self-control in cases of murder, rape and others. Most criminal laws do account for temporary insanity, mental derangement and other circumstances to exclude or mitigate criminal liability, yet they significantly differ from other circumstances that refer to provocation, heat of passion and the like, which embody compassion for the violent perpetrator who "couldn't stop himself." The Istanbul Convention requires States to exclude the possibility of justifying violence on the grounds of a moral assessment of the victim's behaviour.

The Istanbul Convention 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 the second paragraph of article 42 the Explanatory Report to the Istanbul Convention notes the following (Paragraph 218), "*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.*"

Prohibition of cultural or honour-based justifications for human rights violations is a long-standing principle in international law. The Istanbul Convention enshrined such idea in a clear provision that obliges parties to ensure that criminal law excludes defence claims or mitigating circumstances pertaining culture, religion, tradition, so-called honour or perceived appropriate behaviour. Article 42 reflects the general obligation stated in article 12.5 of the Istanbul Convention and reinforces its application in the area of criminal law.

Along the same lines, for instance, the *Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice*, adopted as a resolution by the UN General Assembly[51], states the following: "*Violence against women is often embedded in and supported by social values, cultural patterns and practices. The criminal justice system and legislators are not immune to such values and thus have not always regarded violence against women with the same seriousness as other types of violence. Therefore, it is important that States strongly condemn all forms of violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligation with respect to its elimination and that the criminal justice system recognize violence against women as a gender-related problem and as an expression of power and inequality.*"

[51] Resolution A/RES/65/228

The CEDAW framework has also uphold this idea from a gender perspective. The General Recommendation nº 19 of its Committee highlights that traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion. The recommendation specifically urges States to remove the defence of honour concerning assault or murder of a female family member.

Finally, the Convention on the Rights of the Child, adopted in 1989, also requires States Parties to take all effective and appropriate measures in order to abolish traditional practices prejudicial to the health of children (article 24(3).

VI. CRIMINAL PROCEDURAL

A. General principles

The Istanbul Convention establishes a general obligation of due diligence and breaks it down into specific provisions which refer to procedural mechanisms to ensure criminal accountability of perpetrators and protection of survivors. Some of these mechanisms do not necessarily need to be inserted in the criminal procedure, thus they may be regulated in other pieces of legislation. Many States, for instance, enact framework laws on domestic violence that cover protection orders or other measures required by the Convention.

Conversely, most difficulties in bringing perpetrators to justice stem from poor implementation of the law. The reasons vary and often have to do with lack of prioritisation of cases, lack of specific training of officials or even prejudices against prosecution of some forms of violence against women, such as domestic violence. As stated above, the Istanbul Convention in the area of prosecution pillar calls for due diligence, which needs an appropriate legal framework but also an effective implementation. Hence, an appropriate legal measure does not necessarily mean that any State meets its obligations under this pillar of the Istanbul Convention.

B. Due diligence

Several international instruments and case law judgements endorse the due diligence principle and spell out its implications. In fact, the Special Rapporteur on Violence Against Women, reported to the Commission on Human Rights of the UN Economic and Social Council[52] that *"there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence."*

[52] Special Rapporteur on Violence Against Women, Third Reported to the Commission on Human Rights of the UN Economic and Social Council, E/CN.4/2006/61, 2006.

The European Court of Human Rights has also developed a vast jurisprudence on this principle, including some recent cases of violence against women. Probably the most important and best-known of such cases is *Opuz v. Turkey*, cited in the Explanatory Report to the Istanbul Convention along with several other international sources for the due diligence principle.[53]

Following the European Court of Human Rights case law and other international instruments, chapter VII of the Istanbul Convention reiterates and specifies the application of the standard of due diligence to the investigation and prosecution of offences. Articles 49 and 50 of the Istanbul Convention identify the following obligations:

1) Undue delay. Accordingly, article 49 of the Istanbul Convention dictates that parties have the obligation to ensure that investigations and judicial proceedings are carried out without undue delay. Such notion is not defined in the Istanbul Convention, but the European Court of Human Rights has produced an extensive case law on it. [54]

2) **Effectiveness**. An effective investigation and prosecution means, as the Explanatory Report to the Istanbul Convention puts it, *"establishing the relevant facts, interviewing all available witnesses and conducting forensic examinations, based on a multi-disciplinary approach and using state-of-the-art criminal investigative methodology to ensure a comprehensive analysis of the case."* Accordingly, legislation has to ensure that cases of violence against women are dealt with at least like any other similar type of cases and that no explicit or implicit barriers for investigation or prosecution exist.

