

ევროკავშირი
საქართველოსთვის
The European Union for Georgia



ევროპის საბჭო

“Supporting the criminal justice reforms – tackling criminal aspects of the judicial reform”

Review of the Criminal and Criminal Procedure Codes in the light of Gender equality

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September 2020

This document has been produced as part of a project co-funded by the European Union and the Council of Europe. The views expressed herein can in no way be taken to reflect the official opinion of either party.

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I. Introduction

Over the past few years, Georgia has made considerable advances in criminal justice reform to address issues related to violence against women and domestic violence, bringing its legislation increasingly into conformance with its commitments under the Convention on the Elimination of All Forms of Violence against Women (CEDAW) and the Council of Europe (CoE) Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). In 2017, it adopted a series of amendments, including, *inter alia*: adopting definitions of violence against women and stalking, criminalizing forced sterilization and female circumcision, providing for temporary residency for foreign women who are victims of violence, ensuring that victims of violence are notified prior to the release from custody of the perpetrator, and expanding the list of aggravating circumstances related to gender-based violence.

The package of legislative reforms combined with the creation of a strengthened institutional framework on gender equality, including the creation of trained specialised units within the criminal justice system, model good practice and will continue to serve as the basis for ongoing refinement to ensure women's access to justice, particularly in relation to the crimes that disproportionately affect them. At the same time, the international legal framework and understandings of best practice continue to evolve, requiring adjustments and updates in thinking and practice everywhere.

This report identifies provisions in the Criminal and Criminal Procedure Codes that may have a discriminatory impact of women. It draws on standards as set forth in the CEDAW, the Istanbul Convention, the case law of the European Court of Human Rights (ECtHR), the new ILO Convention (C190) on Violence and Harassment, among others. It complements the *Review of the Compatibility with European Standards of Georgia's Criminal Procedure Code and Related Legislative Provisions* (CPC Review).

Georgia's legislative framework with respect to gender equality and violence against women is quite robust and has become an international good-practice model. Questions remain regarding the application and interplay of diverse provisions in practice. For example, there are a range of provisions that could be applied to cases of intimate and domestic partner violence, such as the crimes related to varying levels of bodily injury, and Articles 11¹, 53¹⁽²⁾, 126¹ and Article 144³.

Yet, despite these advances, the Criminal and Criminal Procedure Codes contain a few significant gaps.

II. Criminal Code

A. Sexual violence

Crimes involving sexual self-determination do not yet meet international standards. These include rape (Article 137) and other forms of sexual violence (Articles 138, 139). The Criminal Code defines these crimes by the threat or use of force, or the helplessness of the victim, in violation of international standards.

Article 36 of the Istanbul Convention requires that these crimes be based exclusively on the absence of the consent of the victim. It defines rape as: “engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object”.¹ It further qualifies that consent “must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances”.² This approach has been adopted by the Rome Statute, the international *ad hoc* Tribunals for the Former Yugoslavia and Rwanda, the ECtHR and the CEDAW Committee.³ The CEDAW Committee stressed in the *Vertido v. Philippines* case: “there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence”.⁴

The UN Handbook on Legislation on Violence against Women recommends that national legislation require demonstration of “unequivocal and voluntary agreement” through proof by the accused of steps taken to ascertain whether the victim was consenting. The legislation should also foresee the possibility of the crime taking place under “coercive circumstances,” and contemplate a broad range of such coercive circumstances.⁵

Rape and sexual violence committed by use of force should rather constitute an aggravating circumstance. The current Criminal Code establishes an aggravating circumstance for rape causing physical or mental harm. Emphasis should be placed on the use of violence, rather than on the harm sustained by the victim. **The Criminal Code should thus be amended to ensure that the crimes of rape and sexual violence rest on the constituent element of consent, and establish aggravating circumstances for rape and sexual assault committed through the use of force, not based on the harm occasioned by the victim. Articles 137, 138 and 139 should be amended in light of international standards.**

Marital rape is not specifically criminalised, nor included as an aggravating circumstance.

¹ Article 36(1)(a), Istanbul Convention.

² Article 36(2), Istanbul Convention. See also, See, *Report of the Public Defender of Georgia: On the Situation of Protection of Human Rights and Freedoms in Georgia, 2019*, recommending, *inter alia*, to remove violence from the definition of rape Article 137 of the Criminal Code of Georgia, and to define violence as an aggravating circumstance in the mentioned article.

