

Conferencia

La nueva regulación de la violencia de género en el ámbito europeo: el
Convenio de Estambul

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1. INTRODUCTION

The Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) was adopted on 12 April 2011 and entered into force on 1 August 2014. Spain was one of the first signatories and states parties, and a strong advocate in the negotiation process, drawing on its very progressive Ley Integral.

While this is a treaty negotiated and adopted within the Council of Europe, its values and antecedents are truly global.

2. SOURCES AND EXPERTISE UNDERPINNING THE ISTANBUL CONVENTION

The most profound basis in law is the requirement under customary international law to ensure an end to gender-based discrimination – first expressed in the United Nations Charter

Article 1(3) “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;” - and to end torture and ill-treatment under the UN International Covenant on Civil and Political Rights 1966, and the Convention against Torture in 1984.

The general recommendations, concluding observations and jurisprudence of the Committee on the Elimination of All Forms of Discrimination (“the CEDAW Committee”), General Assembly Resolutions on violence against women and criminal responses to violence against women, regional treaties on women’s rights from the Americas and Africa were all influential on the content, as was the UN Secretary-General’s in-depth report on violence against women of 2006 and twenty years of insights from three successive Special Rapporteurs on violence against women, its causes and consequences.

The treaty was negotiated by state representatives, some of whom were past and present members of the CEDAW Committee. Others were experienced members of feminist civil society, with in-depth practical knowledge of the demands of service provision to women escaping gender-based violence. Others were representatives of ministries of justice, ministries of equality, and ministries of foreign affairs.

There were also observers to the negotiation – the scientific experts, Christine Chinkin (international human rights law) and Renee Romkens (sociological approaches to violence against women) – and civil society organizations, including Women against Violence Europe, the European Women’s Lobby, and Amnesty International, which is the organization I was representing at the time.

The experience of this diverse group of drafters meant that the Istanbul Convention is a rich mixture of legal principle and practical detail on “what works” in terms of solutions for individual women subjected to violence, such as shelters, protection orders and helplines, and society-wide prevention, such as transformation of attitudes about women’s equality in society through education of children and young people.

3. THE ISTANBUL CONVENTION IS A FRAMEWORK FOR CHANGE: CONSISTENT AND COMPREHENSIVE POLICIES, AND MONITORING TO ENSURE SUCCESS IN PRACTICE

The Istanbul Convention deals with violence against women, including domestic violence, within a legal and policy framework of promoting women’s equality, according to CEDAW Convention Article 1 and the transformative commitment of the entire treaty.

Among its purposes is to contribute to “the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women.” (Article 1b). Its 65 substantive articles are based in a practical response to what we know about the practice of violence against women, and how to eradicate it.

The aim of the treaty is to eradicate gender-based violence against women, and all forms of domestic violence. Violence against women is recognized as being physical, psychological, sexual and economic. It can be carried out by state agents (ie police, armed forces) or non-state actors – ordinary citizens, such as abusive spouses, intimate partners, abusers in the family and the community. The Istanbul Convention establishes a legal and policy framework to ensure “victim-centred approach” and a “holistic response” for state-wide action which brings solutions for all women and girls affected by gender-based violence. The Istanbul Convention also mandates an international monitoring process, staffed by experts, to appraise the effectiveness of the state-wide action and to provide recommendations for improvements in regular reporting processes. Thus it is a catalyst for comprehensive success in supporting victims and eventually preventing all forms of violence against women.

The engine of the treaty is Chapter II – “Integrated policies and data collection” – each article requires something specific to address current failures in state approaches.

Article 7 requires comprehensive and coordinated policies on violence against women, based on the transformative promise of international human rights law – responding to piecemeal, fragmented, and inconsistent state action. Article 8 requires appropriate financial and human resources to address the task of preventing violence against women, and responding to the needs of individual victims - responding to current failures to provide the resources necessary to make a real difference. Article 9 requires that states recognize, encourage and support non-governmental organizations – which so often have the detailed practical knowledge of what survivors need, as mainly, non-governmental organizations are currently the first port of call for survivors. Article 10 requires states to establish or designate a nation-wide organization, to ensure consistency and comprehensiveness of approaches – currently, particularly in federal states, service-provision is inconsistent and criminal justice, medical, psychosocial and economic approaches are not coordinated, leading to a failure to support women and girls survivors appropriately. Finally, Article 11 requires states to establish data collection, to ensure a realistic appraisal of prevalence

and trends in the practice of violence against women and the needs of survivors state-wide. Such data is often incomplete currently. States are also required by Article 11 to undertake research into all forms of violence covered in the convention, in order to study root causes and effects, incidences and conviction rates, as well as the effectiveness of measures taken to implement solutions.

At the international level, there will be a monitoring process by a panel of experts to whom states must provide a report on the implementation of the Convention, known as the GREVIO committee. The GREVIO is empowered to govern its own procedures (article 68(4)), receive information from civil society (Article 68(5)) and international organizations (Article 68(8)) and make recommendations to states on how to improve their implementation of the Convention. Exceptionally, the GREVIO has powers to undertake urgent reports in order to prevent “serious, massive, or persistent” violations of the Convention (Article 68(13)), even with the power to undertake visits to countries (Article 68(14)).

There is a third, and most novel, engine for change - to require states parties to invite their parliaments to participate in the monitoring of the implementation of the convention (Article 70), which is apt and resonant given the huge numbers of women affected by gender-based violence. Addressing violence against women is a matter for democratic scrutiny as well as implementation of the rule of law.

