

**NEW COE CONVENTION ON PREVENTING AND
COMBATING VIOLENCE AGAINST WOMEN AND
DOMESTIC VIOLENCE
„ISTANBUL CONVENTION“
– IMPORTANCE OF SETTING EUROPEAN LEGAL
STANDARDS -**

Abstract

The paper is dealing with the new European legal standards in the area of women human rights – new Council of Europe Convention on combating violence against women and domestic violence (Istanbul Convention set up by the CoE CAHVIO Committee). Key issue of efficiency of legal norms established by the Istanbul Convention is dealt with by reflexion on direct regulations of investigation, prosecution and protection in the area of fighting domestic and gender-based violence, which impose concrete obligations to countries signatories of the Convention.

For the implementation process, it is emphasized several aspects that ensure effectiveness of the Istanbul Convention, such as state obligations and due diligence principle in fighting violence against women and domestic violence and adequate institutional capacities of relevant countries signatories that are bound by the Convention. Monitoring mechanism, established in the form of the independent expert international body is equally important to ensure effective implementation of the Convention. Efficiency of legal regulations in international public law depends on vital national various interests of different countries that are mirrored and included into international norms and conventions. To the

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extent to which the negotiations on setting legal standards led by different states were successful, to the same extent the implementation of those legal norms are to be effective.

Key words: *Council of Europe, Istanbul Convention, fighting violence against women and domestic violence.*

1. Introductory notes

The international treaty, the “Council of Europe (CoE) Convention on Preventing and Combating Violence Against Women and Domestic Violence” – known informally as the “Istanbul Convention” – is the first European treaty specifically targeting violence against women and domestic violence. It sets out commonly agreed legal standards on prevention, protection, prosecution, and integrated policies in the area of fight against gender based violence and domestic violence. Countries ratifying it must also establish services such as hotlines, shelters, medical services, counselling, and legal aid. Istanbul Convention enters into force on 1st of August 2014. The Istanbul Convention of the CoE is open also for the accession of non-member states.

Ad Hoc CoE Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) that was established by the CoE Committee of Ministers on behalf of 47 member states and their 800 million citizens, started its work on the Convention on Preventing and Combating Violence against Women and Domestic Violence in April 2009. Before the Convention, in 2002, the adoption of Council of Europe Recommendation Rec No (2002)5 of the Committee of Ministers to member states on the protection of women against violence represented a milestone in that it proposes, for the first time in Europe, a comprehensive strategy for the prevention of violence against women and the protection of victims in all Council of Europe member states.

The Istanbul Convention represents setting new European legal standards. Text of the CoE Convention was adopted at the CAHVIO session in December 2010. In May 2011 at the CoE Istanbul conference of the Committee of Ministers started the signing of the new Convention. It was at the same time the start of its ratification process. New European standards on combating domestic violence and violence against women are based on the so-called “Concept three P”: prevention, protection, punishment, plus integrated Policies of countries, parties of the CoE

Convention. The aim of the Istanbul Convention is to ensure protection for victims of domestic violence, particularly women and girls, since they are prevalent majority of victims, but also for other victims of domestic violence, children, elderly people and men. It recognizes violence against women as a violation of human rights and a form of discrimination. This means that states are held responsible if they do not respond adequately to such violence.

2. Towards effective implementation of Istanbul Convention

The Istanbul Convention aims at zero tolerance in society for gender based violence. The issue of efficiency legal norms in international public law that is consisted of international treaties, conventions and general legal principles, is usually controversial issue, bearing in mind the highly different legal profile of those norms compared to national ones. There are two theoretical approaches that explain, *inter alia*, the efficiency of international public law: monistic and dualistic theory.²

Furthermore, the implementaion of international legal norms represents the most important litmus-test of their effectiveness. In this context, it is vital to reflect the mechanisms *de facto*, i.e. how the implementation of international rules is followed, reported and „controlled“ at international level.

Next dimension to be analyzed is the content of international norms – in this case it is the new Council of Europe Convention on preventing and combating violence against women and domestic violence (CM Documents, CM (2011) 49 final, 7 April 2011)³. To which extent real content of those rules, in terms of setting the standards in this specific and delicate area, is decisive for their efficiency in implementation at national level of countries signatories of the Istanbul Convention is important issue to be analyzed.

