



**Legislative review of
Bulgarian criminal law
in light of the standards
established by the
Council of Europe
Convention on
Preventing and
Combating Violence
against Women and
Domestic Violence**

**Research conducted within the project
“Improvement of national legal framework
to bring it line with Council of Europe
standards” funded by the Norway Grants
Financial Mechanism**

**LEGISLATIVE REVIEW OF
BULGARIAN CRIMINAL LAW
IN LIGHT OF THE
STANDARDS ESTABLISHED
BY THE COUNCIL OF EUROPE
CONVENTION ON
PREVENTING AND
COMBATING VIOLENCE
AGAINST WOMEN AND
DOMESTIC VIOLENCE**

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28 June 2016

¹ The opinions expressed in this report are solely the responsibility of the author and do not necessarily reflect the official position of the Council of Europe, nor does it bind in any way the 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. This report has been written in English and is based on translations to English from Bulgarian laws. Errors from translation may result.

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I. Introduction

1. Background

In recent years, Bulgaria has taken several steps to improve the protection and support to victims of violence against women. In March 2005, Bulgaria adopted the Law on the Protection against Domestic Violence, which defined domestic violence and established a series of protection measures and rights for victims of domestic violence. It was subsequently amended in 2009, extending the scope of domestic violence to cover economic violence in addition to physical, sexual and psychological violence. That same year, the Bulgarian Criminal Code was amended criminalising the failure to comply with a protection order granted to a victim. Limitations were also introduced on the right of domestic violence perpetrators to possess weapons. Moreover, the Legal Assistance Act was amended in 2013 with a view to ensuring that free legal assistance is provided to victim of domestic and sexual violence unable to afford legal counsel.

Despite these progressive steps taken in the last decade, violence against women, including domestic violence, remains widespread in Bulgaria. According to the recent survey², 28% of women have experienced physical and/or sexual violence by a partner or non-partner since the age of 15 and 38% of them perceive violence against women as a fairly common practice. Although the prevalence of all forms of violence is hard to establish due to under-reporting by victims and a lack of accurate and public statistics, research conducted by national NGOs shows that one in four women has been a victim of domestic violence in the country.³

Against this background, the Council of Europe has partnered with the Ministry of Justice of the Republic of Bulgaria under the project “Improvement of the national legal framework to bring it in line with Council of Europe standards and strengthening the capacity of competent institutions involved in cases of gender-based violence including domestic violence”. The project is being implemented in the framework of Programme BG12 “Domestic and Gender-based Violence”⁴ funded by the Norway Grants Financial Mechanism.⁵ One of the project’s objectives is supporting Bulgaria in the creation of a robust legal framework in the field of gender based violence and domestic violence through the elaboration of an in-depth analysis of relevant Bulgarian legislation highlighting its strengths and gaps in relation with the requirements of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter “the Istanbul Convention”) that Bulgaria signed on the 21 April 2016. The analysis also provides with a comparisons with relevant European practices in the area.

² *Violence against Women – an EU wide survey, Results at a glance*, European Union (EU) Agency for Fundamental Rights, 2014, available at http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf

³ *Struggling for gender equality: Sharing Lithuanian and Bulgarian experience*, Eastern Europe Studies Center, 2013, available at http://www.hrmi.lt/uploaded/Documents/Struggling%20for%20Gender%20Equality_2013_EN_2.pdf

⁴ See <http://eeagrants.org/programme/view/BG12/PA29>

⁵ See <http://eeagrants.org/Who-we-are/Norway-Grants>

This review aims at providing the basis for the development - by the Ministry of Justice - of a national strategy, as well as the elaboration of legislative proposals for improving the Bulgarian framework to deal with violence against women.

2. Scope

The report is a compliance review of the Bulgarian criminal legislation with respect to the standards of the Istanbul Convention. The Istanbul Convention defines and criminalises various forms of violence against women, including domestic violence. It includes in particular, physical and psychological violence, sexual violence including rape, stalking, female genital mutilation, forced marriage and forced abortion and forced sterilisation and sexual harassment.⁶ The scope of this legislative review is circumscribed to the Bulgarian Criminal Code⁷ (hereinafter “BCC”) and Criminal Procedural Code⁸ (hereinafter “BCPC”) *vis-à-vis* the substantive criminal provisions of the Istanbul Convention contained in Articles 33-40, 41, 42, 43, 46, 47, 48 and 55 as well as the general definitions applicable throughout the Istanbul Convention (Article 3). The report also analyses the provisions of the Law on the Protection against Domestic Violence⁹ (hereinafter “LPADV”) and the Law on the Protection against Discrimination (hereinafter “LPD”)¹⁰, where relevant.

This report underlines the gaps but also the strengths of Bulgarian legislation and identifies changes and/or additions to the Bulgarian Criminal Code with a view to ensure the effective criminalisation of all the forms of violence covered by the Istanbul Convention. It must, however, be underlined that the prosecution of these criminal offences, particularly the legislative framing and implementation of the due diligence principle as required by Article 5 and 49 of the Istanbul Convention, is not assessed in this analysis. Other pieces of relevant Bulgarian legislation such as the Law on Legal Aid, the Law on Victims’ Assistance, the Law on the Protection of Children, as well as other non-legislative measures fall outside the scope of this report. As a consequence, this report does not constitute a full and comprehensive review of the entire legal and institutional framework governing the prevention of and protection from violence against women and domestic violence, and the prosecution of perpetrators in Bulgaria.

⁶ The Istanbul Convention leaves the choice to States Parties to criminalise sexual harassment or to apply other legal sanctions (Article 40). This particularity of Article 40 is explained thoroughly in the report under sexual harassment part.

⁷ Criminal Code, adopted on 2 April 1968, last amended on 13 October 2015.

⁸ Criminal Procedural Code, adopted on 29 April 2006, last amended on 13 October 2015.

⁹ Law on Protection against Domestic Violence, adopted on 29 March 2005, last amended on 3 July 2015.

¹⁰ Law on the Protection against Discrimination, adopted on 30 September 2003, last amended on 7 April 2015.

3. Methodology

Although the Istanbul Convention¹¹ is the basic benchmark for the purposes of this report, the legislative review requires taking into account other pertinent international norms.

Bulgaria ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹² in 1982 and its Optional Protocol in 2006. The country is also a party to the European Convention on Human Rights (ECHR)¹³ since 1992 and subject to the jurisdiction of the European Court of Human Rights (ECtHR). As full member of the European Union (EU) since 2007, Bulgaria is also bound by the EU *acquis*. Accordingly, this report construes the standards of Bulgarian criminal legislation in the light of these and other applicable international norms and case law, in particular recommendations and reports of the statutory organs of the Council of Europe (CoE), United Nations (UN) and the EU. As appropriate, good practices from different legal systems are also highlighted.¹⁴

This report also takes into account several research studies and/or reports published by civil society. Bulgarian NGOs have been actively involved in policy and legislation-making processes and are spear-heading the fight against violence against women and domestic violence in the country. Accordingly, the gap analysis and proposals in this report refer to the work of these organizations including but not limited to, the Bulgarian Alliance for Protection against Domestic Violence, Bulgarian Gender Research Foundation, Gender Alternatives Foundation or Alliance Centre of NGOs- Razgrad.

Another important source in performing the gap analysis is the information gathered in the course of a Fact-Finding Mission (FFM) that took place on 21-22 March 2016 in Sofia. Discussions at the meetings with representatives of the judiciary, the police force and civil society have been very useful in identifying the concrete issues related to violence against women and domestic violence in the country. In addition, the four evaluations¹⁵ prepared by the Bulgarian Ministry of Justice have been instrumental in understanding the Bulgarian legal setting and they are thus referred to in this report, where necessary.

¹¹ Bulgaria signed the Istanbul Convention on 21 April 2016. The Istanbul Convention was opened for signature on 11 May 2011 and entered into force on 1 August 2014.

¹² Adopted by UN General Assembly on 18 December 1979 and entered into force on 3 September 1981, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

¹³ Signed on 4 November 1950 and entered into force in 1953, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁵ These evaluations are as follows: (1) evaluation of Bulgarian domestic violence legislation; (2) evaluation of Bulgarian legislation relating to gender-based violence; (3) evaluation of law and practice in four EU member states: (4) Lithuania, Portugal, Romania and Spain; comparative analysis of Bulgarian legislation and best European practice.

4. Structure

As explained above, this report and its ensuing proposals have a limited scope and only intend to identify legal shortcomings in the relevant criminal provisions, thus suggesting changes and/or additions to comply with the Istanbul Convention.

The report first addresses the concepts of violence against women and domestic violence to then commence and article-by-article analysis of the Istanbul Convention, as follows:

- Requirements of the Istanbul Convention;
- Analysis of the Bulgarian criminal legislation; and
- Findings

II. Aligning concepts and definitions of violence against women and domestic violence with the Istanbul Convention

Violence against women and gender-based violence are forms of discrimination that seriously inhibits women's ability to enjoy fundamental rights and freedoms. It is a major obstacle for empowerment and self-fulfilment of women. It is also a clear reflection of historical and structural inequality in power relations between women and men and one of the crucial social mechanisms by which women are forced into a subordinate position. It is therefore important to recognize the scourge of violence against women and gender based violence and to address it in a holistic manner.

1. Violence against women and domestic violence in the Istanbul Convention

The Istanbul Convention (Article 3) provides several definitions that are applicable throughout the whole text. These definitions, particularly the definition of violence against women and domestic violence, are essential for its comprehensive interpretation.

Violence against women is defined in Article 3 (a) as “a violation of human rights and a form of discrimination against women” and that it “shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”¹⁶ Article 3 (d) further sets out what “gender-based violence against women” that means “violence that is directed against a woman because she is a woman or that affects women disproportionately”.

¹⁶ This second part of the definition is the same as contained in the CEDAW Committee General Recommendation No. 19 on violence against women (1992) as well as in Article 1 of the UN Declaration on the Elimination of All Forms of Violence against Women.

Article 3 (b) of the Istanbul Convention defines domestic violence as “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim”. Domestic violence includes mainly two types of violence: intimate-partner violence between current or former spouses or partners and inter-generational violence that typically occurs between parents and children. It is a gender-neutral definition that encompasses victims and perpetrators of both sexes.¹⁷

2. Violence against women and domestic violence in the general legal framework in Bulgaria

Neither violence against women nor domestic violence constitutes specific criminal offences under the LPADV or any other specific legislation. Violence against women and domestic violence can be covered under the different provisions of the BCC and qualify as crimes as long as they fulfil the constituent elements of these offences. In other words, the BCC remains the basis for any criminal responsibility. It contains a number of offences that can be used to prosecute perpetrators of violence against women or domestic violence, but, again, the BCC does not contain any specific offence.

The BCC has an explicit provision under Article 162 that penalises acts of discrimination stating that those “who uses violence against another because of his race, nationality, ethnic origin, religion or political conviction, shall be punished...” However, this provision does not include “gender or sex” as a ground for discrimination. The LPD, on the other hand, has provisions defining harassment and sexual harassment but such definitions do not have a criminal nature.

The Bulgarian legal system distinguishes between offences that can only be prosecuted following a complaint by the victim (private prosecution) and offences of a general nature that require public prosecution. Examples of offences requiring a complaint by the victim are minor bodily injury, insult, slander, theft or injury by relatives (spouse, brother, sister) and are found in the Special Provisions sections of the Bulgarian Criminal Code (BCC)¹⁸ The offences that can be used for the prosecution of domestic violence and violence against women under the BCC mostly fall under crimes of specific nature.