³ See, ECtHR, *M.C. v. Bulgaria*, Appl. No. 39272/98, 2003, para. 166 finding that the positive obligations under Articles 3 (prohibiting torture, inhuman and degrading treatment) and 8 (the right to respect for private life) of the ECHR required “the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim”; *Vertido v. The Philippines*, Communication No. 18/2008, CEDAW, 1 September 2010, paras 8.5, 8.9, (finding violations of Article 2 (c) and (f), and Article 5 (a) read in conjunction with Article 1 of the CEDAW and General Recommendation No. 19 of the Committee). Recommendation Rec5(2002) also requires States to “penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance”. Council of Europe’s Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence, 30 April 2002, Appendix, Article 35.

⁴ *Vertido v. The Philippines*, Communication No. 18/2008, CEDAW, 2010, paras 8.5, 8.9.

⁵ UN Handbook on Legislation on Violence against Women, p. 26.

It cannot be sufficiently emphasised that in cases of sexual violence resulting in pregnancy, requiring a judicial determination of rape in order to obtain an abortion constitutes a severe violation of the sexual and reproductive health and rights of the victim.⁶

B. Femicide

UN treaty bodies and special mandate holders have recognised femicide to be an issue of concern in Georgia.⁷ At present, it appears that incidents of intentional homicide can be qualified as a gender-bias motivated crime in cases of femicide. Alternatively, **a separate crime of femicide could be established within the Criminal Code with proportionate sanctions.**

C. Provocation

Articles 111 and 121, contemplating intentional murder and grave and less grave bodily injury committed under the influence of sudden and extreme excitement, constitute so-called “provocation” for the purpose of attenuating sentencing. Specifically, they justify crimes based on the transgression of the victim.

Article 42(1) of the Istanbul Convention provides:

Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, 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.

Specifically, the language “grave insult, or any other grave immoral act committed by the victim against the offender or his/her close relative” are vague and only have meaning with specific cultural, customary, religious or traditional practices. As the Explanatory Report clarifies, despite its focus on “honour” and other traditional cultural norms, “the drafters intended to ensure that crimes committed to punish a victim for her or his behaviour are not justified”.⁸

Generally, laws on provocation tend to privilege men who kill or harm their intimate partners out of anger, jealousy, a need for control or following the breakdown of a relationship. Many jurisdictions, including New Zealand, Australia and many states in the

⁶ The Public Defender recommends an amendment to provide that the initiation of criminal investigation suffice to finance and terminate the pregnancy. See, *Report of the Public Defender of Georgia: On the Situation of Protection of Human Rights and Freedoms in Georgia*, 2019.

⁷ A/HRC/32/42/Add.3, paras 19, 20, Mission to Georgia 15 to 19 February 2016, citing, CEDAW/C/GEO/CO/4-5, <http://www.ombudsman.ge/uploads/other/3/3389.pdf>, and data from the Chief Prosecutor’s Office; CEDAW, Concluding observations on the combined fourth and fifth periodic reports of Georgia, CEDAW/C/GEO/CO/4-5, 24 July 2014, para 21(a).

⁸ Explanatory Report to the Istanbul Convention, para 216.

U.S., consider "heat of passion" or "provocation" defences as inherently discriminatory and have abolished them.

"Provocation" provisions have also been used in some jurisdictions as a defence for women who kill their abusers, and this appears to be contemplated by the language "or by a psychological trauma caused by multiple unlawful or immoral conduct of the victim" in Article 111.

In jurisdictions where it has been retained, the "provocation" provisions have been amended to ensure a more gender-neutral, non-discriminatory application. Options include, for example, changing the burden of proof, by placing the onus on the defendant, rather than the prosecution, to prove on the balance of probabilities that provocation occurred. Another approach has involved restricting the scope of its application. Examples include limiting its use to only extreme circumstances, and prohibiting its application to cases involving:

- domestic relationships,
- situations of infidelity,
- conflicts about joint parenting.

Alternatively, Article 111 could be amended to preclude its application to cases involving violence against women.

D. Domestic crimes

There are several crimes that are commonly committed by family members that disproportionately impact women that are not contemplated by Article 11¹. These include: intentional murder under sudden excitement (Article 111), intentional less bodily injury under sudden emotion (Article 121), coercion (Article 150), human trafficking (Article 143¹), child trafficking (Article 143²) and ill-treatment (Article 144³).

Given that women are disproportionately affected by violence committed within the family **Article 11¹ should cover all crimes that also disproportionately affect women in the family context.**

Article 126¹ provides for the separate crime of domestic violence. It is to be applied only when the harm has not reached a threshold level to be qualified as the intentional infliction of grave injury (Article 117), and intentional less grave bodily injury (Articles 118 and 120).