This dimension is probably the most indicative for real effectiveness of those specific international legal norms, taking into account the precise (or not) language of the norms, the meaning and scope of legal regulations contained in the Convention. Therefore, majority of this paper is to be focused on the Chapter VI of the Istanbul Convention, because it is dealing with Investigation, prosecution, procedural law and protective measures.

² D. Mitrović, Theory of Law, Belgrade, 2006., 122.

³ The official abbreviation: Istanbul Convention is to be used in the text

The reason why the new CoE Istanbul Convention is chosen for this analyze is that it is the first regional international legal instrument, which is legally binding for countries signatories, contrary to other relevant international recommendations and declarations. The legally binding character is also assured through future monitoring mechanism that is to be established (GREVIO)⁴, as well as through precise content of state duties in this area of women human rights protection, such as protection against all forms of violence.

There is also another very valuable principle established and confirmed by the CoE Istanbul Convention: due diligence principle, which is mandatory for states, parties of the Istanbul Convention. Bearing in mind highly sensitive issue of domestic violence and more specifically, the disastrous consequences of the violence against women, the due diligence principle makes a firm commitment for European states, signatories of the Istanbul Convention, thus contributing to further effectiveness of those legal rules.

3. European legal standards on investigation, prosecution and protection in the area of fighting violence against women and domestic violence

Domestic violence is deeply ingrained in all societies. Since it occurs in the private domain, it is difficult to recognise and register it in comparison to other public forms of violence.

‘Violence against women’ is a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women’s full advancement.⁵

Europe has changed its views on domestic violence and people are increasingly aware that it is a negative social factor. Family violence is classified as a criminal offence in most legal systems.

There is a separate chapter⁶ in the CoE Istanbul Convention, which contains a variety of provisions that cover a broad range of issues related to investigation, prosecution, procedural law and protection against all

⁴ GREVIO – monitoring mechanism of the Istanbul Convention in the form of the future expert body (10 – 15 members)

⁵ United Nations: The Beijing Declaration and the Platform for Action, Fourth World Conference on Women Beijing, China 4-15 September 1995

⁶ Chapter VI

forms of violence covered by the scope of the Istanbul Convention. At the same time, countries signatories are obliged to apply necessary legislative or other policy measures to ensure effective implementation of proclaimed legal norms in the Istanbul Convention.

What is even more important, the general obligations for states signatories of the Convention are established in this context:

“Article 49 – General obligations

1. Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings.
2. Parties shall take the necessary legislative or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences established in accordance with this Convention.”

The aim of those provisions is to prevent that incidents of violence against women and domestic violence are assigned low priority in investigations and judicial proceedings. This will help to secure vital evidence, enhance conviction rates and put an end to impunity.

It is important to note that while it is essential to ensure swift investigations and proceedings, it is equally important to respect the rights of victims during these stages.

Effective investigation and prosecution of offences established in accordance with this Convention - this means, for example, establishing the relevant facts, interviewing all available witnesses, and conducting forensic examinations, based on a multi-disciplinary approach and using state-of-the-art criminal investigative methodology to ensure a comprehensive analysis of the case.

All investigations and procedures are to be carried out in conformity with fundamental principles of human rights and with regard to a gendered understanding of violence - measures taken in implementation of this provision are not prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 ECHR. Especially important is the notion of gendered understanding of violence, bearing in mind the fact that women are prevalent victims.

“Article 50 – Immediate response, prevention and protection

1. Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies respond to all forms of violence covered by the scope of this Convention promptly and appropriately by offering adequate and immediate protection to victims.
2. Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies engage promptly and appropriately in the prevention and protection against all forms of violence covered by the scope of this Convention, including the employment of preventive operational measures and the collection of evidence.”

Law enforcement agencies in states signatories and parties of the Convention, are to react promptly and appropriately by offering adequate and immediate protection to victims, while paragraph 2 calls for their prompt and appropriate engagement in the prevention of and protection against all forms of violence covered by the scope of this Convention, including the employment of preventive operational measures and the collection of evidence.

Compliance with this provision includes, for example, the following:

- the right of the responsible law enforcement agencies to enter the place where a person at risk is present;
- the treatment and giving advice to victims by the responsible law enforcement agencies in an appropriate manner;
- hearing victims without delay by specially-trained, where appropriate female, staff in premises that are designed to establish a relationship of trust between the victim and the law enforcement personnel; and
- provide for an adequate number of female law enforcement officers, including at high levels of responsibility.