3) Respect of the rights of the victim based on a gendered understanding of the violence. Along with the prohibition of undue delay and the requirement of effectiveness, it is equally important that parties avoid, as far as possible, aggravating any harm experienced by victims during investigations and judicial proceedings. Further, States shall provide assistance and support to victims during criminal proceedings. Respect for victims' rights must also embrace a gender perspective, which means, for instance, ensuring that a same-sex forensic specialist is available to examine the victim.

4) Evidences. Diligent collection of evidences such as medical and forensic ones is an important duty of public authorities in order to effectively prosecute acts of violence against women. For instance, the *UN Handbook on Violence Against Women* (Sec. 3. 9. 5) recommends that survivors' access to forensic examination be free of charge even if they chose not to report the crime or otherwise cooperate with the criminal justice system or law enforcement authorities. It is also important that legislations allow for the prosecution and conviction of an offender based solely on the testimony of the complainant. As regard to evidence collection and respect for survivors' rights, the Istanbul Convention states in article 54 the inadmissibility of the sexual history and

[53] See Explanatory Report to the Istanbul Convention, Para 58.

[54] On the principle of due diligence in the case law of the European Court of Human Rights see for instance *Kelly and others v. UK*, nº 30054/96, European Court of Human Rights, 2001.

conduct of the victim. Previous chapter referred to this provision, which also pertains to procedural law.

Article 50 of the Istanbul Convention provides further guidance as to the obligations of due diligence in responding to violence against women. Under this article, States should ensure that enforcement agencies respond to all forms of violence against women **promptly and appropriately** by offering adequate and immediate protection to victims. Further, a second paragraph restates agencies' obligation to "*engage promptly and appropriately in the prevention and protection, including the employment of **preventive operational measures** and the collection of evidence.*"

According to the Explanatory Report to the Istanbul Convention, compliance with this obligation includes, for example, "*the right of the responsible law enforcement agencies to enter the place where a person at risk is present; treating and giving advice to victims by the responsible law enforcement agencies in an appropriate manner; hearing victims without delay by specially trained, and where appropriate female, staff in premises that are designed to establish a relationship of trust between the victim and the law enforcement personnel; and provide for an adequate number of female law enforcement officers, including at high levels of responsibility.*" Most of these obligations pertain to law enforcement agencies thus fall outside the scope of a criminal procedure code. However, this article stresses the importance of a co-ordinated, prompt response to violence that includes protection measures.

Protecting victims from further violence must be a primary concern of law enforcement agencies and the judicial system as a whole. In this regard, the CEDAW Committee has established an important rule **whereby the rights of the perpetrator cannot supersede the rights of the victims,** including rights to life and physical and mental integrity. That principle must also inspire the balance between the rights of defence and the survivors' right to safety.[55]

To protect survivors during investigation and prosecution of violence against women is not an obligation of result but rather an obligation of means. The European Court of Human Rights has laid out **a test** in order to ascertain whether a State has fulfilled its positive obligations in a given case. In *Kontrova v. Slovakia* (2007) the Court established, "*For a positive obligation to arise, it must be established that the authorities **knew or ought to have known** at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*."

By way of conclusion, the due diligence principle requires a legal framework establishing procedures for quick and effective investigation and prosecution of violence against women. It also directs officials to conduct their duties with due regard to the rights of victims and having

[55] CEDAW Committee, *AT v. Hungary*, Communication nº 2/2003. See also *Goekce v. Austria* (2007) and *Yildrin v. Austria* (2007).

their protection always at the centre. In *M.C. v. Bulgaria*[56], the European Court of Human Rights makes it clear that positive obligations on the State are inherent in the right to effective respect for private life. While the Court recognises flexibility on the means States may use, *"effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions."* (Paragraph 58).

Good practices

Although not explicitly required in the Istanbul Convention, a number of countries have implemented legal reforms or prosecution policies that facilitate the investigation and prosecution of cases. The most significant are: 1) designating violence against women as a priority for the police and the public prosecution service; 2) special procedures for investigating violence against women (fast-track procedures); 3) special courts for violence against women or domestic violence; 4) adoption of dedicated guidelines, intervention protocols or manuals on violence against women.

