

Gap analysis of the legislative and policy framework in the field of violence against women and domestic violence in Azerbaijan in line with Council of Europe and other international standards



Partnership for Good Governance II 2019-2022 - “Raising awareness of the Istanbul Convention and other gender equality standards in Azerbaijan”

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GAP ANALYSIS OF THE LEGISLATIVE AND POLICY FRAMEWORK IN THE FIELD OF VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE IN AZERBAIJAN IN LINE WITH COUNCIL OF EUROPE AND OTHER INTERNATIONAL STANDARDS

**Partnership for Good Governance II 2019-2022 -
“Raising awareness of the Istanbul Convention and
other gender equality standards in Azerbaijan”**

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TABLE OF CONTENTS

ACKNOWLEDGMENTS	4
LIST OF ACRONYMS	5
EXECUTIVE SUMMARY	7
AIM AND SCOPE OF THE STUDY	9
METHODOLOGY	10
PART I: CRIMINAL LAW	11
Criminalisation of all forms of violence against women	11
Domestic violence	12
Physical violence	13
Psychological violence	16
Sexual violence	18
Unacceptable justification for crimes, including crimes committed in the name of so-called "honour"	21
PART II: CIVIL REMEDIES AND CUSTODY AND VISITATION RIGHTS	23
Civil Remedies	23
Compensation	26
Dissolution of forced marriages	28
PART III: AREAS WITH POTENTIAL RELEVANCE TO BOTH CRIMINAL AND CIVIL SPHERES	31
Free legal aid	31
Prohibition of mandatory alternative dispute resolution processes	32
Emergency barring orders; restraining or protection orders	33
Data collection	35
CONCLUSION	36
REFERENCES	37
ANNEXES	38
I Report Recommendations	39
II List of Azerbaijani domestic provisions considered within the assessment	41
III List of interviewees	42
IV Consent as an essential element of the crime of sexual violence – international standards	44

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LIST OF ACRONYMS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CoE	Council of Europe
CRC	Committee on the Rights of the Child
CSO	Civil Society Organisation
DV	Domestic Violence
ECHR	Convention for the Protection on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FGM	Female Genital Mutilation
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
IGO	International Governmental Organisations
NGO	Non-governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
PGG	Partnership for Good Governance II 2019-2022
SRAW	United Nations Special Rapporteur on Violence Special Rapporteur on Violence against Women, its causes and consequences
UN	United Nations
VAW	Violence against Women
WAVE	Women Against Violence Europe

EXECUTIVE SUMMARY

The publication of the Azerbaijani National Action Plan on Combating Domestic Violence 2020-2023 represented an important step forward in addressing offences of domestic violence in Azerbaijan.

The stated aim of the National Action Plan is “to achieve alignment between domestic violence prevention measures implemented in Azerbaijan with international standards”. In pursuit of that aim, the findings in this report are the product of careful consideration of the current Azerbaijani domestic legislative framework and policies by reference to established international standards for combating violence against women and domestic violence.

The analysis of Azerbaijani law shows that one of the most effective means by which national legislation could be aligned with international standards would be by means of a new, criminal offence of domestic violence. Such an offence could be specifically drafted to encompass the repetitive nature of the various and compound forms of physical, psychological and sexual violence that is characteristic of domestic abuse. In the absence of a new criminal offence of domestic violence, it is imperative that all offences of physical, psychological and sexual violence are included within the Criminal Code of Azerbaijan rather than the Administrative Code thus acknowledging the serious nature of these crimes as required by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). Consideration should also be given to a separate offence of stalking. Domestic legislation must be amended to reflect that the responsibility for investigation and prosecution of acts of violence should not be wholly dependent on the complaint or consent of the victim. Provisions which could be interpreted to provide an “honour” justification for criminal offending should be removed from the Criminal Code.

With regard to offences of sexual violence, all non-consensual sexual acts must be criminalised based on an absence of consent alone. All forms of non-consensual vaginal, anal penetration should be included within the definition of rape.

In the civil sphere, legislative review and amendment is recommended to provide for the possibility of the deprivation of parental rights and the placement of conditions upon parental visits/communications where a parent has perpetrated domestic violence upon his or her partner. Specialist input from experts in child welfare should be made available to assist in judicial decision making so as to ensure that the best interests of the child are paramount within such proceedings. Specialist contact centres of family meeting points should be created where parental visits can be supervised and monitored by specialist personnel to ensure the safety of the children concerned.

Adequate provision for the protection of victims of domestic violence must be made in the form of support centres and specialist domestic violence shelters that are able to accommodate both adult and children victims of domestic violence. These centres and shelters must be both safe, easily accessible and provide appropriate victim services. Official disaggregated data on the number of protection orders, investigations, prosecutions and convictions must be collected and published. A co-ordinated database must be created in order to make the relevant data accessible and public.

It is recommended that new legislative measures are adopted to provide the right for victims of offences of violence against women and domestic violence (including victims of forced marriage) to claim financial compensation from either the perpetrator or the state. An efficient framework and procedure is required for the processing of such applications that is free of charge to applicants. Information about such a right and how to access it should be made available to victims.

Legislative amendment is required in relation to the dissolution of forced marriages to remove the discretion given to the court to reject a claim for annulment of a forced marriage in certain circumstances. It is further recommended that the Civil Procedure Code be amended to provide for an “express” procedure to enable expedition of the annulment of a forced marriage and the provision of free legal aid and representation for victims in such circumstances. Official data should be

collected on early and forced marriages and used for information campaigns to prevent and combat the practice. It is recommended that forced and early cohabitation also be criminalised so as to protect victims of unregistered marriages.

The Draft Law on Free Legal Aid should be reviewed and amended in order to include free legal aid for victims of violence against women and domestic violence who lack funds to be represented in court. The relevant financial threshold should be determined by reference to the independent income of the victim alone and victims should be exempted from the payment of court fees.

Domestic legislation should be amended to remove any duty on the state and any obligation upon a victim of domestic violence to assist in the normalisation of relations between parties or the resumption of family affairs. The Family Mediation Law 2021 should be amended to remove any mandatory sessions of mediation as applicable to victims of violence against women and domestic violence.

Legislative reform is also necessary to provide powers to require the perpetrator to leave the family home where appropriate. Legislative specification must be provided as to which authority is competent to issue emergency protection orders in cases of immediate danger. The mandatory requirement that a breach of a short-term order must be established prior to making an application for a long-term protection order should be eliminated. Legal provisions for requesting a protection order must be made quick, easily accessible and affordable to the victim.

AIM AND SCOPE OF THE STUDY

The aim of this report is to analyse selected legislation and policy frameworks of Azerbaijan in the field of violence against women and domestic violence (VAW/DV) by reference to international legal standards. Through such an analysis, any “gaps” or shortcomings within the existing domestic legislation can be identified. Potential routes have been recommended by which domestic legislative framework in Azerbaijan could be improved in order to achieve both greater alignment with international standards and the objectives set out by the government in the National Action Plan on Combating Domestic Violence for 2020-2023.

The primary reference tool used for assessment within this report is the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). This is because the Istanbul Convention is widely recognised as the most comprehensive international treaty on this topic and as representing the best of international standards and good practice.¹ It therefore can reasonably be used as a benchmark for international standards in this field. However, where appropriate, other illustrations of these standards are also included within the text in order to demonstrate the wide range of sources which have led to the development of the well-established standards set out within the Istanbul Convention.

It should be noted that this report, its findings and recommendations are not published, related to or endorsed by the Council of Europe’s official monitoring bodies, namely, the Group of Experts on Action against Women and Domestic Violence (GREVIO) or the Committee of the Parties. GREVIO monitors the implementation of the Istanbul Convention by states parties. Based on GREVIO baseline evaluation reports, the Committee of the Parties adopts its recommendations to the states parties concerned. Azerbaijan is not currently a state party to the Istanbul Convention and therefore not subject to the GREVIO monitoring process. This review is a separate process that is part of a technical co-operation project which supports the Azerbaijani authorities in the path towards signature and ratification of the Istanbul Convention.

A comprehensive national strategy for both preventing and combating VAW/DV relies not only on legislative tools in order to be effective, but also targeted programmes of education and training as well as appropriate policies and the implementation of good practice on the ground. However, legislation is the first and foundational building block of a successful process to which all other elements of the process are inextricably linked. It is for this reason that assessment and improvement of the legislation itself is fundamental to the success of any such strategy and as such the focus of this report.

Due to insufficient data, it has not been possible to assess and analyse all relevant Azerbaijani legislation and policy by reference to all of the provisions and standards set out within the Istanbul Convention. A selection has therefore been made of those provisions upon which it is possible at this stage to provide a meaningful assessment. It is hoped that this analysis in relation to key provisions may provide a foundation which future work in this field can complement and build upon. The authors have been assisted in their assessment by the input of a wide range of experienced actors working within the Azerbaijani justice system.

Adherence to international standards in tackling VAW/DV impacts upon a wide range of criminal offences and civil provisions under domestic legislation. This assessment does not cover every aspect of potential legislative reform. For the purpose of this report, primary focus has been placed upon certain key areas in respect of which priority reform is recommended in order to achieve alignment with international standards and to achieve Azerbaijan’s overarching aim as set out in the National Action Plan on Combating Domestic Violence 2020-2023 to:

bring domestic violence prevention measures implemented in the country in line with international standards; provide timely and comprehensive assistance to families to keep them safe and secure, and improve the implementation and effectiveness of legislative measures to combat domestic violence.

1. The Istanbul Convention codifies established standards, jurisprudence and developments at international level, as well as best practice at national level, thereby lending them more weight and ensuring their wider application.

METHODOLOGY

The preparation of this report has been primarily desk based but also included online meetings with relevant stakeholders. The information taken into consideration within this assessment is three-fold and comprises:

- i) relevant portions of the Azerbaijani legislation and relevant policy frameworks;
- ii) online needs assessment meetings with a range of stakeholders which were followed by additional written questions and answers provided to and answered by certain stakeholders;
- iii) consideration of reports prepared by other International Governmental Organisations (IGO) and Civil Society Organisations (CSO) addressing VAW/DV in Azerbaijan.

Information in relation to the domestic law and practice upon which the assessment has been based was provided by the Azerbaijani local consultant and Council of Europe Office staff in Azerbaijan. The contributors to this report were assigned the following roles: a local consultant whose role it was to provide an overview of domestic law and policy, to identify and translate the appropriate provisions for analysis, provide advice upon their interpretation and in the absence of any official translations into English to provide the translation itself. The full list of domestic legislative provisions considered can be found at Annex II to this report. Two international consultants provided international expertise and analysis with responsibility for authoring the criminal and civil sections respectively.

This report has been prepared during the worldwide COVID-19 pandemic and therefore all interviews were conducted online. Interviews conducted included those with members of the judiciary; representatives of ministries, professionals dealing with victims' services and legal practitioners. A full list of those interviewed can be found at Annex III to this report.

This report is divided into three main sections: Part I deals with criminal law provisions; Part II deals with civil remedies and custody and visitation rights; and Part III deals with areas of potential relevance to both criminal and civil spheres. Each of the three parts of the report is broken down by subject matter and each separate subject is in turn broken down into three sub-sections: i) an overview of what the Istanbul Convention requires together with wider illustrations of international standards and practice where appropriate; ii) a review of the Azerbaijani legislative and policy frameworks; iii) report recommendations.

In relation to the subject of consent-based sexual violence, additional illustrative material has been provided at Annex IV dealing with international standards regarding consent as an essential element of the crime of sexual violence.

PART I: CRIMINAL LAW

Criminalisation of all forms of violence against women

The Istanbul Convention and other international standards

Articles 33 to 40 of the Istanbul Convention provide for the criminalisation of gender-based violence, including the following specific types of violence: psychological violence, stalking; physical violence; sexual violence, including rape and causing another person to engage in non-consensual acts of a sexual nature with a third person, forced marriage of an adult or child, including luring an adult or child to enter the territory of another state with the aim of forcing them into marriage, female genital mutilation; forced abortion and forced sterilisation, when lacking the informed consent of the woman and her understanding of the procedure; sexual harassment, whether it be verbal, nonverbal or physical.

Additional provisions within the Istanbul Convention that are particularly relevant to the functioning of criminal law include the following:

Article 42: Unacceptable justification for crimes, including crimes committed in the name of so-called “honour”

Culture, custom, tradition, religion, or so-called “honour” should not be regarded in criminal proceedings as justification for acts of gender-based violence.

Article 43: Application of criminal offences

All offences established in accordance with the Convention should apply irrespective of the nature of the relationship between victim and perpetrator

Article 45: Sanctions and measures

The crimes established by this Convention should be punished by effective, proportionate and dissuasive sanctions. In addition, States may establish measures such as monitoring or supervision of convicted persons and withdrawal of parental rights, if this is in the best interests of the child.