Effective measures should be taken to prevent the most blatant forms of violence, such as murder or attempted murder.

“Article 51 – Risk assessment and risk management

1. Parties shall take the necessary legislative or other measures to ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and if necessary to provide co-ordinated safety and support.

2. Parties shall take the necessary legislative or other measures to ensure that the assessment referred to in paragraph 1 duly takes into account, at all stages of the investigation and application of protective measures, the fact that perpetrators of acts of violence covered by the scope of this Convention possess or have access to firearms.”

Parties of the Convention have the obligation to ensure that any assessment of the risks faced by a victim should systematically take into consideration, at all stages of the investigation and application of protective measures, whether the perpetrator legally or illegally possesses or has access to firearms in order to guarantee the safety of victims (Par 2).

This article therefore establishes the obligation to ensure that all relevant authorities, not limited to the police, effectively assess and devise a plan to manage the safety risks a particular victim faces on a case-by-case basis, according to standardised procedure and in co-operation and co-ordination with each other.

Essential is that any risk assessment and risk management is to consider the probability of repeated violence, notably deadly violence, and to adequately assess the seriousness of the situation.

Important is that such measures shall not aggravate any harm experienced by victims and also investigations and judicial proceedings should not lead to secondary victimisation.

The possession of firearms by perpetrators not only constitutes a powerful means to exert control over victims, but also increases the risk of homicide – therefore, risk assessment duly takes it into account.

Multi-agencies risk assessment of the violence is much needed, since current situation shows that police does not deal with the risk assessment of the violence (as well as other agencies, such as public prosecutor office, judges, etc.). The purpose of this provision is to ensure that an effective multi-agency network of professionals is set up to protect high-risk victims.

In case of immediate danger⁷, it has been foreseen that competent authorities *ex officio* will order to perpetrator to vacate the residence for a

⁷“Article 52 – Emergency barring orders

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

sufficient period of time. The goal is to achieve more protection for victim by taking away a perpetrator for a certain period of time and granting to the victim to stay safe at home.

This provision establishes the obligation of equipping the competent authorities, with the power to order, a perpetrator of domestic violence to leave the residence of the victim and to bar him or her from returning or contacting the victim.

The immediate danger must be assessed by the relevant authorities. It refers to any situations of domestic violence in which harm is imminent or has already materialised and is likely to happen again. Existing examples of such orders in CoE member states range between 10 days and four weeks, with or without the possibility of renewal.

There are also provisions on protection orders.⁸ Those provisions set out the obligation to ensure that national legislation provides for restraining and/or protection orders for victims of all forms of violence covered by the scope of this Convention. Furthermore, it is established a number of criteria for such orders to ensure that they serve their highly protective nature.

National legislation of certain countries Parties of the Istanbul Convention may provide for the combined use of restraining and protection orders. A restraining or protection order may be considered complementary to a short-term emergency barring order.

Its purpose is to offer a fast legal remedy to protect persons at risk of any of the forms of violence covered by the scope of this Convention by prohibiting, restraining or prescribing certain behaviour by the perpetrator.

Whether restraining or protection orders are based in civil law, criminal procedure law or administrative law or in all of them will depend

⁸ “Article 53 – Restraining or protection orders

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

2. Parties shall take the necessary legislative or other measures to ensure that the restraining or protection orders referred to in paragraph 1 are:

-available for immediate protection and without undue financial or administrative burdens placed on the victim;

-issued for a specified period or until modified or discharged;

-where necessary, issued on an ex parte basis which has immediate effect;

-available irrespective of, or in addition to, other legal proceedings;

-allowed to be introduced in subsequent legal proceedings.

3. Parties shall take the necessary legislative or other measures to ensure that breaches of restraining or protection orders issued pursuant to paragraph 1 shall be subject to effective, proportionate and dissuasive criminal or other legal sanctions.”

on the national legal system and above all on the necessity for effective protection of victims.

Any order should take effect immediately after it has been issued and shall be available without lengthy court proceedings at national level. Order is to be issued for a specified or a determined period or until modified or discharged. It follows from the principle of legal certainty that requires the duration of a legal measure to be spelt out clearly. In certain cases these orders may be issued, where necessary, on an *ex parte* basis with immediate effect. This means a judge or other competent official would have the authority to issue a temporary restraining or protection order based on the request of one party only.

Current research has shown that many victims who want to apply for a restraining or protection order may not be prepared to press criminal charges (that would lead to a criminal investigation and possibly criminal proceedings) against the perpetrator.