The other relevant piece of legislation applicable, the LPADV, offers a legal definition of the term “domestic violence”¹⁹ in a gender neutral manner one that does not refer to violence against women or gender based violence. The Article 2 (1) of the LPADV defines domestic violence as “any act of physical, sexual, psychological, emotional or economical violence as well as the attempt for such violence, any forced restriction to the personal life, the personal liberty and the personal rights, against related persons, persons that are or have been in family relationship or in cohabitation”. Article 3 further provides that protection under this law might be granted to any person who was a victim of domestic violence perpetrated by a spouse or an former spouse, an intimate partner or a former partner with whom the victim is in cohabitation, a person with

¹⁷ See Explanatory Report to the Istanbul Convention, par. 41.

¹⁸ Art. 161, 175, 193a, 218 of the BCC.

¹⁹ Art. 2.

whom the victim has had a child, an older relative, a descendant, a brother or a sister, an in-law, a guardian or a foster parent, members of the victim's extended family, and in particular, any person with whom the victim's parent lives.

The LPADV includes a wide array of acts, of physical, sexual, psychological, emotional and economic nature, which is overall in line with the definition of Article 3 of the Istanbul Convention. It is also positive that such definition includes not only completed actions, but also the threat of such actions. It further contains a broad scope of persons under its protection with a notable limitation: partners who are not in cohabitation in Bulgaria (not living together) are not protected under the LPADV and therefore not entitled to a protection order even though former partners who lived in cohabitation are included in the scope of persons covered.

The LPADV is a piece of civil legislation and it does not create criminal responsibility for any of the acts it offers protection for. The main aim of the LPADV is to provide for protective measures in cases of domestic violence and obliges the state to create conditions for the implementation of programmes²⁰ for prevention and protection against domestic violence and for help and support to the victims. The main protective measure foreseen in the LPADV is an administrative act imposed by the regional civil court, called a "protection order".²¹ This order requires the perpetrator to refrain from any further acts of domestic violence, it evicts the perpetrator from the jointly inhabited residence, forbids the perpetrator to come close to the residence, workplace and the social contacts and recreational places of the victim, it requires the perpetrator to attend specialized programmes, and imposes pecuniary penalties.²²

Victims must apply for a protection order within 30 days of an act of violence, after 30 days, it is time-barred and the victim must experience a new act of violence before seeking protection.²³ This one-month time limit to file a petition for a protection order has been criticised by the CEDAW Committee²⁴ that called for its elimination. Similarly, in its decision *V.K. v. Bulgaria*, the CEDAW Committee held that the 30 day limit must be removed to ensure that protection orders are available without placing undue administrative and legal burdens on victims.²⁵

The LPADV provides for remedies under civil law and proceedings initiated in its realm constitute a specific type of civil court claims. This means that the LPADV does not in itself give rise to criminal prosecution for acts of domestic violence except when the perpetrator violates the court-mandated protection order and/or the European Protection Order under Article 296 (1) of the BCC.²⁶ In such cases, the perpetrator is publicly prosecuted for obstructing a judicial sentence, but not for the violence in itself. In other words, the LPADV offers protection from

²⁰ Art. 6.

²¹ Art. 4 and 5.

²² in the amount from BGN 200 to BGN 1,000.

²³ Art. 10(1).

²⁴ Concluding observations of the CEDAW Committee, CEDAW/C/BGR/CO/4-7,7 August 2012, par. 26.

²⁵ *V.K. Bulgaria* (communication no: 20/2008), 27 September 2011, par. 9.16.

²⁶ BCC, Art. 296 (1) reads as follows: "A person who obstructs or prevents in any way whatsoever the enforcement of a judgment or does not comply with an order for protection against domestic violence or European Protection Order shall be punished by deprivation of liberty of up to three years or a fine of up to BGN five thousand."

further violence but does not seek to ensure the judging of the criminal responsibility of the perpetrator for the offence committed.

3. Findings

Recognising and combating with violence against women and gender based violence lie at the heart of the Istanbul Convention. The Istanbul Convention is based on the understanding that violence against women is a form of gender-based violence that is committed against women because they are women and that it is structural violence – violence that is used to sustain male power and control. The Istanbul Convention leaves no doubt: there can be no real equality between women and men if women experience gender-based violence on a large-scale and state agencies and institutions turn a blind eye. In order to step up State parties' commitment to equality and the recognition of the gendered dimension of domestic violence, an important step would be to recognise this scourge and commit itself to eliminate it. Therefore, it would be appropriate in Bulgaria to expand the scope of the LPADV with a view to include the definition of violence against women / gender based violence. Along this same line, Article 162 (2) of the BCC could be amended with a view to integrate gender or sex as a basis for discrimination.

Although not excluded, the LPADV does not offer explicit protection to victims of domestic violence who are in same-sex relationships. Albeit the definition of domestic violence is gender neutral in the Istanbul Convention, Article 4(3) requires its implementation to be secured without discrimination on any grounds, among others, gender, sexual orientation and gender identity.²⁷ In Austria, for instance, the Protection against Violence Act²⁸ grants protection from violence committed by an intimate partner or former partner, including same-sex partnerships. Integrating such a reference could reinforce the legal guarantees provided for same-sex partnerships.

As expressly indicated in the Explanatory Report to the Istanbul Convention, the joint residence of the perpetrator and the victim is not required for certain acts to qualify as “domestic violence”.²⁹ Consequently, the requirement of cohabitation in order to obtain protection under Article 3 of the LPADV does not comply with the standards of the Istanbul Convention. The definition of applicable relationships under the concept of domestic violence would therefore need to be expanded to include victims that do not share the same residence with the perpetrator. For example, in Spain, domestic relationships³⁰ are defined broadly and include non-cohabiting partners.

²⁷ See also Explanatory Report, par. 53.

²⁸ Second Protection Against Violence Act (Zweites Gewaltschutzgesetz), BGBl. I No. 40/2009, available at http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=BgblAuth&Dokumentnummer=BGBLA_2009_I_40

²⁹ Par. 42. See also UN Handbook for Legislation on Violence against Women (VAW), 2010, p. 24-25, available at <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

³⁰ The Spanish Organic Act on Integrated Protection Measures against Gender Violence (2004), available at http://www.isotita.gr/var/uploads/NOMOTHESIA/VIOLENCE/SPANISH%20LAW%20Organic%20Act%201_28-12-04%20on%20Violence.pdf

Lastly, in line with international recommendations to Bulgaria, the 30 day limit needs to be eliminated as it can seriously impair the victim's capacity to obtain the necessary protection.

III. Substantive criminal offences of the Istanbul Convention

The Istanbul Convention and specifically Articles 33 to 39 define different forms of violence against women and establish them as criminal offences. State parties are required to ensure that a particular intentional conduct is criminalised. However, it does not oblige them to necessarily introduce specific provisions criminalising the conduct described by it.³¹ On the other hand, the offences described in these articles represent a minimum consensus and States certainly have the option of establishing higher standards in domestic law. All criminal law provisions of the Istanbul Convention are presented in a gender-neutral manner, in principle; the sex of the victim or perpetrator should thus, in principle, not be a constitutive element of the crime, with the exception of the criminal provision on female genital mutilation and forced abortion and forced sterilization. This does not prevent State parties from introducing gender-specific provisions.³²

A large number of offences established under the Istanbul Convention are offences typically committed by an intimate partner, a family member or others who are in the close social circle of the victim. This personal proximity often puts the victim in a difficult situation for the purposes of prosecution. In some instances, on the other hand, the conduct is not criminalised. The most prominent example is rape within marriage, which for a long time had not been recognized as a crime because of the relationship between the victim and the perpetrator.³³ For this reason, Article 43 of the Istanbul Convention requires that the offences defined apply irrespective of the nature of the relationship between victim and perpetrator.

Another significant element guaranteeing the rights of victims of violence against women and domestic violence is ensuring their access to justice. Obviously, criminal procedure systems vary and the public prosecution is not an absolute rule. However, it is also a fact that victims of violence against women and domestic violence suffer from high level of fear, shame and helplessness given the personal proximity they have with perpetrators and thus, they may fail to initiate criminal proceeding against them. This is why the Istanbul Convention under Article 55 (1) places on State parties the obligation to ensure that the prosecution of certain offences³⁴ shall not be wholly dependent upon the report or complaint filed by the victim (*ex parte*) and that the public prosecution underway may continue even the victim has withdrawn his statement/complaint (*ex officio*).

³¹ Explanatory Report, par. 155.

³² *ibid.*, par. 153.

³³ *ibid.* par. 219.

³⁴ Physical violence (Art.35), sexual violence, including rape (Art.36), forced marriage (Art.37), female genital mutilation (Art. 38) and forced abortion and sterilization (Art.39) of the Istanbul Convention. For cases of psychological violence (Art. 33), stalking (Art.34) and sexual harassment (Art. 40), *ex officio* prosecution is not mandatory.

IV. Article by Article gap analysis

As stated before, the gap analysis of the substantive criminal offences contained in the Istanbul Convention will be limited to Articles 33-40, 41, 42, 43, 46, 47, 48 and 55. Where necessary, proposals for a legal amendment are put forward by providing a reference to other international benchmarks and/or good practices.

Given the intertwined relations and in order to provide a more comprehensive assessment of the shortcomings under the BCC, the requirements of Article 43 (application of criminal offences) and 55 (*ex parte* and *ex officio* proceedings) are analysed horizontally throughout the analysis and not separately. Furthermore, Article 44 (jurisdiction) and 45 (sanctions) are outside the remit of the domestic criminal legislation analysed and therefore will not be covered here.

1. Psychological violence

1.1 Requirements of the Istanbul Convention

Article 33 of the Istanbul Convention requires State parties to criminalise psychological violence, which is described as “the intentional conduct of seriously impairing a person’s psychological integrity through coercion and threats.” Psychological violence can be exerted by various means and methods, such as verbal abuse, yelling, threats, harassment, intimidation, constant criticism, shaming, blaming, name calling, insulting, ridiculing, imitating and publicly humiliating the victim, isolating the victim, discouraging any independent activities, depriving the victim of means of subsistence or economic independence, etc.³⁵ The Istanbul Convention leaves the interpretation of “intentional” to domestic law and it does not define either what constitutes a “serious impairment”. However, the Explanatory Report of the Convention spells out that “psychological violence 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.”³⁶

The Istanbul Convention³⁷ allows for State parties to provide for non-criminal sanctions, instead of criminal sanctions to psychological violence by entering a reservation when ratifying the Convention.³⁸

³⁵ For a thorough explanation of psychological violence and how it is regulated in COE Member States, see Report on the *Psychological Violence* by the Committee on Equal Opportunities for Women and Men of the Parliamentary Assembly of the Council of Europe-PACE- (2011). available at <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12971&lang=en>

³⁶ Explanatory Report, par. 181.

³⁷ Art. 78(3). This is also applicable to stalking under Art. 34.

³⁸ Art. 79 and Explanatory Report, par. 385. However if such a reservation is made it will have a limited validity of five years. After this deadline, reservations will lapse unless they are expressly renewed. In the case of renewal, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO- the independent group of experts tasked with monitoring the implementation of the Istanbul

1.2 Analysis of the Bulgarian criminal legislation

The BCC does not specifically criminalise psychological violence. The rules governing coercion (Article 143) and threat (Article 144 (1) of the BCC may respectively be considered as the corresponding provisions to psychological violence. However, it emerged from the practical application of these provisions that they extend rarely³⁹ to psychological violence. Despite their applicability, the practice established by the Bulgarian law enforcement and the justice system do not lead to the establishment of criminal proceedings under these articles.

Article 127 on instigation to suicide and assisted suicide is also relevant to some of the aspects of psychological violence, particularly given that it includes situations in which there is a systematic abasement of the dignity of a person.⁴⁰ This article is therefore sometimes invoked in cases where there are claims related to some elements of psychological violence.⁴¹ Article 181 (1) of the BCC which defines a “crime of placing a relative in distress”⁴² could also apply to cases of psychological violence in cases of gender-based violence or domestic violence.