There are 6 other sections in the Istanbul Convention which express in detail this core engine of the treaty.

- Prevention
- Support to victims
- Civil law solutions
- Integrated protective measures
- Criminal law solutions
- The right to seek asylum for gender-based persecution

I'll go through these briefly.

Prevention requires social change, through education of children, and awareness raising in society as a whole. The media is an important agent for change. Professionals who come into contact with women and girl victims – the police, lawyers, medical professionals, social service providers such as those working in housing – must be trained to give an effective professional service to victims.

Support to victims requires information on services and solutions to be made available. Basic service provision – for example, basic medical care for survivors – must be integrated with specialist referral services. Specialist services include shelters for those women and children escaping family violence, helplines with information on all forms of gender-based violence, and specialist support for child victims of gender-based violence, and children who have witnessed gender-based violence

Civil law solutions include access to legal aid, protective orders (including “go” orders to require an abusive partner to leave the shared home) and legal support for bringing lawsuits where the state has failed to protect victims who were known to be at risk – or where the state should have known they were at risk. (Articles 52-58). There are many cases in the international and regional human rights courts – for example, the CEDAW Committee and the European Court of Human Rights – where the state knew that women and their children were at risk of violence, but failed to take appropriate action to stop the perpetrator, and therefore serious harm, even murder, was the result.

The section on integrated protection measures is the most practical and revolutionary section – the state is required to ensure an immediate response to reports of violence against women, and give immediate and

adequate protection to victims (Article 50). This should include a risk assessment – including the risk of lethal harm, including whether the alleged perpetrators possess or have access to firearms. (Article 51). Article 31 requires that states parties “take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.” This deals with the common real risk of serious, sometimes fatal violence, that women, their children and families run when a violent former partner continues to have contact with children.

Another important intervention to protect women from harm is (Article 48) the prohibition of mandatory alternative dispute resolution. This reflects the reality that it is not possible to negotiate – the risk of violence and the inequalities between the two parties are too great – when one partner uses violence.

Through any civil or criminal proceedings, victims must be entitled to a variety of protection and assistance measures, for example, being able to give evidence from behind a screen or via video-link, to avoid being in contact with perpetrators, and access to information about the legal processes and where necessary, translators. (Article 56).

Criminal law solutions require that states adopt in their criminal law definitions of all forms of violence against women, including psychological violence (Article 33) stalking (Article 34) physical violence (Article 35) forced marriage (Article 37) Female Genital Mutilation (Article 38) forced abortion and sterilization (Article 39). There are a variety of

Two crimes are defined with great care in the convention, I propose that we look at these in detail:

Rape: The definition of rape draws on positive jurisprudence from the ad hoc International Criminal Tribunals and the European Court of Human Rights case of M.C. v Bulgaria (an ECHR case from 2003 which cites an International Criminal Tribunal for Former Yugoslavia case Prosecutor v. Kunarac from 2001). In the MC v Bulgaria case, a 14 year old girl – a child under international law – had been taken late at night to an isolated place, by three older men. In Kunarac, two women were kept as sexual slaves in a locked apartment, by two soldiers. In both cases, the court indicated that MC and the two women may have “submitted” to sexual contact but that this submission did not mean that the sexual contact was legal, in fact, where a situation is coercive . In both cases, the same quotation was used, which became Article 36(2)

“Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.” (Article 36(2))

In order to reflect the practice of defence lawyers in bringing forward evidence of the victims’ previous sexual history, the Istanbul Convention contains Article 54, which requires states to ensure that courts disregard prejudicial attacks on a victim’s credibility as a witness through the use of evidence of that person’s previous sexual history; it also requires the procedural laws which require that courts do not infer from previous sexual history evidence that a victim or witness is “predisposed to be sexually available.”

Sexual harassment: including street harassment, tends to be the “gateway crime” to more serious forms of violence as it is seen as freedom of expression, not as transgressive of law. Street harassment particularly inhibits women’s and girls’ freedom of movement, association and expression, and their rights to work and education.

Article 40

Parties shall take the necessary legislative or other measure to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a

person, in particular when creating an intimidating, hostile, degrading humiliating or offensive environment, is subject to criminal or other legal sanction.

Another aspect of traditional criminal legal systems also militate against women's and girls' equality before the law is the persistence of discriminatory defences to crimes, for example, that a perpetrator should enjoy a lighter sentence for killing a woman, if he can persuade the court that he killed her because it was "a crime of passion" or that she "provoked" him because, for example, she was unfaithful. These defences are allied with "honour" killings – that a woman's or girl's behaviour made her life less valuable.

Article 42 requires that states ensure that "culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour."

Finally, current international law on refugee rights is reflected, so that gender-based forms of persecution are recognized. The Convention also provides additional protection to migrant women. Sensitive to the problems faced by migrant women who are trapped in abusive relationships, the Istanbul Convention introduces a number of protection measures, including the option of granting them an autonomous residence permit, independent of that of their abusive spouse or partner.

4. CONCLUSIONS

To finish, I think there are a few aspects that will be catalysts for change, very quickly:

Article 8 – proper resourcing for initiatives to end violence against women

Article 11 – gathering of data and research

Article 14 – education of our young people, to behave with dignity and respect to all, irrespective of gender

Article 51 – a risk assessment to be carried out whenever there is a report of violence against women – this will save lives and also educate the police and other authorities about the realities of violence

This is a very fast overview of the Istanbul Convention. Thank you for your attention.