Standing to apply for a restraining or protection order shall therefore not be made dependent on the institution of criminal proceedings against the same perpetrator. Similarly, they should not be made dependent on the institution of divorce proceedings, etc.

Paragraph 3 (Art. 53) aims at ensuring respect for restraining and protection orders by requiring “effective, proportionate and dissuasive” sanctions for any breach of such orders (sanctions may be of a criminal law or other legal nature) and may include prison sentences, fines or any other legal sanction.

Istanbul Convention regulates *ex parte* and *ex officio* proceedings.⁹ Aim of those provisions is to ease the burden which lengthy criminal investigations and proceedings often place on the victims while at the same time ensuring that perpetrators are brought to justice - to enable criminal investigations and proceedings to be carried out without placing the onus of initiating such proceedings and securing convictions on the victim. Articles 35, 36, 37, 38 and 39 of this Convention are: Article 35 – Physical violence, Article 36 – Sexual violence, including rape, Article

⁹ “Article 55 – *Ex parte* and *ex officio* proceedings

1. Parties shall ensure that investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 of this Convention shall not be wholly dependant upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint.

2. Parties shall take the necessary legislative or other measures to ensure, in accordance with the conditions provided for by their internal law, the possibility for governmental and non-governmental organisations and domestic violence counsellors to assist and/or support victims, at their request, during investigations and judicial proceedings concerning the offences established in accordance with this Convention.”

37 – Forced marriage, Article 38 – Female genital mutilation and Article 39 – Forced abortion and forced sterilisation.

Acts resulting in severe bodily harm or deprivation of life must be addressed promptly and directly by competent authorities. Many of the offences covered by this Convention are perpetrated by family members, intimate partners or persons in the immediate social environment of the victim and the resulting feelings of shame, fear and helplessness lead to low numbers of reporting and, subsequently, convictions.

National law enforcement authorities should investigate in a proactive way to make sure that the proceedings may be carried out even if the victim withdraws her or his statement or complaint.

Istanbul Convention includes comprehensive set of protection measures for victims of gender based and domestic violence.¹⁰ This provision (Art. 56) is inspired by Article 31, paragraph 1 of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS No. 201). Paragraph 1 contains a non-exhaustive list of procedures designed to protect victims of all forms of violence covered by the scope of this Convention during proceedings. These measures of protection apply at all stages of the proceedings. Parties of the Convention must ensure that victims are safe from intimidation, retaliation and repeat victimisation.

¹⁰ “Article 56 – Measures of protection

1. Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:

a. providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation;

b. ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively ;

c. informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case;

d. enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;

e. providing victims with appropriate support services so that their rights and interests are duly presented and taken into account;

f. ensuring that measures may be adopted to protect the privacy and the image of the victim

g. ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible;

h. providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence;

i. enabling victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.

2. A child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child.”

In the case of child victims and child witnesses, paragraph 2 states that Parties must take special care of their needs and ensure their rights to special protection measures as a child will usually be more vulnerable than an adult and likelier to be intimidated. Consequently, special protection measures must give due regard to the best interests of the child, which may include measures such as not obliging a child to testify in the presence of the perpetrator.

Victim of domestic violence does not have an automatic right to free legal aid.¹¹ Istanbul Convention foresees that even in the absence of legislation granting free legal assistance in civil matters, it must be assessed whether, in the interest of justice, an applicant who is without financial means should be granted legal assistance if unable to afford a lawyer. European Court on Human Rights in Strasbourg (ECHR) has taken into account the complexity of procedures and the emotional character of a situation in deciding whether someone was in a position to present her or his own case effectively.¹²

It can be assessed that the above-analyzed provisions on investigation, prosecution and protection in the domain of fighting domestic violence and violence against women, besides their direct obligations for states signatories of the Istanbul Convention, also have specific deterrent effect, through setting legal standards that are general legal framework in Europe for achieving zero tolerance towards gender-based and domestic violence.

4. State obligations and Due Diligence principle in fighting violence against women and domestic violence

Violence against women represents a violation of human rights and a form of unlawful and severe discrimination.

This means that states are held responsible if they do not respond adequately to such violence. State obligations and due diligence principle mean that, under international public law, a state is responsible for the commission of an internationally wrongful act which is attributable to

¹¹“Article 57 – Legal aid

Parties shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law.”

