

PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE IN ARMENIA

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This training manual and course was developed within the framework of the Council of Europe project "Preventing and Combating Violence against Women and Domestic Violence in Armenia" in cooperation with the Academy of Justice of the Republic of Armenia.

Violence against women and domestic violence are a universal issue, which inevitably causes serious physical, psychological, financial and social consequences, and not only impacts the persons having become victims of violence, but also hinders advancement for ensuring comprehensive safety for everyone. Combating violence against women and domestic violence is the pivotal issue and the current imperative of progressive humankind today.

It is undeniable that in combating the phenomena, justice and law-enforcement authorities stand out with their unique role and significance. The shaping, improvement and ongoing development of the theoretical knowledge and practical skills of the representatives of the specified authorities, the mission of which falls to the Justice Academy, is a mandatory precondition for the implementation of the functions of the authorities and for the effective application of the necessary tools conditioned by the powers of the authorities.

Attaching importance to the key significance of the issue, the Justice Academy and the Council of Europe expressed, within the “Preventing and Combating Violence against Women and Domestic Violence in Armenia” Project, the commitment to develop a course “On Preventing and Combating Violence against Women and Domestic Violence in Armenia,” and this Manual is designed for ensuring teaching and methodology of the course.

The course “On Preventing and Combating Violence against Women and Domestic Violence in Armenia” will be taught at the Justice Academy starting in 2019.

In this regard, the Justice Academy, having a clear vision, within the scope of the training programmes, has set the objective to accomplish the following goals:

- ▶ to improve the effective application of measures that are taken during the investigation into cases regarding violence against women and domestic violence, of the due diligence criterion with respect to case investigation and criminal prosecution, as well as the knowledge of representatives of justice and law-enforcement authorities about the judicial practice of enforcement of the European Convention on Human Rights under cases regarding domestic violence and sexual abuse;
- ▶ to provide tools, in case of availability of which persons having suffered from the crimes under consideration will be in the focus of those authorities, emphasising the special needs and rights of victims and witnesses in the process of criminal justice;
- ▶ to raise the awareness of justice and law-enforcement authorities about the new developments in the legislation on preventing and combating violence against women and domestic violence in Armenia;
- ▶ to raise the awareness and improve the knowledge of the representatives of justice authorities about the criteria of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) and the steps to meet those criteria.

This Manual is designed for students of the Justice Academy. It may also be useful for the employees of other law-enforcement authorities, lawyers, students, professors and PhD students of universities and faculties of law, as well as for persons and organisations interested in the main issue under consideration.

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INTRODUCTION TO COURSE OUTLINE

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) contains the most advanced standards for preventing and combating gender-based violence and ensuring victims' access to justice. As at 12 September 2018, 33 Council of Europe Member States have ratified the Convention since it opened for signature in 2011; Armenia signed the Convention in January 2018. Armenia also adopted its first law to combat domestic violence in December 2017, the Law on Prevention of Violence within the Family, Protection of Victims of Violence within the Family and Restoration of Peace in the Family (Domestic Violence Law).

With the aim of ensuring the highest standards in the implementation of nascent national legislation by justice sector actors, as part of its project Preventing and Combating Violence against Women and Domestic Violence in Armenia the Council of Europe has developed a training course and materials for the Armenian Justice Academy on the investigation, prosecution and adjudication of domestic violence cases. These training materials building on the Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice and the report on Barriers, Remedies and Good Practices for Women's Access to Justice in Five Eastern Partnership Countries, produced within the project Improving Women's Access to Justice in Eastern Partnership Countries. These training materials on Preventing and Combating Violence against Women and Domestic Violence in Armenia commence by ensuring a basic understanding of the concepts of: gender, gendered stereotypes and masculinities, gender discrimination and gender-based violence, highlighting its forms and the cycle of violence. It covers the applicable international human rights framework, with particular attention to the standards set forth in the Istanbul Convention, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the standards established by the European Court of Human Rights (ECtHR) in its jurisprudence on domestic violence cases.

The training addresses the gendered nature of domestic violence, its different forms, the cycle of violence, prevalence and attitudes about intimate partner and sexual violence, international standards on protection, covering emergency barring and protection orders, as well as protection measures for victims and witnesses during all stages of the proceedings. It details the specific provisions in the Armenian Domestic Violence Law and Criminal Code as applied to the investigation, prosecution and sentencing stages, with particular attention to the rights of victims in the process. A separate section addresses issues pertaining to mediation in cases involving domestic violence. A final section covers the importance of inter-agency partnerships in ensuring effective and efficient implementation of referral pathways, protection orders and data collection.

MAIN TRAINING COMPONENTS

Name	Preventing and Combating Violence against Women and Domestic Violence in Armenia
Beneficiaries	The materials are developed for use by the Justice Academy for the training of investigators, prosecutors and judges.
Aim (or the general objective of the course)	This course is designed to provide the participants with a solid understanding of the specific issues pertaining to combating gender-based violence throughout the justice chain. It will provide a foundational understanding of gender, gendered stereotypes and gender-based violence, violence prevalence and attitudes in Armenia and an overview of the relevant international instruments and applicable standards. Critically, it covers the implementation of emergency barring and protection orders to ensure victim safety, and the full range of technical legal issues from the investigation to sentencing stages of legal proceedings. It addresses the complications inherent in mediating cases involving domestic violence and the standards pertaining to inter-agency partnerships.
Course content	<ul style="list-style-type: none"> ▶ The course will provide the participants with a foundational understanding of the concepts of gender, gendered stereotypes and gender-based violence. It will cover the forms and cycle of violence. It will refer to recent national prevalence data on intimate partner and sexual violence in Armenia, and their implications for justice sector actors. It will provide understanding on the barriers that hinder access to justice. ▶ The course will cover the standards set forth in the Istanbul Convention and CEDAW. It will provide enhanced knowledge of the jurisprudence of the ECtHR with regard to the effective application of the due diligence standard to investigations and prosecutions, as well as the Court’s jurisprudence on the application of Articles 2, 3, 8 and 14 as applied to domestic and sexual violence. ▶ The course will cover all relevant national legislation, including the new Domestic Violence Law, the Criminal and Criminal Procedure Codes, related administrative and civil procedure, and police and prosecution protocols. Existing gaps between national legislation and international standards will be highlighted. ▶ By examining and comparing international standards and national legislation, the course will ensure strong technical legal knowledge of the application of protection orders, investigations, prosecutions, adjudication and sentencing. ▶ Standards and safeguards with respect to reconciliation and mediation in domestic violence cases will be discussed as well as the importance and operational aspects of inter-agency coordination in the issuance and implementation of protection orders, referral pathways and data collection.

Training methodology	The group of participants should preferably not exceed a maximum of twenty persons. All sessions will be conducted in an interactive manner, inviting the active involvement participants to ask questions, and engage in discussions based on their practical work experiences. The methodology will combine lectures with case studies, exercises, videos and role plays. As a training of trainers (ToT), PowerPoint presentations and a handbook will be prepared for the trainer and participants. At the end of each session, time will be reserved for questions and answers, as well as any feedback.
Assessment/evaluation	While the participants will not be evaluated, the training content and presentation will be evaluated through pre- and post-course tests as well as by an evaluation form to be distributed to participants at the end of the course.
Proposed duration of the module	The course will be incorporated into the Justice Academy as part of its standard 10 academic hour trainings, with 40-minute hours. It can thus be offered for 1 1/2 days within or outside of Yerevan.

TRAINING COURSE CONTENT

Session 1	Introduction		
	<i>Topic 1.1</i>	<i>Conceptual framework: Gender</i>	<i>1 hour (40 min)</i>
	<i>Topic 1.2</i>	<i>The forms and cycle of violence</i>	<i>1/2 hour (20 min)</i>
	<i>Exercises</i>	<i>1. Differentiating sex from gender - breakout group exercise; 2. Handouts or brainstorming: myths and facts about domestic violence; 3. Short film clip</i>	<i>10 minutes each</i>

Goal: The goal of this session is to ensure that participants have a solid understanding of concepts related to gender, gendered stereotypes, masculinities and gender-based violence, as they underpin the rest of the training. It will cover the diverse forms of domestic violence and violence against women and the cycle of violence, underscoring its implications for the criminal justice chain. It will cover the power-control wheel, and also the concept of secondary victimisation.

Learning objectives: By the end of the class the participants shall:

- ▶ Understand concepts related to gender;
- ▶ Understand the forms and cycles of intimate partner violence;
- ▶ Understand the power-control wheel and the dynamics of domestic violence;
- ▶ Be able to recognise gendered stereotypes;
- ▶ Recognise forms of secondary victimisation.

Topic 1.1 – Conceptual framework: Gender

Training Methodology

The training will commence with a general introduction of the trainers, participant introductions, an overview of the course (objectives, content), and an agreement on the course rules (no mobile phones, no work during the classes, etc.). An exercise will be used to initiate the first topic, the participants will be broken into four groups, each with a flip chart divided into two categories: men and women. They will be asked to place a series of words in either category. A brief discussion will ensue as to the difference between sex and gender and the gendered stereotypes that led to the placement of the words into one category or another. A lecture will cover the meaning of gender, gender discrimination, gendered stereotypes and gender-based violence. A handout on myths regarding domestic violence will be provided.

Topic 1.2 – The Forms and cycle of violence

Training Methodology

A presentation will be made on the forms and cycle of violence. A film clip will be shown on the dynamics of domestic violence. A presentation will follow on the power-control wheel, and on the concept and causes of secondary victimisation.

Session 2	Legal frameworks and current data		
	Topic 2.1	The victim-centred, human rights-based approach and applicable human rights	1/2 hour
	Topic 2.2	National prevalence of and attitudes towards intimate partner violence and sexual violence in Armenia	1/2 hour
	Topic 2.3	Barriers to access to justice	1/4 hour
	<i>Exercises</i>	1. Case studies will be offered on ECtHR and CE-DAW case law; 2. Group discussions based on questions	3/4 hour

Goal: The goal of this session is to introduce the participants to the applicable international framework, with an emphasis on the standards set forth in CEDAW and the Istanbul Convention. The session will emphasise the need for a human rights-based, victim-centred approach, and will cover the range of human rights violations implicated in gender-based violence, both those that are caused by violence (right to life, prohibition on torture and ill-treatment, etc.), and those caused by the failure of effective State response (right to protection, duty to investigate, a fair trial, an effective remedy). It will briefly identify the rights and the articles of the European Convention on Human Rights (ECHR) that underly the basis for ECtHR jurisprudence on domestic violence cases, which will be described later in the training and used in case studies. National prevalence and attitudes towards sexual and intimate partner violence in Armenia will be presented and barriers to women’s access to justice in Armenia will be discussed.

Learning objectives: By the end of the session the participants shall:

- ▶ Apply the applicable international standards;
- ▶ Understand a victim-centred, human rights-based approach to addressing gender-based violence;
- ▶ Recognise the prevalence of intimate partner and sexual violence, and attitudes towards these forms of violence in Armenia;

- ▶ Identify the rights protected in the ECtHR and CEDAW jurisprudence on domestic and sexual violence;
- ▶ Identify barriers to women’s access to justice in Armenia.

Topic 2.1 – Overview of the international human rights framework

Training Methodology

Beginning with a discussion on victim-centred, human rights-based approach, the applicable human rights instruments and the specific human rights involved in ensuring access to justice for victims of gender-based violence will be presented. Prepared slides can be used to summarise the full list of rights. The PowerPoint presentation will be used to highlight the text of key definitions, and the significance of the use of specific language.

Topic 2.2 – National prevalence data and attitudes on intimate partner violence and sexual violence

Training Methodology

A brief lecture will be provided on the definition and forms of gender-based violence, its prevalence in Armenia and findings from a recent UNFPA study on attitudes toward gender-based violence. A discussion will follow on the application of the data to addressing gender-based violence by the justice sector.

Topic 2.3 – Barriers to access to justice

Training Methodology

A brief presentation will be made on recent Council of Europe reports documenting barriers to women’s access to justice, inviting insights and comments from justice sector actors.

Session 3	Protection		
	<i>Topic 3.1</i>	<i>Emergency barring orders (EBOs) and protection orders and risk assessments</i>	<i>1 hour</i>
	<i>Topic 3.2</i>	<i>Appeals and violations of emergency barring orders and protection orders: administrative and civil proceedings</i>	<i>1 hour</i>
	<i>Exercises</i>	<i>A discussion regarding risk assessments. A hand-out of a checklist for risk assessments will be given.</i>	<i>15 minutes</i>

Goal: The goal of Session 3 is to set forth the international legal standards and the national legislative framework on emergency barring and protection orders. It will cover both the standards for conducting risk assessments, including related ECtHR jurisprudence. This session will also cover the applicable criminal, civil and administrative procedures for appealing and extending protection orders, as well as the consequences for violating such orders. The need to ensure child protection as part of the issuance process will be discussed. Gaps in the national legislative framework will be highlighted.

Learning objectives: By the end of the classes the participants shall:

- ▶ Understand the international legal standards applicable to EBOs and protection orders, with a focus on the
 - ▶ Istanbul Convention and ECtHR jurisprudence;
 - ▶ Understand the national legal framework on EBOs and protection orders, including key gaps;
 - ▶ Understand the applicable standards for conducting risk assessments;
 - ▶ Recognise the need to link child protection and maintenance to EBOs and protection orders;
 - ▶ Understand the procedures for appealing EBOs and protection orders, and those for extending the latter;
 - ▶ Understand the consequences for breaching emergency intervention and protection orders under national law, including the resulting gaps in protection.

Topic 3.1 – Emergency barring and protection orders

Training Methodology

This session will include lectures on international standards for emergency barring orders and protection orders, both those set forth in the Istanbul Convention, and the ECtHR jurisprudence. The discussion will then move to the application of the national legal framework, highlighting notable gaps. The same approach will be applied to risk assessments, noting the factors recognised by the ECtHR and best practices from other Council of Europe Member States. A handout will be provided listing diverse criteria for risk assessments. PowerPoint presentations will provide visual support to clarify the technical legal standards.

Topic 3.2 – Appeals and violations of protection orders

Training Methodology

This session will begin with a presentation addressing the applicable civil and administrative law governing the procedures for appealing EBOs and protection orders, and the consequences for breaching both types of orders under national law. The relevant police protocols will be discussed. The need to link child protection and custody issues will also be addressed.

Session 4	Criminal justice response		
	<i>Topic 4.1</i>	<i>Pre-trial</i>	<i>3/4 hour</i>
	<i>Topic 4.2</i>	<i>Trial</i>	<i>3/4 hour</i>
	<i>Topic 4.3</i>	<i>Working with domestic violence victims and witnesses</i>	<i>1/2 hour</i>
	<i>Exercises</i>	<i>1. A handout will be provided; 2. Sample questions regarding public interest to pursue the case. 3. Role plays on questioning victims; 3. Case discussions on effective investigation and sentencing as well as communicating with victims</i>	<i>1/2 hour</i>

Goal: The goal of this session is to familiarise the participants with the relevant international standards and national legal framework during the pre-trial (investigation) and trial phases, with particular attention to victim’s rights to in-court and out-of court protection. It will cover the treatment of the full range of crimes relevant to domestic violence and violence against women under international standards and national legislation, highlighting gaps in protection.

Learning objectives: By the end of the course the participants shall:

- Understand the due diligence standard and its application to domestic violence cases by the ECtHR (Articles 2, 3 and 8), requiring ex officio investigations and prosecutions and ongoing risk assessments;
- Recognise the common challenges in gathering evidence to build a case on domestic violence, and an expanded scope of potential evidence;
- Have a solid overview of the national legislative framework, including the nascent Domestic Violence Law, criminal law and procedure, and prosecution protocols;
- Be aware of the gaps where national legislation contravenes international human rights law;
- Understand the procedural rights of victims and witnesses, including in-court protection, and the importance of these measures for victims of domestic violence.

Topic 4.1 – Pre-trial procedures

Training Methodology

This session will start with a lecture introducing the due diligence standard, and its implications for State obligations to prevent, investigate, prosecute and, punish acts of violence against women and domestic violence, and to compensate victims. ECtHR case law will be covered in order to ensure participants understand the specific standards and their application to factual scenarios pertaining to domestic violence, such as: ex officio investigations and prosecutions. Case studies will be provided to enable the participants to work through factual scenarios and apply the standards articulated by the Court. Challenges in evidence gathering due to the private nature of the crime and withdrawals of complaints by victims will be discussed, as well as the use of prior sexual conduct evidence, with recommendations for overcoming these challenges. The session will be concluded with a case study regarding ex officio prosecution.

Topic 4.2 – Trial procedures

Training Methodology

This session provides a lecture on the main offences under Criminal Code applicable to domestic violence cases: murder, physical assault, sexual violence, etc. Comparisons are made with international standards pertaining to these crimes, and key gaps are identified within national legislation that result in barriers to victims' access to justice. The lecture will also cover crimes pertaining to violence against women, as set forth in the Istanbul Convention and their treatment under national law.

Topic 4.3 – Working with domestic violence victims and witnesses

Training Methodology

This session will provide a brief presentation on victim's procedural rights, recapping the discussion on the victim-centered approach, highlighting the special needs and rights of victims and witnesses during the criminal justice process. It also addresses in-court protection. Group exercises will be initiated for the participants, including case discussions and role play on working with victims of domestic violence.

Session 5	Sentencing and remedies		
	<i>Topic 5.1</i>	<i>Proportionate and dissuasive sanctions</i>	<i>1 hour</i>
	<i>Topic 5.2</i>	<i>Mitigating and aggravating circumstances, judicial stereotyping</i>	<i>1/2 hour</i>
	<i>Topic 5.3</i>	<i>Compensation</i>	<i>1/2 hour</i>
	<i>Exercises</i>	<i>1. Presentation/discussion facilitated by an NGO on victims' experiences; 2. Group discussion on the gender stereotypes inherent in the mitigating standards based on "morality" and "honour"</i>	<i>3/4 hour</i>

Goal: This session aims to familiarise the participants with the international standards regarding proportionate and dissuasive sanctions as applied to cases of domestic violence, in particular with respect to: custodial sentences, fines and the withdrawal of parental rights. A discussion of ECtHR case law and national examples will be used to exemplify violations of these standards. Aggravated and mitigating circumstances will also be discussed, with attention given to provisions in national law in which culture, religion, tradition or so-called "honour" are used to justify offences involving gender-based violence. The role of judicial stereotyping in rendering inadequate sentences will be addressed, as well as the right to civil remedies and access to compensation.

Learning objectives: By the end of the course the participants shall:

- Understand the need to ensure proportionate and dissuasive sentences in cases involving domestic violence;
- Recognise those national legal provisions that constitute a violation of the standards articulated in ECtHR case law in mitigating sentences involving gender-based violence;
- Awareness of the role of judicial bias in impeding victims access to a meaningful remedy;
- Awareness of the right to compensation as part of a meaningful remedy under international standards.

Topic 5.1 – Proportionate and dissuasive sanctions

Training Methodology

A brief lecture will cover the standards and importance of proportionate and dissuasive sanctions in cases of domestic violence, with attention to ECtHR case law and national examples of violations of these standards. A discussion among participants on the application of these standards in Armenia will follow.

Topic 5.2 – Mitigating and aggravating circumstances, judicial stereotyping

Training Methodology

A lecture describing the operative aggravating and mitigating circumstances will be provided, comparing international standards and national legislation and highlighting the current gaps in Armenia and their impact on victims' access to justice. Particular attention will be paid to mitigating circumstances under national law justifying violence on concepts based on "morality" and "honour". A case study regarding judicial stereotyping will be presented to the participants. A group discussion to identify the gendered stereotypes inherent in the notions of "morality" and "honour" will ensue.

Topic 5.3 – Compensation

Training Methodology

A lecture regarding significance of the right to access to compensation, from the perpetrator or the State, as an element of the right to a meaningful remedy under international standards will be presented by the tutor, highlighting ECtHR jurisprudence. Access to compensation under national civil law will be covered.

Session 6	Mediation and reconciliation		
	<i>Topic 6.1</i>	<i>Mediation and reconciliation</i>	<i>1/2 hour</i>
	<i>Exercises</i>	<i>Role play: reconciliation scenarios</i>	<i>1/2 hour</i>

Goal: This session aims to familiarise the participants with the international standards regarding mediation/ reconciliation in domestic violence cases, highlighting CEDAW General Recommendation No. 33, and underscoring key problems with this approach. It will cover national provisions and the institutional framework on reconciling perpetrators and victims of violence.

Learning objectives: By the end of the course the participants shall:

- Understand the difficulties in reconciling victims and perpetrators of domestic violence in line with international standards that caution against such approach;
- Review national law and practice on reconciliation.

Topic 6.1 – Mediation and reconciliation in domestic violence cases

Training Methodology

A brief overview of the international standards on mediation and reconciliation between perpetrators and victims of domestic violence will caution actors on the inherent challenges of adopting this approach. The session will cover the national legal and institutional framework. It will provide an opportunity to role play in mediating cases.

Assessment/evaluation

While participants will not be assessed as part of this training package, an evaluation will be conducted on the effectiveness of the materials and their presentation. This may include pre- and post-training tests to evaluate whether the material was conveyed effectively.

Literature

ECtHR jurisprudence

- ▶ Opuz v. Turkey, Application No. 33401/02, 2009.
- ▶ Branko Tomašić and Others v. Croatia, Application No. 46598/06, 2009.
- ▶ M.C. v. Bulgaria, Application No. 39272/98, 2004.
- ▶ Aydin v. Turkey, Application No. 23178/94, 1997.
- ▶ Kontrová v. Slovakia, Application No. 7510/04, 2005.
- ▶ Y. v. Slovenia, Application No. 41107/10, 2015.
- ▶ Halime Kiliç v. Turkey, Application No. 63034/11, 2016.
- ▶ A. v. Croatia, Application No. 55164/08, 2010.
- ▶ Mudric v. The Republic of Moldova, Application No. 74839/10, 2013.
- ▶ B. v. The Republic of Moldova, Application No. 61382/09, 2013.

CEDAW jurisprudence

- ▶ A.T. v. Hungary, Communication No. 2/2003, CEDAW/C/36/D/2/2003.
- ▶ V.K. v. Bulgaria, Communication No. 20/2008, CEDAW/C/49/D/20/2008.
- ▶ Karen Tayag Vertido v. The Philippines, Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008.
- ▶ Kell v. Canada, Communication No. 19/2008, CEDAW/C/51/D/19/2008.

Official Documents

- ▶ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)
- ▶ UN Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW)
- ▶ European Convention on Human Rights and Fundamental Freedoms (ECHR)
- ▶ Declaration on the Elimination of Violence against Women, (DEVAW)
- ▶ UN. Secretary-General, In-depth study on all forms of violence against women, U.N. Doc. A/61/122/Add.1 (July 6, 2006)
- ▶ CEDAW, General Recommendation No. 19
- ▶ CEDAW, General Recommendation No. 28
- ▶ CEDAW, General Recommendation No. 33
- ▶ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, UN. Doc. E/CN.4/1995/42 (Nov. 22, 1994)
- ▶ Council of Europe Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence
- ▶ Istanbul Convention Explanatory Report

Literature (handbooks and guidelines)

- ▶ UNFPA, Men and Gender Equality in Armenia, 2016.
- ▶ Factsheet on Guaranteeing Equal Access of Women to Justice (January 2015).
- ▶ Snežana Samardžić-Marković, "The Justice Jigsaw that Cuts out Women", New Europe, 5 October 2015.
- ▶ Council of Europe, Barriers, Remedies and Good Practices for Women's Access to Justice in Five Eastern Partnership Countries, 2016.
- ▶ Council of Europe, Preventing and Combating Violence against Women: A learning resource for training law enforcement and justice officers, 2016.
- ▶ Council of Europe, Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice, 2017.

National Laws

- ▶ Constitution of the Republic of Armenia
- ▶ Family Code of the Republic of Armenia
- ▶ Criminal Code of the Republic of Armenia
- ▶ Criminal Procedure Code of the Republic of Armenia
- ▶ Civil Code of the Republic of Armenia
- ▶ Civil Procedure Code of the Republic of Armenia
- ▶ Administrative Procedure Code of the Republic of Armenia
- ▶ RA Law on “Administration and Administrative Proceedings”
- ▶ RA Law on “Prevention of Violence within the Family, Protection of Victims of Violence within the Family and Restoration of Peace in the Family”
- ▶ Colonel General of the Police order on “Approving Criteria for Assessing Imminent Threat of Recurrence or Continuation of Violence in the Family”
- ▶ Colonel General of the Police order on “Preventive record-registration of an adult having committed violence in the family”
- ▶ “Guideline for the implementation of part 4 of Article 183 of the Criminal Procedure Code of the Republic of Armenia” adopted by the General Prosecutor

EXECUTIVE SUMMARY

This Manual, Preventing and Combating Violence against Women and Domestic Violence in Armenia, contains all of the international standards and case law, as well as domestic legislation and practice relevant for combating domestic violence and violence against women. Drawing particularly on the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), CEDAW Convention, the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR), it highlights good practice and critical gaps in Armenian legislation that render the law and any practice based thereupon in violation of both the ECHR and the Istanbul Convention.

While the recent passage of the Law on the Prevention of Violence within the Family, Protection of Victims of Violence within the Family and Restoration of Peace in the Family (Domestic Violence Law) marks an important first step in bringing national legislation and practice in line with international standards, significant gaps remain. For example, the "gender neutral" approach taken by Armenia fails to adequately take a victim-centred approach, but rather reflects a preferential focus on the perpetrator, which in the vast majority of cases will be men.

This Manual focuses on the core legal domains necessary for combating domestic violence, that is: protection measures, investigations and evidence gathering, standards pertaining to prosecution and the right to an effective remedy, including compensation for pecuniary and non-pecuniary damages. With respect to other forms of violence against women covered by the Istanbul Convention - forced and early marriage, abortion, sterilisation, sexual harassment, female genital mutilation and stalking - the Armenian legal framework fails to criminalize them.

Beyond the technical legal framework, this Manual covers critical concepts necessary for understanding the purpose of existing international standards and from whence they derive. It begins by ensuring an understanding of the definitions of gender, gender roles, gender stereotyping and gender-based violence and gender discrimination. It draws upon the UNFPA study, Men and Gender Equality in Armenia, on the national prevalence of intimate partner and sexual violence and attitudes towards them, in order to raise awareness among legal practitioners of the prevailing gendered stereotypes that inform the decisions of victims, perpetrators, family members and criminal justice authorities in addressing domestic violence and violence against women. Indeed, the overall social tolerance towards violence against women and domestic violence in Armenia, and the deeply-seated practice of victim blaming, often impede women's access to justice. Furthermore, when evaluating national legislation and practice surrounding the context of specific case, the ECtHR considers such reports as part of its decision-making.

The curricula foresees the possibility of presentations by specialised NGOs or experts, including psychologists working with victims, to provide insight into the psychological impact of domestic violence upon victims, and the implications for the victim's ability to engage constructively with the criminal justice process. Taking into consideration the psychological state of the victim and the different stages of the cycle of violence are essential for criminal justice actors to effectively pursue investigations and prosecutions in these cases. Furthermore, international standards on the victim-centred, human rights-based approach were developed based on these particular characteristics of domestic violence.

The Manual is comprehensive in its approach, and each sector of the criminal justice chain can focus on those chapters covering their particular competence. However, a clear understanding of the standards pertaining to each stage provides a fuller picture of how each of the elements must fit together to ensure victims' access to justice. The Manual comes with a USB card where a trainer can find teaching materials and participants additional information to read.

INTRODUCTION TO TRAINING MANUAL

1.1 CONCEPTUAL FRAMEWORK: GENDER

Warm up exercise:

Sex or gender? Participants must break up into groups place a list of words on a page of a flip chart, divided into two categories (men/women). The list can include such words as: judge, child raising, doll, truck, cry, head of household, cleaning, breast feeding, breadwinner, submissive, outspoken, strong, violent, pregnancy, leader, cooking, worldly, sensitive, fire-fighter, police, independent, tender, small, gentle, rough, durable, emotional, nagging, talkative, sociable, silent, compassionate, hardworking, high-earning, etc.

In order to effectively address domestic violence, it is critical to have a solid understanding of concepts related to the term gender. While the term "sex" distinguishes between the biological differences between men and women, gender is defined as the different culturally or socially constructed roles ascribed to women and men. In other words, sex is (or was) an immutable characteristic; gender is ascribed. "Gender" thus refers to all differences between men and women that are not strictly biological¹. Importantly, the term gender applies to both women and men.

Gender roles are thus learned behaviours in a given society that condition us to perceive certain activities, tasks and responsibilities as male or female. Many cultures tend to see gender as a natural phenomenon, deriving from biological differences between women and men. However, understandings of masculine or feminine differ across culture or geographic locations. Other factors, such as socio-economic class can also greatly influence how genders are treated. As socially and culturally constructed, gender roles and identities can and do change over time.

- Sex roles: pregnancy, breast feeding
- Gender roles: child care

Gender stereotypes can be defined the belief that all men and women possess distinct psychological and behavioural traits, and can result in an over-generalized belief in the characteristics of a person based simply on their gender.

Examples of gender stereotypes pertaining to women include:

- ▶ women should be mothers and, therefore, they and not men ought to be concerned with matters relating to the bearing and rearing of children;
- ▶ women are sexually passive and, therefore, they are disposed submissively to surrender to men's sexual advances;
- ▶ women should dress modestly and, therefore, an immodestly dressed woman is responsible for her own sexual assault.

¹ See, CEDAW, General Recommendation No. 28, para 5, noting that these socially constructed gender identities, attributes and roles result in "hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community".

In its most recent Concluding Observations for Armenia in 2016, the CEDAW Committee expressed its concern about:

*the negative perception of the concept of “gender”, as well as the persistence of discriminatory stereotypes concerning the roles and responsibilities of women and men in the family and in society, undermining women’s social status and their educational and professional careers. ... Moreover, the Committee is alarmed about the limited acceptance in Armenian society of provisions implementing the international and national framework for gender equality.*²

The term **masculinity** describes socially constructed attributes, behaviours and roles that pertain to men. Some masculinities are based on hegemonic principles, such as leadership, power and primacy. Other masculinities enable men to be emotional, be deeply engaged with their families and their children and recognize that it is normal to lack confidence at times.

A recent UNFPA study, *Men and Gender Equality in Armenia*, found "quite a high percentage of hegemonic type of masculinity" in which participants in the study expressed their "agreement with the necessity of controlling the woman’s behaviour, beginning with dictating as to what she has to wear and concluding with a permanent control of the partner’s whereabouts".³

Another important aspect of masculinity concerns fathers’ involvement in parenting. Historical and sociological studies on fatherhood and time budgets suggest that over the last century, the role of fathers has changed. Fathers have become continuously more engaged in child care. Overall, the surveyed men think that their contacts with their children are stable and do not connect them with relations with their partners in marriage. Thus, 76% of the respondents do not agree with the proposition “I am afraid that I would lose contact with the children if my relationship broke up.” In spite of the above, 85% of the male respondents admit that their role in child care remains auxiliary (“My role in caring for my children is mostly as a helper”), and is largely limited to that of a provider (89.9%). Over a half of male respondents (54.8%) spend too little time with their children due to excessive workload.

