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EU and European Criminal Procedure

PROSECUTION OF DOMESTIC VIOLENCE AGAINST WOMEN – A PUBLIC OR PRIVATE MATTER?

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I. Introduction.

Under Article 3 (a) of the Convention on preventing and combating violence against women and domestic violence (hereinafter the Istanbul Convention) violence against women (VAW) is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. Article 3 (b) defines domestic violence (DV) as all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.

It is estimated that approximately 45 % of women in Europe have suffered DV. This means that in the European union (EU), with a total of 500 million inhabitants, about 100 million women are estimated to become victims of male violence in their lifetime. Crime statistics show that in the EU there are approximately 3500 DV-related deaths per year.

A clear estimation of the scale of the problem is complicated by the fact that DV is a fairly underreported crime. Surveys show that a mere 2 % to 20 % of women file complaints against the aggressor who is most commonly a husband or an intimate partner. There are numerous reasons for female victims of DV not to report the crime: cultural and social pressure; lack of financial resources to live independently; intimidation by the abuser or fear of retaliation; self-blame and embarrassment; wanting to protect the offender; negative expectations of the police and the justice system. What's more, the psychological impact of an abusive relationship may cause "domestic" Stockholm syndrome (a coping mechanism to endure continuous violence within the family) thus brainwashing the victim into believing that DV is normal. The United Nations Special Rapporteur on violence against women (SRVAW) has outlined in her reports that many women she spoke to during her missions revealed that they are often discouraged and intimidated by the authorities to file a complaint, or when a complaint is filed the law enforcement authorities and social services privilege mediation or "social solutions" over the application of sanctions. It appears that domestic violence against women (DVAW) is widely regarded as a private matter that is excluded from State's interference.

The purpose of this report is to examine the State's positive obligations to prevent, prosecute and punish all acts of DVAW by focusing on the second "P" that demands public

prosecution with due diligence contrary to the understanding that DVAW is a private matter that requires the victim to bring a private prosecution against the perpetrator.

II. Legal framework.

The standard of due diligence in the context of prosecution of DVAW has been adopted in a number of international legal instruments.

1. The United Nations (UN).

In 1979 the UN adopted the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which considered all forms of VAW as unlawful and reminded States that they are explicitly required to take measures against perpetrators. The Committee on the Elimination of Discrimination Against Women (the CEDAW Committee) has found that the general category of gender-based violence includes violence by "private act" and "family violence" as forms of discrimination. In General Recommendation No. 19 (1992) the CEDAW Committee has established that States may also be responsible for private acts if they fail to act with due diligence to prevent, investigate and punish acts of violence.

The 1993 UN Declaration on the Elimination of Violence against Women (DEVAW) urges States to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of VAW, whether those acts are perpetrated by the State or by private persons. This provision was reiterated in the Beijing Platform for Action at the UN Fourth World Conference on Women in 1995.

The UN Resolution 52/86 on Crime prevention and criminal justice measures to eliminate violence against women (1997) urges member States to review, evaluate and revise their criminal procedure, as appropriate, in order to ensure that the primary responsibility for initiating prosecutions lies with prosecution authorities and does not rest with women subjected to violence. The UN Resolution 2005/41 reaffirms that States have an obligation to exercise due diligence to prevent, investigate and punish the perpetrators of violence against women and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms.

2. The Organization of American States (OAS).

In 1994 the OAS concluded the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, known as the Belém do Pará Convention – the first regional multilateral human rights treaty to deal solely with VAW. The Convention asserts that

every woman has the right to be free from violence in both the public and private spheres and sets out States' duties to apply due diligence to prevent, investigate and impose penalties for VAW.

2. The Council of Europe (CE).

In its Recommendation Rec (2002)5 to member States on the protection of women against violence, the Committee of Ministers of the CE recognises that States have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the State or private persons. The Recommendation points out that member States should ensure that all victims of violence are able to institute proceedings, make provisions to ensure that criminal proceedings can be initiated by the public prosecutor, encourage prosecutors to regard VAW as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest.

The Istanbul Convention was adopted by the CE in May 2011 and came into force in August 2014. Article 5 ("State obligations and due diligence") proclaims that 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 the Convention that are perpetrated by non-State actors. Furthermore, Article 55, paragraph 1 provides that parties shall ensure that investigations into or prosecution of certain offences shall not be wholly dependent upon a report or complaint filed by a victim and that the proceedings may continue even if the victim withdraws her or his statement or complaint. Under Article 78 of the Convention any State or the EU may declare that it reserves the right not to apply or to apply only in specific cases or conditions the provisions laid down in Article 55, paragraph 1 regarding minor offences of physical violence.