For instance, most EU member States do have special guidelines for the criminal justice actors that clarify duties and procedures.[57] Moreover, it is a worldwide good practice to enact coordination protocols to regulate operational intervention of all relevant agencies in cases of violence against women, including the judiciary. UN Women recommends that women's groups participate in developing protocols and procedures, which should maintain a focus on safety of victims and holding perpetrators accountable.[58] In the UK, the Crown Prosecution Service has developed a *"Policy for Prosecuting Cases of Domestic Violence,"* which addresses numerous issues including the role of the prosecutor, sufficiency of the evidence, avoiding delay, support and safety for victims, civil proceedings, children, keeping victims informed and so on.

Another promising practice has to do with specialised courts. The *UN Handbook on Violence Against Women* recommends that laws *"provide for the creation of specialized courts or special court proceedings guaranteeing timely and efficient handling of cases of violence against women"* (Sec. 3.2.5). When they have adequate resources, there is evidence that specialized units in the justice system are more responsive and effective in enforcing laws on violence against women. Spain and the UK have developed special courts for domestic violence, although with different competences. In both models, however, specialised training is mandatory and courts provide response to civil and criminal issues in a single proceeding.

[56] *M.C. v. Bulgaria,* nº 39272/98, European Court of Human Rights, 2003.

[57] See EU Feasibility Report, p. 64.

[58] See *UN Women Virtual Knowledge Centre*, www.endvawnow.org.

C. Risk assessment and management

Under the Istanbul Convention, national legislation should mandate that the police, prosecutors, and the judiciary have the duty to conduct risk assessments and to adopt protective measures accordingly. Such assessments are vital in determining the risk for the victim of further injury or homicide, and should play an important role in the State's response to each case. Moreover, risk assessment is critical in cases of domestic violence, where repetition rates and escalation of violence are a well-established pattern. Experience shows that a person known to the victim perpetrates most cases of violence against women.

Pursuant to article 51 of the Istanbul Convention, parties should specifically take into account possession or access to firearms. Additionally, in order to cover all weapons that could be used in serious cases of violence, particularly combat-type knives, parties are encouraged to take into account, as far as possible, the possession of or access to any kind of weapon. The European Court of Human Rights has already evaluated this obligation and in *Opuz v. Turkey* considered that the respondent State failed to take into account that the accused had a shotgun.

Good practices

The *Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice*[59] urges States to "*review, evaluate and update their criminal procedures*" in order to ensure that "*safety risks, including the vulnerability of victims, are taken into account in decisions concerning non-custodial or quasi-custodial sentences, the granting of bail, conditional release, parole or probation, especially when dealing with repeat and dangerous offenders*" (Sec. III-15-j). The same document recommends ensuring that "*criminal justice officials and victims' advocates conduct risk assessments that indicate the level or extent of harm that victims may be subjected to based on their vulnerability, the threats to which they are exposed, the presence of weapons and other determining factors"* (Sec. IV-16-f).

On the other hand, coordination and protocols have proven to be key instruments in assessing and managing risk. For instance, the UK has set up a Multi-Agency Risk Assessment Conference (MARAC) dedicated to high-risk victims. The MARAC meets regularly to exchange information and take action to prevent violence and includes representatives of all relevant involved agencies and authorities. The key instrument the MARAC uses is the individual safety plan for each victim.

[59] Adopted by UNGA *Resolution on Strengthening crime prevention and criminal justice responses to violence against women*, A/RES/65/228, 2011.

D. Protection orders

Articles 52 and 53 introduce the obligation for States Parties to establish so-called protection orders.

Emergency barring orders

As the Explanatory Report to the Istanbul Convention underlines (Paragraph 264), *"Rather than placing the burden of hurriedly seeking safety in a shelter or elsewhere on the victim, who is often accompanied by dependent children, often with very few personal affairs and for an indefinite period of time, the drafters considered it important to ensure the removal of the perpetrator to allow the victim to remain in the home."* Moreover, this measure also may be used to bar the offender from returning to the residence or contacting the victim.

Emergency barring order must cover the following characteristics in order to meet the standard of the Istanbul Convention:

1) Content: vacate the common residence and prohibition of contact.