Table 1: Men's responses to questions on controlling behaviour, in percentages

MEN N=689

Controlling Behavior		Agree	Strongly agree
Q 142	<i>I won't let my partner wear certain things.</i>	23.0	33.8
Q 143	<i>I have more say than she does about important decisions that affect us.</i>	24.2	59.6
Q 144	<i>I tell my partner who she can spend time time with.</i>	19.2	29.2
Q 145	<i>When my partner wear things to make her look beautiful, I think she may be trying to attract other men.</i>	4.2	4.1
Q 146	<i>I want to know where my partner is all of the time.</i>	18.1	67.0
Q 147	<i>I like to let her know she isn't the only partner I could have.</i>	7.1	11.0

The study found that "normative power dynamics" push some men to perpetrate physical violence against intimate partners to demonstrate their masculinity. In this way, the researchers contend, “men’s behaviours, including violence perpetration, help them construct an outward image of power over women that is aligned with a socially constructed ideal of masculinity.” Thus, when speaking of domestic violence and violence against women, we must also understand distinctions in masculinities⁴ that are also based on gendered stereotypes.⁵

² CEDAW/C/ARM/CO/5-6, para 14.

³ UNFPA, *Men and Gender Equality in Armenia*, 2016, pp. 168, 169, Significantly, 18.1% of the men surveyed felt that it was their right to engage in extra-marital relations.

⁴ UNFPA, *Men and Gender Equality in Armenia*, 2016, p. 83.

⁵ UNFPA, *Men and Gender Equality in Armenia*, 2016, p. 215.

Gendered stereotypes and myths related to domestic violence include, inter alia:

- ▶ Violence against women is a private matter
- ▶ Women deserve to be beaten, it shows that the man is the master
- ▶ Women should be silent
- ▶ Men have biological urges that make them naturally aggressive

The UNFPA report, *Men and Gender Equality in Armenia*, found that "a significant percentage of Armenian men still conform to what they see as traditional and cultural norms but what are in fact patriarchal stereotypes."⁶

These socially constructed patterns of identity, roles and behaviours result in discrimination against both men and women, and others that do not conform to strictly defined ideas, myths and stereotypes about gender, such as trans-gendered persons.

Gender discrimination can be defined at its most basic level as the differential treatment of individuals on the basis of their gender. The "differential treatment" is often prejudicial and based on a gender stereotype. Discrimination comes in many forms, intentional, indirect or structural. An example of structural discrimination includes women's unequal access to resources and their limited participation in decision-making in many societies.

Our focus here pertains to gender discrimination that affects women, because there is a strong correlation between discrimination against women and violence against women.

Discrimination against women is defined as:

*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*⁷

This definition is set forth in Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW), which forms the basis of most international standards related to women's equality and right to live free from violence. According to CEDAW General Recommendation No. 28:

*Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure. Moreover, indirect discrimination can exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men.*⁸

With respect to gender discrimination in Armenia, the UNFPA study, *Men and Gender Equality in Armenia*, found that the situation has deteriorated over the past few years. It found that "women are still at a considerable disadvantage in most spheres of public, political, and economic life, that their potential is underutilized and that at times they are not a part of the decision making processes in Armenia".⁹The report further found that the attainment of gender equality is "impeded by wide spread negative gender stereotypes and some traditional practices harmful to women (primarily gender-based violence, son preference and sex selective abortions)," which are still prevalent¹⁰.

⁷ Article 1, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

⁸ CEDAW, General Recommendation No. 28, para 16.

⁹ UNFPA, *Men and Gender Equality in Armenia*, 2016, p. 6.

¹⁰ UNFPA, *Men and Gender Equality in Armenia*, 2016, p. 8

Armenia has not yet enacted anti-discrimination legislation, although discrimination is prohibited, and promoting equality between men and women are set forth in the Constitution in declarative manner.¹¹ Under international and European anti-discrimination law, there are several forms of discrimination, two of which are direct and indirect discrimination. The definition of direct discrimination is:

A person is treated less favourably on grounds such as sex and gender, age, nationality, race, ethnicity, religion or belief, health, disability, sexual orientation or gender identity, than another person is, has been or would be treated in a comparable situation.¹²

Indirect sex/gender discrimination is defined as:

Discrimination occurring where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means for achieving that aim are appropriate and necessary.¹³

Direct discrimination is intentional, indirect discrimination involves a disparate impact. The latter is particularly relevant when we are talking about gender-based violence.

Notably, the protection against discrimination is offered to specific categories of persons. It is important to recall that discrimination can be on multiple or intersectional grounds. Women with disabilities, Roma women or women from lower classes face multiple and intersecting forms of discrimination due to their gender, but also due to their ethnicity, class and disability.

CEDAW General Recommendation 28 provides that discrimination against women based on:

sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.¹⁴

This leads us to our definition of **gender-based violence** (GBV). As it is based on gender, GBV affects both women and men of all ages. However, women are disproportionately affected by gender-based violence, and thus the term **violence against women** is frequently used interchangeably. Violence against women is defined as a form of discrimination in that it affects women's ability to enjoy their human rights and fundamental freedoms on an equal basis with men. While it affects persons of all ranks and class, it often affects vulnerable persons disproportionately.

The Istanbul Convention defines violence against women in these terms:

“violence against women” 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.¹⁵

11 Articles 29 and 86, Armenian Constitution.

12 See, European Institute for Gender Equality (EIGE), <http://eige.europa.eu/rdc/thesaurus/terms/1081>

13 See, European Institute for Gender Equality (EIGE), available at: <http://eige.europa.eu/rdc/thesaurus/terms/1253>.

14 CEDAW, General Recommendation No. 28, para 18.

15 Article 3(a), Istanbul Convention. CEDAW General Recommendation No. 19 provides a very similar definition of gender-based violence. See, CEDAW General Recommendation No. 19: Violence against women, 1992, para 6.

The Preamble of the Istanbul Convention recognises that

violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women; [and that] the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.¹⁶

CEDAW General Recommendation No. 19 underscores the link between gender-based violence and traditional gender stereotypes and violence. It reads:

Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse . . . Such prejudices and practices may justify gender-based violence as a form of protection or control of women.

The Istanbul Convention thus requires States to:

take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men¹⁷.

Violence against women is closely interrelated with some aspects of masculinity as a social construct, as discussed above. It is among the key practices of “hegemonic masculinity” that secures “a dominant social position for men while relegating women to a subordinate social position”¹⁸.

When addressing violence against women, particular attention must be paid to vulnerable or marginalised groups. As the UN Declaration on the Elimination of Violence against Women (DEVAW) draws attention to the fact that:

some groups of women, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence¹⁹.

Key international legal instruments pertaining to violence against women

- UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- General Recommendation No. 19
- UN Declaration on the Elimination of Violence against Women (DEVAW)
- Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)

Armenia ratified CEDAW in 1993, the Optional Protocol thereto in 2006, is signatory to the Beijing Platform for Action (1995) and recently signed the Istanbul Convention in January 2018.

Significantly, Article 5 of the Armenian Constitution provides that international norms shall prevail in case of a conflict between national law and ratified international conventions. Article 5(1) of the Law on International Treaties further provides for the direct legal application of ratified treaties. It states: “The norms of RoA international treaties entered into legal force apply directly in the territory of RoA”. Procedural codes also emphasise that ratified international treaties form part of procedural legislation.

¹⁶ CEDAW, General Recommendation No. 28, para 16.

¹⁷ Article 12(1), Istanbul Convention.

¹⁸ UNFPA, Men and Gender Equality in Armenia, 2016, p. 41.

¹⁹ UN Declaration on the Elimination of Violence against Women (DEVAW), 1993.

1.2 THE FORMS AND CYCLE OF VIOLENCE

As noted in the Explanatory Report on the Istanbul Convention, domestic violence refers to mainly two types of violence: intimate-partner violence between current or former spouses or partners, and inter-generational violence that typically occurs between parents and children. Domestic violence is thus a gender-neutral definition that encompasses victims and perpetrators of both sexes. At the same time, domestic violence is considered a form of violence against women, or gender-based violence. There five principle forms of domestic violence include:

- ▶ Physical violence
- ▶ Sexual violence
- ▶ Economic violence
- ▶ Psychological violence
- ▶ Stalking

Physical violence is defined by Article 35 of the Istanbul Convention and refers to "any intentional act of physical violence against another person irrespective of the context in which it occurs," including one slap²⁰.

In the Istanbul Convention, **sexual violence** refers to three types of acts:

- non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
- other non-consensual acts of a sexual nature with a person;
- causing another person to engage in non-consensual acts of a sexual nature with a third person²¹.

Pursuant to the Istanbul Convention, the jurisprudence of the European Court of Human Rights (ECtHR), international criminal courts and UN treaty bodies, the operative constituent element for crimes involving these three acts is consent. The Istanbul Convention provides: "Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances."²² International standards also require that national legislation criminalise these acts when committed between spouses and former spouses (e.g., marital rape).

Psychological violence refers to actions that impair a person's psychological integrity. Such actions can include:

- ▶ Threats of violence against a person or someone close to him/her (stalking, displaying weapons)
- ▶ Humiliating, insulting comments
- ▶ Isolation, restrictions on communication
- ▶ Use of children to control or hurt the woman (hurting children, kidnapping etc).

Economic violence involves denying and controlling access to resources, including: time, money, transportation, food or clothing. Examples of economic violence include:

- ▶ Prohibiting a woman from working
- ▶ Excluding her from financial decisions of family
- ▶ Withholding money or financial information
- ▶ Refusing to pay bills or maintenance of her and/or children
- ▶ Destroying jointly owned assets.

²⁰ Explanatory Report, para 187.

²¹ Article 36(1), Istanbul Convention.

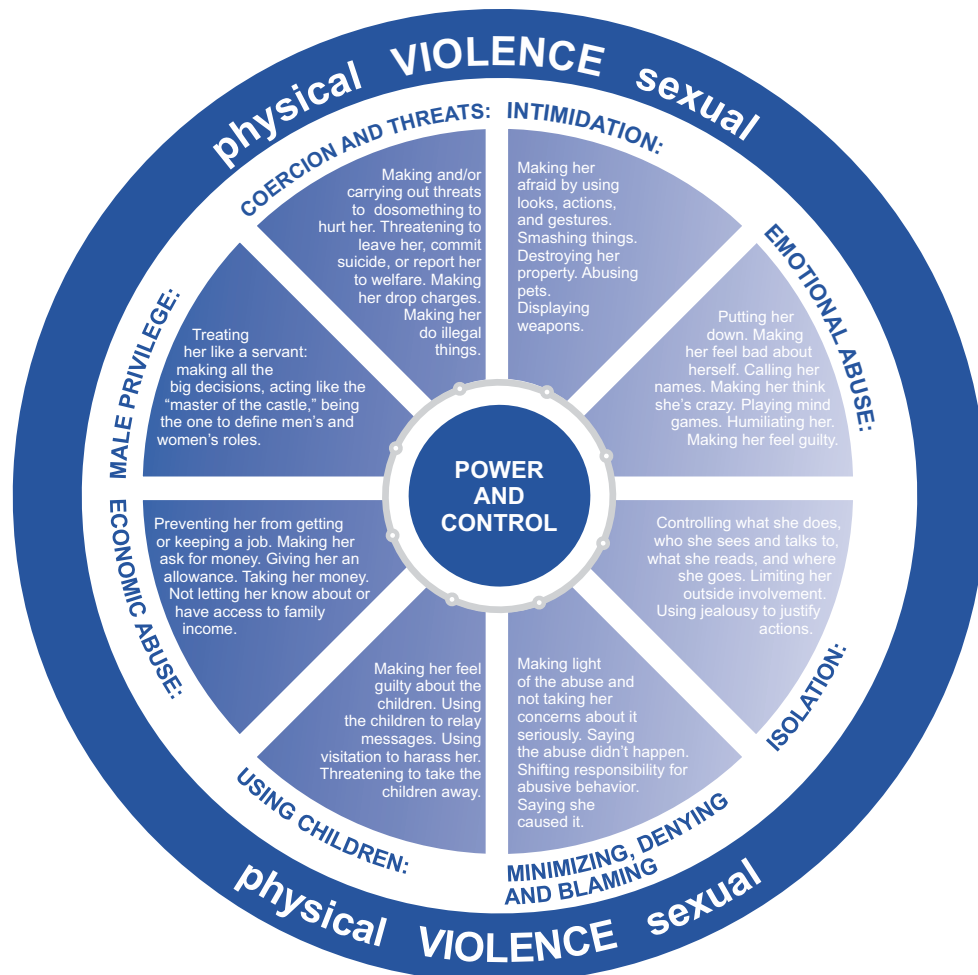
²² Article 36(2), Istanbul Convention.

Both economic and psychological violence pose distinct challenges for the legal system due to evidentiary issues, which are discussed in greater detail below. Notably, OSCE-commissioned research by the Proactive Society revealed that the most common forms of domestic violence in Armenia are psychological and economic.²³ As discussed below, these forms of violence are not sanctioned by criminal law measures effectively.

Stalking is defined as "the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety".²⁴ Significantly, the Criminal Code in Armenia does not address stalking.

Physical and sexual assaults, or threats to commit them, are the most apparent forms of domestic violence and are usually the actions that allow others to become aware of the problem. However, regular use of other abusive behaviours by the batterer, when reinforced by one or more acts of physical violence, make up a larger system of abuse. Although physical assaults may occur only once or occasionally, they instil the threat of future violent attacks and allow the abuser to take control of the woman's life and circumstances.

The power and control wheel is a particularly helpful tool in understanding the overall pattern of abusive and violent behaviours, which are used by a batterer to establish and maintain control over his partner. Very often, one or more violent incidents are accompanied by an array of these other types of abuse. They are less easily identified, yet firmly establish a pattern of intimidation and control in the relationship.



A link to a short film: *Inside Domestic Violence: Power and Control* (20:59 min) can be found from the USB card.

23 OSCE/Proactive Society, Domestic Violence Survey in the Republic of Armenia, 2012, p. 36.

24 Article 34, Istanbul Convention.

25 Domestic Abuse Intervention Programs, Duluth, Minnesota, www.theduluthmodel.org

Domestic violence is considered a form of violence against women because it disproportionately affects women. Other **forms of violence against women** include:

- ▶ Stalking
- ▶ Forced, early marriage
- ▶ FGM
- ▶ Forced abortion/Pre-natal sex selection
- ▶ Sexual harassment
- ▶ Human trafficking
- ▶ Sexual exploitation
- ▶ Virginity testing

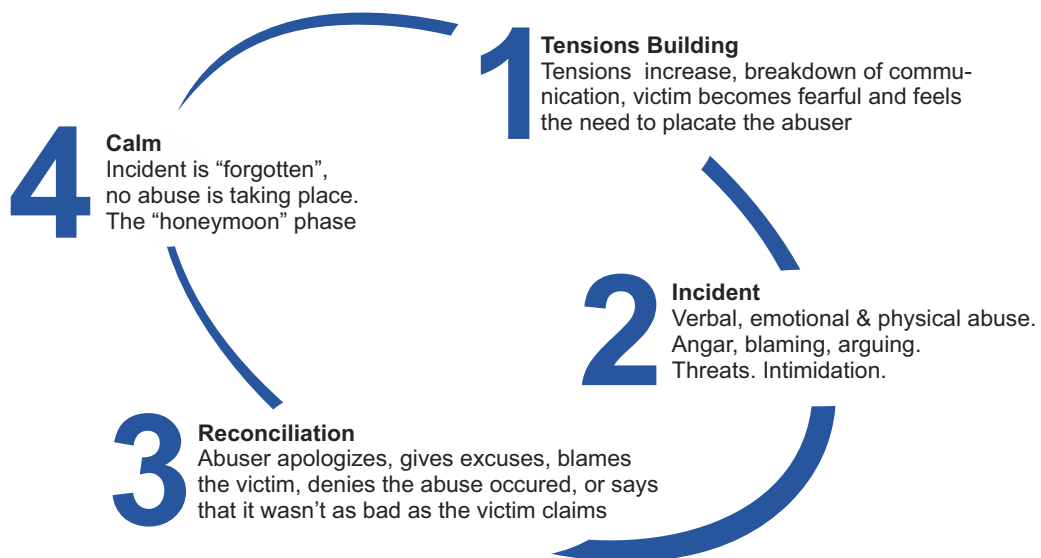
Another important characteristic of domestic violence involves the cycle of abuse. Violent behaviour directed at the woman occurs often in three distinct and repetitive stages that vary both in duration and intensity depending on the individuals involved.

Phase one is referred to as the tension-building stage, during which the battering male engages in minor battering incidents and verbal abuse while the woman, beset by fear and tension, attempts to be as placating and passive as possible in order to stave off more serious violence.

Phase two of the battering cycle is the acute battering incident. At some point during phase one, the tension between the battered woman and the batterer becomes intolerable and more serious violence inevitable.

Phase three is characterized by extreme contrition and loving behaviour on the part of the battering male. During this period the man will often mix his pleas for forgiveness and protestations of devotion with promises to seek professional help, to stop drinking, and to refrain from further violence.

Cycle of Abuse



For some couples, this period of relative calm may last as long as several months, but in a battering relationship the affection and contrition of the man will eventually fade and phase one of the cycle will start anew. The cyclical nature of battering behaviour helps explain why more women simply do not leave their abusers. The loving behaviour demonstrated by the batterer during phase three reinforces whatever hopes these women might have for their mate's reform and keeps them bound to the relationship.

Some women may even perceive the battering cycle as normal, especially if they grew up in a violent household. Or they may simply not wish to acknowledge the reality of their situation. Other women become so hopeless and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation. There is a tendency in victims to feel that any attempt to resist a perpetrator is hopeless.

In addition to these psychological impacts, external social and economic factors often make it difficult for some women to extricate themselves from violent relationships. A woman without independent financial resources who wishes to leave her husband often finds it difficult to do so because of a lack of material and social resources. Women who work typically make less money and hold less prestigious jobs than men, and are more responsible for childcare. Thus, in a violent confrontation where the first reaction might be to flee, women realise soon that there may be no place to go. Moreover, the stigma that attaches to a woman who leaves the family unit without her children undoubtedly acts as a further deterrent to moving out. In addition, battered women, when they want to leave the relationship, are typically unwilling to reach out and confide in their friends, family, or the police, either out of shame and humiliation, fear of reprisal by their husband, or the feeling they will not be believed.

It is important to understand the cycle of violence because one of the biggest challenges to law enforcement in responding to domestic violence cases is the victim's decision to **withdraw her complaint**. The cycle of violence can result in victims calling the police during the acute phase of violence, only to withdraw it during a calm phase, and in light of the many psychological and social barriers that prevent women from leaving. As addressed in greater detail later in the training, the fact that victims withdraw their complaints has led the European Court of Human Rights (ECtHR) in the *Opuz v. Turkey* case to require prosecutors to act *ex officio*.

There are numerous **barriers** that impede victims from leaving an abusive relationship, both psychological and social and economic reasons. Psychological barriers include the fact that for victims who grew up in violent households, violence is normalised; some victims are in denial; the humiliation and degrading treatment suffered over time can result in psychological paralysis and depression. Social and economic barriers that prevent victims from escaping violent relationships include:

- ▶ Limited financial resources
- ▶ Limited social support
- ▶ Social stigma
- ▶ Concern for children
- ▶ Nowhere to go
- ▶ Fear of reprisal
- ▶ Family shame
- ▶ Lack of trust in law enforcement

With respect to the latter, it is very important to understand how the criminal justice system can constitute a barrier for women seeking to escape and for those seeking access to protection from further violence and a remedy for the crimes they have suffered. The lack of gender sensitivity, lack of understanding about the nature of domestic violence and discriminatory treatment of victims by law enforcement actors can and often result in the secondary victimisation of victims. This re-victimisation can be unintentional. **Secondary victimisation** refers to the re-victimisation of crime victims during their interactions with police officers, criminal justice professionals, medical personnel, psychological staff and victim advocates.

There are certain moments in the criminal justice process, from response to adjudication, that can result in re-traumatisation of the victim. These are:

- ▶ Interviews and having to go through multiple interviews
- ▶ Forensic testing
- ▶ Testifying and having to re-testify
- ▶ Lack of in-court protection, confrontation with the accused
- ▶ Postponements and continuances
- ▶ Decisions based on judicial stereotypes.

Final exercise

Trainers may do the following exercise in order to help participants identify and confront common myths about domestic violence:

— Option 1. Participants are asked to complete “Hand-out 1 – Myths and facts about domestic violence: Questions” individually. Afterwards, the whole group discusses the reasons behind these myths. Trainers guide the discussion by revealing which are based on gendered stereotypes.

— Option 2. Trainers prompt a group brainstorming session about the prevailing myths surrounding domestic violence by asking the following questions: Are there common myths about domestic violence that you know of? What do these myths assume about the causes of domestic violence? How do these myths impact the work of legal professionals/police officers? Following the group discussion, “Hand-out 2 – Myths and facts about domestic violence: Answers” is distributed to participants.

Both hand-outs are annexed to this training manual.

II. LEGAL FRAMEWORKS AND CURRENT DATA

2.1 THE VICTIM-CENTRED, HUMAN RIGHTS-BASED APPROACH AND APPLICABLE HUMAN RIGHTS

A victim-centred approach is defined as the systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a non-judgmental manner. The victim's wishes, safety, and well-being take priority in all matters and procedures. A victim-centred approach seeks to minimise re-traumatisation associated with the criminal justice process by providing the support of victim advocates and service providers, and empowering victims as engaged participants in the process. Service provider and law enforcement partnerships are crucial to the provision of a comprehensive and victim-centred response. In light of the historic ineffectualness of the criminal justice system to respond to domestic violence cases, to protect victims' and to ensure their rights are respected throughout the process, ensuring victims' rights is an essential feature of the Istanbul Convention. It ensures, among other rights for victims:

- ▶ Adequate, **timely information on available support services** and legal options in a language they understand (Art. 19)
- ▶ **Access to services** facilitating recovery: legal and psychological counselling, financial assistance, housing, education and skills training (Art 20)
- ▶ Available **civil remedies**, including compensation (Arts 29, 30)
- ▶ Investigations and proceedings **without undue delay** (Arts 49, 50)
- ▶ **Protection measures** for victims and their families from intimidation, retaliation, no contact with the perpetrator (where possible), right to be heard, information on proceedings, interpreters (Art 56).

Each of these rights is addressed in more detail throughout the training. With respect to the access to services, there must be an adequate geographic distribution of specialised support services. The provision of services shall not be dependent upon the victim's willingness to press charges or to testify, and the services must be able to address the needs of vulnerable persons, including child victims.

With respect to the victim's right to information, additional rights to information accrue at the investigation and trial stages of proceedings. These include the right to information on:

- ▶ their rights, regional/international complaint mechanisms
- ▶ status of their complaint,
- ▶ progress of investigations or proceedings,
- ▶ their role in the proceedings,
- ▶ outcome of the case.

The information to be provided to victims at all stages should be in written form, and not just provided verbally.

A **human rights-based approach** requires that the human rights of victims are protected throughout the criminal justice process and in the victim's access to the full range of support services. It requires ensuring

victim's safety, confidentiality and anonymity at all times. Domestic violence, and ineffectual State response, often results in violations of the following rights of victims:

- ▶ the right to **life**
- ▶ the right to be **free from torture or cruel, inhuman or degrading treatment**
- ▶ the right to **liberty and security of person**
- ▶ the right to **equal protection** before the law
- ▶ prohibition of **discrimination**
- ▶ the right to **private and family life**
- ▶ the right to a **fair trial**
- ▶ the right to a **remedy**
- ▶ the right to the highest standard attainable of **physical and mental health.**

Specifically, with respect to the jurisprudence of the ECtHR, the Court has found violations of the following articles of the Convention by States in cases involving domestic and sexual violence:

- ▶ Article 2 – Right to life
- ▶ Article 3 – Prohibition of inhumane and degrading treatment
- ▶ Article 8 – Right to respect for privacy and family life
- ▶ Article 13 – Right to an effective remedy
- ▶ Article 14 – Prohibition of discrimination.

As discussed in greater detail later in the training, the Court has found violations of States' positive obligations under Articles 2, 3 and 8. It has also found a violation of Article 14 as the violence suffered was gender-based, as domestic violence primarily affects women, who in one of the cases in question faced discriminatory judicial passivity. A list of relevant cases, to date, can be found in the Appendices.

Articles 2 and 3

In several domestic violence cases, the Court found that a positive obligation under Article 2:

involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.²⁷

²⁷ Opuz v. Turkey, Application No. 33401/02 2009. para 128.

Article 3

The Court has held that "Article 3 of the Convention enshrines one of the fundamental values of democratic societies and as such it prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Article 3 admits of no exceptions to this fundamental value and no derogation from it is permissible".²⁸ The State must "take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals".²⁹

With respect to the duty to investigate under the positive obligations of Article 3, the Court held in the *Y. v. Slovenia* case:

As regards the Convention requirements relating to the effectiveness of an investigation, the Court has held that it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, such as witness testimony and forensic evidence, and a requirement of promptness and reasonable expedition is implicit in this context.³⁰

In the *Opuz v. Turkey* case, the Court noted that: "Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal" in finding the victim, a woman suffering domestic violence living in Southern Turkey, to be a vulnerable person.³¹ It found that the violence suffered by the victim, "in the form of physical injuries and psychological pressure, were sufficiently serious to amount to ill-treatment within the meaning of Article 3".³²

Article 8

In a case involving on-going violence against the applicant by her husband, *A. v. Croatia*³³, the Court analysed the case under the State's positive obligations pursuant to Article 8. It expressed "no doubt" that the physical attacks and the death threats "pertain to the sphere of private life within the meaning of Article 8," finding that an individual's physical and moral integrity are covered by the concept of private life, which did not "exclude attacks on one's physical integrity."³⁴ It thus held that:

Under Article 8 States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.

³⁵

The Court further noted that the State's obligation under Article 8 in cases involving acts of violence would usually require the adoption of "adequate positive measures in the sphere of criminal-law protection".

It is important to note that with regard to the protection of the right to family life, that the ECtHR has rejected State practices that decline to intervene in domestic violence cases on the basis that they occur in the private sphere. For example, in the Opuz v. Turkey case, the Court stated, "in some instances, the national authorities' interference with the private or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent commission of criminal acts".³⁶

²⁸ *Aydin v. Turkey*, Application No. 57/1996/676/866, 1997, para 81.

²⁹ *Opuz v. Turkey*, Application No. 33401/02 2009, para 159.

³⁰ *Y. v. Slovenia*, Application No. 41107/10, 2015, para 96

³¹ *Opuz v. Turkey*, Application No. 33401/02 2009, paras 159, 160.

³² *Opuz v. Turkey*, Application No. 33401/02 2009, para 161.

³³ *A. v. Croatia*, Application No. 55164/08, 2010.

³⁴ *A. v. Croatia*, Application No. 55164/08, 2010, para 58.

³⁵ *A. v. Croatia*, Application No. 55164/08, 2010, para 60.

³⁶ *Opuz v. Turkey*, Application No. 33401/02 2009, para 144.

Article 13

Pursuant to the Court's jurisprudence:

Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.³⁷

Moreover, the Court has held that Article 13 encompasses both the requirement to conduct an investigation, as well as the availability of compensation, including non-pecuniary damages.

For example, in the *Aydin v. Turkey* case, involving the rape and torture of a minor by police while in detention, the Court stated that:

the nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.

Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.³⁸

In the *Kontrová v. Slovakia* case, in which the victim was unable to access non-pecuniary damages via the criminal proceedings of the police officers for dereliction of duty in responding to incidents involving her husband prior to his shooting the children and himself, the Court stated:

in the event of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies.³⁹

Article 14

The Court has found that ineffective government response to gender-based violence constitutes discrimination and a failure to ensure equal protection of the law.⁴⁰ In the *Opuz v. Turkey* case, the Court examined NGO reports on domestic violence in Turkey, which provided statistics demonstrating that women were disproportionately affected. The Court thus found that the victim had demonstrated a prima facie showing that "domestic violence affected mainly women" on the basis of these unchallenged statistics, and that "the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence".⁴¹ It held that the victim and her mother were discriminated against on account of the authorities' failure to provide equal protection of law due to its "insufficient commitment to take appropriate action to address domestic violence".⁴²

³⁷ *Aydin v. Turkey*, Application No. 57/1996/676/866, 1997, para 103; *Kontrová v. Slovakia*, Application No. 7510/04, 2005, para 62.

³⁸ *Aydin v. Turkey*, Application No. 57/1996/676/866, 1997, para 103.

³⁹ *Kontrová v. Slovakia*, Application no. 7510/04, 2005, para 64.

⁴⁰ *Opuz v. Turkey*, Application No. 33401/02 2009, para 200; *Balsan v. Romania*, Application No. 49645/09, 2017, para 88.

⁴¹ *Opuz v. Turkey*, Application No. 33401/02 2009, para 198.

⁴² *Opuz v. Turkey*, Application No. 33401/02 2009, para 200.

2.1.1 ECtHR AND CEDAW CASE STUDIES

Case studies: Cases from the ECtHR and the CEDAW Optional Protocol are summarised below. The trainers can go over the facts and decision of these cases with the participants. It is advisable to go over the facts and reasoning in the landmark *Opuz v. Turkey* case as part of discussing the standards articulated by the Court elaborated above.

A case study in Hand-out 5 can be found in the annexes, with a factual summary based on the *Balsan v. Romania* case, with questions for the participants. The participants can be broken into groups and work together on drafting a decision of key findings. Additional questions for the facilitator to pose in a group discussion are included as well.

A. ECtHR CASE STUDIES

- *Opuz v. Turkey*

In the landmark case *Opuz v Turkey*, the Court applied Articles 2, 3 and 14, protecting the right to life, the prohibition on torture and ill-treatment and the right to be free from discrimination to a domestic violence case.⁴³ The *Opuz v. Turkey* case involved two victims, the wife of the perpetrator and her mother, filing police complaints on multiple occasions concerning beatings resulting in serious bodily harm and death threats, and then subsequently withdrawing them due to threats of violence by the perpetrator (H.O). Consequently, it involved charges being brought and subsequently dropped by the prosecutor due to "lack of evidence". The perpetrator was charged and found guilty of violence and death threats several times and variously sentenced to imprisonment and fined. The perpetrator eventually killed his wife's mother.

The perpetrator was sentenced to life imprisonment, but the national court reduced the sentence due to the mitigating circumstance that he was provoked by the mother, and due to his good behaviour in court. It ordered his release given that the judgement would be appealed. On his release he sought out the applicant and threatened to kill her and her new boyfriend. No protection measures were instituted despite the victim's request.

The Court found that the victim, a woman suffering domestic violence living in Southern Turkey, to be a vulnerable person, and that the violence suffered by the victim, "in the form of physical injuries and psychological pressure, were sufficiently serious to amount to ill-treatment within the meaning of Article 3".⁴⁴

The Court examined the practice across Council of Europe Member States with regard to ex officio prosecutions in domestic violence cases, noting that:

a crucial question in the instant case is whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O. [the perpetrator] despite the withdrawal of complaints by the victims.⁴⁵

It inferred from the practice of other States 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".⁴⁶ It noted in this regard several characteristics of the case, common to cases of domestic

⁴³ *Opuz v. Turkey*, Application No. 33401/02 2009.

⁴⁴ *Opuz v. Turkey*, Application No. 33401/02 2009, paras 159, 160, 161.

⁴⁵ *Opuz v. Turkey*, Application No. 33401/02, 2009, para 131.