Article 150, criminalising coercion, and Article 144³ criminalising humiliation, degrading treatment and coercion, would most likely meet the requirements set forth by the Istanbul Convention for the criminalisation of psychological violence. Inextricably linked to the definition of psychological violence, "coercive control" is a concept increasingly recognised as most effectively capturing the dynamics at work in domestic and intimate partner violence cases. Coercive control has been recently criminalised in the U.K.⁹ and other

⁹ The U.K. has defined the terms controlling and coercive as follows:

Controlling behaviour is: a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain,

countries. Coercive control requires repeated or patterns of behaviour to be established. It could thus also be prosecuted under Articles 126¹(2)(e) and 144³.

The Criminal Code contains no measure criminalizing economic violence, despite the fact that it is recognised as a form of violence pursuant to the Domestic Violence Law and is prohibited.

E. Sexual harassment

The Criminal Code does not criminalise sexual harassment as required by both the Istanbul Convention and the ILO Convention on Violence and Harassment.¹⁰ **Articles should be enacted criminalizing sexual harassment** across sectors, including in public spaces, at work and in educational institutions. For example, France, Belgium and Serbia recently criminalized sexual harassment, including in public places.

F. Harmful practices: child and forced marriage and virginity testing

Forced marriage is criminalized under article 150¹ of the Criminal Code. Special Rapporteur on the sale of children, child prostitution and child pornography urged Georgia to “[h]armonize all legislation to ensure that the minimum age for marriage is established at 18 without exception”.¹¹ Article 150¹ should be amended to preclude any dispensations for marriage under the age of 18. Several countries have recently eliminated dispensations for the marriage of children under the age of 18.¹² It is important to note in this regard that forced and child marriage has resulted in cases of incitement to suicide in Georgia.¹³

“Virginity testing” has not been criminalised.¹⁴ At the same time, it is important to recall that the CEDAW and Human Rights Committees have urged Georgia to take “measures to eliminate the practice of sex-selective abortions resulting from prenatal sex discernment”.¹⁵

depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Coercive behaviour is: a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.

U.K. Home Office, *Controlling or Coercing Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework*, 2015.

¹⁰ Article 40, Istanbul Convention; Article 4, ILO Convention (190) Violence and Harassment Convention, 2019; see also, CEDAW/C/GEO/CO/4-5, para 29(d), calling on Georgia to “[s]trengthen measures to prevent and combat sexual harassment of women in the workplace by establishing labour inspectorates for effective labour law reporting and enforcement mechanisms.” See also, See also, CCPR/C/GEO/CO/4, para 7(d).

¹¹ A/HRC/34/55/Add.1, paras 82(d).

¹² UN Women, *Regional Assessment of Implementation of the Beijing Declaration and Platform for Action in Europe and Central Asia*, 2020, p. 45.

¹³ A/HRC/32/42/Add.3, para 22, (noting that in 2014, it was estimated that 36 women committed suicide)

¹⁴ CEDAW, Concluding observations on the combined fourth and fifth periodic reports of Georgia, CEDAW/C/GEO/CO/4-5, 2014, para 21(d), calling on Georgia to “prohibit and adequately sanction the practice of virginity tests carried out on women in violation of their right to privacy”.

¹⁵ CEDAW, Concluding observations on the combined fourth and fifth periodic reports of Georgia, CEDAW/C/GEO/CO/4-5, 2014, para 31(b); see also, CCPR/C/GEO/CO/4, para 7(f).

G. Cyber violence and bullying

While the Criminal and Criminal Procedure Codes contemplate comprehensively the role and uses of technology, the Criminal Code could more precisely target the forms of cyber violence that disproportionately affects women. For example, other countries have developed specific legislation on “revenge porn,” “upskirting” and “sexting”.¹⁶ Cyberbullying also disproportionately affects female students, journalists, politicians and other public figures.¹⁷

Although the gendered dimensions of cyber-related violence could possibly be addressed by qualifying specific crimes, such as persecution and disclosure of secrets of personal life, as violations of equality based on sex (Article 142) or crimes motivated by gender-bias (Article 53¹(1)), the current legislative framework does not accurately capture the gendered aspect of these crimes.

H. Protection issues

The Domestic Violence Law provides for restraining and protection orders for victims of violence within the family. Yet, protection is required in cases involve violence against women in all its forms (stalking, FGM, etc.), as well as against those specifically targeted outside of the family context, including: women’s human rights defenders (WHRDs) female politicians and other public figures. All stages of the criminal justice process have a role to play in their protection, which requires the following actions: performing and updating risk assessments, issuing immediate and longer-term protection orders, and ensuring that necessary in-court and out-of-court protection is in place for victims and witnesses, among others.

