

# Report of the German Women Lawyers Association (djB) on the Implementation of the Istanbul Conven- tion in Germany

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# Introduction

This report highlights gaps in the implementation of the Istanbul Convention in Germany on the occasion of the upcoming evaluation procedure conducted by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). In addition to the report of the Federal Government, GREVIO also draws on reports by non-governmental organisations. The present report therefore aims to inform GREVIO about remaining implementation needs in order to feed this information into the evaluation procedure. It also intends to provide the public with an overview of Germany's obligations under international law concerning the protection against gender-based violence.

With its domestic entry into force on 1 February 2018<sup>1</sup>, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) obliges all levels of government in Germany, the Federal Government, the Länder and the municipalities, to effectively combat and prevent violence against women and domestic violence and to provide comprehensive support and compensation for those affected by gender-based violence.<sup>2</sup>

The obligations arising from the Istanbul Convention (IC) apply not only at all levels of government, but also to all state bodies - legislation, courts, executive authorities - which must also enforce the violence protection measures against private individuals. Upon ratification, the Istanbul Convention is considered a federal act in Germany, which takes precedence over Länder law, and is also applicable as binding federal law.<sup>3</sup> At the same time, the Istanbul Convention is an international treaty which concretises the human rights of women and which must be observed by all state authorities when interpreting and applying national law, including fundamental rights under the German Basic Law.<sup>4</sup> It is not sufficient for state authorities to take any action; the measures must be effective, i.e. possible sanctions must be potent, proportionate and dissuasive, and social or cultural patterns legitimising violence must be radically changed.<sup>5</sup>

In Germany, essential aspects of prevention of and protection against violence as well as support for women affected by violence fall under the responsibility of the Länder or are delegated by them to the municipalities. Upon ratification, there is an obligation under international law concerning the federal state, but also a domestic obligation which binds the Federal Government as well as the Länder (and municipalities). As a result of ratification and the domestic order of application, the Länder are also directly bound by the Istanbul Convention and obliged to implement it.<sup>6</sup> Protection from gender-based violence, including prevention and support as well as compensation for those affected, is therefore not a luxury which may have to step back in times of strained public finances, but a legal duty of the federal, Länder and municipal governments in their respective area of responsibility.

The Istanbul Convention employs a comprehensive concept of gender-based violence. Pursuant to Article 3 lit. a, it covers all acts that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, which explicitly and by way of example includes domestic violence. The legal and factual situation in Germany has so far only partially done justice to this. Some regulations and state measures against gender-based violence do

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<sup>1</sup> Law on the Council of Europe Convention of 11 May 2011 on Preventing and Combating Violence against Women and Domestic Violence of 17 July 2017, BGBl. 2017 II, p. 1026.

<sup>2</sup> See German Women Lawyers Association (djb), Stellungnahme zu dem Antrag der Fraktionen SPD und Bündnis 90/Die Grünen „Istanbul Konvention konsequent umsetzen – Mädchen und Frauen vor Gewalt schützen“ im Landtag von Nordrhein-Westfalen, 3 September 2018, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-15/>.

<sup>3</sup> Uerpmann-Witzack, Robert, Innerstaatliche Wirkung des Europaratsübereinkommens gegen Gewalt gegen Frauen, in: Zeitschrift für das gesamte Familienrecht (FamRZ) 2017, pp. 1812-1814 (1812).

<sup>4</sup> See Rudolf, Beate/Chen, Felicitas, Die Bedeutung von CEDAW in Deutschland, in: Hanna Beate Schöpp-Schilling/Beate Rudolf/Antje Gothe (eds.), Mit Recht zur Gleichheit. Die Bedeutung des CEDAW-Ausschusses für die Verwirklichung der Menschenrechte von Frauen weltweit, Baden-Baden 2014, pp. 25-70 (42 et seq); Rabe, Heike, Die Istanbul-Konvention – innerstaatliche Anwendung, in: Feministische Rechtszeitschrift STREIT 4/2018, pp. 147-153 (148-149).

<sup>5</sup> See Lembke, Ulrike, Menschenrechtlicher Schutzrahmen für Betroffene von digitaler Gewalt, in: bff/Nivedita Prasad (eds.), Geschlechtsspezifische Gewalt in Zeiten der Digitalisierung. Formen und Interventionsstrategien, Bielefeld 2021.

<sup>6</sup> Pursuant to Article 59(2) of the Basic Law, the Istanbul Convention has been in force in Germany since 1 February 2018 in the status of a federal law. The obligation of the Länder to implement it therefore follows from the primacy of federal law (see Article 31 of the Basic Law: "Federal law shall take precedence over Land law.") and the principle of loyalty to the Federation. The involvement of the Länder and the resulting voluntary commitment is an additional safeguard. Under the Lindau Agreement, the Federal Government may ratify an international treaty only with the prior consent of the Länder, if its implementation also requires measures in the area of exclusive Länder competences. With this consent, the Länder establish their voluntary commitment to implementation, from which any later deviation implies a violation of Article 31 of the Basic Law and the principle of loyalty to the Federation.

exist, such as the Protection against Violence Act of 2002 and the accompanying regulations,<sup>7</sup> but their practical effectiveness is limited, their implementation is only successful in isolated cases and/or there is hardly any public awareness. As shown by the #MeToo debate<sup>8</sup>, which in Germany began rather hesitantly and has led to few practical consequences, as well as some disconcerting discussions about the reform of the law on sexual offences in 2016, the social and legal discourse on gender-based violence remains underdeveloped. Furthermore, the extent of domestic violence - according to official statistics of intimate partner violence for 2019, 81% of the victims are women, and 307 of them were victims of attempted or completed homicide<sup>9</sup> - is hardly present in public awareness. Counselling services and support systems for girls and women affected by violence are neither secured nor effectively recognized as state duties; victim protection in criminal proceedings for gender-based violence<sup>10</sup> fails time and again.

In some cases, violence against women is regarded as a problem exclusively concerning religious or ethnic minorities, which hinders its recognition, prohibition and effective prevention. Reducing gender-based violence to phenomena such as honour killings, forced marriage or genital mutilation entails the danger of eliminating domestic and sexualised violence from public consciousness and state responsibility. These types of violence occur in all social classes and groups, and have to be prevented in all areas.<sup>11</sup> At the same time, the scandalisation of certain forms of gender-based violence erases particularly vulnerable women and girls from public awareness. This includes violence against women with disabilities who live in institutions, the often invisible commission of violence in the care sector, gender-based violence in institutions for refugees, hate speech against women and reproductive violence against women with so-called mental disabilities or intersex infants, to name but a few examples. Gender-based violence must be effectively prevented and sanctioned in all its manifestations, irrespective of the origin or social status of perpetrators and victims.

A cross-cutting task in the implementation of the Istanbul Convention deserves particular emphasis: The support mechanisms for women affected by violence must be designed and applied without discrimination. At present, for example, the funding of shelters and support services is in no way secured and falls short of the minimum standard set by the Istanbul Convention. In practice, this constitutes a barrier for particularly vulnerable women. Protection against violence and support for women affected by violence must finally be understood as a responsibility of the state, guaranteed by clear and consistent nationwide regulations.<sup>12</sup> Women and girls affected by violence are not a homogeneous group, but are often understood as such - with the consequence that the needs of certain groups which are already at risk of discrimination are often neglected, based on the assertion that not every individual need for protection can be addressed. However, phenomena which appear to affect only small groups actually affect the majority of women at some point in their life, when taking into account, for example, intimate partner violence, cyber violence and violence in the care sector. Above all, the state-sponsored system of protection and support proves its worth precisely where people are particularly vulnerable, be it in their own homes, be it in institutions for people with disabilities or refugees. Effective protection in view of the heterogeneity of those affected is an important structural feature in evaluating the fulfilment of the state's obligation to protect against violence.

In the following, the German Women Lawyers Association(djb) sets out specific implementation requirements with regard to the provisions of the Istanbul Convention in all its areas of application. The report does not present a full analysis of all implementation requirements in Germany, but rather focuses on the areas in which a particularly urgent need for action has been identified.

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<sup>7</sup> See djb, Stellungnahme 10 Jahre Gewaltschutzgesetz - Länderumfrage 2011: Erreichtes und neue alte Aufgabe, 27 October 2012, available at <https://www.djb.de/presse/stellungnahmen/detail/st12-9/>.

<sup>8</sup> See Lembke, Ulrike, Early Start, Slow progress, Racist Takeover, But Destined Not to Yield: The #MeToo Movement in Germany, in: Noel, Ann M./Oppenheimer, David (eds.), *The Global #MeToo Movement*, Washington 2020, pp. 197-213.

<sup>9</sup> Federal Criminal Police Office (ed.), *Partnerschaftsgewalt. Kriminalstatistische Auswertung – Berichtsjahr 2019*, available at [https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/Partnerschaftsgewalt/Partnerschaftsgewalt\\_2019.html?sessionid=94375081EF5AFE6F8A60BAFA1354D4E.live0601?nn=63476](https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/Partnerschaftsgewalt/Partnerschaftsgewalt_2019.html?sessionid=94375081EF5AFE6F8A60BAFA1354D4E.live0601?nn=63476).

<sup>10</sup> On the protection of victims in criminal proceedings for gender-based violence see also djb, Stellungnahme zum Entwurf eines Gesetzes zur Stärkung der Opferrechte im Strafverfahren (3. Opferrechtsreformgesetz, Umsetzung der Richtlinie 2012/29/EU), 12 December 2014, available at <https://www.djb.de/presse/stellungnahmen/detail/st14-21/>.

<sup>11</sup> See European Union Agency for Fundamental Rights (FRA), *Violence against women: An EU-wide survey*, 2014; Federal German Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) (ed.), *Lebenssituation, Sicherheit und Gesundheit von Frauen in Deutschland. Eine repräsentative Untersuchung zur Gewalt gegen Frauen in Deutschland*, 2004; GiG-net (ed.), *Gewalt im Geschlechterverhältnis. Erkenntnisse und Konsequenzen für Politik, Wissenschaft und soziale Praxis*, 2008; Monika Schrötte et al., *Gewalt gegen Frauen in Partnerschaften*, 2008.

<sup>12</sup> See already djb, Stellungnahme im Rahmen der öffentlichen Anhörung des Familienausschusses des Deutschen Bundestages am 12.11.2008 zur Möglichkeit der bundeseinheitlichen Finanzierung von Frauenschutzhäusern, 6 November 2008, available at <https://www.djb.de/presse/stellungnahmen/detail/st08-19/>.



# Executive Summary

In the areas highlighted by the djb, there is still a considerable need for implementation of the international obligations concerning the effective protection against gender-based violence under the Istanbul Convention, as well as a need for application of the corresponding federal law which entails identical obligations. This results in demands directed at the legislature, the executive, the courts and federal and state authorities.

These demands relate to improvements concerning prevention, especially in the case of intimate partner violence, as well as comprehensive protection, support and counselling for women affected by violence and their effective access to justice. Furthermore, the djb calls for the closure of gaps concerning the protection against forced sterilisation and psychological violence as well as in state liability law and presents general and sector-specific requirements for effective law enforcement. Effective protection against violence must also apply to migrant and refugee women. In order to structurally guarantee the implementation of the Istanbul Convention, independent monitoring, appropriate research and comprehensive data collection are also necessary.

## Prevention

### Prevention of intimate partner violence (pp. 12 et seq.)

In addition to the relevant statistics, risk assessments conducted by the responsible persons and institutions must be based on research concerning the causes for criminal acts. The experiences and assessments of the women concerned must also be included. It is necessary to pool information and establish a comprehensive interdisciplinary case management system.

It is also necessary to implement and develop police programmes for dealing with domestic violence as well as networks between the police and other actors who are responsible for the protection against violence such as youth welfare offices, other authorities, counselling centres or shelters. Basic and advanced training programmes enable police officers to assess risks, to intervene successfully in violent situations, to support those affected and to organise subsequent steps.

Approaches to (potential) perpetrators, which the police must carry out in view of the specificity of the case and situation, should be used more frequently for selective interventions. In order to bring about long-term changes in behaviour, it is necessary to conduct measures for assuming responsibility according to the standards of the BAG "Täterarbeit häusliche Gewalt" and to create support services for (potential) perpetrators as well as outpatient and inpatient therapy facilities in adequate numbers and with adequate equipment.

### Prevention through public awareness (pp. 12 et seq.)

Regular campaigns and programmes should be designed to raise public awareness concerning the different manifestations of gender-based violence and to combat patriarchal and misogynist thought patterns. Official curricula at all levels of the education system should include gender equality as well as the elimination of stereotypes concerning the roles of men and women, of gender-based violence against women in all social classes and of harmful sexual and rape myths.

## Support, assistance and access to justice

### Comprehensive support services and their financing (pp. 15 et seq., 18 et seq., 22 et seq.)

All appropriate legislative and other measures must be taken in order to create a comprehensive, universal and accessible support system for all women affected by violence. This includes in particular shelters, counselling centres, emergency numbers, trauma centres, therapy facilities, medical care and accessibility in the broader sense.

Support services for victims of rape and sexualised violence must meet the requirements for crisis centres as defined in the Istanbul Convention.

Effective access to shelters and support services, in particular confidential counselling, must also be guaranteed through needs-based and reliable funding. Protection against violence and support for women affected by violence is a state duty.

### Effective access to justice for women affected by violence (pp. 26 et seq.)

Effective access to justice for women affected by violence must be guaranteed, in particular by providing barrier-free, comprehensible and generally accessible information on individual or collective legal remedies under national or international law, by providing sensitive and knowledgeable assistance in presenting any such complaints, and by fully implementing the rights to legal assistance and free legal aid.

### Taking into account gender-based violence in court proceedings (pp. 34 et seq., 39 et seq.)

It must be ensured that previous incidents of violence against women and domestic violence are adequately taken into account in proceedings concerning custody and visitation rights.

The court practice of seeking settlements in cases of stalking without taking into account the individual case must be critically evaluated and terminated in this form.

## Gaps in legal protection

### Prohibition of sex/gender assignment surgery on children (pp. 42 et seq.)

All necessary measures must be taken to effectively prevent surgery on intersex children that are not medically indicated but based on cultural assumptions about sex and gender. In addition to educating parents, doctors and medical staff, this includes legal measures.

### Criminalisation of forced sterilisation (pp. 45 et seq.)

Any sterilisation conducted without the prior, informed and genuine consent of the woman concerned must be prosecuted as a criminal offence. This also and especially applies to sterilisations of women with learning difficulties (so-called mental disabilities). Section 1905 of the German Civil Code should be repealed.

Effective measures must be taken in order to prevent sterilisations on the basis of insufficient information and invalid consent; in particular, it must be ensured that staff and doctors involved receive human rights-based education and training.

### Criminal liability for psychological violence (pp. 36 et seq.)

Serious psychological violations under Article 33 IC must be covered by criminal law, either by a modified interpretation of the requirement of “health impairment” under Section 223 of the German Criminal Code in accordance with the Convention, or by the creation of a separate criminal offence.

### Compensation for victims of psychological violence with serious consequences (pp. 32 et seq.)

The entitlement to compensation should be amended to ensure that the right to assistance, support and compensation applies not only in the case of “physical violence” or “serious” psychological violence but also in the case of other psychological violence which seriously damages the health or psychological integrity of the person concerned.



## State liability for failure to take appropriate measures (pp. 30 et seq.)

State liability law must be amended to include effective and proportionate claims enforceable against public authorities which, within the scope of their powers, have failed to fulfil their duty to take the necessary preventive or protective measures.

## Effective law enforcement

### Prosecution of gender-based violence (pp. 47 et seq., 50 et seq., 53 et seq., 58 et seq.)

In order to standardize the application of the law, federal and state laws should provide for compulsory participation of public prosecutors and judges in trainings on the causes and effects of gender-based violence and on dealing with gender stereotypes and sexual and rape myths.

In the prosecution of gender-based violence, the existence of an intimate relationship between the perpetrator and the victim must not be considered as a mitigating factor; the Istanbul Convention rather provides for the possibility of aggravating the punishment in the case of attacks by (ex-)partners.

“Gender-based motives” should be included as a circumstance to be taken into consideration for the penalty in Section 46(2) of the German Criminal Code. Such motives are present, for example, if the offence is directed against a woman because she is a woman, or if it is characterised by ideas of gender inequality.

It must be ensured that counsel for victims and witnesses can effectively exercise their support for those affected by gender-based, in particular sexualised, violence in investigations and judicial proceedings. This applies in particular, but not exclusively, to the right of access to files and the scheduling of court hearings.

The right to free psychosocial assistance in judicial proceedings must be extended to all those affected by gender-based violence as defined in the Istanbul Convention.

### Prosecution of femicides in the form of separation-related homicide (pp. 47 et seq.)

In the case of separation-related homicide, the perpetrator ignores the basic and human right of women to decide for themselves whether to enter into and continue an intimate relationship. This should be taken into account for the penalty and, in the case of homicide offences, should generally lead to a finding of “base motives” and thus to criminal liability under the offence of murder.

### Prosecution of sexualised violence (pp. 50 et seq., 53 et seq.)

Measures for the confidential collection of evidence must be available nationwide and close to the place of residence. This also includes the provision of initial medical care and the financing of materials and necessary trainings.

All necessary measures must be taken to spare those affected by sexualised violence from multiple interrogations and to ensure that interrogations are only carried out by trained staff. It must be ensured by law that questions concerning the victim’s past sexual life or behaviour exceeding the facts of the case can only be asked in criminal proceedings in exceptional cases and subject to specific justification.

All appropriate measures must be taken to expedite proceedings in cases of sexual offences.

### Criminal prosecution of physical intimate partner violence (pp. 58 et seq.)

In all gender-based offences against physical integrity, a special public interest in prosecution must be assumed, unless this is contrary to the victim’s interests in exceptional cases. The referral to private prosecution should be excluded. A clarifying amendment to No. 86 of the Guidelines on Criminal Proceedings and Fines (RiStBV) is recommended.

## Effective protection against violence for migrant and refugee women (pp. 60 et seq., 63 et seq.)

Germany should withdraw its reservations to Article 59(2) and (3) of the Istanbul Convention in order to provide comprehensive protection against gender-based and domestic violence to women without secure residence status. The practical effectiveness of the implementation measures for Article 59(1) must be ensured.

Migrant women must have non-discriminatory access to protection systems against violence. The territorial residence restriction must be lifted by means of legal exceptions in cases of protection against violence. Social benefit entitlements and registration obligations under aliens law must be adjusted accordingly. Psychosocial assistance in violent life situations, in particular admission to a women's shelter, must be financed irrespective of residence status.

## Monitoring, research and data collection (pp. 9 et seq.)

An independent and adequately funded monitoring body is to be established to control the implementation of the Istanbul Convention nationwide.

Research on gender-based violence must be guaranteed and promoted through state funding and further support. Disaggregated statistical data on all cases of violence against women and domestic violence covered by the scope of the Convention must be collected by the Federal Republic of Germany and published in a generally accessible form.

## A. Implementation deficits concerning integrated policies and data collection (Chapter II)

### Monitoring, research and data collection on gender-based violence

#### What the Istanbul Convention requires

Article 10 of the Convention obliges the Member States to establish one or more official bodies responsible for coordinating, implementing, monitoring and evaluating measures to prevent and combat all forms of violence against women and domestic violence. Article 11(1), lit. a IC obliges States to collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence within the scope of the Convention. Furthermore, Article 11(1), lit. b IC stipulates that research on all such forms of gender-based violence, their root causes and effects, their incidences as well as conviction rates and the efficacy of measures taken to implement the Convention is to be supported.

#### Current situation and legal framework

The international monitoring body for the Istanbul Convention, GREVIO, understands the obligation in Article 10 in the manner that the state has to separate the functions of (political) coordination on the one hand and monitoring and evaluation on the other, and to transfer the latter to an independent institution.<sup>13</sup> Such a monitoring agency should be able to conduct research and collect data on its own initiative in order to be able to observe and evaluate the implementation of the Convention on the basis of the Convention's standards alone. The monitoring structure should be developed with the participation of civil society in order to integrate its expertise and ensure its cooperation.

The tasks of the coordination body referred to in Article 10 are currently performed jointly by the competent federal ministries.<sup>14</sup> To perform these tasks, the federal ministries use, inter alia, various federal/ Länder working groups ("Bund-Länder-Arbeitsgruppen") or working groups of the federation, the Länder and non-governmental organisations.<sup>15</sup> There is no independent coordination body. The current linkage to already existing structures in the ministries does not meet the requirements of Article 11 IC because sufficient financial and human resources have not been made available.

Moreover, meaningful monitoring is not possible without research and data collection. The Federal Government assumes that the requirements of Article 11 IC are already fully met.<sup>16</sup> However, research on gender-based violence in Germany has so far mainly taken place when civil society organisations or academics<sup>17</sup> get involved in this field. In 2004, the Federal Government published two major studies on violence against women as well as men's experiences of violence,<sup>18</sup> and the Gender Data Report of 2005 contained a very instructive chapter on violence and gender<sup>19</sup>. The detailed accompanying research on the Protection against Violence Act and other measures against domestic violence

<sup>13</sup> Group of Experts on Action against Violence against Women and Domestic Violence, Baseline Evaluation Report Albania, GREVIO/Inf(2017)13, paras 34 und 36; Group of Experts on Action against Violence against Women and Domestic Violence, Baseline Evaluation Report Monaco, GREVIO/Inf(2017)3, para. 27.

<sup>14</sup> Bt.-Drs. 19/781619 of 15 February 2019, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Cornelia Möhring, Gökay Akbulut, Doris Achelwilm, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 19/7134 – Umsetzung des Übereinkommens des Europarates zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt (Istanbul-Konvention), p. 6.

<sup>15</sup> Ibid.

<sup>16</sup> Bt.-Drs. 18/12037 of 24 April 2017, pp. 54 et seq.

<sup>17</sup> See generally GiG-net (ed.), Gewalt im Geschlechterverhältnis, 2008.