⁴⁶ *Opuz v. Turkey*, Application No. 33401/02, 2009, para 139.

violence. It highlighted that:

there was an escalating violence against the applicant and her mother by H.O. The crimes committed by H.O. were sufficiently serious to warrant preventive measures and there was a continuing threat to the health and safety of the victims. When examining the history of the relationship, it was obvious that the perpetrator had a record of domestic violence and there was therefore a significant risk of further violence. (Emphasis added).⁴⁷

The Court concluded that the continued violence in this case was not only possible, but foreseeable. It further rejected the basis for the authorities' refusal to intervene. It stated:

it does not appear that the local authorities sufficiently considered the above factors when repeatedly deciding to discontinue the criminal proceedings against H.O. [the perpetrator]. 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, there is no indication that the authorities considered the motives behind the withdrawal of the complaints. This is despite the applicant's mother's indication to the Diyarbakır Public Prosecutor that she and her daughter had withdrawn their complaints because of the death threats issued and pressure exerted on them by H.O. It is also striking that the victims withdrew their complaints when H.O. was at liberty or following his release from custody.⁴⁸

The Court concluded that the national authorities failed to meet their due diligence obligations, and consequently their positive obligation to protect the right to life of the applicant's mother, who was murdered by the perpetrator, within the meaning of Article 2 of the Convention.

In assessing "whether the national authorities have taken all reasonable measures to prevent the recurrence of violent attacks against the applicant's physical integrity," the Court looked to the common values emerging from the practices of European States, and specialised instruments such as CEDAW.⁴⁹ While noting that the authorities did not remain totally passive, "none of these measures were sufficient" to prevent the perpetrator from committing more violence.⁵⁰ In this regard, it found that:

the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. despite the withdrawal of complaints by the applicant on the basis that the violence committed by H.O. was sufficiently serious to warrant prosecution and that there was a constant threat to the applicant's physical integrity.⁵¹

It found that the authorities did not exercise the required due diligence "to prevent the recurrence of violent attacks" as the perpetrator committed them without "hindrance" and "with impunity," and that their response was "manifestly inadequate".⁵²

With respect to the victim's discrimination claims, the Court referred to CEDAW General Recommendation No. 19, defining gender-based violence as a form of discrimination. The Court also examined several NGO reports related to domestic violence in Turkey, which contained statistics. The reports indicated that:

the highest number of reported victims of domestic violence is in Diyarbakır, where the [victim] lived at the relevant time, and that the victims were all women who suffered mostly physical violence. The great majority of these women were of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income.⁵³

47 Opuz v. Turkey, Application No. 33401/02, 2009, para 134.

48 Opuz v. Turkey, Application No. 33401/02, 2009, para 143.

49 Opuz v. Turkey, Application No. 33401/02, 2009, paras 162-164.

50 Opuz v. Turkey, Application No. 33401/02, 2009, para 167.

51 Opuz v. Turkey, Application No. 33401/02, 2009, para 168.

52 Opuz v. Turkey, Application No. 33401/02, 2009, paras 168-170, noting that "the Court was particularly struck by the Diyarbakır Magistrate's Court's decision to impose merely a small fine, which could be paid by instalments, on H.O. as punishment for stabbing the applicant seven times".

53 Opuz v. Turkey, Application No. 33401/02, 2009, para 194.

The reports also indicated that:

when victims report domestic violence to police stations, police officers do not investigate their complaints but seek to assume the role of mediator by trying to convince the victims to return home and drop their complaint. In this connection, police officers consider the problem as a "family matter with which they cannot interfere".⁵⁴

The NGO reports also noted the numerous delays in obtaining protective injunctions as the police treated them like divorce actions, as well as delays in serving the injunctions on the perpetrators due to the police's "negative attitudes".⁵⁵ Moreover, "the perpetrators of domestic violence do not seem to receive dissuasive punishments, because the courts mitigate sentences on the grounds of custom, tradition or honour". The Court thus found that the victim had demonstrated a prima facie showing that "domestic violence affected mainly women" on the basis of unchallenged statistics, and that "the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence".⁵⁶ It concluded that the victim and her mother were discriminated against on account of the authorities' failure to provide equal protection of law due to its "insufficient commitment to take appropriate action to address domestic violence".⁵⁷

- ***Kontrová v. Slovakia***

In *Kontrová v. Slovakia*, the victim reported a violent incident to the police with a medical certificate, documenting that the injuries left her unfit to work for 6 days. She later returned to the police station with her husband to withdraw the complaint. The police reduced the criminal charge to a minor offence. The following month a relative of the victim called the police to indicate that the husband had locked himself into the apartment with a shotgun and threatened to kill himself and their two children. The victim also called the police. When the police arrived the perpetrator had already left the scene. The applicant filed a complaint the next day. A few days later, the husband shot their two children and himself.

Shortly thereafter, the police inspection service filed a complaint of abuse of public authority and dereliction of duty against two police officers who had handled the second incident for not immediately instituting criminal proceedings against the perpetrator, failing to respond appropriately to an emergency situation and failing to launch an investigation into the incident. The police inspection service also filed a complaint of abuse of public authority against the police officer who responded to the first complaint, for altering the records and treating the incident as a minor offence. These cases were either discontinued or dismissed. The Prosecutor appealed to the Supreme Court, which quashed the lower decisions, finding that the police officers had been derelict in their duties. A district court found the accused police officers guilty, and issued suspended sentences. On appeal, a regional court affirmed. The victim filed two claims before the Constitutional Court in light of her inability to claim non-pecuniary damages in the criminal proceedings, which were declared inadmissible.

In light of the State's responsibility for the victim's the right to life claims under Article 2, the ECtHR found that "compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies" pursuant to Article 13 of the Convention.⁵⁸ It thus found a violation of Article 13 as the victim "should have been able to apply for compensation for the non-pecuniary damage suffered by herself and her children in connection with their death".⁵⁹

54 *Opuz v. Turkey*, Application No. 33401/02, 2009, para 195.

55 *Opuz v. Turkey*, Application No. 33401/02, 2009, para 196.

56 *Opuz v. Turkey*, Application No. 33401/02, 2009, para 198.

57 *Opuz v. Turkey*, Application No. 33401/02, 2009, para 200.

58 *Kontrová v. Slovakia*, Application No. 7510/04, 2005, para 64.

59 *Kontrová v. Slovakia*, Application No. 7510/04, 2005, para 65.

- ***Branko Tomašić and Others v. Croatia***

In *Branko Tomašić and Others v. Croatia*, the Court found a violation of the State's positive obligation under Article 2. In that case, the applicants' son-in-law (M.M.) threatened on multiple occasions to kill their daughter (M.T.) and their child (V.T.), including blowing up the latter with a bomb on his first birthday. The perpetrator (M.M.) made these threats in front of both police and the staff of the social welfare centre. M.T. lodged a criminal complaint against him, and M.M. was convicted for the multiple threats against M.T. and sentenced to five months in prison. A psychiatric evaluation recommended that he receive ongoing psychiatric treatment, in and out of prison. Upon his release, M.M. shot and killed M.T., V.T. and himself. There was no record of M.M.'s psychiatric treatment during his prison term.

The applicants made a two-fold complaint under Article 2:

that the State had failed to comply with their positive obligations in order to prevent the deaths of M.T. and V.T. and secondly that the State had failed to conduct a thorough investigation into the possible responsibility of their agents for the deaths of M.T. and V.T.⁶⁰

The Court reiterated that Article 2:

enjoins the State to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.⁶¹

With respect to the applicable standard—whether 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 third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk—the Court found that "the domestic authorities were aware that the threats made against the lives of M.T. and V.T. were serious and that all reasonable steps should have been taken in order to protect them from those threats".⁶² The Court thus examined "whether the relevant authorities took all steps reasonable in the circumstances of the present case to protect the lives of M.T. and V.T."⁶³

In finding a substantive breach of Article 2, the Court first noted that despite M.M.'s multiple threats concerning a bomb, the authorities never searched his home or vehicle for a bomb or other weapons. It also observed that the Government failed to demonstrate that "the compulsory psychiatric treatment ordered in respect of M.M. during his prison term was actually and properly administered".⁶⁴ In this regard, the Court highlighted that the regulation concerning compulsory psychiatric treatment was very general, and did "not properly address the issue of enforcement of obligatory psychiatric treatment as a security measure, thus leaving it completely to the discretion of the prison authorities to decide how to act".⁶⁵ The Court stated that:

such regulations need to be sufficient in order to ensure that the purpose of criminal sanctions is properly satisfied. In the present case neither the regulation on the matter nor the court's judgment ordering M.M.'s compulsory psychiatric treatment provided sufficient details on the administration of this treatment.⁶⁶

The Court further noted in this regard that no adequate risk assessment was conducted upon the perpetrator's release from prison. It found this "failure particularly striking given that his threats had been taken seriously by the courts and that the prior psychiatric report expressly stated that there was a strong likelihood that he might

⁶⁰ *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 29

⁶¹ *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 49.

⁶² *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, paras 51, 53.

⁶³ *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 53.

⁶⁴ *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, paras 55, 56.

⁶⁵ *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 57.

⁶⁶ *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 57.

repeat the same or similar offences".⁶⁷ As discussed in greater detail below, international standards foresee ongoing risk assessments in cases of domestic violence, particularly for high-risk events, such as separation or divorce, or the perpetrator's release from prison. Finally, the Court noted that the appellate court reduced the compulsory psychiatric treatment to the period of time M.M. spent in prison only. These factors together led the Court to conclude that there was a substantive violation of Article 2 as the domestic authorities failed to take "all reasonable steps in the circumstances of the case" to protect the lives of M.T. and V.T.

- *Aydin v. Turkey*

The applicant was a Kurdish 17-year-old who was blindfolded and taken with other members of her family to a gendarmerie where she was stripped and subjected to torture, interrogation, raped and subsequently beaten. They were released separately the same day. The day after being released, the victim, her father and sister went to the public prosecutor's office where they filed a complaint. They were sent to the State hospital for forensic tests, where the victim was subjected to a virginity test. The doctor confirmed that the hymen had been torn and that the victim had bruising on her inner thighs. Wounds were also documented on the bodies of her family members. The next day public prosecutor sent the victim to a second hospital to determine when she had lost her virginity; the doctor had estimated a week before the examination. No swab was taken. Neither of the forensic doctors were sufficiently qualified experts. A month later, the prosecutor took a second statement from the victim and sent her for a third examination of her virginity. The date of the torn hymen could not be determined. The victim received a letter that the investigation had produced no evidence of the rape.

The victim and her husband suffered harassment by police and public authorities upon her filing her complaint to the European Commission for Human Rights. Her husband was taken into custody and severely beaten.

In finding a violation of Article 3 of the Convention, the Court found that:

While being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally. ⁶⁸

Holding that in cases involving claims of torture under Article 3, Article 13 imposes on States the requirement to conduct an effective investigation, the Court found that the prosecutor failed to conduct a prompt, thorough and effective investigation into the claims of the victim and her family members. In particular, the Court observed:

It would appear that [the prosecutor's] primary concern in ordering three medical examinations in rapid succession was to establish whether the applicant had lost her virginity. The focus of the examinations should really have been on whether the applicant was a rape victim, which was the very essence of her complaint. ⁶⁹

The Court further noted the weaknesses in the specific forensic procedures undertaken. It concluded that:

the requirement of a thorough and effective investigation into an allegation of rape in custody at the hands of a State official also implies that the victim be examined, with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination. It cannot be concluded that the medical examinations ordered by the public prosecutor fulfilled this requirement.⁷⁰

⁶⁷ Branko Tomašić and Others v. Croatia, Application No. 46598/06, 2009, para 58.

⁶⁸ Aydin v. Turkey, Application No. 57/1996/676/866, 1997, para 83.

⁶⁹ Aydin v. Turkey, Application No. 57/1996/676/866, 1997, para 107.

⁷⁰ Aydin v. Turkey, Application No. 57/1996/676/866, 1997, para 107.

- *Y. v. Slovenia*

The *Y. v. Slovenia* case involved the alleged sexual assault of a fourteen-year-old girl by a family friend, aged 55. Reported to the police by a priest with whom the victim's mother spoke, the police first questioned the applicant, (Y.), in July 2002. She was sent for a gynaecological examination, which determined that her hymen was intact. In August 2003, the prosecutor requested a judicial investigation. The perpetrator was summoned in January 2005. In May 2005, the investigating judge issued a decision to open a criminal investigation. In October 2005, the applicant was examined as a witness before the Ljubljana District Court, where she testified in detail. In June 2006, the investigating judge appointed an expert in clinical psychology, R. The latter, after holding a consultation with the applicant, submitted her report on 4 July 2006, and concluded as follows: "Since 2001 Y. has shown all the symptoms of a victim of sexual and other kinds of abuse (emotional, behavioural and physical symptoms). ..."71 In September 2006, the perpetrator was indicted for sexual assault. The Court held three hearings in March, April and May 2008, from which the public was excluded, and in which the perpetrator was questioned about the disability in his left arm. At the May hearing the applicant was questioned without the perpetrator in the courtroom as a protective measure.

In September 2008, the court held a fourth hearing, from which the public was excluded, and at which the perpetrator personally asked the applicant over a hundred questions, many of which were leading questions. During his questioning, the perpetrator also claimed that the charges of rape were fabrications by the applicant's mother. Thus, "he asked the applicant numerous questions about her mother, including about her knowledge of Slovene, her work, and her personal relationships".72 On three occasions, when the victim became agitated and started crying, the court ordered a short recess. As observed by the ECtHR:

At one point the [victim] requested the court to adjourn the hearing as the questions were too stressful for her. However, after being told by [the perpetrator] that the next hearing could not be held until after 19 November 2008 when he would be back from a business trip, the [victim] said, while crying, that he should continue with his questioning as she wanted to get it over with. Eventually, after four hours of cross-examination of the [victim], the presiding judge adjourned the hearing until 13 October 2008.⁷³

After four additional hearings of expert testimony, the court acquitted the perpetrator in 2009.

The ECtHR examined the victim's claims under Articles 3 and 8. With respect to the duty to investigate under the positive obligations of Article 3, the Court held:

As regards the Convention requirements relating to the effectiveness of an investigation, the Court has held that it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, such as witness testimony and forensic evidence, and a requirement of promptness and reasonable expedition is implicit in this context.⁷⁴

The Court recognised that "the domestic courts were faced with the difficult task of having to decide on a sensitive issue of sexual abuse on the basis of irreconcilable statements and without any physical evidence supporting" either side's version of events.⁷⁵ However, it found a violation based on the unexplainable and lengthy "periods of complete inactivity".⁷⁶ It thus found "a violation of the respondent State's procedural obligations under Article 3".⁷⁷

71 *Y. v. Slovenia*, Application No. 41107/10, 2015, para 23.

72 *Y. v. Slovenia*, Application No. 41107/10, 2015, para 35.

73 *Y. v. Slovenia*, Application No. 41107/10, 2015, para 38.

74 *Y. v. Slovenia*, Application No. 41107/10, 2015, para 96.

75 *Y. v. Slovenia*, Application No. 41107/10, 2015, para 97.

76 *Y. v. Slovenia*, Application No. 41107/10, 2015, para 99, noting, inter alia, that the police didn't file an incident report to the prosecutor until a year after the investigation had been concluded; the investigating judge took 21 months to decide on the prosecutor's request for a judicial investigation, and the first hearing was heard a year and half after the alleged perpetrator had been indicted.

77 *Y. v. Slovenia*, Application No. 41107/10, 2015, para 100.

With respect to Article 8, the Court applied its protections to in-court procedures. It stated:

As regards the conflicts between the interests of the defence and those of witnesses in criminal proceedings, the Court has already held on several occasions that criminal proceedings should be organised in such a way as not to unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify, or their interests coming generally within the ambit of Article 8 of the Convention. Thus, the interests of the defence are to be balanced against those of witnesses or victims called upon to testify. Notably, criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. Therefore, in such proceedings certain measures may be taken for the purpose of protecting the victim, provided that they can be reconciled with an adequate and effective exercise of the rights of the defence.⁷⁸

In weighing the balance of these interests, the Court referred to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁷⁹, the EU Council Framework Decision on the standing of victims in criminal proceedings,⁸⁰ which was replaced by the Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime,⁸¹ and the Istanbul Convention. It observed that these standards provided:

protection from intimidation and repeat victimisation, enabling victims to be heard and to have their views, needs and concerns presented and duly considered, and enabling them, if permitted by applicable domestic law, to testify in the absence of the alleged perpetrator. In addition, the EU Directive establishing minimum standards on the rights, support and protection of victims of crime provides, inter alia, that interviews with victims are to be conducted without unjustified delay and that medical examinations are to be kept to a minimum.⁸²

The ECtHR found that although the victim's testimony was the only direct evidence in the case against the alleged perpetrator, justifying the need to cross-examine her, "a person's right to defend himself does not provide for an unlimited right to use any defence arguments".⁸³ It held:

since a direct confrontation between the defendants charged with criminal offences of sexual violence and their alleged victims involves a risk of further traumatising on the latter's part, in the Court's opinion personal cross-examination by defendants should be subject to most careful assessment by the national courts, the more so the more intimate the questions are.⁸⁴

It also found that the participation of an expert witness, called to testify by the court, violated the victim's rights under Article 8. It stated: "the authorities are also required to ensure that other participants in the proceedings called upon to assist them in the investigation or the decision-making process treat victims and other witnesses with dignity, and do not cause them unnecessary inconvenience"⁸⁵. In sum, the Court opined:

the pre-existing relationship between the applicant and the defendant and the intimate nature of the subject matter, as well as the applicant's young age – she was a minor when the alleged sexual assaults took place – were points of particular sensitivity which called for a correspondingly sensitive approach on the part of the authorities to the conduct of the criminal proceedings in issue.⁸⁶

⁷⁸ Y. v. Slovenia, Application No. 41107/10, 2015, para 103.

⁷⁹ UNGA Res. 40/34, 29 November 1985.

⁸⁰ 2001/220/JHA

⁸¹ 2012/29/EU

⁸² Y. v. Slovenia, Application No. 41107/10, 2015, para 104.

⁸³ Y. v. Slovenia, Application No. 41107/10, 2015, para 106.

⁸⁴ Y. v. Slovenia, Application No. 41107/10, 2015, paras 106, 107, noting that the defence questioning lasted four hearings over seven months, and that the alleged perpetrator conducted the questions during two hearings personally, despite being represented by counsel.

⁸⁵ Y. v. Slovenia, Application No. 41107/10, 2015, para 112.

⁸⁶ Y. v. Slovenia, Application No. 41107/10, 2015, para 114.

It held that the authorities failed to achieve the appropriate balance between the defence's fair trial rights, and the rights of the victim under Article 8, which adversely affected the victim's personal integrity.

- Balsan v. Romania

The applicant was 58, lived in Petrosani, was married to N.C.; they had four children. N.C. assaulted the applicant on multiple occasions during 2007–2009, after which the applicant obtained forensic medical certificates documenting her injuries, and which required from two to ten days medical care. In their reports on the incidents, the responding police officers noted that N.C. had locked the applicant out of their joint residence, that the injuries were due to a domestic dispute, and that they had informed her of her right to file a formal complaint.

The applicant lodged two separate complaints with the prosecutor's office, alleging physical assault in the presence of her children, to which she attached copies of the medical certificates. The investigators took the statements of the applicant, and her sister and brother, months after the first incidents, all of which attested to the ongoing violence throughout the year, including threats against her life. The perpetrator, N.C., was not interviewed by the investigators until 5 months after the first reported assault. He denied assaulting her, and indicated that she had a drinking problem and did not clean house properly. N.C. alleged that the medical certificates submitted by the applicant had been forged. Their daughters stated to the police that their father had not hit their mother, but that she would drink and become aggressive when she got drunk.

The applicant applied to the prosecutor on two additional occasions, indicating that N.C. had threatened to kill her, and that she feared for her life. She also requested expedited proceedings and protection. On the day of the second application, the prosecutor's office decided not to press charges, and fined N.C. the equivalent of 50 Euros due to the fact that the applicant had provoked the disputes after drinking alcohol. The prosecution decision referred to N.C.'s statements and those of the applicant's two adult daughters. As regards the alleged threats, it was considered that the applicant had failed to prove her accusations. The prosecutor concluded that, although N.C. had committed the crime of bodily harm, his actions had not created any danger to society, because he had been provoked by the victim, had no previous criminal record and was a retired person. The applicant's complaint against that decision was rejected as ill-founded.

The applicant filed a complaint against the two prosecutor decisions with the Petrosani District Court, asking that N.C. be charged with bodily harm, and be convicted and ordered to pay non-pecuniary damages for the suffering she had endured. She alleged that the administrative fine, which N.C. had refused to pay, had not had a deterrent effect on him as he had continued to assault her after the prosecutor's first decision not to prosecute. She also asked the court to impose criminal sanctions on him and requested permission to submit a recording of a conversation with N.C. in order to prove that she had been assaulted and threatened by him. In the last paragraph of her submission, the applicant stated that she feared for her life and asked the court to "punish N.C. as provided for by law ... to forbid him from entering the apartment ... and to forbid him from coming near her ..."

At the second hearing before the Petrosani District Court, the applicant requested a court-appointed lawyer because she did not have the financial means to hire one. The court dismissed the application, finding that the subject matter of the case did not require representation by a lawyer.

By an interlocutory judgment, the Petrosani District Court partially quashed the prosecutor's decision of 19 December 2007 in respect of the crime of bodily harm and the penalty imposed for it and ordered it to examine that part of the case on the merits. The prosecutor's findings in respect of the threats were upheld. The recording was not admitted as evidence because the court considered that it had no relevance to the case. N.C. gave statements before the court, stating that the applicant had been drunk and had threatened him with a knife. He also stated that in order to defend himself, he had pushed her but he denied having ever hit the applicant. The court also heard a statement from their daughter, C.B., who testified as follows:

My father used to hit my mother [the applicant] and us, the children, many times. He used to do it when he had not come home at night and my mother asked him where he had been. Then he would get angry and hit her. The main reason he got angry was lack of money ... when I moved out of my parents' apartment, my mother continued to be hit by my father; I saw some of these incidents personally ... my mother used to drink alcohol, but it was within normal limits, and in 2007 she stopped drinking. I retract the statement I gave during the criminal proceedings because I gave it after threat from my father.

The Petrosani District Court acquitted N.C. of the crime of bodily harm. The court considered that C.B.'s statement could not be taken into consideration, without mentioning any reasons for that decision. The court concluded as follows:

the applicant has not proved her allegations that ... she was physically assaulted by the defendant. The court considers, also in view of the evidence collected during the criminal investigation, that such assaults by the defendant took place principally because of the injured party's alcohol consumption and because she was not taking adequate care of her four children. The defendant's acts are not so dangerous to society as to be considered crimes and he shall therefore be acquitted of the three counts of bodily harm and shall pay an administrative fine of [the equivalent of] 120 Euros.

The court further dismissed the applicant's claims for damages as ill-founded, without giving reasons. No mention was made in the judgment of the applicant's request for protective measures.

The applicant lodged an appeal on points of law against that judgment. She alleged that N.C. was a violent person who continued to assault her, even after being punished with an administrative fine.

On the 19 February and 21 April 2009, the applicant made five complaints to the Petrosani police concerning new incidents of assault or threats by N.C. to which she attached medical reports. On 29 September, the prosecutor's office of the Petrosani District Court decided not to press charges against N.C. for the five incidents described by the applicant. It imposed another administrative fine against N.C. for EUR 25. The applicant did not lodge any further complaints against the above-mentioned decision.

In its assessment, the ECtHR noted that the physical violence was documented in several police reports and forensic medical reports, the latter indicating that the applicant needed from two to ten days medical care.⁸⁷ It rejected the Government contention that the violence suffered by the applicant did not reach the minimum threshold to invoke Article 3. It stated:

the ill-treatment of the applicant, which on three occasions caused her physical injuries, combined with her feelings of fear and helplessness, was sufficiently serious to reach the required level of severity under Article 3 of the Convention and thus impose a positive obligation on the Government under this provision.⁸⁸

The Court thus examined "whether the national authorities have taken all reasonable measures to prevent the recurrence of the assaults against the applicant's physical integrity".⁸⁹ In this regard, it noted that they were well aware of the violence perpetrated against the applicant for almost one year, as she had made emergency calls to the police, filed criminal complaints and petitioned the head of the police; her complaints were always accompanied by forensic reports, which were never contested. The Court thus concluded that the Romanian authorities were obliged to respond to her complaints.⁹⁰ The Court also observed that the applicant "had at her disposal a legal framework allowing her to complain about the domestic violence and to seek the authorities' protection".⁹¹

With regard to the application of the legal framework, the Court recalled that the investigation into the first violent incident began a month later, and after the occurrence of other violent incidents. Although applicant

⁸⁷ Balsan v. Romania, Application No. 49645/09, 2017, para 59.

⁸⁸ Balsan v. Romania, Application No. 49645/09, 2017, para 60.

⁸⁹ Balsan v. Romania, Application No. 49645/09, 2017, para 61.

⁹⁰ Balsan v. Romania, Application No. 49645/09, 2017, para 62.

⁹¹ Balsan v. Romania, Application No. 49645/09, 2017, para 63.

had indicated that her husband had threatened to kill her, he was not questioned by the police until almost five months after the first incident. The national court concluded that the crime of bodily harm had been committed, it had been provoked and was not serious to warrant more than an administrative sanction.⁹²

The Court observed that the applicant's appeal of this decision was dismissed, and that the District Court acquitted the perpetrator of all charges of bodily harm since he had been provoked, and was not a danger to society. The Court further observed that the national court did not address the withdrawal of the statement of the parties' daughter, nor did the authorities address the applicant's request for protective measures. It noted that the national court applied a slightly increased administrative fine, despite the fact that the first fine had no deterrent effect, as the violence continued.⁹³

In assessing the criminal proceedings as a whole, the Court concluded "with concern that both at the investigation level and before the courts the national authorities considered the acts of domestic violence as being provoked and regarded them as not being serious enough to fall within the scope of the criminal law".⁹⁴ It found that the approach taken by the national authorities "deprived the national legal framework of its purpose and was inconsistent with international standards with respect to violence against women and domestic violence in particular".⁹⁵

With respect to the decision to deny the applicant the appointment of a free legal aid lawyer, as it was not "necessary" in these types of cases, the ECtHR recalled its prior holdings that "in certain circumstances the State's procedural obligations to ensure the effective participation of the victims in the investigation of their complaints of ill-treatment may extend to the issues of providing effective access to free legal representation".⁹⁶

Finally, the Court noted that six additional complaints were filed in the first half of 2008, which the national authorities dismissed due to lack of evidence or as not sufficiently severe.⁹⁷ The ECtHR thus found a violation of Article 3.

The ECtHR considered on its own motion the application of Article 14.⁹⁸ It reiterated its holding that the "failure by a State to protect women against domestic violence breaches their right to equal protection under the law and that this failure does not need to be intentional".⁹⁹ It stressed that the Istanbul Convention defined violence against women as a form of discrimination.¹⁰⁰

The Court then reviewed the factual elements of this case: that the applicant was subjected to violence and death threats by her husband, of which the authorities were aware; and its holding: that the authorities:

deprived the national legal framework of its purpose by their finding that the applicant provoked the domestic violence against her, that the violence did not present a danger to society and therefore was not severe enough to require criminal sanctions, and by denying the applicant's request for a court-appointed lawyer.¹⁰¹

It found that the authorities' passivity in the case was further demonstrated by their failure to consider any protective measures, despite her repeated requests to police, prosecutors and the courts. It opined that the authorities should have examined her case more attentively in light of the vulnerability of victims of domestic violence.¹⁰²

The ECtHR went on to observe statistics demonstrating the social tolerance of domestic violence in Romania, viewed as normal, and that only a few of the reported cases are investigated by police. It observed that the

92 Balsan v. Romania, Application No. 49645/09, 2017, para 65.

93 Balsan v. Romania, Application No. 49645/09, 2017, para 66.

94 Balsan v. Romania, Application No. 49645/09, 2017, para 67.

95 Balsan v. Romania, Application No. 49645/09, 2017, para 67.

96 Balsan v. Romania, Application No. 49645/09, 2017, para 67.

97 Balsan v. Romania, Application No. 49645/09, 2017, para 69.

98 Balsan v. Romania, Application No. 49645/09, 2017, para 72.

99 Balsan v. Romania, Application No. 49645/09, 2017, para 78.

100 Balsan v. Romania, Application No. 49645/09, 2017, para 79.

101 Balsan v. Romania, Application No. 49645/09, 2017, paras 80, 81.

102 Balsan v. Romania, Application No. 49645/09, 2017, para 82.

number of reported cases continues to grow, in which the majority of victims are women, and that there are an insufficient number of shelters for victims, including eight counties with no shelters. It referred to the Concluding Observations of the CEDAW Committee regarding: the lack of awareness in society generally on gender discrimination, women's lack of awareness of their rights, the absence of protection and support services for victims, especially in rural areas, the absence of statistics of domestic violence prevalence and the insufficient implementation of existing legislation.¹⁰³ The Court underscored that the Government failed to demonstrate any monitoring of the impact of its activities in this field, nor monitoring of the implementation of the law and national strategy. The Court opined that:

the combination of the above factors demonstrates that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence in Romania and that their actions reflected a discriminatory attitude towards the applicant as a woman.¹⁰⁴

In light of the prima facie evidence that domestic violence affects primarily women, the Court considered that "the general and discriminatory passivity of the authorities created a climate that was conducive to domestic violence".¹⁰⁵ It found that the criminal law system did not have "an adequate deterrent effect capable of ensuring the prevention of unlawful acts" by the perpetrator in this case, thus violating the applicant's rights.¹⁰⁶ It concluded that despite the adoption of the law and national strategy to combat domestic violence "the overall unresponsiveness of the judicial system and the impunity enjoyed by aggressors . . ." demonstrated a lack of commitment to combating domestic violence.¹⁰⁷ It thus found a violation of Article 14 in conjunction with Article 3.

B. CEDAW OPTIONAL PROTOCOL CASE STUDIES

The CEDAW Optional Protocol has also been used to address cases involving domestic and sexual violence. These include, inter alia:

A.T. v. Hungary¹⁰⁸ was the first domestic violence case submitted under the Protocol. In that case the victim had suffered several years of domestic violence, including beatings (leading to 10 medical certificates documenting separate incidents of severe violence), serious threats and failure to pay child support for three years, which forced her to claim the support by going to the court and to the police. The perpetrator left the residence taking most of the furniture but continued to break in and beat the victim, resulting in her hospitalization

The criminal procedures lasted years, failed to issue a protection order or detain the perpetrator and fined him approximately 365 USD for two incidents involving serious bodily harm. As a victim in the proceedings she had no access to the relevant court documents. No assistance was provided from child protection authorities, despite her requests by phone, letter and in person. There was no proper shelter to accommodate the victim and her children, one of whom had a serious disability. In the civil proceedings brought by the victim to exclude the perpetrator from the family residence the court found that his property rights could not be restricted to prevent his access to the apartment, basing the decision on: (a) lack of substantiation of regular physical violence, and (b) his right to the property,

The CEDAW Committee found that the State party had failed to meet its obligations under the Convention to protect the petitioner against domestic violence on the basis that Hungary's legal and institutional arrangements fell short of international standards, and available domestic remedies were ineffective to protect her against her violent former partner. With regard to the civil proceedings, it stated: "Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy."¹⁰⁹ It also observed the "persistence of entrenched traditional stereotypes regarding

¹⁰³ Balsan v. Romania, Application No. 49645/09, 2017, para 83.