1.3 Findings

Psychological violence is an almost invisible yet widespread form of violence. It does not leave visible marks on the victim’s body, but leaves deep and lasting scars which are very difficult to heal. It very often occurs in intimate relationships or in the domestic context but it may well occur in other settings, such as in the workplace or school environment. It would be therefore appropriate to introduce a general criminal offence of “psychological violence” in the BCC extended to all its aspects instead of having them partially covered in existing criminal provisions. There are several countries that have opted for such an approach. For instance, the French Criminal Code⁴³ defines psychological violence as a crime in itself. In Portugal, psychological ill-treatment is criminalised and can be punished with a prison sentence.⁴⁴ In

Convention) will examine the explanations provided by the state party to justify the extension of its reservations.

³⁹ Based on meetings with experts during the FFM in Sofia on 21-22 March 2016.

⁴⁰ Art. 127 (3) reads as follows “A person who through cruel treatment or systematic abasement of the dignity of a person who was in material or other dependency upon him, has lead him to suicide or to an attempt at suicide, having admitted it as possible, shall be punished by deprivation of liberty for two to eight years”.

⁴¹ Based on meetings with experts during the FFM in Sofia on 21-22 March 2016.

⁴² Article 181 (1) reads as follows: “A person who violates an obligation to a spouse, a relative of ascending or descending line, incapable of taking care for himself, and thereby places him in a position of serious distress, shall be punished by probation as well as by public censure, provided the act does not constitute a graver crime.”

⁴³ Art. 222-33-2-1 which reads as follows: “harassing one’s spouse, partner, cohabitant by repeated acts that degrade one’s quality of life and cause a change in one’s physical and mental state of health is punishable by a maximum penalty of three years in prison and a 45000 euros fine, if such harassment resulted in an incapacity to work for eight days or less (five years and a fine of 75000 euros if the resulting incapacity to work is over eight days)”, available at <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719>

⁴⁴ Art. 152 of Portugal Criminal Code. The prison sentence is one to five years.

other countries, like United Kingdom, where psychological violence is criminalised, higher penalties are provided when it happens in the domestic context.

Psychological violence must unequivocally be defined and prosecuted. As indicated by the ECtHR, State parties to the ECHR are under a positive obligation to set up a legal framework against domestic violence and conduct an effective investigation into alleged cases of domestic violence, even if the victim has not necessarily suffered from physical injury, for instance in cases of psychological abuse.⁴⁵ The CEDAW Committee adopted a similar conclusion⁴⁶ stating that the “gender based violence is not limited to inflict physical harm but also covers actions that inflict mental suffering”.

It shows from the legislation as well as judicial practice that cases regarding psychological violence often stay hidden in Bulgaria. Opting for non-criminal sanctions, even if permitted under the Istanbul Convention, could lessen the gravity of this act of violence and further its pervasiveness. Even though the current provisions of the BCC (Article 143 and 144) would allow the prosecution of psychological violence cases, there seems to be resistance and/or lack of knowledge in the judicial actors’ perception of this kind of violence and this results in very rare use of these provisions in practice. Establishing an explicit provision on psychological violence in the BCC, therefore, would facilitate the prosecution of these actions and it is therefore recommended. This would as well increase the levels of reporting and reduce the impunity of perpetrators. Alternatively, if a dedicated offence covering all manifestations of domestic violence is established under the BCC, this offence should cover acts of psychological violence.

2. Stalking

2.1 Requirements of the Istanbul Convention

Article 34 of the Istanbul Convention defines stalking as “the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety” and states that such behaviour should be criminalised. Albeit the definition of the “threatening conduct” is left to domestic laws, two elements contained in Article 34 are characteristic: a) intention on the part of the perpetrator and b) instilling a sense of fear to the other person. Stalking could be manifested in a wide range of acts, such as repeatedly following another person, engaging in unwanted communication with another person, appearing at his or her work place as well as following another person in the virtual world.⁴⁷

Stalking entails a course of conduct of repetitive and significant incidents. In other words, isolated acts do not qualify as stalking. As the Istanbul Convention Explanatory Report clarifies

⁴⁵ *T.M. and C.M. v. Moldova*, (no. 26608/11), 28 January 2014; *Hajduova v. Slovakia* (no.2660/03), 30 November 2010.

⁴⁶ *V.K. Bulgaria* (communication no: 20/2008), 27 September 2011.

⁴⁷ Explanatory Report, par. 182.

this provision is “intended to capture the criminal nature of a pattern of behaviour whose individual elements, of taken on their own, do not always amount to criminal conduct.”⁴⁸

As with psychological violence, Article 78 (3) of the Istanbul Convention allows State parties to provide for non-criminal sanctions, instead of criminal sanctions for stalking thereby comments made in the previous section on the regulation of such reservations also apply here.

2.2 Analysis of the Bulgarian criminal legislation

The BCC does not contain a specific provision on stalking. While some elements of the behaviours that qualify as stalking may be covered by generic offences under the BCC, such as threat (Article 144 (1), slander (Article 147) or damage to property (Article 216), these general provisions do not grasp the full extent of stalking and are likely to be ineffective.⁴⁹ Furthermore, there is no offence that criminalises engaging in unwanted communication under the BCC. Trespassing is only criminalised if it is intrusion in the victim’s residence under Article 70 of the BCC, but not if the victim is being constantly followed in public spaces.

2.3 Findings

In recent years, there has been a trend in Europe towards criminalising stalking as a specific offence and providing protection for victims, since this crime implies repeated courses of conduct. According to a study⁵⁰ from 2011, almost half of the EU member states have introduced a specific provision on stalking in their respective criminal codes. As stalking tactics are diverse and dynamic, particularly due to the ever popular digital technology⁵¹, most of the countries that criminalise stalking use broad terminology and include non-exhaustive lists of possible stalking tactics. Two of its constituent elements -repetitive behaviour and intention- however, can be found in these countries’ respective pieces of legislation. With the exception of Belgium⁵², all EU member states which criminalise stalking⁵³ define it as a repeat offence and clearly laid

⁴⁸ *ibid*, par. 185.

⁴⁹ Based on meetings with experts during the FFM in Sofia on 21-22 March 2016.

⁵⁰ L. Kelly/C.Hagemann-White/T.Meysen/R.Römkens, *Realising Rights: Case Studies on State Responses to Violence against Women and Children in Europe*, London Metropolitan University, 2011, p. 210. available at https://www.tilburguniversity.edu/upload/0669e981-140a-4b05-acc2-5a2428743222_apRRS.pdf

⁵¹ Indeed, internet is an emerging area of concern regarding stalking. According to EU’s FRA Survey of 2014 (see *op. cit.* footnote 1, p. 81-82), 4% of all 18 to 29 year old women experienced cyber-stalking between 2013 and 2014.

⁵² According to Belgian law, one incident can suffice, but the Belgium Supreme Court has ruled that the behaviour needs to be repetitive in order to qualify as stalking, making the difference only theoretical.

⁵³ For instance, the German Criminal Code has a detailed definition of stalking under Section 238 which indicates the behaviours of 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/his 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 persons close to her; 5. Acting in a comparable way and impacting her/his personal freedom in a severe way. Similarly, Section 265 of the Criminal Code of Denmark provides an interesting criminal provision on stalking whereby a warning or a restraining order must be imposed by the police before the person is liable to punishment.

out that the behaviours that fall under this offence must be displayed with the intention to intimidate another person or to disturb the privacy of the everyday life of another person.⁵⁴

The criminal offences currently in existence in Bulgaria do not suggest an adequate criminalisation of stalking. None of the existing provisions capture the repeat and serious nature of stalking. As stated above, while some important components of stalking are covered by general criminal offences such as threat, slander and trespassing, others such as engaging in unwanted communication or repeatedly watching and following a victim are not. This reveals a gap in Bulgarian criminal legislation which would best be closed with the introduction of a specific offence on stalking.

It is recommended that this new offence consists of two elements: repetitive behaviour of a threatening nature and the intention to instil fear in the victim. Such an offence could be the most favourable option even if it is subject exclusively to private prosecution according to the current regime of crimes in Bulgaria. But it could also be appropriate, given the particularities of this offence and its potential effects on victims, to establish this new offence as crime of a general nature and thus, to make public prosecution available. Also, considering that the most common form of stalking is that of post-separation intimate relationships, the context of a domestic setting can further be established as an aggravating circumstance for stalking, in parallel with Article 46 of the Istanbul Convention, for stalking offences. For example, partner (in Malta) or former partner stalking (in Hungary), are subject to higher penalties.⁵⁵

3. Physical violence

3.1. Requirements of the Istanbul Convention

Article 35 of the Istanbul Convention defines physical violence and requires the criminalisation of any intentional act of physical violence against another person irrespective of the context in which it occurs. Physical violence refers to bodily harm suffered as a result of the application of immediate and unlawful physical force. It includes injuries of a minor and serious nature. The acts resulting in the death of the victim are also included.⁵⁶

3.2 Analysis of the Bulgarian criminal legislation

The BCC contains several provisions that jointly cover all aspects of physical violence. These include: acts having led to murder (Article 115) and bodily injury (Articles 128-135) include.

⁵⁴ For instance, the laws of Hungary, Ireland, Malta and the Netherlands. See EU Commission Directorate General for Justice, *Feasibility study to assess the possibilities, opportunities and needs to standardise national legislation on violence against women, violence against children and sexual orientation violence*, 2010, p.67, available at http://ec.europa.eu/justice/funding/daphne3/daphne_feasibility_study_2010_en.pdf

⁵⁵ *ibid.*

⁵⁶ Explanatory Report, par. 188.

Bodily injury is further categorized according to the level of severity in severe, medium and trivial. These categories have implications in terms of their prosecution.

Article 161 (1) of the BCC prescribes that acts having led to medium and trivial injury are crimes of specific nature which are subject to private prosecution. Pursuant to this provision, for trivial bodily injury under Article 130 and 131, paragraph (1), sub-paragraphs 3- 5, for trivial and medium bodily injury under Article 132, as well as for bodily injury under Articles 129, 132, 133 and 134 (that include severe bodily injury), inflicted on a relative of ascending and descending line, a spouse, brother or sister, the criminal prosecution shall be instituted on the basis of complaint by the victim.

“Complaint by the victim” means that, the case is subjected only to private prosecution which means that there is no public prosecutor handling the investigation and prosecution of the perpetrator. Thus, in cases where a person suffered a trivial-level injury, she/he must proceed through the criminal justice system on his/her own. Likewise, victims who sustain severe and medium-level injuries, under Articles 129, 132, 133 and 134, from a relative, including spouses, must proceed with the prosecution through the criminal justice system without the assistance of a prosecutor. As a consequence, these victims must locate and call their own witnesses and present their own evidence in court.⁵⁷ These cases are discontinued if victims withdraw their complaints. The only exception is when a person who inflicts on another severe or medium bodily injury through negligence (Article 133 of the BCC). In such cases, criminal proceedings may not be terminated upon the victims’ request.⁵⁸

On the other hand, Article 48 (1) of the Bulgarian Criminal Procedural Code⁵⁹ (“BCPC”) establishes a possibility where the prosecutor may join the criminal procedure instituted by a victim’s complaint at all stages of the case if the victim is in a “helpless state” or economically depends on the perpetrator of the crime. Similarly, Article 49 of the BCPC states that in extraordinary cases, when the victim of a crime prosecuted upon his/her complaint is not able to defend his/her rights and legitimate interest due to a helpless status or dependence on the perpetrator of the crime, the instituted criminal procedure “shall be preceded under the general order and may not be discontinued even if the victim withdraws his/her complaint”.⁶⁰ This provision, however, requires that a six month time limit has not lapsed since the commission of the crime.