<sup>18</sup> BMFSFJ (ed.), Lebenssituation, Sicherheit und Gesundheit von Frauen in Deutschland, 2004; BMFSFJ (ed.), Gewalt gegen Männer. Personale Gewaltwiderfahrnisse von Männern in Deutschland, 2004; available at [www.bmfsfj.de](http://www.bmfsfj.de).

<sup>19</sup> BMFSFJ (ed.), Datenreport zur Gleichstellung von Männern und Frauen in der Bundesrepublik Deutschland 2005, Chapter X; currently not available on the BMFSFJ website.

also falls into this period.<sup>20</sup> The Atlas on Equality between Women and Men in Germany from the year 2020<sup>21</sup> contains a chapter on intimate partner violence on two pages, in which victims of intimate partner violence are listed according to gender and the respective Land. It contains no further details on gender-based violence.

In the debate on the amendment of the Criminal Code concerning sexual offences in 2016, necessary data collection also had to be carried out to a large extent by civil society organisations and individual researchers,<sup>22</sup> although the data situation with regard to sexualised violence still needs to be improved. If scientific research on gender-based violence is not commissioned by the state, the necessary cooperation of state agencies that have access to essential data is not always ensured.

The availability of statistical data is still inconsistent and only partially ensured. With regard to police protective measures against domestic violence, the interior ministries of the Länder collect the relevant data, a nationwide consolidation does not take place. Since 2016 the Federal Criminal Police Office has been publishing a situation report Intimate Partner Violence - Crime Statistics Evaluation, most recently in 2019.<sup>23</sup> The Police Crime Statistics only provide a gender-based breakdown for suspects in general and for victims only in relation to selected offences.<sup>24</sup> The Police Crime Statistics can therefore only show how many victims were women in relation to the respective crime, but they do not allow any conclusions to be drawn as to underlying misogynist or sexist motives. Information on non-binary persons is completely missing. All in all, the statistical data collection must overcome the exclusively binary division, which must also apply to the Police Crime Statistics. There is also a considerable backlog in dark field research.

In 2015, the Conference of the Länder Equality and Women's Ministers took stock of the existence, equipment and financing of women's shelters, but the information provided is incomplete.<sup>25</sup> The "FHK residents' statistics" ("FHK-Bewohner\_innenstatistik") of the Women's Shelter Coordination ("Frauenhauskoordination") is the only nationwide statistic that provides annual data on the work of women's shelters and women's shelter residents for practice, research and politics.<sup>26</sup> The Women's Shelter Coordination collects data on the use of support systems, but can only record a proportion of women's shelters (in 2019, for example, 180 of all women's shelters in Germany).<sup>27</sup> There is a considerable need for research and data collection, especially on sexualised violence against women, forced prostitution and trafficking in human beings for the purpose of sexual exploitation, forced marriage, genital mutilation, violence against lesbian women and intersex children, and unwanted sterilisation, which is not currently collected by state or commissioned agencies.

## Demands

An independent monitoring body must be set up to monitor the implementation of the Istanbul Convention nationwide. Research and data collection should be integral components of independent monitoring.

Disaggregated statistical data on all cases of violence against women and domestic violence covered by the scope of the Convention must be collected by the Federal Republic of Germany and published in a generally accessible form. In particular, the collection of gender-related perpetrator-victim relationships must be made mandatory in all areas of physical and psychological violence, as provided for in Article 11(1), lit. a of the IC.

<sup>20</sup> BMFSFJ (ed.), *Gemeinsam gegen häusliche Gewalt. Kooperation, Intervention, Begleitforschung*, 2004.

<sup>21</sup> BMFSJ (ed.), 4. Atlas zur Gleichstellung von Frauen und Männern in Deutschland, 4 September 2020, available at <https://www.bmfsfj.de/bmfsfj/service/publikationen/4--atlas-zur-gleichstellung-von-frauen-und-maennern-in-deutschland/160358>.

<sup>22</sup> See particularly bff, „Was Ihnen widerfahren ist, ist in Deutschland nicht strafbar“. Fallanalyse zu bestehenden Schutzlücken in der Anwendung des deutschen Sexualstrafrechts bezüglich erwachsener Betroffener, 2014.

<sup>23</sup> Lagebericht Partnerschaftsgewalt – Kriminalstatistische Auswertung, 2019, available at [https://www.bka.de/DE/AktuelleInformationen/Statistiken-Lagebilder/Lagebilder/Partnerschaftsgewalt/partnerschaftsgewalt\\_node.html](https://www.bka.de/DE/AktuelleInformationen/Statistiken-Lagebilder/Lagebilder/Partnerschaftsgewalt/partnerschaftsgewalt_node.html).

<sup>24</sup> E.g. Police Crime Statistics 2018 and 2019, available at [https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/themen/sicherheit/pks-2018.pdf?\\_\\_blob=publicationFile&v=4](https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/themen/sicherheit/pks-2018.pdf?__blob=publicationFile&v=4) and [https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/themen/sicherheit/pks-2019.pdf?\\_\\_blob=publicationFile&v=10](https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/themen/sicherheit/pks-2019.pdf?__blob=publicationFile&v=10).

<sup>25</sup> GFMK (eds.), *Bestandsaufnahme Frauenhäuser und Opferunterstützungseinrichtungen*, 2015, available at [https://www.gleichstellungsministerkonferenz.de/documents/anlage\\_top\\_7-1\\_2\\_1510227253.pdf](https://www.gleichstellungsministerkonferenz.de/documents/anlage_top_7-1_2_1510227253.pdf).

<sup>26</sup> See <https://www.frauenhauskoordination.de/publikationen/fhk-bewohner-innenstatistik/>.

<sup>27</sup> *Ibid.*

Research in this area must be guaranteed and promoted through the unreserved cooperation of public authorities as well as appropriate funding.

## B. Implementation deficits concerning Prevention (Chapter III)

### The prevention of separation-related homicides and other forms of intimate partner violence

#### What the Istanbul Convention requires

Article 12 IC calls for comprehensive preventive measures. According to Article 12(2) IC, the Parties shall take the necessary legislative and other measures to prevent all forms of violence by natural or legal persons covered by the scope of this Convention. According to Article 12(3) IC, all measures taken must take into account and address the specific needs of persons made vulnerable by particular circumstances and shall place the human rights of all victims at their centre. According to Article 13 IC, the Parties are obliged to undertake regular awareness-raising campaigns or programmes at all levels in order to increase the awareness and understanding among the general public of the different manifestations of all forms of violence covered by the scope of this Convention, their consequences on children and the need to prevent such violence. Article 14 IC provides that the necessary measures must be taken to include teaching material on issues such as equality between women and men, the elimination of stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity in formal curricula and at all levels of education. Article 23 IC provides that the Parties shall take the necessary legislative or other measures to enable the setting-up of appropriate, easily accessible shelters in sufficient numbers to provide safe accommodation to victims, especially women and their children, and to reach out pro-actively to victims.

#### Current situation and legal framework

Women are affected by acts of violence by their (ex-)partners much more often than men. In 2019, 3027 women in Germany became victims of a (completed) sexual assault, sexual coercion or rape by their (ex-)partner.<sup>28</sup> 307 women fell victim to attempted or completed homicides by their (ex-)partner; 117 women died.<sup>29</sup> More than once an hour a woman is physically attacked by her (ex-)partner and every third day a woman is killed by her (ex-)partner.

Prevention of separation-related homicides and other forms of intimate partner violence must be at the forefront of the fight against such violence.<sup>30</sup> Intimate partner and separation-related violence is often not unforeseeable and therefore not “unavoidable”. It is not uncommon that perpetrators and victims are already known to the police from “crisis missions”, that they have been ordered to leave the scene in the past and that orders to protect against violence have previously been issued; some women have sought refuge with relatives, friends or in women’s shelters. On the one hand, this means that in retrospect the measures already taken, which often successfully guarantee the safety of victims, were not sufficient in the specific case to protect the woman from further serious violence. On the other hand, it also means that the risk has often been known to the authorities and courts for a long time and that the violence no longer occurs in the “seclusion” of a couple’s relationship. In the run-up to such serious acts of violence there are often warning signals for an escalation. In many cases the women lack support when they have decided against the relationship. Numerous cases of intimate partner violence and in particular separation-related violence could therefore be prevented if the existing danger was correctly assessed and victim protection was made more effective.

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<sup>28</sup> Federal Criminal Police Office (ed.), Partnerschaftsgewalt. Kriminalstatistische Auswertung – Berichtsjahr 2019, available at [https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/Partnerschaftsgewalt/Partnerschaftsgewalt\\_2019.htm?ljsessionid=94375081EF5AFE6F8A60BAFA1354D4E.live0601?nn=63476](https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/Partnerschaftsgewalt/Partnerschaftsgewalt_2019.htm?ljsessionid=94375081EF5AFE6F8A60BAFA1354D4E.live0601?nn=63476).

<sup>29</sup> Ibid.

<sup>30</sup> See djB, Policy Paper: Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt, 22 November 2018, pp. 12 et seq, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>.

Legal possibilities to keep a violent man permanently away from the threatened (ex-)partner are only available to a limited extent. Police evictions and prohibitions to return home as well as prohibitions to approach and contact according to the Protection against Violence Act are often not sufficient to defuse highly explosive dangerous situations, because the men disregard police and court orders. In particular, there is also a lack of coordination with family law, according to which contact with the child must be made possible despite the existence of a violence protection order.

## Demands

On the basis of intensive research into the causes of criminal acts, existing risk assessment instruments<sup>31</sup> must be further developed and made available to the persons and institutions involved in potentially dangerous cases so that they no longer have to rely solely on their “gut feeling”. Often the woman concerned knows best how dangerous her (ex-)partner is. Her assessment should therefore be enquired and taken seriously. Statistics - also based on intensive research into the causes of criminal acts - offer a promising method for risk assessment.

The information on individual dangerous situations from counselling centres, women’s shelters, police, courts, etc. must be brought together. It is necessary to establish nationwide interdisciplinary case management.

There is a need for the compulsory, qualified and continuous training of *all* police forces who are confronted with domestic violence in their service. They must be able to assess risks and take first steps towards stabilising the victim’s situation.

Coordination with family law must be improved, especially in cases where, despite the existence of a violence protection order, contact with the child must be made possible.

There is a need for the further expansion of women’s shelters and support services and their secure, long-term funding, with particular attention being paid to the accessibility (in the broader sense) of the support services.

Therefore, it is necessary to conduct measures for assuming responsibility according to the standards of the BAG “Täterarbeit häusliche Gewalt” and to create support services for (potential) perpetrators as well as outpatient and inpatient therapy facilities in adequate numbers.

Regular awareness-raising campaigns or programmes at all levels must be carried out to increase the awareness and understanding of the different manifestations of gender-based violence among the general public. In addition, issues such as equality between men and women, the elimination of stereotyped gender roles, gender-based violence against women in all social classes and awareness-raising concerning common sexual and rape myths need to be included in official curricula at all levels of the education system.

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<sup>31</sup> E.g. DyRiAS (Dynamische Risikoanalyse System), SARA (Spousal Assault Risk Assessment), ODARA (Ontario Domestic Assault Risk Assessments) etc.

## c. Implementation deficits concerning Protection and support (Chapter IV)

### Women's shelters and specialist support services

#### What the Istanbul Convention requires

Article 22 IC obliges the Federal Republic of Germany to provide or arrange for specialist support services in an adequate geographical distribution for immediate as well as short- and long-term assistance to persons affected by violence against women and domestic violence and their children. Article 23 IC obliges the Federal Republic of Germany to take the necessary legislative or other measures to provide appropriate, easily accessible shelters in sufficient numbers.

#### Current situation and legal status

The Federal Republic of Germany is a long way from having a comprehensive and accessible supply of shelters for victims of violence. According to current estimates, there is a lack of more than 14,600 shelter places<sup>32</sup>, women with disabilities have hardly any access and shelters for male victims of domestic violence do not exist. Support services such as specialist counselling centres in particular are neither available close to home nor adequately funded.

Every fourth woman in Germany has experienced physical and/or sexual assault by a relationship partner at least once in her life.<sup>33</sup> With an average of one shelter place per 12,000 inhabitants<sup>34</sup>, there is a supply shortage in Germany.<sup>35</sup> Almost every second request for admission to a women's shelter has to be rejected,<sup>36</sup> although there are considerable regional differences. In North Rhine-Westphalia, for example, two out of three requests are rejected; Bavaria and Saxony have the worst rates<sup>37</sup>. No women's shelters exist in at least 125 administrative districts and independent towns in Germany. The pilot project of the federal and Länder governments to further develop the system of assistance for the protection of women against violence may provide new insights into the extent to which the needs differ in rural and urban areas and how assistance systems can be tailored and financed accordingly.<sup>38</sup> The reference to missing data has delayed the necessary provision of a sufficient number of places in women's shelters and protective shelters for years.

Although women with disabilities are disproportionately affected by violence,<sup>39</sup> only 10% of the existing women's shelters are suitable for them, and only a handful are wheelchair accessible. In the current structures, adequate care for children who have experienced violence is also hardly possible. In many cases, there is a lack of resources for

<sup>32</sup> Wissenschaftlicher Dienst des Deutschen Bundestages, Sachstand „Frauenhäuser in Deutschland“, WD 9 - 3000 - 030/19, 27 May 2019, p. 4, available at <https://www.bundestag.de/resource/blob/648894/7fe59f890d4a9e8ba3667fb202a15477/WD-9-030-19-pdf-data.pdf>.

<sup>33</sup> Monika Schröttle/Ursula Müller, Lebenssituation, Sicherheit und Gesundheit von Frauen in Deutschland, 2004; BMFSFJ (ed.), Gewalt gegen Frauen in Partnerschaften, 2014.

<sup>34</sup> Kleine Anfrage zum Modellprojekt zur Weiterentwicklung des Hilfesystems zum Schutz von Frauen vor Gewalt, BT-Drs. 19/752 of 14 February 2018, Vorbemerkung der Fragesteller, p. 1, available at <http://dip21.bundestag.de/dip21/btd/19/007/1900752.pdf>. This corresponds with calculations based on the data in: Konferenz der Gleichstellungs- und Frauenministerinnen und -senatoren der Länder (GFMK), Bestandsaufnahme Frauenhäuser und Opferunterstützungseinrichtungen, 2015, pp. 63 et seq. However, if one looks only at the actual places for women and subtracts the places for children stated by four Länder, there is on average one place in a women's shelter for every 16,350 inhabitants.

<sup>35</sup> The Council of Europe demands one women's shelter place per 7,500 inhabitants.

<sup>36</sup> Wissenschaftlicher Dienst des Deutschen Bundestages, Sachstand „Frauenhäuser in Deutschland“, WD 9 - 3000 - 030/19, 27 May 2019, p. 4, available at <https://www.bundestag.de/resource/blob/648894/7fe59f890d4a9e8ba3667fb202a15477/WD-9-030-19-pdf-data.pdf>.

<sup>37</sup> In each case 1:17,000. If places for children are not taken into account in Bavaria, the ratio is 1:36,000.

<sup>38</sup> Kleine Anfrage zum Modellprojekt zur Weiterentwicklung des Hilfesystems zum Schutz von Frauen vor Gewalt, BT-Drs. 19/752 of 14 February 2018, available at <http://dip21.bundestag.de/dip21/btd/19/007/1900752.pdf> (key questions on p. 3). The final federal report has not yet been made publicly available.

<sup>39</sup> Claudia Hornberg and Monika Schröttle (Projektleitung), Lebenssituation und Belastungen von Frauen mit Beeinträchtigungen und Behinderungen in Deutschland, Studie im Auftrag des BMFSFJ, 3rd ed. 2014, pp. 56-57; Federal Ministry of Labour and Social Affairs (ed.), Zweiter Teilhaberbericht der Bundesregierung über die Lebenslagen von Menschen mit Beeinträchtigungen. Teilhabe – Beeinträchtigung – Behinderung, 2016, p. 413.



language mediation, which can also represent a massive barrier for women who have experienced violence and have a history of flight or migration.

At the same time, established protection and assistance structures must not only be expanded in terms of quantity and be financed securely. The quality of the services must also be improved in order to reach women with a greater need for support. Violence is often accompanied by further burdens and disadvantages and is further aggravated by them, for example by poverty, indebtedness, homelessness, disability, psychiatric history, addiction or an insecure residence status. Protection and support can only be effective if they are also accessible to particularly vulnerable target groups in a factual and reliable way. Moreover, women with a greater need for support face an inaccessible housing market, which means that they remain in shelters for longer, thus further aggravating the capacity problem. Necessary protection and support services for women affected by violence cannot be solely provided by general shelters and specialist counselling centres. Rather, other institutions such as the municipal housing sector, specialist counselling centres, health and social services are also under obligation. Their cooperation and the establishment of intervention chains which guarantee protection and support also for women with increased need for support are absolutely necessary.

Contrary to repeated allegations, so-called domestic violence does not affect women and men equally. At the same time, the male victims of domestic violence cannot be ignored either. Violence in close social relationships is gender-based; male violence against women is more frequent, more ritualistic, more serious and has far more severe consequences than domestic violence by women.<sup>40</sup> Moreover, women far more often than men lack the financial and other resources to leave a violent relationship. The Convention requires shelters “especially for women and their children”, but not exclusively, and it does not exclude male victims of domestic violence altogether. This is also consistent insofar as the perception of male victims themselves can change gender roles. There are currently no shelters for men in Germany at all. This has to be changed immediately, although it has to be taken into account that for the reasons mentioned above the need for shelters will be considerably lower than the need for shelters for women.

The supply of shelters must be adapted to existing needs without delay, which implies the opening of shelters for male victims of domestic violence as well as the quantitative expansion of women’s shelters so that rejections will no longer be necessary, but also the barrier-free and needs-oriented equipment (in the broadest sense) of existing and new shelters. In view of the major challenges, a reorientation in financing is also unavoidable, which can thus far be described as extremely inconsistent, hardly ever cost-covering and associated with great uncertainty.<sup>41</sup> In this context, the investment programme by the Ministry of Justice and Consumer Protection is to be welcomed, under which the Federal Government will spend a total of 120 million euros between 2020 and 2023 on the expansion, conversion and new construction of women’s shelters and counselling centres, 30 million of which will be spent on the expansion, conversion and new construction as well as the renovation of women’s shelters and specialist counselling centres.<sup>42</sup> However, this does not yet guarantee a nationwide supply and adequate financing.

Shelters cover only part of the necessary support for victims of violence against women and domestic violence. Specialist support services provide uncomplicated support for women affected by violence close to their homes, focusing on different forms of gender-based violence. Confidential counselling is particularly important. Through public relations work, they also contribute substantially to the social condemnation of gender-based violence and provide information on manifestations, prejudices and countermeasures. Their work is considerably hampered by the fact that they are insufficiently equipped and not adequately financed. This results in long waiting times for counselling appointments; immediate help cannot always be guaranteed even in emergencies. In rural areas there are often no services close to where people live, so that those affected by violence have to travel long distances and incur high costs; pro-active intervention centres are only available in isolated cases in urban areas; outreach work is hardly possible due to a lack of resources. In many specialist counselling centres, accessibility cannot be guaranteed either in terms of the structural conditions or through language mediation or childcare.

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<sup>40</sup> See extensively GiG-net, *Gewalt im Geschlechterverhältnis*, 2008. In contrast, studies used to prove equal distribution have so far suffered from the serious methodological error of not differentiating between violent acts, in other words, shouting and beating are counted with the same value.

<sup>41</sup> For details of funding, see Wissenschaftlicher Dienst des Deutschen Bundestages, *Sachstand „Frauenhäuser in Deutschland“*, WD 9 - 3000 - 030/19, 27 May 2019, pp. 6 et seq, available at <https://www.bundestag.de/resource/blob/648894/7fe59f890d4a9e8ba3667fb202a15477/WD-9-030-19-pdf-data.pdf>.

<sup>42</sup> Communication of the BMFSFJ of 21 October 2019, available at <https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/bundesinvestitionsprogramm--gemeinsam-gegen-gewalt-an-frauen--startet/140312>.

A comprehensive, generally accessible range of support services is currently not available. This means that the requirement of the Istanbul Convention to ensure effective access to protection against violence - in particular also regardless of “migrant or refugee status, or other status”<sup>43</sup> according to Article 4(3) of the Convention – has not been fulfilled. It would be preferable to have a federal regulation for a legal right to protection and assistance in the event of violence for all women, which could be anchored, for example, in Article 23(1) of Social Code XII, excluding para.(3). For asylum seekers, tolerated and undocumented persons, the benefits for protection against violence could be explicitly anchored in Section 6 of the Act on Benefits for Asylum Seekers and linked to a legal entitlement. The entitlement to benefits would have to be supplemented by an exemption from the reporting obligation in Section 87(1) of the Residence Act for social services vis-à-vis the foreigners authorities.

## Demands

All appropriate legislative and other measures must be taken to create a comprehensive, universal and generally accessible support system for all women affected by violence. This includes in particular shelters, counselling centres, emergency telephone helplines, trauma centres, therapy facilities, medical care and accessibility in the broader sense.

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<sup>43</sup> See Access to justice for migrant women, pp. 63 et seq. of this report.

# Financing of shelters and specialist support services

## What the Istanbul Convention requires

Article 8 IC obliges the Federal Republic of Germany to provide the appropriate financial and human resources, inter alia, for the implementation of measures to prevent and combat violence against women and domestic violence, including measures implemented by non-governmental organisations and civil society. Articles 22 and 23 IC oblige the Federal Republic of Germany to take measures to provide or ensure the provision of support services and to enable the establishment of shelters to provide safe housing and to reach out pro-actively to those seeking protection.