Article 46: Aggravating circumstances

Among many, the following circumstances should be considered aggravating in the determination of a sentence for the offence established in the Convention: offence against current or former spouse or partner as recognised by internal law, by a member of the family or a person cohabiting with the victim; when the offence was committed repeatedly; the offence was committed in the presence of a child; when extreme violence was involved; when the offence resulted in severe physical or psychological harm for the victim

Article 55 of the Istanbul Convention also requires that investigation or prosecution of all forms of violence against women covered by it are not wholly dependent on the report or complaint by the victims, but a responsibility of state institutions.

These articles of the Istanbul Convention reflect established international standards. See by way of example the Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation 35 (2017), in its paragraph 29 which states the following:

Ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual, or psychological integrity, are criminalized and introduce, without delay, or strengthen legal sanctions commensurate with the gravity of the offence as well as civil remedies.

And the United Nations (UN) Handbook for Legislation on Violence Against Women (2012) which recommends that:

Legislation should:

be comprehensive and multidisciplinary, criminalizing all forms of violence against women, and encompassing issues of prevention, protection, survivor empowerment and support (health, economic, social, psychological), as well as adequate punishment of perpetrators and availability of remedies for survivors (para 3.1.2)

apply to all forms of violence against women, including but not limited to: Domestic violence; Sexual violence, including sexual assault and sexual harassment; Harmful practices, including early marriage, forced marriage, female genital mutilation, female infanticide, prenatal sex-selection, virginity testing, HIV/AIDS cleansing, so-called honour crimes, acid attacks, crimes committed in relation to bride-price and dowry, maltreatment of widows, forced pregnancy, and trying women for sorcery/witchcraft; Femicide/feminicide; Trafficking; and Sexual slavery (para 3.4.1)

recognize violence against women perpetrated by specific actors, and in specific contexts, including: violence against women in the family and violence against women in the community (para 3.4.1)

Review of the Azerbaijani legislative and policy frameworks

The review of the Azerbaijani legislative and policy frameworks for each form of violence against women and domestic violence considered in this report by reference to the standards of the Istanbul Convention will be addressed separately in the sections below

Domestic violence

The Istanbul Convention and other international standards

Whilst the Istanbul Convention does not require the introduction of specific criminal offences, national criminal legislation must capture the course of conduct that is typical of cases of domestic violence. This includes the repeated nature of domestic violence and its multiple forms, including psychological and sexual violence as well as patterns of power and control and is usually best served by a specific criminal offence.

As stated by the European Court of Human Rights (ECtHR) in *Volodina v. Russia*, Application no. 41261/17, judgment 9 July 2019, paragraph 78:

The obligation on the State in cases involving acts of domestic violence would usually require the domestic authorities to adopt positive measures in the sphere of criminal-law protection. Such measures would include, in particular, the criminalisation of acts of violence within the family by providing effective, proportionate and dissuasive sanctions. Bringing the perpetrators of violent acts to justice serves to ensure that such acts do not remain ignored by the competent authorities and to provide effective protection against them... The Court has accepted that different legislative solutions in the sphere of criminal law could fulfil the requirement of an adequate legal mechanism for the protection against domestic violence, provided that such protection remains effective.

Review of the Azerbaijani legislative and policy frameworks

The domestic law of Azerbaijan currently contains no specific offence of domestic violence and although certain provisions of the criminal law may be used to prosecute physical, sexual and psychological violence within the context of domestic violence, there is little evidence that the current legislative framework captures the course of conduct, multiple forms or patterns of power of control by which offences of domestic violence are so often characterised.

The relevant provisions applicable to of physical, sexual and psychological violence are outlined and assessed in sequential sections below.

The Istanbul Convention and other international standards

Article 35 of the Istanbul Convention requires states parties to ensure that “the intentional conduct of committing acts of physical violence against another person is criminalised” – a requirement that applies regardless of the severity of injury caused and even where no injury has been sustained by the victim.

Review of the Azerbaijani legislative and policy frameworks

Lack of criminalisation of all acts of physical violence against another person

The domestic law of Azerbaijan contains no specific offence of domestic violence but instead establishes a range of criminal and administrative offences which may be used to prosecute acts of physical violence.

All offences of violence that currently exist in Azerbaijani law (whether criminal or administrative) are generic in that they may be used both for the prosecution of all acts within their remit and are not specifically dedicated to either domestic violence or any of the other forms of violence against women covered by the Istanbul Convention. The requirement of this treaty is to criminalise the behaviour in question, while equipping law enforcement agencies and other criminal justice actors with the ability to recognise and respond to the specific situation of women victims of gender-based violence, including the vulnerabilities and dependencies that may exist.

The fact that certain offences of physical violence are contained within the Code of Administrative Offences of Azerbaijan (the Administrative Code) rather than the Code of Criminal Offences of Azerbaijan (the Criminal Code) means that not all intentional acts of physical violence are criminalised under the current domestic framework. This in turn means that Azerbaijani legislation would not be in line with Article 35 of the Istanbul Convention.

As long as the Criminal Code contains no definition of domestic violence there can be no such offence in law. Although a definition is set out within the Law of Azerbaijan on the Prevention of Domestic Violence (Law on Domestic Violence), this law creates no separate criminal offences without incorporation into the Criminal Code. As a result, criminal offences of domestic violence at present may only be prosecuted under general offences of violence within the Criminal Code.

It is likely therefore, that in Azerbaijan, the combined effect of the lack of a specific offence of domestic violence together with the failure to criminalise all forms of physical violence creates a compound effect detrimental to the objective of protecting women against domestic violence and preventing, prosecuting and eliminating violence against women and domestic violence.

In this regard, it is illustrative to consider the nature of those offences that are respectively categorised as criminal and administrative offences under Azerbaijani law.

The Criminal Code establishes the following offences of physical violence:

Article 126: Deliberate causing of serious harm to health where “serious harm to health” is defined as:

Intentional infliction of grievous bodily harm, that is, harm that is dangerous to a person’s life, or entailing loss of vision, hearing, speech or any organ or loss of its functions by an organ, mental disorder or other health disorder, long-term disability for at least one third or, knowingly for the guilty person, complete loss of professional ability to work, or termination of pregnancy, or harm that caused the victims drug addiction or substance abuse, or resulted in the indelible disfigurement of the person..

Article 127: Intentional infliction of less serious harm to health where “less serious harm to health” is defined as:

less serious harm to health, not dangerous to the life of the victim and not entailing the consequences specified in Article 126 of this Code, but which caused a long-term health disorder or significant loss of general working capacity by less than one third of it...

Article 128: Intentional infliction of slight harm to health where “slight harm to health” is defined as:

a harm to health that has caused a short-term health disorder or a slight loss of general labour capacity...

Article 133: Tormenting which is defined as:

Causing physical or mental suffering by systematic beatings or other violent actions, if this did not entail the consequences specified in Articles 126 and 127 of this Code

The Administrative Code establishes the administrative offence of beating in the following terms:

Article 157: Beating: Intentional beating or committing other violent acts that caused physical pain

In broad terms, for a single act of violence to fall within the Criminal rather than Administrative Code, it requires proof of “harm to health”. Where no “harm to health” can be established then the relevant act of physical violence can only be prosecuted as an administrative rather than criminal offence under Article 157 of the Administrative Code unless the relevant criteria for the offence of “tormenting” can be made out.

This distinction raises concerns which go to the core of meaningful prevention of and protection from offences of violence against women and domestic violence. It also detracts from the aims set out by the Azerbaijani Government in its National Action Plan on Combating Domestic Violence.

- i) Firstly, the classification of beating as an administrative rather than criminal offence amounts to a failure to recognise the criminality of all acts of physical violence.
- ii) Secondly, the requirement within the elements of offence that physical pain flowed from the violent act in question, is problematic. The practical effect of this formulation means that even where intentional beating or another violent act can be proved, unless causation of physical pain by the act in question can also be established, then there is no offence. This requirement is directly at odds with the Istanbul Convention in terms of the recognition of all forms of violence as criminal offences. It also fails to recognise or penalise the harm caused by all forms of physical violence, regardless of the injury or pain caused to the victim.
- iii) Thirdly, in combating the phenomenon of domestic violence it is important to note that a pattern of such offending (often by an intimate partner, current or former) may begin with offences of lesser violence that incrementally increase in frequency and intensity and physical harm over time. The classification of beating or other acts of violence (including psychological violence) that fall within Article 157 as non-criminal offences sends a message that such acts of violence are considered by the state to be less worthy of criminal investigation, trial and sentencing. Also, that the victims of such acts of violence (disproportionately women) are less worthy of criminal protection. In addition, it misses the opportunity to address such offending at a point in the cycle of criminal behaviour where there is a greater opportunity to protect the victim from serious harm and to prevent the escalation of violence before it has occurred.
- iv) Fourthly, the Azerbaijani “Rules on considerations of complaints about domestic violence that do not contain indications of a crime” acknowledge that in the absence of criminal elements (that is, in relation to administrative offences), any complaint made is reviewed by the executive authority of the resident area. In such circumstances, the complaint is only investigated “with the consent of the victim or his or her legal representative”. Such procedure places an additional burden and pressure upon the victim of an administrative offence and lessens the chances of effective investigation and/or prosecution. This is particularly so in any culture that promotes reconciliation between the parties and prioritisation of the family unit above the protection of victims from harm. Furthermore, this approach represents a departure from the requirements of Article 55 of the Istanbul Convention that the investigation or prosecution of offences shall not be wholly dependent upon a report or complaint filed by the victim and that the proceedings may continue even when the victim withdraws his or her statement or complaint.
- v) Finally, under Azerbaijani law, the inclusion of any offence of violence within the Administrative rather than Criminal Code, brings with it a statute of limitations of only one month for the offence in question. This compounds the difficulties in tackling this type of offending and reduces the likelihood of achieving effective protection against or prosecution of violence against women and domestic violence. In order to effectively tackle such crime, it is crucial to appreciate the shame or sense of responsibility which many victims² may feel as a result of their victimisation and the reluctance to report such offences to law enforcement officials or even to confide in members of their own family. This may be due to fear; a wish to protect children; economic dependency; absence of viable alternative housing; a sense of taboo around such subjects; the belief that the preservation of the marriage or the family unit should be prioritised above the safety of the victim and the hope that such actions if overlooked will not be repeated. For these reasons and many others, there may often be significant delays in the

2. Throughout this report, the authors use the term “victim” and “victimisation” to refer to people who have been the subject of domestic violence/ violence against women. We use this term for brevity though we recognise that not everyone who has been the subject of an abuse identifies as a “victim” and some may prefer another term (such as survivor) while some may prefer not to label themselves based on their experience of violence.

reporting of such offences – particularly those offences which occur at the start of what latterly may be recognised as an escalating scale of violence. As such, the classification of beating or other acts of physical violence as an administrative rather than criminal offences is particularly detrimental to the overall aims of the Azerbaijani government as set out in National Action Plan on Combating Domestic Violence in Azerbaijan.

The requirement to prove harm, injury or pain

Additional difficulties exist within those criminal offences of physical violence that are currently established under the Azerbaijani Criminal Code. Most notable of these is the requirement to prove physical harm, injury or pain within the criminal offences of violence outlined above.

The Istanbul Convention's requirement to criminalise all acts of physical violence against another person is intended to be wide in order to encompass the many and varied acts of physical violence that may characterise an abusive relationship. Violence cannot be defined merely by reference to physical harm, injury and pain and the Istanbul Convention makes clear that any intentional act of violence must be criminalised. The requirement to criminalise all acts of violence is not dependent upon the consequences of the violent act in question. Therefore, the requirement in each of the criminal offences outlined above to establish more than the act of violence itself is problematic. This framing places emphasis upon the result of the violent action as opposed to the violent action itself.

While the injury or harm caused to a victim is an appropriate factor for categorisation of offence and/or sentence following conviction, the absence of such injury or harm cannot be seen as an indicator that no crime has been committed and its inclusion in the elements of a criminal offence is a further departure from the requirements of Article 35 of the Istanbul Convention.

To provide one example: the violent act of non-fatal strangulation is recognised to be a common feature of many abusive intimate relationships yet often leaves no visible injury or obvious physical harm and would seem unlikely to fall to be prosecuted under Azerbaijani criminal law on the basis of current definitions. Yet this is just one example of the range of potential acts of domestic violence that may not cause sufficient harm to be prosecuted under criminal law in Azerbaijan if assessed solely by reference to physical injuries or pain. The current framework also fails to recognise that many perpetrators choose methods of violence which undermine or psychologically terrorise their victims yet do not cause lasting or long-term physical injury, marks on the body or even, in some instances, pain. As already acknowledged, many victims of domestic abuse may minimise, deny or justify the behaviour of the offender in question out of love, shame, fear, preservation of the family or coercive control.