2) Period: it is up to the State, but it must be enough to afford protection to the victim and allow her to take further steps. In particular, it should be long enough to have a protection order or similar mechanisms enforced.

3) Competent authority: it is up to the State, but it must be an immediate decision. In most cases, it is the police or a judge who are granted with this power.

4) Procedure: it is up to the State and normally dependent upon the competent authority. Access to emergency barring orders must be easy and feasible for victims.

5) Scope: the Istanbul Convention refers to persons at risk. In most States this mechanism is limited by the context of the violence, often the family, status of victims and forms of violence, and sometimes only available in the context of criminal proceedings. It is advisable to include victim's relatives under the scope of these orders.

Protection orders

Initially, protection orders were developed to provide legal protection to victims of intimate partner violence who, after the separation, continued to be threatened and harassed by an ex–partner. Now they have become essential mechanisms in most forms of violence against women, as the growing body of knowledge in the area shows that in most cases violence comes from a person known to the victim.

Restraining or protection orders must cover the following characteristics in order to meet the standard of the Istanbul Convention:

1) Content. The Explanatory Report to the Istanbul Convention notes that the protection order aims at *"prohibiting, restraining or prescribing a certain behaviour by the perpetrator."* Usually, the content of protection orders is very flexible as to include: to stay away from the complainant and her children and/or other people (sometimes specified in area and/or as a minimum distance); to prohibit the perpetrator from directly or indirectly contact with the victim; to refrain from further violence; to prohibit possession, use or access to firearms or other weapons; etc. Some legal frameworks also include contents of a "civil" nature, such as use of common properties, child custody, parental rights, or providing financial support for the victim.

2) Period. The protection order is issued for a specified period or until modified or discharged. Most States have one or two months long protection orders, with the possibility of renewing it.

3) Competent authority: it is up to the State, but it must be an immediate decision. In most cases, the competent authority is a judge.

4) Procedure: it is up to the State and normally dependent upon the competent authority (i.e. civil judge or criminal judge). The Istanbul Convention requires that they are available for immediate protection and without undue financial or administrative burdens placed on the victim. Accordingly, evidentiary requirements should not be too high and it is advisable the possibility of issuing the order only based on the victim's testimony exist.

Moreover, protection orders should be available irrespective of, or in addition to, other legal proceedings, as the victim may not be prepared to press criminal charges. On the other hand, the fact that criminal or civil proceedings concerning the same set of facts are underway against the same perpetrator shall not prevent a restraining or protection order from being issued. In other words, it should be an autonomous procedure.

5) Standing. The Istanbul Convention states that, where necessary, the order may be issued on an *ex parte* basis. According to the Explanatory Report to the Istanbul Convention (Paragraph 272), *"This means that a judge or other competent official would have the authority to issue a temporary restraining or protection order based on the request of one party only."* However, *"the person against whom such an order has been issued should have the right to appeal it before the competent authorities and according to the appropriate internal procedures."*

Some States only allow the victim to apply for protection orders, while others include the possibility for *ex officio* orders or expand standing as to encompass victim's relatives, NGO, dedicated institutions and so on. The Explanatory Report to the Istanbul Convention notes on this regard that (Paragraph 276): *"parties may also consider taking measures to ensure that standing to apply for restraining or protection orders referred to in paragraph 1 is not limited to victims. These measures are of particular relevance in relation to legally incapable victims, as well as regarding vulnerable victims who may be unwilling to apply for restraining or protection orders for reasons of fear or emotional turmoil and attachment."* Still, the possibility of applying for a protection order usually depends on the jurisdiction that applies, criminal or civil.

6) Legal regime. In most cases, both the procedure and the role of involved parties depend on the legal regime under which the orders may be issued. Paragraph 269 of the Explanatory Report to the Istanbul Convention makes it clear that it is up to the State, as what matters is to achieve effective protection, *"Whether restraining or protection orders are based in civil law, criminal procedure law or administrative law or in all of them will depend on the national legal system and above all on the necessity for effective protection of victims."*

7) Scope: it is up to the State. It is advisable to allow for protection orders for relatives or persons close to the victim. On the other hand, recent legislative developments have extended the application of such orders to forms of violence other than domestic.

8) Sanctions. Third paragraph of article 53 requires effective and dissuasive sanctions against breaches of the protection orders, while these sanctions may be criminal or not. However, most experts recommend criminalising any violation of a protection order, as discussed above in the chapter on the Criminal Code.