As a general rule under Article 24 of the BCPC, private complaints must be submitted within six-month period from the day when the victim learned about the commitment of the crime, or from the day on which the victim has received a message about discontinuing of the pre-trial procedure on the ground that the crime shall be subject to prosecution on complaint by the victim. In either situations, which allow the prosecutor to join the private prosecution under

⁵⁷ Submission by Bulgarian Gender Research Foundation and the Advocates for Human Rights in cooperation with Alliance for Protection against Domestic Violence for the 22nd Session of the Working Group on the Universal Periodic Review, United Nations Human Rights Council. April-May 2015, par. 17.

⁵⁸ Art. 161 (2) of BCC.

⁵⁹ Criminal Procedural Code (BCPC), adopted on 29 April 2006, last amended on 13 October 2015.

⁶⁰ Sub-paragraphs 3 and 4 of article 49 of the BCPC also states that the victim may participate in the penal procedure acting as a private prosecutor or a civil claimant. But if the prosecutor withdraws his/her participation in the procedure, the victim may maintain the accusation.

Article 48 and 49, the initiation of criminal proceedings still depends on the filing of a complaint by the victim in the first place.

3.3 Findings

Physical violence is the most widespread form of violence against women and domestic violence. In most of the cases, victims suffer from bodily injury and the violence occurs between intimate partners. Bodily injury might result in severe health damage to the victim.⁶¹ In the absence of a specific provision criminalising domestic violence under the BCC, the provisions regarding bodily injuries (Articles 128-135) remain the primary criminal offences for which perpetrators can be held accountable. The fact that these criminal offences are prosecuted exclusively upon the complaint of the victim, as required by Article 161 of the BCC, puts the victims in a very vulnerable situation, particularly given the fact that the BCC specifically sets out this requirement when the injury was inflicted by a relative, including spouse.

By referring cases of intimate partner violence to private prosecution exclusively, the BCC virtually characterises violence against women and domestic violence as a private act. This approach does not ensure the rights of the victims, especially their right to life and personal integrity, right to safety and to access to justice. Expecting victims to bring private prosecution proceedings against perpetrators would mean acting as prosecutor and investigator in a highly sensitive matter and risking a violent reaction by the perpetrators. Furthermore, perpetrators, knowing that they are subject only to a private prosecution, could easily influence a victim not to prosecute, given their close relationship with the victim and their power and control they have over them.⁶² In *Bevacqua and S. v. Bulgaria*⁶³, the ECtHR concluded 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”⁶⁴ and thus, it found a violation of the ECHR.

Article 55 of the Istanbul Convention prescribes that the prosecution of certain offences, including physical violence, not be wholly dependent upon a complaint by the victim but by *ex officio* prosecution.⁶⁵ Under Article 161 (1) of the BCC, however, most of offences under physical violence are dependent upon the victim’s complaint. Articles 48 and 49 of the BCPC permit public prosecution to be involved in privately prosecuted cases of physical violence under certain conditions. In practice, this does not seem to happen in cases of violence against women

⁶¹ These would include: damages to the hearing or the vision, fractures of the limbs, the torso or the neck, damages to the genitals (excluding loss of reproductive ability); broken jaw or teeth, disfigurement of the face or other bodily parts; injuries that penetrate the cranial, chest and abdominal cavities.

⁶² Submission by Bulgarian Gender Research Foundation and the Advocates for Human Rights in cooperation with Alliance for Protection against Domestic Violence for the 22nd Session of the Working Group on the Universal Periodic Review, United Nations (UN) Human Rights Council. April-May 2015, par. 17. This practice was further confirmed by the experts that were met during the FFM in Sofia.

⁶³ ECtHR, application no. 71127/01, 12 June 2008.

⁶⁴ *ibid.*, par. 83.

⁶⁵ Although Article 78 (2) of the Istanbul Convention allows for a reservation regarding this provision, it is only valid in respect of minor offences under physical violence and it is left to the State parties to decide what constitutes a minor offence.

and domestic violence.⁶⁶ Furthermore, as it was stated during the FFM⁶⁷, the preclusive six-month period to file a complaint to initiate private prosecution as required by Article 24 of the BCPC is rather short which renders the organisation of the prosecution almost impossible, in practice. The reasons put forward are twofold: 1. reasons arising from the health situation of victims, 2. emotional reasons due to the personal proximity of victims with perpetrators.

In light of all these considerations, the current system of criminal offences covering the various forms of physical violence in Bulgaria falls short to comply with the standards of the Istanbul Convention. Consequently, it would be advisable to amend the BCC, particularly Article 161 (1) and the BCPC in order to specifically criminalise domestic violence and to introduce the possibility of *ex officio* prosecution for this offence. This implies that all elements of domestic violence, including physical violence, is recognized as a specific crime and all forms of domestic violence leading to any degree of bodily injury are prosecuted *ex officio*. This is the case, for instance, of the Austrian Criminal Code of Procedure (sections 34, 36 and 84) where *ex officio* prosecution is possible in cases regarding all forms of violence, no matter the level of injury. Similar recommendations were recently made to Bulgaria by international monitoring bodies, particularly UN Human Rights Council⁶⁸ and CEDAW Committee.⁶⁹

Recognizing domestic violence as a stand-alone offence under the BCC would be transformative in combatting with this scourge. The current system diminishes the importance of the problem and sustains perpetrators' understanding that domestic violence does not merit serious attention. It also reinforces society's understanding that domestic violence is a private matter and that the state does not bear the responsibility for preventing such violence and adequately punishing perpetrators.

Criminalising domestic violence under the BCC would also help with reducing attrition (i.e. when domestic violence cases fail to make it through the criminal justice system and do not result in a criminal conviction) and could be influential in changing police and justice professionals' attitudes⁷⁰ *vis-à-vis* domestic violence in Bulgaria. Apart from the studies published by relevant NGOs on the matter, the UN Human Rights Committee has stated its concern about the low number of cases that had been brought to justice and sanctioned in Bulgaria despite the high prevalence of domestic violence.⁷¹

⁶⁶ Based on meetings with experts during the FFM in Sofia on 21-22 March 2016.

⁶⁷ The document provided by the Bulgarian Research Foundation, namely, Monitoring and Comments concerning the Draft for a new Criminal Code following the FFM.

⁶⁸ Report of the Working Group on the Universal Periodic Review- Bulgaria, UN Human Rights Council, A/HRC/30/10, 8 July 2015, available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Pages/ListReports.aspx>

⁶⁹ Concluding observations of the CEDAW Committee, CEDAW/C/BGR/CO/4-7, 7 August 2012, par. 26.

⁷⁰ For a thorough study and good practices on the matter, see The EU Handbook of Best Police Practices on Overcoming Attrition in Domestic Violence Cases, December 2012, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012719%202012%20REV%202>

⁷¹ Compilation prepared by the Office of the UN High Commissioner for Human Rights for UN Human Rights Council Working Group on Universal Periodic Review on Bulgaria, A/HRC/WG.6/22/BGR/2, 23 February 2015, par. 26, available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=24780

4. Sexual violence, including rape

4.1 Requirements of the Istanbul Convention

Article 36 of the Istanbul Convention obliges State parties to criminalise all forms of non-consensual acts of a sexual nature, including rape. Being the most detailed substantive criminal law provision of the Istanbul Convention, Article 36 provides a “catch all” definition for sexual violence. The first paragraph explains the conducts that fall under this provision. Sub-paragraph (a) includes acts commonly referred to as rape and gives a broad definition that includes all forms of penetration⁷² of bodily parts carried out with bodily parts or objects. Sub-paragraph (b) covers all other non-consensual sexual acts which do not consist in rape but that also must be criminalised. Sub-paragraph (c) further criminalises the causing of another person to perform or comply with acts of a sexual nature with third persons. This covers situations, especially in relationships of abuse, in which victims are forced to engage in sexual acts with a person chosen by the perpetrator.

The notion of acts of a sexual nature is described as an act that “has a sexual connotation. It does not apply to acts which lack such connotation or undertone”.⁷³ The key element in what qualifies as sexual violence is consent. As defined under Article 36 (2), consent must be given voluntarily as the result of the person’s free will, as assessed in the context of the surrounding circumstances. Both the definition of rape and the provision on other forms of sexual violence revolve around the lack of consent.

The criminalisation of sexual offences applies irrespective of the nature of the relationship between the perpetrator and the victim including relationships such as current or former spouses and partners (Article 36 (3)). This is in line with Article 43 of the Istanbul Convention which requires this principle to be applied to all offences established therein.

4.2 Analysis of the Bulgarian criminal legislation

The BCC’s section on “debauchery” (Articles 149-159) governs the offences related to sexual violence. Several sexual offenses are covered including rape, forced prostitution, providing premises for fornication, solicitation or coercion of another person to use narcotic substances or analogues thereof for the purpose of prostitution, intercourse, fornication.⁷⁴

Rape is criminalised under Article 152 of the BCC. The constituent elements of rape under this provision are that the victim is “unable to defend herself and without her consent,” that the act is committed “by compelling her by force or threat,” and, that the act renders her “into a helpless state”. The significant feature of this provision is that it is not gender neutral. According to Article 152, rape can only be committed against a female person and the sexual act requires

⁷² Vaginal, anal or oral.

⁷³ Explanatory Report, par. 190.

⁷⁴ Under this section, “adultery, creating pornographic material; solicitation of a person under 14 years of age to participate or observe actual, virtual or simulated sexual intercourse between persons of the same or different sex or lewd display of human genitalia, sodomy, masturbation, sexual sadism or masochism, abduction of a person to be subjected to debauchery” are also defined as criminal offences.

sexual intercourse, meaning that it must include a vaginal penetration with a bodily organ. This provision does not explicitly mention marital rape nor refer to the nature of relationship between the perpetrator and the victim.

The repeal of the much criticised provision of the BBC that led to a termination of criminal proceedings initiated for sexual offences under Articles 149 to 151 and Article 153 if the perpetrator marries the victim in September 2015 is a positive development.

On the basis of the information gathered during the FFM as well as the study conducted by the Bulgarian Ministry of Justice⁷⁵, sexual violence against underage and minor girls is a matter of increasing concern in Bulgaria, particularly, the marital-like cohabitation with underage and minor girls. In relation to this social reality, Article 191(4) of the BCC seems problematic. Pursuant to this provision, a person of full age living in a marital relationship- without having concluded a marriage- with a girl under 16 years of age, is subject to criminal proceedings and can be sentenced to up to two years of imprisonment. However, the perpetrator is not punished or the imposed punishment is not enforced if he marries the girl before the end of proceedings.

4.3 Findings

According to the recent survey⁷⁶ among EU countries, one in ten women has experienced a form of sexual violence since the age of 15. One in twenty women has been raped since the age of 15. Sexual violence, as a form of gender based violence, violates, impairs and nullifies women's human rights. While all forms of sexual violence are serious, rape is especially hurtful and damaging and can have far-reaching negative consequences. Men and boys can also be victims of rape, although this is much less common.⁷⁷

There are several issues pertaining to the definition and interpretation of the legal concepts of rape used in legal instruments, including: the concept of consent, the relevant range of body parts, and the (ir)relevance of the status of marriage.