Furthermore, the inclusion of such a requirement further reduces the possibilities of prosecution without the participation of the victim as required by Article 55 of the Istanbul Convention and which is a valuable tool for effectively tackling violence against women. As such, this additional element of proof not only fails to comply with the requirements of the Istanbul Convention but may also present an additional barrier to the effective prosecution of such crimes.

In terms of the protection of victims, it is a well-established phenomenon that the frequency, seriousness and level of harm of domestic violence tends to escalate over time, as does the risk for the victim. Consequently, the failure to engage state responsibility for appropriate criminal law protection to all victims of such acts of violence fails to provide the adequate criminal law response to domestic violence that is required by the Istanbul Convention. It also misses an important opportunity to address the offending behaviour before risks escalate further for the victim concerned. Remedying this gap has the potential not only to prevent further and more serious violence against individual victims' abusive relationships but also in time to change a culture of tolerance for or normalisation of "low level" domestic violence.

Report recommendations

Report recommendation 1

To criminalise all acts of physical violence and to consider the introduction of a specific offence of domestic violence that would cover all its elements, ranging from psychological to physical, economic and sexual violence.

The criminalisation of domestic violence could be achieved by the introduction of a new, specifically drafted offence in line with international standards which would also encompass the repetitive nature of the various/compound forms of physical violence as well as psychological and sexual forms of violence as provided for by the Istanbul Convention. This is likely to be the most effective and efficient means by which to achieve legislative alignment with international standards in relation to the effective prosecution of violence against women and domestic violence.

Report recommendation 2

To include all offences of physical, psychological and sexual violence within the Criminal Code rather than the Administrative Code.

The administrative offence of beating should be recognised as an inappropriate means of prosecuting domestic violence cases and ill-equipped to reflect the nature of the offence in question. Its inclusion within the Administrative Code not only undermines the aims of the Azerbaijani authorities to tackle domestic violence in practical terms but also may send the message that victims of domestic violence are offered lesser protections than other victims of violence. As a minimum, this offence and all offences relating to physical violence should be placed within the Criminal Code. However, a preferable course of action may be to replace or complement this offence with a stand-alone criminal offence of domestic violence as outlined in recommendation 1.

Report recommendation 3

To remove the requirement to prove injury, pain or physical harm as a constituent element of domestic violence.

Depending on which route the Azerbaijani authorities choose to implement the report recommendations 1 and 2, it may be appropriate to remove all reference to any requirement to prove injury, pain or physical harm within one consolidated single offence of domestic violence. However, if no specific offence is instituted, it is imperative that at least one criminal offence of physical violence reflect the intentional act of violence itself as a criminal act without any additional requirement to prove specific injury, pain or physical harm.

Report recommendation 4

To review domestic legislation and practice to ensure that the state's obligations of investigation and prosecution are accurately reflected and actively pursued even without the complaint or consent of the victim.

Azerbaijani domestic law should be amended in order to reflect that the responsibility for investigation and prosecution of all acts of physical violence lies with the state and is never wholly dependent upon the complaint or consent of the victim. It should be possible under domestic law for investigation and prosecution of all acts of physical violence to be continued even if a victim withdraws his or her complaint or statement.

Psychological violence

The Istanbul Convention and other international standards

The Istanbul Convention requires under Article 33 that the

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats is criminalised.

Article 34 which is entitled "Stalking" requires that

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing him or her to fear for his or her safety, is criminalised.

Pursuant to Article 78(3) of the Istanbul Convention, signatory parties may reserve the right to provide for non-criminal sanctions, in place of criminal sanctions in response to psychological violence but such reservations are intended to provide temporary flexibility and must not undermine the ultimate intention of the Istanbul Convention in this regard. The criminalisation of psychological violence remains an important aspect of the protections and safeguards provided for within the Istanbul Convention. This is particularly so in the context of domestic violence where, as outlined above, it is the repeated nature of the psychological violence (often as part of pattern of power and control and/or in combination with other forms of domestic violence) that is a critical aspect of the offending and usually best reflected by a criminal offence of domestic violence that captures all its multiple forms. Without such an offence, the criminalisation of psychological violence in a domestic violence setting (as required by the Istanbul Convention) may be lost.

The requirements of the Istanbul Convention with regard to psychological violence are again reflect well-established international standards as set out for example in the following documents:

CEDAW General Recommendation 35 to:

Ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their ... psychological integrity, are criminalized (para 29(a));

The United Nations Handbook on violence against women (2012):

Legislation should include a comprehensive definition of domestic violence, including...psychological...violence (paragraph 3.4.2.1):

The framework for model legislation on domestic violence by the United Nations Special Rapporteur on Violence against Women, its causes and consequences (SRAW) (1996):

All acts of gender-based physical, psychological and sexual abuse by a family member against women in the family, ranging from simple assaults to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating verbal abuse, forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or bride-price related violence, female genital mutilation, violence related to exploitation through prostitution, violence against household workers and attempts to commit such acts shall be termed "domestic violence".

Review of the Azerbaijani legislative and policy frameworks

Article 134 of the [Criminal Code](#) criminalises "threat of murder or infliction of grave harm to health if there were real reasons to fear the execution of this threat".

This offence does not criminalise the conduct set out in Articles 33 or 34 of the Istanbul Convention and no other offence in the Criminal Code criminalises the types of psychological harm envisaged by these Articles.

Article 33 of the Istanbul Convention requires the criminalisation of "intentional conduct of seriously impairing another person's psychological integrity through coercion or threat" and Article 34 requires the criminalisation of "intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing him or her to fear for his or her safety". The threshold of "threat of murder or infliction of grave harm to health" as set out in Article 134 of the Criminal Code is therefore too restrictive to provide the relevant protection envisaged by the Istanbul Convention.

In addition, Article 134 of the Criminal Code only criminalises such conduct where it can be proved to the criminal standard that "there were real reasons to fear the execution of this threat" thereby adding a further barrier to the prosecution and conviction of this offence.

Finally, this offence fails to reflect the relevance of repeated threats or coercion and/or types of situations which more usually fall into offences of psychological violence. In such instances it is the repetition of certain actions that is a crucial factor in assessing the offending behaviour in question. This is so particularly in relation to actions, which, if assessed in isolation, might be considered unproblematic yet when as part of a course of conduct amount to criminal behaviour.

In order to provide the protection envisaged by Articles 33 and 34 of the Istanbul Convention, the Criminal Code would require amendment in order to criminalise the relevant conduct set out in each Article.

A free-standing offence of stalking is particularly important because the individual actions of a pattern of behaviour that make up such an offence, if taken alone would be unlikely to amount to a criminal offence. For example, following someone in the street, repeatedly visiting their house uninvited, repeated telephone calls and messages either to the victim or their friends and family. While this type of behaviour can cause extreme fear and psychological harm over time, it is usually the pattern of the behaviour in question rather than the individual acts that meet the threshold of criminality. This is key to allowing law enforcement agencies to respond to post-separation stalking which may continue for years after an (abusive) relationship has ended and can indicate an increased level of risk to the victim and her children.

Report recommendations

Report recommendation 5

To amend the Criminal Code in order to include specific and separate offences that meet the Istanbul Convention requirement for criminalisation of psychological violence in the terms set out in Article 33 - psychological violence (which might most appropriately be achieved by the incorporation of a specific offence of domestic violence) and Article 34 - stalking.

The Istanbul Convention and other international standards

Article 36 of the Istanbul Convention requires parties to criminalise all sexual acts that are not conducted with consent. The text of the article reads as follows:

Parties shall take necessary legislative or other measures to ensure that the following intentional conducts are criminalised

- a. Engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
- b. Engaging in other non-consensual acts of a sexual nature with a person;
- c. Causing another person to engage in non-consensual acts of a sexual nature with a third person.

Consent must be given voluntarily as the result of a person's free will assessed in the context of the surrounding circumstances.

Consent-based legislation recognises definitions of sexual violence that are based on the victim's genuine, free and willing consent rather than the perpetrator's use or threat of force or the helplessness of the victim. That is to say, the absence of the victim's consensual participation in the act in question forms a constituent element of the relevant crime. This means that under consent-based legislation, even without the use or threat of violence or in situations where the victim is not "helpless" an offence of sexual violence may still be committed if the act in question is not consensual.

This requirement reflects recognised international standards, including, as set out by:

The CEDAW General Recommendation 35, paragraph 29 (e) to:

Ensure that sexual assault, including rape, is characterized as a crime against the right to personal security and physical, sexual and psychological integrity and that the definition of sexual crimes, including marital and acquaintance or date rape, is based on the lack of freely given consent and takes into account coercive circumstances. Any time limitations, where they exist, should prioritize the interests of the victims/survivors and give consideration to circumstances hindering their capacity to report the violence suffered to the competent services or authorities."

The Council of Europe Recommendation (2002)5 of the Committee of Ministers on the Protection of Women against Violence, paragraph 35 that:

National law should penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance; penalise sexual penetration of any nature whatsoever or by any means whatsoever of a non-consenting person.

And most recently, the recommendation of the SRAW in her Report to the Human Rights Council (2021) paragraph 85 that

- a. States should explicitly include lack of consent at the centre of their definition of rape. Force or threat of force provide clear evidence of non-consent, but force is not a constituent element of rape. States must specify that consent must be given freely, as a result of the person's free will, assessed in the context of the surrounding circumstances. Intercourse with out consent should be criminalized as rape in all definitions;
- b. Criminal provisions on rape should specify the circumstances in which determination of lack of consent is not required or consent is not possible, for example, when the victim is in an institution such as a prison or detention centre, or is per manently or temporarily incapacitated owing to the use of alcohol and drugs;
- c. Legislation criminalizing rape should establish that consent of children below the age of 16 is immaterial and that any sexual intercourse with an individual below the age of consent is rape (statutory rape), where determination of lack of con sent is not required. Exceptions could include consensual intercourse between a child aged under 18 and a child older than 14 and younger that 16;
- d. Estupro provisions, where they exist, should be abolished.

Article 43 of the Istanbul Convention provides that the offences established in accordance with the convention shall apply irrespective of the nature of the relationship between victim and perpetrator. This provision is considered to be

of particular importance in relation to offences of sexual violence as the explanatory notes to Article 43 of the convention explain:

A large number of the offences established in accordance with the Convention are offences typically committed by family members, intimate partners or others in the immediate social environment of the victim. There are many examples from past practice in Council of Europe member states that show that exceptions to the prosecution of such cases were made, either in law or practice, if victim and perpetrator were, for example, married to each other, or had been in a relationship. The most prominent example is rape within marriage, which for a long time had not been recognised as rape because of the relationship between victim and perpetrator. For this reason, the drafters considered it necessary to establish the principle that the type of relationship between the victim and perpetrator shall not preclude the application of any of the offences established in this Convention.

In addition, Article 36 also requires that parties take

the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.

These requirements reflect once again, well established international standards and have been widely commented upon, for example by the SRAW in her Report to the Human Rights Council dated 19 April 2021

The criminalization of rape should include rape between spouses or intimate partners. All States that exclude the criminalization of marital rape, contrary to international human rights standards, should urgently repeal those provisions. a

Finally, as with physical violence, Article 55 of the Istanbul Convention requires that the prosecution of any of these crimes is not wholly dependent on the complaint of the victim.

Review of the Azerbaijani legislative and policy frameworks

The Azerbaijani Criminal Code criminalises the offences of: rape (Article 149); violent acts of a sexual nature (Article 150); compulsion to conduct of a sexual nature (Article 151); sexual intercourse and other actions of a sexual nature with a person under the age of sixteen (Article 152) and lecherous acts (Article 153). However, none of these provisions are consent-based offences and not all of the intentional conducts enumerated in Article 36 of the Istanbul Convention are criminalised under the law. For these reasons, there is a significant gap between the requirements of the Istanbul Convention and the current legislative framework in Azerbaijan.

Consent-based legislation

In Azerbaijani law, rape is defined under Article 149 of the Criminal Code as “sexual intercourse with the use of violence or with the threat of its use against the victim or other persons, or with the use of the victim’s helpless state”. There is no mention of consent within the legislation and indeed on current wording, sexual intercourse without consent would not amount to a crime unless it could be established that even a non-consensual act was accompanied by violence, threat of violence or the “helpless condition” of the victim.

Violent acts of a sexual nature under Article 150 of the Criminal Code are defined as “Sodomy or other actions of a sexual nature with the use of violence or with the threat of its use against the victim or other persons, or with the use of the helpless state of the victim”. The same requirement for violence, threat of violence or helpless condition is therefore incorporated as an element of the offence, but lack of consent is not.

Compulsion to conduct acts of a sexual nature under Article 151 of the Criminal Code is defined as “Forcing a person to have sexual intercourse, sodomy or commit other acts of a sexual nature by threatening to destroy, damage or seize property, or with the use of the material or other dependence of the victim”. In this offence, the requirement of violence, threat of violence or helpless condition is replaced by threats to destroy, damage or seize property or the use of the material or other dependence of the victim. Once again, consent does not form an element of the offence.