3. The European Union (EU).

The political importance of the issue of DV has been underlined in the Declaration on Article 8 of the Treaty on the Functioning of the European Union which stipulates that in its general efforts to eliminate inequalities between women and men, the EU will combat all kinds of DV and as a means to this end member States should take all necessary measures to prevent and punish these criminal acts.

In its Resolution (12 September 2017) on the proposal for a Council decision on the conclusion, by the EU, of the Istanbul Convention, the European Parliament highlights that the Convention provides a sound basis for changing the social structures that create, legitimate and perpetuate VAW, and provides tools for the introduction of measures to that effect. It also stresses

that the Convention simultaneously addresses prevention, protection and prosecution (the three-tiered approach) and applies a comprehensive and coordinated approach, stemming from the principle of due diligence which establishes a positive obligation on States to respond effectively to all acts of violence. As of March 2019, all EU member States have signed the Convention and 21 (BE, DK, DE, EE, EL, ES, FR, HR, IE, IT, CY, LU, MT, NL, AT, PL, PT, RO, SI, FI, SE) have ratified it.

III. The clash of the due diligence standard and the public/private dichotomy.

On the basis of the practice and opinio juris outlined above, it can be concluded that there is a rule of customary international law that obliges States to respond with due diligence to acts of VAW whether those are committed in the public or private sphere. A fundamental principle in the application of the due diligence standard is that of non-discrimination, which implies that States are required to use the same level of commitment in relation to prosecution of DVAW as they do with regards to other forms of violence.

The aforementioned international legal instruments adopted the concept of due diligence as a yardstick to assess whether the State has met its positive obligations in combating VAW. The State's inaction and failure to investigate and prosecute acts of DVAW perpetrated by private actors are inconsistent with the State's obligation to be duly diligent. However, the application of the due diligence standard with respect to DVAW has tended to be State-centric, largely neglecting the obligation of the State to prosecute non-State actors. This approach is a result of a deeply embedded patriarchal notion that the State should not interfere in the private sphere.

One of the main obstacles in human rights law in the aspect of DVAW has been attributed namely to the role of the public/private dichotomy, that has left the hierarchical relations in the private sphere off limits to State intervention. As stated in the Preamble of the DEVAW, the universal phenomenon of VAW is the result of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men. The approach of non-intervention in the private sphere has been applied primarily with regard to the patriarchal hegemony in the family. The public/private codification has served as an ideological barrier to the development of the human rights discourse in many societies where the struggle for human rights seems to end at one's doorsteps. Even in societies where there is seemingly a high level of gender equality, violence occurring in the private sphere continues to be regarded as a matter undeserving of public policy attention.

IV. Case law on prosecution of DVAW with due diligence.

In case law DVAW is considered a human rights violation and a form of gender-based violence that triggers the State's obligation to prosecute with due diligence.

1. The Inter-American Human Rights System.

The duty of due diligence under international law has been applied in the context of human rights violations since the landmark case of Velasquez Rodriguez v. Honduras (1988). In this case the Inter-American Court of Human Rights holds that an illegal act which violates human rights and which is initially not directly imputable to a State because it is the act of a private person can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to respond to it. The Court strongly determines that the State must investigate, prosecute and punish acts of violence and that the omission to take action itself represents a violation of basic human rights.

In the case of Maria Da Penha v. Brazil (2001), the Inter-American Commission on Human Rights finds that the State has failed to exercise due diligence to respond to a DV case despite the clear evidence against the accused and the seriousness of the charges. The Commission states that tolerance by the State organs is not limited to this case, rather it is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors. It is the view of the Commission that the condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage VAW. That general and discriminatory judicial ineffectiveness creates a climate that is conducive to DV, since society sees no evidence of willingness by the State to take effective action to sanction such acts.

2. The European Court of Human Rights (ECHR).

In its case law on DV the ECHR (the Court) has found violations of Article 2 (right to life), Article 3 (prohibition of torture), Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights (the Convention).

