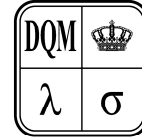


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## ISTANBUL CONVENTION - OBLIGATION OR NEEDS

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***Summary:** The Istanbul Convention is an internationally legally binding document that represents a turning point in the fight against violence against women. The most important element of this Convention is the obligation of States to act with due diligence - with due regard to the prevention, detection, prosecution and sanctioning of violence against women. Harmonizing domestic legislation with the standards of the Convention, the obligation that Serbia took over by ratification, which also caused the adoption of the Law on the Prevention of Domestic Violence. This is the first step, but obviously, not enough. There is an improvement of practical dealing with gender-based violence acts, as well as preventing and raising awareness on unacceptability of violence in contemporary conditions. The trend of its omnipresence is very visible. However, there still are many EU countries that have not yet ratified this convention, while in some it has led to serious polarization in society. The public in Serbia has mostly not being informed that this convention exists. There is a contradiction of the great idea of advocacy in fight against violence against women and vulgarization of dealing with terminological dilemmas and rigidity. It seems as some situations of normative erosion are repeated. Engrossed with formalism, we ratify and pass a series of laws that mostly remain as "dead letter on paper" without true commitment in real use.*

***Key words:** Istanbul Convention, domestic violence, discrimination against women, criminalization of various forms of violence, "due diligence", protocols.*

### 1. INTRODUCTION

The Council of Europe's Convention on the Prevention and Combating Violence against Women and Domestic Violence was adopted in Istanbul on May 11, 2011<sup>1</sup>, and ratified in Serbia in October 2013 and came into force on August 1,

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<sup>1</sup> About this convention voted in the European Parliament and 489 representatives were "for", 114 "against" and 69 abstentions.

2014<sup>2</sup>. Recalling the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and its Protocols, the European Social Charter (1961, revised in 1996), the Council of Europe Convention on Action against Trafficking in Human Beings (2005) and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007); Recalling the following recommendations of the Committee of Ministers to member States of the Council of Europe: Recommendation Rec (2002, 2005) on the protection of women against violence, Recommendation CM/Rec(2007, 2017) on gender equality standards and mechanisms, Recommendation CM/Rec(2010) 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. Attention is drawn to the UN Human Rights Commission Resolution 2003/45 on the elimination of violence against women that encourages governments to introduce: "an affirmative obligation to promote and protect the human rights of women and girls and must with due diligence to prevent, investigate and punish all acts of violence against women and girls" because this is the first time when in international law mentioned the notion of due diligence.

The basic goal of the Istanbul Convention is to achieve a zero level of tolerance towards domestic violence. But above all, it is a call for greater equality, because violence is rooted in the inequality of men and women in society.

## **2. DEFINITIONS, PRINCIPLES AND POLICIES**

The Istanbul Convention for the Prevention and Combating Violence against Women and Domestic Violence defines the notion of gender: "gender", in contrast to sex, implies socially determined roles, behaviors, activities and attributes that society finds appropriate for women and men (article 3 of the Convention) and that those who sign the Convention shall „ensure the implementation of the provisions

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<sup>2</sup> Official Gazette of the Republic of Serbia - International Agreements no. 12/2013.

of this Convention, and in particular measures to protect the rights of victims, without discrimination on any grounds such as sex, gender, race, color, language, religion, political or second belief, national or social origin, belonging to national minorities, wealth, birth, sexual orientation, gender identity, age ... (in Article 4 of the Convention). "Gender" is a social construct in time and space dimensions and is a variable category. As such, it opens the possibility for social, legal and political changes, which is the basis for achieving gender equality, one of the fundamental values of a democratic society based on the idea of equality of human beings as members of the human community.

The distinction between gender and sex has long been present in social sciences, and their definitions are widely used. The definitions of these concepts (sex and gender) are also found in the anti-discriminatory documents of the European Union, the United Nations and the Council of Europe. Gender is determined by human biological (inborn, immutable), and the genus of social (acquired, variable) characteristics. Therefore, it is about distinguishing the biological and social (cultural) influences that shape the individual. This results in certain gender and gender roles of men and women. The birth of children is, for example, the full role of women, while housekeeping is still widely perceived today as her gender role.