In order to align with international standards as set out by the Istanbul Convention, legislative reform would be required. Any such reform would remove the use or threat of violence or force as a constituent element of any offence of sexual violence. The same applies for the “helpless condition” of the victim, whether unconscious or due to the effect of drink or drugs or any other reason and to the various forms of threats set out under Article 151 of the Criminal Code. All these matters may be recognised as aggravating features of any sexual assault but not elements of the crime itself.

It is likely, of course, that when considering the evidence against the alleged offender in any offence of sexual assault, that where violence, threat of violence or a “helpless condition” can be established, such evidence will be highly relevant

to determining the question of whether an act is consensual or not. However, this is distinct from being a necessary feature of the offence itself.

In simple terms, under consent-based legislation, any sexual act which takes place without the consent of both parties amounts to a criminal offence with or without any additional features such as violence or threats. It is the lack of consent that is the crucial characteristic of the crime. Consent may be lacking in many scenarios that do not involve violence threats or “helplessness” and this must be reflected in the relevant legislation.

Criminalisation of all non-consensual sexual acts

It is important that all acts of sexual violence provided for under the Istanbul Convention are clearly defined and criminalised under domestic law. At present, Azerbaijani domestic law does not clearly criminalise all non-consensual acts of vaginal, anal, oral penetration of a sexual nature with any bodily part or object. Neither does it explicitly criminalise all other non-consensual acts of a sexual nature or causing another person to engage in non-consensual acts of a sexual nature with a third person.

Rape under Article 149 of the present Criminal Code appears to relate only to vaginal penetration of a woman by a man. Although no definition of the term sexual intercourse is provided within the law, domestic lawyers state that in practice, the term is used to refer only to vaginal penetration of a woman by a man as based on the offence of rape as derived from former Soviet Union Criminal Codes. It is said that this definition is also taught to students of law.

As such, the offence of rape under Azerbaijani law does not encompass the various acts of penetration which are required by Article 36.a of the Istanbul Convention: engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.

Furthermore, it would appear that the current formulation and use of Article 149 actively excludes non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object. In order to comply with the Istanbul Convention, additional criminal offences reflecting these actions will need to be established within the Criminal Code.

Domestic lawyers also state that the various forms of penetration of a sexual nature which cannot be prosecuted under Article 149 may instead be prosecuted under 150. However, Article 150 refers only to “sodomy or other acts of a sexual nature” without clear definition of the other acts of sexual nature. Neither it is clear in practice how common such prosecutions are under this article. There is a need for legislative reform to provide clarity with regard to those specific acts which are criminalised and to ensure that the criminal law as a whole establishes clear offences that cover the conduct laid out in Article 36 of the Istanbul Convention.

Finally, it is notable that the penalties provided for under Article 149 and 150 are different. The respective penalties for each suggest that the act of vaginal penetration by a man to a woman (where the other elements of offence are also made out) is considered to be a more serious offence under Azerbaijani law than other forms of penetration. It has been suggested that this manner of classification is intended to reflect the risk of impregnation which comes with vaginal penetration and which is not present in other offences of sexual violence by penetration. However, this form of distinction requires careful consideration due to its potential to “downgrade” the violence and violation experienced by victims of sexual violence by means of other forms of penetration.

Report recommendations

Report recommendation 6

To criminalise all non-consensual sexual acts based on absence of consent alone.

It is vital that the Azerbaijani legislation is reframed so as ensure that the following intentional conduct is criminalised in line with the provisions of Article 36 of the Istanbul Convention:

- a. Engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
- b. Engaging in other non-consensual acts of a sexual nature with a person;
- c. Causing another person to engage in non-consensual acts of a sexual nature with a third person.

Furthermore, the definition of consent within any new legislation must be framed so as to ensure that it provides for a consent that is given voluntarily by reference to a person’s free will as assessed in the context of the surrounding circumstances. Consent given by virtue of psychological, economic or any other form of coercion is not free consent.

Report recommendation 7

To remove the use of violence or threat of violence and “helplessness” of the victim as elements of any offences of sexual violence and include them instead as aggravating features of the crime in question which if proven, would result in a greater penalty.

In line with recommendation 6 above (offences of sexual violence defined solely on the basis of the lack of consent), it is important that the use of or threats of violence within the context of any non-consensual sexual act are recognised as aggravating features but not within the elements of the offence itself.

Report recommendation 8

To include all forms of non-consensual vaginal, anal and oral penetration within the definition of rape.

Such an amendment would not only be in line with international standards but would rectify the current discrepancy which provides for lesser sentences under Article 150 for offences of non-vaginal rape than for vaginal rape under Article 149.

Report recommendation 9

To ensure that all criminal offences dealing with non-consensual sexual acts are applicable to acts committed against victims who are the current or former spouse or partner of the accused.

Offences of marital rape and/or sexual assault must not only be recognised in legislation but also investigated and prosecuted in practice to ensure that this protection is not simply an illusory one which exists theoretically under the law but not pursued in practice.

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

The Istanbul Convention and other international standards

Article 42 of the Istanbul Convention provides that the

Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of the Convention, culture, custom, religion, tradition or so-called “honour” shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour

and that

Parties shall take the necessary legislative or other measures to ensure that incitement by any person of a child to commit any of the acts referred to in paragraph 1 shall not diminish the criminal liability of that person for the acts committed

This requirement is also reflective of well-established international standards, as set out in the following provisions:

CEDAW General Recommendation 35, paragraph 31 to:

repeal all legal provisions that discriminate against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them; including in customary, religious and indigenous laws. In particular, to repeal:

(...)

b) discriminatory evidentiary rules and procedures, including procedures allowing for women’s deprivation of liberty to protect them from violence, practices focused on ‘virginity’ and legal defences or mitigating factors based on culture, religion or male privilege, such as the so-called ‘defence of honour’, traditional apologies, pardons from victims/survivors’ families or the subsequent marriage of the victim/survivor of sexual assault to the perpetrator, procedures that result in the harshest penalties, including stoning, lashing and death being often reserved to women, as well as judicial practices that disregard a history of gender-based violence to the detriment of women defendants.

The United Nations Handbook on Violence Against Women (2012), recommendation 3.11.2 to:

remove legislative provisions which provide: reduced penalties and/or exculpate perpetrators in cases of so-called honour crimes; exculpate a perpetrator of violence if he subsequently marries the survivor; and provide for the imposition of lesser penalties in cases involving particular 'types' of women, such as sex workers or non-virgins.

Review of the Azerbaijani legislative and policy frameworks

Within this context, Article 122.1 and 129 of the Azerbaijani Criminal Code raise concerns. Article 122.1 ("intentional homicide") and 129 ("Intentional infliction of grievous or less grievous bodily harm in a state of sudden strong mental agitation") contain such extenuating circumstance as a "a state of sudden strong mental agitation", which is described as:

a state of sudden strong emotional excitement (affect) caused by violence, grave insult from the victim or other illegal or immoral actions (inaction) of the victim, as well as a prolonged psycho-traumatic situation that arose in connection with the systematic illegal or immoral behaviour of the victim

It is of concern that the wide drafting of this section might allow for a perpetrator to carry out an honour killing and blame his victim for his or her actions.

It is known that Article 122 was used in four criminal cases of domestic violence in the year 2020 alone. Unfortunately, the details of how the provision was argued in those cases and the manner in which those cases were resolved have not been possible to ascertain but the regularity of use of the provision in question emphasises how important it is to ensure that there is no risk of misusing these provisions.

Report recommendations

Report recommendation 10

To remove the provisions for extenuating circumstances from Articles 122 and 129 of the Criminal Code as they could be construed as an "honour" justification for criminal behaviour.

PART II: CIVIL REMEDIES AND CUSTODY AND VISITATION RIGHTS

Civil remedies

The Istanbul Convention and other international standards

Civil Remedies

The right of victims to civil remedies against perpetrators of domestic violence is included in Article 29 of the Istanbul Convention. Through this article, parties are obliged to adopt all necessary measures and legislative changes into national legislation to provide victims with civil remedies and other civil law measures which offer protection against perpetrators.

The Explanatory Report to the Istanbul Convention indicates that the main reason for this provision is to guarantee adequate civil remedies to victims against perpetrators for any of the forms of violence within the Istanbul Convention. This includes allowing “a civil law court to order a person to stop a particular conduct, refrain from a particular conduct in the future or to compel a person to take a particular action”.

In the legislation of most states parties to the Istanbul Convention, these civil measures and remedies are established through protection or restraining orders, which are issued by the competent judicial authority, and which may include both criminal and civil law measures for the protection of the victim and children. Among the main civil law remedies that a civil court judge can adopt, are:

- the obligation of an abusive parent to leave the shared residence;
- the attribution of the use of the family home to the victim and children;
- the limitation or suspension of visits and communication by the abusive parent with his/her children;
- the removal of parental responsibility; and
- the establishment of an alimony for the victim and minor children.

Custody and Visitation Rights

The obligation and commitment to ensure that a child's life takes place in an environment free of violence is contained in numerous international conventions and instruments. The best interests of the child must always prevail over any other legitimate interest, including that of the parents themselves.

Article 31 of the Istanbul Convention establishes that a parent's custody and visitation rights must not pose a danger to the victim nor the minors. This requires that incidents of violence against women and domestic violence must always be taken into account when determining these rights and when issuing contact orders with the abusive parent. All necessary legislative measures must be taken so that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim and children.

The interests of the child must therefore be paramount when weighing the right of the child to have a meaningful relationship with his or her parent against the danger that the exercise of this right could pose to the child's safety and wellbeing.

The Council of Europe's Convention on the protection of children against sexual exploitation and sexual abuse (the Lanzarote Convention), to which Azerbaijan is party, establishes in its Article 14 that measures of assistance to victims shall take due account of the views, needs and concerns of the child. They shall be determined in accordance with the best interests of the child.

Likewise, Article 3 of the United Nations Convention on the Rights of the Child also recognises as essential the consideration of the interest of the child, committing the states parties to take all the appropriate legislative and administrative measures to ensure the protection of the minor and care necessary for his/her well-being.

In cases of domestic violence where the relationship between the parents has ended, child-related issues are often the only remaining ties between victim and offender. For many victims and their children, complying with contact orders can present a serious risk to their safety because it often means meeting the perpetrator face-to-face. Minors who live and grow up in a family environment with domestic violence are also considered victims of such violence, as this negatively affects their well-being, personal development and health.

Review of the Azerbaijani legislative and policy frameworks

Civil Remedies

Article 10.3 of the Azerbaijani Law on Prevention of Domestic Violence regulates civil remedies that can be requested for the victim. These may include: limitation of or restriction upon visits and communication by the abusive parent with the minor children; adjudication of the use of the family home to the victim and children; and the perpetrator's obligation to cover the medical and legal expenses that have been caused to the victim of the crime.

Custody and Visitation Rights

The Azerbaijani Law on Prevention of Domestic Violence embraces the right to protect the best interests of the child and regulates it in Articles 9.0.2. and 10.3.1. In case of a conflict between the rights of the perpetrator to interact and communicate with his/her children, and the right to protect the safety and well-being of the minors, the law clearly opts for the latter, in line with international standards. The law allows for the possibility of limiting and restricting visits and communications of the abusive parent in cases of high risk for the victims and their children and domestic violence, and whenever the contact can harm the health, safety and general well-being of the minors.

In line with this principle, the Azerbaijani Civil Procedure Code regulates the procedure for requesting and issuing an order specifying rules of communication for the abusive parent, often the father, with his children, as well as the terms of use of the family home or joint ownership (Article 355-4). The victim may request a long-term protection order that includes the limitation or even the suspension of the abusive parent's visitation and communication rights in relation to his/her minor children in cases of domestic violence.

Article 68 of the Azerbaijani Family Code provides for the possibility of applying legal restrictions on parental responsibility without its total deprivation. It also provides the possibility of removing the child from one or both parents if the interests of the child so require.

Both the Azerbaijani Civil Procedure Code and the Azerbaijani Family Code appear to be in line with the Istanbul Convention with regards to available legal procedures to request a limitation/restriction on visitation and communication rights where the rights and safety of children may be jeopardised. However, some issues remain unaddressed, and the Azerbaijani legal framework remains insufficient on the following aspects:

Children witnesses of domestic violence

The simple fact that children witness domestic violence against their non-abusive parent constitutes in itself an act of domestic violence against those children. This is irrespective of whether the minors suffer these acts directly and even if there is no direct aggression against their own health or life.

Article 19 of the United Nations Convention on the Rights of the Child establishes that the states parties shall adopt the necessary measures for the protection of the minor against "any form of physical or mental violence," which determines the need to consider abuse not only direct violence, but also the indirect effects of domestic violence on children.