2.1. The Court establishes the concept of due diligence in the case of Osman v. United Kingdom (no. 87/1997/871/1083, judgment of 28.10.1998) by introducing the so-called "Osman test". The Court refers to the primary duty of the State to secure the right to life by putting in place effective criminal-law provisions backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. In the opinion of the Court where there

is an allegation that the authorities have violated their positive obligation to protect the right to life, it must be established to its satisfaction 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 non-State actor and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

2.2. In the case of Kontrová v. Slovakia (no. 7510/04, judgment of 31.05.2007), the applicant filed a criminal complaint against her abusive husband along with a medical report indicating that the injuries he had caused her would incapacitate her from work for up to seven days. Later the applicant and her husband sought to withdraw her complaint and a police officer advised them that, in order to avoid prosecution, they would have to produce a medical report showing that the applicant had not been incapacitated from work for more than six days. After producing such a report, the police officer decided that the above matter was to be dealt with under the Minor Offences Act and called for no further action. Later the applicant and a relative of hers reported to the police that her husband had a shotgun and was threatening to kill himself and the children. The applicant went to the police station to enquire about her criminal complaint just before her husband shot their two children and himself dead.

The Court holds that, contrary to the State's obligations, which included, *inter alia*, accepting and duly registering the applicant's criminal complaint, launching a criminal investigation and commencing criminal proceedings against the applicant's husband immediately, the police officer assisted the applicant and her husband in modifying her criminal complaint in order to avoid prosecution, which resulted in a violation of Article 2 of the Convention.

2.3. In the case of Bevacqua and S. v. Bulgaria (no. 71127/01, judgment of 12.06.2008), the applicant was battered by her aggressive husband who had caused bruises on her body. Her request for a public prosecution was rejected on the grounds that it was a "private matter" requiring a private prosecution.

The Court notes that, without overlooking the vulnerability of the victims in many cases of DV, in this particular case it does not accept the applicants' argument that her Convention rights could only be secured if the perpetrator was prosecuted by the State and that the Convention required State-assisted prosecution, as opposed to prosecution by the victim, in all cases of DV. However, the Court considers that the possibility for the applicant to bring private prosecution proceedings was not sufficient. The Court holds that the authorities' view that the dispute

concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' rights under Article 8 of the Convention.

2.4. In the pilot case of Opuz v. Turkey (no. 33401/02, judgment of 09.06.2009), the applicant and her mother were threatened and assaulted over many years by the applicant's husband, leaving both women with life-threatening injuries. On each occasion (except for one) no prosecution was brought against the perpetrator on the grounds that both women had withdrawn their complaints, despite the given explanation that the aggressor had harassed them into doing so, threatening to kill them. The perpetrator subsequently stabbed his wife seven times and was given a fine equivalent to about 385 euros, payable in instalments. Eventually, the aggressor shot dead his mother-in-law, arguing that his honor had been at stake.

The Court considers that a crucial question is whether the local authorities displayed due diligence to pursue criminal proceedings against the aggressor despite the withdrawal of the victims' complaints. The Court observes that there are certain factors that can be taken into account in deciding whether to pursue the prosecution: the seriousness of the offence; whether the victim's injuries are physical or psychological; if the defendant used a weapon; if the defendant has made any threats since the attack; if the defendant planned the attack; the effect (including psychological) on any children living in the household; the chances of the defendant offending again; the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved; the current state of the victim's relationship with the defendant and the effect on that relationship of continuing with the prosecution against the victim's wishes; the history of the relationship, particularly if there had been any other violence in the past; and the defendant's criminal history, particularly any previous violence. It is inferred that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints. In the Court's opinion, the local authorities have not considered the above factors when repeatedly deciding to discontinue the criminal proceedings against the aggressor. Instead, they seem to have given exclusive weight to the need to refrain from interfering with what they perceived to be a "family matter". Moreover, the authorities have not considered the motives behind the withdrawal of the complaints despite the clear indication that both women had been pressured and threatened to do so by the perpetrator.

In light of the Government's argument that any attempt by the authorities to separate the applicant and her husband and convict the latter while they were living together as a family would

have amounted to a breach of their right to family life, the Court reiterates that, in some instances, the national authorities' interference with the private or family life of the individuals might be necessary in order to protect the rights of others or to prevent commission of criminal acts.

The Court regrets to note that the criminal prosecution in the instant case was strictly dependent on the pursuance of complaints by the applicant and her mother in accordance with the domestic law that was in force at the relevant time, which prevented the prosecuting authorities from pursuing the criminal investigations because the criminal acts in question had not resulted in sickness or unfitness for work for ten days or more. It observes that the application of the above-mentioned provisions and the cumulative failure of the domestic authorities to pursue criminal proceedings against the aggressor deprived the applicant's mother of the protection of her life and safety. In other words, the legislative framework then in force, particularly the minimum ten days' sickness unfitness requirement, fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of DV and providing sufficient safeguards for the victims. The Court thus considers that, the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims' withdrawal of complaints. The Court reiterates in this connection that, once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures.