Article 152 of the BCC includes the notion of "consent" explicitly in its wording and lack of consent is established as the constituent element of the offence. However, lack of consent is linked to the use of force and threat by perpetrator. The word "force" and "threat" may be interpreted as implying physical force and physical resistance by the victim; also, the wording of Article 152 seems to suggest that one of the constitutive elements of this criminal offence is some degree of violence, threats of violence and/or the use of force. As concluded in the case *M. C. Bulgaria*⁷⁸ before the ECtHR, any non-consensual sexual act, including in the absence of physical resistance by the victim, should be penalized and effectively prosecuted. In the course

⁷⁵ Rositsa Dicheva, Evaluation and Analysis of the Gaps in the Bulgarian Legislation in the field of Gender Based Violence, p. 12-13.

⁷⁶ *Op.cit.* footnote. 2.

⁷⁷ S. Walby et al, *Overview of the worldwide best practices for rape prevention and assisting women victims of rape*, Report published by European Parliament: Policy Department Citizens' Rights and Constitutional Affairs, October 2013, p. 27, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493025/IPOL-FEMM_ET%282013%29493025_EN.pdf

⁷⁸ ECtHR, (application no. 39272/98), 4 December 2003, par. 166.

of the FFM it was however noted that Bulgarian investigative and prosecutorial bodies mostly prosecute cases when the rape victim shows resistance against the perpetrator, leaving unprotected those victims who are unable or unwilling to fight back. It is the practice that consent is conditioned on the proof of physical resistance. This situation is as a source of victim's secondary victimization.⁷⁹ To avoid it, judicial practice should not focus on undue expectations of physical resistance on the part of the victim but assess the question of consent using a context/situational approach and by paying due regard to victim testimony. In other words, to ensure a broad application of the lack of consent even in the absence of physical resistance by the victim, it would be preferable if Article 152 did not refer to "force" and "threat" but would focus solely on whether consent to the sexual act was given voluntarily as the result of the person's free will, in light of all the circumstances of the case, as required by Article 36 of the Istanbul Convention.

Another concern related to rape cases in Bulgaria is the difficulty experienced with respect to the proof of the lack of consent. As concluded by the ECtHR⁸⁰ in *P.M. v Bulgaria*⁸¹, the authorities' inaction during prosecution of a rape case is verged on arbitrariness despite the gravity of the facts. Recently, in *S.Z v Bulgaria*⁸², the ECtHR further held that the shortcomings in the investigation carried out into the rape of the applicant, having regard in particular to the lack of investigation into certain aspects of the offence was contrary to the ECHR. Even though prosecution is left outside the scope of this report and the problems of ineffective investigation and prosecution are not exclusive to sexual violence cases⁸³, underlining this situation would still be helpful to understand the challenges in tackling with sexual violence in Bulgaria.

Moreover, as it is the case with many other countries, the social stigma and gender stereotypes attached to rape seems to be making it difficult for many victims to come forward after being

⁷⁹ Secondary victimization occurs when the victims suffer further harm not as a direct result of the criminal act but due to the manner in which the institutions and other individuals deal with the victim. It may be caused, for instance, by repeated exposure of the victim to the perpetrator, repeated interrogation about the same facts, the use of inappropriate language, unintentionally insensitive comments made by all those who come into contact with victims, insensitive media reporting of cases. See Chapter 5 of the 2009 Report on Non-Criminal Remedies for Crime Victims prepared by the Group of Specialists on Remedies for Crime Victims nominated by the Committee of Ministers of the COE, under the aegis of the European Committee on Legal Cooperation (CDCJ), available at http://www.coe.int/t/dghl/standardsetting/victims/victims%20final_en%20with%20cover.pdf

⁸⁰ For a thorough analysis of the ECtHR case law regarding rape, see I. Radačić, *The European Court of Human Rights as a Mechanism of Justice for Rape Victims: Contributions and Limitations*, in *Rape Justice-Beyond Criminal Law*, Ed. By. A. Powell et al, Palgrave Macmillan, 2015.

⁸¹ ECtHR, application no. 49669/07, 24 January 2012, par. 65-67.

⁸² ECtHR, application no. 29263/12, 3 March 2015, par. 50-53. In fact, in this case, the ECtHR concluded that investigations in Bulgaria suffer from a "systemic problem of ineffectiveness". It observed that it had already, in over 45 judgments against Bulgaria, found that the authorities had failed to comply with their obligation to carry out an effective investigation and considered that these recurrent shortcomings disclosed the existence of a systemic problem. It considered that it was incumbent on Bulgaria, in cooperation with the Committee of Ministers, to decide which general measures were required in practical terms to prevent other similar violations of the convention in the future. Evidently, this systemic problem also affects the investigations on sexual offences.

⁸³ *ibid.*

assaulted. As already stressed by the CEDAW Committee in *Vertido v The Philippines*⁸⁴ and *RPB v The Philippines*⁸⁵ “stereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or ... have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim....”. Therefore, it is very important to ensure that the interpretation of laws regarding rape and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality. These problems are interlinked and obviously affecting the judicial responses to sexual violence cases in Bulgaria.

Laws on rape vary in their definition of involved body parts. For instance, Belgium, Germany, Portugal and Sweden employ a wide definition of rape which covers all forms of penetration by body parts and objects in full compliance with the requirements of Article 36 of the Istanbul Convention. However, like Bulgaria, Hungary employs a narrow definition restricted to penis-vaginal penetration. The range of body parts included within the law affects whether rape is exclusively a crime committed by men towards women or not, as it is defined in Bulgaria. In many countries, rape is applicable to all forms of sexual penetration without consent, irrespective of gender.⁸⁶

The review of the BCC and other relevant legislation has confirmed that rape in marriage is not specifically criminalised/prosecuted or other in Bulgaria. This seems to be the case as well in six additional EU member states⁸⁷: Lithuania, Estonia, Hungary, Poland, Latvia and Slovakia. The international standards allow no exceptions for rape on the basis of a marital relationship. Article 152 of the BCC does not provide explicitly that the marital condition will not serve as an exception. The CEDAW Committee, in its last concluding observations on Bulgaria⁸⁸, also recommended to specifically criminalising marital rape.

In light of these observations, it would also be advisable to expand the definition of rape under Article 152 to cover other forms of non-consensual penetration, including with objects and apply this offence on a gender-neutral basis. Furthermore, in line with the conclusions of international bodies referred to above, it would be a progressive step to recognize and explicitly criminalise marital rape under the BCC either: i. by providing that rape/sexual assault provisions apply ‘irrespective of the nature of the relationship’ between the perpetrator and victim; or ii. by stating that ‘no marriage or other relationship shall constitute a defence to a charge of rape/sexual assault under the legislation’. Another possibility would be to enhance Article 152 by adding that rape committed in a domestic context, including marital rape, will be subject to aggravated penalties in order to underline the special gravity of this form of rape.

The recognition of marital rape in whichever form would bring the BCC in line with Article 36 of the Istanbul Convention as well and it would reinforce compliance with its Article 43. An

⁸⁴ Communication no. 18/2008, 22 September 2010.

⁸⁵ Communication no. 34/2011, 12 March 2014.

⁸⁶ For differences in defining rape, see S. Walby et al, *Stopping Rape- Towards a Comprehensive Policy*, Policy press, 2015, p. 111-171.

⁸⁷ European Parliament Question for a written answer: Rape within marriage, 13 March 2015, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2015-004211&language=EN>

⁸⁸ Concluding observations of the CEDAW Committee, CEDAW/C/BGR/CO/4-7, 7 August 2012, par. 26.

example of a good practice which combines both is Article 222-22 of the French Criminal Code which establishes rape and other acts of sexual violence as criminal offences “regardless of the nature of the existing relationship between the aggressor and its victim, including when they are related by marriage”.

Lastly, given the increasing trend of marital-like cohabitation with girls under 16 years of age in the Bulgarian society, Article 191 should be clearly monitored to detect sexual abuse against girls. In fact, it was stated during the FFM that often, criminal proceedings against adults are terminated because the underage girl enters into marriage pursuant to Article 191 (4) of the BCC. This provision may easily lead to the exploitation of girls and to impunity of perpetrators of sexual violence. Therefore, it would be appropriate to repeal Article 191 (4) in order to prohibit early/child marriages and to stop disguised sexual violence against underage girls.

5. Forced marriage

5.1 Requirements of the Istanbul Convention

Article 37 of the Istanbul Convention concerns forced marriage and requires the criminalisation of two types of conduct: a) “forcing” a person, by use of psychological pressure, constraint or duress, to enter into marriage; b) “luring” a person to a foreign country with the purpose of forcing her or him to enter into a marriage (whether or not the marriage is actually concluded).⁸⁹ State parties’ legislation has to provide mechanisms to determine the validity of consent of both parties with respect to marriage. As indicated in the Explanatory Report, the 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.

Another important aspect of forced marriage is the marital age, given the close link between forced marriage and early/child marriage.⁹⁰ The Istanbul Convention explicitly requires criminalising forced marriage of a child considering as such a person under 18 years old, as defined on the UN Convention on the Rights of the Child.⁹¹

⁸⁹ Explanatory Report, par. 195 and 197.

⁹⁰ In this regard, The Joint General Recommendation No.31 of the United Nations Convention on the Rights of the Child (CRC) on harmful practices draws a link between forced marriage and child marriage due to the inability of children to give their free and full consent to marry and reiterates the importance of issuing and implementing laws establishing 18 as the minimum age to enter marriage.

⁹¹ Adopted by UN General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

5.2 Analysis of the Bulgarian criminal legislation

The BCC has a specific provision on forced marriage. Article 177 (1) criminalises situations where a person is forced to enter in marriage with another person.⁹² However, no further clarification is provided as of what is considered 'compulsory manner'. Article 177 (2) deals with the abduction of a woman for the purpose of forcing her into marriage and provides for a prison sentence from three to five⁹³ years but there is no criminalisation/sanction of situations where the person is lured to another country with the purpose of forcing that person to enter into marriage⁹⁴. The BCC under Article 178 also criminalises arranged marriages which refer to circumstances where a parent or relative receives a dowry (in some countries this is called "bride price").

With regard to marital age, Bulgarian civil law rules⁹⁵ provide that a marriage cannot be concluded by a person below 18 years of age and that only in specific cases and under the condition of consent of the parents and authorisation of a judge, children who are 16 years of age can get married. In this respect, Bulgarian law is in compliance with international norms prohibiting child marriage, particularly the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.⁹⁶ In addition to rules criminalising forced marriage the BBC introduces regulation on child marriage albeit not explicitly. For instance, the BCC penalises parents who force their children younger than 16 years of age to cohabitation (Article 190). It also criminalises the behaviour of any male adult who persuades or coerces a girl under 16 years of age to cohabit (Article 191).⁹⁷

⁹² BCC, Art. 177(1) reads as follows: "A person who has induced another in compulsory manner to enter in marriage, and therefore the marriage was proclaimed null and void, shall be punished by deprivation of liberty for up to three years."

⁹³ If the victim is not full age, there is a higher penalty.

⁹⁴ C. Hagemann-White, *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. 61 (hereinafter *Analytical study of Rec(2002)5*), available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680465f71>

⁹⁵ Article 6 of Family Code of 23 June 2009, last amended on 2 August 2013.

⁹⁶ Article 2 calls upon States Parties to specify within their national legislation a minimum age for marriage, adding that 'no marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses'.

⁹⁷ Article 191(4) of the BCC looks problematic with regard to prohibiting early/child marriages. Pursuant to this provision, a person living in a marital relation- without having concluded a marriage- with a girl under 16 years of age, is subject to criminal proceedings and up to two years of imprisonment. However, the perpetrator is not punished or the imposed punishment not be enforced, if he marries the girl before the end of proceedings. This might in practice cause sexual abuse as explained in the sexual violence part above.