Article 10 of the Law on Elimination of Domestic Violence, Protection and Support of Victims of Domestic Violence (Domestic Violence Law) foresees the issuance of protection and restraining orders, to be issued by judges and law enforcement, respectively. Questions remain regarding the availability of these remedies for victims of gender-based violence outside of the domestic violence context in high-risk cases. In this regard, Denmark has created specialized temporary restraining orders for stalking, and the U.K. established FGM and forced marriage protection orders.¹⁸ Authorities might also consider using risk assessments outside of the domestic violence context to gauge the risk of WHRDs and prominent women in the public sphere, such as journalists, politicians and artists, who face threats to their security, including via cyber-violence.

¹⁶ In 2015, the UK established custodial sentences for up to two years for revenge pornography. In 2019, the Voyeurism (Offences) Act was passed in the U.K., criminalizing upskirting, defined as making unauthorized photographs under a woman's skirt or man's kilt, capturing an image of the crotch area, underwear, and sometimes genitalia. Spain criminalized "sexting," and online child grooming. Austria criminalized cyber-bullying. Sweden and France criminalized revenge porn and the dissemination of sensitive images.

¹⁷ CoE and Inter-Parliamentary Union, *Sexism, harassment and violence against women in parliaments in Europe*, 2018; OECD, *Girls are more exposed than boys to cyberbullying*, relying on 2014 data, available at: <https://www.oecd.org/gender/data/girls-are-more-exposed-than-boys-to-cyberbullying.htm>.

¹⁸ UN Women, *Regional Assessment of Implementation of the Beijing Declaration and Platform for Action in Europe and Central Asia*, 2020, pp. 49, 50.

Violations of restraining and protection orders should be criminalized. Article 53(3) of the Istanbul Convention states: “Parties shall take the necessary legislative or other measures to ensure that breaches of restraining or protection orders ... shall be subject to effective, proportionate and dissuasive criminal or other legal sanctions”. First breaches of both orders are currently addressed under the code of administrative offences, which do not appear on the perpetrator’s criminal record. Article 381¹ of the Criminal Code establishes criminal sanctions for a person who has not complied with a restraining or protective order, and has already been subjected to an administrative penalty under article 175² of the Administrative Code. It is thus only upon the second breach that a violation of a restraining or protection order is criminalised.

Every breach of a restraining or protection order should be indicated on the perpetrator’s criminal record in order to establish a clear record of abuse for the purpose of risk assessment and for the purpose of penalty enhancement. Moreover, victims of repeat offenders should have heightened and/or lengthened protection. Repeat offenders should be subject to mandatory arrest.¹⁹

Article 381¹ states: “Non-performance of the requirements and/or obligations provided for by a protective or restraining order . . . shall be punished by a fine or community service from one hundred and eighty to two hundred and forty hours or with imprisonment for up to a year.” The imposition of fines, which are frequently paid from the family budget, can result in additional adverse consequences for the victim, disincentivizing reporting. As a potential additional burden on the survivor, fines constitute an inappropriate form of punishment for the perpetrator. Article 381¹ should be amended to eliminate fines as a sanction for the violation of a protection order.

The Criminal Code contains several provisions that contemplate lenient and conditional sentencing and the release from liability (Articles 55, 63, 68, 70 and 70¹ of the Criminal Code, and 284, 285 and 285¹ of the Criminal Procedure Code) based on distinct grounds. As identified by the CPC Review, these provisions impact upon the rights of the victim.²⁰ Protection in the event of the early release of the perpetrator constitutes one such human rights concern, which should be addressed by either precluding release from liability in cases involving violence against women, or by mandating a series of long-term protection measures in the event of such release. It should be noted in this regard that the length of the longest-term protection order is less than one year.²¹

¹⁹ Public Defender’s Office, *Special Report: Evaluation of Protection Mechanism from Domestic Violence*, 2017, p. 18, stating: “consider the indicator of repetitive violence while responding to cases of domestic violence, and given the above, use appropriate protective measures”.

²⁰ See, CPC Review, paras 555, 556, 558, 563, 595, 596, 598, 599, 600, 601, 603-606.

²¹ Article 12(1) of the Domestic Violence Law establishes the temporal limit of protective orders as six months; Subsection (2) of that Article provides for their extension to a maximum of 3 months, thus providing for a total of 9 months protection, irrespective of the actual, long-term risk to the victim. As the Public Defender’s Office has identified, “it is difficult for victims to escape from their abusers for good [], which means that long-term protection measures are not being addressed”. Public Defender’s Office, *Special Report: Evaluation of Protection Mechanism from Domestic Violence*, 2017, p. 7.

