

Introduction to the legal framework on gender-based violence against women under the Istanbul Convention of

11 May 2011

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What is the objective of the Convention?

- Creating a Europe free of violence against women
- It is an international treaty, signed by 9 Member States with the Council of Europe and in the process of accession by the European Union (not in force)
- It recognises that violence against women is a *human rights* violation and *a form of discrimination* (2 legal assets protected)

Physical or moral integrity
Sexual freedom
Dignity

Equality and
prohibition of
discrimination

2014 Fundamental Rights Agency Survey

- 1/3 of women in Europe have suffered physical or psychological violence since the age of 15
- 55% of women have been subjected to sexual harassment
- 11% of women have been victims of cyber-bullying
- 5% (1 in 20) have been raped
- 1/10 has suffered sexual violence
- More than half of women's violent deaths are at the hands of a partner, ex-partner or family member
- Only 14% of partner violence is reported
- Only 13% of non-partner violence is reported
- Increasing trend since #metoo movement
- 71% of the world's victims of human trafficking are women and girls

Why is the Convention innovative?

- **Gender violence:** Two key ideas:
 - It is not just intersubjective violence: Connotations of domination present in culture that justify it
 - What is gender and what is sex according to CEDAW
 - It is not enough to punish, but you have to:
 - Prevent violence
 - Protect victims
 - Prosecute perpetrators
 - **Integrated policies**

State liability for lack of due diligence

- It is aimed at the protection of women and girls and States are "invited" to apply the Convention to other victims of domestic violence, men, children, the elderly

Monitoring the implementation of the Convention

- Expert Group on Violence against Women and Domestic Violence ([GREVIO](#))
- [Committee of the Parties](#) as a political body composed of representatives of the States Parties to the Convention

Its conclusions help States to improve and ensure compliance with the provisions of the Convention on the basis of the GREVIO recommendations

CONCEPT

Istanbul Convention of 11 May 2011: talks about violence against women simply because they are women and conceptualises it as any act of "gender-based" violence, which causes or is likely to cause physical, sexual and psychological harm to women, their children and girls, whether committed in the [private sphere](#) - by individuals - or in the [public sphere](#) - institutional violence.

CONCEPT

- What types of gender-based violence we may encounter (among others):
 - ✓ Violence from a partner or former partner
 - ✓ Domestic violence
 - ✓ Any sexual contact without consent, without the need for penetration (sexual abuse)
 - ✓ Harassment
 - ✓ Forced marriage (will lead to rape situations)
 - ✓ Forced abortion
 - ✓ Forced sterilization
 - ✓ Female genital mutilation
 - ✓ Trafficking of human beings

Towards a New Paradigm: Due Diligence

UN Committee against Torture in its General Comment 2: “Where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise *due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts*. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of *torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity*, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. **The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking”**

ISTANBUL CONVENTION OF 11 MAY 2011

- The objectives of the Convention to be achieved by the signatory States are
 - Preventing violence, protecting victims and taking appropriate action against perpetrators
 - To raise awareness and sensitize society as a whole, especially the male gender, in order to break with the patriarchal culture and the denialist positions that ultimately perpetuate gender discrimination and encourage violence against women.
 - Coordination of public bodies, institutions and services, together with civil society, to prevent, prosecute and combat this type of violence
 - Collection of statistical and research data on all forms of violence against women.

CRIMINAL LAW REQUIREMENTS OF THE ISTANBUL CONVENTION

- Establishment of **criminal law provisions for the** prosecution of these crimes
- **Gender Aggravation**
- Qualification as a serious violation of human rights, however, **criminal prosecution** is left to the victim and the message we send to society is that *sexual violence is not a matter of first order - lack of awareness (art. 13).*

CIVIL REQUIREMENTS OF THE ISTANBUL CONVENTION

- Civil remedies for the victim against the *abuser or rapist* and against the *State*, if it did not fulfil its due diligence duty
- Right to *compensation for the victim* by the *perspetrators* art. 29 and by the *State* art. 30
- Family relations: custody and visiting rights are *suspended* if there is violence (31)
- Forced marriages may be *annulled without financial or administrative burden* (32)

PROCEDURAL REQUIREMENTS OF THE ISTANBUL CONVENTION

- **Procedures with a gender perspective** (method of interpretation) to give effectiveness and protection of fundamental rights
- Reliable system for **assessing the risk** and seriousness of the reported situation
- Power of the authorities to require **removal from the home and attached prohibitions** (art. 52)
- Victims can benefit from a **national and European protection order**
- **No evidence of the victim's sexual behaviour** is **admissible** Art. 54
- **Prosecution of crime** is not dependent on the will of the party
- No unnecessary **delays** or secondary victimisation