¹² European Court of Human Rights ECHR case-law (Airey v. Ireland judgment, 9 October 1979) The Court’s view is that effective access to a court may necessitate free legal assistance. Its position is that it must be ascertained whether appearance before a court without the assistance of a lawyer would be effective in the sense that the person concerned would be able to present their case properly and satisfactorily.

it, through the conduct of their agents such as the police, immigration officials and prison officers.

This principle is set out in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001), which are widely accepted as customary international law.

Under international human rights law, the state has both negative duties and positive duties: state officials must both respect the law and refrain from the commission of internationally wrongful acts and must protect individuals from their commission by other non-state actors.

Article 5 of the Convention, paragraph 1¹³, addresses the state obligation to ensure that their authorities, officials, agents, institutions and other actors acting on behalf of the state refrain from acts of violence against women, whereas paragraph 2 sets out Parties' obligation to exercise due diligence in relation to acts covered by the scope of this Convention perpetrated by non-state actors. In both cases, failure to do so will incur state responsibility.¹⁴

Parties shall refrain from engaging in any act of violence against women and ensure that state authorities, officials, agents, institutions and other actors acting on behalf of the state act in conformity with this obligation.

Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-state actors.

A requirement of due diligence has been adopted in a number of international human rights instruments, interpretations, and judgments with respect to violence against women. These include CEDAW Committee General Recommendation No. 19 on violence against women

¹³ "Article 5:

1. Parties shall refrain from engaging in any act of violence against women and ensure that state authorities, officials, agents, institutions and other actors acting on behalf of the state act in conformity with this obligation.

2. Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-state actors."

¹⁴ ECHR Case *Opuz v. Turkey* (2009), ECHR brought the judgment that Turkey has violated art. 2, 3, and 14 of the European Convention on Human Rights: right to live, interdiction of torture and ban of discrimination. The legal basis for the ultimate attribution of responsibility to a State for private acts relies on State failure to comply with the duty to ensure human rights protection, as set out in Article 1(1) of the American Convention on Human Rights (1969).

Court concludes that the national authorities of Turkey cannot be considered to have displayed due diligence. They therefore failed in their positive obligation to protect the right to life of the applicant's mother within the meaning of Article 2 of the Convention.

(1992), Article 4 of the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993), the Convention on the Prevention of Violence against Women (Convention of Belém do Pará, 1994) adopted by the Organisation of American States as well as the Council of Europe Recommendation Rec No (2002)5 of the Committee of Ministers to member states on the protection of women against violence (2002).

Furthermore, the content of Article 5 reflects the case-law of the European Court of Human Rights. In its recent case law on domestic violence, the Court has adopted the obligation of due diligence (see the ECHR Judgment of *Opuz v. Turkey*, 2009¹⁵).

It has established that the positive obligation to protect the right to life (Article 2 ECHR) requires state authorities to display due diligence, for example by taking preventive operational measures, in protecting an individual whose life is at risk (ECHR Judgment *B. Tomašić and others v. Croatia*, 2009¹⁶).

¹⁵ The case originated in an application (no. 33401/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mrs Nahide Opuz (“the applicant”), on 15 July 2002.

The applicant alleged, in particular, that the State authorities had failed to protect her and her mother from domestic violence, which had resulted in the death of her mother and her own ill-treatment. In the period of 1995-2002 H.O. attacked seriously six times his wife and her mother, with severe health consequences that were life-dangerous. Investigation was stopped three times due to giving up of the victim to file the suit and two times because of the lack of evidence. Case resulted in shooting the applicant’s mother by H.O. firearm and her instant death. It was the final consequence of the long-term repeated domestic violence.

ECHR brought the judgment that Turkey has violated art. 2, 3, and 14 of the European Convention on Human Rights: right to live, interdiction of torture and ban of discrimination

The legal basis for the ultimate attribution of responsibility to a State for private acts relies on State failure to comply with the duty to ensure human rights protection, as set out in Article 1(1) of the American Convention on Human Rights (1969).

¹⁶ On 2 January 2006 M.M. had come to the Social Welfare Centre in Croatia and claimed that he had a bomb and would “throw it at his former wife [meaning M.T.] and child”. On 3 February 2006 M.M. was detained following the instigation of the criminal proceedings against him in the Čakovec Municipal Court on 27 January 2006. A psychiatric opinion obtained during the proceedings stated that on 2 January 2006 M.M. had claimed before the employees of the Welfare Centre that he had a bomb and that his threats had been meant seriously. He had repeated the same claim on 19 January 2006 before police officers from the Medumurje Police. On 15 March 2006 the Municipal Court found M.M. guilty of threatening M.T. on several occasions during the period between July and 30 December 2005 = 5 months of imprisonment and a security measure of compulsory psychiatric treatment.