¹⁰⁴ Balsan v. Romania, Application No. 49645/09, 2017, para 85.

¹⁰⁵ Balsan v. Romania, Application No. 49645/09, 2017, para 86.

¹⁰⁶ Balsan v. Romania, Application No. 49645/09, 2017, para 87.

¹⁰⁷ Balsan v. Romania, Application No. 49645/09, 2017, para 88.

¹⁰⁸ Communication No. 2/2003, CEDAW/C/36/D/2/2003.

¹⁰⁹ Communication No. 2/2003, CEDAW/C/36/D/2/2003, para 9.3.

the role and responsibilities of women and men in the family".¹¹⁰It also condemned the low priority afforded by national courts to domestic violence cases. It found a violation of Articles 2 (a, b, e), 5 and 16 of the Convention.

- ***V.K. v. Bulgaria***

The perpetrator only provided the victim with enough money for the family's basic needs. As they were living in Poland for his job, she could not work and thus was economically dependent. She was treated like a housekeeper, was not allowed to communicate freely with her friends and family. For years, she felt humiliated and depressed. When she insisted on returning to work, her husband ceased their financial maintenance "in an attempt to make her 'behave' and 'obey'".¹¹¹

After numerous violent incidents, including against a women's centre staff member assisting the victim when she tried to contact her son, whom the husband had locked at home, the victim returned with her children to Bulgaria where she applied for a protection order. An emergency order was applied but the protection order was denied after a hearing because no violent incidents had occurred within the month preceding the application.

The issue considered by the Committee was "whether the refusal of the Plovdiv courts to issue a permanent protection order [for one year] against the author's husband, as well as the unavailability of shelters, violated the State party's obligation to effectively protect the author against domestic violence".¹¹² It noted that on appeal, the regional court had confirmed the lower court's decision as the victim had not shown "that the fact that her husband had struck at her on 21 September 2007 amounted to violence, thereby placing the burden of proof on the author".¹¹³ The Committee recalled that gender-based violence "is not limited to acts that inflict physical harm, but also covers acts that inflict mental or sexual harm or suffering, threats of any such acts, coercion and other deprivations of liberty," and found that "[b]oth courts focused exclusively on the issue of direct and immediate threat to the life or health of the author and on her physical integrity, while neglecting her emotional and psychological suffering".¹¹⁴

The Committee further observed that neither court had taken cognizance of the history of continuous violence in the case, and had imposed an "excessively high" burden of proof on the victim: beyond reasonable doubt.¹¹⁵The Committee stressed that "stereotyping affects women's right to a fair trial and that the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence"¹¹⁶. In this regard it found that:

the rationale behind the one-month period within which a victim needs to apply for a protection order is to provide for urgent court interventions rather than to police the cohabitation of partners, lacks gender sensitivity in that it reflects the preconceived notion that domestic violence is to a large extent a private matter falling within the private sphere, which, in principle, should not be subject to State control.¹¹⁷

It also found that the decision was based on a discriminatory, stereotypical understanding of what constitutes domestic violence, and that the civil court decision on the divorce contained "traditional stereotypes of women's roles in marriage".¹¹⁸

The Committee further found the unavailability of shelters a violation of Article 2(c) and (e) obliging States

110 Communication No. 2/2003, CEDAW/C/36/D/2/2003, para 9.4.

111 Communication No. 20/2008, CEDAW/C/49/D/20/2008, para 2.6.

112 Communication No. 20/2008, CEDAW/C/49/D/20/2008, para 9.4

113 Communication No. 20/2008, CEDAW/C/49/D/20/2008, para 9.7, noting that the regional court had stated: "... striking, as described, is not associated with disturbance of the physical [integrity] of the plaintiff or at least it is not stated so, neither [is there any evidence].

Striking at someone, you can exercise violence, but only after breaking certain limits of abuse".

114 Communication No. 20/2008, CEDAW/C/49/D/20/2008, paras 9.8, 9.9.

115 Communication No. 20/2008, CEDAW/C/49/D/20/2008, para 9.10.

116 Communication No. 20/2008, CEDAW/C/49/D/20/2008, para 9.11.

117 Communication No. 20/2008, CEDAW/C/49/D/20/2008, para 9.12.

118 Communication No. 20/2008, CEDAW/C/49/D/20/2008, para 9.12

"to provide for the immediate protection of women from violence".¹¹⁹ Lastly, the Committee recognized that the victim was left without State protection and experienced "re-victimisation through the gender-based stereotypes relied upon in the court decisions".

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- ***Karen Tayag Vertido v. The Philippines***

In the case *Karen Tayag Vertido v. The Philippines*¹²¹, the CEDAW Committee determined that the Philippines had failed to comply with its obligation to ensure Ms Tayag Vertido's right to an effective remedy, which was implied under Article 2(c) of CEDAW. Article 2(c) requires States parties "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination".

The Committee found that the victim, the Executive Director of the Davao City Chamber of Commerce and Industry in Davao City, who was raped by a senior professional colleague, the 60-year-old President of the Chamber, had been denied an effective remedy by the State due to extensive delays in the process, and because of numerous gendered stereotypes and myths relied upon throughout the trial court decision acquitting the accused. The CEDAW Committee observed that the decision acquitting the accused was based on several principles one of which—"an accusation for rape can be made with facility", reveals in itself a gender bias".¹²²

The judge in the case acquitted the accused, finding that the victim should have should have fought off the accused once she had regained consciousness and while he was raping her. She also doubted the victim's account of events, disbelieving that the accused would have able to proceed to the point of ejaculation as he was in his 60s. The victim claimed that she had suffered re-victimization by the State after she was raped. As a general matter, in its decision the Committee stressed that:

stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence.¹²³

The Committee assessed "the level of gender sensitivity applied in the judicial handling" of the case.¹²⁴ It found that in the national court's assessment of the credibility of the victim's version of events, the decision:

was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and 'ideal victim' or what the judge considered to be the rational and ideal response of a woman in a rape situation as become clear from the following quotation from the judgement:

"Why then did she not try to get out of the car when the accused must have applied the brakes to avoid hitting the wall when she grabbed the steering wheel? Why did she not get out or even shout for help when the car must have slowed down before getting into the motel room's garage? Why did she not stay in the bathroom after she had entered and locked it upon getting into the room? Why did she not shout for help when she heard the accused talking with someone? Why did she not run out of the motel's garage when she claims she was able to run out of the hotel room because the accused was still NAKED AND MASTURBATING on the bed? Why did she agree to ride in the accused's car AFTER¹²⁵ he had allegedly raped her when he did not make any threats or use any force to coerce her into doing so?"¹²⁶

119 Communication No. 20/2008, CEDAW/C/49/D/20/2008, para 9.13.

120 Communication No. 20/2008, CEDAW/C/49/D/20/2008, para 9.14.

121 Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (22 September 2010), para 8.4.

122 CEDAW, Communication No. 18/2008, 2010, para 8.5.

123 Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (22 September 2010), para 8.4.

124 Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (22 September 2010), para 8.4

125 CEDAW, Communication No. 18/2008, 2010, para 8.5.

126 CEDAW, Communication No. 18/2008, 2010, para 8.5.

The Committee found:

several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim. In this regard, the Committee views with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgement, such as the weight given to the fact that the author and the accused knew each other, constitute a further example of "gender-based myths and misconceptions".¹²⁷

The Committee held that there should be no presumption that the victim consents if she does not physically resist unwanted sexual conduct, "regardless of whether the perpetrator threatened to use or used physical violence."¹²⁸ The Committee found further "gender-based myths and misconceptions" and stereotypes about both female and male sexuality. For example, the trial judge had given weight in the decision to acquit to the fact that the accused and the victim knew each other, and found it unbelievable that the accused could come to ejaculation if the victim was physically resisting.¹²⁹

It concluded that Ms. Tayag Vertido suffered "revictimisation through the stereotypes and gender-based myths relied upon in the judgement."¹³⁰ The Committee thus held that the Philippines had violated Articles 2(f) and 5(a) of the Convention, which ensure freedom from wrongful stereotyping.

- ***Kell v. Canada***

Cecilia Kell, a Canadian aboriginal woman who belongs to the community of Rae-Edzo in the Northwest Territories of Canada:

experienced spousal abuse and the situation worsened when she got a job and became financially independent. Her partner was extremely jealous and controlled her finances, monitored her whereabouts, threatened her, prevented her from having contact with her family, assaulted her on several occasions, tried to stop her from working and took actions that resulted in her losing jobs. She was admitted a couple of times to McAteer House, a shelter for battered women in Yellowknife.¹³¹

The perpetrator, without her knowledge, removed her name from their jointly owned house, as he was a board member of the housing authority at the time. Upon engaging in employment without permission, he had her forcibly removed from the house.

The victim commenced legal action in 1995:

to seek compensation for assault, battery, sexual assault, intimidation, trespass to chattels, loss of use of her home and consequential payment of rent and attendant expenses She also filed a declaration that her partner had obtained the house through fraudulent methods, aided and abetted by the Government of the Northwest Territories.¹³²

She represented by a series of legal aid lawyers, due to their changing jobs, residences, and because they did not represent her interests. The cases were dismissed for "want of prosecution," and costs were imposed of almost Can\$6000. She complained that although she had been represented"

by many lawyers from the Legal Services Board over a period of 10 years, the lawyers did not comply with her instructions. She submits that a settlement had been negotiated without her consent and contrary to her instructions. She believes that as a result of her refusal of the said

¹²⁷ Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (22 September 2010), para 8.6.

¹²⁸ CEDAW, Communication No. 18/2008, 2010, para 8.5.

¹²⁹ CEDAW, Communication No. 18/2008, 2010, para 8.6.

¹³⁰ Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008, 22 September 2010, para 8.8.

¹³¹ Communication No. 19/2008, CEDAW/C/51/D/19/2008, para 2.4.

¹³² Communication No. 19/2008, CEDAW/C/51/D/19/2008, para 2.7.

*settlement, she was denied further legal aid and was obliged to represent herself.*¹³³

The Committee found that the distinction based on the fact that the victim "was an aboriginal woman victim of domestic violence", a vulnerable person, which constituted intersection discrimination.¹³⁴ It stated: "States parties must legally recognise and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned".¹³⁵ It found that "such violence had the effect of impairing the exercise of her property rights".¹³⁶ It noted that Article 2(e) requires States to ensure the practical realisation of the elimination of discrimination against women, which including enabling the filing of complaints and securing effective remedies. The Committee also noted that in being forced to change lawyers several times, the victim suffered "severe prejudice" in relation to her domestic violence and property-related claims.

- ***Yildirim v. Austria***

Fatima Yildirim and her husband Irfan Yildirim married in 2001. Fatima had three adult children from a prior marriage; Melissa was born of the marriage and was five years old at the time of the incidents. Upon returning from a visit to Turkey in July 2003, the couple had a dispute and Irfan threatened to kill Fatima. He again threatened to kill her one month later, in August. Fatima and Melissa went to live with her daughter. Thinking him at work, Fatima returned to her apartment to collect her belongings. Irfan entered at that time, assaulting her and threatening again to kill her. She reported him to the federal police. The police issued an order prohibiting him from returning to the home, and requested that the prosecutor detain him. The prosecutor denied the request. The police referred Fatima to a domestic violence intervention centre.

Two days later, with support from the intervention centre, Fatima obtained an injunction on behalf of herself and her daughter. That same day after work, Irfan harassed her as she was leaving work, and the police were called. Irfan later threatened Fatima's adult son. The next day, Irfan threatened to kill Fatima at her workplace. By the time the police arrived, he had left. The police called him to return, and spoke to him in person. The police spoke to Irfan on his cell phone that evening after he had again threatened Fatima and her son. Two days later, Irfan came to Fatima's workplace and threatened to kill her. Two days later, Fatima made a formal statement to the police about the threats, and the police requested that Prosecutor detain Irfan. The Prosecutor refused the request. Two weeks later, Fatima filed for divorce. A week later, a no-contact ban was issued against Irfan for the period of the divorce proceedings, which impeded contact with his child Melissa for three months. Ten days later, Irfan followed Fatima home from work and fatally stabbed her. He was arrested a week later trying to enter Bulgaria, and is serving life imprisonment.

The CEDAW Committee underscored the State's due diligence obligations, in which it is "responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".¹³⁷ In this regard, it underscored that although the State had established a comprehensive system to address domestic violence, for the practical realization of an individual woman's rights, "the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors".¹³⁸ In particular it found that

the facts disclose a situation that was extremely dangerous to Fatma Yildirim of which the Austrian authorities knew or should have known, and as such the Public Prosecutor should not have denied the requests of the Police to arrest Irfan Yildirim and place him in detention.¹³⁹

In response to the State's argument that an arrest warrant seemed "unduly invasive" at the time, the Committee reiterated its holding in *A.T. v. Hungary*, that "the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity".¹⁴⁰ The Committee found violations of Article 2(a), (c)-(f) and Article 3 of CEDAW.

¹³³ Communication No. 19/2008, CEDAW/C/51/D/19/2008, para 2.13

¹³⁴ Communication No. 19/2008, CEDAW/C/51/D/19/2008, para 10.2, citing General Recommendation 28.

¹³⁵ Communication No. 19/2008, CEDAW/C/51/D/19/2008, para 10.2.

¹³⁶ Communication No. 19/2008, CEDAW/C/51/D/19/2008, para 10.2.

¹³⁷ Communication No. 06/2005, CEDAW/C/39/D/6/2005, para 12.1.1.

¹³⁸ Communication No. 06/2005, CEDAW/C/39/D/6/2005, para 12.1.2.

¹³⁹ Communication No. 06/2005, CEDAW/C/39/D/6/2005, para 12.1.4.

¹⁴⁰ Communication No. 06/2005, CEDAW/C/39/D/6/2005, para 12.1.5.

2.2 NATIONAL PREVALENCE OF AND ATTITUDES TOWARDS INTIMATE PARTNER VIOLENCE AND SEXUAL VIOLENCE IN ARMENIA

This session briefly touches upon the prevalence of, and attitudes towards, intimate partner violence¹⁴¹ and sexual violence in Armenia as detailed in the 2016 UNFPA study *Men and Gender Equality in Armenia*, the first of its kind conducted in Armenia, and intended to provide baseline data. There is no available data on the incidence of violence against women, more broadly defined, in Armenia. Given that a large proportion of domestic violence, and violence against women, is intimate partner and sexual violence, the data remains extremely relevant.

2.2.1 THE PREVALENCE OF INTIMATE PARTNER AND SEXUAL VIOLENCE IN ARMENIA

Understanding both prevalence and attitudes on violence is essential for recognising its gendered nature of such, as well as the gendered stereotypes that both foster its prevalence and impede victims' access to justice. The data is disaggregated by sex, residence and education level, among other factors.

Forms of intimate partner violence (IPV). The survey data clearly demonstrated that psychological violence is the most prevalent of the various forms of violence and is followed by economic abuse and physical violence (see table 2). Concerning psychological violence, the most prevalent acts, as reported by men, were insulting a female partner or deliberately making her feel bad about herself (49.4%) and doing things to scare or intimidate her on purpose (10.1%). For women, the most prevalent acts included those (43.6% and 9.2% respectively), and humiliation by the partner in front of other people (9.8%).

As regards economic abuse, only one type of act figured prominently in the reports of both men and women (19.3% and 19.5% respectively), that is, women are prohibited by their intimate partner from getting a job, going to work, trading or earning money. Two types of physical violence were the most prevalent, but to a considerably lesser extent than in other forms of violence. Those are a man slapping his female partner or throwing something at her that could hurt her (12.9% of men and 10.3% of women) or pushing or shoving her (11.4% and 7.5% respectively).¹⁴²

With regard to the data on the prevalence of sexual violence, the questionnaire was given only to men and based on their self-reporting. The study concluded that sexual violence was underreported by the perpetrators for several reasons. These include an inaccurate perception of what "forcing" means, especially involving a regular intimate partner, and an unwillingness to admit to committing this type of violence even on the condition of anonymity. In this regard, the study stated that "[w]hile having several intimate female partners may be seen by men (especially young men) and by large segments of the present-day Armenian society as a manifestation of their masculinity, forcing a woman to have sex is not seen by the general public and the

¹⁴¹ As noted above, the term "intimate partner violence" describes physical violence, sexual violence, stalking and psychological aggression (including coercive acts) by a current or former intimate partner.

¹⁴² UNFPA, *Men and Gender Equality in Armenia*, 2016, p. 43.

man himself as a 'manly' thing to do." Men are thus reluctant to admit even to themselves they rely on force in intimate relations.¹⁴³

Table 2: Forms of violence

Percentage of men who perpetrated psychological violence against a female intimate partner	53.3%	Percentage of women subjected to psychological violence by a male intimate partner	45.9%
Percentage of men who perpetrated economic abuse against a female intimate partner	20.8%	Percentage of women subjected to economic abuse by a male intimate partner	21.3%
Percentage of men who perpetrated physical violence against a female intimate partner	17.4%	Percentage of women subjected to physical violence by a male intimate partner	12.5%
Percentage of sexual violence (perpetrated and reported by men)			14.6%
Experienced at least one type of violence (Percentage of women reporting - through self-administered questionnaire - having been subjected to moderate & grave acts of physical violence outside the home in the last 3 months)			3.7%
Percentage of male respondents reporting that they exhibited controlling behaviour			95.5%

Disaggregating the data by marital status revealed that the highest percentage of those reporting intimate partner violence is among separated and divorced women. On the average, it exceeds the percentage among other groups of women by 2 to 3 times (and even more at times) across the board for all forms of violence and compared to all other groups of women. This is unsurprising because intimate partner violence is often among women's reasons for separating and/or divorce. The difference is particularly striking in prevalence of physical violence. This data correlated to that indicating that divorced or separated men have the highest percentage for committing almost all acts of violence¹⁴⁴

With respect to residence, the survey data reveal a clear pattern: the consistently highest percentage of intimate partner violence victims is among residents of Yerevan, while the lowest percentage is for the most part among rural residents.¹⁴⁵ The disaggregated data on employment status revealed that informally employed women are consistently the highest percentage of victims by a significant margin for physical, economic abuse and psychological violence.¹⁴⁶

Another key conclusion of the study is that women under-report psychological and physical violence. The data clearly indicate that in the case of a face-to-face interview many female respondents did not disclose intimate partner violence even though the interview was conducted with no third party present and confidentiality assurances were given. The data from anonymously filled out self-administered questionnaires supports this conclusion as the percentage of women reporting exposure to physical violence is significantly higher (almost double) than that of women reporting physical violence via the face-to-face interviews-based questionnaires, namely: 22.4% vs. 12.5% (see table 3 below)¹⁴⁷. In other words, the prevalence of physical violence committed by an intimate male partner remains underreported. Significantly, the discrepancy between the outcomes of the two modes of reporting by the same women of the same violent acts also depends on severity of the act. This discrepancy, which may be called "a (prevalence) underreporting gap," increases with the gravity and severity of the act.¹⁴⁸

143 UNFPA, Men and Gender Equality in Armenia, 2016, p. 67

144 UNFPA, Men and Gender Equality in Armenia, 2016, p. 58.

145 UNFPA, Men and Gender Equality in Armenia, 2016, p. 58.

146 UNFPA, Men and Gender Equality in Armenia, 2016, p. 58.

147 UNFPA, Men and Gender Equality in Armenia, 2016, pp. 48, 59, 60, noting that when female respondents filled out the questionnaire anonymously and by themselves, the percentage reporting IPV is at least 1.5 and usually 2 or more times bigger than during the interviews, depending on the form of violence.

148 UNFPA, Men and Gender Equality in Armenia, 2016, p. 60.

TABLE 3: Acts of violence by women respondents

Percentage of ever-partnered women who reported *having ever been subjected* to the following acts of physical violence by intimate male partner

Acts of violence	Answers to interviewer's questions	Answers to questions from self-administered questionnaire
	Percentage of ever-partnered women subjected to physical violence N=767	Percentage of ever-partnered women subjected to physical violence N=634
Partner slapped or thrown something at her that could hurt her	10.3%	14.1
Partner pushed or shoved her	7.5	16.5
Partner hit her with a fist or with something else that could hurt her	4.6	9.3
Partner kicked, / dragged, beaten, choked or burned her	2.8	7.1
Partner threatened to use or actually used a gun, knife or other weapon against her	0.6	5.9
Percentage of women subjected to physical violence by a male intimate partner	12.5%	22.4%

Table 4: Male respondents subjected to violence

Percentage of male respondents subjected to physical violence (Lifetime prevalence)	49.3%
Percentage of male respondents subjected to physical violence in childhood (before 18)	27.2%
Percentage of male respondents subjected to psychological violence in childhood	10.9%
Percentage of male respondents subjected to sexual violence in childhood	3.5%
Percentage of male respondents subjected to neglect & abandonment in childhood	.9%

Men are not immune to violence (see table 4). Their exposure to violence contributes to the perpetuation of a patriarchal version of masculinity that condones violence. The data on this issue is quite troubling. The data clearly show that the history of victimisation and exposure to physical violence encourages men's violent and abusive behaviour, which is directed toward their female intimate partners. There is a strong association between violence experienced by men and their use of physical violence against their intimate female partner. In fact, the percentage of men in this category who physically abused their intimate partner is from 1.5 to over 3 times higher than among men who were not subjected to physical violence. The study concluded that violence begets violence, and that one effective way to drastically reduce intimate partner physical violence is to protect men against violence.¹⁴⁹

149 UNFPA, Men and Gender Equality in Armenia, 2016, pp. 81, 82, recommending that efforts focus on combating gender-based violence, conceived of broadly.

2.2.2 ATTITUDES TOWARDS INTIMATE PARTNER AND SEXUAL VIOLENCE IN ARMENIA

In turning to look at the data on attitudes towards IPV and sexual violence, the aim is to highlight the social biases specific to Armenia that can serve as barriers to reporting violence, influence the ways in which law enforcement and other authorities engage with victims and influence judicial reasoning in particular cases.

Table 5: Attitudes towards violence

A woman should tolerate violence in order to keep her family together	35.7%
There are times when a woman deserves to be beaten	27.7%
If a woman cheats on a man, it is okay for him to hit her	55.4%
It is okay for a man to hit his wife if she won't have sex with him	5.1%
Percentage of respondents who justify intimate partner physical violence	70.3%

Significantly, the highest percentage of the respondents justifies intimate partner violence when a woman cheats on a man, 55.4%. The application of this statistic to cases involving intimate partner violence was noted by the UNFPA study, which stated:

It does not come as a surprise because whenever a court case on intimate partner violence because of woman's (alleged) unfaithfulness is reported and discussed in social media, in most cases the discussants justify violence, say that the woman and her lover should have been dealt with even more brutally (contending, without mixing words, that the "guilty parties" deserve death) and that the perpetrator is in fact innocent and should not be prosecuted.¹⁵⁰

Consequently, although there is no justification for perpetrating acts of violence, including infidelity, the generalised social acceptance of such violence can preclude a victim's decision to come forward for fear that: i) she will be blamed for the violence by her family and community; ii) access to justice will be denied to her as justice sector actors share such attitudes and will not adequately penalise the violence; or, iii) the victim herself believes that she deserves the violence and thus will not come forward to denounce it.

The UNFPA study further noted the respondents' justification of intimate partner violence by a purported concern for the family, signalling that 35.7% believe that a woman should tolerate violence to keep the family together. It described as a "paradox" the fact that the family is seen as a core value in Armenia, and calling into question the viability of a social unit based on violence. It noted in this regard that "every fifth marriage in Armenia ends in divorce and that physical violence (wife beating) is one of the reasons behind a growing divorce rate," as well as the fact that the divorce rate increased 20% between 2013 and 2014.¹⁵¹

In other words, attitudes towards violence in Armenia privilege the unity of the family over the health, rights and well-being of one of its members, most frequently women. This patriarchal notion of the "family" is maintained at the expense of women, who are expected to sublimate their rights and endure ill-treatment. As noted by the UNFPA study, the increase in rates of divorce reflects the unsustainability of this practice.

¹⁵⁰ UNFPA, Men and Gender Equality in Armenia, 2016, p. 85.

¹⁵¹ UNFPA, Men and Gender Equality in Armenia, 2016, p. 86

Table 6: Attitudes towards violence disaggregated by sex

Questions	Men	Women
A woman should tolerate violence in order to keep her family together	44.6%	27.8%
There are times when a woman deserves to be beaten	35.2%	21.0%
If a woman cheats on a man, it is okay for him to hit her	60.9%	50.5%
It is okay for a man to hit his wife if she won't have sex with him	5.8%	4.5%
Percentage of respondents who justify intimate partner physical violence	78.6%	62.9%

Table 6 disaggregates the data from Table 5 by sex. Note the statistically significant correlation between the respondents' sex and their attitudes toward justification of violence against women, where women are not as inclined to exonerate intimate partner violence. Indeed, one out of three male respondents (35.2%) agreed with the statement that there are times when a woman deserves to be beaten; only one out of five female respondent agreed (21.0%). Similarly, the percentage of the male respondents who "strongly agree" with the statement (15.1%) was three times that of female respondents (5.9%). As observed by the UNFPA study: "Male respondents are more inclined than female respondents to expect women to comply with patriarchal norms."¹⁵²

Table 7: Attitudes towards rape

When a woman is raped, she usually did something to put herself in that situation.	32.2%
In some rape cases, women actually want it to happen.	35.8%
If a woman doesn't physically fight back, you can't really say it was rape.	59.8%
In any rape case, one would have to question whether the victim is promiscuous or has a bad reputation.	62.75%
Percentage of respondents who justify rape agreeing at least with one statement above	82.4%

The UNFPA study qualified the respondents' attitudes with respect to rape as "staggering," without exaggeration. Indeed, it is interesting to note that the percentage of the respondents who justified rape (82.4%) for one or more reasons was considerably higher than that of the respondents who justified physical violence against women (70.3%). It stated:

In fact, between one-third and almost two-thirds of the respondents are inclined to blame the victim for one of the reasons taken separately and 82.4% of the respondents actually justify rape by agreeing with at least one statement.¹⁵³

The study further observed that the "attention is shifted from culpability of the perpetrator and from inadmissibility of rape to incrimination of women".¹⁵⁴ The attitudes expressed further ignore or trivialise the fact that rape is a traumatic experience for the victim. The study stated:

These respondents do not know or do not wish to accept a simple truth that any sexual activity without mutual consent is, in fact, violence and that sexual intercourse under such circumstances is rape. In other words, for those respondents, unless a woman complies with patriarchal cultural norms by being "virtuous" and by putting up a fierce fight to defend her "honour" when sexually assaulted, she may be suspected or even accused of "provoking" men, of being of "easy virtue" or of having herself invited trouble, especially when she does not have a male "protector."¹⁵⁵

152 UNFPA, Men and Gender Equality in Armenia, 2016, p. 87.

153 UNFPA, Men and Gender Equality in Armenia, 2016, pp. 109, stating: "The data also plainly indicate that most of those respondents agreed with two or more statements."

154 UNFPA, Men and Gender Equality in Armenia, 2016, p. 109, 118, stating: "The survey data clearly indicate that 4 out of every 5 respondents agree with at least one statement that justifies rape, while between one-third and almost two-thirds of the respondents are inclined to blame the victim for one of those reasons taken separately."

155 UNFPA, Men and Gender Equality in Armenia, 2016, p. 109.

This unwillingness to except consent as the basis for sexual relations constitutes a major barrier for actors in the justice system to address sexual violence in line with international standards and EU case law. First, these social attitudes constitute a significant barrier for victims to come forward to report sexual violence, as their "virtue" will be on trial rather than the acts of the perpetrator. Secondly, a major paradigm shift has to occur in the collection of evidence and prosecution strategies in order to address cases of sexual violence based on the lack of consent rather than physical force and the victim's resistance. As described in greater detail below, these attitudes are also clearly reflected in judicial decisions in Armenia.

Table 8: Attitudes towards rape disaggregated by sex

Questions	Men	Women
When a woman is raped, she usually did something to put herself in that situation.	40.9%	24.2%
In some rape cases, women actually want it to happen.	44.0%	28.6%
If a woman doesn't physically fight back, you can't really say it was rape.	61.3%	58.4%
In any rape case, one would have to question whether the victim is promiscuous or has a bad reputation.	64.4%	61.0%
Percentage of respondents who justify rape agreeing at least with one statement above	86.2%	78.9%

With respect to the first two statements in Table 8, men were 1.5 to 2 times more likely than women to blame victims of rape. At the same time, one out of four female respondents blamed the victim. For the latter two statements the difference between men's and women's responses was negligible, as "well over a half of the respondents of both sexes basically justify a rapist as they question the fact of rape on flimsy grounds".¹⁵⁶

Overall, an extremely high percentage of both male and female respondents agree with one or more statements that exonerate rape, (86.2% and 78.9% respectively). Interestingly, when disaggregated by the level of education and residence, among other factors, the level of education was the most significant indicator: 82.6% of those with a basic level of education agreed as compared with 57.2% for those with higher education. Rural residents had higher levels of victim-blaming than urban residents.

In sum, the UNFPA study revealed that gender stereotypes were a common occurrence, and that:

*patriarchal and "traditional" rigid social norms and perceptions regarding masculinity, femininity, gender equality, sexuality, relationship with family members, including children, division of household tasks as well as acceptance of violence against women, intimate partner violence and peer violence are still quite prevalent in the Armenian society.*¹⁵⁷

¹⁵⁶ UNFPA, Men and Gender Equality in Armenia, 2016, p. 111.

¹⁵⁷ UNFPA, Men and Gender Equality in Armenia, 2016, p. 215.

2.3 BARRIERS TO ACCESS TO JUSTICE

The Council of Europe has identified a number of barriers to women's access to justice. They comprise socio-economic and cultural barriers, as well as substantive and procedural legal barriers¹⁵⁸. They include a number of interrelated factors (a 'justice puzzle')¹⁵⁹, some of which are features of the legal system itself and some of which are outside of it. Gender-neutral obstacles can disproportionately impact women's ability to obtain redress due to their disadvantaged position in society (e.g., the cost of legal procedures or the location and working hours of justice institutions).

In addition to blatant gender bias in judicial decisions resulting in discriminatory decision-making, the prevalence of gender stereotypes and discriminatory attitudes towards victims of sexual and intimate partner violence can frequently result in low reporting of the incidence of violence due to social stigma and shame. Ineffective response due to the failure of law enforcement to give weight and credibility to victims' versions of events also send a strong signal that result in low reporting. Barriers to access to justice in domestic violence cases include.

- ▶ Failure to report
 - ▶ Social stigma, shame
 - ▶ Discriminatory treatment, re-victimisation
 - ▶ Gendered stereotypes, victim-blaming
 - ▶ Fear of violence from perpetrator
- ▶ Lack of information
- ▶ Economic dependence
- ▶ Corruption

According to a recent report by the Council of Europe, Barriers, Remedies and Good Practices for Women's Access to Justice in Five Eastern Partnership Countries, barriers to women's access to justice in Armenia are due to the following:

- ▶ The lack of legal guarantees
- ▶ The existence of unequal or gender-blind legal provisions
- ▶ Limited ability to access justice mechanisms, such as courts, legal aid and policy programmes for the following reasons:
 - ▶ economic (lack of money)
 - ▶ social and psychological (stigma, restrictions on mobility, time constraints) and
 - ▶ educational (limited education and social networks)
- ▶ Poor access to information.¹⁶⁰

The report finds that "traditional family values have largely excluded women from the rule of law agenda at both the conceptual and practical levels."¹⁶¹

As indicated in Article 18(3) of the Istanbul Convention, overcoming these barriers requires a "gendered understanding of violence against women". Specific strategies involve:

- ▶ An Integrated approach (multi-agency cooperation)
- ▶ Avoiding secondary victimisation
- ▶ Providing space for victims to tell their story
- ▶ Ensuring safety
- ▶ Fostering economic independence and empowerment
- ▶ Attending to the specific needs of vulnerable victims.