PROCEDURAL REQUIREMENTS

- Protection as a **witness** art. 56
- **Free legal assistance with specialisation** (Art. 57)
- Statute of **limitation** in sexual violence (art.58)
- **Specialisation of the bodies involved**
 - Judges
 - Lawyers
 - Prosecutors
 - Forensic doctors
 - Police

HEALTH AND SOCIAL REQUIREMENTS OF THE ISTANBUL CONVENTION

ARTICLE 25 Support for victims of sexual violence:

" Parties shall take the necessary legislative or other measures to provide for the setting up of appropriate, easily accessible rape crisis or sexual violence **referral centres for victims** in sufficient numbers to provide for **medical and forensic examination, trauma support and counselling for victims**"

DUE DILIGENCE IN THE ISTANBUL CONVENTION

Private persons may violate international humanitarian law, and although their behaviour cannot be directly attributed to the *State*, the fact is that the State *has the obligation to* exercise due diligence with the aim of preventing and avoiding such behaviour, and prosecuting them once they have occurred with the aim of repressing and exemplifying society.

TOWARDS DUE DILIGENCE IN THE ISTANBUL CONVENTION

• Due diligence: BACKGROUND

➤ **INTERNATIONAL TRIBUNALS:** Judgments of the International Criminal Tribunals for the Prosecution of War Crimes in the Former Yugoslavia and Rwanda

• ICTY:

- Case Dusko Tadic (Trial Chamber) of 14 July 1997, IT 94-1-7
- Celibici (Trial Chamber) case of 16 November 1998
- Furundzija case of 10 December 1998, IT-95-17/1

• ICTR:

- Case Jean-Paul Akayesu (Trial Chamber) of 2 September 1998, ICTR-96-4
- Musema (Trial Chamber) case 27 January 2000, ICTR-96-13-A
- Rutaganda case of 6 December 1999, ICTR-96-3-T

TOWARDS DUE DILIGENCE IN THE ISTANBUL CONVENTION

Background ICC Statute 7.1.g: Systematic forms of violence against women

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population and with knowledge of the attack: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity.

TOWARDS DUE DILIGENCE IN THE ISTANBUL CONVENTION

➤ **SUPRANATIONAL COURTS (ECtHR and IACHR)** States must take appropriate action to safeguard the life and physical integrity of persons under their jurisdiction.

✓ **IACHR:** Judgment 16 November 2009, Gonzalez et al ("Campo Algodonero") case against Mexico Violence against women is a crime against humanity, a serious violation of human rights, and the State must answer for its passivity in preventing and prosecuting these crimes.

TOWARDS THE ISTANBUL CONVENTION DUE DILIGENCE

• Due diligence: BACKGROUND

✓ECHR: condemns the States that have omitted due diligence by not protecting women against the violation of their rights and public freedoms simply because they are women, that is, by not carrying out the appropriate policies to prevent, prosecute and punish gender-based violence in that country (gender perspective):

- ECHR of 28 October 1998, Osman v. United Kingdom, HUDOC 23452/94;
- ECHR, 15 January 2009, Medova v. Russia, HUDOC No. 25385/04;
- ECHR, 9 June 2009, Opuz v. Turkey, reference, HUDOC No. 33401/02
- ECHR, 10 May 2010, Rantsev v. Cyprus and Russia, HUDOC No. 25965/04;
- ECHR of 2 March 2017, Talpis v Italy HUDOC No 41237/14.

TOWARDS DUE DILIGENCE IN THE ISTANBUL CONVENTION

• Due diligence: BACKGROUND

✓ECHR of 4 December 2003, case M.C. v. Bulgaria, on sexual violence:

- What are the specific obligations of the States Parties with regard to the sanctioning and prevention of ill-treatment, specifically of rape.
- Lack of consent means there has been a crime of rape and this should be legislated.
- The victim must not prove a lack of resistance for it to be considered rape.
- Wquates sexual violence with torture (a serious human rights violation)

TOWARDS DUE DILIGENCE IN THE ISTANBUL CONVENTION

- **Due diligence: BACKGROUND**

- UNITED NATIONS:

- ✓ General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women
 - ✓ The Special Rapporteur on violence against women stated in her annual report of 10 March 1999
 - ✓ General Comment 2 of the UN Committee against Torture

ISTANBUL CONVENTION OF 11 MAY 2011

- **Due diligence: BACKGROUND**

General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women stated that States have an obligation to prevent acts that affect the recognition, enjoyment or exercise of rights by women and to ensure that private **persons** do not commit acts of discrimination, including acts of gender-based violence, otherwise **States may also be responsible for** private acts if such measures are not taken.