The applicants made a twofold complaint under Article 2 of the European Convention on Fundamental Freedoms and Human Rights. They contended firstly that the State had failed to comply with their positive obligations in order to prevent the deaths of M.T. and V.T. and secondly that the State had failed to conduct a thorough investigation into the possible responsibility of their agents for the deaths of M.T. and V.T.

A positive obligation of the state will arise where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures

Furthermore, state obligations in fighting gender-based and domestic violence are also ensured through other relevant international conventions listed in the Preamble of the Istanbul Convention.¹⁷

Relevant offences that are regulated by the Istanbul Convention and are subject to criminal or other legal sanction, are: physical violence; psychological violence; stalking; sexual violence, including rape; sexual harassment; forced marriage; female genital mutilation, forced abortion

within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see *Osman*, cited above, § 116; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 55, ECHR 2002-III; and *Bromiley v. the United Kingdom (dec.)*, no. 33747/96, 23 November 1999).

Since no adequate psychiatric treatment was provided to M.M. in the prison there was also no assessment of his condition immediately prior to his release from prison with a view to assessing the risk that, once at large, he might carry out his previous threats against the lives of M.T. and V.T. The Court finds such a failure particularly striking given that his threats had been taken seriously by the courts and that the prior psychiatric report expressly stated that there was a strong likelihood that he might repeat the same or similar offences.

The Court notes that it has found that the authorities, in relation to the death of the applicants' two close relatives breached the European Convention on Fundamental Freedoms and Human Rights. In these circumstances the Court considers that the applicants must have sustained non-pecuniary damage. Ruling on an equitable basis and having regard to the awards made in comparable cases, it awards the applicants EUR 40,000 jointly under that head, plus any tax that may be chargeable to them.

¹⁷ "Preamble

The member states of the Council of Europe and the other signatories hereto,

Recalling the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, 1950) and its Protocols, the European Social Charter (ETS No. 35, 1961, revised in 1996, ETS No. 163), the Council of Europe Convention on Action against Trafficking in Human Beings (ETS No. 197, 2005) and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS No. 201, 2007);

Recalling the following recommendations of the Committee of Ministers to member states of the Council of Europe: Recommendation Rec No (2002)5 on the protection of women against violence, Recommendation CM/Rec (2007)17 on gender equality standards and mechanisms, Recommendation CM/Rec (2010)10 on the role of women and men in conflict prevention and resolution and in peace building, and other relevant recommendations;

Taking account of the growing body of case law of the European Court of Human Rights which sets important standards in the field of violence against women;

Having regard to the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW", 1979) and its Optional Protocol (1999) as well as General Recommendation No. 19 of the CEDAW Committee on violence against women, the United Nations Convention on the Rights of the Child (1989) and its Optional Protocols (2000) and the United Nations Convention on the Rights of Persons with Disabilities (2006);

Having regard to the Rome Statute of the International Criminal Court (2002);

Recalling the basic principles of international humanitarian law, and especially the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) and the Additional Protocols I and II (1977) thereto;

Condemning all forms of violence against women and domestic violence;

Recognising that the realisation of *de jure* and *de facto* equality between women and men is a key element in the prevention of violence against women;

Recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women;

Recognising the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men;....."

and forced sterilisation. In this context, important message is proclaimed: that violence against women and domestic violence are not private matters.

5. Concluding remarks

European states are required to organise their response to all forms of violence covered by the scope of the CoE Istanbul Convention in a way that allows relevant authorities to diligently prevent, investigate, punish and provide reparation for such acts of violence. Reparation may encompass different forms of reparation under international human rights law such as: restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition. Term “non-state actor” refers to private persons, a concept which is already expressed in point II of CoE Recommendation Rec No (2002)5 on the protection of women against violence.

Failure to do so incurs state responsibility for an act otherwise solely attributed to a non-state actor. As such, violence against women perpetrated by non-state actors crosses the threshold of constituting a violation of human rights as referred to in Article 2 insofar as Parties have the obligation to take the legislative and other measures necessary to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of the new Convention, as well as to provide protection to the victims, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms.