5.3 Findings

Although Article 177 of the BCC criminalises forced marriage, it nevertheless falls short of complying with all the requirements of Article 37 of the Istanbul Convention. The second conduct covered in the Convention – luring the person outside the country to enter into marriage by force- is not reflected in the existing Bulgarian criminal provision and it is thus recommended to expand Article 177 of the BCC to explicitly mention it. Such a provision would provide a better protection to potential victims of forced marriage who usually belong to migrant and/or ethnic minority communities and, with a view of protecting the cultural values of their community, may be obliged by their families to leave the country of residence to get married in their family's country of origin. This is also pertinent in view of the increasing refugee flow to European countries including Bulgaria, and given the fact that forced marriage often intertwines with other harmful practices such as marriage brokering.⁹⁸

In order to avoid such situations, different provisions already exist in other national legislations. For instance, in Spain, Germany and Sweden, the provisions criminalising forced marriage include within their scope the criminal liability of whoever forces another person to leave the country (Spain)⁹⁹ and/or to enter the country (Germany) or to enter any other country (Sweden) for the purpose of forcing him/her into a marriage.¹⁰⁰ In Austria, a criminal provision is in force since January 2016 that penalises forced marriage performed in another State and concerning Austrian nationals as well as those performed in Austria concerning foreigners.¹⁰¹

Forced marriage seems to continue to be prevalent among Roma communities in Bulgaria which has been mentioned as a source of concern by the UN. For example, the UN Committee against Torture¹⁰² (CAT) was concerned by the practice of early and forced marriage of Roma girls as young as 11 years old. The CEDAW Committee¹⁰³ expressed a similar concern and urged Bulgaria to prohibit early marriages in Roma communities. It appears that this problem primarily occurs due to ineffective use of existing criminal legislation under Article 177 where the prosecutors mostly dismiss such cases on grounds of customs and cultural practices.¹⁰⁴ Even though the effective prosecution of criminal offences are not covered by the scope of this report, it must be underlined that the training of the relevant professionals to ensure implementation of the law is of crucial importance in order to avoid such judicial practices.

⁹⁸ For a thorough 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*, 2011, available at <http://www.un.org/womenwatch/daw/vaw/handbook/Supplement-to-Handbook-English.pdf>

⁹⁹ Art. 172bis of Spanish Criminal Code.

¹⁰⁰ E.Psaila et al, *Forced Marriage from a Gender Perspective*, Report published by European Parliament: Policy Department Citizens' Rights and Constitutional Affairs, February 2016, p. 45, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556926/IPOL_STU%282016%29556926_EN.pdf

¹⁰¹ Art. 106a of the Austrian Criminal Code.

¹⁰² Concluding observations of the CAT, CAT/C/BGR/CO/4-5, 14 December 2011, par. 26-27.

¹⁰³ Concluding observations of the CEDAW Committee, CEDAW/C/BGR/CO/4-7, 7 August 2012, par.49-50.

¹⁰⁴ Based on meetings with experts during the FFM in Sofia on 21-22 March 2016.

6. Female genital mutilation

6.1 Requirements of the Istanbul Convention

Article 38 of the Istanbul Convention defines a specific crime of female genital mutilation (hereinafter “FGM”) and requires criminalisation of the practice of cutting away or otherwise damaging certain parts of the female genitalia¹⁰⁵ as well as the fact of “coercing or procuring a woman to undergo this practice.”¹⁰⁶ The Istanbul Convention further criminalises the act of assisting the perpetrator to performing FGM by inciting, coercing or procuring a girl to undergo the FGM.¹⁰⁷ Although these acts fall within the scope of crimes against the person such as bodily injury or torture, given the particularly invasive and painful nature of this crime, the Istanbul Convention specifically calls for its prohibition.

Due to the specificity of FGM, Article 38 is a gender-specific provision. It includes situations in which anyone, in particular, parents, grandparents or other relatives coerce their daughter or female relative to undergo the procedure.¹⁰⁸

6.2 Analysis of the Bulgarian criminal legislation

The BCC does not contain any specific provision concerning FGM. However, provisions on bodily injury under Articles 128, 129 and 130 are applicable to FGM. Particularly, Article 129 (2) indicates disturbance of the functions of the genital organs and qualifies such cases as a medium-level injury. Article 128 (2), on the other hand, covering severe bodily injury¹⁰⁹ does not specify any elements of FGM. However, given the potential serious implications for the health and even the lives of girls and women, the requirement of “permanent health impairment” or danger to life of Article 128 (2) can well apply to FGM. Article 181 of the BCC (“placing a relative in distress”) can also be used in the prosecution of cases when FGM is inflicted within the family. However, even by extending the interpretation of these provisions to FGM, they would only cover the actual commission of acts defined under Article 38 (a) of the Istanbul Convention. As for the sub-paragraphs b and c of Article 38, governing coercion (Article

¹⁰⁵ Art. 38(a) reads as follows: “excising, infibulating or performing any other mutilation to the whole or any part of a woman’s labia majora, labia minora or clitoris. The term “performing any other mutilation” refers to all other physical alterations of the female genitals. The Explanatory Report, par. 199, explain the terms “excising” and “infibulating”. “Excising” refers to the partial or total removal of the clitoris and the labia majora. Infibulating covers the closure of the labia majora by partially sewing together the outer lips of the vulva in order to narrow the vaginal opening. The term “performing any other mutilation” refers to all other physical alterations of the female genitals.

¹⁰⁶ *ibid*, Art. 38(b)

¹⁰⁷ Art. 38 (c).

¹⁰⁸ Explanatory Report, par. 201.

¹⁰⁹ Art. 128 (2) “A bodily injury shall be considered severe if it has caused: continuous disturbance of consciousness; permanent blindness of one or both eyes; permanent deafness; loss of speech, reproduction inability; disfigurement which causes permanent disturbance of the speech or of a sensory organ; loss of one kidney, the spleen or a lung lobe; loss or mutilation of a leg or an arm; permanent general health impairment, dangerous to life.”

143) and threat (Article 144(1), the BCC does not comply completely with the requirements of the Istanbul Convention.

6.3 Findings

FGM comprises all procedures that involve altering or injuring the female genitalia for non-medical reasons. It can cause irreparable and lifelong damage and is usually performed without the consent of the victim. Due to the nature of FGM, Article 38¹¹⁰ of the Istanbul Convention is one of the criminal offences that break with the principle of gender neutrality of the criminal law part of the Istanbul Convention as the victims are necessarily women or girls.¹¹¹ FGM is mostly performed as a cultural and/or religious tradition and there is no reliable information as to the prevalence of FGM in Bulgaria. So far, there has not been any prosecution of such offence under the above-mentioned provisions of the BCC.¹¹² According to a study¹¹³ by the Bulgarian Gender Research Foundation in 2005, FGM is practised in “isolated cases”.

Even though the social and cultural context in Bulgaria is in principle not conducive to the practices related to FGM, it is still important to recognize FGM as a gross violation of the human rights of women and girls. FGM is already defined as a specific criminal offence in 19 Council of Europe member states.¹¹⁴ For instance, in the United Kingdom, where also the luring a woman or a girl into undergoing FGM¹¹⁵ is criminalised. Similarly, the Italian law not only criminalises FGM but also establishes a range of preventative and protective measures.¹¹⁶

The EU has developed a policy¹¹⁷ framework. As with forced marriage, FGM prevalence might be expected to grow gradually in Europe, including Bulgaria, with the growing influx of refugees. Given the unique social dynamics that surround FGM, it is recommended to amend the existing provisions on severe bodily harm under Art. 128 (2) as it only covers actual commission of the crime but not the luring, the coercion and the aiding to the commission. An easier and more

¹¹⁰ For a thorough explanation of FGM under the Istanbul Convention, see *The Istanbul Convention: a tool to end female genital mutilation*, Council of Europe and Amnesty International, 2014, available at, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680464e9f>

¹¹¹ Explanatory Report, par. 198.

¹¹² Based on meetings with experts during the FFM in Sofia on 21-22 March 2016.

¹¹³ The findings of this study were collected through in-depth interviews with representatives of NGOs, state and local institutions, school and police in seven Bulgarian cities.

¹¹⁴ Analytical study of Rec(2002)5, p. 61.

¹¹⁵ *Promoting best practices in tackling violence against women*, Report by the Committee on Equality and Non-Discrimination of the Parliamentary Assembly of the Council of Europe-PACE- (2015), par.63. <http://website-pace.net/documents/19879/1274427/20150930-ViolenceWomenBestPract-EN.pdf/4c7ecb18-fe6b-48d1-8df3-ccc09f197bd7>

¹¹⁶ Law no. 7/2006. For other good practices, see J.T.Cuevas/G. Khrystova, *Good International Practices and Standards on Violence Against Women and Domestic Violence*, COE, 2015, p. 38, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168044e7c0>

¹¹⁷ EU Parliament Resolution on ending female genital mutilation, 14 June 2012, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0261+0+DOC+XML+V0//EN>

comprehensive option, however, would be to legally introduce a stand-alone offence on FGM in the BCC to prohibit all actions defined in the Istanbul Convention.

7. Forced abortion and forced sterilisation

7.1 Requirements of the Istanbul Convention

Article 39 of the Istanbul Convention defines forced abortion and forced sterilization as specific crimes and obliges states to criminalise two different acts: a) the intentional termination of the pregnancy of a woman without her prior and informed consent, by whatever means and b) the carrying out of any procedure in order to terminate a woman's capacity to reproduce naturally, without her prior and informed consent or understanding of the procedure.

This article acknowledges the importance of respecting women's reproductive rights, by allowing women to decide freely on their reproduction and by ensuring their access to appropriate information on natural reproduction and family planning. The Istanbul Convention does not aim at criminalising any medical interventions or surgical procedures which are carried out, for example, with the purpose of assisting a woman for saving her life during or after pregnancy.¹¹⁸

7.2 Analysis of the Bulgarian criminal legislation

Article 126 (5) of the BCC regulates forced abortion in cases where the pregnancy is ended without the consent of the women and sets a prison sentence for those who performed it. The BCC, however, does not have any dedicated offence on forced sterilization. Despite this, any harm resulted in the inability to reproduce is defined as a severe bodily injury under Article 128 (2)¹¹⁹.

7.3 Findings

As with female genital mutilation, Article 39 of the Istanbul Convention breaks with the principle of gender neutrality of its part on substantive criminal law. In principle, the provisions of the BCC cover the types of acts defined under Article 39 of the Istanbul Convention. However, an important aspect in both offences is the need for an "informed consent"¹²⁰ of the victim which is currently not a factor in the BGG provisions on severe bodily harm. Informed consent is not a mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision made by the person undergoing the medical intervention, which is a concept that protects the rights of the patient involved in medical decision-making, and assigns associated

¹¹⁸ Explanatory Report, par. 206.

¹¹⁹ *Op.cit.* footnote 59.

¹²⁰ Art.5 of the COE Convention on Human Rights and Biomedicine and its Explanatory Report par.34-36.

duties and obligations upon health care providers.¹²¹ The importance of informed consent has also been emphasized by the ECHR in different judgements and lastly in *V.C v Slovakia*¹²² and *N. B v Slovakia*¹²³ in which the forced sterilization of a woman of Roma ethnic origin without her informed consent was found in violation of the Article 3 and 8 of the ECHR. In *V.C Slovakia*, the ECtHR stated that although the applicant signed the sterilization request form, she was not in understanding of the nature of the sterilization procedure or its consequences at the time of signature.

Considering the specificities related to the criteria of “informed consent” it is recommended that a specific offence on forced sterilization is introduced in the BCC.