Many studies prove that children who experience domestic violence within their family structure, whether they are direct or indirect victims, suffer enormous negative consequences throughout their lives. This can affect both their physical and psychological development, their emotions, values, behaviour, school performance and social adaptation. Children who witness violence between their parents are also at higher risk of being violent in their future relationships.

In this matter, the Azerbaijani Family Code is not in line with international standards, because even though it establishes that a court may suspend or withdraw the parental authority of a parent who has committed acts of domestic violence against his/her children (Article 64.0.5), it fails to include that acts of domestic violence against the other spouse could also lead to the deprivation of parental responsibility. With the current wording, cases in which minors witness acts of domestic violence by one parent against the other, which in itself constitutes an act of psychological violence against the child, even if they do not suffer physical violence directly, would be excluded from the protection under this article.

Assessment of potential damage of contact

Parents whose parental rights have been restricted by a court may be allowed to have contact with their children, as long as it does not harm the children (Article 71 of the Azerbaijani Family Code). Parents' contact with their minor children is permitted with the consent of the relevant executive authority, the guardian (trustee) of the children, the adoptive parents or the administration of the institution where the children are located. However, the Family Code does not set out any criteria by which the possible damage that the contact with the parent will cause to the minor child may be assessed. In addition, there is no specialised psychosocial agency or department to advise the court on this issue when deciding on the restriction of parental rights.

Safety of victim and children during visitation

One of the main risks for victims of domestic violence and their children is further acts of violence during the visitation and communication regime. The Istanbul Convention establishes the obligation to guarantee that victims and their children do not suffer additional damage. In addition, legislative or other necessary measures must be adopted so that the exercise of visitation or custody rights do not endanger the safety of the victim and their children (Article 31.2).

In Azerbaijan, the mechanisms to guarantee the safety of the victims and children during visits with the non-custodial parent are very limited, and there is no official mechanism to supervise such visits. There are no provisions in the Law on Prevention of Domestic Violence, the National Action Plan on Combating Domestic Violence nor the Civil Procedure Code establishing the obligation to guarantee the safety of the victims and their children during visits or communications with the perpetrator. This should be taken into consideration as in many cases the abuser uses the contact with the children as an opportunity to continue attacking the former spouse/partner or the children.

The creation of specialised centres or “family meeting points” where the abusive parent’s visits with the minor can be supervised and controlled by specialised personnel (psychologists, social workers, etc.) is not envisaged in the legislation. These centres help creating a neutral space where they these visits can be carried out in safety conditions and with full legal guarantees.

The main objective of these centres is to achieve the stability of minors and avoid risks occurring during contacts with the abusive parent, thus guaranteeing their physical and psychological integrity. These centres offer a space for children where they can have the adequate physical and mental safety conditions an appropriate accompaniment in establishing relationships with their parent while guaranteeing the best interests of the child at all times.

Regarding the safety of victims and their children, the Law on Prevention of Domestic Violence, in its Articles 14 and 15, refers to the establishment of support centres and shelters for victims of domestic violence. These centres should provide victims with legal, medical, psychological and social assistance, as well as to provide temporary shelter to affected persons, both the victims and their children.

However, a very limited and insufficient number of support centres and shelters for victims and their children have been created in Azerbaijan and they are mainly run by non-governmental organisations which given the lack of financial resources, are unable to provide all the services required by the law. Non-state centres must be accredited by the Ministry of Labour and Social Protection of the Population according to “Rules of accreditation of the centres of non-state help to victims of domestic violence”. There is a fine for failing to accredit non-state centres of help to victims of domestic violence.

The Council of Europe report “Barriers, Remedies and Good Practices for Women’s Access to Justice in Azerbaijan” (2017) indicates that women victims of domestic violence face numerous obstacles in accessing support and protection mechanisms, and highlights that “there are only three NGOs [non-governmental organisations] providing, inter alia, shelter services to victims of violence and functioning under the authority of the Ministry of Labour and Social Protection of the Population with the financial support of the Council of State Support to Non-Governmental Organizations and international donor agencies”. These are Clean World Public Union in Baku, the shelter at the Azerbaijan Children Union in Baku and the shelter Themes Public Union in Ganja, which functions mainly accommodating victims of domestic violence and human trafficking (Council of Europe, 2017).

The country report by the Women Against Violence Europe (WAVE) (2019) highlights that Azerbaijan does not meet the minimum standards of the Istanbul Convention for provision of national women’s shelters, as 90% of services are currently missing. There are 11 women’s centres located in several regions throughout the country, that provide counselling, specialist support (in cases such as forced marriage, honour-based violence, trafficking in persons), advice and advocacy (regarding legal procedures, housing, employment) and accommodation in emergency situations. These centres are run by women’s NGOs and government agencies and receive funding from national and local authorities.

Report recommendations

Report recommendation 11

Article 64.0.5 of the Family Code should explicitly state that violence against a co-parent could lead to the deprivation of parental rights of the abusive parent.

At present, only domestic violence against the children can lead to deprivation of parental rights. The law should also include the possibility to remove parental responsibility in court if one of the parents commits acts of domestic abuse against the other spouse.

Report recommendation 12

To include in the Civil Procedure Code the obligation of consultation by a judge with duly qualified specialists before deciding on modalities of parental authority and custody of minors.

It would be advisable to review and amend the Civil Procedure Code as to include a provision to require the judge to obtain the professional opinion of duly qualified specialists, before adopting any decision on the restriction of parental authority and the potential limitation of visits and communications. These specialists should include psychologists and social workers, in particular those working in domestic violence shelters and women's support services, when deciding on the suitability of the mode of exercise of parental authority and custody of minors.

Report recommendation 13

To amend the Law on Prevention of Domestic Violence and the Civil Procedure Code to protect the safety of victims and their children during visitations and communication with the perpetrator, through visit supervision.

It is recommended that both the Law on Prevention of Domestic Violence and the Civil Procedure Code be modified, to implement measures that guarantee the safety of the victims and their children during visits and communications with the abusive parent. In addition, it should include for example the creation of specialised centres or family meeting points where these visits could be supervised and controlled by specialised personnel and could be carried out in safe conditions and with full legal guarantees. This would ensure at the same time the legal possibility and professional capacity for staff at these centres to inform family judges or other professionals about any harm resulting from the supervised visitation.

Report recommendation 14

To create adequate support centres and specialist domestic violence shelters for victims, including children.

It would be advisable to increase the number of publicly funded support centres and shelters. These centres should be easily accessible for victims and children and provide safe accommodation for them. They should include child appropriate services for child witnesses of violence.

Compensation

The Istanbul Convention and other international standards

The right of the victim to request compensation from the perpetrator for any offence established in Istanbul Convention is regulated in Article 30 paragraph 1 of the convention. Parties must therefore take the necessary legislative measures to guarantee this right from perpetrators.

The second paragraph of Article 30 determines that the state should award adequate compensation if the damage in question cannot be covered by other sources such as the perpetrator, insurance or state-funded health and social provisions. In this case, the state compensation has a subsidiary nature, and the parties may require the perpetrator of the crime to reimburse the compensation awarded.³

The Explanatory Report to the Istanbul Convention clarifies that although the scope of state compensation is limited to serious injuries and deterioration of health, this does not prevent the parties from establishing more generous compensation arrangements. It should be noted that the term "bodily injury" includes injuries that have caused the death of the victim, and that "damage to health" also includes serious psychological damage.

The principle of the subsidiary responsibility of the state in relation to the compensation of the damages caused to the victims and an effective reparation, is also established in other Council of Europe instruments. It can be found in Article 2 of the Convention 116 on Compensation to Victims of Violent Crimes of 1983, to which Azerbaijan is party, and in Article 8 of the Recommendation (2006)8 of the Committee of Ministers on assistance to victims of crime.

In addition to this subsidiary compensation from the state when it cannot be covered by the perpetrator or other sources, states parties have the obligation to apply due diligence to prevent, investigate, punish and provide reparation for acts of violence within the scope of the Istanbul Convention according to Article 5 (principle of due diligence) in relation to Article 29.2 of the convention which establishes that

Parties shall take the necessary legislative or other measures to provide victims, in accordance with the general principles of international law, with adequate civil remedies against State authorities that have failed in their duty to take the necessary preventive or protective measures within the scope of their powers.

Failure to comply with this obligation may result in state legal liability and therefore civil law should offer solutions to address such failure, such as the possibility to claim financial compensation to the state for damages. In this case, certain actions or omissions are sufficient to generate the civil responsibility of the state. These can include, but are not limited to, not issuing appropriate preventive and protection measures resulting in the death of the victim, delay and slowness in holding the prior hearing, postponement of procedural deadlines or action by the police without the necessary diligence.

3. Article 30.2 of the Istanbul Convention is open to reservations.

In the case *Opuz v. Turkey*, Application no. 33401/02 of 9 June 2009, the ECtHR concluded that the national authorities had not shown due diligence in preventing violence against the applicant and her mother (who was killed) in particular by pursuing criminal or other appropriate preventive measures against the perpetrator.

Review of the Azerbaijani legislative and policy frameworks

The only mention made by the Azerbaijani Law on Prevention of Domestic Violence in relation to the financial compensation of the victim is in Article 10.3.3. This article provides that long-term protection orders may include the reimbursement of the expenses related to the provision of medical and legal assistance to the victim by the person who committed acts of domestic violence.

Both the Azerbaijani Civil Code and the Criminal Code recognise the right of the aggrieved or injured person to request financial compensation for the damages suffered by any offence in general. Article 181.2 of the Code of Criminal Procedure states that a person will have the right to file a civil claim for material and moral damages that have been caused directly by the commission of a crime during a criminal procedure.

In addition, the Azerbaijani Civil Code defines civil torts in Article 1097, which establishes that the person who commits an unlawful act and causes damage to another person or property is obliged to pay financial compensation to the injured person.

Nevertheless, Azerbaijani legislation on domestic violence does not regulate subsidiary compensation of the state when the damage is not covered by other sources, including by the perpetrator of VAW/DV, as reflected in Article 30.2 of the Istanbul Convention. Neither the Law on Prevention of Domestic Violence nor the current National Action Plan on Combating Domestic Violence include any mention of this type of compensation for the victim in line with the terms of the Istanbul Convention.

Despite the absence of this specific regulation, the provisions contained in Article 191 of the Azerbaijani Criminal Procedure Code could be applied by legal analogy to cases of domestic violence. This provision establishes the right to compensation from the state to the victim of an offence, which should be charged to the state budget of the Republic of Azerbaijan for any damage caused by an act provided for in criminal law in cases where the perpetrator of the offence fails to pay. The court would have to indicate the amount with which the convicted person would have to contribute to the compensation.

Despite these legal provisions, in Azerbaijan the number of claims for financial compensation is extremely low and remains very rare. According to statistical data available, the total number of civil cases reviewed by courts in 2019 was as follows: six cases reviewed, out of which only three were sentenced. In the first six months 2020, there were no claims of this type.

The legal responsibility of the state for not acting with due diligence is regulated by Article 1100 of the Civil Code, which establishes the responsibility of the state for damages caused by state agencies or bodies, local self-government agencies and their officials in the exercise of their functions due to illegal or unlawful acts or omissions, and the right to demand financial compensation from the state. This would mean for example, that there is a theoretical possibility for victims of domestic violence to initiate proceedings against the state for failure to protect a victim of domestic violence when the authorities knew or ought to have known the immediate risk to the life of an individual victim of domestic violence. To the extent of the information gathered for this report, Article 1100 has not been used in the context of a case of violence against women or domestic violence.

Report recommendations

Report recommendation 15

To include in the current legislation on violence against women and domestic violence the right of the victims to request financial compensation both from the perpetrator and subsidiarily from the state.

It is recommended that the Law on Prevention of Domestic Violence and in the National Action Plan on Combating Domestic Violence be revised to include the right of the victim to apply for financial compensation with a clear indication that such an application could be made either against the perpetrator of the abuse or subsidiarily from the state. This would contribute to a greater social awareness about the subsidiary responsibility of the state in these cases. It would in turn give greater visibility to domestic violence, and to make judicial cases more affordable for the victim. All of this would also help to highlight the public nature of Domestic Violence, and therefore the public responsibility of the state, helping society not continue to perceive this issue as a private matter.

Report recommendation 16

To ensure that financial compensation from the perpetrator and subsidiarily from the state can be obtained for rape, forced marriage and all other forms of VAW.

It is recommended that the Azerbaijani Criminal Procedure Code include an article that expressly guarantees and regulates the right of the victim to claim financial compensation from the perpetrator of a crime of rape, forced marriage and all other forms of VAW, and subsidiarily to the state if the aggressor does not pay.

Report recommendation 17

To establish a simple, fast and efficient procedure for the compensation of victims that is free of charge.