Protection orders are complementary to a short-term emergency barring order thus one does not exclude the other. Both should be available.

It is also important to prevent perpetrators from taking advantage of these two mechanisms, which requires a gender understanding of violence against women. Paragraph 276 of the Explanatory Report to the Istanbul Convention calls on States to ensure that *"in cases of domestic violence, restraining and protection orders as referred to in paragraph 1 may not be issued against the victim and perpetrator mutually. Also, parties should consider banning from their national legislation any notions of provocative behaviour in relation to the right to apply for restraining or protection orders. Such concepts allow for abusive interpretations aimed at discrediting the victim and should be removed from domestic violence legislation."*

Finally, experts draw attention to the fact that there has to be a well functioning institutional apparatus for the protection orders to be effective. Cheryl A. Thomas, former director of the Women's Human Rights Program at The Human Rights Advocates, notes, *"As with all laws, the effectiveness of the order for protection greatly depends on an understanding of the dynamics of domestic violence by those who implement the law, as well as diligent monitoring by advocates and legal system professionals to identify gaps and weaknesses that undermine victim safety and offender accountability as the law is applied."*[60]

There are numerous comprehensive researches on the types and purposes of such orders, the scope of measures they encompass and the relevant legal proceeding conducted by leading international organizations or distinguished experts. A significant effort towards the analysis of the existing legal mechanisms has been made by the United Nations Special Rapporteur on Violence Against Women, Radhika Coomaraswamy through a report on *Further Promotion and*

[60] Legal Reform on Domestic Violence in Central and Eastern Europe..., supra. note 11, p. 2.

*Encouragement of Human Rights and Fundamental Freedoms (*1996) and its Addendum which has provided a framework for model legislation on domestic violence.

Good practices

Legal systems differ widely in the regulation of emergency orders with regard to the respective powers of police, prosecutors and courts. In Austria, the State is pioneering this measure, police officers act by their own authority on site and can evict the perpetrator from the common home and impose a ban prohibiting return for a period of up to ten days. This measure does not require the consent or request of the victim.

Other States place the emergency orders within the authority of the criminal or civil judge, although with different procedural requirements. In France, the family court judge is the authority empowered to issue emergency protection orders. In Georgia, the police can issue the order but it requires court approval within 24 hours. These different regulations can all be effective, if the competent authority is able to respond in a very short time and to prevent further violence within such period.

The Spanish Organic Act on Integrated Protection Measures against Gender Violence (2004) shows one the very fruitful experience of implementation of effective protection orders of victims of violence.

Unlike other legal systems, the Spanish protection order is a court order, which protects the victim from further abuses and includes **a multi-disciplinary (criminal, civil and assistance) response.**

Every victim of gender based violence (including spouses, common-law relationships, boyfriends and former relationships of the above types) or intra-family violence can go to any Police station, Examining Magistrate's Court, Public Prosecutor's Office or State Women's Services Centres to ask for protection. The state-wide protection order form is immediately sent with all pieces of evidence (such as victim's evidence, witnesses´ testimony, police reports and medical reports…) to the Examining Magistrate's Court, where a full hearing, in which the defendant, the victim and the witnesses are summoned, is scheduled within **72 hours.** The jurisdictional authority to issue the protection order corresponds to the court where the complaint is filed, regardless of the couples´ or victims´ place of residence or the location where the violent act took place.

The protection order can include, as previously mentioned, criminal, civil and assistance measures:

a) Criminal Measures

1. Forbidding the offender to approach the victim, her family, her residence, her job or any other place she might visit, requiring him to remain at a distance established by the Examining Magistrate to guarantee the protection and security of the victim. When the victim and the offender live together, this means evicting the violent offender from the family home, prioritising the victim's right over the property right.

2. Forbidding the offender to contact the victim by telephone, sms, e-mail, post or

through another persons

3. Prohibiting the possession of firearms by violent offenders. When the risk of threat with firearms exists, the Examining Magistrate may authorize law officers to seize any weapons belonging to the violent offender or order him to surrender them.

4. Prohibiting residence in the same town as the victim, in the case of high level of danger for the victim.

5. In case of great risk or great harm to the victim –due to the nature of the offence-, the Examining Magistrate is allowed to take precautionary pre-trial detention measures, when the aim is to prevent the risk of new violent acts against the legal rights of the victim.