The Court also observes that the violence suffered by the applicant, in the form of physical injuries and psychological pressure, was sufficiently serious to amount to ill-treatment within the meaning of Article 3 of the Convention. Given the opaque nature of DV and the particular vulnerability of women who are too often frightened to report such violence, a heightened degree of vigilance is required of the State. The Court reiterates its opinion that the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against the aggressor despite the withdrawal of complaints by the applicant on the basis that the violence committed by him was sufficiently serious to warrant prosecution.

Furthermore, the applicant alleged that the domestic law of the respondent State was discriminatory and insufficient to protect women, since a woman's life was treated as inferior in the name of family unity, and drew the Court's attention to the improbability of any men being a victim of similar violations. The Court notes on a research, conducted by a non-governmental organisation, which indicates that when victims report DV, police officers, by considering the

problem as a "family matter with which they cannot interfere", do not investigate such complaints but seek to assume the role of mediator by trying to convince the victims to return home to "make peace" and drop their complaint. It thus appears that the alleged discrimination at issue was not based on the legislation *per se* but rather resulted from the general attitude of the local authorities towards DVAW. Bearing in mind that the general and discriminatory judicial passivity in Turkey mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. The Court holds that the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address DV.

The Court stresses that the issue of DV cannot be confined to the circumstances of the present case because it is a general problem which concerns all member States and does not always surface since it often takes place within personal relationships or closed circuits.

2.5. In the case of Eremia v. the Republic of Moldova (no. 3564/11, judgment of 28.05.2013), the applicant was continuously abused by her husband who was a police officer and felt immune to any State action. The applicant was called to the police station and pressured to withdraw her complaint. Her lawyer's complaint about that was left with no answer. The Social Assistance and Family Protection Department had suggested reconciliation since the applicant was anyway "not the first nor the last woman to be beaten up by her husband".

The Court considers that the assaults were repeatedly committed in the privacy of home thus preventing any outside help. Bearing in mind that the risk to the applicant's physical well-being was imminent and serious, the Court considers that it is unclear how the prosecutor could find that the aggressor had committed a "less serious offence" and "did not represent a danger to society" in order to suspend criminal proceedings, which had the effect of shielding him from criminal liability rather than deterring him from committing further violence, resulting in his virtual impunity. In view of the authorities' failure to take action to ensure the punishment of the aggressor, the Court concludes that the State has promoted further violence. Sadly, those findings of the Court are further reiterated in the cases of Mudric v. Moldova (no. 74839/10, judgment of 16.06.2013), N.A. v. the Republic of Moldova (no. 13424/06, judgment of 24.09.2013), T.M. and C.M. v. Moldova (no. 26608/11, judgment of 28.01.2014).

2.6. In the case of Valiulienė v. Lithuania (no. 33234/07, judgment of 26.03.2013), the applicant's partner was charged with systematically causing her minor bodily harm. The investigator had noted that in the one-month period during which the violence had allegedly taken place, the police had only been called to the apartment twice to sort out "family quarrels". After many procedural and investigative flaws, the public prosecutor discontinued the investigation due to a legislative reform which introduced that prosecutions in respect of minor bodily harm had to be brought by the victim privately unless the case was of public interest or the victim was unable to protect his/her interests. The prosecutor returned the case to the applicant for private prosecution two years after the legislative reform despite the risk of the prosecution becoming time-barred and despite the fact that, even after the reform, it was still possible for the public prosecutor to pursue the investigation if it was in the public interest, that is to say, the prosecutor did not consider the crime to be of "public importance". Without delay the applicant lodged a new request for a private prosecution but it was dismissed as the prosecution had become time-barred thus leaving the perpetrator unpunished.

Even though the Court was satisfied with Lithuanian law which provided a sufficient regulatory framework, it concludes that the manner in which the criminal-law mechanisms were implemented, violated the victim's right under Article 3 of the Convention.

In his Concurring opinion judge Pinto de Albuquerque further notes that a more rigorous standard of diligence is especially necessary in certain societies, which are faced with a serious, long-lasting and widespread problem of DV. He considers that the emerging due diligence standard in DV cases is stricter than the classical Osman test, in as much as the duty to act arises for public authorities when the risk is already present, although not imminent. Judge Pinto de Albuquerque also outlines the international legal preference for a public prosecutable offence contrary to the requirement of a victim to act as a private prosecutor, which reflects the misconception of violence between members of a family/intimate relationship as "private business", that is not compatible with the positive obligation to protect.