Among the factors that can explain the extremely low number of claims for compensation to the state in Azerbaijan, there are excessively complex legal procedures, short timeframes for requesting compensation, and an excessive delay between the commission of the offence and the payment of compensation. It would be advisable to establish a simple speedy procedure which is also free of charge to access compensation.

Report recommendation 18

To run information campaigns on the rights of victims of violence against women, including domestic violence, highlighting their right to obtain compensation.

Information on compensation is currently insufficient. It would be advisable for victims to have adequate, complete and reliable information on their rights and possible results of the financial claim process.

Dissolution of forced marriages

The Istanbul Convention and other international standards

The Istanbul Convention, in addition to requiring the criminalisation of forced marriages (Article 37), imposes the obligation on states parties to take all necessary legislative measures to render void, annul or dissolve these marriages (Article 32) without undue financial or administrative burden placed on victims.

Procedures must therefore be simple and affordable by anyone, regardless of their age and level of education.

The main victims of forced marriages are minor girls, although this crime also affects adolescents and young women, many of whom do not dare to report it, for fear that this could lead to the prosecution and imprisonment of parents and close relatives. This is why legal reforms must be accompanied by awareness-raising campaigns aimed at society in general and at parents and relatives in particular.

Forced marriages include the use of both physical and psychological force on the victims, to cause girls to marry against their will, thus nullifying their decision-making capacity and violating their personal freedom.

In cases of forced marriages that are also early marriages, there are added consequences, such as an increase in school dropout rate, premature pregnancies and a considerable number of health risks for minors.

Review of the Azerbaijani legislative and policy frameworks

Article 25 of the Azerbaijani Family Code states that a marriage without written consent of the parties is invalid *ab initio*. The invalidation of such a marriage must be addressed in court. Likewise, the nullity of the marriage may be requested by the party whose consent has been given under deception, duress, or error.

It should be noted that one of the main civil consequences of the annulment or invalidation of a forced marriage is that it does not affect the rights of children born during the marriage or within 300 days after the date of its annulment. Nor does it affect the goods acquired during the marriage, to which the provisions of the Civil Code will still apply. In addition, the party whose rights have been violated and who has been forced to marry may request compensation for material and moral damages, and the court may also withhold funds for her maintenance (Azerbaijani Family Code, Article 28).

There are, however, certain gaps and deficiencies in the national legislation. Some improvements and amendments should be considered in order to be fully aligned with the terms of the Istanbul Convention. Among them, the following stand out:

Insurmountable difficulties to the victim for annulment

The established legal procedures for annulment must not present insurmountable difficulties or indirectly lead to financial difficulties on the part of the victim. This issue is not properly resolved in Azerbaijani legislation, since there is no provision in the Law on Prevention of Domestic Violence, in the Civil Code or in the Civil Procedure Code that facilitates a quick or “express” procedure that expedites an annulment of a marriage in which one of the parties has been forced to marry. Nor in this case the compulsory free legal assistance for the victim or financial aid for legal assistance is established.

Court discretion

In certain cases, the Azerbaijani Family Code (Article 27, paragraph 2) grants the power to the court to reject a claim for annulment of this type of marriages if the “interests” of the minor so require. This contradicts the fact that a forced marriage is void *ab initio*, meaning that discretion should not be left to a court to grant a nullity nor to base such a decision on a hypothetical assessment of what best favours the minor. Nullity or dissolution of a marriage in which the use of force to obtain the consent of one of the parties has been proven, must always be granted, regardless of the consequences it may have.

Barriers for the victim to request the annulment

Article 26.1.1 of the Family Code of Azerbaijan determines that the people who can request a judgement of invalidity of marriage in cases of marriages with minors are the following: a minor spouse, his/her parents (or legal guardians) or an appropriate body of the executive power (custody and guardianship bodies of local executive power).

The report of the Office of the High Commissioner for Human Rights of the United Nations (OHCHR) on “Preventing and Eliminating Child, Early and Forced Marriage” (2014) indicates that some of the main obstacles and barriers that exist in relation to the annulment of a forced marriage of a minor are time limitations on petitions for annulment, economic constraints and the requirement that “a girl has the support of an adult if she is still a minor” in order for her to submit a petition.

According to information coming from the OHCHR’s (2014) and other international reports, in Azerbaijan the requirement of having the support of an adult is not mandatory. However, in most of these cases the minor does not dare to request the annulment of the marriage if she/he does not have the support of the adult, family member or close friend. This is because of the fear of family and social rejection, and the uncertainty of what will happen, what the procedure is, where it should be carried out, etc. Finally, an additional concern is not having the necessary financial resources to face the legal procedure.

Early and forced religious marriages (“kabin”)

Despite the fact that the Azerbaijani Criminal Code punishes forced marriages as a crime, various international reports highlight that in certain areas of the country, mainly rural ones, the practice of arranged or forced/early religious marriages (“kabin”) continues. These types of religious marriages are not formally registered in any official registry, so they do not have the legal protection that the registration grants and lack formal and legal visibility. In the event of dissolution, there is no legal protection for the girls and women forced to marry, nor for the children born from such marriages.

The Council of Europe report “Barriers, Remedies and Good Practices for Women’s Access to Justice in Azerbaijan” (2017) states that despite the fact that criminal responsibility for forced or early marriages is defined in the Criminal Code of the Republic of Azerbaijan, this provision is not applied in practice. Forced or child marriages remain a major problem in Azerbaijani society. However, ten years after the inclusion of this provision into the Criminal Code, Article 176 in 2011, the first criminal investigation was initiated under this Article by the Ministry of Internal Affairs in 2021. There is no official data on unregistered forced marriages.

The CEDAW in its Concluding Observations On the Fifth Periodic Report of Azerbaijan (2015) highlights the persistence of these unregistered religious marriages (“kabin”), the increase in the number of child marriages, the lack of reflection in official statistics, and the lack of investigation and prosecution of these cases. The 2015 Shadow Report on Azerbaijan to the CEDAW (2015), prepared by the non-governmental organisation WARD highlights the lack of legal protection for women divorced from unregistered religious marriages. In addition, problems frequently appear with the registration of the children of this type of marriage.

The main problem of “kabin” marriages rests in the fact that in many cases, they are forced marriages because they concern children below the legal age of marriage or because the will of one of the parties has been forced. As they are not registered and given that the Azerbaijani Family Code and the Civil Code do not contain any provision protecting the interests and rights of girls and women in unregistered marriages, victims of such marriages are unable to apply to courts for specific civil and economic measures.

These cases, as they are not official or formal marriages, should be treated as equivalent to forced cohabitation or early cohabitation, in which the victims do not have access to adequate legal protection.

Report recommendations

Report recommendation 19

To remove or amend paragraph 2 of Article 27 of the Family Code to avoid any misinterpretation with regard to the annulment of forced marriages.

In relation to the circumstances that exclude the annulment of the marriage, it would be advisable to review and amend Article 27 of the Azerbaijani Family Code, eliminating its second paragraph which grants in certain cases the power to the court to reject a claim for annulment of this type of marriages if the interests of the minor so demand. This wording can give rise to various interpretations by the court, among which is the possibility of not annulling or invalidating a forced marriage if the supposed interests of the minor husband/wife so demand, despite being void *ab initio*.

Report recommendation 20

To include in the Civil Procedure Code a rapid or “express” procedure that expedites the annulment of a forced marriage and to provide free legal aid for the victim.

The established legal procedures must not present insurmountable difficulties or indirectly lead to financial difficulties on the part of the victim.

Report recommendation 21

To include in Civil Procedure Code the possibility for the Public Prosecutor’s Office to legally represent a minor involved in a forced marriage when requesting an annulment.

It would be advisable for the Public Prosecutor’s Office to represent minors in the defence of their economic, family and social interests and rights in court or a competent executive authority when they do not have the support of an adult.

Report recommendation 22

To collect data on early and forced marriage, to run information campaigns to prevent and combat the practice of early and forced religious marriages (“kabin”) and to adopt measures to empower forced/child marriage victims.

Data collection is an important source for policy making and to analyse trends related to forced and early marriages. It also helps identify the underlying causes of these phenomena and therefore provides valuable information for running information campaigns, including the identification of potential target groups such as schools, communities or parents. Due to the reticence of victims to dissolve a marriage that would leave them unprotected, it would be essential to adopt comprehensive measures to provide for the social and economic empowerment of victims.

Report recommendation 23

To include and criminalise forced and early cohabitation both in the Criminal Code and Family Code in the definition of forced marriage and early marriage.

It would be advisable to include a detailed, complete and comprehensive definitions of “early marriages” and “forced marriages” both in Criminal Code and Family Code, including not only marriages but also “early and forced cohabitations”, so that victims of unregistered marriages have access to adequate legal protection.

PART III: AREAS WITH POTENTIAL RELEVANCE TO BOTH CRIMINAL AND CIVIL SPHERES

Free legal aid

The Istanbul Convention and other international standards

Article 57 of the Istanbul Convention refers to the obligation to ensure that an existing legal aid/legal assistance scheme is available to victims of violence against women and domestic violence within the conditions provided for by national law. This article aims to guarantee the principle of equality of the parties in the judicial procedure and to ensure that no party is prevented from having adequate legal advice during any phase of the process (including the request of a protection order) due to lack of financial resources. It is intended to protect the most vulnerable victims, guaranteeing their access to justice so that financial resources are not a barrier to obtaining adequate legal advice.

The provision of free legal assistance to the victim when applying for a protection order is considered a good practice at international level. The Council of Europe's Recommendation (2002)⁵ of the Committee of Ministers on the Protection of Women against Violence establishes that member states should guarantee that victims receive free legal assistance without interruption throughout the procedure (Appendix to Recommendation, No. 23).

Review of the Azerbaijani legislative and policy frameworks

Article 61 of the Constitution of Azerbaijan stipulates everyone's right to receive qualified legal assistance. In cases envisaged by law, legal assistance shall be provided free of charge, at the expense of the state. According to Article 20 of the Law on Advocates and Advocacy, the accused person and everyone who lacks funds to be represented in court has the right to be represented by advocates funded by the government. In practice, free state legal aid is usually provided in cases where involvement of a legal counsel is mandatory. A law on free legal aid has been drafted, but at the time of publication of this report its adoption was still pending.

According to Article 14.0.4 of the Law on Prevention of Domestic Violence, legal measures in the field of prevention of domestic violence include "providing legal assistance to victims at the expense of state funds". Furthermore, in the cases of "obligations of the state in connection with domestic violence not investigated in accordance with the procedure established by the criminal procedure legislation", state authorities have an obligation "if necessary, to provide legal assistance to the victim" (Article 8.0.6.).

Despite the legal coverage to provide legal aid for victims of violence against women and domestic violence, interlocutors interviewed for this report informed that free legal aid is not easily available in practice due to the lack of specific rules to regulate its provision. In practice, legal aid for victims is usually provided voluntarily by lawyers without any regulation of its provision to victims in need.

According to the Bar Association, as the Law on Free Legal Aid has not been adopted, members of the Bar Association can provide legal assistance at the expense of the state only where cases are specified by Article 20 of the Law on Lawyers and Advocacy. In practice this means that many victims of violence against women and domestic violence are not able to avail themselves of these provisions.

Report recommendations

Report recommendation 24

To review and amend the draft of the new Law on Free Legal Aid, to include

- ▶ Free legal aid for victims of violence against women and domestic violence who lack funds to be represented in court, including giving information on their economic, social and legal rights, advising and providing guidance prior to going to court, and legal representation in court.
- ▶ A determination of the exact income threshold that must be taken into account to grant free legal aid to a victim, limited exclusively to the income of the victim.
- ▶ Victims should be exempt from the payment of the state fee imposed in civil cases and any other judicial fee that may exist.

The Istanbul Convention and other international standards

The United Nations Handbook on Violence Against Women (2012), recommendation 3.11.2 to:

1. Parties shall take the legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention.
2. Parties shall take the necessary legislative or other measures to ensure that if the payment of a fine is ordered, due account shall be taken of the ability of the perpetrator to assume his or her financial obligations towards the victim.

Therefore, although it does not expressly prohibit mediation and conciliation, it does prohibit its mandatory nature. The essential requirements of mediation/conciliation are, on the one hand, voluntariness, equality and free disposition of the parties and on the other hand, neutrality, impartiality and confidentiality of the mediators.

Family mediation

In violence against women and domestic violence, the relationship of power and control that has been generated between the perpetrator and the victim is of such level that mediation is not possible in most cases. The imbalance and the power relationship that exists between the parties prevents reaching valid agreements. For some victims after years of violence, the simple fact of being in the physical presence of the abuser makes them feel coerced and intimidated in such a way that it prevents them from acting freely and without fear of possible reprisals from the perpetrator or family members.