The Istanbul Convention is a very useful legal tool for contributing to the fight against violence against women and promoting gender equality which recognizes:

- that the achievement of *de iure* and *de facto* equality between women and men is a key element in the prevention of violence against women,
- violence against women is a manifestation of historically unequal power relations between women and men, which have led to the domination and discrimination against women by men, and to the prevention of the advancement of women to the full,
- the structural nature of violence against women as gender-based violence, and that violence against women is one of the key social mechanisms that women are forced to be in a subordinate position vis-à-vis men,
- that women and girls are often exposed to severe forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called "honor" and genital mutilation, which constitute a serious violation of human rights of women and girls and the main obstacle to achieving equality between women and men,
- existing human rights violations during armed conflict, affecting the civilian population, in particular women, in the form of widespread or systematic rape and sexual violence, as well as the potential increase in gender-based violence during and after the conflict,
- that women and girls are at greater risk of gender-based violence than men,

- that domestic violence affects women unevenly, and that men can also be victims of domestic violence,
- that children are victims of domestic violence, as well as witnesses of domestic violence,
- an effort to create a Europe free of violence against women and domestic violence.

### 3. "DUE DILIGENCE"

Due diligence some translates as a full commitment, but a more precise translation due diligence is due or adequate attention/dedication. Regarding the term due diligence, no matter what the translation is, any similar term does not appear in the domestic legislative texts, until the obligation of the state authorities to do so comes only by indirect interpretation of the legal norms.

The Law on the Prevention of Domestic Violence nowhere foresees due diligence, or full commitment to treatment (and not due attention), although such an interpretation exists in the part of the feminist public. This law requires a number of state authorities to act promptly, effectively, urgently, coordinated and conscientiously. Furthermore, there is a "duty to immediately forward", "duty to inform", "to assess risk as soon as possible", "promptly deliver promptly", "deliver an order", "immediately after its delivery", "investigate notifications and evaluates the risk assessment", "extends the emergency measure in situation of an imminent threat of violence after evaluation", "exchanges notifications every day", "makes an individual plan of protection and support to the victim", "holds meetings at least once in 15 days", "are obliged to first contact with the victim of domestic violence give the victim full information", "keep records", "monitor the implementation of this law and improve coordination".<sup>3</sup>

From all of the foregoing, it can be concluded that the Law requires coordinated and conscientious treatment with a special emphasis on the urgency of the work of the competent authorities. Full commitment from all of the foregoing can not be the obligation of any actors required by this Law. This initially leads to discrepancies between (excessive and unrealistic) expectations and the real interpretation of the legal text and the behavior of the responsible institutions based on it.

The provisions of the Istanbul Convention on compulsory state accountability in preventing violence against women deal with the responsibility of the State for the actions of non-state actors. Namely, if the State guarantees the basic human right to life, it is not enough that the guarantees remain on paper and that the state does not violate the rights of citizens, it is necessary for the state to actually make sure that the citizen truly enjoys his right. This principle also contains the Istanbul Convention in the provisions on the prevention of violence relating to the systematic confrontation of violence not only through repressive

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<sup>3</sup> Articles 12, 13, 14, 16, 17, 18, 19, 24, 25, 29, 32 and 35.

measures, but also through the most widely understood prevention. Thus, in the part of the text of the Convention dedicated to prevention, Art. 12. st. 1, stipulates that States undertake the necessary measures in promoting the change of social and cultural patterns of behavior of women and men in order to eradicate prejudices, customs, traditions and other practices, based on the idea of inferiority of women, that is, on the stereotypical roles of women and men.

The functioning of state agencies in this sense is a blow to the very roots of violence against women and consequently the resulting femicides. Article 13 1 of the Convention, States undertake to propagate, or at all levels, public awareness campaigns or programs to raise public awareness of the various manifestations of all forms of violence against women, in cooperation with: state human rights institutions and equality bodies, civil society and non-governmental organizations, especially women, whenever necessary, with the aim of raising awareness and understanding of the general public. These are measures to educate the general public, and it should be borne in mind that frequent and detailed writing about violence and the presentation of violence scenarios does not necessarily have a beneficial effect on raising awareness, especially if it is a sensationalistic approach. Provisions of Article 51 of the Convention are of key importance precisely for the prevention of femicide because they provide for the State's obligation to take the necessary legislative or other measures and ensure that all relevant authorities undertake an assessment of the risk of mortality, seriousness of the situation and the risk of repetition of violence with a view to managing risk, and if necessary, provide coordinated protection and support (Article 51, paragraph 1).