¹⁵⁸ For more details see: Factsheet on Guaranteeing Equal Access of Women to Justice, (January 2015).

¹⁵⁹ Snežana Samardžić-Marković, "The Justice Jigsaw that Cuts out Women", New Europe, 5 October 2015.

¹⁶⁰ Council of Europe, Barriers, Remedies and Good Practices for Women's Access to Justice in Five Eastern Partnership Countries, pp. 22, 23.

¹⁶¹ Council of Europe, Barriers, Remedies and Good Practices for Women's Access to Justice in Five Eastern Partnership Countries, p. 24.

Each of these strategies must be mainstreamed into all stages of the justice process, from the first police response and the application of protection measures, throughout the investigation and trial procedures, to their access to a meaningful remedy through proportionate sanctions and compensation. The rest of the training focuses on the implementation of these principles and practices into the criminal justice chain.

Questions for group discussion:

- What are the existing barriers to justice for victims of domestic violence in Armenia?
- What are the legal and procedural barriers?
- What are the socio-economic and cultural barriers?
- What are the best strategies for overcoming these barriers?
- Do victims have access to remedies? Compensation?

Brief overview of issues of concern in Armenian law and practice

The passage of the Law on the Prevention of Violence within the Family, Protection of Victims of Violence within the Family and Restoration of Peace in the Family (Domestic Violence Law) in December 2017 constitutes an important milestone in Armenia. It establishes a general framework for protection orders, as well as assistance and services for victims. Yet, the current legislative framework in Armenia contains significant gaps that must be addressed before the system can function effectively and in line with international standards.

As a general matter, the Domestic Violence Law does not adopt a gender sensitive approach. Framed solely in terms of family violence, among the stated aim of the Law is to "protect the family unit," and "restore peace in the family" in addition to ensuring "the safety and protection of the victims of violence and guarantee their rights". It remains a question as to whether in cases of domestic violence these competing aims are balanced appropriately.

The Preamble to the Istanbul Convention, which Armenia has signed, provides:

- ▶ Recognising that women and girls are exposed to a higher risk of gender-based violence than men;
- ▶ Recognising that domestic violence affects women disproportionately, and that men may also be victims of domestic violence.

However, the Law does not acknowledge the disproportional impact of domestic violence on women, nor the higher risk of gender-based violence faced by women and girls. Effectively combating domestic violence will continue to pose a challenge to the relevant authorities in Armenia, and render it vulnerable to adverse judgments by international human rights tribunals, as long as it fails to incorporate a gender perspective on this highly gendered phenomenon.

As addressed in greater detail throughout the training, the Domestic Violence Law and the relevant legislative framework for its implementation contain numerous gaps with significant consequences for the protection of victims. Some key gaps that violate international standards include:

- ▶ procedural protections in the issuance of protection orders focus on the perpetrator's rights to the detriment of the victim's rights, and the same procedural protections are not envisaged for victims;
- ▶ several forms of domestic violence, including those covered and not covered by the Domestic Violence Law, are not covered by the Criminal Code, including economic violence, psychological violence, stalking and physical violence not meeting a minimal threshold. Consequently, these forms of violence do not trigger protective orders, precluding victims from bringing actionable claims seeking protection and a remedy for them;
- ▶ several forms of violence against women are not criminalised at all, including: female genital mutilation, forced and early marriage, forced abortion and sexual harassment;
- ▶ mitigating circumstances based on concepts of morality and honour.

In addition to the legal gaps, current de facto practice also raises cause for concern:

- ▶ judicial bias in sentencing
- ▶ the practice of obtaining forensic evidence violates numerous human rights of the victims and should be abolished
- ▶ questioning victims of domestic violence about their prior sexual conduct
- ▶ victim blaming
- ▶ victim questioning and lack of specialised, gender-sensitive approach
- ▶ reconciliation of the parties without ensuring victims equality in the process.

Questions for group discussion:

- How might anti-discrimination law (international) and gender equality law (domestic) be used to address the issues raised above?
- What are the sex disaggregated statistics on employment within the law enforcement sector? Among police? investigators? prosecutors? judges?

III. PROTECTION

As a general matter, the Istanbul Convention requires States to "take the necessary legislative or other measures to protect all victims from any further acts of violence"¹⁶². Importantly, this requires:

*appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of this Convention, including by referring to general and specialist support services.*¹⁶³

This requires not only the legislative framework to ensure emergency barring and protection orders, but also an inter-agency mechanism to ensure that protection, judicial remedies and support services are effectively implemented in an integrated manner.

3.1 EMERGENCY BARRING ORDERS (EBOS) AND PROTECTION ORDERS AND RISK ASSESSMENTS

3.1.1 EMERGENCY BARRING ORDERS

With regard to protection, Article 52 of the Istanbul Convention provides:

Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk.

As aptly described by the Council of Europe, the concept of EBOs requires a "paradigm shift".

*Rather than asking victims to seek a place of safety from violence. It shifts that burden to the perpetrator, who is ordered to leave the residence of the victim or person at risk and not to contact her or him.*¹⁶⁴

Although Article 52 requires the adoption of such measures, it leaves the modalities to the State's discretion. EBOs are not intended to function as a replacement for an array of other measures, such as arrest, detention and prosecution. At the same time, Article 52 must be read in conjunction with Articles 50, 51 and 53, which require immediate response by law enforcement, risk assessments and the availability of longer-term protection.

¹⁶² Article 18(1), Istanbul Convention.

¹⁶³ Article 18(2), Istanbul Convention.

¹⁶⁴ Council of Europe, Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention, 2017, p. 43.

Emergency barring orders can be characterised by their immediate application and their short-term duration. As defined in the Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter "Explanatory Report"), the term "immediate danger" in Article 52 refers to situations in which harm is imminent, has materialised and is likely to reoccur. EBOs are to be imposed for "a sufficient period of time," which generally ranges in other States from 10 days to 4 weeks.

An EBO constitutes a protective measure, and thus its issuance should not be contingent upon the commission of an offence, nor linked to proof of criminal responsibility.¹⁶⁵ As the Explanatory Report details, the Istanbul Convention obliges States "to ensure the possibility for victims to obtain a restraining or protection order whether or not they choose to set in motion any other legal proceedings"¹⁶⁶.

EBOs can be issued by the police, a court or another designated authority. The EBO can also be qualified under civil, criminal or administrative law. The Istanbul Convention does not specify which institution should be responsible for the issuance of the EBO, though in most countries it falls to the police, given their protection mandate, and that they are operational 24/7. The issuance of an EBO should not require that an application be initiated by the victim. EBOs should be issued at no cost to the victim. Article 62 of the Istanbul Convention further calls for cross-border recognition of court-ordered protection orders.¹⁶⁷

The scope of protection set forth in Article 52 is limited to covering: a) the victim's home or temporary residence (including shelters); and, b) general no contact orders. Many countries have extended the protection to the victim's children, if any, thus covering schools or childcare facilities.

3.1.2 PROTECTION ORDERS

With regard to longer-term restraining or protection orders, Article 53 of the Istanbul Convention states:

- 1▶ Parties shall take the necessary legislative or other measures to ensure that appropriate restraining or protection orders are available to victims of all forms of violence covered by the scope of this Convention.¹⁶⁸
- 2▶ Parties shall take the necessary legislative or other measures to ensure that the restraining or protection orders referred to in paragraph 1 are:
 - available for immediate protection and without undue financial or administrative burdens placed on the victim;
 - issued for a specified period or until modified or discharged;
 - where necessary, issued on an ex parte basis which has immediate effect;
 - available irrespective of, or in addition to, other legal proceedings;
 - allowed to be introduced in subsequent legal proceedings.

EBOs and POs must be monitored by: police patrols, initiating contact with the victim and electronic monitoring for perpetrators prone to violating an order or for high-risk victims. The Convention requires that States "ensure that the existence of a restraining or protection order may be introduced in any other legal proceedings against the same perpetrator. The aim of this provision is to allow for the fact that such an order has been issued against the perpetrator to be known to any other judge presiding over legal proceedings against the same person".¹⁶⁹

¹⁶⁵ Council of Europe, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS 210, 2011, para 265.

¹⁶⁶ Explanatory Report, para 273, noting that many victims may not be ready to press criminal charges.

¹⁶⁷ EU Directive 2011/99/EU on the European Protection Order and EU Regulation 606/2013/EU on mutual recognition of protection measures in civil matters complement the Istanbul Convention.

¹⁶⁸ The Istanbul Convention covers all forms of violence against women, including: domestic violence, physical and sexual violence, forced marriage, female genital mutilation, stalking, sexual harassment, forced abortion and forced sterilization. Articles 3, 33-40, Istanbul Convention.

¹⁶⁹ Explanatory Report, para 274.

Finally, with regard to the rights of the perpetrator, it should be underscored that the perpetrator's temporary inability to access his/her right to property and private and family life cannot supersede the victim's rights to life, and the right to physical and mental integrity.¹⁷⁰ The priority is to be placed on the victim's safety and that of his/her children. The EBO issued in a particular case should be proportionate, as reflected by a risk assessment. It should also be subject to due process and judicial review. That is, the order should be issued in writing, and contain both the content of the restriction(s) and duration. If the perpetrator is not heard on the spot by the police, he or she should have the right to be heard promptly. Perpetrators should also have the right to appeal a barring order, but without suspensive effect.

Violations of EBOs or protection orders should result in criminal or administrative sanctions. Fines are viewed as counter-productive as they may be paid for out of the family budget and are not an effective deterrent.¹⁷¹ With respect to violations of protection orders, Article 53(3) of the Istanbul Convention requires that breaches of protection orders "be subject to effective, proportionate and dissuasive criminal or other legal sanctions". The violation of an EBO "must lead to an official measure against the perpetrator"¹⁷². Other Council of Europe Member States provide for an administrative or a criminal sanction, ranging from a fine to arrest.

The victim is not restrained by an EBO or a PO. There are different reasons why the victim may want to contact the perpetrator or does not hinder him or her from entering the home, including fear. Victims should not be sanctioned for breaches to the EBO, including by a termination of the order.

3.1.3 CUSTODIAL AND VISITATION RIGHTS

Custody claims are sometimes used as a pretext by abusers in order to get into contact with the victim and/or the children. This can have dire consequences for both. For this reason, incidents involving domestic violence should be taken into account in the determination of custody and visitation rights of children. Conversely, the issuance of an EBO or a protection order should automatically result in an interim determination concerning the custody of children and visitation rights. In other words, the perpetrator's custody and/or visitation rights should be automatically suspended upon the issuance of a protection order. This is because the exercise of the perpetrator's custody and visitation rights cannot jeopardise the rights and safety of victim and children.

3.1.4. ARMENIAN LEGISLATION

3.1.4.1 FORMS AND SCOPE OF PROTECTION

The Law on "Prevention of Violence within the Family, Protection of Victims of Violence within the Family and Restoration of Peace in the Family" (Domestic Violence Law) provides for both emergency intervention orders (Article 7) and longer-term protection orders (Article 8) as stipulated by the Istanbul Convention. With respect to the protection of victims, Article 5 of the Domestic Violence Law contemplates three actions to be taken by police: i) the issuance of a warning; ii) an emergency intervention order; and, iii) a protection order. It provides that the application of one of these three measures shall not impede the institution of a criminal case, nor criminal prosecution.

Pursuant to Article 6, warnings are to be issued upon the first police response, if there are no elements of a criminal offence, nor grounds for an emergency intervention. This is in violation of the Istanbul Convention, as explained above, which requires that the issuance of a protection order without reference to the commission of an offence. In contrast, the issuance of an emergency intervention or protection order does not require the commission of a crime.

¹⁷⁰ See, *Yildirim v. Austria*, Communication No. 06/2005, CEDAW/C/39/D/6/2005, para 12:1:5, 2005, stating that "the perpetrator's rights cannot supersede women's human rights to life and physical and mental integrity".

¹⁷¹ See, e.g., *A.T. v. Hungary*, Communication No. 2/2003, CEDAW/C/36/D/2/2003, where the perpetrator was fined the equivalent of US\$365 for two incidents involving serious bodily harm to the victim.

¹⁷² Council of Europe, *Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention*, 2017, p. 21.

It is important to note in this regard that many acts that constitute domestic violence under the Convention are not considered grounds for either a criminal or administrative offence in Armenia, thus contravening international standards. As described in greater detail below, these include: acts of physical violence that do not meet the legal threshold of battery¹⁷³ (e.g., slaps, pulling hair), diverse forms of economic violence and neglect.

In the case *V.K. v. Bulgaria*, the State authorities rejected the victim's request for a protection order because the violence in question, "striking," did not meet the required threshold under national law. The national court had stated, "striking, as described, is not associated with disturbance of the physical [integrity] of the plaintiff...

Striking at someone, you can exercise violence, but only after breaking certain limits of abuse". The CEDAW Committee recalled that gender-based violence "is not limited to acts that inflict physical harm, but also covers acts that inflict mental or sexual harm or suffering, threats of any such acts, coercion and other deprivations of liberty," and found that the national "courts focused exclusively on the issue of direct and immediate threat to the life or health of the author and on her physical integrity, while neglecting her emotional and psychological suffering".¹⁷⁴

Article 6 of the Domestic Violence Law further requires that the perpetrator be notified, and provides a right to appeal. No mention is made of ensuring that the victim has a formal notification of the warning, nor is explicit mention made of the victim's right to appeal, which can be filed under the general rules of administrative procedure. In this regard, the current provision is not sufficiently victim-centred.¹⁷⁵

Article 7 of the Domestic Violence Law provides for the imposition of an emergency intervention order issued by the police if violence has been committed and there is a "reasonable belief of imminent risk of repeated or continuing violence". It can also be issued in the event of violent acts not constituting a criminal offence within 1 year of the issuance of a warning. The measures apply to protect the victim, and to anyone under the victim's care.

The emergency intervention order can remain in effect for up to 20 days. In contrast to the Istanbul Convention, which provides for the issuance of an emergency barring order *ex parte* with immediate effect, in Armenia they become effective upon service to the perpetrator via phone, email or registered mail to the address of registration, and receipt of the latter's signed acknowledgement. Significantly, the address of registration may be the home from which the perpetrator should be barred, with the potential adverse result of the perpetrator's required presence there (to receive notice), placing the victim's safety in jeopardy. In other words, the time period for becoming effective in Armenia remains indeterminate, rather than immediate. The procedure is potentially time consuming, and more problematically prioritises protecting the procedural rights of the perpetrator over the right to life and physical integrity of the victim in violation of international standards. Continued attempts to contact and/or harm the victim would not be considered as violating an order that has not become effective due to procedural delays. Finally, delays in the application of the emergency intervention order can have important bearing for possible violations of the protection order.

As the CEDAW Committee held in the *A.T. v. Hungary* case: "Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy."¹⁷⁶ In the *Yildirim v. Austria* case, the CEDAW Committee also found that the Prosecutor's decision not to detain the perpetrator who had threatened to kill the victim on multiple occasions, because it had seemed "too invasive" at the time, violated the State's due diligence obligations.¹⁷⁷

¹⁷³ Armenian legislation and/or case law on battery.

¹⁷⁴ Communication No. 20/2008, CEDAW/C/49/D/20/2008, paras 9.8, 9.9.

¹⁷⁵ See, e.g., *A.T. v. Hungary*, Communication No. 2/2003, CEDAW/C/36/D/2/2003, in which the victim, as the victim, had no access to judicial documents pertaining to the criminal case against the perpetrator.

¹⁷⁶ Communication No. 2/2003, CEDAW/C/36/D/2/2003, para 9.3.

¹⁷⁷ Communication No. 06/2005, CEDAW/C/39/D/6/2005, para 12.1.5.

Pursuant to Article 7, the scope of the emergency intervention order foresees the following:

- ▶ Removal from family residence
- ▶ Barred from victim's residence, workplace, children's school, places of leisure, other venues frequented by the victim
- ▶ No-contact ban, with distance specified, no communication (phone, email, etc.)
- ▶ Immediate confiscation of firearms
- ▶ Perpetrator can collect personal belongings from the home accompanied by police.

One or more of these measures can be applied, each with varying duration. No mention is made regarding the need for any interim measures with respect to custody and visitation rights, although the no-contact ban covers persons in the care of the victim.¹⁷⁸

The perpetrator is to be notified of the issuance of an emergency intervention order in person, or via registered mail, email or phone. The victim shall be notified by mail (not registered) at his/her residence or temporary shelter. The law does not provide for the victim to receive official notification in-person at the time of the issuance of the order, or via registered mail again reflecting its perpetrator-centred approach. The perpetrator has 5 days to appeal. The appeal has no suspensive effect.

Under Article 8, a protection order can be issued by a court upon the victim's application. The protection order can be issued for up to 6 months, with the possibility of obtaining a 3-month extension twice. Questions remain concerning the protection to be applied to victims for whom the threat of violence extends longer than one year.

Pursuant to Article 8(5), the scope the protection order includes:

- ▶ Immediately remove perpetrator or victim from the home
- ▶ Ban from victim's home, workplace, school, leisure and other venues frequented by the victim
- ▶ No-contact ban (distance & communication)
- ▶ Confiscation of firearms
- ▶ Alimony & child support
- ▶ No visitation or custody
- ▶ Mandatory rehabilitation programmes.

Like the emergency intervention orders, any combination of these protection measures can be applied, with varied duration periods. The perpetrator is entitled to remove his/her personal effects from a joint residence accompanied by the police once every two months during a protection order.

Although Articles 7 and 8 enable police to confiscate firearms from the perpetrator upon the issuance of an emergency intervention or protection order, they are reportedly returned to him upon the expiry of the order, thus recreating the threat of lethal danger for the victim.¹⁷⁹ Possession of or access to firearms constitutes a significant risk to the victim. In several EU Member States, the right to own a firearm is terminated for perpetrators. For example, in Spain, upon a criminal prosecution for domestic violence, the perpetrator is prohibited from possessing a weapon from two to five years.¹⁸⁰

With respect to the first measure, Article 8(5)(1) states:

The protection order may apply the following restrictions:

Immediately and forcibly remove the perpetrator of violence within the family from the residence of the victim of violence within the family and prohibit his return until the deadline established in the order. When establishing the deadline of this measure the court shall take into consideration

¹⁷⁸ See, e.g., V.K. v. Bulgaria, Communication No. 2/2003, CEDAW/C/36/D/2/2003, where the perpetrator locked his children into the apartment in Warsaw, and later refused to pay maintenance in order to force his wife to "obey".

¹⁷⁹ Article 51, Istanbul Convention.

¹⁸⁰ Article 148.4, Spanish Penal Code.

the possibility and expediency of moving the victim of violence within the family and persons under her care to a shelter and availability of other places of residence for the perpetrator of violence within the family.

While the judge is best placed to evaluate the specific facts in any given case, by foreseeing the removal of the victim from the home, Article 8(5) fails to make the "paradigm shift" required by the Istanbul Convention. As cited above:

Rather than asking victims to seek a place of safety from violence. It shifts that burden to the perpetrator, who is ordered to leave the residence of the victim or person at risk and not to contact her or him.¹⁸¹

No detail is provided within the Domestic Violence Law concerning the means for monitoring the implementation of these measures by the police. This is a critical gap that undermines the practical effectiveness of the Law. Indeed, details about monitoring the implementation of the orders is addressed by a police protocol, which remains unavailable to the public. Indeed, the level of inter-agency cooperation necessary to effectively implement protection orders requires transparency and constant communication and cooperation between justice sector actors and institutions.

3.1.4.2 IMPLEMENTATION/SUPERVISION OF THE ORDERS

According to the Domestic Violence Law, the Police shall supervise the implementation of the emergency intervention and protection orders by the perpetrator of violence.¹⁸² The Law itself remains vague with respect to both the manner of supervising implementation of the orders and the consequences to the perpetrator for breaching an emergency intervention or protection order.

To ensure their effective de facto implementation, police, investigators, prosecutors and judges should have up-to-date information on the issuance, appeals and violations of all three forms of protection. Although it remains unclear whether warnings, emergency intervention orders and protection orders are registered into an accessible database in Armenia, what is foreseen is the registration of the perpetrator, for the purpose of monitoring, receiving counselling and other forms of support, further demonstrating a perpetrator-centred approach. According to Article 11 of the Domestic Violence Law, the perpetrator against whom a warning, an emergency intervention or protection order is issued, as well as an adult with a criminal record involving family violence, shall be registered by the Police for preventive purposes. A social worker from the local centre providing social services shall, in the scope of preventive registration, carry out monitoring to prevent acts of violence within the family by adults pursuant to the Law on Social Assistance. For minors, the monitoring shall be carried out in the manner established by the Head of the Competent Authority or the Chief of Police.

Moreover, Article 11(3) stipulates that within the scope of preventive registration, the police officer and the social worker from the local social centre shall have at least monthly meetings with the registered person and the victim of violence within the family to raise awareness. It does not specify whether these monthly meetings are to be held with the victim and perpetrator together or separately. Either way, this provision does not appear to be dependent upon the consent of the parties, and thus would appear to function as de facto mandatory efforts at reconciliation. The social worker from the local centre shall immediately notify the Police if a risk of repeated violence is identified during the monitoring. Perpetrators are registered for one year, unless a new emergency intervention, protection order or criminal conviction has been issued during that period. If no additional protection order or criminal conviction occurs during the year, the perpetrator is de-registered.

In sum, in contrast to the "paradigm shift" required by the Istanbul Convention deemed necessary to ensure

¹⁸¹ Council of Europe, Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention, 2017, p. 43.

¹⁸² Articles 7(11), 8(9), Domestic Violence Law.

protection of the victim, the Domestic Violence Law can be characterised by their almost exclusive attention to the rights and needs of the perpetrator, rather than to the victim. In reality, the "gender neutral" approach taken by Armenia to the adoption of the Domestic Violence Law reflects a preferential focus on the perpetrator, which in the vast majority of cases will be men.

BEST PRACTICE: PROTECTION ORDERS IN SPAIN

Spain constitutes a good practice example on the implementation of protection orders. It has established one of the most advanced normative frameworks in the world for addressing gender-based violence¹⁸⁴, and is continuously cited internationally. In 2004, Spain established a comprehensive, gender-specific legal framework for addressing intimate partner violence, which entailed inter alia, the creation of specialised gender-based violence courts. These specialised courts are located in all regions of Spain, are operational 24/7, and enable the judge to impose a wide range of protection measures: criminal, civil (including family law) and social protection.

Applications for protective measures are filed *ex officio* by police and prosecution authorities. They are automatically issued in cases involving criminal gender-based violence convictions. The issuance of the order lies exclusively within the competence of the special court judge, who can also issue an order *sua sponte*, that is, on his/her own motion, without the filing of a request. Victims, family members of the victim, the police, social support organisations (public and private) and specialised prosecutors within the public prosecutor's office can all request a protection order.¹⁸⁵ Social welfare, health and other professionals are under a mandatory obligation to report incidents of violence to police or prosecution authorities.

Protection orders¹⁸⁶ must be issued within 72 hours of a request. Within 72 hours, the judge summons the parties for a hearing with the public prosecutor. As an in-court protection measure for victims, hearings with the perpetrator and victim(s) are conducted separately. Affected children are also heard separately.¹⁸⁷

While the perpetrator should be present at the hearing for the protection order, the proceedings can be conducted in *absentia*, if he cannot be found.¹⁸⁸ If the perpetrator fails to appear, the judge can turn the summons into an arrest warrant. In situations involving immediate risk to the victim, police are obliged to arrest the perpetrator and to maintain him in custody until the order is issued (within the 72 hour period).

In Spain, protection orders are issued to protect women from intimate partner violence, that is, by spouses, ex-spouses or men with whom they have had affective relations, irrespective of cohabitation. Protection orders are issued at no cost to the victim or the perpetrator.

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184 Act 1/2004 of comprehensive protection measures against gender violence. Article 1 states: "The object of this Act is to act against the violence which, as a manifestation of discrimination, the situation of inequality and the relations of power of men over women, is carried out against the latter by their spouses or ex spouses or who are or have been their partners by means of a similar relation of affection, even though they have not lived together". All forms of domestic violence were criminalised in the Penal Code in 1989.

185 In practice, the highest percentage of cases, 72.9%, is reported by the victims themselves; 13.8% are initiated by the police. The lowest percentage of complaints (2%) is initiated by healthcare professionals.

186 Act 27/2003 of 31 July.

187 Article 544 ter.4, Code of Criminal Procedure. The Code of Criminal Procedure also contemplates video-conferencing as an in-court protection measure.

188 Three conditions must be met to issue a protection order in *absentia*: a) the urgency of the matter is justified; b) the alleged person can challenge the order either by appeal or at the subsequent hearing; and, c) the subsequent hearing is held within a short delay.

The law contemplates two types of protection orders: criminal and civil. Protection orders linked to criminal proceedings can include:

- ▶ Prison;
- ▶ Restraining orders;
- ▶ Prohibition to communicate;
- ▶ Prohibition to return to the scene of crime or the victim's residence;
- ▶ Seizure of weapons or other dangerous objects.¹⁸⁹ Civil protection orders provide for:
 - ▶ Awarding the use and enjoyment of the dwelling;
 - ▶ Restrictions on the conditions of custody, visits and communication with children;
 - ▶ Provision of maintenance;¹⁹⁰
 - ▶ Child protection measures to avoid danger or injury.¹⁹¹

Protection orders can thus consist of a general no contact ban, barring the perpetrator from the victim's home, preventive custody of the perpetrator, granting the victim preliminary custody of the children, suspending the alleged perpetrator's parental authority, custody, guardianship and visitation rights and ordering maintenance payments to ensure children's well-being, among other dispositions. In general, criminal measures are applied more often than civil measures.

The geographical scope of the order remains at the discretion of the judge and, in contrast to Austria, can include the victim's workplace.¹⁹² A minimum of 500-meter ban is suggested in order to facilitate swift police response, and to avoid visual contact between the parties as well. Electronic monitoring enables immediate notification of a violation, and is frequently used for perpetrators who have breached an order. Violations of protection orders constitute a criminal offence in Spain. Significantly, the Criminal Code punishes the infringement of the protection order by the aggressor, not by the victim.¹⁹³ At the same time, the judge may adopt new measures that impose greater limitations on the aggressor. Prior protection orders are taken into consideration in all relevant criminal or civil proceedings.¹⁹⁴

Interim protective measures remain in effect for up to 30 days, until a final decision is taken by the judge to affirm, amend or revoke the order.¹⁹⁵ Protection orders may be maintained beyond the issuing of a final judgment in a case, and during the process of any appeals lodged.¹⁹⁶ Criminal protection measures can last up to five years for minor crimes, 10 years for serious crimes and 6 months for petty offences.

A simplified standard application form is available in municipal and social services offices, police stations, the special courts and NGOs. It is available in Spanish, the other official languages in Spain (Basque, Catalán, etc.), English and French. As noted above, Spain allows limited third party applications (by the victim's family), which can be submitted to diverse social service organisations or governmental bodies, in addition to the police or

189 Article 2(6), Act 27/2003 on protection orders.

190 In cases where gender-based violence is alleged and a child maintenance order has been issued but no payments are made, the government guarantees payment of the allowance out of the social benefits guarantee fund. Article 19, Organic Act 1/2004.

191 Article 2(7), Act 27/2003 on protection orders.

192 Action and Coordination Protocol of the Security Forces and the Judicial Bodies for the protection of victims of domestic and gender-based violence [Protocolo de Actuación de las Fuerzas y Cuerpos de Seguridad y de Coordinación con los Órganos Judiciales para la protección de las víctimas de violencia doméstica y de género].

193 Art. 468 of the Spanish Criminal Code criminalizes the infringement of a protection order and is punishable by 6 months to one year of prison. Specifically for domestic violence cases the law foresees prison from 3 months to one year, or community work from 90 to 180 days. The consent of the victim is not relevant when determining the sanction for the infringement.

194 Article 61, Organic Act 1/2004.

195 Article 2(7), Act 27/2003 on protection orders. The interim protective measures can be prolonged at the request of the victim.

196 Article 69, Organic Act 1/2004 on Comprehensive Protection Measures against Gender Violence, (such extended measures must be explicitly set forth in the judgment).

the specialised court, fostering the accessibility of the procedure. As noted above, the law mandates that social protection agencies and civil society organisations with information concerning incidents of violence to report them to the police or specialised court, which is then obliged to issue, *ex officio*, a protection order.

The victim has the right to be heard by the court, which is not bound by her requests. A significant percentage (approximately 30%) of victims' applications for protection orders are denied each year. Perpetrators have the right to appeal an order, and the right to be heard by the court on the matter. The appeal does not have suspensive effect.¹⁹⁷

The victim is notified of the issuance of a protection order, and of the conditions it imposes, by the judge, who also notifies the perpetrator and the relevant implementing authorities.¹⁹⁸ Within 24 hours of its issuance, the notification is transmitted electronically, by fax or express mail. In addition to security bodies, social assistance, legal, health and psychological support services are also notified, depending on the needs of victims in a specific case. An integrated system of administrative coordination has thus been established, in order to facilitate these communications. (Inter-agency coordination is described in more detail, below).

The victim's receipt of comprehensive assistance¹⁹⁹ (psycho-social support, legal assistance and representation, and expert witness support, financial aid,²⁰⁰ educational and vocational skills training, and housing) is conditioned upon her reporting the violence to the authorities.²⁰¹ It is the court that informs the relevant service providers of the protection order and the victim's right to access services. The services offered to victims of intimate partner violence are compatible with those provided to victims of sexual violence, in line with the standard set forth in the Istanbul Convention.²⁰²

The protection order is recorded in the Central Register for the Protection of Victims of Domestic Violence, which is managed by the Ministry of Justice. It can be accessed by family and criminal courts, the public prosecutor's office, the police, Government delegations and sub-delegations, and autonomous communities through designated points of contact, in order to ensure effective implementation throughout the State for both temporary and final orders.²⁰³ The Central Register is also used for monitoring purposes.

A Monitoring Committee²⁰⁴ on the implementation of the law governing protection orders was established, which has prepared several protocols to guide the implementation of protective orders as well as mechanisms for inter-agency cooperation and the application form.

197 Article 44, Organic Act 1/2004 on Comprehensive Protection Measures against Gender Violence.

198 Article 1(8), Act 27/2003 on protection orders.

199 Article 19(2), Organic Act 1/2004 of 28 December.

200 Article 3(5), Act 1/1996 on Free Legal Aid exempts victims from paying legal fees if they otherwise qualify for free legal aid. They can be assisted at the outset for free in urgent matters, and if they do not qualify, will have to subsequently pay the attorney's fees. The Action and Coordination Protocol of the Security Forces and the Judicial Bodies for the protection of victims of domestic and gender-based violence requires bar associations to establish on-call duties to ensure that lawyers are available 24/7 for urgent representation needs.

201 Article 2(5), Act 27/2003 on protection orders. The conditioned access to assistance has been a subject of debate in Spain, and in some regions the laws have been amended to provide access to those rights without requiring criminal intervention.