## Current situation and legal framework

The financing of private shelters and support services is in no way secured and falls below the minimum standard.<sup>44</sup> The fragmentation, inconsistency and complexity of the financing arrangements in this area act as barriers to access to protection and support primarily for women in particularly precarious life situations:<sup>45</sup>

The financing modalities of private shelters and support services vary considerably from one state and municipality to another.<sup>46</sup> There is a legal regulation only in Schleswig-Holstein and a fixed budget item in Berlin; apart from that, only non-binding directives and administrative regulations exist. In most Länder, shelters are financed by a mixture of state subsidies, municipal subsidies, the providers' own resources and daily rates according to Social Code II, Social Code XII and the Act on Benefits for Asylum Seekers. The financing of the other support systems is still largely left to the municipalities, which is why such services depend on the providers' own resources as well as donations and fines. The individual components of financing and the lack of a uniform federal regulation raise various problems.<sup>47</sup>

There is no legal entitlement to state or municipal funding; it has to be applied for anew each year from various funders in complex procedures and usually does not cover the costs. This ties up resources that should actually benefit those affected, makes planning more difficult and has a negative impact on staff motivation.<sup>48</sup> Moreover, state subsidies often require a considerable amount of the providers' own funds. However, revenues from fundraising and the allocation of fines have declined considerably (in some cases to 10%), while the Länder and local authorities demand a consistent amount of own funds. The coronavirus crisis is expected to cause further constrictions. Women's shelters and counselling centres can at least apply for pandemic-related special loans from KfW until 30 June 2021.<sup>49</sup> However, numerous other non-profit organisations are also eligible to apply and the funds are limited.

Furthermore, financing of shelters through daily rates provided for in Social Code II, Social Code XII and the Act on Benefits for Asylum Seekers excludes several groups of affected persons: school children, students, trainees, migrants with insecure residence status, diplomats' wives and UN members as well as newly arrived EU citizens.<sup>50</sup> Women with their own income have to apply for social benefits and/or run into debt, as the daily rates exceed the average income. Mixed financing also makes it considerably more difficult to accept women from other municipalities or Länder. Furthermore, individualised financing through social welfare law also raises considerable problems with regard to the

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<sup>44</sup> On the international, EU and domestic constitutional legal framework Schuler-Harms, Margarete/Wieland, Joachim, *Der Rechtsanspruch auf Schutz und Hilfe für Frauen betroffene Gewalt und ihre Kinder*, 2012, pp. 4 et seq. Comparable obligations of the Federal Republic also result from Directive 2012/29/EU.

<sup>45</sup> BMFSFJ (ed.), *Bericht der Bundesregierung zur Situation der Frauenhäuser, Fachberatungsstellen und anderer Unterstützungsangebote für gewaltbetroffene Frauen und deren Kinder*, BT-Drs. 17/10500, pp. 13, 16, 18.

<sup>46</sup> For details on the respective financing of women's shelters, specialist support services, intervention centres and emergency hotlines: Konferenz der Gleichstellungs- und Frauenministerinnen und -minister, -senatorinnen und -senatoren der Länder (GFMK), *Bestandsaufnahme Frauenhäuser und Opferunterstützungseinrichtungen*, 2015, pp. 49 et seq; see also Wissenschaftlicher Dienst des Deutschen Bundestages, *Sachstand „Frauenhäuser in Deutschland“*, WD 9 - 3000 - 030/19, 27 May 2019, pp. 6 et seq, available at <https://www.bundestag.de/resource/blob/648894/7fe59f890d4a9e8ba3667fb202a15477/WD-9-030-19-pdf-data.pdf>.

<sup>47</sup> On elements as well as problems, see exemplarily Oberlies, Dagmar, *Rechtliche Anforderungen und Möglichkeiten der Ausgestaltung und Finanzierung des Hilfesystems bei Gewalt*, 2012, pp. 18 et seq.

<sup>48</sup> Kavemann, Barbara/Rothkegel, Sibylle/Helfferich, Cornelia, *Abschlussbericht der Bestandsaufnahme spezialisierter Beratungsangebote bei sexualisierter Gewalt in Kindheit und Jugend: Finanzierungspraxen*, 2012, pp. 43 et seq.

<sup>49</sup> See KfW, *Merkblatt zum KfW-Sonderprogramm „Globaldarlehen an Landesförderinstitute für gemeinnützige Organisationen“*, available at [https://www.kfw.de/PDF/Download-Center/F%C3%B6rderprogramme-\(Inlandsf%C3%B6rderung\)/PDF-Dokumente/6000004691\\_M\\_279\\_Globaldarlehen\\_an\\_LFI.pdf](https://www.kfw.de/PDF/Download-Center/F%C3%B6rderprogramme-(Inlandsf%C3%B6rderung)/PDF-Dokumente/6000004691_M_279_Globaldarlehen_an_LFI.pdf).

<sup>50</sup> In detail Rixen, Stephan, *Probleme des geltenden Rechts und verfassungsrechtlichen Gestaltungsrahmen*, in: BT-Drs. 17/10500, pp. 211 et seq.

confidentiality of support services - confidential counselling, which is an indispensable component of protection concepts and support services, would thus become virtually unaffordable.

The provision and financing of support systems is generally assigned by the Länder to the municipalities as a voluntary task within the framework of public services. This means that the provision of local support services is dependent not only on the municipal budget situation but also on the goodwill of those responsible at municipal level. However, the exact structure of the federal system in Germany is irrelevant for the obligation arising from the Convention as an international treaty; the Federal Republic is obliged to fulfil its tasks effectively (whether by itself, through the Länder or the municipalities).

To date, political efforts for an adequate funding framework have not been sufficient: As early as 2009, the CEDAW Committee called on the Federal Republic to ensure the availability of a sufficient number of women's shelters throughout Germany through improved cooperation between the Federal Government, the Länder and local authorities, as well as their adequate funding, accessibility independent of income and appropriate equipment, especially for women with disabilities.<sup>51</sup> The Federal Government's Second Action Plan to Combat Violence against Women had left out the question of funding. In 2008 and 2009 the possibility of financing women's shelters on a nationwide basis was discussed in parliament and an audit mandate was issued to the Federal Government (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth).<sup>52</sup> Upon enquiry, the responsible parliamentary state secretary again pointed out in 2010 that the federal states and local authorities were responsible for the existence and financial security of the support infrastructure for women and children affected by violence and rejected a uniform nationwide regulation with regard to shelters for women.<sup>53</sup> The urgent need for secure funding for outpatient support facilities was not even discussed.<sup>54</sup> In 2013, the government of North Rhine-Westphalia had considered establishing by means of a state law an un-bureaucratic, needs-based and reliable funding system that was detached from the individual case.<sup>55</sup> Although such a state law proved to be legally possible, the state government rejected the initiation of a legislative procedure, because on the one hand, this would have cut federal subsidies, and on the other hand, it would have reduced the financial scope for action of the municipalities by allocating funds for specific purposes. This does not appear to be a suitable justification for falling below the due diligence standard. Rather, the current funding situation must be seen as a major impediment to access for women affected by violence and the main obstacle to the reliable work of women's shelters and other support services<sup>56</sup>.

The model project of the Federal Government and the Länder to further develop the aid system for the protection of women against violence, which ran until the end of 2019, was intended to collect data on needs, but did not implement secured and adequate funding. The innovation programme "Gemeinsam gegen Gewalt gegen Frauen" ("Together against violence against women") of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth<sup>57</sup> is not sustainable, but only an acute measure. Under this investment programme, the Federal Government will spend, among other investments, 30 million euros between 2020 and 2023 on the expansion, conversion and new construction as well as on the renovation of women's shelters and specialist counselling centres.<sup>58</sup>

Protection against violence and support for women affected by violence must become a compulsory task and be guaranteed by clear and consistent regulations that apply throughout the country. There are various models for the concrete implementation. Some suggest flat rate financing.<sup>59</sup> Partly, it is proposed that appropriate and needs-based funding be regulated by federal law as a matter of state welfare, because equal living conditions in Germany require

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<sup>51</sup> CEDAW Committee, Concluding remarks, 10 February 2009, CEDAW/C/DEU/CO/6, paras 43-44.

<sup>52</sup> Available at <http://dipbt.bundestag.de/extrakt/ba/WP16/199/19950.html>.

<sup>53</sup> See BT-Drs. 17/2715, pp. 52-53.

<sup>54</sup> However, see also Bundesverband Frauenberatungsstellen und Frauennotrufe (bff), Positionspapier für eine verlässliche finanzielle Absicherung im Rahmen bundesweit verbindlicher Regelungen der ambulanten Unterstützungsangebote für Frauen und Mädchen insbesondere bei körperlicher und sexualisierter Gewalt, April 2010.

<sup>55</sup> Statement of the state government of North Rhine-Westphalia on the legal opinion „Unterstützung für gewaltbetroffene Frauen und ihre Kinder in NRW: Verfassungsrechtliche Handlungsspielräume und Regelungsoptionen“, 2013.

<sup>56</sup> See Rixen, Stephan, Probleme des geltenden Rechts und verfassungsrechtlicher Gestaltungsrahmen, in: BT-Drs. 17/10500, pp. 252-253.

<sup>57</sup> See the guidelines for funding, available at <https://www.bmfsfj.de/blob/155020/6242481e0385229c5c251fbecc41ad8a/foerderleitlinie-gemeinsam-gg-gewalt-an-frauen-data.pdf>.

<sup>58</sup> Communication of the BMFSFJ of 21 October 2019, available at <https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/bundesinvestitionsprogramm-gemeinsam-gegen-gewalt-an-frauen--startet/140312>.

<sup>59</sup> djb, Stellungnahme an die Mitglieder des Ausschusses für Familie, Senioren, Frauen und Jugend des Deutschen Bundestages anlässlich des nicht öffentlichen Fachgesprächs zur Situation der Frauenhäuser vom 10. November 2014, 10 November 2014, available at <https://www.djb.de/presse/stellungnahmen/detail/st14-19/>.

federal legislation.<sup>60</sup> To this end, a law on cash benefits could be enacted,<sup>61</sup> a federal foundation established<sup>62</sup> or the law on social benefits and related organisational regulations carefully reformed<sup>63</sup>. An individual legal entitlement under social welfare law to shelter and support in the event of violence would require reliable financing of services in women's shelters and specialist counselling centres and make them independent of voluntary services,<sup>64</sup> but would have to be secured by a federal benefits law.

The choice of the regulatory model is left to legislative discretion as long as the result - in contrast to the current situation - guarantees effective financing and thus effective access to support systems. The fact that effective access to shelters and specialist counselling centres must be guaranteed in the event of gender-based violence is not a matter of discretion, but a state duty. Measured against these duties, the current situation of fragmented financing is legally and not only politically insufficient.

## Demands

Effective access to shelters and support services, in particular confidential counselling, must also be guaranteed by way of their reliable funding. Protection against violence and support for women affected by violence is a state duty. Their adequate and, in particular, needs-based financing must be guaranteed by means of clear and consistent regulations that are uniform throughout the country, as well as the provision of appropriate budgetary resources.

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<sup>60</sup> Schuler-Harms, Margarete/Wieland, Joachim, Der Rechtsanspruch auf Schutz und Hilfe für Frauen betroffene Gewalt und deren Kinder, 2012, pp. 10 et seq.; djb, Stellungnahme im Rahmen der öffentlichen Anhörung des Familienausschusses des Deutschen Bundestages am 12. November 2008 zur Möglichkeit der bundeseinheitlichen Finanzierung von Frauenschutzhäusern, 6 November 2008, available at <https://www.djb.de/presse/stellungnahmen/detail/st08-19/>. Endorsing only moderate reforms of social welfare law and related organisational regulations Rixen, Stephan, Probleme des geltenden Rechts und verfassungsrechtlichen Gestaltungsrahmen, in: BT-Drs. 17/10500, pp. 201 et seq.

<sup>61</sup> djb, Stellungnahme im Rahmen der öffentlichen Anhörung des Familienausschusses des Deutschen Bundestages am 12. November 2008 zur Möglichkeit der bundeseinheitlichen Finanzierung von Frauenschutzhäusern, 6 November 2008, available at <https://www.djb.de/presse/stellungnahmen/detail/st08-19/>; Schuler-Harms, Margarete/Wieland, Joachim, Der Rechtsanspruch auf Schutz und Hilfe für Frauen betroffene Gewalt und ihre Kinder, 2012, p. 18.

<sup>62</sup> Schuler-Harms, Margarete/Wieland, Joachim, Der Rechtsanspruch auf Schutz und Hilfe für Frauen betroffene Gewalt und ihre Kinder, 2012, pp. 15-16.

<sup>63</sup> Rixen, Stephan, Probleme des geltenden Rechts und verfassungsrechtlicher Gestaltungsrahmen, in: BT-Drs. 17/10500, pp. 201 et seq.

<sup>64</sup> Frauenhauskoordinierung e.V., Rechtsanspruch auf Schutz und Hilfe bei Gewalt, Diskussionspapier von FHK, 2017, available at [https://www.frauenhauskoordinierung.de/fileadmin/aktuelles-archiv/2017-10-17-Rechtsanspruch\\_FHK\\_Diskussionspapier\\_final.pdf](https://www.frauenhauskoordinierung.de/fileadmin/aktuelles-archiv/2017-10-17-Rechtsanspruch_FHK_Diskussionspapier_final.pdf); in detail already Oberlies, Dagmar, Rechtliche Anforderungen und Möglichkeiten der Ausgestaltung und Finanzierung des Hilfesystems bei Gewalt, 2012.

# Support and protection of those affected by sexualised violence: Crisis centres for victims as well as legal counsel, psychosocial assistance and private accessory prosecution

## What the Istanbul Convention requires

According to Article 25 of the Istanbul Convention, crisis centres for victims of rape and sexualised violence must be set up in sufficient numbers to provide medical and forensic examinations, trauma support and counselling. Article 18 IC requires that protection and support measures must be aimed at avoiding secondary victimisation. Article 55(2) of the Convention guarantees assistance and support to those affected by governmental or non-governmental organisations or counsellors in investigations and judicial proceedings. According to Article 56(1), lit. e, appropriate support services must be made available to the persons affected so that their rights and interests are duly presented and taken into account in investigations and judicial proceedings.

## Current situation and legal framework

### 1. Crisis centres

Although there are women's emergency hotlines, specialist counselling centres and health care facilities such as trauma clinics, it cannot be concluded that they exist in sufficient numbers, nor can it be concluded that they could currently fulfil all functions of crisis centres for victims of sexualised violence.<sup>65</sup> This does not necessarily mean that new facilities have to be established nationwide as crisis centres for victims of sexualised violence. However, the existing facilities must be examined to evaluate whether they actually fulfil the obligation under Article 25 of the Convention. This may necessitate much more intensive connection between or a supplementation of existing support services.

The current federal investment programme "Gemeinsam gegen Gewalt gegen Frauen" ("Together against violence against women") provides for funding of 30 million euros in the coming years for the expansion, conversion and new construction as well as the renovation of women's shelters and specialist counselling centres.<sup>66</sup> This is meant to strengthen the support structures and in particular to improve access for women with disabilities and women with children. However, this does not guarantee that there will be sufficient supply for women seeking counselling and appropriately trained staff in the *long term*, nor that crisis centres will be available for those affected by sexualised violence. The requirements for crisis centres under the Istanbul Convention are only met if victims of rape and sexualised violence can turn to a generally known and accessible institution which either offers the services mentioned (medical and forensic examinations, trauma support, counselling etc.) itself or refer the victims to the appropriate services without delay or further requirements.

### 2. Psychosocial assistance in legal proceedings

Although since 1 January 2017 victims of certain crimes in Germany have been entitled to free professional support and assistance during the entire duration of criminal proceedings (so-called psychosocial trial assistance), this does not apply to all victims of violence against women and domestic violence - especially not to all victims of sexual offences. Adult victims of sexual offences under Section 177 of the German Criminal Code, which are classified as less serious criminal offences ("Vergehen"), remain excluded from the possibility of appointment of counsel, unless the

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<sup>65</sup> On the current status of care and concrete recommendations on the implementation of Article 25 of the Istanbul Convention, see the cooperation project of the German Institute for Human Rights and the Bundesverband Frauenberatungsstellen und Frauennotrufe (bff), Artikel 25 Istanbul-Konvention: Akutversorgung nach sexualisierter Gewalt, available at <https://www.institut-fuer-menschenrechte.de/themen/frauenrechte/istanbul-konvention/projekt-artikel-25-istanbul-konvention/>.

<sup>66</sup> Federal investment programme „Gemeinsam gegen Gewalt an Frauen“, communication of the BMFSFJ of 21 October 2019, available at <https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/bundesinvestitionsprogramm--gemeinsam-gegen-gewalt-an-frauen--startet/140312>.

victim is unable to sufficiently safeguard his or her own interests.<sup>67</sup> In cases of bodily harm and dangerous bodily harm according to Sections 223, 224 of the German Criminal Code or “simple” stalking according to Section 238(1) of the German Criminal Code, an appointment according to Section 406g(3) and Section 397a(1) of the Code of Criminal Procedure is still excluded.<sup>68</sup>

Psychosocial assistance in the sense of Section 406g of the Code of Criminal Procedure is a form of non-legal support in criminal proceedings, which serves to provide information as well as qualified care and support in criminal proceedings. According to Section 2(1) of the Law on Psychosocial Assistance in Criminal Proceedings (PsychPbG), its aim is to reduce the individual burden on the injured person and to avoid secondary victimisation.

However, the provision in Section 406g(3) of the Code of Criminal Procedure does not provide for the right to free psychosocial trial assistance for all persons affected by violence against women and domestic violence, but only if certain criminal offences have been committed. Although all those affected can make use of psychosocial assistance (Section 406g(1) of the Code of Criminal Procedure), they often have to finance it by themselves. In many cases this is not economically possible for the victims, so that their need for protection is not taken into account. As a result of the Law on the Modernisation of Criminal Proceedings, which was passed on 15 November 2019<sup>69</sup>, the need for support in the especially serious case of a less serious criminal offence (“Vergehen”) under Section 177(6) of the German Criminal Code (rape) can now also lead to the reimbursement of costs. Other sexual offences that are not classified as serious criminal offences (“Verbrechen”) are still not covered.

### 3. Private accessory prosecution

The scope of application of private accessory prosecution was extended slightly by the Law on the Modernisation of Criminal Proceedings passed by the Bundestag on 15 November 2019, but not sufficiently for victims of gender-based violence.

It is to be criticised that sexual offences under Section 177 of the German Criminal Code, which are classified as less serious criminal offences (“Vergehen”), continue to be excluded from the possibility of appointment of counsel in the case of adults, unless the victim is unable to sufficiently safeguard his or her own interests. Cases are conceivable where the representation of the person’s own interests appears possible, but the trial and the interrogation may have a retraumatising effect which makes legal representation of interests appear absolutely necessary. In cases of bodily harm and dangerous bodily harm according to Sections 223, 224 of the German Criminal Code or “simple” stalking according to Section 238(1) of the German Criminal Code, an appointment of counsel according to Section 397a(1) of the German Code of Criminal Procedure is still excluded.<sup>70</sup>

At the same time, the reform considerably and problematically restricted private accessory prosecution in cases with several injured persons by way of a new provision in Section 397b of the German Code of Criminal Procedure.<sup>71</sup>

A further problem is that despite the decision of the Federal Court of Justice of 5 April 2016<sup>72</sup>, there are still tendencies in the jurisprudence to refuse the private accessory prosecution’s right of access to files in situations where one testimony stands against another.<sup>73</sup> This is often the case with sexualised and other forms of gender-based violence. In some cases, public prosecutors’ offices refuse to grant access to the files in preliminary proceedings, referring to a decision of the Hamburg Higher Regional Court (OLG)<sup>74</sup>, arguing that in order to establish the truth, it is necessary to

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<sup>67</sup> Criticizing this, see djb, Stellungnahme zum Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz für ein Gesetz zur Modernisierung des Strafverfahrens, 8 October 2019, available at <https://www.djb.de/presse/stellungnahmen/detail/st19-22/>. The subsequent government draft, which was passed as a law by the Bundestag on 15 November 2019, did not contain any changes in this respect.

<sup>68</sup> Criticizing this, see djb, Stellungnahme zum Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz für ein Gesetz zur Modernisierung des Strafverfahrens, 8 October 2019, available at <https://www.djb.de/presse/stellungnahmen/detail/st19-22/>. The subsequent government draft, which was passed as a law by the Bundestag on 15 November 2019, did not contain any changes in this respect.

<sup>69</sup> See Federal Ministry of Justice and Consumer Protection, press release of 15 November 2019, available at [https://www.bmju.de/SharedDocs/Pressemitteilungen/DE/2019/111519\\_Modernisierung\\_StPo.html](https://www.bmju.de/SharedDocs/Pressemitteilungen/DE/2019/111519_Modernisierung_StPo.html).

<sup>70</sup> For the parallel findings on the possibility of assigning psychosocial trial assistance, see the djb policy paper of 22 November 2018, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>.

<sup>71</sup> See djb, Stellungnahme zum Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz für ein Gesetz zur Modernisierung des Strafverfahrens, 8 October 2019, available at <https://www.djb.de/presse/stellungnahmen/detail/st19-22/>.

<sup>72</sup> Federal Court of Justice, decision of 5 April 2016, 5 StR 40/16.

<sup>73</sup> German Institute for Human Rights, Rabe, Heike/Leisering, Britta, Analyse Istanbul Convention, February 2018, p. 50.

<sup>74</sup> Higher Regional Court Hamburg, decision of 24 October 2014, 1 Ws 110/14.

obtain a witness statement which is as unclouded as possible from knowledge of the file contents and to avoid the possibility of the injured witness' testimony being adapted to it.

Refusal to grant access to the file makes it impossible to exercise a large part of the rights of the injured party and means that the legal counsel cannot work properly.<sup>75</sup> As a rule, representatives of injured persons do not pass on the file to the client in situations where one testimony stands against another, because the problem of a possible devaluation of the witness's testimony is known and should of course be avoided in the interest of the client. However, the public prosecutor's offices or courts often refuse access to the file even if the counsel for private accessory prosecution agrees not to pass it on to the witness. This not only constitutes a violation of Article 56(1), lit. d of the Istanbul Convention, but may also affect the right to compensation under Article 30 and ultimately the obligation under Article 36 of the Convention to ensure effective criminal proceedings.<sup>76</sup>

Another problem is that trials dates are sometimes scheduled without regard to the private accessory prosecutor: the private accessory prosecutor and his or her representative are not necessary participants in the criminal proceedings, with the result that the courts are not obliged to coordinate the trial schedule with them. As a result, private accessory prosecutors often cannot sufficiently exercise their rights in criminal proceedings. Problems also arise from the lack of information vis-à-vis the private accessory prosecutor in the event of a relaxation of the conditions of detention or release. Even if a notification to this effect is requested by the private accessory prosecutor's representative, such notification is often not given in practice.