The duration of the protection order is not predetermined by law. Examining Magistrates may issue the criminal measures as precautionary measures as long as the need to protect and prevent a new violent act exists and the procedure has not been sentenced or stayed.

b) Civil Measures

Victims of violence may ask for civil measures parallel to criminal ones, such as temporary child custody and vacation determinations, payment for child support and basic living expenses. In the full hearing both parts should defend their positions and present their evidence to demonstrate which one should protect the best interest of the children.

Urgent civil measures only last 30 days. Within this term the victim should file for separation or divorce. In case she does not do so within 30 days, civil measures fail. The jurisdictional authority corresponds to the same Examining Magistrate's Court[61].

c) Assistance Measures

The Spanish Organic Act on Integrated Protection Measures against Gender Violence recognises to every woman who receives a protection order the so called "integral status of protection of the victim", that ensures labour, social security and economic rights, as well as the right to full social assistance.

In this regard, Cheryl A. Thomas notes that, *"In addition to removing a violent offender from a shared dwelling and ordering him to stay away from the victim, it is critically important that new legislation grant courts the authority to include other relief in the order. For example, experience has shown that the orders will often not be effective unless the victim receives payment for child support and basic living expenses."*[62]

It's important to stress, that in some countries complainants/survivors of forms of violence other than domestic violence also may seek protection orders. Chapter 6 of the *Mexican Law on Access of Women to a Life Free of Violence* (2007) makes protection orders available to survivors of any form of violence defined in the Act, including violence in the family, violence in the workplace or educational settings, violence in the community, institutional violence, and femicide.

[61] Spanish Legislation on Violence against Women: Challenges and Facts Expert Paper prepared by: Carmen de la Fuente Méndez, Pueblos Unidos Madrid, Spain – P. 7-9

[62] Cheryl A Thomas, Legal Reform on Domestic Violence in Central and Eastern Europe and the Former Soviet Union, EGM/GPLViolence Against Women/2008/EP.01, UN, 2008, p. 3.

E. Ex officio prosecution

This key standard calls for the public prosecutor to have competence to initiate prosecution, excluding referral to private prosecution, regardless of whether acts of violence occur within the family or not. It follows from the consideration of violence against women as a public offence, domestic violence in particular, and makes it clear the positive obligation of the State to prosecute effectively all these forms of violence, so it is an essential component of the due diligence principle. In this regard, the *Council of Europe Analytical Study* notes, *"Penalisation in law may not mean sanctions in practice. (...) the reality of sanctions and their possible dissuasive effect very much depends on whether the responsible statutory agencies have both the power and the will to initiate prosecution when there is evidence of a crime"* (p. 19).

In *Bevacqua v. Bulgaria*[63] 71127/01 (2008), the European Court of Human Rights assessed the respondent State's compliance with its positive obligations under article 8 of the European Convention of Human Rights. The Court found that the possibility for the applicant to bring private prosecution proceedings and seek damages *"was not sufficient as such proceedings obviously required time and could not serve to prevent recurrence of the incidents complained of"* (Paragraph 83). The Court upholds similar standards in cases of sexual violence, for instance in *MC v. Bulgaria*, where it concluded, "*States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution"* (Paragraph 153).

There are significant differences in prosecutorial systems, most notably between States with a legality principle, where the prosecutor has the legal duty to prosecute *ex officio* and those with a more discretionary system, where the decision to prosecute depends primarily on whether it is in the public interest. The Istanbul Convention requires that at least with regard to some forms of violence against women, States consider that investigation and prosecution is always in the public interest.

In particular, the standard in the Istanbul Convention mandates that investigation and prosecution shall not be "wholly dependent" upon the victim's report. The Explanatory Report to the Istanbul Convention confirms that this term intends to allow for a flexible implementation, *"The drafters decided to use the term "wholly dependent" in order to address procedural differences in each legal system, bearing in mind that ensuring the investigations or prosecution of the offences listed in this article is the responsibility of the state and its authorities"* (Paragraph 280).

On the other hand, 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. With regard to every other form of violence against women, the Explanatory Report to the Istanbul Convention clarifies that, *"law enforcement authorities should investigate in a proactive way in order to gather evidence such as substantial evidence,*

[63] *Bevacqua v. Bulgaria* nº 71127/01, European Court of Human Rights, 2008.