202 Act 35/1995 of 11 December on Aid and Assistance to Victims of Violent Crimes and Crimes against Sexual Liberty.

203 Article 1(10), Act 27/2003 on protection orders. Royal Decree 513/2005 provides access to autonomous communities, Government delegations and sub-delegations. The General Council of the Judiciary maintains an updated list of the designated coordination points and provides full information with their modifications or updates to the Ministries of Justice, Employment and Social Affairs and the Interior, as well as to the Public Prosecutor's Office and the High Court of Justice, the Central Registry and the investigating courts of the relevant autonomous community.

204 The Monitoring Committee includes participation by representatives of the General Council of the Judiciary, the Ministries of Justice, Labour and Social Affairs, and Interior, autonomous communities with competence in the field of justice, the Public Prosecutor's Office, the General Council of Lawyers, the National Bar Association, and the Federation of Municipalities and Provinces.

The Protocol for the implementation of the protection order for victims of domestic violence, sets forth the criteria for coordination between the judiciary, law enforcement and other government bodies in the security, legal, psychological, health and social areas as requested by the victim.

The Action Protocol for the Security Forces, including coordination with the Judicial Bodies covers the communication and coordination system between police and judicial bodies to ensure effective victim protection. The Protocol requires police to intervene upon learning about facts that could constitute domestic violence. It requires that they:

- ▶ Inform the victim of her right to legal assistance in accordance with Annex 1 of the Protocol;
- ▶ Immediately and exhaustively take the victim's statement, and that of witnesses where relevant;
- ▶ In the event that there are indications of a criminal offence, urgently collect information from the neighbours, family members, co-workers, classmates, social services, victim care offices, etc. on the existence of any previous maltreatment by the suspect, as well as his personality and possible addictions;
- ▶ Check the existence of prior police interventions and/or complaints in relation with the victim or the suspect, any antecedents of the latter and possible injuries of the victim reported by the medical services; and,
- ▶ Check the existence of protection measures ordered previously by the judicial authorities in relation with the persons involved. For that purpose, and in all cases, the existing data recorded in the Central Register for the Protection of Victims of Domestic Violence is to be consulted.

Once the facts and the risks are assessed, a decision is made on the necessity to adopt specific measures aimed at the protection of life, physical integrity and the rights and legitimate interests of the victim(s) and their relatives. In this respect, the police may adopt the following measures in cases of extreme urgency:

- ▶ Personal protection that, depending on the level of risk, may include permanent protection, 24 hours per day, by the police;
- ▶ Information / training on the adoption of self-protection measures;
- ▶ Ensuring that the victim is informed in a clear and accessible manner of the content, implementation and effects of the protection order, as well as of the social services, victim care offices and coordination points that she may have at her/his disposal.

The Action Protocol further provides for accessible and continuous communication between the victim(s) and the corresponding security corps, as well as their immediate access to all the necessary data to assess the risk at any moment. For that purpose and whenever possible:

- ▶ The implementation of protection orders will be assigned to personnel specially trained in assistance and protection of the victims of domestic violence;
- ▶ The victim will have access to a direct and permanent phone number in order to reach the assigned personnel to obtain individualised attention;
- ▶ The victim will benefit from technical mechanisms that allow a swift, fluent and permanent communication with the corresponding security forces and bodies, whenever the circumstances of the case and of the victim so require.

The Protocol also regulates how protection orders are monitored. The police and the judiciary actively monitor protection orders. In practice, specialised police units within the National Police, the Guardia Civil and the police in the autonomous provinces of Catalonia, the Basque Country and Navarra ²⁰⁵monitor the effectiveness of protection orders. However, these specialised units are only available in the major cities. Any incident that affects one of the components of the system, such as the entry of the aggressor in the exclusion zone or his getting closer to the victim and the zone of exclusion while losing signal, are considered as serious incidents. The police protection mechanism is activated whenever the bracelet is broken, taken off or separated from its GPS, as well as when the battery dies. The victim is informed of any incident that may occur during the validity of the protection order. She is always able to push the “panic” button whenever she thinks that the aggressor is acting illegitimately. In these cases, the Control Center immediately contacts the victim to assess the situation and adopt the relevant measures.²⁰⁶

The Protocol for coordination between civil and criminal jurisdictions for the protection of victims of domestic violence establishes criteria for the effective coordination between both jurisdictions, which is intended to:

- ▶ Provide the victim with a comprehensive framework of protection, preventing the existence of conflicting resolutions;
- ▶ Provide family courts with adequate knowledge of the actions taken by pre-trial investigation courts in matters of domestic violence;
- ▶ Enable the family court to adopt a resolution within the legal time limit on the ratification, modification or revocation of the civil measures agreed in a protection order.

3.1.4.3 BREACHES OF PROTECTION ORDERS

Article 7 provides that an emergency protection order can be revoked if violated, but no instruction is provided concerning its replacement with a stricter order, nor the need to arrest and detain the perpetrator. Similarly, Article 8 provides for “liability” for a breach, without reference to criminal, civil or administrative liability. However, 2017 amendments to the Criminal and Administrative Offences Codes fill in this gap, foreseeing imprisonment and fines for breaching protection orders. However, these amendments do not apply to all of the forms of protection set forth in Articles 7 and 8, as detailed below.

An amendment to the Criminal Code stipulates sanctions for the breach of the emergency intervention and protection orders involving: the removal of the perpetrator from the victim's residence; bans from the victim's workplace, schools, leisure venues and home; bans prohibiting the perpetrator to approach the victim from within a specified distance, and the surrendering of firearms.²⁰⁷ The sanctions contemplated include:

- ▶ a fine in the amount of 300 to 500 minimal salaries²⁰⁸
- ▶ arrest and detention from one to three months
- ▶ imprisonment for up to 6 months.²⁰⁹

The Code of Administrative Offences was also amended in 2017 to foresee sanctions for the violation of emergency intervention and protection orders. Specifically, it provides for fines from 80-100 minimal salaries for violating the no-contact bans, bans on child visitation and failure to attend rehabilitation programs.²¹⁰

²⁰⁵ Autonomous communities coordinate the police at all levels, including the local police in smaller cities and villages.

²⁰⁶ Control Centres, are operational 24 hours a day, 365 days a year.

²⁰⁷ These restrictions are provided for both emergency intervention and protection orders, pursuant to Article 7(3)(1)-(4) and Article 8(5)(1)-(4) of the Domestic Violence Law, respectively.

²⁰⁸ One minimal salary constitutes 1000 Armenian Dram.

²⁰⁹ Article 353.1, Criminal Code.

²¹⁰ These restrictions are provided for both emergency intervention and protection orders, pursuant to Article 7(3)(5) and Article 8(5)(6)-(8) of the Domestic Violence Law, respectively.

As noted above, fines do not constitute an effective deterrent nor preventive measure, and they are often taken from the family budget. Yet, they constitute the principle form of sanction for the violation of protection and emergency intervention orders. It further remains unclear whether breaches in both types of orders will be addressed by the Criminal Code, which foresees preventive measures such as arrest, detention and imprisonment for the violation of an order, or by the Administrative Offences Code, which foresees only a fine, and does not function as either a preventive measure or a deterrent.

Significantly, in the case of *Yildirim v. Austria*, the CEDAW Committee found that the State's failure to detain the perpetrator after twice violating interim protection measures banning him from the victim's home, workplace and from contacting the victim violated its due diligence obligations.²¹¹

Critically, no sanctions are foreseen for violating orders to provide alimony and child maintenance to ensure that the perpetrator provides for his share of the living expenses, as set forth in Article 8(5)(5). This gap thus entitles perpetrators to commit economic violence, and violate protection orders to prevent such violence, with complete impunity.

Both the emergency intervention and the protection order can be suspended if the perpetrator is detained or is committed to a medical facility, or if the victim is relocated or undergoes a change of identity. It remains unclear how a change of identity would reduce a threat to the victim.

3.1.5 RISK ASSESSMENT PROTOCOLS

3.1.5.1. INTERNATIONAL STANDARDS

The ECtHR has established positive obligations for States to protect citizens from human rights violations committed by non-State actors, including in the private sphere. Specifically, Articles 2 and 3, protecting the right to life and the prohibition on ill/treatment, respectively, enjoin "the State to take appropriate steps to safeguard the lives of those within its jurisdiction," and "to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual".²¹² The ECtHR has specifically held that:

A positive obligation will arise where it has been established 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 third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.²¹³ (Emphasis added).

In this regard, the Istanbul Convention requires States to "ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and if necessary to provide co-ordinated safety and support," taking into account all stages of the investigation, protection measures and possession of, or access to, firearms by the perpetrator.²¹⁴

The ECtHR has developed a two-pronged standard for assessing whether States have met their positive obligations under Articles 2 and 3: a) whether the authorities knew or ought to have known of the violence to which the victim had been subjected and "the risk of further violence,"²¹⁵ and, b) "if so, whether all reasonable measures had been taken to protect her and to punish the perpetrator".²¹⁶ In this regard, risk assessments constitute a practical tool for determining "the existence of a real and immediate risk".

In the *Opuz v. Turkey* case, the Court observed:

²¹¹ Communication No. 06/2005, CEDAW /C/39/D/6/2005, para 12.1.5.

²¹² *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, paras 49, 50; see also, *Mudric v. The Republic of Moldova*, Application No. 74839/10, 2013, para 40.

²¹³ *Case of Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 51.

²¹⁴ Article 51, Istanbul Convention.

²¹⁵ *B. v. The Republic of Moldova*, Application No. 61382/09, 2013, para 51.

²¹⁶ *Case of B. v. The Republic of Moldova*, Application No. 61382/09, 2013, para 51.

that despite the deceased's complaint that H.O. the perpetrator had been harassing her, invading her privacy by wandering around her property and carrying knives and guns, the police and prosecuting authorities failed either to place H.O. in detention or to take other appropriate action in respect of the allegation that he had a shotgun and had made violent threats with it. ... [T]he Court observes that it is not in fact apparent that the authorities assessed the threat posed by H.O. and concluded that his detention was a disproportionate step in the circumstances; rather the authorities failed to address the issues at all.²¹⁷

In the case *B. v. Moldova*, the Court found that "the authorities did not make an analysis of whether the seriousness and number of attacks which the first applicant had suffered on the part of V.B. the perpetrator and the seriousness of the first allegation of rape" required a criminal investigation²¹⁸. The Court further noted the failure of the State to take into consideration the subsequent incidents and the ongoing episodes of violence. It found that "the domestic courts should have taken into consideration the factual developments which had taken place after the [relevant court decision] had been adopted, namely the two additional attacks by V.B."²¹⁹ Based on the finding that the authorities had failed to assess the evolving risks, the Court held that Moldova had violated Article 3 of the Convention.

The need for a protective order and other safety measures must thus be assessed on a regular basis. It is important to remember that there are several situations that can raise the level of risk, such as separation or divorce, a court hearing and child contact, among others.

The aim of using risk assessment tools is to prevent further violence. The assessment of risk and identification of safety measures should be conducted continuously: from the first meeting with the victim all the way to a possible sentence, and sometimes also in connection with the perpetrator's release from prison. The risk assessment has to be conducted in close co-operation with the victim. It is also important to ensure the safety of, and need for, protection measures for children involved in domestic violence cases at all stages of investigations and judicial proceedings.

The Istanbul Convention leaves the risk assessment methodology to the discretion of the States. Yet, it is recommended that first responders specially focus on risk factors such as:

- ▶ violence;
- ▶ threats;
- ▶ escalation;
- ▶ violation of protection orders;
- ▶ alcohol and/or substance abuse;
- ▶ psychological problems.²²⁰

Significantly, EBO violations should constitute a risk factor, requiring stronger measures.

Risk assessment protocols function not only as a life-saving tool, but as a means of ensuring the efficient and effective use of limited resources by distinguishing between levels of risk. When the police come into contact with a victim exposed to domestic violence, their main task is to ensure victim safety. They have a range of measures they can use in non-urgent situations, from advising the victim on practical safety measures they can implement themselves, such as removal of the nameplate on the door, inserting a peephole in the door, installing safety locks, using different routes to and from work, locking car doors when driving, among others, in addition to more comprehensive measures such as protection orders.

Other factors indicating risk include:

- ▶ Perpetrator in the victims' home or in the area
- ▶ Recent violent episode

217 *Opuz v. Turkey*, Application No. 33401/02, 2009, para 147.

218 *B. v. The Republic of Moldova*, Application No. 61382/09, 2013, para 54.

219 *B. v. The Republic of Moldova*, Application No. 61382/09, 2013, para 56.

220 See, Council of Europe, *Preventing and Combating Domestic Violence against Women: A learning resource for training law enforcement and justice officers*, 2016, p. 40

- ▶ Violence is escalating
- ▶ Suicide threats
- ▶ Violence towards others
- ▶ Possession of, access to, weapons
- ▶ Threats of violence or abuse are made toward children
- ▶ Jealousy
- ▶ Assaults during pregnancy
- ▶ Substance abuse

Women are at increased risk of violence, particularly lethal attacks, when they are with an abuser who has a criminal history and/or has abused other intimate partners. The reality is that leaving the relationship often precipitates the last violent attack that leads to a victim's death. This is because batterers will step up their efforts to use power and control against victims when they threaten or attempt to leave. When a man feels that he has ownership over his partner, which in traditional societies is often the case, he may become insanely possessive, especially when he fears losing her. Prior threats to kill a victim are one of the strongest lethality risk factors. Indicators for lethality include:

- ▶ History of violence (past abuse)
- ▶ Separation
- ▶ Obsessive/possessive behaviour
- ▶ Threats to kill
- ▶ Cultural acceptance of domestic violence.

3.1.5.2 ARMENIAN LEGISLATION/SPANISH POLICE PROTOCOLS

Subsequent to the passage of the Domestic Violence Law, the Colonel General of the Police has adopted five orders regulating police intervention in cases of domestic violence. These orders include several elements and tools for performing risk assessments. However, they have not yet been made available to the public. When considering the issuance of emergency intervention and protection orders in Armenia, it is important to recall that pursuant to the Istanbul Convention, as measures of protection, the issuance of emergency barring and protection orders should not be contingent upon the commission of an offence, nor linked to proof of criminal responsibility.

To provide a good practice example, the police in Spain are obliged to use two risk-assessment tools to guide any protection applied pursuant to the Police Protocol to evaluate the level of risk of violence against women in the cases covered by Organic Act 1/2004. The first protocol identifies the exposure to the reoccurrence of violence. It lists the following indicators of violence:

- ▶ physical violence-with or without visible injury;
- ▶ sexual violence;
- ▶ the use of firearms, hazardous tools or other objects when attacking the victim(s);
- ▶ intimidation, threats of physical/mental harm addressed at victims;
- ▶ an increase, intensification of and/or repetition of violent incidents or threats;
- ▶ mental violence used by the perpetrator against victims; damage caused at the place of residence, damage to property;
- ▶ the non-observance of protection orders issued by the court;
- ▶ a breach of the principles of serving a court-ordered sentence;
- ▶ provocative and/or disregarding behaviour by the perpetrator towards authorities, police officers, or other persons representing police services or justice bodies, as well as

- towards the victim in the presence of the above-mentioned persons;
- ▶ previous conflicts with the law, in particular involving the use of violence;
- ▶ the consumption of alcohol, drugs or other psychoactive substances by the perpetrator;
- ▶ the perpetrator shows envy and/or obsessive behaviour towards the victim;
- ▶ clear problems, inflammatory points in the couple's relationship;
- ▶ employment and/or financial problems of the perpetrator;
- ▶ previous attempts and/or suicidal tendencies.

Additional indicators, not on the list, can be added by the officer filling out the form.

The form also requires the police to specify the source of information and to evaluate among four levels of risk: extremely high, high, average and low. If the officer filling out the form believes the risk to be different from the one automatically generated by the form, the degree of risk can be increased. There is no option for the officer to reduce the level of risk from that automatically generated by the form.

Each degree of risk has a corresponding date at which the situation should be reassessed, as follows:

- ▶ extremely high = 72 hours;
- ▶ high = 7 days;
- ▶ average = 30 days;
- ▶ low = 60 days.

After the imposition of court-ordered protection measures, a second form is used to monitor the ongoing evolution of risk within the deadlines established according to the level of identified risk (see above). It also assesses the effectiveness of the court-ordered protective measures applied. It is to be used periodically as the case evolves.

The indicators of this form include:

- ▶ the perpetrator has no possibility to harm the victim; he is in prison or a closed centre of different nature, left the country, or because of the state of health is physically unable to use violence;
- ▶ the perpetrator left the victim; he does not persecute the victim, has changed his place of residence far from the victim, abides by the preventive measures adjudged by a court, together with electronic supervision measures (wearing appropriate bracelet);
- ▶ from the moment of the proceedings' initiation, the perpetrator has behaved in a calm, controlled manner; he accepts the situation; he does not show willingness to take revenge on the victim or persons from her social environment;
- ▶ the perpetrator demonstrates full respect towards the law, police officers, or other persons representing police services or justice bodies; his social situation, financial and professional situation is stable; the perpetrator shows remorse, has pangs of conscience, voluntarily takes part in classes or corrective therapy;
- ▶ the victim may count on support from her social environment in terms of safety;
- ▶ the victim has changed her place of residence, which remains unknown to the perpetrator
- ▶ the situation proceeds without event since the last risk evaluation;
- ▶ the perpetrator ran away, hides or is in an unknown place;
- ▶ the perpetrator shows envy and/or obsessive behaviour towards the victim;
- ▶ the perpetrator has previously attempted suicide and/or demonstrates suicidal tendencies, mental illnesses, psychological problems, addiction to alcohol, drugs or other psychoactive substances;
- ▶ the victim does not abide by the agreed-upon safety principles, (e.g., prohibition to contact the perpetrator), electronic supervision, shows the desire to withdraw complaints, changes her statements or testimony, wants to withdraw from the preventive measures;

- ▶ the victim is in a relationship that the perpetrator does not accept and/or really wants to force the victim to break this relationship;
- ▶ the victim has mental problems, psychiatric problems and/or is addicted to alcohol, drugs or other psychoactive substances; in the socio-familial environment of the victim there is a person related to the perpetrator who constitutes a real threat to her mental integrity.

Again, additional indicators can be added by the assessing officer.

Pursuant to the Action Protocol of the Security Forces and Bodies, including Coordination with the Judicial Bodies for the Protection of the Victims of Domestic and Gender Violence, depending upon the level of risk, the following compulsory measures should be undertaken:

Level 1 (low risk):

- ▶ Providing the victim permanent contact telephone numbers (24 hours) with the nearest police bodies;
- ▶ Sporadic telephone contacts with the victim;
- ▶ Informing the aggressor that the victim has police support for her protection;
- ▶ Recommendations on self-protection and ways to avoid incidents;
- ▶ Accurate information on the mobile remote assistance service.

Level 2 (medium risk): Application of the mandatory measures for Level 1 plus:

- ▶ Regular monitoring at home, workplace and entrances and exits of schools;
- ▶ Accompanying the victims in as many proceedings, either judicial, administrative or for assistance, as is required;
- ▶ Training the victim in self-protection measures;
- ▶ Seek to provide the victim with a mobile terminal (remote assistance service).

Level 3 (high risk): Application of the mandatory measures applied for Level 1 and 2 plus:

- ▶ Continuous surveillance of the victim during the urgent levels of threat, until the circumstances of the offender are no longer considered an imminent threat;
- ▶ Encouraging the victim to move to a support centre or to the home of a relative if she has not done so yet, at least during the first days and especially if the offender has not been arrested;
- ▶ Sporadic control of the aggressor's movements.

In case of discrepancies between the police protection measures agreed by the court and those which result from the police risk assessment, the measures decided by the court will always prevail and the judicial authorities will immediately be informed about the existing discrepancies in order to agree what is most appropriate.

3.2 APPEALS AND VIOLATIONS OF EMERGENCY BARRING ORDERS AND PROTECTION ORDERS: ADMINISTRATIVE AND CIVIL PROCEEDINGS

3.2.1 ADMINISTRATIVE PROCEEDINGS

The Domestic Violence Law enables the perpetrator, but not the victim, to appeal the issuance of a warning and an emergency intervention order. Consequently, the Domestic Violence Law fails to provide the victim with a form of appeal for a police decision not to issue a warning or an emergency intervention order. However, in such cases the general rules for appealing administrative acts apply, thus enabling victims to appeal police decisions.²²¹

According to Article 7(1) of the Domestic Violence Law, the issuance of a warning requires notification to the perpetrator of the applicable legal sanctions in the event of continued or repeated violence. The warning is to be issued by the responding officer as soon as possible after being apprised of the case.

Article 7(6) of the Domestic Violence Law stipulates that the issuance of the warning is subject to appeal within one month of its notification. As police decisions constitute administrative acts, appeals are regulated by the Law on the “Principles of the Administration and Administrative Proceedings,” which provides for suspensive effect.²²² The suspensive effect of an appeal of the issuance of a warning has particular relevance in cases in which the perpetrator would have violated the warning, which should automatically result in the issuance of an emergency intervention order, but would not because the violence occurred during the suspensive effect of the warning, thus compromising the level of protection afforded to the victim.

The emergency intervention order is also subject to appeal according to Article 7 of the Domestic Violence Law, which stipulates that an emergency intervention order can be appealed, pursuant to the hierarchy of appeals (e.g., to the chief of the police and then the Administrative Court) within five days of its notification to the perpetrator. The emergency intervention order shall contain the following notification for the perpetrator: the deadline for its appeal, the appeal body, including the court where the order can be challenged, and the legal sanctions for breaching the order. Article 7 of Domestic Violence Law explicitly provides that an appeal of the emergency intervention order shall not have suspensive effect, thus ensuring the victim's protection throughout the process of the appeal. Again, the Domestic Violence Law makes no specific provision for victims' appeal, which is rather governed by the general application of the Law on Administration and Administrative Proceedings.

Chapter 31.1 of the Administrative Procedure Code sets forth the specific procedures for appealing an emergency intervention order. According to Article 222.11, within 36 hours of the appeal,²²³ the competent court must decide on the following:

- ▶ the admissibility of the appeal,
- ▶ the return of the appeal, (e.g., for errors),
- ▶ rejection of the application as inadmissible,
- ▶ redirecting the application to another court.

²²¹ Article 69, Law on Administration and Administrative Proceedings, covering appeals pertaining to claims regarding the actions and omissions of officials.

²²² According to Article 74, an administrative appeal shall suspend the execution of the administrative act, except in cases otherwise provided by law, when the administrative act is subject to immediate application and where the immediate application is necessary for the public interest.

²²³ Article 222.11 provides for a faster procedure than the general provisions for administrative appeals, which can be up to one year.

Moreover, notification of the appeal of the emergency intervention order shall be forwarded to the parties, and the perpetrator or to his legal representative, immediately after the court session is scheduled. Public notices (placing notification on the official public notice webpage) cannot be used to notify parties in these cases. According to the same Article 222.11, a final decision must be made by the court within 48 hours of the admissibility decision.

3.2.2 CIVIL PROCEEDINGS

In contrast to warnings and emergency intervention orders, protection orders are governed by civil law and procedure. According to Article 8 of the Domestic Violence Law, the victim, or the support centre acting with the victim's consent, may submit an application for a protection order to the first instance civil court. Chapter 27.1 of the Civil Procedure Code provides special procedures on the issuance of protection orders. According to Article 234.1, the application is lodged with the first instance court of the place of residence of the victim or in the place where the support centre is located that is bringing the application on behalf of the victim. In addition to the general information required in civil proceedings the application must also include:

- ▶ relevant legal provisions of the Domestic Violence Law,
- ▶ information regarding family relations between the respondent and victim,
- ▶ information that substantiates the immediate threat of violence in the family,
- ▶ note about the use of specific restrictions pursuant to the Domestic Violence Law,
- ▶ whether the respondent has been subject to preventive registration.

If available, decisions regarding warnings and emergency intervention orders also must be attached to the application. In cases in which the support centre is applying on behalf of the victim, her written consent must also be attached.

According to Article 234.3 of the Civil Procedure Code, the court shall decide whether to accept the application within three days of its submission. A reply to the application to appeal by the perpetrator must be filed within three days from the date of receipt of the application by the perpetrator. The court must issue a decision within ten days of accepting the application. A decision on the issuance of a protection order is at the total discretion of the judge, who is not bound by the evidence, motions, recommendations, explanations and objections presented by the participants in the proceedings and, upon its own motion, must take adequate measures to obtain available information on the facts that are required for issuing a determination in a specific case.

The protection order comes into force upon its publication. The court's decision is sent to the victim and the perpetrator, and other parties to the application. "If necessary," copies of the judicial act are provided to the police, the authorised body designated by the Domestic Violence Law (Ministry of Labour and Social Affairs) and the Compulsory Enforcement Service.²²⁴ The failure to systematically inform the police of the issuance of a protection order raises significant concerns. As explained above, the implementation of protection order requires the following actions: patrolling, contacting the victim periodically, continually updating the risk assessment and possibly electronic monitoring. Rather, all justice sector actors must have access to up-to-date information on the issuance and implementation of protection orders. It remains questionable whether the Compulsory Enforcement Service can effectively engage in the meaningful implementation of protection orders. Notably, Articles 7(11) and 8(9) assign the implementation of protection orders to the police.

According to the Article 234.4(6) of the Civil Procedure Code, the protection order may be terminated earlier by the court in the case of reconciliation, pursuant to the Domestic Violence Law. The court can do so without holding a hearing, which raises potential protection concerns.

A protection order can also be terminated if it is proven that the victim "undertakes such actions on a regular basis" which results in the perpetrator violating the protection order.²²⁵ This provision further violates best

²²⁴ If the judicial act relates to the interests of a minor or an incapable person, it is also sent to the guardianship and trusteeship body.

²²⁵ Article 234.4, Civil Procedure Code.

practice standards. Victims should not be held liable for violating a protection order issued on their behalf, nor should the protection order be terminated due to the victim's actions. Secondly, Article 234.4(6) is phrased in such a way as to blame the perpetrator's violation of the protection order on the victim, constituting explicit legislative victim-blaming.

3.2.3. CHILD CUSTODY AND OTHER RELATED MATTERS IN CASES OF THE ISSUANCE OF EMERGENCY INTERVENTION AND PROTECTION ORDERS

Many domestic violence cases affect children, either as direct victims of violence by the perpetrator, or as indirect victims, as witnesses to the violence, both of which are extremely harmful to children. As the ECtHR has acknowledged, "children, too, are often casualties of the phenomenon, whether directly or indirectly".²²⁶ Given their special protection needs, as set forth in the Convention on the Rights of the Child, working with child victims requires special protection considerations.

The Domestic Violence Law foresees procedures for addressing the protection needs of minors as direct victims of violence, but not as indirect victims. Article 7(5) of the Domestic Violence Law provides that if the person under imminent threat is a minor or lacking in capacity, the competent police officer issuing the emergency intervention order shall send a copy of that order and relevant records to the guardianship and trusteeship body, which shall assess the situation and undertake measures stipulated in law and in its charter. If the emergency intervention order is issued against the only legal representative of a minor or person lacking legal capacity living with the latter, then the guardianship and trusteeship body, upon the receipt of a copy of the order but no later than within 24 hours, shall arrange for their care, following the procedure set forth by the relevant legislation and based on their best interest.²²⁷

However, as noted above, the procedures foreseen in the issuance of an emergency intervention order do not entertain the need for making interim custody or contact ban arrangements in order to: a) prevent the minor from continued exposure to violence; and, b) not serve as an excuse or justification for contacting the victim based on the assertion of parental rights, thus compromising the protection provided to the victim and the child.

With respect to the issuance of a protection order, Article 8 of the Domestic Violence Law further provides that if the victim of violence within the family is a minor, or a person deemed by the court as lacking legal capacity, the application for a protection order can be made by close relatives, a legal representative and the guardianship and trusteeship body.²²⁸ If the protection order is issued against the only legal representative (or representatives) of a minor living with the perpetrator(s), then the court shall instruct the guardianship and trusteeship body to arrange for their temporary care in accordance with national law and based on their best interest.

According to Part 9(8) of the Government Decree 631- , the guardianship and trusteeship body can choose the manner of accommodating children left without parental care, these include: appointing a guardian or a trustee, or placing the child within a foster family.

Significantly, violence against a child can result in the withdrawal of parental rights as well. According to Article 59 of the Family Code, the deprivation or restriction of parental rights can only be made by law, pursuant to a court decision and in the child's best interests. Recently amended in 2017, Article 59 of the Family Code provides the list of instances when a parent may be deprived of his/her rights by the court. It stipulates that in order to ensure the child's best interests, parents may be deprived of parental rights if they treat the child

²²⁶ *Opuz v. Turkey*, Application No. 33401/02, 2009, para 132

²²⁷ Article 7, Domestic Violence Law.

²²⁸ The Domestic Violence Law thus requires that both the family, or the legal representative, must file the complaint with the guardianship bodies, thus complicating the procedure.

"brutally".

According to Article 60 of the Family Code, claims to deprive a parent of his/her rights can be submitted to the court by:

- ▶ one of the parents,
- ▶ the guardianship and trusteeship body,
- ▶ State and local authorities mandated to protect children's rights and interests.

Moreover, the Family Code provides special procedures for the guardianship and trusteeship bodies and State and local authorities to address such claims. Article 60(1.1) stipulates that these bodies must apply to the court within one month of knowing of the grounds for the deprivation of parental rights. The guardianship and trusteeship body must be present at the court hearings of these cases.

IV. CRIMINAL JUSTICE RESPONSE

DUE DILIGENCE - PREVENTION, INVESTIGATION, PROSECUTION, PUNISHMENT, COMPENSATION; EX OFFICIO PROCEEDINGS

The duty of due diligence under international law evolved from the principles of diplomatic protection and it has been applied in the context of human rights violations since the landmark case of *Velasquez Rodriguez v. Honduras* (1989). In that case, the Inter-American Court of Human Rights held that a State must take action to prevent human rights violations, and to investigate, prosecute and punish them when they occur. The Court determined that the State's failure or omission to take preventive or protective action "itself represents a violation of basic rights on the State's part. This is because the State controls the means to verify acts occurring within its territory".²²⁹ The ECtHR also recognised the obligation for authorities to protect an individual whose life was at risk from the criminal acts of another individual in the landmark decision *Osman v. United Kingdom* (1998). This duty has been confirmed in a number of subsequent judgments concerning domestic violence and violence against women.²³⁰

The ECtHR's jurisprudence on the due diligence standard establishes State liability "if the State authorities fail to act with due diligence" in: i) protecting, ii) investigating, iii) prosecuting and iv) punishing violations committed by third persons, and, v) providing redress for victims.²³¹ International human rights bodies, including UN treaty bodies and special mandate holders also recognise the due diligence principle in their decisions, recommendations and policy discourse.²³² A State's duty to protect victims of gender-based violence derives from the due diligence obligations set forth under Article 1 of the European Convention of Human Rights (ECHR).²³³ The application of the due diligence standard to domestic violence and violence against women cases has been codified in Article 5(2) of the Istanbul Convention:

Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.

Prevention/protection: The first obligation of a State in complying with the due diligence standard is to prevent violence from occurring by ensuring proper protection for victims. The ECtHR has found that States have positive obligations to do so under Articles 2, 3 and 8 of the ECHR, protecting the right to life, the prohibition on torture and ill-treatment and the right to respect for private and family life, respectively.