I. Gender-bias motive and other aggravating factors

Georgia's inclusion of gender in one of its provisions on bias motivated crimes, Article 53¹(1), is a significant advance in the use of criminal law and an international best-practice model.

Article 53¹(2) also makes crimes committed within the family an aggravated circumstance. Article 142¹ establishes an aggravating circumstance for racially-motivated bias. Aggravated circumstances are additionally set forth with respect to specific crimes, including intentional grave and less-grave bodily injury (Articles 117, 118, 120) and the crime of domestic violence, Article 126¹(2). Article 126¹(2) foresees the following aggravated circumstances:

- a) knowingly against a minor, a helpless person, a person with disability or a pregnant woman;
- b) in the presence of a minor against his/her family member;
- c) against two or more persons;
- d) by a group of persons;
- e) repeatedly.

While the legal framework covers a wide range of aggravated circumstances for the above-mentioned crimes, the full range of aggravated circumstances required by Article 46 of the Istanbul Convention to be applied to all of crimes set forth in the Convention²² have not yet been incorporated comprehensively into the Criminal Code. These include:

- the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority
- the offence, or related offences, were committed repeatedly
- the offence was committed against a person made vulnerable by particular circumstances
- the offence was committed against or in the presence of a child
- the offence was committed by two or more people acting together
- the offence was preceded or accompanied by extreme levels of violence
- the offence was committed with the use or threat of a weapon
- the offence resulted in severe physical or psychological harm for the victim
- the perpetrator had previously been convicted of offences of a similar nature.

Most of the above-listed aggravated circumstances are provided for with respect to grave and less-grave bodily injury and domestic violence. **Amendments should ensure that all of the listed aggravating circumstances cover all of the crimes set forth in the Istanbul Convention.**

III. Criminal procedure

According to the Public Defender's Office, obstacles in the **process of granting victim status** challenge the protection of victims' rights. This issue was addressed in the Criminal

²² Articles 33-40 of the Istanbul Convention call on States to criminalise the following crimes: psychological violence, stalking, physical violence, sexual violence and rape, forced marriage, FGM, forced abortion and forced sterilisation and sexual harassment, respectively.

Procedure Code Review, calling into question the need for a formal recognition of “victim” status.²³ Victims’ should have the right to repeal a rejection of victim status, not just to the senior prosecutor. Victims should also have the ability to review the case file at all stages of the proceedings, not just prior to the preliminary hearing pursuant to Article 57(1)(j) of the Criminal Procedure Code.²⁴

Given the nature of the cycle of violence, there is a tendency for victims to withdraw their complaint or to refuse or change their testimony, often in the face of threats by the perpetrator(s). Thus, as an overarching issue, the prosecution of cases involving violence against women should be conducted *ex officio*.²⁵ Recommendation Rec5(2002) of the Committee of Ministers of the Council of Europe to member States on the protection of women against violence requires States “to ensure that criminal proceedings can be initiated by the public prosecutor,” and thus not require a complaint by the victim as a prerequisite.

Article 115 criminalising incitement to suicide should also be investigated as an *ex officio* crime.

A. In-court and out-of-court protection

Article 56 of the Istanbul Convention foresees the full array of protection measures for victims of gender-based crimes, (which should apply to all vulnerable victims). This includes protection against intimidation and re-victimisation, protection of their privacy and image, the provision of information pertaining to their rights, the course of the proceedings and the release of the perpetrator, the right to be heard, access to services and preventing “contact between victims and perpetrators within court and law enforcement agency premises,” including during the victim’s testimony. Most of these rights to protection are covered by the current legislative framework.

Contact between the accused and victims of gender-based violence should be avoided in courts, whenever possible, pursuant to Article 56(g) of the Istanbul Convention. Article 56(i) further provides:

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

This means that victims should be able to be heard in the courtroom without necessarily being physically present, or at least without having to see the accused. The ECtHR has also recognized limitations to the defense right to call and examine witnesses in cases involving gender-based violence.²⁶ In this regard, **Article 14(2) of the CPC, which allows for personal interrogation by a party should be amended to preclude its application in cases involving violence against women. Article 245 of the CPC on cross examination should also be amended to preclude direct questioning of the victim by the accused in cases involving**

²³ See, Criminal Procedure Review, paras 167-169.

²⁴ See, *Gender analysis for the project “Implementation of judicial reforms in Georgia,”* 2019, p. 21.

²⁵ See, ECtHR, *Opuz v. Turkey*, Application no. 33401/02, 9 June 2009, paras 143, 145-149.