## Demands

Support services for victims of rape and sexualised violence must be made available in sufficient numbers and must meet the requirements for crisis centres as defined in the Istanbul Convention.

The right to free psychosocial assistance in criminal proceedings must be extended to all those affected by gender-based and domestic violence as defined by the Istanbul Convention.

It must be ensured that counsel for witnesses and private accessory prosecutors can effectively exercise their support for those affected by gender-based, in particular sexualised, violence during investigative and judicial proceedings. In particular, it has to be ensured that access to the files for the representative of the aggrieved person entitled to participate as a private accessory prosecutor is not denied on the grounds of a situation in which one testimony stands against another. Further, trial scheduling must be coordinated with the private accessory prosecutor's representative.

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<sup>75</sup> See djv, Policy Paper „Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt“, 22 November 2018, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>.

<sup>76</sup> See German Institute for Human Rights, Rabe, Heike/Leisering, Britta, Analyse Istanbul Convention, February 2018, p. 50.



# Effective access to justice for women affected by violence

## What the Istanbul Convention requires

Article 21 IC obliges the Federal Republic of Germany to ensure that affected persons have information on and access to applicable regional and international mechanisms for individual or collective complaints and to promote the provision of sensitive and knowledgeable assistance to affected persons in presenting such complaints. Under Article 57 IC, the Federal Republic of Germany must provide for the right of affected persons to legal assistance and free legal aid.

## Current situation and legal framework

Article 57 IC does not automatically give the victim the right to free legal aid. It is for the Member States to determine the conditions under which such free legal aid is provided. At the same time, Article 57 IC does not limit the right to free legal aid to criminal proceedings. Member States may also have to guarantee free legal aid in civil proceedings. This right, derived from the right of access to justice under Article 6(1) of the ECHR, follows from the combination of Article 57 IC, Article 6(3), lit. c ECHR, Article 6(1) ECHR and the jurisprudence of the ECtHR<sup>77</sup>. The decisive factor is whether the victim is able to present his or her case satisfactorily without such legal assistance and will be successful in that respect. If the complexity of the procedure and/or the emotional burden does not allow the person to do so, she must also be provided with free legal assistance in civil proceedings, even if the law does not provide for it. The focus is thus on the practicability and effectiveness of the right of access to justice.

## 1. Information on regional and international mechanisms for individual or collective complaints

Targeted measures by the Federal Republic of Germany to inform those affected about access to regional and international mechanisms for individual or collective complaints are not discernible unless the nationwide “Violence against Women” emergency help line performs this task. It is very unlikely, however, that information about international complaint mechanisms will be provided in this context.

State-funded institutions such as the German Institute for Human Rights point out the possibility of such complaints, but it is difficult to ensure comprehensive information for those affected. Qualified support for affected persons in filing national or international complaints is not guaranteed in Germany. As the law stands, it is also not apparent that victims would be guaranteed legal assistance and free legal aid for all violent incidents covered by the Convention, which must be changed immediately.

## 2. Access to justice

Article 57 IC does not explicitly mention that *access* to justice must also be ensured by the Member States. In the overall picture, however, access to justice is of course a prerequisite for the protection of victims, effective prosecution and also prevention, so that the rights and entitlements arising from IC can only be safeguarded through effective access to justice. Moreover, affected persons can only make use of legal assistance or legal aid if they are given access to it.

Access to justice is particularly problematic for women with disabilities, older women, homeless women, migrant women with precarious residence status and female refugees. Information, counselling and support can rarely be provided barrier-free or in different languages due to a lack of financial and human resources. Furthermore, jurisdictional rules in family law proceedings can make access to justice more difficult in cases of intimate partner violence.

Political efforts such as the “Round Table of Federal Republic, the Länder and Municipalities against Violence against Women”, which was established in September 2018, have so far not produced legally binding solutions for effective

<sup>77</sup> Explanatory report to the IC, Art. 57, para. 295.

access to justice. At the Round Table's session in June 2020, it was decided to develop key points of a legal right to protection and counselling in cases of violence at federal level until 2021. The planned federal investment programme "Together against violence against women" with a total investment sum of 120 million euros is meant to enable the expansion, conversion, new construction and renovation of women's shelters and specialist support services over the next four years. The construction measures are urgently needed and will initially also improve (e.g. barrier-free) access to counselling and support. However, in the absence of further investment in trained personnel, it is not clear how support for those affected in filing complaints against gender-based violence or free legal aid can be guaranteed. Moreover, the lack of access to protection, counselling and legal resources for certain groups of victims is not changed at all by structural improvements of women's shelters and counselling centres, since the problem of lack of access to justice often begins at a much earlier stage.

Women with disabilities are disproportionately affected by violence.<sup>78</sup> At the same time, there is a lack of independent monitoring and complaint mechanisms in institutions such as housing facilities or psychiatric clinics, and in some cases there is virtually no access to justice. Furthermore, the provisions of the Protection Against Violence Act do not apply to residential institutions, as these do not constitute a domestic community. No adequate measures are provided for situations where violence is committed by assistants on whose support the person concerned is particularly dependent. Similar challenges may also arise for older women subjected to violence. In addition to facilities for children and youths, facilities in which persons in need of care and disabled persons are cared for and accompanied for several hours a day or even overnight over a longer period of time must also be obliged to develop and implement effective concepts for protection against violence.

#### a. Legal assistance and legal aid in criminal law

The legislator has regulated in Section 397(2), sentence 1 of the Code of Criminal Procedure that the private accessory prosecutor may use the services of a lawyer or be represented by one in proceedings. Section 397a(1) of the Code of Criminal Procedure regulates the conditions under which a lawyer is to be appointed to assist the private accessory prosecutor at state expense. In the case of serious crimes, the victims are thus provided with legal representation of their own choosing free of charge and independent of income.<sup>79</sup> However, only serious violent and sexual offences are covered, such as cases classified as serious offences ("Verbrechen") under Section 177 of the German Criminal Code, or the especially serious case of a less serious criminal offence ("Vergehen") according to Section 177(6) of the German Criminal Code (rape). Other violent crimes below this threshold, such as bodily harm under Section 223 or dangerous bodily harm under Section 224 of the German Criminal Code, are not covered. Likewise, the basic offence of stalking (Section 238(1) of the German Criminal Code) is not listed. This means that a large number of cases of domestic violence are excluded from the regulation on the coverage of costs.<sup>80</sup>

In cases in which no legal counsel is appointed under Section 397a(1) of the Code of Criminal Procedure, legal aid for calling in a lawyer may be granted upon application under Section 397a(2) of the Code of Criminal Procedure in accordance with the requirements of the Code of Civil Procedure, but only if the private accessory prosecutor cannot sufficiently exercise his or her own rights or if the person cannot reasonably be expected to do so. Such unreasonableness is generally assumed for victims of sexual offences.<sup>81</sup> The legislator has now eliminated the additional requirement of factual and legal difficulty.<sup>82</sup> Overall, however, both the excessively narrow catalogue of offences in Section 397a(1) and the possibility of recourse to Section 397a(2) of the German Code of Criminal Procedure make access to justice considerably more difficult for affected women. As a result, not all victims are granted the right to free legal representation by victim's counsel.

There are also problems in the area of legal aid. When applying for legal aid, the courts often issue certificates to victims of violence which are limited to the criminal offence, e.g. "stalking"/"bodily harm". As a rule, counselling is

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<sup>78</sup> Hornberg, Claudia/Schröttle, Monika (project management): *Lebenssituation und Belastungen von Frauen mit Beeinträchtigungen und Behinderungen in Deutschland*, Studie im Auftrag des BMFSFJ, 3rd ed. 2014, pp. 56-57; Federal Ministry of Labour and Social Affairs (ed.), *Zweiter Teilhabebereicht der Bundesregierung über die Lebenslagen von Menschen mit Beeinträchtigungen. Teilhabe – Beeinträchtigung – Behinderung*, 2016, p. 413.

<sup>79</sup> On the significance of private accessory prosecution, see also Kräuter-Stockton, Sabine: *Nebenklage: Im Sinne der Opfer und der Wahrheitsermittlung, Bewertung zweier aktueller Gesetzesentwürfe*, *Zeitschrift des Deutschen Juristinnenbundes (djz)*, Vol. 11 (2018), No. 2, pp. 78 et seq.

<sup>80</sup> See djb, *Stellungnahme: Opferrechte im Strafverfahren wegen geschlechtsbezogener Gewalt*, 22 November 2018, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>.

<sup>81</sup> Hannich, Rolf (ed.): *Karlsruher Kommentar zur Strafprozessordnung*, 8th ed. 2019, Section 397a StPO marginal no. 12.

<sup>82</sup> Draft act of the CDU/CSU and SPD parliamentary groups, *Entwurf eines Gesetzes zur Stärkung der Rechte von Verletzten und Zeugen im Strafverfahren*, BT-Drs. 16/12098, p. 34.

remunerated with 35 euros. However, cases concerning domestic violence and/or intimate partner violence often necessitate counselling which covers various areas such as criminal law, protection against violence, family law or even labour law. Even in these cases, the fee can only be charged once on the basis of the legal aid certificate issued. In view of the multitude of legal questions and the often difficult emotional situation of the affected persons, adequate counselling is not possible for a fee of only 35 euros. For effective legal protection for victims of sexualised violence which takes place within an intimate relationship, it is indispensable that the law on legal aid be specified in such a way that one certificate can cover several billable consultations if these are set out in the account of charges.

## b. Legal assistance and legal aid in civil law

Under the Act on Advisory Assistance and Representation for Citizens with a Low Income, it is possible to claim legal aid if the victim does not have sufficient financial means to obtain legal assistance. The conditions for granting legal assistance are set out in Section 1 of the Act on Advisory Assistance. However, the provision is complex and difficult to understand for those affected in the area of application. Furthermore, there is no general entitlement to free legal counselling for women affected by violence under civil law either. However, legal aid may be granted for legal proceedings under Section 114 of the Code of Civil Procedure. Here too, however, the granting of legal aid is exclusively dependent on the economic circumstances, which are measured according to Section 115 of the Code of Civil Procedure. No reference is made to the complexity of the procedure or the emotional burden, as provided for in the jurisprudence of the ECtHR.

### Demands

Effective access to justice for women affected by violence must be guaranteed, in particular by providing barrier-free, comprehensible and generally accessible information on applicable regional and international mechanisms for individual or collective complaints, by providing sensitive and knowledgeable assistance to victims in presenting such complaints, and by fully implementing the right of victims to legal assistance and free legal aid.

The provision of Section 397a(1) of the Code of Criminal Procedure must be extended to cover all cases of gender-based violence, so that all victims are granted the right to free legal assistance as an expression of their right to access to justice. The Act on Advisory Assistance must be concretised in such a way that one legal aid certificate can cover several billable consultations if these are set out in the account of charges.

## D. Implementation deficits concerning Substantive law (Chapter V)

### State liability for failure to take appropriate measures

#### What the Istanbul Convention requires

Article 29(2) IC requires civil remedies against authorities which, within the scope of their powers, have failed in their duty to take the necessary preventive or protective measures. According to Article 5(2) IC, the *due diligence* standard applies to the state duty to take the necessary preventive or protective measures.

#### Current situation and legal framework

In addition to the requirements of the IC, the civil liability of state authorities is based on the jurisprudence of the ECtHR, according to which liability is not limited to intentional failure or gross negligence, but it is sufficient if the state authorities “knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”.<sup>83</sup> The IC Explanatory Report explicitly states that, according to the case-law of the ECtHR, responsibility for this omission is not limited to a gross negligence or wilful disregard of the duty to protect life, and therefore suggests that this standard of liability should also apply to the obligations under the Convention as a whole.

German state liability law currently does not reflect this standard. It is characterised by strict conditions for state liability and by far-reaching so-called liability privileges, which also refer to the significant underperformance of state obligations or the state’s own damaging actions. For example, breaches of duty in the context of a court ruling under Section 839(2), sentence 1 of the German Civil Code only give rise to liability if the breach of duty consists of a criminal offence. Thus, the regulation not only falls short of the standards of the Istanbul Convention, but also leads to unacceptable results in individual cases.

For example, in a 2014 trial, a rape victim had to watch the video of the crime, recorded by the perpetrators, in the courtroom to activate her memory, as the court put it.<sup>84</sup> The victim-witness was heavily intoxicated at the time of the crime, so that she was spared memories of it until that point. Although the video had to be interrupted several times in order to stabilise the victim and, as expected, it did not bring back any memories, the presiding judge ordered that she had to watch the video in the presence of the defendants until the end. This procedure led to a considerable (re)traumatisation. The perpetrators were sentenced to pay high compensation for pain and suffering.<sup>85</sup> However, insofar as this compensation for pain and suffering also related to the chosen means of conflict defence, this cannot be reconciled with the right of the defendant to make use of all means available under the Code of Criminal Procedure. Rather, in such a case it would have to be examined whether there is a claim to state liability because the court did not comply with the necessary protection of victims under the Code of Criminal Procedure or because such limitations were not sufficiently available to protect victims from gender-based violence. Under German state liability law, there is no such claim.<sup>86</sup>

<sup>83</sup> ECHR, *Osman v. United Kingdom*, 28 October 1998, No. 87/1997/871/1083, para. 116; reference in the Explanatory report to the IC, Art. 29, para. 163.

<sup>84</sup> In detail, see djb, Submission to the UN Committee against Torture (CAT) - parallel report to the Sixth State Report of Germany (Sixth Periodic Report), 27 March 2019, available at <https://www.djb.de/presse/stellungnahmen/detail/st19-09/>.

<sup>85</sup> Landgericht Münster of 7 December 2017, O 2 229/17, available at [https://www.justiz.nrw.de/nrwe/lgs/muenster/lg\\_muenster/j2017/02\\_o\\_229\\_17\\_Teil\\_Versaeumnis\\_und\\_Schlussurteil\\_20171207.html](https://www.justiz.nrw.de/nrwe/lgs/muenster/lg_muenster/j2017/02_o_229_17_Teil_Versaeumnis_und_Schlussurteil_20171207.html).

<sup>86</sup> In detail, see djb, Policy Paper “Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt”, 22 November 2018, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>.

In order to counter the problem of a lack of state protection in investigative and judicial proceedings concerning gender-based violence and the resulting independent violations of individual rights by the state, legal regulations cannot be avoided. Such a regulation could, for example, provide for adequate compensation to a witness who suffers harm as a result of inappropriate treatment by law enforcement authorities in connection with investigations or prosecution of serious gender-based violence against women.

### Demands

State liability law must be amended to include effective and proportionate claims enforceable against public authorities which, within the scope of their powers, have failed to fulfil their duty to take the necessary preventive or protective measures.

# Compensation for victims of psychological violence with serious consequences

## What the Istanbul Convention requires

According to Article 30(2) in conjunction with Article 33 IC, victims of psychological violence are also entitled to compensation from the state if they have suffered serious physical or psychological impairment of health and recourse to the perpetrator is not available.

## Current situation and legal framework

Originally, the relevant Victims' Compensation Act only covered damages caused by an "assault" (Section 1), and the Federal Social Court<sup>87</sup> also limited the benefits to damage to health caused by physical violence. This narrow version of the Victims' Compensation Act neither corresponded to the requirements of the Istanbul Convention nor did it do justice to the individual cases in question.

With the Act on the Regulation of Social Compensation Law of 12 December 2019, the right to social compensation (previously: right to victims' compensation) was fundamentally restructured and, among other things, the concept of the violent act giving rise to a claim was extended to include "acts of psychological violence".<sup>88</sup> According to Section 13(1), no. 2 of Social Code XIV, an act establishing a claim also includes "other intentional, unlawful, serious conduct directed against the free will of a person (psychological violence)". As a rule, conduct pursuant to Section 13(2), no. 2 of Social Code XIV is deemed to be serious if it constitutes the offences of sexual abuse (Sections 174 to 176b of the Criminal Code), sexual assault, sexual coercion, rape<sup>89</sup> (Sections 177 and 178 of the Criminal Code), trafficking in human beings (Sections 232 to 233a of the Criminal Code), stalking (Section 238(2) and (3) of the Criminal Code), hostage-taking (Section 239b of the Criminal Code) or extortion with use of force or threat of force (Section 255 of the Criminal Code) or if it is of comparable gravity to these offences. Although the extension of social compensation to victims of "psychological violence" is welcome, it still does not meet the requirements of the Istanbul Convention.<sup>90</sup>

The Istanbul Convention does not limit itself to "serious" psychological violence, which is determined from the perspective of the perpetrator. Rather, every form of gender-based violence must be resolutely combated and it must be recognised that physical violence is only one of its manifestations. Psychological violence such as digital hate speech against women, non-physical forms of violence in close social relationships or threatening e.g. victims of human trafficking or their relatives can also cause considerable health impairments up to chronic suffering for those affected. Such consequences must be considered as the decisive factor, not the perpetrator's own assessment or the fulfilment of certain criminal offences.<sup>91</sup>

In the explanatory statement on the draft of the social compensation act, the Federal Ministry of Labour and Social Affairs stated that the concept of "psychological violence" had to be restricted, as otherwise the possibilities for compensation would be endless.<sup>92</sup> This is not wrong, but the restriction must be in line with the Convention. Article 33 of the Istanbul Convention defines psychological violence as intentional conduct "seriously impairing" a person's psychological integrity. In addition to the severity of the act, which can also result from the fulfilment of certain criminal

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<sup>87</sup> Federal Social Court, judgment of 16 December 2014, B 9 V 1/13 R; Federal Social Court, judgment of 17 April 2013, B 9 V 1/12 R; Federal Social Court, judgment of 7 April 2011, B 9 VG 2/10 R. However, the Federal Social Court also interpreted the concept of assault in situations of considerable threat increasingly broadly, on this and fundamentally on the previous legal situation with further references German Institute for Human Rights, *Entschädigung nach dem Opferentschädigungsgesetz und der Gesetzlichen Unfallversicherung*, Berlin 2013, available at [https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Entschaedigung\\_nach\\_dem\\_Opferentschaedigungsgesetz\\_u\\_der\\_gesetzlichen\\_Unfallversicherung\\_Handreichung\\_fuer\\_Beratungsstellen.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Entschaedigung_nach_dem_Opferentschaedigungsgesetz_u_der_gesetzlichen_Unfallversicherung_Handreichung_fuer_Beratungsstellen.pdf).

<sup>88</sup> Act on the regulation of social compensation law of 12 December 2019, BGBl. I, p. 2652.

<sup>89</sup> It remains unclear how an act of rape, which by definition is connected with an invasion of the victim's body, could be committed as a purely psychological act of violence without physical assault. Since the overdue reform of the law on sexual offences was also based essentially on requirements of the Istanbul Convention, it must be assumed that there is a general lack of a human rights-based concept for measures against gender-based violence.

<sup>90</sup> Comprehensively, see djb, *Stellungnahme zum Referentenentwurf des Bundesministeriums für Arbeit und Soziales „Entwurf eines Gesetzes zur Regelung des Sozialen Entschädigungsrechts“*, 9 January 2019, available at <https://www.djb.de/presse/stellungnahmen/detail/st19-01/>.

<sup>91</sup> Correctly djb, *Stellungnahme zum Referentenentwurf des Bundesministeriums für Arbeit und Soziales „Entwurf eines Gesetzes zur Regelung des Sozialen Entschädigungsrechts“*, 9 January 2019, available at <https://www.djb.de/presse/stellungnahmen/detail/st19-01/>.

<sup>92</sup> Federal Ministry of Labour and Social Affairs, draft act for the regulation of social compensation law of 20 November 2018, p. 149.

offences, it is therefore imperative that the assessment of a claim to compensation take into account the consequences for the affected person.

The law on social compensation must therefore be amended in such a way that, in addition to physical assault and psychological violence considered as “serious” according to the current definition based on the perpetrator’s perspective or the fulfilment of a criminal offence, those affected by psychological violence not deemed “serious” in this sense also receive support, assistance and compensation. A restriction of the right to compensation for psychological violence cannot be based solely on its classification as serious according to criminal offences, but must (at least also) be based on the consequences for the affected person. If the health or psychological integrity of a person is seriously affected by non-physical violence, that person must not be deprived of support, assistance and compensation.

### **Demands**

The entitlement to social compensation should be amended to ensure that the right to assistance, support and compensation applies not only in the case of “physical assault” or “serious” psychological violence but also in the case of other psychological violence which seriously damages the health or psychological integrity of the person concerned.

# Taking into account prior incidents of violence in proceedings on custody and visitation rights

## What the Istanbul Convention requires

Article 31 IC demands that in the determination of custody and visitation rights, prior incidents of violence covered by the scope of the Convention are always taken into account and that the exercise of custody or visitation rights cannot jeopardise the rights and safety of the woman affected by violence or her children.