#### **4. GENERAL AND SPECIAL PROTOCOLS<sup>4</sup> AS A POSSIBLE SOLUTION**

The Protocol on the treatment of health institutions is well conceived, and its employee behavior regulations are closest to the concept of *due diligence* from the Istanbul Convention. It remains doubtful whether a similar document exists regarding educational institutions, although a document titled "The Review of the treatment of educational institutions" has circulated. The Protocol on the conduct of the police has no date of adoption, so the question remains: is it really adopted? The Protocol on the conduct of the judiciary mostly contains allegations of procedural laws, which otherwise regulate the behavior of these bodies, similar to the Protocol on the Treatment of Centers for Social Work, which relies on the Family and some other, already existing laws.

But in spite to these formal defects, the texts of the protocol, although they do not contain explicit terms of due attention or full commitment, are in fact a well-conceived set of procedures for standardized institutional treatment. Their

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<sup>4</sup> General and special protocols regulate acting the staf in institutions, such as police, ceenters for social aids, courts, public prosecution offices, health insitutions, local self managements and other state factors and aghencies, mandated to deal with cases of reprts pof violence against women in familz and partners relationships.

consistent application to the institutions competent to deal with cases of violence against women in Serbia<sup>5</sup> would only facilitate work and give results in terms of more effective protection against violence, contributing to a more regular and equitable sanctioning of perpetrators of violence, which would in all cases represent the true application of due diligence in practice.

However, as reports from independent institutions warn<sup>6</sup>, protocols are not actually known, their implementation is missing, multisectoral coordinated cooperation has not come into practice in practice, nor has cooperation with civil society. Competent institutions continue with previous practice, employee training is rarely, campaigning, and sporadically, and where more frequent, for example, in Vojvodina, there is no data of existing the actual results in the form of improved practices, in line with protocols.

Gradually, the protocols remain unrecognized and not applied, so they increasingly go into oblivion, and independent institutions seem to give up reminders of the necessity of their application, accepting the reality that whoever wants to apply them - applies, and who does not, remains on it.

It happens that there is already a practice in Serbia, that an unapplied laws are replaced by others, which also have a great chance of not being applied, in the already created atmosphere of normative erosion.

This is precisely the challenges for application the due diligence, but also other provisions of the Istanbul Convention. At first, the protocols in the perennial period since adoption have not been adequately applied, and thus become an increasingly forgotten part of the past in time. The Law on the Prevention of Domestic Violence has caused great media and political attention of the public, as well as changes in the Criminal Code, but the results in more efficient treatment of institutions responsible for dealing with cases of violence against women are still hard to notice. Non-implemented protocols and still uncertainly applied new legal provisions for their part, significantly compromise the implementation of the Istanbul Convention. In practice, this international document becomes only one of many provisions which, despite the timely ratification, did not come to life.

It is possible that the key to the implementation of the Istanbul Convention lies precisely in the protocols, because, hypothetically, they are respected, and adequately and consistently applied, it would open the door and new legislation in recent years, and in this environment and due dignity would be real, life, practically applied institute in dealing with the relevant institutions in cases of violence against women.

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<sup>5</sup> The obligation to act in cases of domestic violence include: police, social welfare institutions and other providers of services in the social welfare system, health institutions and other forms of health service, institutions in the education and training system in cases when children are witnesses of violence, the public prosecutor's office, regular and misdemeanor courts.

<sup>6</sup> Special Report by the Protector of Citizens on the Application of the General and Special Protocols for the Protection of Women against Violence November 18, 2014.

## **5. CONCLUSION**

A complete change in discourse in terms of gender perspective and the achievement of a balanced level of equality between men and women means more than just formal fulfilling the obligations of the Istanbul Convention. This means that inclusion and empowerment of women is a precondition for the promotion and implementation of equality policies, but also for the implementation of other effective, comprehensive and coordinated national policies, which include all relevant measures to prevent and to combat all forms of violence covered by this Convention. It also means that the rights of victims are placed at the center of all measures and applied through the effective cooperation of all competent institutions of institutions and organizations, such as: state bodies, national, regional and local assemblies and administrations, state institutions for the protection of human rights and civil society organizations societies.

Elimination of violence must be a standard norm for human rights, and not something imposed by contractual international obligations. It is necessary to accept the situation that gender equality can be achieved only in a non-discriminatory environment in which there is an equal chance for all and in which sanctions are applied to every form of violence, above all the one against women. In order to achieve such equality, traditional patriarchal beliefs must be changed as well as the social context in which equality must be created as a real democratic imperative. Bearing in mind that changing attitudes and beliefs is the most salient aspect of any reform process, it can be safely said that it will take time to reach the level of society with zero tolerance of violence. But in the name of all victims of violence, it is necessary to persevere and, with the inevitable exclusion of defeatism, to dynamize in time the application of all the provisions of the Convention.

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