²⁶ See, *Y. v. Slovenia*, Application No. 41107/10, 28 May 2015.

violence against women.²⁷ A defence lawyer could be required for this purpose under Article 45.

More generally, as noted in the CPC Review, Article 115 should be amended to consider the need to protect vulnerable witnesses, “including the possibility that a particular manner of questioning or its conduct by a suspect would be inappropriate”.²⁸ The CPC Review also suggests that Article 40(1), restricting the right of the accused to be present at a hearing if a protective measure for a witness has been applied, should be clarified.²⁹

It should be noted that Article 49(1)(f) enables witnesses to “request taking a special measure of protection”. The application of protection measures could also be requested by the prosecution or the judge, based on the results of the risk assessment. This should be added to the list of prosecutorial functions under Article 33(6) of the CPC.

Articles 57 and 58 of the CPC covers many of the applicable rights. Article 57(1)(g)(i) and (k) and Article 58 enables the victim to request: protection measures, information on the measure of restraint and release of the convicted person, and the closing of a hearing partially or in full, and advance notice of the time and place of specific procedures, respectively. These decisions should also fall to the responsibility of the prosecution and the court, and not depend solely upon the victim’s request.³⁰

In light of the victim’s right to be informed upon the release of the perpetrator from detention, **Article 176 of the CPC**, on grounds for release, could reference this requirement in cases involving violence against women.

Issues concerning witness anonymity and screening off the witness are addressed comprehensively in the CPC Review.³¹

With regard to the level and means of restraint of the accused, **Article 199(3) of the CPC** should include electronic monitoring for cases involving gender-based violence. (Electronic monitoring is listed in subsection 2). In such cases, the type of restraint should be determined based on an updated risk assessment conducted by law enforcement (or the prosecution or court). **Article 199 should make reference to the requirement of a risk assessment in such cases**, which need to be regularly updated especially in high-risk cases.

B. Evidentiary issues

The Criminal Procedural Code provides no separate evidentiary rule limiting the introduction of evidence on the character or past sexual conduct of the victim in cases involving sexual violence. A specific evidentiary rule should be introduced into the Criminal Procedure Code, limiting character and past conduct evidence from being introduced by defendants in sexual

²⁷ Article 115(2), which makes reference to Article 245, should also be amended accordingly.

²⁸ CPC Review, para 286, citing *S.N. v. Sweden*, no. 34209/96, 2 July 2002 and *Y v. Slovenia*, no. 41107/10, 28 May 2015.

²⁹ See, CPC Review, paras 107, 108.

³⁰ See also, CPC Review, paras 176-179, referring to Directive 2012/29/EU.

³¹ See, CPC Review, paras 353-360.

violence cases. **Evidence relating to the sexual history and conduct of the victim should be permitted only when it is relevant and necessary.**

Demonstrating lack of consent in cases involving sexual violence raises particular evidentiary challenges. In addressing this issue, one solution is to require the defendant to demonstrate efforts to obtain affirmative consent by a preponderance of the evidence, or similar evidentiary standard. **The Criminal Procedure Code should be amended to provide guidance on the evidentiary burden related to consent in cases involving sexual violence.**

Some crimes occur as single incidents, while others involve a “course of conduct”. The latter include crimes such as: intimate partner and domestic violence (coercive control), stalking, human trafficking, sexual harassment, and sometimes, sexual violence. Evidence of a series of criminal justice interventions (complaints filed, past risk assessments and protection orders, prior convictions, etc.) are often necessary to demonstrate a course of conduct that may take place over a number of years.

In this regard, amendment of **Article 238 of the CPC should be considered with respect to the consideration of previous convictions of the accused.** In cases involving domestic and intimate partner violence, previous convictions and administrative offences are relevant to the continuing nature of the offence and should be permitted to demonstrate patterns of coercive control. An exception should be made to Article 238 in such cases.

There are currently no rules, regulation or guidelines on **forensic evidence** in sexual violence cases, including their accessibility for victims of sexual violence.³² **Article 111(9)** of the CPC should apply to forensic testing in cases involving sexual violence in order to require, if possible, a female forensic expert in such cases. More specialized legislation could:

- Mandate proper collection and submission to court of medical and forensic evidence, where possible;
- Mandate the timely testing of collected medical and forensic evidence;
- Ensure that multiple collections of medical and forensic evidence are prevented so as to limit secondary victimisation of the complainant;
- State that medical and forensic evidence are not required in order to convict a perpetrator.³³

C. Plea bargaining

The use of plea bargaining can have significant implications for victims of violence against women. The consultant understands that there is a current prosecution protocol or practice not to enter into plea bargain in GBV cases. The CRC Review extensively addressed the CPC provisions on plea bargaining, including the need to consider the rights of victims.³⁴

³² Articles 111 and 147 would seemingly apply.