## Current situation and legal framework

On first glance, the legal provisions, in particular in Sections 26 and 155 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction, seem to meet the requirement that previous incidents of violence be taken into account in custody and visitation rights proceedings and that any endangerment of the woman who has been subjected to violence and her children be excluded. The family court can decide on the scope of the visitation rights and regulate their exercise in more detail, including in relation to third parties (Section 1684(3) of the Civil Code). In doing so, the family court can restrict or exclude the visitation rights to the extent that this is necessary for the child's well-being. To avert a threat to the child's well-being, visitation rights may also be restricted or excluded for a longer period or permanently (Section 1684(4) of the Civil Code). Pursuant to Section 33(1), sentence 2 and Section 157(2) of the Act on Proceedings in Family Matters, a court hearing or discussion in a case involving a child is to be held in the absence of a parent if this is necessary to protect the victim or the children. Section 1631(2) of the Civil Code stipulates that children have a right to non-violent upbringing and that physical punishments, psychological injuries and other degrading measures are prohibited. The principle of the best interests of the child applies to court decisions on custody and visitation rights, i.e. the court takes the decision that is most conducive to the child's well-being (Section 1697a of the Civil Code). In practice, however, there are still problems with violence protection proceedings, such as the judicial waiver of a separate hearing or the court's efforts to find a settlement, both often to the detriment of those affected by violence.<sup>93</sup>

The Ministry of Family Affairs had already commissioned a study on "Child Well-being and Visitation Rights" in 2016 in order to assess whether further measures are necessary to ensure that the existing legal bases are applied correctly in the light of the Convention. The results of the study have not yet been published.<sup>94</sup>

Particularly in proceedings on custody and visitation rights, it becomes clear that authorities and courts are not sufficiently aware of the effects of witnessing so-called domestic violence on children, the strategic use of visitation rights by offenders to force contact with the ex-partner and the limited possibilities of protection of women affected by violence over a longer period of time, or they do not sufficiently take them into account. The Committee on the UN Convention on the Rights of Women (CEDAW Committee) also calls for explicit and appropriate consideration of previous patterns of violence and relationships as well as the vulnerability of affected women in determining the best interests of the child in custody and visitation rights proceedings.<sup>95</sup>

With regard to the state obligation that the exercise of visitation and custody rights does not jeopardise the rights and safety of the victim of violence or the children, German practice still needs to be improved. Corresponding comments by the civil society alliance Istanbul Convention are now also being taken up in politics.<sup>96</sup> Apart from necessary changes in practice, the extent to which legal regulations can remedy this deficit must also be examined. For example, the presumption that contact with both parents is in the child's best interests pursuant to Section 1626(3) of the Civil Code could be restricted in cases of intimate partner violence and domestic violence, as the provisions of Section

<sup>93</sup> See djb, Stellungnahme an die Mitglieder des Ausschusses für Familie, Senioren, Frauen und Jugend des Deutschen Bundestages anlässlich des nicht öffentlichen Fachgesprächs zur Situation der Frauenhäuser, 10 November 2014, available at <https://www.djb.de/presse/stellungnahmen/detail/st14-19/>; djb, Stellungnahme zu 10 Jahre Gewaltschutzgesetz, available at <https://www.djb.de/presse/stellungnahmen/detail/st12-9/>.

<sup>94</sup> See BT-Drs. 18/12037, p. 74.

<sup>95</sup> CEDAW, Communication No. 47/2012, 187.2014, CEDAW/C/58/D/47/2012.

<sup>96</sup> Bündnis Istanbul-Konvention (BIK), press release of 27 November 2019 on custody, visiting rights and safety, available at <https://www.djb.de/presse/stellungnahmen/detail/pm19-43/>.



1684(4) and Section 1631(2) of the Civil Code do not provide sufficient protection. There are strict requirements for the exclusion of contact, which can rarely be met in practice.

### Demands

It must be ensured that previous incidents of violence against women and domestic violence are adequately taken into account in proceedings on custody and visitation rights.

# Criminal liability for psychological violence

## What the Istanbul Convention requires

Intentional conduct which seriously impairs a person's psychological integrity through coercion or threats must be criminalised pursuant to Article 33 IC. This includes, for example, digital hate speech against women, non-physical forms of domestic violence or threatening victims of human trafficking or their relatives.

## Current situation and legal framework

There is no specific offence of psychological violence in German criminal law. Such behaviour can be covered by various criminal offences. In addition to the offences of coercion (Section 240 of the German Criminal Code) and threatening (Section 241 of the German Criminal Code), it can also be covered by the offence of bodily harm (Section 223 of the German Criminal Code) and by Section 4(1) of the Protection against Violence Act<sup>97</sup>. In German criminal law, however, the offence of threatening is not directed at causing (psychological) effects on the victim, but the focus is on the perpetrator's behaviour. Corresponding psychological impairments are therefore not a constituent element of the offence, meaning they are not a prerequisite for applicability on the one hand, but on the other hand do not necessarily lead to criminal liability even if they are present. Although the protected interest of the offence of coercion includes the freedom of will guaranteed by Article 2(1) of the Basic Law<sup>98</sup> and thus an aspect of psychological integrity, the offence does not take into account other serious impairments of psychological health which are not related to an impairment of this freedom; such impairments may only constitute side effects of other offences.

Thus far, German criminal law has focused on inducing physical effects and conditions. This concerns both the interpretation of the concept of violence in Section 240 of the German Criminal Code, as well as that of health damage in Section 223 of the German Criminal Code and health violation in Section 1 of the Protection against Violence Act. Due to the jurisprudence of the German Constitutional Court, which partly prevents an alternate interpretation (see below), a change in this respect is not to be expected. Full consideration of serious psychological impairments can only be achieved by means of legal reforms.

## 1. Coercion (Section 240 of the German Criminal Code)

According to a fundamental decision of the Federal Constitutional Court<sup>99</sup>, the concept of violence always requires physical coercion. Although this may remain minor - as the Federal Constitutional Court specified in later decisions<sup>100</sup> - physical effects still remain the prerequisite for a finding of violence. It would probably be futile to attempt to establish a more far-reaching interpretation, since the Federal Constitutional Court based its argument on a violation of the requirement of certainty (Article 103(2) of the Basic Law), which sets constitutional limits to the jurisprudence in the interpretation of the elements of a crime. This leaves only the legislature. A timely change in the Federal Constitutional Court's position is not apparent.

## 2. Threatening (Section 241 of the German Criminal Code)

The offence of threatening currently only includes the threat of a serious criminal offence ("Verbrechen"), i.e. acts which are punishable by a minimum term of imprisonment of one year or more (Section 12(1) of the German Criminal Code). On the one hand, the threat must be sufficiently concrete, which (deliberately) excludes vague statements. On the other hand, neither dangerous bodily harm (Section 224 of the German Criminal Code) nor sexual assault under Section 177(1) and (2) of the German Criminal Code, for example, are classified as serious criminal offences. For this

<sup>97</sup> However, in the case of violations of the Protection against Violence Act, the victim must first apply for a (civil) order for protection against violence; criminal liability under Section 4 of the Protection against Violence Act applies only if this order (or an obligation from a court-approved settlement) is then violated.

<sup>98</sup> Federal Constitutional Court of 10 January 1995, 1 BvR 718/89; Federal Court of Justice of 24 April 1986, 2 StR 565/85; see also Sinn, Arndt/Sander, Günther, Münchener Kommentar zum Strafgesetzbuch, Volume 4, 3rd ed., Munich 2017, Section 240 marginal no. 2.

<sup>99</sup> Federal Constitutional Court, decision of 10 January 1995, 1 BvR 718/89 and others, in: BVerfGE 92, 1, 18.

<sup>100</sup> Federal Constitutional Court, decision of 29 March 2007, 2 BvR 932/06, in: NJW 2007, 1669; see also already Federal Constitutional Court, decision of 24 October 2001, 1 BvR 1190/90 and others, in: BVerfGE 104, 92, 102 et seq.

reason, the criterion of the threatened crime is not generally suitable to assess the extent to which a threat impairs psychological integrity.

However, a new law providing for the extension of the offence of threatening will enter into force shortly: It will cover threats of an unlawful act against sexual autonomy, physical integrity, personal freedom or an object of significant value.<sup>101</sup> This version of the law would come closer to the provisions of Article 33 IC. However, here too the focus is on the threatened offence, not on the resulting harm to the victim. It is quite conceivable that serious impairments of a person's psychological integrity can also be caused by intentional threats of non-punishable but extremely undesirable behaviour, or by the threat of offences other than those mentioned. Section 241 of the Criminal Code does not provide any means of dealing with this.

### 3. Bodily harm (Section 223 of the German Criminal Code)

The intentional causing of serious psychological impairments can be "compensated" to a limited extent by the offence of bodily harm. Although the wording of the crime does not limit it to physical injury, such a restriction is firmly established in the jurisprudence, according to which an injury to health means "any causing or increasing of a condition adversely affecting the normal functioning of the human *body*"<sup>102</sup>. Even if critical voices can be heard in the literature in this respect<sup>103</sup>, it cannot be assumed that the established jurisprudence will readily change. It seems conceivable, however, to demand a different interpretation (in line with international law) with regard to the binding requirements of the IC. This could be a starting point for further training of legal practitioners.

Overall, it can be concluded that the incitement of serious psychological impairments is not sufficiently covered under current criminal law. The resulting implementation deficits - with regard to Article 33 IC - must be eliminated.

#### Demands

The causing of serious psychological impairments must be covered by criminal law in accordance with the requirements of Article 33 IC. It is necessary either to interpret the element of health damage in Section 223 of the German Criminal Code in conformity with the Convention or to create a separate crime, which solely covers psychological impairments within the meaning of Article 33 IC.

<sup>101</sup> <https://dip21.bundestag.de/dip21/btd/19/177/1917741.pdf>.

<sup>102</sup> See Federal Court of Justice, decision of 18 July 2013, 4 StR 168/13, in: NSTZ-RR 2013, 375 with further references. In this decision, the Federal Court of Justice states inter alia: "The 'psychological burden through somatisation' as the only factor taken into account in the legal assessment does not constitute viable grounds for the occurrence of bodily harm" (ibid., p. 376). The prerequisites for bodily harm in the case of a "brief reactive depressive illness due to external stress" were also rejected. This view is based on systematic and textual arguments (heading), see Federal Court of Justice, judgment of 9 October 2002, 5 StR 42/02, in: BGHSt 48, 34. On the lack of success in causing bodily harm in the case of so-called "flashbacks" see also Federal Court of Justice, decision of 12 March 2019, 4 StR 63/19, in: BeckRS 2019, 4737.

<sup>103</sup> Bublitz, Der (straf-)rechtliche Schutz der Psyche, RW 2011, 28; Hardtung, JuS 2008, 864, 867, who - in contrast to the dominant view - refers to the systematic construction of Sections 223 et seq. of the German Criminal Code as an argument for also including psychological harm.

# Legal protection against stalking

## What the Istanbul Convention requires

Article 34 IC provides that Member States shall criminalise conduct which intentionally and repeatedly threatens another person, causing her or him to fear for her or his safety. The threatening behaviour may, for example, consist of pursuing the person, making unwanted contact or letting the person know that he or she is being watched. The pursuit can be conducted physically, but also digitally, such as on social networks. According to the Istanbul Convention, the decisive factor is that the behaviour is intentional and is aimed precisely at instilling fear in the victim. The criminality of the behaviour results from the repeated manner of its commission, since the individual acts do not necessarily reach the level of a criminal act. The Member States are free to extend the criminalisation to cases where the perpetrator is targeting the relatives of the person being stalked and not the victim in the strict sense.<sup>104</sup>

## Current situation and legal framework

### 1. Criminal law protection

In 2019, over 18,000 cases of stalking were registered by the police.<sup>105</sup> In 2007, the legislator made stalking a punishable offence for the first time with the introduction of Section 238 of the German Criminal Code. According to the old version of Section 238 of the Criminal Code, anyone who stalked a person without authorisation and thereby seriously restricted the person's lifestyle committed a crime. However, the constituent element of the offence – the serious restriction of a person's lifestyle – posed considerable problems, since the legal construction as an offence which requires a certain result did not make criminality dependent on the perpetrator's act or its intensity, but solely on how the victim reacted to the act.<sup>106</sup> The old version of the offence was unable to offer protection particularly to victims who showed resilience and attempted to (outwardly) defy the perpetrator by not changing their way of life, or to those who simply could not afford to move or change jobs. According to the legislator as well as the higher courts' jurisprudence, a change in the external circumstances of life was a prerequisite for criminal liability.<sup>107</sup> This interpretation did not take into account the legal harm captured by the offence of stalking and failed to recognise that stalking always causes a heavy burden for the victim, regardless of whether the victim visibly changes his or her behaviour as a result of the stalking. Making the victim's behaviour a prerequisite for criminal liability thus represented a double burden for the victims and a considerable problem, not least due to the fact that attempted stalking is not punishable.<sup>108</sup> Moreover, the earlier version disregarded the fact that people living in precarious financial circumstances were often unable to move due to lack of liquidity. This includes many single parents. For this group of victims, moving or changing jobs would be contrary to the best interests of the child.<sup>109</sup> Furthermore, the old version of the offence enabled the public prosecutor's office to refer the victims to private prosecution.

The current version of Section 238 of the German Criminal Code offers improvements. The legislator has recognised the problems inherent in the legal situation and has attempted to eliminate them by changing the character of the offence in 2017: Instead of requiring a concrete endangerment, the new version of the offence refers to the abstract suitability of the behaviour.<sup>110</sup> According to the new offence, a person is punished with imprisonment of up to three years if he or she stalks another person without authorisation in a manner which is suitable of seriously restricting the person's lifestyle. Thus, under the new law, the victim is no longer required to change his or her lifestyle. The suitability of the conduct to induce a change in the way of life is sufficient. This takes the idea of victim protection

<sup>104</sup> Explanatory report to the IC, Art. 34, paras 182-186.

<sup>105</sup> Police Crime Statistics, yearbook 2019, volume 1, p. 11.

<sup>106</sup> Draft act of the Federal Government to improve protection against stalking, BT-Drs. 18/9946, p. 1.

<sup>107</sup> Federal Court of Justice, NSTZ 2010, pp. 277 et seq.; see also the Federal Government's draft act to improve protection against stalking, BT-Drs. 18/9946, p. 10.

<sup>108</sup> From criminal prosecution practice, for example, it is known that 20,000 reports of stalking led to 200-560 convictions, see Mosbacher, Andreas: Neuregelung der Stalking-Strafbarkeit, Neue Juristische Wochenschrift, 2017, pp. 983-986, 983.

<sup>109</sup> Draft act of the Federal Government to improve protection against stalking, BT-Drs. 18/9946, p. 13.

<sup>110</sup> Ibid.; Beschlussempfehlung und Bericht des Ausschusses für Recht und Verbraucherschutz (6. Ausschuss) zu dem Gesetzesentwurf der Bundesregierung - Drucksache 18/9946, BT-Drs. 18/10654; Mosbacher, Andreas: Neuregelung der Stalking-Strafbarkeit, Neue Juristische Wochenschrift, 2017, pp. 983-986, 984.

into account. Furthermore, the offence of stalking has been removed from the list of private prosecution offences. Thus, the substantive criminal law provisions and the amendments to the Code of Criminal Procedure basically comply with the minimum principles laid down by the Istanbul Convention.

## 2. Civil law protection with criminal law reinforcement

In addition, the Protection against Violence Act offers protection under civil law in matters of stalking by allowing the court to order, for example, a contact ban at the victim's request. According to Section 4 of the Protection against Violence Act, a violation of such an order is punishable by imprisonment for up to one year or a fine. Similarly, a violation of court-approved settlements is also subject to this penalty (see also Section 214a, sentence 1, of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction). This appeared to be indispensable, particularly because of frequent court practice to work towards settlements that end the proceedings, contrary to the wording of Section 36(1), sentence 2, of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction. Despite the possibility of legal action under the Protection against Violence Act, the affected persons are often not on an equal footing with the perpetrators, they are susceptible to psychological repression and are generally still in a situation in which they cannot adequately report their experiences and cannot comprehensively enforce their rights. The penalisation of settlement breaches at least partially closed this gap.<sup>111</sup>

Despite the positive development of the legal situation, there is still need for improvements with regard to the effective protection of victims of stalking. In the basic offence under Section 238(1) of the German Criminal Code, victims of stalking are not entitled to free psychosocial assistance in accordance with Sections 406g(3) and 397(1) of the German Code of Criminal Procedure. Free psychosocial assistance is only possible if the aggravated elements of the crime according to Section 238(2) and (3) are realised.<sup>112</sup>

The offence of violating court-approved settlements as well as court orders, as provided for in Section 4(1) of the Protection against Violence Act, must be criticised with regard to the penalty. Imprisonment of up to one year or a fine does not adequately reflect the harm of the offences and thus probably fails to achieve its preventive effect.<sup>113</sup> During the legislative procedure, the committees had also recommended to the Bundesrat, among other things, to raise the upper limit of the penalty in Section 4 of the Protection against Violence Act to imprisonment for up to two years.<sup>114</sup>

From a practical point of view, court practice to work towards settlements, which is contrary to Section 36(1), sentence 2 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction, must be criticised. In the course of proceedings under the Protection against Violence Act, the unequal balance of power between perpetrator and victim has not yet been resolved and may be entrenched in a settlement.

In general, protection against stalking cannot be limited to the creation of criminal offences, but requires a comprehensive awareness of the problem, including through training of law enforcement authorities.

### Demands

Free psychosocial assistance must also be guaranteed by law for cases of "simple" stalking as well as for all other criminal manifestations of gender-based violence.

A legal reform should increase the penalties in Section 4(1) of the Protection against Violence Act to up to three years of imprisonment or a fine.

The court practice of seeking settlements in cases of stalking without taking into account the individual case must be critically evaluated and terminated in this form.

<sup>111</sup> See djb, Statement on the draft law to improve protection against stalking, 6 May 2016, available at <https://www.djb.de/presse/stellungnahmen/detail/st16-12-1>.

<sup>112</sup> djb, Stellungnahme Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt, 22 November 2018, pp. 21-22, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>.

<sup>113</sup> See djb, Stellungnahme zum Entwurf eines Gesetzes zur Verbesserung des Schutzes gegen Nachstellungen, 6 May 2016, available at <https://www.djb.de/presse/stellungnahmen/detail/st16-12-1>.

<sup>114</sup> Bundesrat, Empfehlungen der Ausschüsse zum Entwurf eines Gesetzes zur Verbesserung des Schutzes gegen Nachstellungen, Federführender Rechtsausschuss: Ausschuss für Frauen und Jugend sowie Ausschuss für Innere Angelegenheiten, BR-Drs. 420/1/16, p. 3.

Last but not least, awareness-raising and training of the police, prosecution and judiciary is essential.

In addition, comprehensive and free advice and assistance is also required, especially when taking legal action under the Protection against Violence Act.

# Prohibition of sex/gender assignment surgery on children

## What the Istanbul Convention requires

Article 38 of the Istanbul Convention (IC) obliges the Federal Republic of Germany to criminalise female genital mutilation and any coercion or procurement of a woman or girl to undergo such a procedure. Article 39 lit. b IC states that it must be a criminal offence to intentionally perform surgery with the purpose or effect of terminating a woman's reproductive capacity without her prior and informed consent or without her understanding of the procedure. Article 46 lit. a IC stipulates that in assessing the penalty, it may be considered as an aggravating circumstance that the offence was committed by a member of the victim's family, a person living with the victim or a person abusing his or her authority. Articles 12(5) and 42(1) of the Convention oblige the Federal Republic of Germany to ensure, by means of legislative or other measures, that culture, custom, religion or tradition are not regarded as justification for gender-based violence, in particular not in corresponding criminal proceedings.

## Current situation and legal framework

When it comes to cultures of gender-based violence, these are often projected exclusively onto religious or ethnic minorities. Keywords are honour killings, forced marriages, genital mutilation etc.<sup>115</sup> These serious human rights violations must be prevented by the state with all necessary means. All too often, however, it is overlooked that cultures of gender-based violence are also rooted in the majority society. Here, too, there are patterns, traditions, customs and beliefs which trivialise or even legitimise gender-based violence, often by attributing a substantial share of the blame to the victims.<sup>116</sup>

Such cultural entrenchments of gender-based violence are also evident when it comes to sex classification of newborns and infants.<sup>117</sup> Despite public discussion of this problem<sup>118</sup>, sex/gender assignment surgery on intersex newborns and infants is still quite common.<sup>119</sup> If children are born without being clearly recognisable as male or female, it is common practice to assign a sex to them after birth and to adapt their external appearance in the first months of life if possible.<sup>120</sup> This is why many doctors still recommend surgery for intersex children.<sup>121</sup> Sex/gender assignment surgery requires a number of serious genital surgery procedures, which can have a negative effect on body image and sexual desire, and may often cause reproductive incapacity.<sup>122</sup> Overall, the procedures are risky.<sup>123</sup> In addition, many of those affected are left in the dark about their physical condition and often learn about their intersexuality only by

<sup>115</sup> See further Klimke, Romy, *Schädliche traditionelle und kulturelle Praktiken im internationalen und regionalen Menschenrechtsschutz*, Berlin/Heidelberg 2019.

<sup>116</sup> On the fundamental concept of "cultural violence", see Galtung, Johan, *Frieden mit friedlichen Mitteln*, Wiesbaden 1998. Victim-blaming trivialisation of violence can be based on cultural structures which are understood as modern, for example when abused women are accused of not succeeding in separating from their partner despite the existence of the Protection against Violence Act, or when raped women are accused of not being emancipated and not being able to defend themselves. In the case of separation-related homicide, some German courts still tend to consider whether the separation was initiated by the victim or whether the victim gave the perpetrator cause for jealousy or other possessive thoughts, instead of naming femicides as an expression of patriarchal structures and convictions, see djb, *Femizide in Deutschland*, Themenpapier vom 25.11.2019, available at <https://www.djb.de/themen/thema/fk/st19-24/>.

<sup>117</sup> Lindenberg, Helen, *Rechtsfragen medizinischer Interventionen bei intersexuell geborenen Minderjährigen*, Baden-Baden 2020, pp. 73 et seq.

<sup>118</sup> The German Ethics Council's public discourse process, available at <https://www.ethikrat.org/themen/gesellschaft-und-recht/intersexualitaet/>, has contributed to this, but also the tireless work of organisations of those affected, see <http://www.im-ev.de/>.

<sup>119</sup> The number of cosmetic genital operations in children is not declining, see the quantitative study by Klöppel, Ulrike, *Zur Aktualität kosmetischer Operationen "uneindeutiger" Genitalien im Kindesalter*, ZtG-Bulletin 2016, available at [https://www.gender.hu-berlin.de/de/publikationen/gender-bulletin-broschueren/bulletin-texte/texte-42/kloepfel-2016\\_zur-aktualitaet-kosmetischer-genitaloperationen](https://www.gender.hu-berlin.de/de/publikationen/gender-bulletin-broschueren/bulletin-texte/texte-42/kloepfel-2016_zur-aktualitaet-kosmetischer-genitaloperationen).