„Expert services are often faced with different forms of ‘behind four walls’ violence, but only after the violence has been present between individuals for a longer period of time and is manifested in cruel, sometimes even fatal consequences.“¹⁸.

Relevant international and comparative law - The UN CEDAW defines discrimination against women as “... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

¹⁸ 29th Conference of Council of Europe Ministers of Justice, “Breaking the silence – united against domestic violence”, 17-19 June 2009, Tromsø, Norway, Report presented by Minister of Justice of the Republic of Slovenia, www.coe.int/t/, date of accession to the web site: 25th of Nov 2013

The Committee on the Elimination of All Forms of Discrimination Against Women (hereinafter “the CEDAW Committee”) has found that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men” and is thus prohibited under Article 1 of CEDAW. Within the general category of gender-based violence, the Committee includes violence by “private act” and “family violence”¹⁹.

Consequently, gender-based violence triggers duties in States. The General Recommendation no. 19 sets out a catalogue of such duties. They include a duty on States to “take all legal and other measures that are necessary to provide effective protection of women against gender-based violence including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence.”

Efficiency of legal regulations in international public law is a multidimensional issue and depends on vital national various interests of different countries that are mirrored and included into international norms and conventions. To the extent to which the negotiations on setting legal standards led by different states were successful, to the same extent the implementation of those legal norms are to be effective.

Example of the Istanbul Convention indicates the complexity of those negotiations even at expert level, while formulating relevant legal norms in the area of fighting violence against women and domestic violence. Reasons for such complexity are in multicultural beliefs and often stereotype way in treatment of domestic violence and gender-based violence, even in modern states based on the rule of law and democracy.

If we ask ourselves what would be the final goal of the effective regional legal standards set up by the Istanbul Convention, the answer is for sure: zero tolerance towards gender-based violence and towards domestic violence.

Effectiveness of relevant international rules, such as in the case of the Istanbul Convention, is directly linked with the institutional capacities of specific countries that apply the CoE Convention’s provisions. More precisely, national law enforcement agencies, judiciary and other relevant stakeholders should dispose with significant capacities to cope with the violence against women and domestic violence. Number of principles which should be met in an effective national court system to ensure access to justice:

¹⁹ Committee’s General Recommendation No. 19 on “Violence Against Women,” (1992) UN doc. CEDAW/C/1992/L.1/Add.15

- (a) be *just* in the results it delivers;
- (b) be *fair* in the way it treats litigants;
- (c) offer appropriate procedures at a reasonable *cost*;
- (d) deal with cases with reasonable *speed*;
- (e) be *understandable* to those who use it;
- (f) be *responsive* to the needs of those who use it;
- (g) provide as much *certainty* as the nature of the particular case allows;
- (h) be *effective*: adequately resourced and organised.

Monitoring mechanism, if established by international legal norms is also very important since it provides for a feedback on the status of concrete implementation of those international norms in each specific country, which is obliged by those provisions.

Istanbul Convention of the Council of Europe (Art. 66 – 70)²⁰ has foreseen the establishment of an independent expert international body (GREVIO) with the aim to monitor the effective implementation of the Istanbul Convention²¹. The Convention sets up a Group of experts on action against violence against women and domestic violence (hereafter “GREVIO”) which is an expert body, composed of independent and highly qualified experts in the fields of human rights, gender equality, violence against women and domestic violence, criminal law and in assistance to and protection of victims of violence against women and domestic violence, with the task of “monitoring the implementation of this Convention by the Parties”. GREVIO will devise questionnaires for State parties to fill in; receive, analyse, evaluate information; it will write

²⁰ Legitimacy of relevant international organizations to establish mandatory legal norms has been discussed in various essays (Legitimacy of International Organizations, Edited by Jean-Marc Coicaud and Veijo Heiskanen), taking into account :“ decolonization; growing awareness of the global nature of many economic, environmental, and public health problems; multiplication of non-governmental organizations; globalization of mass media and the market; rapid developments in the field of biotechnology; and the emergence of new information technologies, particularly the Internet.“, 2006.

²¹Chapter IX of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties. In its interim report, the CAHVIO stated that: “The Committee is of the opinion that a strong and independent monitoring mechanism is of utmost importance to ensure that an adequate response to this problem is given in all Parties to the Convention.”