Review of the Azerbaijani legislative and policy frameworks

The Law on Prevention of Domestic Violence lays emphasis upon the state's duty to "assist in normalisation of relations between parties and resumption of family affairs". During the needs' assessment meetings, several stakeholders raised concerns about the nature of this provision which is problematic on many levels. Firstly, normalisation of relations between parties might require re-establishing an abusive relationship in which one party is in danger. Secondly, the usage of state resources and the authority of state officials to respond to an allegation of domestic violence by pursuit and prioritisation of the continued unity of the couple or family in question rather than focus on the prosecution of offending and the safeguarding of victims from future harm runs contrary to the objectives of the Istanbul Convention.

Family Mediation

The new Law on Mediation of Azerbaijan came into force on 1 July 2021. Its Article 3.2 states that before going to court on issues related to family law, parties will have to participate at least in one mediation session. This participation in the preliminary mediation session is mandatory.

The Istanbul Convention prohibits compulsory alternative modes of conflict resolution, including mediation and conciliation in cases of violence against women and domestic violence. Therefore Article 3.2 of the new Family Mediation law is not in line with the terms of the convention, as it does not exempt victims of violence against women and domestic violence from this requirement.

Report recommendations

Report recommendation 25

To amend domestic legislation to remove any duty for the state and any obligation for the victim of domestic violence to assist in the normalisation of relation between parties and the resumption of family affairs.

Report recommendation 26

To review Article 3.2 of the new Family Mediation Law, regarding the mandatory nature of the first mediation session in cases of violence against women and domestic violence.

It is advisable to include VAW/DV cases as an exception to this article, since the relationship of power and submission that has been generated between the perpetrator and the victim prevents reaching valid agreements.

The Istanbul Convention and other international standards

Article 52 of the Istanbul Convention dealing with emergency barring orders requires that:

Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk.

Article 53 of the convention dealing with restraining or protection orders requires Parties to:

take the necessary legislative or other measures to ensure that appropriate restraining or protection orders are available to victims of all forms of violence covered by the scope of this Convention.

Article 53 further requires that such orders are subject to effective, proportionate and dissuasive criminal or other legal sanctions as well as meeting the following criteria: available for immediate protection and without undue financial or administrative burdens placed on the victim; issued for a specified period or until modified or discharged; where necessary, issued on an *ex parte* basis which has immediate effect; available irrespective of, or in addition to, other legal proceedings; allowed to be introduced in subsequent legal proceedings.

The legal process to request a protection order must be simple and easy to access by the injured person and must never result in secondary victimisation.⁴ National legislation must include the appropriate instruments to guarantee the effectiveness of protection orders and the co-ordination among the different authorities involved.

Review of the Azerbaijani legislative and policy frameworks

Azerbaijani domestic law provides for two forms of protection order: a short-term protection order and a long-term protection order. Short-term orders are issued by executive authorities and long-term orders are issued by the courts.

The distinction between short-term and long-term orders does not provide an adequate response to the needs of victims, since victims can only request long-term protection orders if the abuser breaches the short-term protection order previously issued. This requirement is clearly not in line with the Istanbul Convention and prevents the protection of the victim from being quick, immediate and effective, since it is not possible for victims to go directly to the courts requesting a protection order. Victims must wait for the short-term protection order issued by the local executive authority to be breached by the perpetrator. This makes the procedure long, complicated and ineffective.

The competent executive authority may issue a short-term protection order for a period of 30 days, and a long-term protection order for a period of 30 to 180 days (Articles 11 and 12 of the Law on Prevention Domestic Violence).

According to the data submitted by the State Committee on Family, Women and Children Affairs, local executive authorities issued 38 short-term protection orders in 2019, 36 in 2020 and 69 for January-September 2021. The courts issued two long-term protection orders in 2019, none in 2020 and four for the period January-September 2021. These numbers are extremely low, especially for the long-term protection orders. During the needs assessments' meetings, interviewees reported that the current system was not providing the necessary protection for victims of domestic violence and that the relevant authorities are not responding reliably to requests for protection.

Short-term protection orders

The procedure for the issuance of short-term protection orders is regulated by the 'Rules on considerations of complaints about domestic violence that do not contain indications of a crime' adopted by Cabinet of Ministers Decision No 46 (24 February 2012). Article 3.3 establishes that the parties are to be heard separately in order to assess the situation objectively and determine whether there is an immediate danger to the victim and children. Article 3.3 also enables police to carry out a preliminary investigation at the scene. However, it is important to note that according to Article 52 of the Istanbul Convention it is the risk of immediate danger that is the basis for the issuing of an emergency barring order, not the outcome of an investigation.

4. A definition of secondary victimisation can be found at the glossary of the European Institute for Gender Equality: [secondary victimisation | European Institute for Gender Equality \(europa.eu\)](https://www.eige.europa.eu/glossary/secondary-victimisation)

Indeed, short-term protection orders fall short of the requirements of the Istanbul Convention for emergency barring orders. Article 10.2 of the Law on Prevention Domestic Violence establishes that a short-term protection order may forbid a person who has committed domestic violence to commit violence again or to search for an aggrieved person if his/her whereabouts are unknown to him/her. However, this provision does not include the measure of ordering in cases of immediate danger, the eviction of the perpetrator from the family home. Article 52 of the Istanbul Convention that regulates emergency barring orders is also applicable to persons who have not yet committed an act of violence but where the police assesses that there is an immediate danger to the victim. No other legislative act seems to exist in Azerbaijan that would grant the authorities the power to order a perpetrator of domestic violence to vacate the residence.

Also, to avoid contradictory decisions between different authorities, the relevant personnel who can issue short-term protection orders must be clearly defined in civil legislation to protect procedural guarantees. Local executive authorities face difficulties in practice in issuing short-term protection orders, defined by the Rules on consideration of complaints about domestic violence that do not contain indications of a crime by the Cabinet of Ministers. There is no dedicated personnel to deal with this issue. Sometimes deputy directors or staff from the custody department of local executive authorities are involved in issuing short-term protection orders.

Long-term protection orders that include civil measures

The Azerbaijani Civil Procedural Code (Chapter 40-1) regulates the legal procedure to request long-term protection orders that include civil measures. However, the victim and the local executive authorities only have the right to apply to the court for a long-term protection order in cases where the perpetrator of domestic violence has not complied with the warning and the requirements of the short-term protection order (Article 12.1, Law of the Republic of Azerbaijan On Prevention of Domestic Violence).

The legal procedure for requesting a protection order should be quick, easily accessible and should not impose a financial barrier to the victim. The Azerbaijani State Tax Law imposes a state tax on civil cases, and long-term protection orders are not exempt from this tax. This makes legal procedures even more expensive and can prevent many women from applying for this type of protection order, because they might not have the financial resources to do so.

An additional barrier for victims requesting long-term protection orders with civil measures is the fact that applications for protection orders are only considered in the presence of the victim of domestic violence and the perpetrator (Article 355-3.2, Civil Procedure Code). Article 185 Civil Procedure Code states the possibility that one of the parties does not appear in court if there is valid cause, but cases of domestic violence are not specifically considered within those causes. In cases of any risk to the victim, the judge should be able to adopt the appropriate measures to avoid confrontation between the abuser and the victim, their children and the other members of the family, and to allow them to give their statements separately in court, avoiding any direct contact between the victim and the perpetrator.

Report recommendations

Report recommendation 27

To enact legislative reforms to ensure that provisions on emergency protection orders specify the authority competent to issue such orders in cases of immediate danger and to ensure that the powers vested include the eviction of the perpetrator of domestic violence.

Report recommendation 28

To eliminate the mandatory requirement of the breach of the short-term protection order by a perpetrator in order for the victim to be able to request a long-term protection order including civil measures.

It would be advisable to review and eliminate this mandatory requirement so that a long-term protection order could be requested directly in the court from the beginning of the procedure, independently from a previously short-term protection order having been issued or not.

Report recommendation 29

To review and amend the Law on Prevention of Domestic Violence and Civil Procedure Code of Azerbaijan to include the possibility to require the perpetrator to leave the family home.

It would be advisable to include in both laws the possibility that an emergency and immediate order be issued *ex officio* ordering the eviction of the perpetrator from the family home in cases of immediate danger.

Report recommendation 30

To render the legal procedure for requesting a protection order quick, easily accessible and ensure it does not impose a financial barrier to the victim.

It would be advisable to eliminate the state tax on civil cases for the long-term protection orders, because they are not exempt from this tax. Regarding short-term protection orders, to avoid contradictory decisions between different authorities, the relevant personnel who can issue this kind of protection orders must be clearly defined in civil legislation to protect procedural guarantees.

Data collection

The Istanbul Convention and other international standards

Article 11 of Istanbul Convention⁵ establishes that states parties shall collect reliable and detailed statistical data on all forms of violence included in the convention, as well as its causes, effects and effectiveness of the measures adopted, stimulating international co-operation and allowing for international data comparison. All of this aims to promote exchanges among countries of experiences and ideas to improve statistics on violence against women and domestic violence. This in turn requires harmonising indicators to be used to help improve national statistics collection systems to incorporate categories such as the sex of the victim and perpetrator, their age and relationship as well as the place where the act of violence occurred.

Review of the Azerbaijani legislative and policy frameworks

Despite the fact that the Azerbaijani Law on Prevention of Domestic Violence mentions the need for collection of statistical information and the establishment of a database on domestic violence, at present there is a lack of disaggregated data and the information available is unreliable. In addition, there is almost a total lack of collection of official statistical data on number of orders of protection orders not complied with by the perpetrators.⁶

To date, there are no common statistical indicators developed by the Azerbaijani state to evaluate the scale of domestic violence and the different forms of violence against women covered by the Istanbul Convention. In addition, there is a lack of statistical data on judicial procedures related to VAW/DV, such as data on procedures attended per year, on convictions, or on non-compliance with the measures issued in this type of offence per year, etc. All of this makes it difficult to assess the actual situation.

The Committee on the Elimination of Discrimination Against Women (CEDAW) in its Concluding Observations on the Fifth Periodic Report of Azerbaijan (2015) confirms that the lack of application of the Law on Prevention of Domestic Violence is reflected in the modest number of reported cases and short and long-term protection orders issued, as well as the lack of systematic collection of data on domestic violence. The periodic and reliable collection of data by the state is a necessary requirement for the prevention of VAW/DV and for the development and advancement of policies. Collection of data disaggregated by categories and with indicators to assess it and the periodic publication of findings should be systematic. Only by gathering and comparing data, it is possible to know if the legislation on domestic violence is adequately being implemented and whether victims are exercising their rights to request the appropriate civil measures, thus facilitating the evaluation of compliance of those obligations by states.

As indicated earlier in this report, according to statistics submitted by the State Committee on Family, Women and Children Affairs for the preparation of this report, local executive bodies issued 38 short-term protection orders in 2019, 36 in 2020 and 69 for January-September 2021. The courts issued two long-term protection orders in 2019, zero in 2020 and four for the period January-September 2021.

Report recommendations

Report recommendation 31

To systematically collect official disaggregated data on the number of protection orders, investigations, prosecutions and convictions, and to create a co-ordinated database, making data accessible and public.

Given the lack of adequately disaggregated collection of relevant data, it is recommended that official and systematic collection is commenced immediately. In addition, this data collected should be included in a co-ordinated database created for this purpose and used across different public administrations. The data should be disaggregated by categories and indicators should be developed to assess the collected data and made public periodically.

5. The Council of Europe study “Ensuring data collection and research on violence against women and domestic violence: Article 11 of the Istanbul Convention” is currently being translated into Azerbaijani, but it was not ready at the time of publication of this report. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680640efc>

6. The Report of the Special Rapporteur on Violence Against Women, its causes and Consequences, on her Mission to Azerbaijan (Human Rights Council United Nations, 2013) highlights the need to develop an integrated data collection system from all stakeholders (police, judiciary, legal professionals, social services, healthcare institutions) for an adequate implementation of the legislation against domestic violence.

CONCLUSION

The stated aim of the Azerbaijani National Action Plan on Combating Domestic Violence 2020-2023 is to bring domestic violence prevention measures implemented in Azerbaijan into alignment with international standards. The analysis in this report sets out a clear route by which such alignment can be improved including by means of legislative review and amendment within both the civil and criminal legal framework of Azerbaijan as well as the addition of specific offences, provisions and frameworks as set out above.

Further opportunity for alignment has been identified within the practical provision made for the support of victims of domestic violence in the form of support centres, specialist domestic violence shelter and contact centres. The publication of official disaggregated data a variety of areas set out in the analysis above as well as the provision of public information in relevant areas must also be made a priority.

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ANNEXES

- I Report Recommendations
- II List of Azerbaijani domestic provisions considered within the assessment
- III List of interviewees
- IV Consent as an essential element of the crime of sexual violence: international standards

ANNEX I – Report recommendations

Report recommendation 1: To criminalise all acts of physical violence and to consider the introduction of a specific offence of domestic violence that would cover all its elements, ranging from psychological to physical, economic and sexual violence.