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" (Paragraph 280).

It is important to notice that article 55 includes two different obligations. It requires *ex officio* investigation and prosecution, but it also mandates that the legislation should allow proceedings to continue even if the victim withdraws her/his statement or complaint. Evidentiary issues may arise in many cases without the cooperation of the victim and prosecution may not succeed. However, the Istanbul Convention only requires that such prosecution is legally possible.

Finally, article 78.2 of the Istanbul Convention signals paragraph 1 of article 55 as open to reservation, yet only in respect of minor offences under article 35 (physical violence).

Pursuant the second paragraph of article 55, the Istanbul Convention requires parties to allow governmental and non-governmental organizations 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. As the Explanatory Report to the Istanbul Convention recalls, *"Good practice examples have shown that victims who are supported or assisted by a specialist support service during investigations and proceedings are more likely to file a complaint and testify and are better equipped to take on the emotionally challenging task of actively contributing to the outcome of proceedings."* Furthermore, this provision does not only cover legal assistance but also psychological and other kinds of support.

Good practices

A growing international trend upholds the principle that there is a public interest in effective investigation and prosecution of such offences. For instance, in the United States, government-funded service centres are located in court buildings to provide efficient and easy access to legal advice and other support for domestic violence survivors. Specialized NGOs run most of these centres. Similar facilities exist in Spain or Sweden, but they are State-run services. Finally, in Germany, victims of rape or sexual coercion have the right to be accompanied by a trusted person during investigation and court proceedings.

F. Support and protection of victims

The obligation to protect and assist the victim, *"requires exploring the connections between human rights and victims' rights."*[64] Legal proceedings often re-victimize survivors; therefore, it is

[64] EU feasibility study, p. 26

important to ensure that legal proceedings are conducted in a manner that protects their safety and dignity.

The standard adopted in the Istanbul Convention follows also a growing international trend to enhance the role of victims in criminal proceedings. In fact, there are specific international victims' rights instruments, like the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [65] or the EU Framework decision on the standing of victims in criminal proceedings, recast as Directive 2012/29/EU of the European Parliament and of the Council, 2012. Moreover, measures included in article 56 go along the line of good practices suggested in the UN Handbook on Violence Against Women, sections 3.9.3 and 4.

In particular, the Istanbul Convention calls for the implementation of different procedures, yet some of them are mandatory and others are subordinated to the possibilities under internal law. Hence, the latter measures are not part of the minimum standard.

1) **Protection and support.** Indents a) and f) of article 56 include general obligations, which couple with dedicated mechanisms provided for in the Istanbul Convention, such as the risk assessment (Article 51), the protection order (Arts. 52 and 53) or assistance in proceedings (Article 55.2).

2) **Information.** Indents b) and c) seek to guarantee victims' right to information. They should be informed about the custody status of the perpetrator and any relevant change. Further victims ought to be informed about their rights and services available to them and the follow-up given to their complaint. The Explanatory Report to the Istanbul Convention (Paragraph 286) clarifies that these provisions, read in conjunction with article 19, require that information be provided in a language the victim can understand.

3) **Participation in proceedings**. Indent d) provides rules for enabling victims to take part in criminal proceedings in a manner consistent with internal law. The Istanbul Convention seeks to ensure that, at least, victims may present their views and provide evidence. Furthermore, indent h) ensures the right of the victim to be assisted by an "independent and competent interpreter." The Explanatory Report to the Istanbul Convention adds that the interpreter must be provided free of charge (Paragraph 291).

4) **Privacy**. Article 56 requires parties to ensure the right of privacy and honour, in particular, adopting measures to prevent the public dissemination of any information that could harm the victim or lead to her identification. The Explanatory Report to the Istanbul Convention emphasises that this provision shall not interfere the right of defence (Paragraph 289).

[65] GA Resolution 40/34, 1985

5) **Contac with the perpetrator.** States should avoid contact between victim and perpetrator within court, police offices and other dependences whenever is possible. Moreover, indent i) encourages parties to enable victims to testify without being present (i.e. video conference) or at least without the presence of the perpetrator. There are a number of ways to ensure this right, which is essential to prevent re-traumatizing the victim, without hampering the rights of the defence.[66]

6) **Children**. Finally, second paragraph of article 56 envisages especial measures to protect the best interest of child victims and child witnesses.

[66] See ER, Para. 292