²²⁹ Ad Hoc Committee on Prevention and Combating Violence against Women and Domestic Violence (CAHVIO), *The Duty of Due Diligence*, 2010, discussing the case *Velasquez Rodriguez v. Honduras* (1989), p. 2, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593fc8>.

²³⁰ See, e.g., *Opuz v. Turkey*, Case No. 33401/02 2009; *Aydin v. Turkey*, 57/1996/676/866, 1997; *A. v. Croatia*, Application No. 55164/08, 2010, para 60; *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009; *Bevacqua v. Bulgaria*, Application No. 71127/01 2008, para 65; *Kontrová v. Slovakia*, Application No. 7510/04, 2007, para 49.

²³¹ *A. v. Croatia*, Application No. 55164/08, 2010; *Bevacqua v. Bulgaria*, Application No. 71127/01, 2008; *Kontrova v. Slovakia*, Application No. 7510/04, 2007.

²³² See also, CEDAW, General Recommendation No. 19: Violence against Women, para 9; see also, U.N. Secretary-General, In-depth study on all forms of violence against women, 73, 89, G.A. Res. 48/104, Art. 4(c), (d) U.N. Doc. A/RES/48/104 (Dec. 20, 1993) and U.N. Doc. A/61/122/Add.1 (July 6, 2006); the United Nations Committee against Torture articulates a similarly broad frame for States' obligations to address gender-based violence: When State officials "know or have reasonable grounds to believe" that non-State or private actors are committing acts of torture or ill-treatment and they "fail to exercise due diligence to prevent, investigate, prosecute and punish" these actors "the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible . . . for consenting to or acquiescing in such impermissible acts." CAT Gen. Comment 2, supra note 9, para 18; Article 4, Declaration on the Elimination of Violence against Women (DEVAW), 1994; Council of Europe, Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence.

²³³ See also, CEDAW General Recommendation 28.

For example, in the *Opuz v. Turkey* case, the Court found that a positive obligation under Article 2:

*involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.*²³⁴ (Emphasis added).

In an examination of the State's positive obligation "to take preventive operational measures" to protect the right to life under Article 2, the Court applied the standard:

*whether 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 third party and that they failed to take measures . . . which, judged reasonably, might have been expected to avoid that risk.*²³⁵

- ▶ ECtHR due diligence test: effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.
- ▶ preventive operational measures standard:

Investigation: The due diligence standard also requires States to properly and effectively investigate crimes, including those involving violence against women. While the Court issued its finding under the substantive aspect of Article 2 in the *Branko Tomašić and Others v. Croatia* case, it further noted that the procedural aspects of Article 2 required that "there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by State officials or private individuals".²³⁶ The Court continued:

*The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of death, or identify the person or persons responsible, will risk falling foul of this standard. Whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention.*²³⁷ (Emphasis added).

Thus, States' positive obligation under Article 2 require ex officio investigations. In the *M.C. v. Bulgaria* case, involving the multiple rape of a 14-year-old girl, the Court held that States also have a positive obligation to investigate under both Articles 3 (prohibition against torture and ill-treatment) and 8 (right to respect for private life) of the Convention.²³⁸ Concerning the State's positive obligation to investigate under Article 3, the Court stated: "Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation. Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents."²³⁹ With respect to the positive obligation under Article 8, the Court explained:

*While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection.*²⁴⁰

²³⁴ *Opuz v. Turkey*, Application No. 33401/02, 2009, para 128; see also, *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 49.

²³⁵ *Opuz v. Turkey*, Application No. 33401/02, 2009, para 130.

²³⁶ *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 62.

²³⁷ *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 62.

²³⁸ *M.C. v. Bulgaria*, Application No. 39272/98, 2004, paras 150-153.

²³⁹ *M.C. v. Bulgaria*, Application No. 39272/98, 2004, paras 151.

²⁴⁰ *M.C. v. Bulgaria*, Application No. 39272/98, 2004, para 150.

In *Aydin v. Turkey*, the ECtHR found that the State had failed to conduct a proper investigation because it did not seek out eye-witnesses to the rape and torture of the victim²⁴¹. The Court agreed with the victim that there was an “absence of an independent and rigorous investigation and prosecution policy,” a “prevalence of intimidation of complainants . . . and the lack of professional standards for taking medical evidence.”²⁴²

Prosecution: The third obligation of a State under the due diligence standard is to fairly and effectively prosecute those who commit these crimes. This issue takes on particular relevance in domestic violence cases, where the cycle of violence frequently results in victims withdrawing their complaints. As described above, the Court found that a “crucial” question in the *Opuz v. Turkey* case was whether the authorities displayed due diligence “despite the withdrawal of complaints by the victims.”²⁴³ In that case, the Court inferred from the practice of other Council of Europe Member States 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.”²⁴⁴ It noted in this regard several characteristics of the case, common to cases of domestic violence. It highlighted that:

*there was an escalating violence against the applicant and her mother by [the perpetrator]. The crimes committed by [the perpetrator] were sufficiently serious to warrant preventive measures and there was a continuing threat to the health and safety of the victims. When examining the history of the relationship, it was obvious that the perpetrator had a record of domestic violence and there was therefore a significant risk of further violence. (Emphasis added).*²⁴⁵

At the same time, in both the *Opuz v. Turkey* and *Branko Tomašić and Others v. Croatia* cases, the ECtHR recognised the difficulty of assigning such proactive responsibility. It stated:

*Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.*²⁴⁶

In General Recommendation No. 28, the CEDAW Committee affirmed that:

*Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate criminal proceedings, to bring the perpetrator(s) to trial and to impose appropriate penal sanctions.*²⁴⁷ (Emphasis added).

Punishment: CEDAW General Recommendation 19 provides: “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”²⁴⁸ Moreover, Article 45 of the Istanbul Convention requires States 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. These sanctions shall include, where appropriate, sentences involving the deprivation of liberty which can give rise to extradition.

241 *Aydin v. Turkey*, Application No. 23178/94, 1997.

242 *Aydin v. Turkey*, Application No. 23178/94, 1997.

243 *Opuz v. Turkey*, Application No. 33401/02, 2009.

244 *Opuz v. Turkey*, Application No. 33401/02, 2009, para 139.

245 *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 50.

246 *Opuz v. Turkey*, Application No. 33401/02, 2009, para 134.

247 CEDAW, General Recommendation No. 28 on the Core Obligations of State Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW/C/GC/28, 2010, para 34.

248 CEDAW General Recommendation No. 19, para 9.

In *A. v. Croatia*, the ECtHR found a violation of Article 8 in a case involving multiple proceedings (three criminal proceedings; four minor offenses) in a domestic violence case. These proceedings resulted in the issuance of several protection orders, pre-trial detention, psychiatric and psycho-social treatment and a prison term. Although some of the sanctions were implemented, the perpetrator did not serve prison sentences for two offenses, one of which included making death threats to the victim.

The ECtHR found that the State failed to adequately protect the applicant's rights when the authorities did not take into consideration the diverse criminal and minor offenses proceedings concerning multiple violent acts committed by the same person against the same victim, thus failing to view the case history as a whole. This case underscores the importance of coordination across the judicial system, and the need to consider the full scope of the proceedings when determining the appropriate sanction and/or protection measure. It also draws attention to the role of judicial oversight in ensuring that judgements are executed and sentences are served.²⁴⁹

Compensation: Also falling under the right to an effective remedy, Article 30 of the Istanbul Convention requires States to "take the necessary legislative or other measures to ensure that victims have the right to claim compensation from perpetrators for any of the offences established in accordance with this Convention". In the case of *Kontrová v. Slovakia*, the ECtHR held that there had been a violation of Article 13 (the right to an effective remedy), as the applicant should have been unable to seek compensation for non-pecuniary damages for the dereliction of duty convictions against the police officers who had failed to protect her children from being shot by her husband.²⁵⁰

States have an obligation to provide compensation to victims, even if State agents are not directly responsible for the violence. The United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences has observed that, "in the context of norms recently established by the international community, a State that does not act against crimes of violence against women is as guilty as the perpetrators".²⁵¹

249 Council of Europe, Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice, 2016, p. 85, available at: <https://rm.coe.int/training-manual-final-english/16807626a4>.

250 *Kontrová v. Slovakia*, Application No. 7510/04, 2007.

251 Special Rapporteur on Violence Against Women, its Causes and Consequences, Alternative Approaches and Ways and Means within the United Nations for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, para 72, U.N. Doc. E/CN.4/1995/42, (Nov. 22, 1994) (prepared by Radhika Coomaraswamy), also stating: "measures of redress need to link individual reparation and structural transformation," which "subvert, instead of reinforce, pre-existing patterns of . . . gender hierarchies, systemic marginalization, and structural inequalities . . ."

4.1. PRE-TRIAL: INVESTIGATION AND EVIDENCE GATHERING

4.1.1 EX OFFICIO INVESTIGATIONS AND PROSECUTIONS

4.1.1.1 INTERNATIONAL STANDARDS

Article 55 of the Istanbul Convention codifies the requirement under the due diligence standard established by the ECtHR in the *Opuz v. Turkey* case to engage in ex officio prosecution in cases involving domestic violence and violence against women. It provides that:

investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 [physical and sexual violence, forced marriage, female genital mutilation and forced abortion or sterilisation] of this Convention shall not be wholly dependent upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint.

The Explanatory Report of the Istanbul Convention indicates that the aim of Article 55 is "to enable criminal investigations and proceedings to be carried out without placing the onus of initiating such proceedings and securing convictions on the victim".²⁵² It explained:

The fact that many of the offences covered by this Convention are perpetrated by family members, intimate partners or persons in the immediate social environment of the victim and the resulting feelings of shame, fear and helplessness lead to low numbers of reporting and, subsequently, convictions. Therefore, law enforcement authorities should investigate in a proactive way in order to gather evidence such as substantial evidence, testimonies of witnesses, medical expertise, etc., in order to make sure that the proceedings may be carried out even if the victim withdraws her or his statement or complaint at least with regard to serious offences, such as physical violence resulting in death or bodily harm.²⁵³

Like the standards set forth by the ECtHR in its jurisprudence on States' positive obligations under Articles 2, 3 and 8, the drafters of the Istanbul Convention put emphasis on the proactive effort required by authorities in cases involving severe bodily harm or deprivation of life.

As described above, the Court found that a "crucial" question in the *Opuz v. Turkey* case was whether the authorities displayed due diligence in taking appropriate preventive measures to protect "despite the withdrawal of complaints by the victims".²⁵⁴ In this regard, the Court looked to the practice of other Council of Europe Member States to identify factors to take into account in engaging in ex officio prosecution. It noted the following factors:

- ▶ 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.²⁵⁵

²⁵² Explanatory Report, para 279.

²⁵³ Explanatory Report, para 280

²⁵⁴ *Opuz v. Turkey*, Application No. 33401/02, 2009, para 131.

²⁵⁵ *Opuz v. Turkey*, Application No. 33401/02, 2009, para 138.

These factors enumerated by the ECtHR can be a useful guide for prosecutors in determining when to prosecute domestic violence cases ex officio. The Court's approach to the national legislation in force Turkey can be further illuminating with respect to its assessment of the legislative framework in Turkey that allowed ex officio public prosecution only in cases in which the victim's injuries resulted in a 10-day unfitness to work. It found that:

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 domestic violence and providing sufficient safeguards for the victims. The Court thus considers that, bearing in mind the seriousness of the crimes committed by [the perpetrator] in the past, the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims' withdrawal of complaints.²⁵⁶

The adequacy of the recently revised Criminal Procedure Code and the nascent Guidelines used by the General Prosecutor in prosecuting domestic violence cases ex officio is addressed in the section on the national legal framework, below.

4.1.1.2 ARMENIAN LEGISLATION

Article 33 of the Armenian Criminal Procedure Code distinguishes between crimes subject to private versus public prosecution. Crimes of private prosecution can only be investigated and prosecuted upon complaint of the victim and shall be terminated if the victim withdraws the complaint or forgives the perpetrator. Article 183 of the Criminal Procedure Code lists the crimes requiring private prosecution, including: the infliction of wilful medium-gravity or light damage to health²⁵⁷, battery²⁵⁸, and threats²⁵⁹. In Armenia, most cases of domestic violence have been prosecuted under these articles via private prosecution.

Consequently, the Criminal Procedure Code was amended in 2017. Currently, pursuant to Article 183(4), regardless of whether the victim has filed a complaint or not, the prosecutor can institute a criminal case involving violence in the family, "where the person, by virtue of his or her helpless state or dependence on the alleged offender" is unable protect his or her lawful interests. In such cases, the criminal prosecution shall not be terminated in the event of the victim's reconciliation with the accused.

When evaluating the new standard articulated in the Criminal Procedure Code, it is important to note that in contrast with the criteria used by the ECtHR, which assess the behaviour of the perpetrator, the focus in Armenia rests on the victim. More significantly, it rests on the "helplessness" of the victim, which reflects the gender stereotypes rejected by the ECtHR and the CEDAW Committee, as detailed throughout this training.

The General Prosecutor has adopted the "Guideline for the implementation of part 4 of Article 183 of the Criminal Procedure Code of the Republic of Armenia". The Guideline refers to the Domestic Violence Law with respect to the definitions of violence in the family and its forms, and pursuant to Article 183(4) of the Criminal Procedure Code requires verification that the victim is in "a helpless state" or dependent upon the alleged perpetrator as a mandatory requirement for initiating the prosecution ex officio. While much of the language of the Guideline remains unclear, the victim's dependence can be material and/or non-material. The Guideline, inter alia, defines "helpless state" by a "real and immediate threat to life or health" of the victim, referencing the standards articulated by the ECtHR.

Like Article 183(4) of the Criminal Procedure Code, the Prosecutor's Guideline raises several issues. First, the criteria by which it determines whether an ex officio prosecution should be initiated, namely the helplessness or dependence of the victim, does not reflect that set forth in Article 55 of the Istanbul Convention, namely:

²⁵⁶ Opuz v. Turkey, Application No. 33401/02, 2009, para 145.

²⁵⁷ Articles 113.1, 114.1, 115, 116 and 117, Armenian Criminal Code.

²⁵⁸ Article 118, Armenian Criminal Code.

²⁵⁹ Article 137, Armenian Criminal Code.

the severity of the offence. The criteria set forth in the Guideline also fails to reflect that set forth by the ECtHR in the *Opuz v. Turkey* case, as listed above.²⁶⁰ It is important to recall the ECtHR's rejection as insufficient the Turkish legislation limiting ex officio prosecutions to violence based on the severity of the injuries²⁶¹. More problematic, the Criminal Procedure Code and Guideline's reference to the helplessness of the victim as a criterion seems to be based on impermissible gender stereotypes.²⁶² Article 183(4) of the Criminal Procedure Code and the Prosecution Guideline may function as an impediment to effective decision-making with respect to ex officio prosecutions in Armenia, and render Armenia vulnerable to adverse judgements by the ECtHR.

In addition to the factors set forth by the ECtHR in determining whether prosecution should be conducted ex officio, it is important that prosecutors be aware of any possible bias in how they assess the victim's character, behaviour and credibility. They must ensure that their assessment is not based on stereotypes of "genuine victims" and "appropriate behaviour" for women. Particular attention should be paid to how prosecutors assess:

- ▶ the perpetrator-victim relationship;
- ▶ the victim's characteristics;
- ▶ the suspect's characteristics;
- ▶ the case's characteristics.²⁶³

4.1.2 EVIDENCE GATHERING

There are several challenges in building a strong evidentiary case in domestic violence investigations and prosecutions. One principle challenge is the victim's withdrawal of the complaint and refusal to participate. This may be due to threats, duress, fear of re-victimisation by law enforcement authorities, the lack of familial support, economic dependence or reconciliation. Whatever the reason, law enforcement officials are faced with the challenge of building a case without relying on victims' statements. Moreover, these crimes are committed in private, often with no other witnesses.

Proceeding without the victim's testimony requires law enforcement to be creative and proactive in identifying other sources of evidence. For example, expert evidence can help to explain the impact of trauma on memory and delays by the victim in disclosure. Experts are also used to support evidence of psychological or emotional violence.

First responders should document every relevant comment or reaction that might have significance as to what happened. For example, if the perpetrator says, after being informed of his rights: "She deserved to be hit! You should have seen the way she provoked me!" these remarks may later be used along with other pieces of evidence at the trial, including if the victim refuses to make a statement. Such spontaneous statements may also be used as corroborating evidence if the victim's credibility is questioned. Spontaneous comments made by other witnesses at the scene should also be recorded²⁶⁴.

Significantly, the absence of a medical certificate or any other physical indication of violence should not form the basis of a decision not to investigate. The absence of such evidence has no bearing on whether the victim's claims are credible.

There are numerous types of evidence that can be used to support domestic violence prosecutions, as listed in the textbox.

260 *Opuz v. Turkey*, Application No. 33401/02, 2009, para 138.

261 See, *Karen Tayag Vertido v. The Philippines*, Communication No. 20/2008.

262 See, *Karen Tayag Vertido v. The Philippines*, Communication No. 20/2008.

263 Council of Europe, *Preventing and Combating Violence against Women: A learning resource for training law enforcement and justice officers*, 2016, p. 59, available at: <https://rm.coe.int/16805970c1>.

264 See, *Nachova and Others v. Bulgaria*, Application Nos. 43577/98 and 43579/98, 2005, concerning the fatal shooting of two unarmed Roma conscripts by automatic weapons in daylight in a Roma neighborhood. Immediately after the killing, a military police officer allegedly yelled at one of the town residents, "You damn Gypsies!" while pointing a gun at him. The Court found the spontaneous statements by the military officer to indicate discriminatory motives in violation of Article 14 of the ECHR.

EVIDENTIARY CHECKLIST:

- Statements of police officers, from the scene or regarding other interactions with the victim or accused.
- Statements of neighbours or other witness accounts (for example, friends, children, teachers, co-workers, staff of women's crisis centres and shelters, etc.).
- Recordings of emergency calls/police dispatch calls.
- CCTV recordings (note that such recordings are especially useful in cases of stalking or harassment).
- Photographs of the injury and scene (including photographs of property damage).
- Medical history/reports (including history of emergency treatment as well as reports that show a history of abuse, such as dental records; examinations by specialists).
- Forensic medical certificates from the incident(s).
- History of previous incidents, (e.g., criminal record of the perpetrator; prior emergency intervention or protection orders and any violations thereof; administrative penalties).
- Previous reports of domestic violence that were not pursued
- Communications from the perpetrator to the victim, especially those that can be used as evidence of threats (notes, letters, emails, SMS messages, facebook/whatsapp posts, etc.)
- Bad character evidence about the perpetrator
- Expert testimony or witnesses, (especially to explain: the impact of violence on the victim, common behaviours and reactions of rape victim, concepts such as the cycle of violence or battered women's syndrome, etc.)²⁶⁵

Moreover, identifying witnesses to provide evidence should not be limited to eye-witnesses only. A broader range of persons may provide information related to the facts of the case. For example, neighbours may have information on noises they have heard during domestic conflicts, relatives or the trusted persons of the victims may be able to describe incidents that the victim had previously shared with them. Teachers and school administrative staff may provide information regarding children and their attendance at school or other possible behavioural indications of violence in the home.

It is good practice for prosecutors to ensure that there is a clear and comprehensive victim statement in the case file that can be used as evidence if the witness does not testify in court. The victim statement can be used to protect the victim from unnecessary and repetitive questioning about the incident(s), especially those involving sexual violence, during each phase of the justice process. The victim's statement can be written or recorded on video.

Another important aspect of case preparation is to anticipate and plan for the possible introduction of prejudicial, embarrassing or harmful evidence by the defence. Particular attention should be paid to evidence that may be damaging to the witness, but which is not relevant or has no probative value in the case (for example, evidence of past sexual conduct, reputation, of substance abuse, etc.) Very often, intrusive questioning in cases of violence against women is used in order to present evidence based on stereotypes and assumptions about women's behaviour, dress and private life. Prosecutors must be ready to object to, and shield victims/witnesses from, negative character evidence that may be prejudicial and unrelated to the incident(s) being prosecuted. Likewise, judges should also monitor the proceedings and intervene if the attention shifts toward questioning the victim's character and credibility, rather than establishing the guilt or innocence of the accused. Indeed, a case based on evidence beyond the statements of the victim is less vulnerable to challenges concerning his or her credibility.

²⁶⁵ Council of Europe, Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice, p. 79, available at: <https://rm.coe.int/training-manual-final-english/16807626a4>.

Case-law example:

The case of *Y. v. Slovenia* concerned the role of the judge during criminal proceedings in a case of sexual assault. The underlying case concerned a claim made by the victim against X, the perpetrator, alleging that he had forced her, a 14-year old girl at the time, to engage in sexual intercourse. During the criminal proceedings, the defence personally cross-examined the victim, asking her over 100 questions during four hearings spanning over a seven-month period. The ECtHR examined whether in the criminal proceedings against X, the State afforded sufficient protection to Y's right to respect for her private life, and especially for her personal integrity. The Court found that many of X's questions during cross-examination were aimed at attacking Y's credibility and intended to denigrate her character. While acknowledging the right of the defendant to cross-examination, the Court held that the State failed to maintain an appropriate balance between the rights of the defendant and the victim's right to privacy. While noting that the defence has some leeway to challenge the reliability and credibility of the witness/victim, and to point out possible inconsistencies in her testimony, the Court also stated clearly that "cross-examination should not be used as a means of intimidating or humiliating witnesses".²⁶⁶

4.1.3 EVIDENCE OF PRIOR SEXUAL CONDUCT AND FORENSIC EVIDENCE

4.1.3.1 INTERNATIONAL STANDARDS

Pursuant to article 54 of the Istanbul Convention:

Parties shall take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary.

As the Explanatory Report provides:

In judicial proceedings evidence relating to the sexual history and sexual conduct of a victim is sometimes exploited in order to discredit the evidence presented by the victim. The defence sometimes uses previous sexual behaviour history evidence in order to challenge the respectability, the credibility and the lack of consent of victims. This particularly regards cases of sexual violence, including rape. Presenting this type of evidence may reinforce the perpetuation of damaging stereotypes of victims as being promiscuous and by extension immoral and not worthy of the protection provided by civil and criminal law. This may lead to de facto inequality, since victims, who are overwhelmingly women, are more likely to be provided with this protection if they are judged to be of a respectable nature.²⁶⁷

Moreover, the Explanatory Report underscores that a victim's past sexual behaviour should not be considered as an excuse for acts of violence against women and domestic violence, resulting in the exoneration of the perpetrator or diminishing his liability. Article 54 thus restricts the admissibility of such evidence, in both civil and criminal proceedings, to cases where it is relevant to a specific issue at trial and if it is of significant probative value. Therefore, it does not rule out the admissibility of such evidence. Where judges admit prior sexual history evidence, it should only be presented in a way that does not lead to secondary victimisation.²⁶⁸

Special attention should be paid to the collection of forensic evidence in cases of domestic and sexual violence. In order to ensure a gender-sensitive and victim-centred approach, the collection of forensic evidence should

²⁶⁶ *Y. v. Slovenia*, Application No. 41107/10, 2015.

²⁶⁷ Explanatory Report, para 277.

²⁶⁸ Explanatory Report, para 278.

be done in a private setting within a medical facility.²⁶⁹ Medical personnel who assist investigators with evidence collection should be trained on gender-sensitivity in working with victims of gender-based violence, and examinations should be conducted by women whenever possible. In all medical examinations where forensic evidence is collected, the privacy and confidentiality of the victim is to be maintained, and the only information handed over to investigators should be that which relates directly to the forensic evidence.²⁷⁰ The collection of forensic evidence should be available to victims in all geographic regions.

Forensic evidence must be gathered only where relevant. In the *Aydin v. Turkey* case, the prosecutor required the victim to undergo four forensic examinations, the sole aim of which was to establish whether she was a virgin prior to the alleged rape.²⁷¹ In the *Y. v. Slovenia* case, regarding the testimony of a gynaecological expert, the ECtHR observed that:

*[The expert] confronted the applicant with the findings of the police and orthopaedics reports, and questioned her on why she had not defended herself more vigorously, thus addressing issues that were indeed not related to the question he was requested to examine. In the Court's opinion, [the expert's] questions and remarks, as well as the legal findings he made in his expert opinion, exceeded the scope of his task, as well as of his medical expertise. Moreover, it does not appear that [the expert] was trained in conducting interviews with victims of sexual abuse; hence, it is difficult to see what purpose was to be served by his intervention in matters within the jurisdiction of the prosecuting and judicial authorities. More importantly, as argued by the applicant, she was put in a defensive position which, in the Court's opinion, unnecessarily added to the stress of the criminal proceedings.*²⁷²

Significantly, the Court found that "the State could be held responsible for [the expert's] conduct. The Court sees no reason to hold otherwise, observing that the expert was appointed by, and the disputed examination ordered by, the investigating judge in the exercise of his judicial powers".²⁷³

4.1.3.2 ARMENIAN LAW

There is no particular legal provision in Armenia governing the introduction and use of prior sexual conduct evidence, rendering its admission to the discretion of the judge.

According to Articles 25 and 127 of the Armenian Criminal Procedure Code, the judge, as well as the agency for inquest, the investigator or the prosecutor shall carry out a detailed, thorough and impartial evaluation of the totality of the evidence, independently and free of bias. These standards apply to prior sexual history evidence.

CASE DISCUSSION AND ASSIGNMENT

A. is charged with committing death threats, physical and sexual violence against his wife B., charges which he denies. B. has separated from A. and is now living on her own with their children. There have been allegations of domestic violence in the past, but none rising to the severity as those charged in this case. On one prior occasion, A. was fined and all charges were dropped. In the past, B. always returned to A.

Upon B's testimony in court, there is repeated eye-contact between A. and B. Some inconsistencies arise between her testimony and statements taken by the law enforcement officials, and she is asked probing and searching questions by the defence lawyer. Finally, she says, in tears, that she wants to exercise her right not to give evidence against her husband. As there was no other evidence, after a short deliberation court acquits A.

269 UNDOC, Handbook on effective police responses to violence against women, Criminal Justice Handbook Series, p. 57.

270 UNDOC, Handbook on effective police responses to violence against women, Criminal Justice Handbook Series, p. 58.

271 *Aydin v. Turkey*, Application No. 23178/94, 1997.

272 *Y. v. Slovenia*, Application No. 41107/10, 2015, para 113.

273 *Y. v. Slovenia*, Application No. 41107/10, 2015, para 112.

What could have been done differently in this case?

- ▶ Tips for the trainer, create discussion regarding questions below:
- ▶ Was enough evidence gathered during investigation?
- ▶ Were there really no other witnesses to the facts?
- ▶ Did something go wrong during B's interview with the police?
- ▶ Would it have turned out differently if B. was represented by a lawyer or supported by a counselling centre?
- ▶ Did A. put pressure on B. in the run-up to the trial?
- ▶ How could that have been prevented?
- ▶ Has a victim-centred and gendered approach been adapted?
- ▶ Was any consideration given to the set up in the Court room?
- ▶ In cases of violence against women and domestic violence alongside pre-trial custody and/or bail conditions, barring/restraining and protection orders could be considered.
- ▶ Did B. get access to proper support and assistance?

4.2 TRIAL: APPLICABLE CRIMES AND GAPS IN ARMENIAN CRIMINAL CODE

The Istanbul Convention requires the criminalisation of specific actions that constitute violence against women and domestic violence, juridical competence over these crimes and their prosecution at the domestic level. Domestic violence is a form of violence against women that encompasses a wide range of possible unlawful acts, many of which can be captured under generic offences such as, inter alia: murder, assault, bodily injury, rape and others.

Although several forms of domestic violence can be prosecuted using the generic offences of the Armenian Criminal Code, it does not contain a specific provision criminalising domestic violence, nor a definition of this term. It further lacks any specific mechanism to take into account the gendered nature as well as specific gendered dynamics involved in these crimes. Nor does it adequately consider the kinship between the victim and the perpetrator (except for the crime of rape) that characterize these crimes.

With respect to other forms of violence against women, the Criminal Code in Armenia does not cover all forms of violence covered by the Istanbul Convention, namely: female genital mutilation (FGM), forced abortion, stalking and early and forced marriage, as detailed below.

4.2.1 MURDER / FEMICIDE

4.2.1.1 INTERNATIONAL STANDARDS

Murder constitutes a violation of the right to life, protected under Article 2 of the ECHR. The due diligence standards discussed above apply to such cases. According to Explanatory Report, effective measures should be taken to prevent the most blatant forms of violence, which are murder or attempted murder. Each such case should be carefully analysed in order to identify any possible failure of protection in view of improving and developing further preventive measures.²⁷⁴

²⁷⁴ Explanatory Report, para 259.

4.2.1.2 ARMENIAN LAW

In 2012, 10.5% of murders (12 deaths) were perpetrated against women by their intimate partners or family members. Between 2010-2015, approximately 30 women died as a result of acute battery and bodily injuries in the context of domestic violence.²⁷⁵

The Criminal Code contains up to six provisions on murder. Article 104(1) prohibits murder. Subsection 2 defines aggravated forms of murder, listing up to 16 aggravating components, including the murder of a pregnant woman or with a discriminatory motive. Significantly, Article 104(2) does not make reference to discriminatory motives based on gender, but covers only nationality, race or religious hatred or fanaticism. Additionally, the Criminal Code provides for five attenuated crimes involving deprivation of life: Article 105 (murder in the state of strong temporary insanity),²⁷⁶ Article 106 (murder of a newly born child by the mother), Article 108 (murder by exceeding necessary defence) and Article 109 (causing death by negligence).

Article 105 mitigates criminal liability based on, inter alia, immoral behaviour on the part of the victim and offences to the dignity or honour of the perpetrator. As a result, in some cases, a woman's sexual history or an accusation of adultery served to justify men being "in a state of insanity" that resulted in murder. This is best exemplified in the case of the murder of Diana Nahapetyan by multiple stabbings in 2012, in which the first instance court sentenced her husband to 3.6 years of imprisonment based on the mitigating circumstance set forth in Article 105, based on alleged infidelities resulting in her husband's "temporary insanity". In addition to being based on stereotypical and gendered concepts of "immoral" behaviour, the provision contains many vague notions that call into question legal certainty with respect to its application.²⁷⁷ In the Nahapetyan case, its application resulted in a violation of the right to an effective remedy, which requires proportionate and dissuasive sanctions.

4.2.2 PHYSICAL VIOLENCE

4.2.2.1 INTERNATIONAL STANDARDS

Article 35 of the Istanbul Convention requires States to ensure that "the intentional conduct of committing acts of physical violence against another person is criminalised". The term "physical violence" refers to bodily harm suffered as a result of the application of immediate and unlawful physical force. It also encompasses violence resulting in the death of the victim.²⁷⁸

4.2.2.2 ARMENIAN LAW

The Criminal Code establishes a wide range of offences encompassing different forms of physical violence. Chapter 16 offers a comprehensive criminal response to "crimes against life and health," ranging from murder to minor bodily injuries. In the absence of a specific offence on domestic violence, the provisions regarding murder and bodily injuries constitute the primary criminal offences for which perpetrators of domestic violence can be held accountable.

Many specialists suggest that most cases of domestic violence are prosecuted under Article 118 for battery.²⁷⁹

²⁷⁵ See, Coalition to Stop Violence against Women, *Femicide: A silent epidemic*, 2016, p. 14, available at: http://coalitionagainstvviolence.org/wp-content/uploads/2016/05/Femicide_Report_ENG.pdf?be05b6.