ISTANBUL CONVENTION OF 11 MAY 2011

- **Due diligence: BACKGROUND**

The Special Rapporteur on violence against women established a series of guidelines in his annual report of 10 March 1999: ratification of international human rights instruments; constitutional guarantees on women's equality; existence of national laws and administrative sanctions providing adequate redress for women victims of violence; policies or action plans addressing the issue of violence against women; gender awareness of the criminal justice system and the police, accessibility and availability of support services; existence of measures to raise awareness and change discriminatory policies in the field of education and in the media; and data collection and development of statistics on violence against women

ISTANBUL CONVENTION OF 11 MAY 2011

- **Due diligence: BACKGROUND**

General Comment 2 of the UN Committee against Torture: if the State failed to exercise due diligence to prevent, investigate, prosecute and punish the perpetrators of torture and physical and/or degrading treatment, including sexual violence as a form of torture, it is responsible, and **its officials should be considered as perpetrators, accomplices or liable to the crimes committed by reason of their lack of commitment to eradicate these crimes**

DUE DILIGENCE IN THE ISTANBUL CONVENTION

- All of this background is incorporated into the Istanbul Convention → binding rule.
 - It requires the **state to ensure the right to life, to physical and moral integrity by demanding efficient provisions in criminal law to discourage the commission of crimes involving gender violence, backed by adequate legal enforcement machinery for the prevention, suppression and punishment of violations of these provisions.**

DUE DILIGENCE IN THE ISTANBUL CONVENTION

- This also implies, in appropriate circumstances, **a *positive obligation for the authorities* to take operational preventive measures to protect women whose lives, physical and moral integrity are at risk, from sexist criminal acts**
 - Otherwise, **financial liability of the State.** Judgement no. 1263/2018, of 17 July (case of Ángeles González Carreño)

CONCLUSION: MULTILEVEL INTERPRETATION FROM OUR CONSTITUTIONS

- **Art. 4 Istanbul Convention**

- "Parties shall **take the** necessary **legislative and other measures** to promote and protect, the right for everyone, in particular, **women, to live free from violence in both the public and private sphere**".

- **Article 5 Istanbul Convention** under the heading "State obligations and Due Diligence".

1. Parties shall ensure that State **authorities, officials, agents and 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

Can the State be responsible for not changing the patriarchal structure of our society?

Does this mean that people's freedom can be limited by virtue of the equality of others (women)?

Paradigm shift after Istanbul

- **State responsibility in its systemic dimension (structural violence) Aims to change society**

- appropriate legislation (civil, criminal, administrative and labour) to transform this society and protect women against discrimination and violence **by providing appropriate sanctions for those (economic and social power) who do not comply**
- **There are limits to freedom: Women's social rights**

Preliminary title, I, II, III Spanish Organic Law on Gender Violence

- **State responsibility in its individual dimension (intersubjective violence) Aims to protect the victim**

- state obligations to provide protection to victims who suffer specific violence by their partner or former partner by **providing for appropriate sanctions for authorities who fail to comply or the errors of the system in that specific case a, which has allowed the woman to be harmed by a man**
- **There are limits to public authorities' freedom of action: the harm to women**

*Title V Spanish Organic Law on Gender Violence
POOR SOCIAL SERVICES
POOR PRIOR LEGALADVICE*

NECESSARY MEASURES

- Training of the different groups of professionals who intervene in situations of gender violence.
- Telephone information and legal advice service on gender-based violence, which is free and available 24 hours a day, 365 days a year.

NECESSARY MEASURES

- Design and permanent updating statistical information on gender violence.
- Raising public awareness and preventing gender-based violence by means of information and awareness campaigns.
- Ensuring that victims have access to special protection measures (European Protection Order and Victim Protection Measures)

NECESSARY MEASURES

- Regulations are not enough: the involvement of people working in the institutions is necessary for a victim to report the criminal act and for it to be prosecuted, because for example in the field of sexual violence, in my country, crimes are semi-public and in the case of public crimes, the persistence of the incrimination and subsequent declaration is essential to achieve a conviction (general prevention and retribution). It is made dependent on the victim.
- Lack of involvement leads to state responsibility.
- The Convention is binding and hierarchically superior to our internal rules (art. 10.2 EC): direct application or need to implement measures we have not yet adopted? We must act in accordance with the guidelines of the Convention.

THANK YOU VERY MUCH

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