³³ UN Handbook on Legislation on Violence against Women, p. 41. Recommendation Rec (2002)5 also requires that States “take all the necessary measures in order to ensure that collection of forensic evidence and information is carried out according to standardized protocol and forms”. CoE Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence, 30 April 2002, Appendix, Article 25.

³⁴ CPC Review, paras 405-421.

D. Judicial decisions and judgements

The requirement to give a reasoned decision is a basic tenet of the rule of law. Yet, as observed by the Public Defender's Office:

Repeated violence is not reflected in the court's decisions and each case of violence is considered separately. Indication of the repeated nature of violence is especially important for planning preventive measures and protecting the victim, as repetition of an abusive act by the same person is related to increased risks and needs to be considered.³⁵

Consequently, while the legislative framework refers to repeated and continuing violations related to domestic violence, they cannot be triggered without their being referenced in judicial decisions.

Moreover, the Public Defender's Office further observed that court decisions "typically do not include a description of the facts; therefore, the nature of the violence cannot be established and future risks for the victim cannot be determined".³⁶ It underscored the need for court decisions to contain "information on what the act of violence was and the location/environment where the violence took place" as well as "on the social status of families and individual family members, especially those who abuse alcohol or other substances". The CPC Review also recommended that Article 254 of the CPC be amended to ensure that judgements take into consideration the relevant "facts and legal provisions".³⁷ Article 194(2), CPC, also calls for court decisions to "be substantiated," thus covering not only final judgements. Significantly, this standard should be applied to judicial decisions on protection orders, as the absence of detailed and specific information may render the ordered measures ineffective.³⁸

Specifically, the Public Defender's Office recommended the conclusion of concrete information as to whether physical violence involved severe injuries or was committed in a cruel manner, which could indicate a high risk of the escalation of violence or femicide.³⁹

Amendments to Article 254 and other provisions sure ensure a description of relevant facts in judicial decisions and judgements, including in the issuance of protection orders.

³⁵ Public Defender's Office, *Special Report: Evaluation of Protection Mechanism from Domestic Violence*, 2017, pp. 5, 10, (also stating: "there are cases when restraining orders are issued several times against the same person over a year, but court decisions often do not consider these circumstances").

³⁶ Public Defender's Office, *Special Report: Evaluation of Protection Mechanism from Domestic Violence*, 2017, p. 15.

³⁷ CPC Review, para 520.

³⁸ Public Defender's Office, *Special Report: Evaluation of Protection Mechanism from Domestic Violence*, 2017, p. 13.

³⁹ Public Defender's Office, *Special Report: Evaluation of Protection Mechanism from Domestic Violence*, 2017, p. 14.

E. Sentencing

With respect to sentencing, disproportionately lenient sentences for people convicted of gender-based violence often impedes women's access to justice. As noted above, several provisions of the Criminal Code and Criminal Procedure Code foresee lenient and conditional sentencing, and release of liability for criminal perpetrators, based on diverse grounds (Articles 55, 63, 68, 70 and 70¹ of the Criminal Code and Articles, 284, 285, 285¹ of the Criminal Procedure Code). As identified by the CPC Review, these provisions impact upon the rights of the victim.⁴⁰ The right to an effective remedy constitutes one such rights concern. In this regard, the CPC Review states:

Although it may not be unreasonable to release those committing minor offences from criminal liability where it is genuinely a first offence, the release provided in paragraph 1 is hardly consistent with the commitment under Article 45 of the Istanbul Convention to "take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness".⁴¹

These provisions of the Criminal and Criminal Procedure Codes should be amended to account for the rights of the victim.

In this regard, it is important to note that Article 218(8) of the CPC carves out an exception for those convicted of violating Articles 144¹-144³ of the Criminal Code. Article 144³ criminalises humiliation and degrading treatment, including coercion. Subsection (2)(f) provides for an aggravating circumstance if in violation of the victim's equality based on sex. While Article 144³ could certainly apply to cases involving coercive control in intimate partner and domestic violence cases, it is unclear if this provision is used for that purpose.