<sup>120</sup> Schmidt am Busch, Birgit, *Archiv des öffentlichen Rechts* 137 (2012), pp. 441-458; Schrott, Nina, *Intersex-Operationen*, Baden-Baden 2020, p. 153; Lindenberg, Helen, *Rechtsfragen medizinischer Interventionen bei intersexuell geborenen Minderjährigen*, Baden-Baden 2020, S. 68.

<sup>121</sup> While recommendations by various medical associations now call for cautious approaches, there is no unanimous demand to wait until intersex children are able to consent, see Schrott, Nina, *Intersex-Operationen*, Baden-Baden 2020, pp. 153-154.

<sup>122</sup> See Kolbe, Angela, *Intersexualität, Zweigeschlechtlichkeit und Verfassungsrecht*, Baden-Baden 2010; Plett, Konstanze, *Intersexuelle - gefangen zwischen Recht und Medizin*, in: Koher, Frauke/Pühl, Katharina (eds.), *Gewalt und Geschlecht. Konstruktionen, Positionen, Praxen*, Wiesbaden 2003, pp. 21-41; Plett, Konstanze, *Intersex und Menschenrechte*, in: Lohrenscheit, Claudia (ed.), *Sexuelle Selbstbestimmung als Menschenrecht*, Baden-Baden 2009, pp. 151-168; Tönsmeier, Britt, *Die Grenzen der elterlichen Sorge bei intersexuell geborenen Kindern*, Baden-Baden 2012; Schrott, Nina, *Intersex-Operationen*, Baden-Baden 2020, p. 125.

<sup>123</sup> Adamietz, Laura, *Geschlecht als Erwartung*, Baden-Baden 2011, p. 45; on the consequences see in detail Kappler, Katrin, *Die Verfolgungen wegen der sexuellen Orientierung und der Geschlechtsidentität als Verbrechen gegen die Menschlichkeit*, Baden-Baden 2019, pp. 68-69 (with further references), who also highlights the relevance for international criminal law.

chance.<sup>124</sup> It can also not be ignored that the procedures often have serious psychological consequences for those affected.<sup>125</sup> These interventions are medically indicated only in very rare cases; the vast majority of them are intended to affirm cultural norms of the supposedly exclusive biological sex binary.<sup>126</sup>

Sex/gender assignment surgery is a serious infringement on the right to self-determination over one's gender identity as well as physical integrity.<sup>127</sup> Doctors abuse their position of authority when they urge parents or even press them shortly after birth to subject their intersex child to serious genital surgery involving mutilation of the existing clitoris, often resulting in incapacity to reproduce, even though these procedures are not medically indicated. It is now possible to register the sex of a newborn child not only as "female" or "male", but also as "diverse" or without specification,<sup>128</sup> which alleviates pressure from those affected.<sup>129</sup>

In any case, parents cannot consent to genital mutilation, which is regularly carried out through sex/gender assignment surgery in which healthy tissue is removed for cosmetic purposes.<sup>130</sup> This is explicitly punishable under Section 226a of the German Criminal Code with regard to female children; moreover, Section 223 of the Criminal Code and, in the event of loss of capacity to reproduce, Section 226(1), no. 1, (2) of the Criminal Code apply.<sup>131</sup>

However, effective prosecution or even knowledge of the criminal nature of this behaviour appears to be limited, as demonstrated by the continued practice of sex/gender assignment surgery on intersex infants.<sup>132</sup> The sexual, reproductive and physical integrity protected by the Istanbul Convention is thus not guaranteed. The Federal Republic of Germany must take the necessary measures, including criminal legal measures, to effectively prevent operations on intersex children which are not medically indicated but based on cultural assumptions about sex and gender.<sup>133</sup>

A draft law on the protection of children with variants of sex development, which is currently being discussed in parliament, is to be welcomed in principle. This is because, according to the draft, the parents of a child with a variant of sexual development who is not able to give consent her- or himself cannot, on the basis of their parental rights, consent to treatment aimed at bringing the child's physical appearance into line with that of the male or female sex. The draft also provides for judicial authorisation in the event that the parents consent to surgery on the internal and external sexual characteristics of the child who is unable to consent him- or herself. The examination is strictly limited to the child's well-being and linked to obtaining and presenting (by the parents) a submission by an interdisciplinary commission. It remains to be seen whether this will be sufficient.

## Demands

All necessary measures must be taken to effectively prevent surgery/treatments on intersex children which are not medically indicated but based on cultural assumptions about sex and gender. This includes educating parents, doctors and medical staff and standardising counselling obligations as well as effective criminal prosecution.

<sup>124</sup> Kolbe, Angelika, *Kritische Justiz* 42 (2009), pp. 271-281.

<sup>125</sup> Schmidt am Busch, Birgit, *Archiv des öffentlichen Rechts* 137 (2012), pp. 441-458; Schrott, Nina, *Intersex-Operationen*, Baden-Baden 2020, p. 125.

<sup>126</sup> Lindenberg, Helen, *Rechtsfragen medizinischer Interventionen bei intersexuell geborenen Minderjährigen*, Baden-Baden 2020, pp. 79 et seq.

<sup>127</sup> Schmidt am Busch, Birgit, *Archiv des öffentlichen Rechts* 137 (2012), pp. 441-458.

<sup>128</sup> These options were introduced by the Act to amend the information to be entered in the birth register of 18 December 2018, BGBl. I, p. 2635. The Federal Constitutional Court (of 10 October 2017, 1 BvR 2019/16) had set the legislator a deadline of 31 December 2018.

<sup>129</sup> However, there is no legally relevant correlation between the treatment under civil status law and the permissibility of sex/gender assignment surgery, see Schrott, Nina, *Intersex-Operationen*, Baden-Baden 2020, pp. 173 et seq.

<sup>130</sup> BMFSFJ, *Situation von trans- und intersexuellen Menschen im Fokus. Sachstandsinformationen des BMFSFJ*, 2016, p. 19; Lindenberg, Helen, *Rechtsfragen medizinischer Interventionen bei intersexuell geborenen Minderjährigen*, Baden-Baden 2020, pp. 194-195.

<sup>131</sup> BMFSFJ, *Situation von trans- und intersexuellen Menschen im Fokus. Sachstandsinformationen des BMFSFJ*, 2016, p. 19. For details on the facts of the case, see Schrott, Nina, *Intersex-Operationen*, Baden-Baden 2020, pp. 193 et seq.

<sup>132</sup> See the study by Hoenes, Josch/Januschke, Eugen/Klöppel, Ulrike, *Häufigkeit normangleichender Operationen „uneindeutiger“ Genitalien im Kindesalter. Follow-up-Studie*, Bochum 2019.

<sup>133</sup> See also UN Committee against Torture, *Concluding Observations on the fifth periodic report of Germany*, CAT/C/DEU/CO/5 (2011), para. 20(a); UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Germany*, CRPD/C/DEU/CO/1 (2015), para. 29(d); and CEDAW Committee, *Concluding observations on the combined seventh and eighth periodic reports of Germany*, CEDAW/C/DEU/CO/7-8 (2017), para. 24(d).



# Criminalisation of forced sterilisation

## What the Istanbul Convention requires

Article 39 lit. b of the Istanbul Convention establishes criminal liability for intentionally performing a surgery with the purpose or effect of terminating a woman's reproductive capacity without her prior and informed consent or without her understanding of the procedure.

## Current situation and legal framework

Article 39 lit. b of the Istanbul Convention prohibits sterilisation if the woman concerned has not given her prior and informed consent or if she lacks understanding of the procedure. Therefore, the practice of sterilisation of women with disabilities must be subjected to a very critical examination.

In Germany, official statistics show that between 9% and 18% of women with disabilities are sterilised<sup>134</sup>, whereas the national average for women is between 5% and 8%<sup>135</sup> depending on the source. Women with learning difficulties (so-called mental disability) are particularly affected. Studies suggest that the decision to sterilise is also due to persuasion by doctors, professional staff or parents or a lack of knowledge about contraceptive options. The practice is also based on cultural perceptions of how much sexual activity women with disabilities are generally expected and allowed to engage in, especially when they are institutionalised.<sup>136</sup>

Although the possibility of compulsory sterilisation was abolished in 1992, Section 1905 of the German Civil Code continues to provide the basis for sterilisation of persons incapable of giving consent, with the consent of the custodian and the approval of the custodianship court, under the following conditions:

1. the sterilisation is not inconsistent with the intention of the person under custodianship,
2. the person under custodianship will permanently remain incapable of consenting,
3. it is to be assumed that without the sterilisation there would be a pregnancy,
4. as a result of this pregnancy a danger for the life of the pregnant woman or the danger of a serious adverse effect on her physical or psychological state of health were to be expected which could not be prevented in a reasonable way, and
5. the pregnancy cannot be prevented by other reasonable means.

Approximately 37 such sterilisations are performed annually.<sup>137</sup> However, a much higher number of women with learning difficulties are sterilised without even going through these proceedings.<sup>138</sup> In fact, the affected women are sometimes misinformed or inadequately informed by doctors, medical staff or family members, or even harassed or instructed to have this procedure carried out.<sup>139</sup> Sterilisation is often conducted "prophylactically" without any concrete risk of pregnancy.

The Istanbul Convention suggests the deletion of Section 1905 of the German Civil Code.<sup>140</sup> Any sterilisation to which the woman concerned has not given her effective consent is punishable as grievous bodily harm pursuant to Section

<sup>134</sup> BMFSJ (ed.), *Lebenssituation und Belastungen von Frauen mit Behinderungen und Beeinträchtigungen in Deutschland*, 2013, available at <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationsliste,did=199822.html>.

<sup>135</sup> Position paper of the national coordination mechanism under Article 33 of the UN Convention on the Rights of Persons with Disabilities, 2017, available at [https://www.behindertenbeauftragte.de/SharedDocs/Downloads/DE/20170426\\_Positionspapier\\_Zwangsterilisation.pdf?\\_\\_blob=publicationFile&v=1](https://www.behindertenbeauftragte.de/SharedDocs/Downloads/DE/20170426_Positionspapier_Zwangsterilisation.pdf?__blob=publicationFile&v=1); TNS Emnid: *Verhütungsverhalten Erwachsener. Ergebnisse der im Auftrag der BzGA durchgeführten Befragung*, Cologne: BzGA 2011.

<sup>136</sup> See Julia Zinsmeister, *Hat der Staat den Bürger\*innen Sexualität zu ermöglichen?*, in: Ulrike Lembke (ed.), *Regulierungen des Intimen. Sexualität und Recht im modernen Staat*, 2017, p. 71 (76 et seq).

<sup>137</sup> Federal Office of Justice, *Betreuungsverfahren: Zusammenstellung der Bundesergebnisse für die Jahre 1992 bis 2014, 2015, 2016*, available at [https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Betreuungsverfahren.pdf?\\_\\_blob=publicationFile&v=6](https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Betreuungsverfahren.pdf?__blob=publicationFile&v=6).

<sup>138</sup> Comprehensively, see Julia Zinsmeister, *Zur Einflussnahme rechtlicher Betreuerinnen und Betreuer auf die Verhütung und Familienplanung der Betreuten*, in: *BtPrax* 2012, pp. 227 et seq. with reference to Schröttle, *Lebenssituation und Belastungen von Frauen mit Beeinträchtigungen - Sonderauswertung „Reproduktion“ 2012* (unpublished).

<sup>139</sup> This is indicated by the results of a survey among facility residents, see Julia Zinsmeister, *Zur Einflussnahme rechtlicher Betreuerinnen und Betreuer auf die Verhütung und Familienplanung der Betreuten*, in: *BtPrax* 2012, pp. 227 et seq.

<sup>140</sup> This is also required by the UN Convention on the Rights of Persons with Disabilities, see UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Germany*, CRPD/C/DEU/CO/1 (2015), para. 38(a).

226(1), no. 1,(2) of the German Criminal Code, unless it is an unavoidable side effect of an urgently medically indicated intervention. However, this existing criminal legal framework must also be effectively enforced. This requires, among other things, the education and training of doctors and medical staff on the criminal liability for sterilisation against or without a person's will, as well as an effective monitoring system for corresponding violations of the reproductive health of women with disabilities in institutions.

## Demands

Any sterilisation without the prior, informed and effective consent of the woman concerned must be consistently prosecuted as a criminal offence. This also and especially applies to sterilisations of women with learning difficulties (so-called mental disabilities).

Section 1905 of the German Civil Code should be repealed.

Effective measures must be taken to prevent sterilisations on the basis of insufficient information and invalid consent; in particular, the training of the medical staff and doctors involved must be ensured.

# The prosecution of femicides in the form of separation-related homicide

## What the Istanbul Convention requires

Article 43 of the Istanbul Convention calls for the application of criminal offences established in accordance with the Convention irrespective of the nature of the relationship between victim and perpetrator. Article 46 lit. a IC calls for the necessary measures to ensure that in the assessment of penalties, it may be considered as an aggravating circumstance if the offence was committed by the (ex-)husband or (ex-)partner. According to Article 49(2) IC, the effective investigation and prosecution of offences established in accordance with this Convention must be guaranteed, taking into account a gendered understanding of violence. Article 15(1) IC obliges the Federal Republic of Germany to provide or strengthen appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence covered by the scope of the Convention, inter alia on the needs and rights of victims as well as on how to prevent secondary victimisation.<sup>141</sup>

## Current situation and legal framework

In Germany, on average one woman a day is affected by an attempted or completed homicide committed by her own husband, partner or ex-partner.<sup>142</sup> Three women die each week. The motive is almost always the woman's intention to separate or an already completed separation which the ex-partner does not want to accept. Separation-related homicide is therefore the standard case of male homicide in relationships.

Such separation-related homicides are classified as femicides, i.e. killings of women based on their gender. In cases of separation-related homicide, women are killed because the perpetrators do not grant them a self-determined life separate from them. Thus, the acts are an expression of a patriarchal notion of women as property as well as of gender inequality. Women are subjected to a genuine threat of being killed or seriously injured if they no longer want to spend their lives with their previous partner.

In judicial practice, such cases of deadly intimate partner violence usually raise the question of whether the murder characteristic of "base motives" is realised. Motives are considered "base" if they are at the lowest moral level and are therefore much more despicable than in the case of manslaughter ("Totschlag").

In the legal discourse, the evaluation of the motivation not to allow the (ex-)partner to lead an independent life continues to vary. So-called honour killings by perpetrators of Turkish or Arab origin are now regularly punished as murder with base motives; there is no cultural bonus, but rather a questionable shortening of the evaluation of the murder characteristic.<sup>143</sup> In the case of a man killing his (ex-)partner because she wants to leave or has left him, the evaluation is conducted much more thoroughly and critically.

In several decisions by the Federal Court of Justice, the existence of base motives was questioned when "the separation was initiated by the victim and the accused deprives himself of what he does not actually want to lose".<sup>144</sup> Under the Istanbul Convention, this may no longer take place. The victim's initiation of the separation and the perpetrator's loss of the object he desires to control must not be characterized as comprehensible motives underlying the crime and thus lead to the negation of base motives; rather, this is a form of victim-blaming and an expression of a patriarchal notion of women as property. It is also to be rejected that "the fact that the separation was initiated by the victim

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<sup>141</sup> At the same time, the provisions of the Convention and the explanatory report point out at various instances the need to promote awareness and education on "gender stereotypes and myths about male and female sexuality". Comparable guidelines are also contained in Article 25(1) of the Victims' Protection Directive, which is binding for all Member States.

<sup>142</sup> Federal Criminal Police Office, Partnerschaftsgewalt. Kriminalstatistische Auswertung – Berichtsjahr 2019, available at [https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/Lagebilder/Partnerschaftsgewalt/partnerschaftsgewalt\\_node.html](https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/Lagebilder/Partnerschaftsgewalt/partnerschaftsgewalt_node.html)

<sup>143</sup> On this and the following, see the analysis of jurisprudence by Foljanty, Lena/Lembke, Ulrike: Die Konstruktion des Anderen in der „Ehrenmord-Rechtssprechung“, *Kritische Justiz* 47 (2014), pp. 298-315.

<sup>144</sup> Federal Court of Justice, BGHSt 53, 31; Federal Court of Justice, NStZ-RR 2006, 340; Federal Court of Justice, NStZ 2004, 34; correspondingly also Leipold, Klaus/Tsambikakis, Michael/Zöllner, Alexander (eds.): *AnwaltKommentar StGB*, 3rd ed., Heidelberg 2020, Section 211, marginal no. 42. From the more recent jurisprudence of lower courts, see Regional Court of Koblenz, 25 April 2013, BeckRS 2013, 200221. See also djb: Policy Paper: Strafrechtlicher Umgang mit (tödlicher) Partnerschaftsgewalt, 4 November 2020, available at <https://www.djb.de/presse/pressemitteilungen/detail/st20-28>.

[...] may be considered as a circumstance that speaks against the baseness of the motive”, as it has been held in the jurisprudence.<sup>145</sup>

The murder characteristic of “perfidiousness” can be present if the killing of an (ex-)partners was a planned attack by the perpetrator, which may have taken place in a conflict-ridden relationship or a dispute, but in which the partner does not currently expect a significant attack on her physical integrity or even on her life. Cases exist where the perpetrator stalks the woman who has separated from him and finally ambushes her at her home, workplace or day-care centre in order to kill her, or lures her into an unprotected situation under an excuse such as asking for a final conversation. In such cases, the murder characteristic of “perfidiousness” may be present, which requires a deliberate exploitation of the victim’s guilelessness and defencelessness at the time of the attack with intent to kill.<sup>146</sup>

The victim’s guilelessness and defencelessness at the time of the separation-related homicide is not negated by previous mistreatment and threats on the basis of which the victim could have expected a further attack. A determination of the victim’s guilelessness and defencelessness must always be made on the basis of the concrete course of the crime; it may not be rejected in general terms with reference to the previous relationship. Thus, according to the higher courts’ jurisprudence, “even in the case of victims who are permanently afraid for their lives because of existing conflict situations or previous threats, the [...] rejection of guilelessness should only be considered if there was an acute reason for them to believe that the constantly feared serious attack on their life or physical integrity was imminent.”<sup>147</sup> The interpretation of the victim’s behaviour also needs to be considered on a case-by-case basis. For example, the assumption of a latent permanent danger must not conceal the fact that the victim has ultimately exposed herself to a situation because she still trusted her (ex-)partner insofar that she did not fear for her life, which was then exploited by the perpetrator.<sup>148</sup>

The media coverage of separation-related homicides or the widespread designation as a “drama” or “family tragedy” of cases in which a man annihilates his family by killing his wife and children because he believes that they could not or should not live without him shows how deeply the trivialisation and thus legitimisation of violence are entrenched in society.<sup>149</sup> In fact, these cases should be described as multiple murders, their gender-based causes should be analysed and preventive measures should be taken.

## Demands

In order to standardise the application of the law, it is necessary for public prosecutors and judges to take part in further trainings on the subject of gender-based violence.<sup>150</sup> Such an obligation could be enshrined in the federal Judiciary Act, taking judicial independence into account.<sup>151</sup> These trainings should deal with the causes and effects of gender-based violence and the examination of gender stereotypes and myths concerning sexuality.

In applying the law, the existence of an intimate relationship between the perpetrator and the victim must not be considered as a mitigating factor; the Istanbul Convention rather provides for the possibility of aggravating the punishment in the case of attacks by (ex-)partners.

From a human and women’s rights perspective, every person has the right to decide freely with whom she or he enters into or maintains a partnership. By injuring or killing the partner who wants to separate, the perpetrator disregards this fundamental value. This should be taken into account as a determining factor in the

<sup>145</sup> Federal Court of Justice, NStZ 2019, 518.

<sup>146</sup> Erb, Volker/Schäfer, Jürgen (eds.): Münchener Kommentar zum StGB, 3rd ed., Munich 2018, Section 211, marginal no. 172.

<sup>147</sup> See Federal Court of Justice, NStZ 2013, 337.

<sup>148</sup> This trust is partly based on the fact that previous violent attacks or clashes had not yet exceeded the level of (dangerous or grievous) bodily harm.

<sup>149</sup> We therefore welcome the - overdue - announcement by the German Press Agency (dpa) that terms such as “family tragedy” or “relationship drama” will no longer be used.

<sup>150</sup> See already djb, Policy Paper: Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt, 22 November 2018, pp. 12 et seq, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>. See also the welcome approaches in the Federal Government’s draft act to combat sexualised violence against children, available at [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE\\_Bekaempfung\\_sex\\_Gewalt\\_Kinder.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Bekaempfung_sex_Gewalt_Kinder.pdf?__blob=publicationFile&v=2).

<sup>151</sup> von Mangoldt, Hermann/Klein, Friedrich/Starck, Christian (eds.): Kommentar zum Grundgesetz, 7th ed., Munich 2018, Article 97, marginal no. 29a; see also Wissenschaftliche Dienste des Deutschen Bundestages: Kurzinformation Fortbildungspflicht bei Juristischen Berufen, available at <https://www.bundestag.de/resource/blob/567690/3574d419e1a95477f9eb95323aed2492/WD-7-173-18-pdf-data.pdf>.

sentencing of the perpetrator, discussed in the written reasons for sentencing (Section 267(3), sentence 1 of the German Code of Criminal Procedure) and, in the case of homicide offences, generally lead to a finding of “base motives”. Gravely abnormal mental disorders of the perpetrator are taken into account in the context of the examination of his or her criminal responsibility (Sections 20, 21 of the German Criminal Code).

## E. Implementation deficits concerning Investigation, prosecution, procedural law and protective measures (Chapter VI)

### Punishment for sexualised violence by (ex-)partners

#### What the Istanbul Convention requires

Article 43 IC calls for the application of criminal offences established in accordance with the Convention irrespective of the nature of the relationship between victim and perpetrator. Article 46 lit. a IC calls for the necessary measures to ensure that in the assessment of penalties, it may be considered as an aggravating circumstance if the offence was committed by the (ex-)husband or (ex-)partner.