2.7. In the case of Durmaz v. Turkey (no. 3621/07, judgment of 13.11.2014), the prosecutor had accepted from the outset that G. O. had committed suicide by taking an overdose of medicines, as stated by her husband, and never conducted an investigation into the allegations brought by the mother of the deceased, who claimed that O. O. had beaten up his wife before, hospitalising her twice, but after apologizing he had persuaded her to change her mind by promising that he wouldn't

be violent towards her again. The applicant alleged that the real problem in the present case was the national authorities' continuing tolerance towards DVAW, which was a systemic problem in Turkey, and that the national authorities would have complied with their procedural obligation and carried out an effective investigation had her case not involved the issue of DV.

The Court considers that the prosecutor's failure is part of a pattern of judicial passivity to allegations of DV, referring to the Court's findings in the Opuz v. Turkey case.

2.8. In the case of Halime Kılıç v. Turkey (no. 63034/11, judgment of 28.06.2016), the applicant claimed that, despite having lodged four complaints, her daughter was killed by her husband, who had not been arrested merely because it was a case of DV. The Court finds that in turning a blind eye to the repeated acts of violence and death threats against the victim, the authorities had created a climate that was conducive to DV. In the Court's view, the impunity afforded to the aggressor reflected the national authorities' wilful denial regarding the seriousness of the incidents of DV and the particular vulnerability of the victims. The Court regrets to consider that the findings it had reached in the Opuz v. Turkey judgment remained valid in the circumstances of the present case.

2.9. In the case of Talpis v. Italy (no. 41237/14, judgment of 21.03.2017), the applicant lodged a complaint against her abusive husband. In seven months when she was first summoned for questioning, she altered her original statements because of the psychological pressure exerted by her husband, and the prosecution requested that the case be discontinued. Eventually, the aggressor murdered his son and attempted to murder his wife.

The Court considers that, by failing to act rapidly after the applicant had lodged her complaint, the national authorities deprived the complaint of any effectiveness, creating a situation of impunity conducive to the recurrence of the aggressor's acts of violence. The Court again emphasises that special diligence is required in dealing with DV cases and considers that the specific nature of DV as recognised in the Preamble to the Istanbul Convention must be taken into account in the context of domestic proceedings. The Court considers that the authorities' actions were not a simple failure or delay in dealing with the violence in question, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the complainant as a woman. The Court concludes that a large number of women are murdered by their partners or former partners (femicide) and that the socio-cultural attitudes of tolerance of DV persist.

2.10. In the case of Balsan v. Romania (no. 49645/09, judgment of 23.05.2017), the applicant's husband had assaulted her on several occasions causing her injuries that require a maximum of ten days medical care. The authorities considered the acts of DV as being provoked and regarded them as not being serious enough to fall within the scope of the criminal law so they imposed an administrative fine of about 50 euros on the perpetrator.

The Court stresses on the State's (procedural) obligation to conduct effective official investigation where an individual raises an arguable claim of ill-treatment and notes with concern that the authorities did not fully appreciate the seriousness and extent of the problem of DV in Romania and that their actions reflected a discriminatory treatment.

3. The Court of Justice of the European Union (CJEU).

In its judgment on the joined cases Magette Gueye and Valentin Salmeron Sanchez (C-483/09 and C-1/10), the CJEU (the Court) holds that in DV law-enforcement the objective is not only to protect the interests of the victim as he or she perceives them but also other more general interests of society. The Court thus concludes that the mandatory imposition of an injunction to stay away for a minimum period, provided for as an ancillary penalty by the criminal law of a member State, on persons who commit crimes of violence within the family, even when the victims of those crimes oppose the application of such a penalty, is admissible. The Court further acknowledges that member States are permitted to exclude recourse to mediation in all criminal proceedings relating particular category of offences committed within the family.

V. Prosecution of DVAW under domestic law.

1. Comparative law.

Over the years, a number of countries have acknowledged that DV is a public matter. This process has reached different stages throughout Europe resulting in various legislative solutions.