8. Sexual harassment

8.1 Requirements of the Istanbul Convention

Article 40 of the Istanbul Convention prohibits sexual harassment and provides for it be subject to criminal or other legal sanction. Sexual harassment is generally considered to be a form of discrimination and in many legal systems it is placed exclusively under civil or even labour law. For this reason, the Istanbul Convention allows State parties ample discretion to punish sexual harassment either by criminal law or by administrative or other legal sanctions.

The type of conduct covered under Article 40 includes three main forms of behaviour: verbal, non-verbal or physical conduct of a sexual nature unwanted by the victim. These behaviours must have the purpose or effect of violating the dignity of a person and create an intimidating, hostile, degrading, humiliating or offensive environment.¹²⁴

As sexual harassment typically takes place at the work place, most legal measures that exist pertain to the area of labour law. However, sexual harassment can occur in multiple contexts and thus the scope of application of this article is not limited to that field.¹²⁵ In fact, most international bodies recommend both criminal and non-criminal remedies. Legal sanctions in any case must be comprehensive and must prohibit sexual harassment wherever it may happen (education, employment, health care, public space, etc).¹²⁶

8.2 Analysis of the Bulgarian criminal legislation

The BCC does not explicitly contain a criminal offence of sexual harassment. Article 153 defines the offence of “copulation using employment or material dependency” that is punishable by

¹²¹ Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc A/64/272, 10 August 2009, par. 9, available at <http://www.refworld.org/docid/4aa762e30.html>

¹²² ECtHR, application no. 18968/07, 8 November 2011.

¹²³ ECtHR, application no. 29518/10, 12 June 2012.

¹²⁴ Explanatory Report, par. 208.

¹²⁵ *ibid*, par. 209.

¹²⁶ See *op.cit.* footnote 17, UN Handbook for legislation on VAW, Section 3.4.

imprisonment and which can be relevant for sexual harassment claims. However, it appears that there is no legal practice related to sexual harassment at work under this criminal provision.

The Law on the Protection against Discrimination (hereinafter “LPD”)¹²⁷ has provisions defining harassment and sexual harassment. The LPD explicitly includes sexual harassment among the prohibited forms of discrimination.¹²⁸ It defines sexual harassment as “any unwanted conduct of a sexual character expressed physically, verbally or in any other manner, which violates the dignity or honour or creates hostile, degrading, humiliating or intimidating environment and, in particular when the refusal to accept such conduct or the compulsion thereto could influence the taking of decisions, affecting the person.”¹²⁹ The adoption of the LPD and the treatment of sexual harassment under antidiscrimination legislation in Bulgaria is the result of transposition of the EU legislation, particularly EU Directive 2002/73 (recast in EU Directive 2006/54/EC) on equal treatment in access to employment. The LPD, however, has a broader scope than the EU Directives¹³⁰ which is positive.

The LPD provides remedies for harassment for different contexts. A specific complaint procedure is set up for harassment cases at the workplace¹³¹ and in the field of education and training.¹³² Article 17 requires employers who receive a complaint from an employee who considers him/herself a victim of harassment, including sexual harassment, at the workplace to “immediately carry out an investigation, take measures to stop the harassment, as well as impose disciplinary sanction in case the harassment has been committed by another worker or employee.” Article 31 requires the same to “training institutions” who receive complaints from students. If a student complains about a staff member or another student, the institution, “must immediately carry out an investigation and take measures to stop the harassment, as well impose a disciplinary sanction.”

The LPD also contains a general procedure for claims. As harassment and sexual harassment are broadly defined as a form of discrimination, the concept can cover all possible areas where such discrimination may occur.¹³³ The Bulgarian Commission for the Protection against Discrimination (hereinafter “CPD”) is charged with enforcing the LPD by investigating claims/complaints, issuing rulings and imposing sanctions. Alternatively, cases on sexual harassment can be brought before civil courts.

The remedies and sanctions in cases of discriminatory harassment, including sexual harassment, vary depending on the avenue selected by the victim of discrimination to obtain

¹²⁷ Law on the Protection against Discrimination, adopted on 30 September 2003, last amended on 7 April 2015.

¹²⁸ Art. 5 of the LPD.

¹²⁹ Additional art. 2 to the LPD.

¹³⁰ For instance, the protection against harassment as a form of discrimination is extended to all protected grounds, including, for example, race and ethnicity, thus going beyond the current scope of protection against harassment in EU law.

¹³¹ Art. 17 of the LPD.

¹³² Art.31 of the LPD.

¹³³ Pursuant to Art. 6 of the LPD, “The prohibition of discrimination shall be binding upon all, in exercising and protecting the rights and freedoms laid down by the Constitution and the laws of the Republic of Bulgaria.”

remedy: the CPD or the civil court. The CPD can declare the existence of discriminatory harassment and identify the perpetrator and determine the type and the amount of the sanction imposed. It can also apply coercive administrative measures¹³⁴ and administrative penal sanctions in the form of a fine.¹³⁵ The civil court can establish the existence of sexual harassment, order the perpetrator to cease the discriminatory action or practice and to refrain from similar future behaviour, and can order *restitutio in integrum*. Contrary to the CPD civil he courts can also award compensation for the victim.

8.3 Findings

In light of the existing legal framework in Bulgaria, sexual harassment as defined under Article 40 of the Istanbul Convention is sanctioned. As a result of EU Directive 2002/73 (recast in EU Directive 2006/54/EC), sexual harassment is mostly framed as a form of discrimination, with minimal consideration of its dimension as gender-based violence. Correspondingly, there is no mention of the possible use of criminal law for penalisation of harassers.

Article 153 of the BCC on copulation using employment or material dependency offers a potential avenue for prosecuting of sexual harassment but it requires sexual intercourse which would rather fall under sexual assault. Currently, there is an increasing global trend in the world coupled with recommendations of international bodies for a specific criminalization of sexual harassment. For instance, the Spanish Criminal Code¹³⁶, as well as France's¹³⁷ and Hungary's¹³⁸, offer examples of criminal provisions on sexual harassment. These provisions serve as important tools to send a message of zero tolerance for any acts of violence, including sexual harassment, as well as to end impunity for perpetrators. Introducing a specific criminal provision on sexual harassment thus might be entertained as an option in Bulgaria.

9. Aiding or abetting and attempt

9.1 Requirements of the Istanbul Convention

Article 41 of the Istanbul Convention aims at establishing additional offences relating to aiding or abetting of the offences defined in the Convention and the attempted commission of some.

Paragraph 1 requires State parties to establish offences of aiding or abetting the commission of the following offences established in accordance with the Istanbul Convention: psychological

¹³⁴ Art. 76 of the LPD. Coercive administrative measures are i. to give obligatory prescriptions to the employers and the officials to remove violations of the legislation for prevention of discrimination; ii. to stop the execution of illegal decisions or orders of employers or officials, which lead or may lead to discrimination.

¹³⁵ Article 78 of the LPD. Administrative penal sanctions consist of a fine of EUR 125 to 1000 (BGM 250 to 2000).

¹³⁶ Art. 148 of the Spanish Criminal Code reads as follows: "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".

¹³⁷ Art. 222-33.

¹³⁸ Art. 197.

violence, stalking, physical violence, sexual violence, including rape, forced marriage, female genital mutilation (only for acts defined under sub paragraph a of Article 38), and forced abortion and forced sterilization.¹³⁹

Paragraph 2, on the other hand, obliges State parties to establish as an offence the attempt to commit the following offences : serious cases of physical violence, sexual violence, including rape, forced marriage, female genital mutilation (only for acts defined under sub paragraph a of Article 38) and forced abortion and forced sterilisation.

9.2 Analysis of the Bulgarian criminal legislation

The BCC has dedicated sections setting out general rules regarding attempt and abetting. Section II of Chapter II regulates “preparation and attempt” in Articles 17-19. Section III on “complicity” governs the rules regarding abetting. Apart from these general rules, there are some provisions in which aiding or abetting is specifically defined as an offence or, in other words, where these acts are the constituent elements of the offence. For example, preparation for murder and abetting for murder are criminalised specifically under Article 117 (1) and 117 (2) respectively.

9.3 Findings

The above-mentioned provisions of the BCC set out general rules for aiding or abetting and attempt and therefore allow for the establishment of these acts as criminal offences that meet the requirements of Article 41 of the Istanbul Convention. Although domestic violence is not criminalized under the BCC, it has corresponding provisions that criminalise acts defined under the Istanbul Convention, such as physical violence, sexual violence, forced marriage, forced abortion. However, as explained above, some offences under the Istanbul Convention, such as stalking, psychological violence, female genital mutilation, forced sterilization are still not covered by neither the BCC nor the existing provisions provide grounds for prosecution. Therefore, it is necessary to establish all criminal offences defined under the Istanbul Convention in the BCC accordingly.

10. Unacceptable justifications of crimes, including crimes committed in the name of so-called “honour”

10.1 Requirements of the Istanbul Convention

Article 42 of the Istanbul Convention obliges States parties to ensure that culture, tradition, religion, custom or so-called “honour” is not regarded as a justification for any of act of violence covered by the scope of the Convention. This covers claims that victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour. National criminal law and criminal procedural law should not allow these justifications and the personal convictions

¹³⁹ Explanatory Report, par. 211-213.

of the actors of the judicial system should not lead to interpretations of the law that amount to a justification on any of the above-mentioned grounds.

Within the remit of Article 42 also fall justifications around loss of self-control (because of jealousy, substance abuse or other) in cases of murder, rape and others. State parties should also prevent these elements from constituting specific mitigating circumstances leading to reduced sanctions.

So-called honour crimes are often committed by a child below the age of criminal responsibility, at the instigation of an adult member of the family or community. In such crimes, e.g. attempted or completed murder, where the minors are instrumentalised, gaps might occur in establishing criminal liability. Paragraph 2 of Article 42 (on the incitement of a child) aims at avoiding such gaps and sets up the criminal liability of the instigator(s).

10.2 Analysis of the Bulgarian criminal legislation contains

The BCC does not include justifications on the grounds of so-called honour, religion, culture or custom. There are mitigating factors listed in the respective provisions of the BCC for each criminal offence. For example, Article 118 of the BCC regulating murder allows for mitigating factors including when the crime is committed “in a state of strong vexation, provoked by the victim with violence, with a grave insult or slander or with another unlawful action”.

10.3 Findings

Article 42 of the Istanbul Convention ensures that criminal law excludes defence claims or mitigating circumstances pertaining to culture, religion, tradition, so-called honour or perceived appropriate behaviour.¹⁴⁰

During the FFM, it was stated that violence against women that ends in the death of the victim sometimes are perceived as “murders of jealousy” or “domestic murder” resulting in relatively lower sentences compared to other murder cases. Such judicial behaviour¹⁴¹ clearly infringes the requirements of Article 42 and reinforces the gender stereotypes in society. In this way, gender and assumed cultural background, particularly “Balkan mentality” as expressed during the FFM are used to tolerate an act that is punishable by law. They also lead to introducing double standards– murders in domestic setting have to be judged differently from other murders.

Such justifications of crimes are of concern and are potentially dangerous for victims; they can easily lead not only to harm toward the victims but to the violation of the State’s obligation to actively exercise due diligence to prevent violence against women as required in Article 5 of the Istanbul Convention. Therefore, States Parties need to take effective measures to ensure a due

¹⁴⁰ For different country practices, see Good Practices in Legislation on Violence against Women, UN Report of the Expert Group Meeting, 26-28 May 2008, available at http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20%28final%2011.11.08%29.pdf

¹⁴¹ For a similar case, see Sahide Gökce v. Austria, CEDAW Committee, Communication no. 5/2005, 6 August 2008.

diligence approach and to hold accountable those State actors that do not comply with it. As elaborated earlier, the ECtHR has, in recent years, dealt with several cases concerning the State's failure to exercise due diligence in protecting victims in Bulgaria.