#### Current situation and legal framework

On 7 July 2016, the Bundestag passed an act reforming the criminal law on sexual offences, according to which non-consensual sexual acts are now criminalised without further conditions (no means no). The reform was largely due to feminist campaigning and was based on the Federal Government and legislator's overdue acknowledgement that Article 36 of the Istanbul Convention required such an amendment to the German criminal law on sexual offences.<sup>152</sup> However, the Convention's requirements for effectively combating and prosecuting sexualised violence go much further.<sup>153</sup> These include, among other things, measures to protect and support those affected as well as measures for the effectiveness of criminal prosecution, but also regulations in the area of penalties and sentencing.

Particularly in cases of sexual assault or sexualised violence after a prior intimate relationship, stereotypical victim blaming as well as the prospect of a light sentence or a termination of proceedings may hinder effective prosecution. In the case of sexual assaults within or after a previous intimate relationship, the courts still frequently impose a reduced sentence or even assume that a less serious case of the offence was committed.<sup>154</sup>

In cases of sexualised intimate partner violence, previous or existing sexual relationships between perpetrator and victim – contrary to common practice<sup>155</sup> – must not be allowed to have a mitigating effect on the punishment.<sup>156</sup> According to the jurisprudence of the Federal Court of Justice, this circumstance cannot have any significant mitigating effect in the case of acts of a criminal nature.<sup>157</sup> This applies all the more if the sexual offences – as is not uncommon – are associated with a particular humiliation of the victim.<sup>158</sup>

But even beyond this, the existence of an intimate relationship between perpetrator and victim should not be considered as a mitigating factor.<sup>159</sup> Rather, this circumstance often triggers aggravating circumstances: Sexual assaults

<sup>152</sup> djb, Stellungnahme zur grundsätzlichen Notwendigkeit einer Anpassung des Sexualstrafrechts (insbesondere § 177 StGB) an die Vorgaben der Konvention des Europarats zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt (Istanbul-Konvention) von 2011, 9 May 2014, available at <https://www.djb.de/Kom/K3/st14-07/>; Tatjana Hörnle, Menschenrechtliche Verpflichtungen aus der Istanbul-Konvention. Ein Gutachten zur Reform des § 177 StGB, DIMR 2015.

<sup>153</sup> The requirements correspond in essential points with requirements under the Victims' Protection Directive 2012/29/EU.

<sup>154</sup> Joachim Renzikowski, in: Münchner Kommentar zum Strafgesetzbuch, 3rd ed. 2017, Section 177 nF, marginal no. 195; furthermore Ulrike Lembke, Vergebliche Gesetzgebung. Die Reform des Sexualstrafrechts 1997/98 als Jahrhundertprojekt und ihr Scheitern in und an der sog. Rechtswirklichkeit, in: ZfRSoz 2014, p. 253 (272 et seq).

<sup>155</sup> For example, in Federal Court of Justice, decision of 19 July 2007, 4 StR 262/07; of 21 January 2003, 4 StR 414/02, NStZ-RR 2003, 168 and of 10 September 2009, 4 StR 366/09, NStZ-RR 2010, 9.

<sup>156</sup> See djb, Policy Paper: Strafrechtliche Umgang mit (tödlicher) Partnerschaftsgewalt, 4 November 2020, available at <https://www.djb.de/presse/pressemitteilungen/detail/st20-28>.

<sup>157</sup> See Federal Court of Justice, decision of 10 July 2007, 3 StR 242/07; NStZ-RR 2007, 300.

<sup>158</sup> See Federal Court of Justice, judgement of 20 April 2016, 5 StR 37/16, NStZ-RR 2016, 203.

<sup>159</sup> See already djb, Stellungnahme zur effektiven Umsetzung des Übereinkommens des Europarats zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt (Istanbul-Konvention) in Deutschland, 29 January 2018, p. 15, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-02/>.

by (ex-)partners often have serious physical and psychological consequences for the victim, which must be taken into account as an aggravating factor. A breach of trust that may accompany such attacks also suggests that the punishment should be aggravated. Where a woman has already separated from her partner, she has expressed her refusal of the intimate relationship and thus also to sexual relations. The fact that the perpetrator thus disregards her self-determined will should also be taken into account as an aggravating factor.

The occasional classification of sexual offences committed by an (ex-)partner as “less serious cases” (Section 177(9) of the German Criminal Code) due to the existence of a (previous) sexual relationship also disregards the fact that the overwhelming majority of sexual offences occur in the victim’s close social sphere.<sup>160</sup> From a systematic point of view, the assumption of a less serious case is therefore incorrect; after all, less serious cases are intended to apply to situations in which the entire picture of the crime, including all subjective factors and the perpetrator’s personality, deviates from the average case of a sexual assault to such an extent that the application of an exceptional sentencing range appears indispensable.<sup>161</sup>

Last but not least, the consideration of a previous or existing sexual relationship between perpetrator and victim as a mitigating circumstance contradicts the Istanbul Convention: Article 46 lit. a IC obliges the Parties to ensure that the fact that violence is directed against a past or present spouse or partner can be taken into account as an aggravating circumstance. The Explanatory Report to the Convention justifies this aggravation by reference to the misuse of trust and the particular psychological harm that can be caused when a serious offence is committed in the context of an intimate relationship.

## Demands

In applying the law, the existence of an intimate relationship between perpetrator and victim must not be taken into account as a mitigating circumstance. On the contrary, the Istanbul Convention provides in Article 46 lit. a and h IC that assaults by (ex-)partners can be taken into account as aggravating circumstances.

The characteristic of “gender-based motives” should be included as a circumstance to be taken into consideration for the penalty in Section 46(2) of the German Criminal Code in order to sensitise prosecutors and judges for dealing with the sentencing of such offences. Gender-based motives are present, for example, if the offence is directed against a woman because she is a woman or if it is characterised by ideas of gender inequality. The characteristic is based on the concept of gender-based violence against women and its definition in Article 3 lit. a and d IC, insofar as these are transferable to the individual accusation of guilt.

In order to standardise the application of the law, it is necessary for public prosecutors and judges to take part in further trainings on the subject of gender-based violence.<sup>162</sup> Such an obligation could be enshrined in the federal Judiciary Act, taking judicial independence into account.<sup>163</sup> These trainings should deal with the causes and effects of gender-based violence and the examination of gender stereotypes and myths concerning sexuality.

<sup>160</sup> See Renzikowski, in: Münchener Kommentar zum StGB, 3rd ed. 2017, Section 177 marginal no. 195.

<sup>161</sup> Ziegler, in: BeckOK StGB, 46th ed., 1 May 2020, Section 177 marginal no. 141.

<sup>162</sup> See already djv, Policy Paper: Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt, 22 November 2018, pp. 12 et seq, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>.

<sup>163</sup> v. Mangoldt/Klein/Starck/Classen, 7th ed. 2018, Article 97, marginal no. 29a; see also Wissenschaftliche Dienste des Deutschen Bundestages, available at <https://www.bundestag.de/resource/blob/567690/3574d419e1a95477f9eb95323aed2492/WD-7-173-18-pdf-data.pdf>.

# Effective prosecution of sexualised violence

## What the Istanbul Convention requires

Article 50 IC requires immediate and appropriate protection of victims by law enforcement authorities, including the collection of evidence. According to Article 49(2) IC, it must be guaranteed that effective investigation and prosecution of offences established in accordance with this Convention are carried out, taking into account a gendered understanding of violence. Article 15(1) IC obliges the Federal Republic of Germany to provide or strengthen appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence covered by the scope of the Convention, inter alia on the needs and rights of victims as well as on how to prevent secondary victimisation.

## Current situation and legal framework

### 1. Confidential collection of evidence

Confidential collection of evidence is a procedure in which evidence that can be used in court is secured without the need to immediately report the offence or initiate a preliminary investigation. Those affected by sexualised violence often cannot immediately decide whether to report the offence and thus initiate criminal proceedings. This particularly applies to cases in which the violence was committed by a perpetrator whom the victim knows or is close to. The confidential collection of evidence enables the professional preservation and documentation of injuries and traces for criminal proceedings to be initiated at a later stage. This evidence is stored so that those affected have time to consider whether they wish to initiate criminal proceedings, which may entail considerable burdens for them. However, the confidential collection of evidence is not yet offered nationwide and close to the place of residence, but only exists in regional pilot projects and in a few of the Länder.<sup>164</sup> A major reason for the poor distribution is the lack of secure financial coverage for medical examinations, documentation and the storage of evidence.

The Federal Government has passed a law on anonymous securing of evidence after sexualised violence, which entered into force on 1 March 2020.<sup>165</sup> The provision in Section 27(1), sentence 6, Section 132k of Social Code V now stipulates that health insurance will reimburse confidential forensics in cases of suspicion of abuse or sexualised violence; it is thus one of their regular services.<sup>166</sup> Contracts on the provision of such services are to be concluded between health insurance providers, the Länder and suitable institutions or doctors.

This new law is welcome, but it has some gaps. On the one hand, it is not regulated who pays for the material and training for those who carry out anonymous securing of evidence. However, training is indispensable to ensure that the quality of the evidence is sufficient to use it in court. On the other hand, it is the responsibility of the Länder and the respective health insurance associations to implement the law. To this end, each of the Länder must submit an application to initiate negotiations. The law does not specify when such negotiations have to begin. The requirements of the Istanbul Convention will only be met if the law is implemented quickly in the Länder and if its implementation guarantees nationwide coverage. Furthermore, there is a risk that women whose medical treatment is not governed by Social Code V will not benefit from the new regulation. This may apply to women who are in state custody, for example in remand detention or during the enforcement of a sentence or measure of reform and prevention. On the one hand, sexualised violence by other persons in custody in these facilities and by state employees is unfortunately not uncommon. On the other hand, these women are particularly dependent on state support due to the living con-

<sup>164</sup> On the current status of care and concrete recommendations on the implementation of Article 25 of the Istanbul Convention, see the cooperation project of the German Institute for Human Rights and the Bundesverband Frauenberatungsstellen und Frauennotrufe (bff), Akutversorgung nach sexualisierter Gewalt – Umsetzung von Artikel 25 der Istanbul-Konvention. For the regulations on anonymous evidence collection or evidence collection without reporting obligations in the Länder, see Terre des Femmes, available at <https://www.frauenrechte.de/unsere-arbeit/themen/haeusliche-und-sexualisierte-gewalt/unterstuetzung-fuer-betroffene/anonyme-spurensicherung>. For the statewide procedures in Lower Saxony, see <http://www.opferschutz-niedersachsen.de/nano.cms/sicherung-von-beweisen-einer-straftat>.

<sup>165</sup> Act on the Protection against Measles and for Strengthening Vaccination Prevention (Measles Protection Act), BR Drs. 629/19, available at [https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3\\_Downloads/Gesetze\\_und\\_Verordnungen/GuV/M/Masernschutzgesetz\\_Bundesrat.pdf](https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/M/Masernschutzgesetz_Bundesrat.pdf).

<sup>166</sup> Section 27(1), sentence 6 of Social Code V reads: "Medical treatment also includes services for the confidential collection of evidence on the body, including the necessary documentation as well as laboratory tests and the proper storage of the seized findings, in the case of indications of health damage caused by others, which can be the result of mistreatment, sexual abuse, sexual assault, sexual coercion or rape."



ditions imposed upon them. However, medical treatment is not provided according to Social Code V, but rather according to penal law or other special regulations on health care. Although the nature and scope of these laws are based on the provisions of the Social Code, the so-called principle of equivalence applies, i.e. deviations are possible. In order not to abandon the women accommodated in institutions, it is therefore necessary to ensure by law that the confidential collection of evidence is also available and securely financed there.

## 2. Interrogation of affected persons

The Act on the Modernisation of Criminal Proceedings passed by the Bundestag on 15 November 2019<sup>167</sup> is intended, among other things, to reduce the considerable burden on victims of sexualised violence as a result of repeated interrogations in investigations and trials<sup>168</sup>. According to Section 58a(1) of the Code of Criminal Procedure, it had already been possible to audio-visually record interrogations of children and juveniles subjected to sexualised violence and then to play the recording during the trial instead of repeating the interrogation. This regulation, which has been implemented in various ways in practice, has now been extended to adult victims of sexualised violence.

In principle, this is a welcome development, but the new rules are cumbersome and not consistent.<sup>169</sup> The new regulation juxtaposes a discretionary and an obligatory provision for the purpose of avoiding multiple interrogations, but the relationship between them is unclear. Furthermore, the affected persons still have no legal remedy against a decision denying a recording in order to avoid multiple interrogations. Above all, however, the new regulation does not adequately take into account the reasons for which the possibility of recording interrogations has not been widely used thus far. These include, among other reasons, the courts' lack of technical equipment, or, if this equipment is available in principle for trials, the lack of possibility to use it in the preliminary investigation stage; the high workload on typists during transcription; and the lack of specialisation through training of investigating judges on the interrogation of child witnesses or particularly burdened witnesses, as well as the lack of appropriate competence centres.<sup>170</sup>

## 3. Prevention of secondary victimisation

Effective prosecution and prevention of violence against women and domestic violence not only depends on the legal framework and successful collection of evidence. The gendered understanding called for in the Convention, the human rights-based approach and the unconditional objective of preventing secondary victimisation also play an essential role. The Istanbul Convention emphasises the importance of training measures for effectively combating and preventing gender-based violence. Even a fundamental change in criminal law on sexual offences would not necessarily bring about its effective and gender-sensitive implementation.

As the so-called Explanatory Report (para. 192) on Article 36 of the Istanbul Convention makes clear, it must be ensured that "interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality." Any assessment of evidence "must recognise the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations."<sup>171</sup>

A concrete example for the damaging effects of not reflecting stereotypes on the treatment of victim-witnesses of sexualised violence is the lack of application of Section 68a of the Code of Criminal Procedure in proceedings concerning sexual offences. The restriction of the right to ask questions contained in this provision aims to protect the private and intimate sphere by allowing questions concerning the victim-witness' personal life only if this is absolutely

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<sup>167</sup> See Federal Ministry of Justice and Consumer Protection, press release of 15 November 2019, available at [https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2019/111519\\_Modernisierung\\_StPo.html](https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2019/111519_Modernisierung_StPo.html).

<sup>168</sup> See Federal Ministry of Justice and Consumer Protection, draft act on the modernisation of criminal proceedings of 8 October 2019, and Federal Government, draft act on the modernisation of criminal proceedings of 23 October 2019, both available at [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Modernisierung\\_Strafverfahren.html](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Modernisierung_Strafverfahren.html).

<sup>169</sup> djb, Stellungnahme zum Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz für ein Gesetz zur Modernisierung des Strafverfahrens, 8 October 2019, available at <https://www.djb.de/presse/stellungnahmen/detail/st19-22/>. The subsequent government draft did not contain any changes in this respect.

<sup>170</sup> Ibid.

<sup>171</sup> djb, Pressemitteilung: Tag zur Beseitigung von Gewalt gegen Frauen: Istanbul-Konvention in Deutschland vollständig umsetzen, 25 November 2019, available at <https://www.djb.de/presse/stellungnahmen/detail/pm19-41/>, on the demand not to pit victims' rights against the presumption of innocence, especially in criminal proceedings for sexualised violence, and to reflect on rape myths.

necessary. In practice, however, in the case of sexualised violence in court proceedings, victim-witnesses are sometimes compelled to disclose their sexual life and preferences in detail and to have this intimate information commented on in a stereotypical manner in front of the parties involved in the proceedings, although the victim's previous life in particular is usually of no significance for assessing the truth of her statement.<sup>172</sup> It must therefore be ensured in court practice that questions concerning the personal sphere remain limited to the extent that is absolutely necessary and that decisions in this regard are not guided by the aforementioned misconceptions. A more far-reaching regulation in Section 68a of the German Code of Criminal Procedure or a clarifying addition in the Guidelines on Criminal Proceedings and Fines (RiStBV) are conceivable. Questions about the victim's previous sexual life should require an active justification. Such an obligation to justify questions would also contribute to transparency and the defence would be obliged to examine the indispensability of its question itself.

Although judges' academies certainly offer training on the role of the victim in trials and the effects of criminal proceedings, trainings reflecting victim-damaging gender stereotypes or rape myths exist only in isolated cases at best. Rape myths appear in various forms, for example as general, massively victim-damaging ideas about sexual interactions,<sup>173</sup> hostile reservations towards the victim with regard to his or her credibility<sup>174</sup>, or mostly unfulfillable and always unreasonable expectations with regard to ideal victim behaviour, which have a victim-blaming and perpetrator-exonerating effect.<sup>175</sup> Such stereotypes and myths have so far been a major obstacle to the effective prosecution of sexual offences.<sup>176</sup>

It is therefore necessary to provide compulsory<sup>177</sup> trainings for the police, public prosecutors and judges throughout the country, enabling members of these professional groups to reflect on gender stereotypes and rape myths and to meet the needs and respect the rights of those affected by sexualised violence in criminal proceedings.<sup>178</sup>

## 4. Length of proceedings

Besides the fundamental difficulties in establishing the truth, the long duration of criminal proceedings is a great burden particularly (but not exclusively) for children and youths who have been subjected to sexualised violence. It must also be taken into account that in some cases therapy is not recommended prior to the conclusion of witness examination due to the associated risk of devaluating the testimony, so that the person affected is not given valuable help in coping with what he or she has experienced. All measures should therefore be taken to expedite proceedings in cases of sexual offences.

### Demands

Measures for the confidential collection of evidence must be available nationwide and close to the place of residence. This also includes the provision of initial medical care and the financing of materials and necessary trainings to successfully guarantee the confidential collection of evidence.

Furthermore, all legal and factual measures must be taken to spare those affected by sexualised violence from multiple interrogations and to ensure that interrogations are only carried out by trained staff.

<sup>172</sup> See fundamentally djb, Stellungnahme: Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt, 22 November 2018, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>; furthermore Clemm, Christina: AktenEinsicht - Geschichten von Frauen und Gewalt, 2020.

<sup>173</sup> E.g. Deutscher Richterbund, Stellungnahme Nr. 3/16, January 2016, p. 5: "Even beyond all clichés, there are probably many cases in which one of the two sexual partners must first persuade the other to perform the desired sexual acts, and may not only use the force of his arguments, but possibly also the envisaged seductive effect of sexual acts."

<sup>174</sup> See the study by Elsner, Erich/Steffen, Wiebke: Vergewaltigung und sexuelle Nötigung in Bayern, 2005, pp. 160 et seq, according to which police officers assume false report rates of up to 80%; see fundamentally Estrich, Susan: Palm Beach Stories, Law and Philosophy 11 (1992), pp. 5-33, 11: "No myth is more powerful in the tradition of rape law than the myth of the lying woman."

<sup>175</sup> See fundamentally Lembke, Ulrike: Vergebliche Gesetzgebung. Die Reform des Sexualstrafrechts 1997/98 als Jahrhundertprojekt und ihr Scheitern in und an der sog. Rechtswirklichkeit, Zeitschrift für Rechtssoziologie, 2014, pp. 253-283.

<sup>176</sup> In detail *ibid.*; fundamentally Steinhilper, Udo: Definitions- und Entscheidungsprozesse bei sexuell motivierten Gewaltdelikten, 2nd ed., Konstanz 1998.

<sup>177</sup> A statutory training obligation for judges does not violate the principle of judicial independence, see von Mangoldt, Hermann/Klein, Friedrich/Starck, Christian (eds.): Kommentar zum Grundgesetz, Volume 3: Articles 83-146, 3rd ed. 2018, Article 97 GG marginal no. 29.

<sup>178</sup> djb, Policy Paper: Strafrechtlicher Umgang mit (tödlicher) Partnerschaftsgewalt, 4 November 2020, available at <https://www.djb.de/presse/pressemitteilungen/detail/st20-28>.

It is necessary to supplement the legal provision of Section 68a of the Code of Criminal Procedure, which ensures that questions about a victim's previous sexual life or behaviour exceeding the facts of the case are generally considered inadmissible in criminal proceedings and that the admissibility of such questions is subject to specific justification.

In addition, compulsory trainings for the police, public prosecutors and judges on how to appropriately deal with sexualised violence and those affected by it should be introduced, in which gender stereotypes as well as sexual and rape myths are reflected.<sup>179</sup>

All appropriate measures must be taken to expedite proceedings in cases of sexual offences.

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<sup>179</sup> See also the welcome approaches in the Federal Government's draft act to combat sexualised violence against children, available at [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE\\_Bekaempfung\\_sex\\_Gewalt\\_Kinder.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Bekaempfung_sex_Gewalt_Kinder.pdf?__blob=publicationFile&v=2).

# Prosecution of physical intimate partner violence

## What the Istanbul Convention requires

Article 55(1) IC provides that investigation or prosecution of the offences established in Articles 35 to 39 (including physical violence) shall not be wholly dependant upon a report or complaint filed by a victim. Article 50 IC calls for immediate and adequate protection of victims by law enforcement agencies, including the collection of evidence. Article 55(2) IC guarantees victims access to specialist psychological or psychosocial support services in addition to legal counselling in order to support them emotionally and psychologically in the investigation and trial. According to Article 49(2) IC, the effective investigation and prosecution of offences established in accordance with this Convention must be guaranteed, taking into account a gendered understanding of violence. Article 15(1) IC obliges the Federal Republic of Germany to provide or strengthen appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence covered by the scope of the Convention, inter alia on the needs and rights of victims as well as on how to prevent secondary victimisation.

## Current situation and legal framework

Criminal offences cover the various forms of intimate partner violence, in particular as completed or attempted murder or manslaughter, (“simple”, dangerous or grievous) bodily harm, bodily harm resulting in death, sexual assault, rape, sexual coercion, stalking, coercion or threatening. According to established case law, the assessment of the sentence is generally based on the severity of the offence in terms of its significance for the violated legal order and the degree of perpetrator’s culpability.<sup>180</sup> On this basis, a severe punishment of intimate partner violence is necessary, making it clear that state and society are unwilling to accept or trivialise this form of violence as a particularly drastic expression of structural power relations to the disadvantage of women.