As a significant number of legal systems make a distinction between crimes which are privately prosecutable (and for which the victim's complaint is a prerequisite) and those which are publicly prosecutable (usually more serious offences for which prosecution is considered to be in the public interest), DV is prosecuted either ex officio or upon a private complaint. There is actually a third option which serves as a compromise between the public and private interests that stand behind DV. For example, the Czech Criminal Procedure Code provides that criminal prosecution of bodily harm within the family may be initiated or continued only with the consent of the aggrieved person (section 163). However, consent is not required, if the circumstances clearly show

that the consent was not given or was withdrawn in distress caused by threats, coercion, dependence or subordination (section 163a). The Romanian Criminal Code provides that in cases of battery and other acts of violence committed against a family member a criminal action may be initiated not only on a prior complaint filed by the victim but also ex officio (Article 199). However, in 2018 a Romanian NGO (APADOR-CH) noted that ex officio proceedings are actually initiated in exceptional cases and only in relation to situations where 90 days of medical care are needed (in practice, most physically assaulted women receive about 8-10 days of medical care).

In some countries DV is criminalized as a separate offence, while in other countries it serves as an aggravating factor to other offences such as battery, threatening, stalking, rape. For example, in Croatia the 2011 Criminal Code abolished the separate criminal offence of DV and provided that violence within the family constituted an aggravating form of a number of other offences, subjecting them to public prosecution (for example bodily harm under Article 117 that is generally subject to private prosecution). In 2015 DV was reintroduced as a separate offence in Article 179a because the solution under the 2011 Criminal Code was incapable of addressing all the forms of DV occurring in practice.

In the case of Opuz v. Turkey (no. 33401/02, judgment of 09.06.2009), the ECHR concludes that there is no general consensus among States Parties regarding the pursuance of the criminal prosecution against perpetrators of DV when the victim withdraws her complaints. The Court observes that: 1) in eleven member States of the Council of Europe (Albania, Austria, Bosnia and Herzegovina, Estonia, Greece, Italy, Poland, Portugal, San Marino, Spain and Switzerland) the authorities are required to continue criminal proceedings despite the victim's withdrawal of complaint; 2) in twenty-seven member States (Andorra, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, England and Wales, Finland, "the former Yugoslav Republic of Macedonia", France, Georgia, Germany, Hungary, Ireland, Latvia, Luxembourg, Malta, Moldova, the Netherlands, the Russian Federation, Serbia, Slovakia, Sweden, Turkey and Ukraine) the decision on whether to proceed where the victim withdraws his/her complaint lies within the discretion of the prosecuting authorities, which primarily take into account the public interest in continuing criminal proceedings. In some jurisdictions, such as England and Wales, in deciding whether to pursue criminal proceedings against the perpetrators of DV the prosecuting authorities (Crown Prosecution Service) are required to consider certain factors; 3) Romania seems

to be the only State which bases the continuance of criminal proceedings entirely, and in all circumstances, on the wishes/complaints of the victim.

In 2013 Hungarian Criminal Code (section 212A) provided that DV shall be prosecuted upon private motion insofar as the act did not result in a more serious criminal offense – such as simple battery (which takes less than eight days to heal) that is generally prosecuted upon private motion unless inflicted within the family. A private motion may not be withdrawn (section 31).

Furthermore, there is a different approach to mediation/reconciliation in terms of terminating criminal proceedings in cases of DV. Under the Romanian Criminal Code reconciliation eliminates criminal liability even if the criminal action is initiated ex officio. In Greece all forms of DV are prosecuted ex officio but prosecutors tend to refer DV misdemeanours to a procedure of reconciliation that eliminates the offence. Switzerland has moved away from an emphasis on mediation in DV cases. Spanish law prohibits mediation in all cases of offences committed within the family.

In light of the ongoing social and legal process of acknowledging DV as a public matter, it came as a surprise when in 2017 Russia decriminalised DV that is committed not more than once a year and does not cause serious injury requiring hospitalization. This is now an administrative offense punishable with 15 days in prison or a fine of 30,000 roubles (£380). The lawmaker had stated that the aim of the amendment was to limit "State meddling" in the family and to protect "family values" adding that "a man beating his wife is less offensive than when a woman humiliates a man". It's been revealed that Russian women who have been victimized are often forced to pay the fines handed down to their abusive husbands, because the funds come from a shared bank account.

2. Bulgarian domestic law.

2.1. Bulgarian law until February 26, 2019: a legal and critical overview.

Since 1982 Article 161 of the Bulgarian Criminal Code (BCC) has provided that for average bodily harm willfully inflicted on an ascendant, descendant, spouse, brother or sister, criminal proceedings should be instituted upon a complaint of the aggrieved person. Under Article 129 of the BCC the injury shall be considered average if it has caused: permanent weakening of the sight or hearing; permanent speech difficulty or difficulty of limb, body or neck movement; disfunctions of the genitals without causing generative disability; braking of jaw or knocking out teeth thus impeding chewing or speech; disfiguring of the face or other body parts; permanent non-

lifethreatening health disorder or health disorder that is temporarily lifethreatening; injuries penetrating the skull, chest and abdominal cavity. In other words, domestic law considers injuries with long-lasting repercussions inflicted within the family as a "private character crime". In comparison, average bodily harm inflicted on an intimate partner (with whom the perpetrator is in a de facto marital cohabitation) or even a stranger is a "public character crime" that is prosecuted by the State. On the other hand, light bodily injury (such as bruises, a broken nose without breathing impediment, head contusions without loss of consciousness) inflicted on any person (except for an official, a military or a person under international protection) is a "private character crime".