Article 26 CoE Convention on Action against Trafficking and EU Directive 2011/36 provide for the non-punishment of victims of trafficking for crimes committed during the course of being trafficked.⁴² **Article 167(2)(c) of the Criminal Procedure Code should not be limited only to the reflection period.**

Article 269(5)(f) of the Criminal Procedure Code also allows the judge to release a victim of trafficking from serving sentences for illegal border crossing and the use or possession of fraudulent documents. While this provision formally complies with EU Directive 2011/36, increased understanding of the scope of crimes committed by trafficking victims under coercion and arising out of their situation as a trafficking person are not limited to status-related crimes. It is important to note in this regard that Article 143¹ Note 1(c) of the Criminal Code recognises human trafficking for the purpose of criminality.

Article 269(5)(f) should be amended in two ways. First, it should cover a wider scope of crimes committed by victims of trafficking who are trafficked for the purpose of criminality.

⁴⁰ See, CPC Review, paras 555, 556, 558, 563, 595, 596, 598, 599, 600, 601, 603-606.

⁴¹ CPC Review, para 516.

⁴² See, UNODC, Global Report on Trafficking in Persons, 2016; CEDAW, Concluding observations on the combined fourth and fifth periodic reports of Georgia, CEDAW/C/GEO/CO/4-5, 2014, para 23(e), calling on Georgia to "ensure that, during raids of brothels and individual establishments, victims of trafficking and forced prostitution are not treated as offenders".

Secondly, it should be noted that the convictions themselves constitute a form of punishment and can have long-term negative impact on the employment and educational opportunities of victims of trafficking forced to commit such crimes, and thus on the possibilities for their rehabilitation.⁴³ Indeed, Principle 7 of the OHCHR *Recommended Principles and Guidelines on Human Rights and Human Trafficking* recognises the non-punishment principle to apply to detention and prosecution (and thus conviction) and not only to punishment. It states:

Trafficked persons shall not be **detained, charged or prosecuted** for the illegality of their entry into or residence in countries of transit and destination, **or for their involvement in unlawful activities** to the extent that such involvement **is a direct consequence of their situation as trafficked persons**. (Emphasis added)

F. Compensation

With respect to the victims' right to a remedy, this includes: the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights. Compensation can also include costs for the restoration of rights (e.g., the costs associated with hearing witnesses located in a different geographical area, both for their physical travel as well as the costs of establishing technological communications, such as telephone or video linkages).

Victims of gender-based violence have a right to compensation from the perpetrator, and a right to compensation from the State (from a State-run fund) in cases in which the perpetrator fails to provide compensation. They also have a right to compensation by the State for any failures in its due diligence obligations to investigate, prosecute and prevent the violence. Georgia's reservation to Article 30(2)⁴⁴ of the Istanbul Convention, which provides for State compensation to victims absent another source, expires on 1 September 2022. Preparations should be made to incorporate the victims' rights to compensation from the State into the legislative framework. Damages should contemplate, *inter alia*, unremunerated domestic and care giving support.

Article 260 of the CPC on the issues to be resolved by the judgement does not mention victims' rights to compensation for damages or injury or referral to civil proceedings.⁴⁵

⁴³ See further, OSCE, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, 2013; Special Rapporteur on trafficking in persons, especially women and children, *The importance of implementing the non-punishment provision: the obligation to protect victims*, 2020.

⁴⁴ Article 30(2) of the Istanbul Convention states in full:

Adequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions. This does not preclude Parties from claiming regress for compensation awarded from the perpetrator, as long as due regard is paid to the victim's safety.

⁴⁵ CPC Review, para 524.

G. Juries

Articles 221-224 cover the jury selection process. They contain nothing specific on preventing discrimination in jury selection, such as on the gender or ethnicity of jurors. Article 223(5) indicates in vague terms that selection will not be based on “personal data”. Article 226(3) also guarantees that the “composition of the jury shall ensure its independence and impartiality”. However, no specific provisions aim to ensure the implementation of Articles 223(5) and 226(3).

As noted in the CPC Review, Article 28(2) related to the social guarantees provided to jurors raises the issue of discrimination against self-employed persons. At the same time, it can raise issues of discrimination related to the provision of unpaid care and domestic work by women, who would also have to pay out-of-pocket for care provision to participate as jurors. Precisions regarding the term “health status” in Article 28 of the CPC should make reference to pregnancy and childbirth.

Along these lines, Article 261(4), (6) of the CPC, setting forth the hours of jury deliberation, fail to consider domestic and caregiving responsibilities by both female and male jurors. In light of Georgia’s patriarchal culture, in which women perform the bulk of unpaid care and domestic work, the foreseen hours may negatively impact on: 1) women’s ability to serve on juries, constituting discrimination; 2) the needs of children and the elderly whose family members are serving on a jury.

Amendments to the process for jury selection and service should take into consideration the disproportional impact the current process has on women jurors and the possibility for women to serve on juries.