Report recommendation 2: To include all offences of physical, psychological and sexual violence within the Criminal Code rather than the Administrative Code.

Report recommendation 3: To remove the requirement to prove injury, pain or physical harm as a constituent element of domestic violence and any offences of violence.

Report recommendation 4: To review domestic legislation and practice to ensure that the state's obligations of investigation and prosecution are accurately reflected and actively pursued even without the complaint or consent of victim.

Report recommendation 5: To amend the Criminal Code in order to include specific and separate offences that meet the Istanbul Convention requirement for criminalisation of psychological violence in the terms set out in Article 33 - psychological violence (which might most appropriately be achieved by the incorporation of a specific offence of domestic violence) and Article 34 - stalking.

Report recommendation 6: To criminalise all non-consensual sexual acts based on absence of consent alone.

Report recommendation 7: To remove the use of violence or threat of violence and "helplessness" of the victim as elements of any offences of sexual violence include them instead as aggravating features of the crime in question which if proven, would result in a greater penalty.

Report recommendation 8: To include all forms of non-consensual vaginal, anal and oral penetration within the definition of rape.

Report recommendation 9: To ensure that all criminal offences dealing with non-consensual sexual acts are applicable to acts committed against victims who are the current or former spouse or partner of the accused.

Report recommendation 10: To remove the provisions for extenuating circumstances from Articles 122 and 129 of the Criminal Code as they could be construed as an "honour" justification for criminal behaviour.

Report recommendation 11: Article 64.0.5 of the Family Code should explicitly state that violence against a co-parent could lead to the deprivation of parental rights of the abusive parent.

Report recommendation 12: To include in the Civil Procedure Code the obligation of consultation by a judge with duly qualified specialists before deciding on modalities of parental authority and custody of minors.

Report recommendation 13: To amend the Law on Prevention of Domestic Violence and the Civil Procedure Code to protect the safety of victims and their children during visitations and communication with the perpetrator, through visit supervision.

Report recommendation 14: To create adequate support centres and specialist domestic violence shelters for victims, including children.

Report recommendation 15: To include in the current legislation on violence against women and domestic violence the right of the victims to request financial compensation both from the perpetrator and subsidiarily from the state.

Report recommendation 16: To ensure that financial compensation from the perpetrator and subsidiarily from the state can be obtained for rape, forced marriage and all other forms of VAW.

Report recommendation 17: To establish a simple, fast and efficient procedure for the compensation of victims that is free of charge.

Report recommendation 18: To run information campaigns on the rights of victims of violence against women, including domestic violence, highlighting the right to obtain compensation.

Report recommendation 19: To remove or amend paragraph 2 of Article 27 of the Family Code to avoid any misinterpretation with regard to the annulment of forced marriages.

Report recommendation 20: To include in the Civil Procedure Code a rapid or "express" procedure that expedites the annulment of a forced marriage and to provide free legal aid for the victim.

Report recommendation 21: To include in Civil Procedure Code the possibility for the Public Prosecutor's Office to legally represent a minor involved in a forced marriage when requesting an annulment.

Report recommendation 22: To collect data on early and forced marriage, to run information campaigns to prevent and combat the practice of early and forced religious marriages (“kabin”) and to adopt measures to empower forced/child marriage victims.

Report recommendation 23: To include and criminalise forced and early cohabitation both in the Criminal Code and Family Code in the definition of forced marriage and early marriage.

Report recommendation 24: To review and amend the draft of the new Law on Free Legal Aid, to include:

- ▶ Free legal aid for victims of violence against women and domestic violence who lack funds to be represented in court, including giving information on their economic, social and legal rights, advising and providing guidance prior to going to court, and legal representation in court.
- ▶ A determination of the exact income threshold that must be taken into account to grant free legal aid to a victim, limited exclusively to the income of the victim.
- ▶ Victims should be exempt from the payment of the state fee imposed in civil cases and any other judicial fee that may exist.

Report recommendation 25: To amend domestic legislation to remove any duty for the state and any obligation for the victim of domestic violence to assist in the normalisation of relation between parties and the resumption of family affairs.

Report recommendation 26: To review Article 3.2 of the new Family Mediation Law, regarding the mandatory nature of the first mediation session in cases of violence against women and domestic violence.

Report recommendation 27: To enact legislative reforms to ensure that provisions on emergency protection orders specify the authority competent to issue such orders in cases of immediate danger and to ensure that the powers vested include the eviction of the perpetrator of domestic violence.

Report recommendation 28: To eliminate the mandatory requirement of the breach of the short-term protection order by a perpetrator in order for the victim to be able to request a long-term protection order including civil measures.

Report recommendation 29: To review and amend the Law on Prevention of Domestic Violence and Civil Procedure Code of Azerbaijan to include the possibility to require the perpetrator to leave the family home.

Report recommendation 30: To render the legal procedure for requesting a protection order quick, easily accessible and ensure it does not impose a financial barrier to the victim.

Report recommendation 31: To systematically collect official disaggregated data on the number of protection orders, investigations, prosecutions and convictions, and to create a co-ordinated database, making data accessible and public.

ANNEX II - List of Azerbaijani domestic provisions considered within the assessment

- Civil Code (approved by the Law of the Republic of Azerbaijan No. 779-IQ, December 28, 1999)
- Civil Procedural Code (approved by the Law of the Republic of Azerbaijan No. 780-IQ, December 28, 1999)
- Criminal Code (approved by the Law of the Republic of Azerbaijan No. 787-IQ, December 30, 1999)
- Criminal Procedural Code (approved by the Law of the Republic of Azerbaijan No. 907-IQ, July 14, 2000)
- Code of Administrative Offences (approved by the Law of the Republic of Azerbaijan No. 96-VG, December 29, 2015)
- Law on Advocates and Advocate's Activity, No. 783-IQ, December 28, 1999
- Law on Police, No. 727-IQ, October 28, 1999
- Law on guarantees of gender (male and female) equality, No. 150-IIIQ, October 10, 2006
- Law on Prevention of Domestic Violence, No. 1058-IIIQ, June 22, 2010
- National Action Plan on combating domestic violence in the Republic of Azerbaijan for 2020-2023, approved by the Order of the President of the Republic of Azerbaijan No. 2307, November 27, 2020
- Regulations of the State Committee for Family, Women and Children Affairs, adopted by Decree of the President of the Republic of Azerbaijan No. 444, August 9, 2006
- Rules of accreditation of the centres of non-state help to victims of domestic violence, approved by the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan, No. 89, April 25, 2012
- Rules of prophylactic registration of perpetrators of domestic violence and carrying out educational and preventive work with these persons, approved by the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 206, December 19, 2011
- Rules on considerations of complaints about domestic violence that do not contain indications of a crime, approved by the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 46, February 24, 2012
- Rules on organising and maintaining a database on domestic violence, approved by the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 207, December 19, 2011

ANNEX III – List of interviewees

Representatives from the State Committee for Family, Women and Children Affairs:

Ms Taliya IBRAHIMOVA, Head of Law Department
Ms Vafa ALAKBAROVA, Head of Domestic Violence Sector
Ms Sabina MANAFOVA, Head of International Relations Department

Representatives from the Ministry of Justice:

Ms Aynur SABITOVA, Head of Human Rights and Public relations Department
Ms Aygun BASHIROVA, Head of General Department on Legislation
Ms Konul YUSIFLI, Senior Advisor at International Relations Department
Ms Leman MEHDIYEVA, Gender focal point

Representatives from the Ministry of Labour and Social Protection of the Population:

Mr Babak HUSEYNOV, Head of Dept of Social Guaranteeing Policy
Ms Maftuna ISMAYILOVA, Head of Adoption department of Social Services Agency
Ms Habiba GARIBOVA, the Director of the Victim Assistance Centre (VAC)
Mr. Dayanat JAMILLI, Head of International Relations Department of Social Services Agency

Representatives from the Ombudsperson's office:

Mr Zaur VALIMAMMADLI, Head of International Relations Department
Ms Ayten TARVERDIYEVA, Head of Sector

Representatives from the Supreme Court of Justice:

Mr Hafiz NASIBOV, Chair of the Criminal Chamber of the Supreme Court
Mr Sanan HAJIYEV, Chair of the Civil Chamber of the Supreme Court

Representatives from the office of the General Prosecutor of the State:

Ms Shabnam MAMMADOVA, Prosecutor of the Office of Non-Criminal Proceedings
Ms Parvana BAYRAMOVA, Prosecutor of Legal Provision and Human Rights Issues department
Ms Nigar ASKAROVA, Prosecutor of the Science and Education Center
Mr Elvar HASANOV, Prosecutor of the Departments overseeing the implementation of Laws in the course of (pre-trial) criminal inquiry and investigation, as well as operational-search activities (special investigation means) of Internal Affairs Bodies

Representative from the Bar Association (Free Legal Service):

Mr Farhad NAJAFOV, member of the working group on draft law on Free Legal Aid

International organisations and civil society:

Ms Bahija ALIYEVA, Programme Analyst, UNFPA

Ms Mehriban ZEYNALOVA, Executive Director of NGO CLEAN World

Ms Shahla ISMAYIL, Chair of Women's Association for Rational Development (WARD)

Ms Rovshana RAHIMLI, independent lawyer

Ms Vafa RUSTAM, independent lawyer

Ms Sevinj ALIYEVA, lawyer, member of Azerbaijan Bar Association

ANNEX IV - Consent as an essential element of the crime of sexual violence: international standards

CEDAW General Recommendation No 35 on gender-based violence against women, updating general recommendation No. 19

General legislative measures

29. The Committee recommends that States parties implement the following legislative measures:

(e) Ensure that sexual assault, including rape, is characterized as a crime against the right to personal security and physical, sexual and psychological integrity and that the definition of sexual crimes, including marital and acquaintance or date rape, is based on the lack of freely given consent and takes into account coercive circumstances. Any time limitations, where they exist, should prioritize the interests of the victims/survivors and give consideration to circumstances hindering their capacity to report the violence suffered to the competent services or authorities.

UN Handbook for Legislation on Violence against Women (2012)

Defining sexual violence

Recommendation – Legislation should:

(...)

Remove any requirement that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:

- Requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or
- Requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances

Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović (UN Doc A/HRC/47/26), 19 April 2021

Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention.

85. The Special Rapporteur makes the following recommendations:

(a) States should explicitly include lack of consent at the centre of their definition of rape. Force or threat of force provide clear evidence of non-consent, but force is not a constitutive element of rape. States must specify that consent must be given freely, as a result of the person’s free will, assessed in the context of the surrounding circumstances. Intercourse without consent should be criminalized as rape in all definitions;

(b) Criminal provisions on rape should specify the circumstances in which determination of lack of consent is not required or consent is not possible; for example, when the victim is in an institution such as a prison or detention centre, or is permanently or temporarily incapacitated owing to the use of alcohol and drugs;

ECtHR - M.C v Bulgaria (App No. 39272/98), judgment of 4 December 2003

[Definitions in International Criminal Law that require voluntary consent] “reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse” and that “the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy. In accordance with contemporary standards and trends in that area, the member States’ positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.” (paras 163, 166)

CEDAW Committee - *Vertido v. Philippines*, CEDAW/C/46/D/18/2008, 16 July 2010

8.7 “With regard to the definition of rape, the Committee notes that the lack of consent is not an essential element of the definition of rape in the Philippines Revised Penal Code. It recalls its general recommendation No. 19 of 29 January 1992 on violence against women, where it made clear, in paragraph 24 (b), that “States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity”. Through its consideration of States parties’ reports, the Committee has clarified time and again that rape constitutes a violation of women’s right to personal security and bodily integrity, and that its essential element was lack of consent”

CEDAW Concluding Observations – Azerbaijan CEDAW/C/AZE/CO/4, August 2009

“The Committee... remains concerned that the definition of rape in the Criminal Code is based on the use of force, rather than on lack of consent...[and] calls on the State party to amend its Criminal Code” (para 21 and 22)

International Criminal Law

International Tribunal for the Former Yugoslavia, Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001.

“In the view of the present Trial Chamber, the legal systems there surveyed, looked at as a whole, indicated that the basic underlying principle common to them was that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim” (para 440)

“the Trial Chamber understands that the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim” (para 46)

International Tribunal for the Former Yugoslavia, Prosecutor v. Kunarac et al., Appeal Judgment, 12 June 2002,

“with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal’s prior definitions of rape. However, in explaining its focus on the absence of consent as the condition sine qua non of rape, the Trial Chamber did not disavow the Tribunal’s earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape. In particular, the Trial Chamber wished to explain that there are “factors ‘other than force’ which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim”. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.”(para 129)

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