Consequently, the drafters considered that the monitoring system foreseen by the Convention should be one of its strengths. At the time of writing this paper, GREVIO has not yet been established in practice. It will be established and precisely organized after the entry into force of the Istanbul Convention.

reports; also it will make recommendations; and where necessary hold country visits. Of course, a gender and geographical balance, as well as multidisciplinary expertise will be taken account while setting GREVIO, for the purpose of effectiveness of the future expert body. GREVIO will establish its own rules of procedure. The Convention also establishes a Committee of the Parties, composed of the representatives of the Parties to the Convention.

Finally – new European legal standards in fighting violence against women and domestic violence ensure:

- that violence against women is criminalised and appropriately punished;
- that excuses on the grounds of culture, custom, religion or so-called “honour” are unacceptable for any act of violence;
- that victims have access to special protection measures during investigation and judicial proceedings²²;
- that law enforcement agencies respond immediately to calls for assistance and manage dangerous situations adequately.

International legal transplants are one of main sources of legal changes in national legal systems, preferably in more advanced and prosperous manner to provide for optimal protection of human rights and the rule of law.

Consequently, the importance of the new European legal standards in the area of fight against gender based violence and domestic violence that are set up by the CoE Istanbul Convention is exactly in moving the boundaries of national legal systems²³. At the same time, the globally widespread negative gender stereotypes can be more easily dismantled.

“The rule of law requires not only that laws are passed, but that they are equally enforced and independently adjudicated, free from bias or discrimination”²⁴.

²² Chapter VI of the CoE Istanbul Convention

²³ E. Buscaglia, W.E. Ratliff, *Law and economics in developing countries*, Hoover Press, USA, 2000, 31.

²⁴ UN WOMEN “Progress of the World’s Women 2011 – 12, In Pursuit of JUSTICE”

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**NOVA KONVENCIJA SAVETA EVROPE O PREVENCIJI I
BORBI PROTIV NASILJA NAD ŽENAMA I PORODIČNOG
NASILJA
„ISTANBUL KONVENCIJA“
– ZNAČAJ USTANOVLJAVANJA EVROPSKIH PRAVNIH
STANDARDA -**

Rezime

Nova Istanbul Konvencija Saveta Evrope o prevenciji i borbi protiv nasilja nad ženama i nasilja u porodici, koja stupa na snagu 1. avgusta 2014. godine postavila je pravno obavezujuće norme u domenu prevencije, zaštite žrtava porodičnog i rodno zasnovanog nasilja i kažnjavanja počinioca. Naglasak je na rodno zasnovanom nasilju u kontekstu zaštite ljudskih prava žena, jer se rodno zasnovano nasilje tretira kao ozbiljno kršenje ljudskih prava i oblik nezakonite diskriminacije prema ženama. Veliku većinu žrtava porodičnog nasilja, tj. od deset žrtava devet su žene. Ključno pitanje efikasnosti pravnih normi ustanovljenih Istanbul Konvencijom SE sagledano je kroz analizu međunarodno-pravnih propisa o istrazi, krivičnom gonjenju i merama sveobuhvatne zaštite žrtava rodno zasnovanog nasilja i porodičnog nasilja. Ove norme ustanovljavaju konkretne obaveze prema zemljama potpisnicama Istanbul Konvencije, a istovremeno, momentom njenog stupanja na snagu se formiraju pravno obavezni standardi prevencije i borbe protiv porodičnog i rodno zasnovanog nasilja. U procesu buduće implementacije Istanbul Konvencije, ukazano je na nekoliko aspekata koji obezbeđuju njenu efikasnu primenu, kao što je obaveza dužne pažnje država („due diligence princip“) i adekvatni institucionalni kapaciteti relevantnih zemalja potpisnica Istanbul Konvencije. Takođe, predviđeno je formiranje međunarodnog nadzornog ekspertskeg tela „GREVIO“ za svrhe efikasnog sprovođenja Istanbul Konvencije. Efikasnost normi u međunarodnom javnom pravu zavisi od vitalnih nacionalnih interesa

različitih zemalja, koji su uključeni i ogledaju se u međunarodnim konvencijama. U meri u kojoj su pregovori o formulisanju međunarodnih pravnih standarda između različitih država bili uspešni, u istoj meri će i sprovođenje tih propisa biti efikasno.

Ključne reči: Savet Evrope, Istanbul Konvencija, borba protiv nasilja nad ženama i porodičnog nasilja