Women are affected by acts of violence by their (ex-)partners much more often than men. In 2019 a total of 69,012 women were victims of intentional bodily injury in Germany by their (ex-)partners (11,991 women were victims of dangerous bodily harm and 57 were victims of grievous bodily harm). This means that a woman is physically assaulted by her (ex-)partner more than once an hour.<sup>181</sup>

The prosecution of “simple” bodily harm (Section 223 of the German Criminal Code) requires an official request or the public prosecutor’s affirmation of a special public interest in prosecution (Section 230 of the German Criminal Code). In practice it occurs that the public prosecutor’s office rejects the special public interest in cases of intimate partner violence and the proceedings are discontinued. In some cases there is also a referral to private prosecution. This practice must be seen as problematic. If offences of bodily harm are committed within an intimate relationship, the “special public interest” should generally be affirmed in accordance with the requirements of Article 55(1) IC.<sup>182</sup> The referral of the victim filing a criminal complaint to private prosecution should also be excluded; this practice is also contrary to the jurisprudence of the ECtHR.<sup>183</sup>

In addition, victims of “simple” and dangerous bodily harm are not entitled to free psychosocial assistance during criminal proceedings.<sup>184</sup>

## Demands

In all gender-based offences against physical integrity, a special public interest in prosecution must be assumed, unless this is contrary to the victim’s interests.

<sup>180</sup> Schäfer, Gerhard/Sander, Günther/Gemmeren, Gerhard: Praxis der Strafzumessung, 6th ed., Munich 2017, margin no. 577.

<sup>181</sup> Federal Criminal Police Office, Partnerschaftsgewalt. Kriminalstatistische Auswertung – Berichtsjahr 2019, available at [https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/Lagebilder/Partnerschaftsgewalt/partnerschaftsgewalt\\_node.html](https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/Lagebilder/Partnerschaftsgewalt/partnerschaftsgewalt_node.html)

<sup>182</sup> See nos. 233, 234(1), 235(3) of the Guidelines on Criminal Proceedings and Fines.

<sup>183</sup> ECHR, Volodina v. Russia, 9 July 2019, judgment no. 41.261/17, para. 82; Bevacqua und S. v. Bulgaria, 12 June 2008, judgment no. 71127/01, para. 83. See also Council of Europe Committee of Ministers, Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence, available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805e2612](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2612).

<sup>184</sup> See already djb, Stellungnahme: Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt, 22 November 2018, pp. 18-24, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>.

The referral to private prosecution should be excluded in such cases. The djv therefore calls for a clarifying amendment to No. 86 of the Guidelines on Criminal Proceedings and Fines (RiStBV) to the effect that a special public interest in prosecution ex officio generally exists in cases of gender-based violence.<sup>185</sup>

The right to free psychosocial assistance in judicial proceedings must be extended to all those affected by gender-based violence as defined in the Istanbul Convention, especially victims of “simple” bodily harm.<sup>186</sup>

The characteristic of “gender-based motives” should be included as a circumstance to be taken into consideration for the penalty in Section 46(2) of the German Criminal Code in order to sensitise prosecutors and judges for dealing with the sentencing of such offences. Gender-based motives are present, for example, if the offence is directed against a woman because she is a woman or is characterised by ideas of gender inequality. The characteristic is based on the concept of gender-based violence against women and its definition in Article 3 lit. a and d IC, insofar as these are transferable to the individual accusation of guilt.

There is a need for compulsory training for police, public prosecutors and judges on the subject of gender-based violence.<sup>187</sup> Such an obligation could be enshrined in the federal Judiciary Act, taking judicial independence into account.<sup>188</sup> These trainings should deal with the causes and effects of gender-based violence and the examination of gender stereotypes and myths concerning sexuality.<sup>189</sup>

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<sup>185</sup> See already djv, Stellungnahme zum Gesetzentwurf der Bundesregierung „Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Verbesserung des Persönlichkeitsschutzes bei Bildaufnahmen“, 25 May 2020, available at <https://www.djb.de/presse/stellungnahmen/detail/st20-19/>.

<sup>186</sup> See already djv, Stellungnahme: Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt, 22 November 2018, pp. 18-24, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>.

<sup>187</sup> See already djv, Stellungnahme: Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt, 22 November 2018, pp. 12-14, available at <https://www.djb.de/presse/stellungnahmen/detail/st18-18/>.

<sup>188</sup> v. Mangoldt, Hermann/Klein, Friedrich/Starck, Christian, Grundgesetz, 7th ed., Munich 2018, Article 97 marginal no. 29a; see also Wissenschaftliche Dienste des Deutschen Bundestages, available at <https://www.bundestag.de/resource/blob/567690/3574d419e1a95477f9eb95323aed2492/WD-7-173-18-pdf-data.pdf>.

<sup>189</sup> Explanatory report to the IC, Art. 15, paras 98 et seq.

## F. Implementation deficits concerning Migration and asylum (Chapter VII)

### Withdrawal of the reservation on Article 59 of the Convention

#### What the Istanbul Convention requires

Article 59(1) IC obliges the States Parties to ensure that women who are victims of violence and whose residence status depends on the residence status of their spouse or partner can, in the event of dissolution of the marriage or relationship in particularly difficult circumstances, be granted an autonomous residence permit on application, irrespective of the duration of the marriage or relationship. Article 59(2) IC requires the suspension of expulsion (or deportation) proceedings in order to enable persons affected by violence against women or domestic violence with a derived right of residence to apply for an autonomous residence permit. This is intended to enable those affected to obtain a residence permit on humanitarian grounds. Moreover, according to Article 59(3) IC, persons affected by violence against women or domestic violence should be granted a renewable residence permit if their stay is necessary due to their personal situation or for the purpose of participating in a criminal investigation or trial.

#### Current situation and legal framework

The Federal Republic of Germany has made reservations in respect of Article 59(2) and (3) IC, so that the corresponding obligations do not currently apply to Germany. The Federal Government justifies these reservations by asserting that it does not have to create a humanitarian residence title within the meaning of Article 59(2) IC, since it is already possible to obtain a family residence title (Section 31 of the Residence Act). However, this exclusively applies to extensions of an existing family residence title, so that a large number of other residence situations are not covered. The Federal Government explicitly rejects a residence title for persons affected by violence within the meaning of Article 59(3) IC on the grounds that personal reasons are too vague and that in principle only a deportation ban is granted in the case of criminal investigations or trials.

It is unclear why those affected by violence against women or domestic violence should not have access to a humanitarian residence permit. Instead, their protection against gender-based violence and its consequences is considerably reduced. The granting of a residence permit for persons affected by violence within the meaning of Article 59(3) IC is also part of the Convention's comprehensive understanding of protection against violence. The personal reasons for which a residence permit is required must then be defined by domestic law in relation to the purpose of the Convention. Possible situations include those in which either the consequences of the violence make it unreasonable to leave the country because, for example, therapeutic and counselling measures are being undertaken in Germany, or in which the nature of the violence (in particular sexualised violence) can lead to considerable disadvantages for the persons concerned when returning to their country of origin. The German practice of only granting deportation bans to those affected by violence against women or domestic violence for the purpose of investigations or trials is a major obstacle to criminal prosecution; this practice degrades the affected persons to mere objects of law enforcement, because it is granted exclusively in the public interest of safeguarding criminal proceedings. The suspension of deportation also offers insufficient protection; the subsequent immigration of children from abroad is excluded, exclusion from social benefits and employment restrictions remain. The restriction of free movement may also have far-reaching consequences, for example in the case of violence in organised structures that extend to the country of origin.<sup>190</sup>

The threat of domestic or family violence is also a relevant ground for persecution according to Sections 3, 3b(1), no. 4 lit. b of the Asylum Act. In many cases, particularly with regard to women affected by violence from "safe countries of origin" (the Balkans), it is assumed that protection is granted by the state authorities in accordance with Section

<sup>190</sup> Here, a regulation based on the better possibilities of protection against violence would be necessary, similar to the derogation provided for in the Dublin procedure (see BAMF, DA-Asyl, 25 April 2017, Human Trafficking).

3d of the Asylum Act or that internal protection is available in accordance with Section 3e of the Asylum Act. This often does not do justice to the actual conditions for granting protection in the countries of origin. The aim here must be to measure the protection possibilities against the requirements of the Istanbul Convention and to demand more than the possibility of avoiding violence by moving to another part of the country. Protection is not granted within the state of persecution as long as no offers of protection are provided for and actually available.

Finally, Article 59(1) of the IC, which was ratified without reservation, has not been sufficiently implemented into German law. At first glance, its provisions appear to be fulfilled by Section 31(2) of the Residence Act, which reads: "The requirement stipulated in subsection (1) sentence 1 no. 1 for marital cohabitation to have existed lawfully for three years in the federal territory is to be waived if necessary to enable the spouse to continue his or her residence in order to avoid particular hardship, unless an extension of the foreigner's temporary residence permit is not permitted. Particular hardship is deemed to apply especially if the marriage is not valid or has been suspended under German law because the spouse was a minor when he or she married, if the obligation to return to the country of origin resulting from the termination of marital cohabitation threatens to substantially harm the foreigner's legitimate interests, or if continuing marital cohabitation is unreasonable due to the harm to the foreigner's legitimate interests; in particular this is to be assumed if the spouse is the victim of domestic violence. Such legitimate interests also include the well-being of a child living with the spouse as part of a family unit. In order to avoid abuse, extension of the temporary residence permit may be denied if the spouse relies on benefits under Book Two or Book Twelve of the Social Code for reasons for which he or she is responsible."

The construction of Section 31(2) of the Residence Act as a hardship provision with explicit mention of "domestic violence" and an individual legal entitlement certainly contains an adequate approach to protection. However, the excessive evidence requirements, the interpretation of the concept of violence by the administrative courts and the restrictive requirement of a causal connection between being affected by violence and ending the marital relationship are problematic. Furthermore, only domestic violence is explicitly mentioned as an example, not sexualised violence. The foreigner authorities often doubt that violence was experienced and generally assume an abuse of the regulation. Such doubts are intensified if the person concerned continues to live with the perpetrator despite asserting a case of hardship. If, however, she moves to a women's or other shelter, the marital cohabitation ends and deportation looms.<sup>191</sup> The assertion of a case of hardship is therefore fraught with high risks for the person concerned; in many cases, months or years pass before a decision is reached. If the residence permit is granted in accordance with Section 31 of the Residence Act, the women have to prove that their livelihood is secure when the permit is to be extended for the first time after one year, which in many cases (e.g. as a single mother or if the husband had prevented them from learning German) may present them with almost insurmountable difficulties. Once the reservation is withdrawn, the provision in Section 31(2) of the Residence Act must be amended to meet the requirements of the Convention.

An independent residence permit for women affected by violence has been rightly demanded for years, and the Federal Republic should no longer evade this. It could be modelled after Section 25(4a) of the Residence Act (trafficking in human beings), or this regulation could be extended to cases of domestic violence. This includes: a period for consideration of three months with regard to the initiation of criminal proceedings in the event of unauthorised residence (Section 59(7) of the Residence Act), the entitlement to a temporary residence permit for the purpose of conducting criminal proceedings as a general rule (like in Section 25(4a), sentence 1 of the Residence Act) and the entitlement to extension to permanent residence in cases of hardship as a general rule (like in Section 25(4a), sentence 3 of the Residence Act). This would also be linked to the entitlement to benefits under Social Code II (in contrast to benefits under the Act on Benefits for Asylum Seekers for tolerated persons).

The core approach to the full implementation of Article 59(1) IC must be to detach the law on residence from the principle of accessoriness as early as possible. A legal presumption should be included in the hardship clause provision for recourse to protection against violence proceedings. It would be important to amend the administrative regulations to define the concept of violence more precisely and to clarify that it does not matter who initiates the separation and that continued cohabitation does not render acts of violence irrelevant. A discretionary decision on the extension of the residence permit in accordance with Section 31 of the Residence Act should be taken if the livelihood is not secure.

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<sup>191</sup> Incidentally, the marital cohabitation period was increased from two to three years in 2011 - on the grounds that this would prevent forced marriages. Victims of violence with a precarious right of residence are more likely to perceive the period of marital cohabitation itself as promoting their forced marriage.

## Demands

The Federal Republic of Germany should withdraw its reservations to Article 59(2) and (3) of the Istanbul Convention in order to provide comprehensive protection against gender-based and domestic violence to women without secure residence status. The practical effectiveness of the implementation measures for Article 59(1) must be ensured.



# Access to protection against violence for migrant women

## What the Istanbul Convention requires

According to Article 4(3) of the Convention, measures for the protection of victims are to be implemented without discrimination, explicitly also on the grounds of migrant or refugee status. The IC thus obliges the States Parties to ensure equal access to protection against violence, irrespective of the question of the legality of residence, an application for asylum, the suspension of deportation or even an unauthorised stay.

## Current situation and legal framework

Refugee women are subject to restrictions on their freedom of movement both in the asylum reception proceedings and with a protected status or during the period of a deportation ban due to a due to an obstacle to deportation, which makes it significantly more difficult or impossible for them to choose a location for protection from a threat of violence. The restrictions on freedom of movement correspond to social-law provisions which restrict the benefits for securing livelihood to the assigned location. Female EU citizens who enjoy freedom of movement in Germany are also excluded from benefits to secure their existence, from psychosocial assistance as well as admission to a women's shelter or other forms of protected and supported accommodation (Section 16a, no. 3 of Social Code II, Sections 67 et seq. of Social Code XII). Even access to limited temporary services to prepare for departure (Section 23(3), sentences 3-6 of Social Code XII) is difficult to obtain in practice.

During an asylum procedure there is first of all an assignment to a reception centre in the Länder (Section 46 of the Asylum Act). The Länder are obliged to take appropriate measures to protect women and persons in need of protection (Section 44(2a) of the Asylum Act). Further details are not regulated by law, and the Länder are not obliged to adopt statutory provisions.

The compulsory duration of stay in a reception centre is 18 months for single and married women (Section 47(1), sentence 1 of the Asylum Act), and under certain circumstances even longer (Section 47(1), sentence 3 of the Asylum Act). For families, the obligation to live in such a reception facility ends after just six months (Section 47(1), sentence 1 of the Asylum Act). For the entire period, the radius of movement is restricted to the district of the foreigner authority in which the reception facility is located (residence obligation, Section 56(1) of the Asylum Act). If women have to leave this district in order to protect themselves against domestic or sexualised violence in the reception facility, they have the possibility of applying for a permit to leave for "compelling reasons" to the Federal Office for Migration and Refugees (Section 57(1) of the Asylum Act). They can also submit an application to the respective state authority for the distribution of asylum seekers in order to be released from the reception facility for "reasons of public security and order, or for other compelling reasons" (Section 49(2) of the Asylum Act)<sup>192</sup> and to be assigned to a municipality (Section 50(1), sentence 2 of the Asylum Act). Both procedures can sometimes be lengthy and put women in danger of committing an administrative offence (Section 86(1) of the Asylum Act). Although a justification must be assumed for such a violation, this puts the woman in an irregular residence situation. At the same time, there is no secure financing of livelihood during this period. The social welfare body responsible for the reception centre remains responsible (Section 10a of the Act on Benefits for Asylum Seekers), but often refuses to provide benefits other than benefits in kind in the reception centre. In this respect, it can invoke the provision in Section 11(2) of the Act on Benefits for Asylum Seekers, according to which outside the assigned district, "only a travel allowance is regularly granted to cover the unavoidable need to travel to the legal place of residence". As a rule, the exclusion of benefits does not apply to exceptional situations which also require assistance under constitutional law to safeguard human dignity (Article 1(1), Article 20(1) of the Basic Law). However, service providers are generally overstrained with such an interpretation of the law so that benefits are nevertheless refused. The social welfare body responsible for the reception centre also remains responsible for the costs of the women's shelter; the only legal basis for such benefits is the general clause in Section 6 of the Act on Benefits for Asylum Seekers ("indispensable in individual cases to

<sup>192</sup> Protection against violence is necessary for reasons of public safety. Admission to a women's shelter can also constitute a compelling reason, see also Bender, Dominik/Bethke, Maria in Hofmann, Rainer: *Ausländerrecht*, 2nd ed., Baden-Baden 2016, Section 49 of the Asylum Act, marginal no. 5.

secure livelihood or health”). In view of the unclear reimbursement claims and the refusal of most social welfare bodies to provide benefits, the vast majority of women’s shelters refuse to accept asylum seekers. Asylum-seeking women affected by gender-based violence therefore do not have any possibility to freely decide on different options of protection, but have to accept insufficient protection, for example by way of transferral within the same reception centre.<sup>193</sup>

If the woman has already been released from the reception centre and assigned to a municipality or if her deportation has been suspended (toleration), her freedom of movement is now only subject to a residence restriction (Section 61 of the Residence Act). This allows her to temporarily leave the accommodation and the area of the municipality assigned to her in order to protect herself from gender-based violence. However, she is confronted with the same problems because here too the social welfare office of the assigned municipality is exclusively responsible for the costs of securing her livelihood and psychosocial assistance, for example in a women’s shelter (Section 10a of the Act on Benefits for Asylum Seekers) and reimbursement of costs is refused on the basis of Section 11(2) of the Act on Benefits for Asylum Seekers (limitation to travel assistance as a rule).<sup>194</sup>

Women who have been granted protection status (asylum, recognised refugees, persons entitled to subsidiary protection, obstacles to deportation, admitted refugees) are also subject to a residence regulation in the first three years after being granted protection status or a residence permit (Section 12a of the Residence Act). They too can temporarily move to another place for protection against gender-based violence. Here, however, they are no longer granted benefits for subsistence (Section 36(2) of Social Code II).<sup>195</sup> Although the residence restriction is to be lifted in cases of protection against violence<sup>196</sup>, this requires justification and the submission of evidence. Here, too, complex procedures are necessary, in some cases involving various authorities (foreigner authority and state authority for distribution), there is no clear legal basis and there are no transitional arrangements until the restriction is lifted.

During the first five years of their stay, EU citizens who are not gainfully employed or who can derive their right to freedom of movement from another person are excluded from subsistence benefits and from psychosocial assistance in cases of gender-based violence (Article 7(1), sentence 2, nos. 1 and 2 of Social Code II and Article 23(3), sentence 1, nos. 1 and 2 of Social Code XII). The costs of a stay in a women’s shelter can only be paid for as a temporary service “in individual cases due to special circumstances to overcome particular hardship and to cover a situation of temporary need” (Section 23(3), sentence 6 of Social Code XII).<sup>197</sup> Against this background, EU citizens who are not gainfully employed are predominantly not admitted by women’s shelters.

Women who are staying in Germany without permission can alarm the police in cases of violence and are also entitled to benefits under the Act on Benefits for Asylum Seekers. However, public bodies<sup>198</sup> are obliged to inform the foreigner authority on their own initiative if they become aware of a person’s unauthorised stay (Section 87(2), no. 1 of the Residence Act).<sup>199</sup> Protection against violence can thus only be provided at the cost of termination of residence and voluntary departure or deportation.

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<sup>193</sup> Social Court of North Rhine-Westphalia, decision of 23 June 2016, L 20 AY 38/16 B ER, paras 40 et seq; Treichel, Stefan in Ehmann, Frank/Karman-ski, Carsten/Kuhn-Zuber, Gabriele: Gesamtkommentar SRB, 2nd ed., Baden-Baden 2018, Section 6 of the Act on Benefits for Asylum Seekers, marginal no. 7.

<sup>194</sup> For the substantive examination of the reasons for deviating from the residence restriction, the social courts refer to action under administrative law, see Social Court of Schleswig-Holstein, decision of 30 January 2019, L 9 AY 3/19 B ER, marginal no. 5.

<sup>195</sup> Social Court of Lower Saxony-Bremen, decision of 5 March 2018, L 15 AS 32/18, para. 7; Social Court of Berlin-Brandenburg, decision of 26 June 2017, L 31 AS 618/17 B ER; differently Social Court of North Rhine-Westphalia, decision of 20 January 2017, L 19 AS 2381/17 B ER. The provision of Section 36(2) of Social Code II for persons with a residence restriction under Section 12a of the Residence Act supersedes the competence provision of Section 36a of Social Code II, according to which admission to a women’s shelter establishes the competence of the employment agency at the location of the women’s shelter.

<sup>196</sup> Communication of the Federal Ministry of the Interior and BMFSFJ of 14 February 2020, BMI M3-20010/22#11, available at <https://www.asyl.net/rsdb/m28103/>.

<sup>197</sup> Fundamentally on the benefits in special circumstances: Social Court of Hesse, 1 July 2020, L 4 SO 120/18; Social Court of Lower Saxony-Bremen, 29 November 2018, L 8 SO 134/18 B ER; Deckers, Jörg in Flint, Thomas (ed.): Grube/Wahrendorf/Flint, SGB XII, 7th ed., Munich 2020, Section 23 SGB XII, marginal no. 76.

<sup>198</sup> The administrative regulation on the Residence Act explicitly mentions the police and the social welfare offices under 87.1.1.1. Schools and educational institutions are excluded, Section 87(1) of the Residence Act.

<sup>199</sup> Hospitals and doctors are not obliged to pass on data according to Section 88(1) of the Residence Act because they are subject to secrecy, but the social welfare offices are obliged to do so as soon as they become aware of the application for assumption of costs, see Winkelmann, Holger/Krämer, Walter in Bergmann, Jan/Dienelt, Klaus: Ausländerrecht, 13th ed., Munich 2020, Section 87 AufenthG, marginal nos 14-15.

## Demands

Access to protection against violence must be regulated without discrimination. Legal exceptions are necessary which suspend the territorial residence restriction in cases of protection against violence.

In cases of change of residence for the purpose of protection against violence, social benefit entitlements should be linked to the actual place residence. The obligation to register with the foreigners authority should be explicitly excluded in these cases.

Psychosocial assistance in violent life situations, in particular admission to a women's shelter, should not, as has been the case to date, be covered by the benefit exclusions under Section 7(1), sentence 2 of Social Code II and Section 23(3) of Social Code XII, but should be financed irrespective of residence status.