"Private character crimes" are prosecuted only if the victim lodges a written complaint within a period of six months following the crime. In addition, the victim must pay a tax with regard to the admissibility of the complaint. The private complainant bears the burden of proof but cannot testify as a witness. Furthermore, criminal proceedings shall be discontinued if the victim fails to appear when summoned, withdraws the complaint or reconciliates with the aggressor. If the perpetrator is found guilty the penalty shall not be executed if the victim has so requested before the beginning of its fulfilment.

Under Article 49 of the Bulgarian Criminal Procedure Code (BCPC) in exceptional cases of crimes prosecuted on a private complaint by the victim, where the latter cannot defend his or her rights due to a state of helplessness or dependency upon the perpetrator of the crime, within a period of six months following the crime the prosecutor may institute ex officio criminal proceedings that follow the general procedure and cannot be terminated upon request by the victim. Sadly, an overview of domestic case law shows that this special prosecuting mechanism is non-applicable with regard to DVAW.

The shortcomings of Bulgarian law in terms of prosecuting DVAW have been outlined on several occasions. In 1996, the Minnesota Advocates for Human Rights conducted a research on DV in Bulgaria and concluded that the law exempts from State prosecution certain types of assault if committed by a family member, although the State prosecutes the same act if committed by a stranger; the State does not assist in prosecuting crimes of domestic assault unless the woman has been killed or permanently injured; even when the woman is permanently injured, the State does not always prosecute. The SRVAW notes in her report on Bulgaria (2003) that when DV between spouses results in light or average bodily harm the victims have the right to initiate a private suit but they seldom exercise this right because they face additional difficulties. In the case of Bevacqua

and S. v. Bulgaria (no. 71127/01, judgment of 12.06.2008), the ECHR observes that the relevant Bulgarian law, according to which many acts of serious violence between family members cannot be prosecuted without the active involvement of the victim, may be found, in certain circumstances, to raise an issue of compatibility with the Convention. Due to concern over the low number of cases of DV that are actually brought to justice and sanctioned in Bulgaria, in 2011 the Human Rights Committee recommended the State to: encourage the victims to report the cases to the relevant authorities; make thorough analysis on the reasons why such cases are rarely reported; secure criminal investigation, prosecution and sanction of all cases of DV. In the case of V. K. v. Bulgaria (2011) the CEDAW Committee concludes that Bulgarian courts have a traditional stereotyped concept of the DV and that they interpret DV as a private matter falling within the private sphere, which should not be subject to state control. In its observations on Bulgaria (2012) the CEDAW Committee reiterates its serious concern about the persistence of sociocultural attitudes condoning DV, its underreporting and the lack of criminal prosecution of violence within the family thus urging Bulgaria to amend domestic law in order to introduce ex officio prosecution.

2.2. Bulgaria's constitutional troubles with the Istanbul Convention.

In 2016 Bulgaria signed the Istanbul Convention thus showing eagerness to embrace the idea of public prosecution of all forms of DV (see Articles 5, 55 and 78 of the Convention cited above). However, conservative members of Bulgarian society did not perceive the actual idea behind the Convention but rather saw it as a tool for introducing the "third sex" and legalizing same-sex marriages. Those concerns induced a debate of epic proportions which resulted in a Ruling of the Bulgarian Constitutional Court (27.07.2018). The majority (8 out of 12 judges) ruled that the Convention contradicted Bulgaria's Constitution thus precluding the possibility for its ratification. The arguments that the majority put forward can roughly be divided into two clusters, which are related and intertwined throughout the decision: 1) the Convention is self-contradictory and has a broader scope than its title suggests, which can compromise the rule of law in Bulgaria; 2) Articles 3(c) of the Convention which defines the term "gender" is not compatible with Bulgaria's Constitution that is built on the understanding of the binary existence of human species. One may indeed question if the majority were not influenced by public opinion or even by their personal values since a stereotypical view of the role of women seem to show through the legal reasoning. In fact, the Executive Secretary of the Istanbul Convention at the Council of Europe, who was palpably concerned about the direction of debate in countries like Bulgaria, had

previously underscored that the Convention distinguished between "sex" and "gender" for the sake of clarity as "gender" referred to expected roles for women and men – and how too often these roles are defined by outdated stereotypes that can make VAW, intimidation and fear more "acceptable". The four constitutional judges who dissented actually alluded that there may be non-legal factors which motivated the ruling, including political campaigns and the loud public uproar by some conservative groups. They expressed outrage of the fact that due to unconvincing legal reasoning Bulgarian women remain deprived of protection that they urgently need.