Against this background, Bulgaria may consider the possibility of introducing a general provision prohibiting any kind of justification on the grounds of religion, tradition, customary rules, honour or inappropriate behaviour of the victim under the BCC. Another option could be to add a specific prohibition for each crime, particularly regarding murder and bodily injury, in line with what the BCC currently does with mitigating (and aggravating) factors.

11. Aggravating circumstances

11.1 Requirements of the Istanbul Convention

Article 46 requires State Parties to ensure that certain circumstances be taken into consideration as aggravating circumstances in the determination of the penalty for offences established in the Convention. These circumstances, however, must not already form part of the constituent elements of the offence.

Article 46 lists the following circumstances to be regarded as aggravating- if the offence: 1. was committed against a former or current spouse or partner, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority; 2. was committed repeatedly; 3. was committed against a vulnerable person¹⁴²; 4. was committed against or in the presence of a child; 5. Was committed by two or more people acting together; 6. was preceded or accompanied by extreme levels of violence; 7. Was committed with the use or threat of a weapon; 8. resulted in severe physical or psychological harm for the victim; 9. the perpetrator had previously been convicted of offences of similar nature or in other words, was an act of recidivism.¹⁴³

By using the phrase “may be taken into consideration”, the Istanbul Convention places an obligation on State parties to ensure that these aggravating circumstances are available for judges to consider when sentencing although there is no obligation on judges to apply them. They should be in the list of circumstances that render an offence more severe.

¹⁴² For an indicative list of possible vulnerable persons are stated in par. 87 of the Explanatory Report-e.g. pregnant women, women with young children, persons with disabilities, including those with mental or cognitive impairments, persons living in rural or remote areas, prostitutes, migrants, including undocumented migrants and refugees, gay men, lesbian women, bisexual and transgender persons, persons of national or ethnic minority, HIV positive persons, homeless persons, children and the elderly.

¹⁴³ For explanations about these circumstances, see Explanatory Report, par. 234-244.

11.2 Analysis of the Bulgarian criminal legislation

The BCC does not have a specific provision in which all aggravating circumstances are listed. However, Chapter 5 of the BBC, Articles 54-59, on “meting out of punishments” sets out the rules governing how the sentences will be measured. Article 54 in particular establishes that the punishments are mete out taking into consideration “the degree of social danger of the act and the perpetrator, the motives for crime perpetration, and other attenuating or aggravating circumstances.”

The aggravating circumstances under the BCC are defined for each offence specifically. For example, Article 152 states that in cases of rape, the commission by two or more people or the danger of recidivism are aggravating circumstances.

For the purposes of this report, two articles of the BCC which are directly related to domestic violence cases must be underlined: murder (Article 116) and bodily injury (Article 131). Both articles consider aggravating circumstances the murder of or the inflicting bodily injury to- *inter alia*- mother, father, biological child, pregnant woman, a minor or more than a person, to a person in a helpless state, with particular cruelty, or if it represents a case of dangerous recidivism. However, this list does not include former or current spouses or partners.

11.3 Findings

Legal systems vary greatly in different countries that lead to a variety of legal approaches to aggravating circumstances. Given the fact that domestic violence mostly occurs in the form of physical violence and in intimate relations, particularly between spouses and partners, the BCC should recognize violent acts, such as murder and bodily injury against spouses, partners or former spouses or partners as aggravating circumstance.

As stated in Article 46 (a) of the Istanbul Convention, the existence of an intimate relationship between a perpetrator and a victim should be systematically added as an aggravating circumstance in various criminal provisions of a more general nature, unless there exists a specific criminal offence of domestic violence as this fact already forms part of its constituent elements. Therefore, Article 116 and 131 of the BCC should be amended with a view to ensuring that the physical violence committed against spouses and partners is considered as aggravating circumstance. For instance, in France, certain offences committed against an (former) partner or spouse, are always considered aggravating. In this respect, as per international and regional recommendations, penalties should be commensurate with the gravity of the crimes and legislation should provide for harsher penalties for crimes involving domestic violence than for similar violence related crimes in a non-domestic context.¹⁴⁴

The BCC contains most of the aggravating circumstances defined under Article 46 of the Istanbul Convention for criminal offences, but these can be integrated in a more systemic

¹⁴⁴ *Promoting best practices in tackling violence against women*, Report by the Committee on Equality and Non-Discrimination of the Parliamentary Assembly of the Council of Europe-PACE- (2015), par. 85. <http://website-pace.net/documents/19879/1274427/20150930-ViolenceWomenBestPract-EN.pdf/4c7ecb18-fe6b-48d1-8df3-ccc09f197bd7>

manner, provided that they do not already form part of the constitutive elements of the offence. For instance, it may be advisable to integrate an aggravating circumstance under Article 296 (1) of the BCC. As known, this provision criminalises persons who do not comply with the protection orders given under the LPADV or the European Protection Orders. In this regard, “repeated” violations of protection orders can be defined as aggravating circumstance. In a similar vein, in Austria, along with the Second Protection against Violence Act, the criminal offence “persistent perpetration of violence” was introduced¹⁴⁵ and it allows examining acts of violence (e.g. serious threats, maltreatments, physical violence) that took place over a longer period - as they regularly do in cases of domestic abuse - in their entirety and provide for more severe punishment.

12. Sentences passed by another party

12.1 Requirements of the Istanbul Convention

Article 47 of the Istanbul Convention requires State parties to take necessary legislative and other measures to provide for the possibility of taking into account final sentences passed by another State party in relation to the offences established in accordance with the Istanbul Convention when determining the sentence.

12.2 Analysis of the Bulgarian criminal legislation

Article 8 of the BCC states that the sentence of a foreign court for a crime to which the Bulgarian Criminal Code is applicable shall be taken into consideration in the cases specified in an international agreement to which the Republic of Bulgaria is a party.

Similarly, Article 4 of the BCPC states that “(1) criminal proceeding instituted by a body of another country, or the effective sentence passed by a Court of another country, and not recognized under the order of this Code, shall not be an obstacle to the institution of criminal proceedings by the authorities of the Republic of Bulgaria regarding the same crime and against the same person; (2) the effective sentence passed by a Court of another country and not recognised under the order of the Bulgarian legislation shall not be subject to execution by the authorities of the Republic of Bulgaria; (3) the provisions of paragraph 1 and paragraph 2 shall not apply, if stipulated otherwise in an international treaty to which the Republic of Bulgaria is a party, which has been ratified, promulgated and has entered into force.”

12.3 Findings

The applicable provisions under the BCC and BCPC allow for the consideration of sentences passed in a foreign state, therefore Bulgaria meets the standard embodied in Article 47 of the Convention.

¹⁴⁵ Fortgesetzte Gewaltausübung”, section 107b StGB.

As an EU member, Bulgaria was obliged to incorporate the so called EU *acquis* in its national laws, such as the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union¹⁴⁶ as well as Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.¹⁴⁷ These instruments should be tools to enhance the implementation of Article 47 for the sentences passed within the EU territory. Similarly, the application of Article 13 (judicial records) of the European Convention on Mutual Assistance in Criminal Matters¹⁴⁸ ratified by Bulgaria is equally important to further fulfil the requirements of Article 47 of the Istanbul Convention.

13. Prohibition of mandatory alternative dispute resolution processes or sentencing

13.1 Requirements of the Istanbul Convention

Article 48 of the Istanbul Convention prohibits mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered within its scope. The prohibition is limited to the mandatory participation in any of these methods which implies that victims need to be consulted and give their consent if such alternative process is set up. These methods should not replace adversarial court proceedings.

The second paragraph of Article 48 requires states to take due account of the ability of the perpetrator to assume his or her financial obligations towards the victim in case that he or she is ordered the payment of a fine. This provision aims to prevent an unintended consequence which legal measures may have on the victim. Many of the perpetrators of the offences under the Istanbul Convention are members of the family of the victim and often, they are the sole breadwinners of the family.¹⁴⁹ Article 48 therefore requires states to avoid any potential financial hardship which may indirectly punish the victim through the fines imposed on perpetrators.

13.2 Analysis of the Bulgarian criminal legislation

The BCC and BCPC do not have any mandatory alternative dispute resolution processes. Despite that, Article 381 (1) of the BCPC allows for a plea bargain or a plea agreement. According to these procedures, the prosecution and the defence could enter into a plea agreement after the investigation has concluded. The parties had to agree, inter alia, whether an offence had been committed and on the type and severity of the punishment. The prosecutor would then submit

¹⁴⁶ For a summary of the Framework Decision, see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ajl0016>

¹⁴⁷ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008F0675>

¹⁴⁸ See <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030>

¹⁴⁹ Explanatory Report, par. 253.

the agreement to the competent district or regional court which would examine it in the presence of the prosecutor, the accused and the latter's counsel. If the court finds that the agreement did not run counter to law or morality, the judge would approve the agreement and discontinuing the criminal proceedings. There is no appeal against this decision. A plea agreement approved by a competent court had the same binding force as a final sentence and/or conviction.

Plea bargains are prohibited for the cases of murder (Article 115) and offences related to sexual violence as defined under the section on debauchery (Article 149-159). On the other hand they can apply to offences related to bodily injury under Article 128-135.

Article 183 of the BCC concerns the non-payment of financial support to family members including spouses and lays down criminal sanctions following failure to pay two consecutive months. This provision, however, does not include any element as to consider the effect of any imposed fine in the capacity of the perpetrator to undertake financial obligations towards his or her family. Similarly, the LPADV does not contain any provision in relation to the financial capacity of the perpetrators. It further places no obligation to establish that fines ordered under Article 5 of the LPADV against perpetrators do not put victims of domestic violence in a more vulnerable situation.

13.3 Findings

Alternative dispute resolution processes can be problematic and indeed dangerous in cases of violence against women and domestic violence. Whereas alternative dispute resolution processes presume that parties approach the process with equal resources and power, cases of violence against women and domestic violence involve unequal power relationships between the parties, based on acts of assault, violent intimidation, controlling, abusive, or humiliating behaviours. If the Istanbul Convention does not deny the importance and positive effects of such mechanisms for a modern justice system (and indeed several Council of Europe member States have provisions for alternative dispute resolution and mediation in criminal and civil law) it calls for caution when such mechanisms are applied in the field of violence against women and domestic violence.

Plea-bargaining agreements under the BCPC were in fact a matter of concern before the CEDAW Committee which was reflected in *SVP v Bulgaria*¹⁵⁰ as the BCPC allowed to the plea-bargain for certain sexual offences. After having amended the BCC in 2007 to categorize as serious crimes, the behaviors contained in article 149 (1) and that plea-bargaining agreements are no longer possible for charges under that article, Bulgaria has reinforced victims' rights and needs. Albeit the current system under Article 381 (2) allows entering into plea-bargaining agreement for offences related to bodily injury, this procedure is not mandatory and the victims' consent is required. Thus the requirements under Article 48 (1) of the Istanbul Convention are fulfilled.

As for the requirements under Article 48 (2) of the Istanbul Convention, on the other hand, it stems from the Bulgarian legislation as well as judicial practice that where the courts impose a fine to the perpetrator, its potential impact on the latter's ability to fulfil financial obligations is

¹⁵⁰ Communication no. 31/2011, 27 November 2012.

not taken into consideration. The courts in Bulgaria are only required to bear in mind the severity of the offence while determining the amount of fine or financial support. It is, however, of critical importance to weigh the possible effects of sanctions of financial nature, particularly in cases of domestic violence where the victim is often economically dependent on the perpetrator. Hence, it is recommended to introduce a provision under Article 183 of the BCC as well as Article 5 of the LPADV for ensuring victims of domestic violence shall not be exposed to any direct or indirect financial hardship due to such sanctions against perpetrators.

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