2.3. Bulgarian law after February 26, 2019: a legal and critical overview.

As a form of social and legal compromise for not ratifying the Istanbul Convention, the Bulgarian National Assembly looked into the matter of DV and introduced amendments in BCC which came into force on February 26, 2019. The newly amended Article 161 of BCC now provides that average bodily harm inflicted willfully on an ascendant, descendant, spouse, brother or sister shall be prosecuted as a "private-public character crime" which means that criminal proceedings shall be instituted upon a complaint of the aggrieved person addressed to the public prosecutor and cannot be terminated upon a request by the victim. This legislative move may be applauded with regard to the introduction of non-termination upon withdrawal of the private complaint by the victim who is often pressured to do so by the perpetrator. However, the requirement of lodging a private prosecution remains a "conditio sine qua non" for initiating criminal proceedings. The idea of public prosecution of average bodily harm inflicted on a spouse was actually part of a project for amending BCC (submitted on October 24, 2018) that was disregarded by the Bulgarian legislative body.

DV was not recognized as a separate crime but as an aggravating factor to several general offences – homicide, bodily harm, kidnapping, compulsion, death threat, stalking. Thus infliction of bodily harm, no matter light, average or severe, was introduced in Article 131 of BCC as a "public character crime" if committed "in conditions of domestic violence" which was defined as preceded by systematic physical, sexual or psychological violence, placing the person in economic dependence, coercive restriction of personal life, personal liberty and personal rights, and enforced against persons in ascending and descending order, a spouse or ex-spouse, a person with whom one shares a child, a person with whom one is or has been in a de facto marital cohabitation, or a person with whom one lives or has lived in a common household. It should be noted that the State shall prosecute only if the perpetrator has adopted a "systematic" approach towards the victim by

committing the offence “at least three times”. If not committed systematically, DV is considered: 1) a “private character crime” when resulting in a light bodily injury; 2) a “private-public character crime” when resulting in a medium bodily injury; 3) a “public character crime” when resulting in a severe bodily injury.

On February 24, 2019 (two days before the aforementioned amendments came into force) another woman was fiercely beaten to death by her husband at their home just before their divorce trial. So far, the investigation has shown that in the last few years the victim had occasionally reported the ongoing DV to the police but the authorities had only warned the perpetrator of the criminal liability he may bear. On each occasion the victim reported back to the police that she and her husband had reconciled.

Despite the legislative efforts to recognize DV as a public matter, the amended provision of Article 161 of the BCC did not introduce average bodily harm inflicted within the family as a “public character crime” that is prosecuted by the State. As a result, the victims of such a serious form of DV are still required to initiate criminal proceedings against the aggressor despite the fact that they are often too vulnerable to do so. Thus, Bulgarian domestic law diminishes the importance of the problem and sustains the deeply embedded understanding that DVAW is a private matter that is excluded from State involvement. In Bulgaria the problem of DVAW remains hidden behind the intimacy of the private sphere and the patriarchal notion that family integrity should be protected at all costs. When committed in the privacy of home VAW is more often tolerated than prosecuted as a crime thus giving perpetrators a greater sense of impunity. Amongst authorities and society DVAW is still widely regarded as a trivial, family matter, that does not warrant public prosecution. This misconception is a product of stereotyped beliefs combined with a narrow interpretation and application of human rights law. It may be concluded that Bulgaria has violated its positive obligations under international law to prosecute DVAW with due diligence.

VI. Conclusion.

DVAW poses a serious threat, not only to the individual victim, but also to society at large, and constitutes a violation of the public interest that stand behind the idea of a public prosecution. The State has the potential and the obligation to disempower patriarchal notions, no matter how deeply embedded they are, by sending an unequivocal message that DVAW is a crime that shall be prosecuted with due diligence. The legal and social condemnation of DVAW as a public matter is a big step towards the ultimate goal of a world free of violence.

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