²⁷⁶ Article 105 of the Criminal Code reads in full: "murder committed in the state of sudden insanity caused by violence, mockery, heavy insults or other illegal, immoral actions (inaction) of the victim as well as in the state of a sudden affect arising from a long-term psychologically depressive situation caused by regular illegal and immoral behavior of the victim".

²⁷⁷ Council of Europe, *Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice*, Chapter on Armenia, p. 12, available at: <https://rm.coe.int/training-manual-for-judges-and-prosecutors-on-ensuring-women-s-access-/1680764286>.

²⁷⁸ Explanatory Report, para 188.

²⁷⁹ Council of Europe, *Gap analysis of Armenian criminal law in light of the standards established by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, p. 13, available at: <https://rm.coe.int/gap-analysis->

Battery is defined as the commission of violent acts that have not resulted in light injuries, as envisaged by Article 117. The Cassation Court has held "that battery is the infliction of multiple (more than one) blows to the victim that resulted in physical pain".²⁸⁰ (Emphasis added). This construction of the actus reus fails to capture many acts of violence that occur in cases of domestic violence, typically involving series of acts over long periods of time, each of which may in itself not be penalised (e.g., one slap, pulling hair). In other words, battery is a threshold crime, below which there can be no criminal action.

Numerous forms of violence are not considered criminal offences under Armenian Law, including, inter alia, acts of physical violence falling under the threshold of battery, and all forms of economic violence, and thus would not trigger an adequate response by law enforcement authorities. Thus, the use of Article 117 does not capture the full scope of actions requiring criminalization under the Istanbul Convention.

In this regard, it is important to recall the *V.K. v. Bulgaria* case in which the CEDAW Committee found a violation as the lower national court had rejected the victim's application for a protection order because being struck by the perpetrator did not meet the threshold for violence under national law. The Committee recalled that gender-based violence "is not limited to acts that inflict physical harm, but also covers acts that inflict mental or sexual harm or suffering, threats of any such acts, coercion and other deprivations of liberty," and found that "[b]oth courts focused exclusively on the issue of direct and immediate threat to the life or health of the author and on her physical integrity, while neglecting her emotional and psychological suffering".²⁸¹

The creation of a separate crime of domestic violence, or the establishment of aggravating circumstances pertaining to: i) violence committed within the family or by intimate partners; and, ii) the ongoing or continuous nature of the violence, would enable the criminal justice system to better capture the nature of the crime and to ensure access to justice for its victims.

4.2.3 PSYCHOLOGICAL VIOLENCE

4.2.3.1 INTERNATIONAL STANDARDS

Article 33 of the Istanbul Convention requires parties to criminalise psychological violence, which is described as the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats. According to the Explanatory Report: "This provision refers to a course of conduct rather than a single event. It is intended to capture the criminal nature of an abusive pattern of behaviour occurring over time – within or outside the family."²⁸²

The obligation to prosecute psychological violence also derives from other sources of international law. The ECtHR, for instance, has indicated that parties to the European Convention on Human Rights are under a positive obligation to effectively investigate cases of domestic violence, even if the victim has not suffered from physical injury.²⁸³ The CEDAW Committee adopted a similar conclusion in *V.K. v. Bulgaria* stating that "gender based violence is not limited to inflicting physical harm but also covers actions that inflict mental suffering".²⁸⁴

Psychological violence reflects controlling behaviour that is expressed in a wide range of forms: intimidation through insults, humiliation, threats of any kind, and isolation from the victim's inner circle/immediate family, etc. Psychological violence may also be linked to forms of economic violence such as deprivation or restriction of financial resources.

The criminalisation and prosecution of psychological violence is not an easy task. UN Women recommends use of the term "coercive control," shifting the focus from the damaging result to the aim of the unlawful

armenian-law-eng/168075bac2.

280 See, Decision of the Cassation Court No. /0176/01/11, case of Arevik and Tsovinar Sahakyans, 1 November 2012, para 18.

281 CEDAW, Communication No. 20/2008, paras 9.8, 9.9.

282 Explanatory Report, para 181.

283 See, e.g., *Opuz v. Turkey*, Application No. 33401/02, 2009; *Hajduová v. Slovakia*, Application No. 2660/03, 2010.

284 See, e.g., *Opuz v. Turkey*, Application No. 33401/02, 2009; *Hajduová v. Slovakia*, Application No. 2660/03, 2010.

behaviour.²⁸⁵ “Coercive control” includes psychological and economic violence, but does so in a way that links these concepts to a pattern of domination. It refers to extreme control through intimidation, isolation or degradation, and directs legal measures to target truly harmful behaviours that affect the victim’s autonomy and dignity.

Recent good practice in this area comes from the UK, which adopted a new Serious Crime Act on 3 March 2015.²⁸⁶ The Act creates a new offence of controlling or coercive behaviour in intimate or familial relationships (Section 76). The new offence criminalises repeatedly or continuously engaging in behaviour towards another person that is controlling or coercive and has a serious effect on the victim. According to this provision, controlling or coercive behaviour has a serious effect if it causes the victim to fear on at least two occasions that violence will be used against him/her, or if it causes serious alarm or distress in the victim, affecting his/her day-to-day activities. The offence carries a maximum sentence of five years’ imprisonment, a fine or both.

4.2.3.2 ARMENIAN LAW

The Armenian Criminal Code lacks a specific provision that captures the abusive and controlling patterns that constitute psychological forms of domestic violence. Prior to 2015, the Criminal Code did not contain any specific offence on psychological violence or related behaviours such as coercion or duress. The recently amended Article 119 on torture includes “mental suffering” as a constituent element, and the offence was renamed as “infliction of strong physical pain or mental suffering”. Article 119 may be a useful provision for prosecuting the psychological element of domestic violence cases. Obstacles to its effective use include the fact that the Criminal Code does not define mental suffering, and Article 119 lacks any reference to the means or acts the perpetrator may employ to achieve the resulting suffering. Such vagueness hinders the effective application of this provision and makes it more difficult to tackle the attempted commission of this crime.²⁸⁷ It should be noted that the Criminal Code does not provide for criminalisation of coercion, which usually works as a catch-all offence in criminal law. Furthermore, Article 119 encompasses an aggravated form that includes, inter alia, discriminatory motives, such as national, racial or religious hatred or religious fanaticism. Sex-based discrimination is not included here as a ground for aggravation.

Article 137 of the Criminal Code prohibits threats, but only for a limited number of crimes: to murder, to inflict severe damage and to destroy property. Its narrow application does not encompass blackmail or threats to reveal personal secrets. Moreover, Article 137 necessitates proof of real danger that the threat would be carried out. This requirement may set too high a threshold to enable effective prosecution for the psychological violence that results from threatening behaviour.

Finally, inducement to suicide is criminalised in Article 110 for causing somebody to commit suicide, and Article 111 encompasses abetment to suicide.

²⁸⁵ Virtual Knowledge Centre to End Violence Against Women and Girls, available at: www.endvawnow.org/en/articles/398-definition-of-domestic-violence.html?next=399.

²⁸⁶ Serious Crime Act on 3 March 2015, United Kingdom, available at: www.legislation.gov.uk/ukpga/2015/9/section/76/enacted.

²⁸⁷ Article 34 of the Criminal Code covers attempt.

4.2.4 SEXUAL VIOLENCE

4.2.4.1 INTERNATIONAL STANDARDS

Article 36 of the Istanbul Convention mandates States to criminalise all forms of non-consensual acts of a sexual nature, including rape. This long, comprehensive Article is the most detailed offence in the Convention and provides a “catch-all” definition for sexual violence. In penalising sexual violence, States should have regard to the case law of the European Court of Human Rights. The Explanatory Report refers in particular to the case of *M.C. v. Bulgaria* (2003), where the Court concluded that States’ positive obligations under the European Convention on Human Rights “must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim”.²⁸⁸

Sexual violence crimes should encompass sexual abuse occurring within the family. Historically, the laws of many countries implicitly or explicitly have condoned marital rape. Under Article 43 of the Istanbul Convention, the criminalisation of sexual offences applies irrespective of the relationship between the perpetrator and victim.

The Convention defines all forms of sexual violence in terms of one principle constituent element: consent. As defined in Article 36(2), consent must be given voluntarily as a result of the person’s free will, as assessed in the context of the surrounding circumstances. Accordingly, national legislation may consider a broad range of circumstances in which consent is immaterial, such as sexual assault by an individual in a position of authority.²⁸⁹

As determined by the ECtHR, requiring proof of physical resistance in all circumstances risks leaving certain types of rape unpunished and thus jeopardises the effective protection of sexual autonomy.²⁹⁰ The Court found in the *M.C. v. Bulgaria* case that the authorities failed to sufficiently investigate the surrounding and contextual circumstances of the rape, “putting undue emphasis on ‘direct’ proof of rape,” namely the force and threat elements as required by the national legislation, and “practically elevating [the victim’s] ‘resistance’ to the status of defining element of the offence”.²⁹¹ The Court placed great emphasis on the lack of consent as the defining constituent element in rape cases, citing criminal legislation from numerous European States as well as the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY). It stated:

while in practice it may sometimes be difficult to prove lack of consent in the absence of “direct” proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent²⁹². (Emphasis added).

In the case *Karen Tayag Vertido v. The Philippines*, in which victim was raped by a senior colleague, the CEDAW Committee held that there should be no presumption that the victim consents if she does not physically resist unwanted sexual conduct, “regardless of whether the perpetrator threatened to use or used physical violence”.²⁹³ Rather, the Committee held that the accused must give evidence of the steps taken to ascertain whether the victim was consenting.²⁹⁴

²⁸⁸ *M.C. v. Bulgaria*, Application No. 39272/98, 2003, para 166.

²⁸⁹ Explanatory Report, para 193.

²⁹⁰ *M.C. v. Bulgaria*, Application No. 39272/98, 2003, para 166.

²⁹¹ *M.C. v. Bulgaria*, Application No. 39272/98, 2004, para 182.

²⁹² *M.C. v. Bulgaria*, Application No. 39272/98, 2004, para 181.

²⁹³ CEDAW, Communication No. 18/2008, 2010, para 8.5.

²⁹⁴ CEDAW, Communication No. 18/2008, para 8.9, requiring, in pertinent part, that States “[r]emove any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either: requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting”.

The Criminal Code of Canada²⁹⁵ provides a good example of an approach based on consent and its assessment, taking into account the surrounding circumstances. Article 273(1) defines consent as “the voluntary agreement of the complainant to engage in the sexual activity in question”. Sub-paragraph 2 describes circumstances in which no consent was obtained:

(a) the agreement is expressed by the words or conduct of a person other than the complainant; (b) the complainant is incapable of consenting to the activity; (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Furthermore, Article 273(2) of the Canadian Criminal Code states that it is not a defence against charges of sexual assault that the accused believed that the complainant consented if any of the following concur: “self-induced intoxication”; “recklessness or wilful blindness”; or “the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting”.

4.2.4.2 ARMENIAN LAW

The Criminal Code of Armenia devotes Chapter 18 to crimes against sexual inviolability and sexual freedom. Rape is a criminal offence in Armenia under Article 138 of the Criminal Code. Although not explicit, it covers marital rape. The definition of rape only covers sexual intercourse, requiring proof of penetration between “a man with a woman”. Secondly, it requires that the act be performed against the will of the victim, that is, without her consent. The offence includes a third constituent element: the perpetrator must use violence, threats or take advantage of the woman’s helpless situation. Article 139 covers other forms of sexual violence, including between persons of the same sex, and includes the same constituent elements and sanction as rape, without the penetration requirement.

In violation of the standards set forth in the Istanbul Convention, Article 138 requires proof of penetration. Significantly, both Articles 138 and 139 contain constituent elements based on the use of force; they are not solely defined in terms of the absence of consent. Accordingly, concurrent violence, or threats or the victim’s helpless situation must be proven. Although the Criminal Code does not contain guidance on the evidentiary aspect of these requirements, proof of resistance is a *de facto* constituent element of these crimes.²⁹⁶

As explained above, the requirement of proving force or threat of force, rather than the absence of consent, now constitutes a violation of international standards, pursuant to the Istanbul Convention, long-standing jurisprudence of the ECtHR, the CEDAW Committee and the international criminal tribunals.

Articles 138 and 139 also incorporate parallel aggravated forms of sexual assault. Thus, the second paragraph of both Articles covers the same set of eight aggravating circumstances, namely, rape: by a group of persons, against a minor, with particular cruelty, causing death or grave injury, and committed by someone previously convicted for these crimes.

Article 140 criminalises forced violent sexual acts. Despite the title, this provision differs from Articles 138 and 139 in that there is no requirement that violence be demonstrated. Rather, the recognised forms of force that must be established include: blackmail, threats against property or abuse of position. The Criminal Code thus contains no offence criminalising sexual violence the constituent element of which is solely the lack of consent.

²⁹⁵ The Criminal Code of Canada is available at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/>.

²⁹⁶ Information gathered during Council of Europe fact finding mission, 17-18.07.2018.

The Armenian Criminal Code addresses sexual violence against children under Articles 141²⁹⁷ and 142²⁹⁸.

In another significant legal gap, the Criminal Code does not expressly penalise the act of coercing a person to engage in non-consensual acts of a sexual nature with a third person. While the general rules on aiding and abetting may apply (Articles 37 and 38), the Istanbul Convention require specific criminalisation.

As detailed above, the criminal legal provisions concerning sexual violence do not meet the standards set forth in the Istanbul Convention and the international jurisprudence.

4.2.5 STALKING

4.2.5.1 INTERNATIONAL STANDARDS

Article 34 of the Istanbul Convention mandates the criminalisation of intentional repeated “threatening conduct directed at another person, causing her or him to fear for her or his safety,” also known as stalking. It defines the crime by two constituent elements: “a) intention on the part of the perpetrator; and, b) the effect of instilling a sense of fear to the other person.”²⁹⁹ Despite the “diverse range of threatening behaviours targeted,” the primary constituent element of the offence is the intention to or the effect of instilling in the victim a sense of fear. It requires that the perpetrator must have intentionally aimed at a certain outcome or at least known or should have known that certain negative consequences for the victim could ensue. Legal measures revolving around the intent of the perpetrator make it possible to consider a large number of behaviours by the stalker. Furthermore, stalking entails a course of conduct of repetitive and significant incidents. In other words, isolated acts do not qualify as stalking. As the Explanatory Report clarifies, this provision is “intended to capture the criminal nature of a pattern of behaviour whose individual elements, if taken on their own, do not always amount to criminal conduct.”³⁰⁰

The Istanbul Convention leaves the exact definition of the threatening conduct that may amount to stalking to be determined by States. The Explanatory Report provides examples:

repeatedly following another person, engaging in unwanted communication with another person or letting another person know that he or she is being observed. This includes physically going after the victim, appearing at her or his place of work, sports or education facilities, as well as following the victim in the virtual world ... vandalising the property of another person, leaving subtle traces of contact with a person's personal items, targeting a person's pet, or setting up false identities or spreading untruthful information online.³⁰¹

²⁹⁷ Article 141 criminalizes s. Sexual acts with a person under 16. It provides:

Sexual intercourse or other sexual acts with a person obviously under 16, by a person who reached 18 years of age, in the absence of elements of crime envisaged in Articles 138, 139 or 140 of this Code, is punished with correctional labour for the term of up to 2 years, or with imprisonment for the term of up to 2 years.

²⁹⁸ Article 142 criminalizes "lecherous acts." It states:

1. Lecherous acts with a person obviously under 16, in the absence of elements of crime envisaged in Article 140 or 141, is punished with a fine in the amount of 200 to 400 minimal salaries, or with correctional labour for up to 1 year, or with imprisonment for up to 2 years.

2. The acts envisaged in part 1 of this Article committed with violence or threat thereof, are punished with imprisonment for up to 3 years. It remains problematic that an element of the crime for "lecherous acts" relates to the appearance of the victim. It criminalizes sexual violence perpetrated against persons "obviously under 16," thus limiting protection to persons under the age of sixteen who appear older.

²⁹⁹The threatening behaviour may consist of: repeatedly following another person, engaging in unwanted communication with another person or letting another person know that he or she is being observed; physically going after the victim, appearing at her or his place of work, sports or education facilities, as well as following the victim in the virtual world (chat rooms, social networking sites, etc.). Engaging in unwanted communication entails the pursuit of any active contact with the victim through any available means of communication, including modern communication tools.

³⁰⁰ Explanatory Report, para 185.

³⁰¹ Explanatory Report, paras 182, 183.

A good example of a detailed definition of stalking can be found in the German Criminal Code, which details with particularity actions that constitute stalking:

- ▶ seeking out physical proximity;
- ▶ using telecommunications or other instruments of communication or using third parties to get into contact;
- ▶ using her personal data improperly to order goods or services in her name or prompting third parties to get in contact with him/her;
- ▶ threatening life, physical integrity, physical health of freedom of hers or of persons close to him/her;
- ▶ acting in a comparable way and impacting her/his personal freedom in a severe way.³⁰²

Notably, the last act moves from a behavioural-based to a results-based definition, thus significantly enlarging its scope of application.

Other criminal statutes craft their provision on stalking with regard to the intent of the perpetrator. Belgium for instance was among the very first EU Member State to introduce a crime on stalking, and opted for a broad definition based on the intent of the perpetrator. According to current wording of Article 442.bis of the Belgian Penal Code, a person “who has 'belaged' (harassed) a person, while he knew or should have known that due to his behaviour he would severely disturb this person's peace” is guilty of stalking.³⁰³

Finally, Denmark enacted an interesting regulation on stalking whereby the police impose a warning or a restraining order before the person is liable for punishment. Section 265 of the Criminal Code of Denmark states:

Any person who violates the peace of some other person by intruding on him, pursuing him with letters or inconveniencing him in any other similar way, despite warnings by the police, shall be liable for a fine or to imprisonment for any term not exceeding 2 years. A warning under this provision shall be valid for 5 years.³⁰⁴

4.2.5.2 ARMENIAN LAW

Armenia does not have any specific criminal provision addressing stalking, violating Istanbul Convention requirements. Some generic offences, such as infliction of severe physical pain or mental suffering (Article 119), extortion (Article 182) or threats (Article 137), may target some behaviours that fall within the concept of stalking. Yet they fail to capture the specific nature of this crime. Several courses of conduct that constitute stalking are not addressed by the above-mentioned provisions, such as constantly following the victim or engaging in unwanted communication. In fact, the component missing in the Armenian Code is the ability to target a course of conduct, rather than single, isolated events.

4.2.6 FORCED MARRIAGE

4.2.6.1 INTERNATIONAL STANDARDS

Article 37 of the Istanbul Convention requires the criminalisation of two types of conduct: 1) forcing an adult or a child to enter into a marriage; and, 2) luring an adult or a child to a third country with this purpose (even if the marriage has not been concluded). With regard to the element of force, the Explanatory Report notes that the term “‘forcing’ refers to physical and psychological force where coercion or duress is employed”.³⁰⁵ Accordingly, the requirement of force should be interpreted in a broad sense, with due regard to the surrounding circumstances.

³⁰² Section 238. The German Criminal Code is available at: www.gesetze-im-internet.de/englisch_stgb/.

³⁰³ The Belgian Penal Code is available at www.legislationline.org/documents/section/criminal-codes.

³⁰⁴ The Criminal Code of Denmark is available at: www.legislationline.org/documents/section/criminal-codes.

³⁰⁵ Explanatory Report, para 196.

One option is to tackle forced marriage as a type of coercion or intimidation. That is the case in Germany, where criminal law provisions “hold liable whomsoever unlawfully, with force or threat of serious harm, causes a person to commit, suffer or omit an act”.³⁰⁶

Norway’s Penal Code defines forced marriage as a specific felony against personal liberty (Section 222(2)): “Any person who by force, deprivation of liberty, improper pressure or any other unlawful conduct or by threats of such conduct forces anyone to enter into a marriage shall be guilty of causing a forced marriage.”³⁰⁷

4.2.6.2 ARMENIAN LAW

Article 35 of the Constitution of the Republic of Armenia declares the freedom of marriage between men and women of marriageable age (18 years old) as a fundamental right. The Criminal Code does not criminalise forced marriage, which is a violation of Istanbul Convention requirements. The possible options for prosecuting forced marriage include the offence of kidnapping (Article 131) or the deprivation of freedom (Article 133). Neither captures the crime of forced marriage, pursuant to Article 37 of the Istanbul Convention.

4.2.7 FORCED ABORTION AND FORCED STERILISATION

4.2.7.1 INTERNATIONAL STANDARDS

Article 39 of the Istanbul Convention requires the criminalisation of two types of acts: 1) terminating the pregnancy of a woman without her prior and informed consent, by whatever means; and, 2) carrying out of any procedure aiming at terminating a woman’s capacity to reproduce naturally without consent. The Explanatory Report provides that forced abortion covers any procedure that results in the expulsion of the products of conception.³⁰⁸ Further, sterilisation includes any procedure that results in the loss of the ability to naturally reproduce.³⁰⁹

As an example of national legislation in compliance with the Istanbul Convention, the Spanish Criminal Code criminalises non-consensual sterilisation³¹⁰. It also contains a dedicated offence on forced abortion, stating:

Whoever perpetrates an abortion on a woman without her consent shall be punished with a sentence of imprisonment from four to eight years and special barring from practising any health profession or from providing services of any kind at public or private gynaecological clinics, institutions or surgeries, for a term of three to ten years.³¹¹

4.2.7.2 ARMENIAN LAW

Article 122 of the Criminal Code criminalises illegal abortion, with different penalties for medically trained and non-trained abortion providers. However, this provision does not distinguish between consensual and non-consensual abortions. There is no specific reference to forced sterilisation in the Criminal Code of Armenia, in violation of Istanbul Convention requirements. Such a provision would cover, inter alia, cases in which the woman is coerced by family members to obtain an abortion. In this regard, Armenia has a long-standing problem regarding sex-selective abortion, which is considered as another form of gender-based violence.³¹²

306 German Criminal Code, Section 237, available at: www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

307 The Penal Code of Norway is available at: <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19020522-010-eng.pdf>.

308 Explanatory Report, para 204.

309 Explanatory Report, para 205.

310 Article 149, Spanish Penal Code.

311 Article 144, Spanish Penal Code.

312 Both CEDAW and the Council of Europe Committee of Ministers have called upon governments to adopt national legislation prohibiting pre-natal sex selection. While it is not explicitly prohibited by the Istanbul Convention, it is prohibited by the Council of Europe Convention on Human Rights and Biomedicine, which Armenia has not joined.

4.2.8 SEXUAL HARASSMENT

4.2.8.1 INTERNATIONAL STANDARDS

Article 40 of the Istanbul Convention prohibits sexual harassment, which it defines as “unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”. The offence of sexual harassment encompasses: unwanted behaviour, of a sexual nature, that affects or could affect the dignity of a person. It is important to note that sexual harassment usually implies a course of conduct whose individual elements, taken in isolation, might not necessarily result in a sanction. EU anti-discrimination directives also define and prohibit sexual harassment.³¹³

Sexual harassment often takes place in the workplace and educational settings, but can occur anywhere. Accordingly, the context or setting does not constitute an element of the offence. Many legal systems address sexual harassment by civil law, in anti-discrimination, labour and education legislation; some States criminalise the behaviour; other States maintain criminal and civil liability.

France currently defines sexual harassment in Article 222-33 of the Criminal Code as “imposing on someone, in a repeated way, words or actions that have a sexual connotation” and either “affecting the person’s dignity because of their degrading and humiliating nature” or putting him or her in an “intimidating, hostile or offensive situation”.³¹⁴

4.2.8.2 ARMENIAN LAW

The Armenian Criminal Code does not address sexual harassment. Sexual harassment is defined in the Law on Equal Rights and Equal Opportunities for Women and Men.³¹⁵ However, no sanction is foreseen either under civil or criminal law, which is a violation of Istanbul Convention requirements and CEDAW. Rather, the Law refers to institutional bodies with the authority to receive and redress alleged violations. However, these internal mechanisms and procedures have yet to be implemented three years after the passage of the Law. Consequently, the Law on Equal Rights and Equal Opportunities does not currently provide a solid basis for victims to seek redress against this form of violence. Furthermore, Armenia has yet to enact a comprehensive anti-discrimination law, which would likely include a prohibition on sexual harassment as a form of discrimination in line with EU anti-discrimination directives.³¹⁶

In conclusion, the Armenian national legal framework contains enormous gaps with respect to the criminalisation of, and establishment of dissuasive and proportionate sanctions for several forms of violence against women, in violation of the Istanbul Convention, namely: sexual harassment, forced abortion, forced sterilisation, forced marriage and stalking. In particular, the national legal framework violates Article 51 of the Convention, which requires the establishment of appropriate sanctions for violence against women, and Articles 1, 2(b) and 11 of CEDAW.

³¹³ See, e.g., Article 2(2) of the Council Directive on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions Council Directive 2002/73/EC, 23 September 2002.

³¹⁴ The French Penal Code is available at: www.legifrance.gouv.fr/.

³¹⁵ Articles 2(21), 6, Law on Equal Rights and Equal Opportunities for Women and Men, 2013.

³¹⁶ See, e.g., Article 2(2) of the Council Directive on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions Council Directive 2002/73/EC, 23 September 2002.

CASE DISCUSSION

— A case example is provided in the Hand-out 4. Sample questions are also provided that can help the trainer to organise discussions regarding the public interest in pursuing a case *ex officio*, gathering relevant evidence, and determining the appropriate charges against the perpetrator. Divide the participants into two groups and present the case. Participants are then required to make decisions on the proposed questions.

4.3 WORKING WITH VICTIMS AND WITNESSES

To be both effective and meet international standards in cases of domestic violence and violence against women requires a victim-centred and human rights-based approach, which should be the baseline standard for investigations and all legal procedures. Applying a victim-centred and human rights-based approach in practice entails that victims of domestic violence are treated with respect, dignity and sensitivity. All communication with victims should be geared towards empowering them to overcome their traumatic experiences with violence and threats of violence, and supporting and empowering them through the legal proceedings.

4.3.1 WITNESS AND VICTIM STATEMENTS; QUESTIONING THE VICTIM

Statements from the victim and witnesses are often the most important pieces of evidence in cases of violence against women and domestic violence. After experiencing abuse, victims are often in a poor physical and psychological state. Yet, they are usually more willing to make statements right after an attack than if the interview takes place after a few days. The victim's statement can support criminal prosecution efforts, but may also provide important information with regard to the immediate risk assessment and safety planning. Thus, whenever possible and reasonable to do so, efforts should be made to interview the victim immediately and separated from the perpetrator.

Domestic violence and violence against women have an emotional impact on victims. Victims may be:

- ▶ distracted and/or emotionally distraught
- ▶ in denial
- ▶ afraid
- ▶ worried
- ▶ angry
- ▶ passive
- ▶ depressed.

Consequently, working with victims has many challenges. Victims may have other concerns, needs and priorities or be experiencing anger. They may refuse to acknowledge the abusive incident, minimise the level of abuse or recant their account later. They may defend the perpetrator and be aggressive towards the police. They may fear retaliation from the perpetrator for having called the police. They may also be afraid that the police will not take action to stop the violence; that police will believe the perpetrator and not them; and, that they will lose contact with their children as the perpetrator may have threatened. They may worry that they will not survive financially if the relationship ends, or if the perpetrator is sent to prison. They may be worried about their immigration status. They may be angry because prior reports of abuse did not lead to any punishment of the perpetrator, or because they were not protected from on-going abuse from the perpetrator. They may be

quiet and reserved and reluctant to answer questions about the abuse due to depression or trauma.

In order to prevent secondary victimisation³¹⁷, authorities interviewing the victim must adopt a particularly sensitive and empathetic approach. How the authorities conduct the interviews at different stages of the investigation and judicial proceedings will often determine the victim's willingness to cooperate. If she feels safe and believed, it is more likely that she will provide all the necessary information for building a case. Avoiding secondary victimisation means also ensuring that the victim feels that her voice is being heard. Hence, it is necessary to maintain on-going contact with victims, ensuring their safety and awareness regarding the process.

International and European standards have been developed to assist justice sector actors to support victims of crime in criminal proceedings³¹⁸. According to Article 56 of the Istanbul Convention, States must:

take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:

- ▶ enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;
- ▶ ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible;
- ▶ providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence;
- ▶ 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.

Victims who feel that they are supported and treated in a respectful manner, and who receive the necessary psycho-social support services, are more likely to continue co-operating with the justice authorities and to provide the best possible testimony in terms of quality and quantity. Preparing the victim for the trial is essential in order to avoid the victim's reluctance to testify. Keeping the victim well-informed of proceedings, their progress and potential outcomes, and explaining the role of the victim in the proceedings can help to minimise the risk that the victim will decide not to support the prosecution.

Checklists can be useful for law enforcement officials to prepare for meeting with a victim, to recall what particular information should be provided to victims of domestic violence, and to conduct the interview so that the victim's needs and concerns are taken into consideration. Example of pointers to be considered during meetings with a victim include:

- ▶ the victim's state of mind, as she is likely to be anxious or distressed;
- ▶ the victim's fear of possible repercussions;
- ▶ the victim's concern for the perpetrator;
- ▶ the victim's concern for any children/family members;
- ▶ the victim's fears regarding her financial situation;
- ▶ the victim's fears concerning the possible outcome of the case, whether or not the victim is receiving any kind of support from social welfare agencies or NGOs.

In order to ensure that victims are willing to cooperate with the law enforcement officials, it is important to ensure that victims do not feel judged or misunderstood.

³¹⁷ The term secondary victimisation refers to additional trauma caused to the victim by victim-blaming and insensitive attitudes, behaviour and practices by authorities and service providers.

³¹⁸ See, inter alia, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA and UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA 40/34, 1985.

How to conduct an interview

- ▶ Ideally the victim chooses the gender of the interviewer
- ▶ Victim is accompanied (e.g., by a support worker)
- ▶ The meeting is conducted in a quiet interview room without disruptions
- ▶ An interpreter is provided, if the national language used is not the victim's mother tongue
- ▶ Act sensitively and empathetically
- ▶ Inform the victim of her rights
- ▶ Allow sufficient time for the victim to tell her story and listen
- ▶ Use open-ended questions
- ▶ Before asking intimate questions, an explanation may be necessary as to why such questions are important
- ▶ Rebut victims' expressions of self-reproach and/or self-doubt
- ▶ Avoid value judgments
- ▶ Avoid specialist terminology.

Victims may become scared of the perpetrator, and any contact with him during criminal proceedings could potentially harm the victim. Hence, contact between the victim and the perpetrator should be avoided at all stages of investigations and legal proceedings. The judge and court staff should take care that during the trial all possible legal and practical in-court and out-of-court protection measures are applied to prevent further trauma and preclude intimidation. Thus, the need for in-court protection measures should also be assessed, such as testifying in a separate room, pre-recording the victim's testimony or having the victim testify via video-conference. In situations where the victim has agreed to provide testimony on court premises, the principle of no-contact can be respected by allowing the victim to testify without the presence of the perpetrator. It is important to understand that while the court case might focus on one particular incident, the victim is likely to have undergone on-going abusive and coercive control, consequently rendering any contact with the perpetrator traumatic.³¹⁹

Article 98.13 of the Code of Criminal Procedure envisages: the use of audio or other technology, a limitation on the persons present in the courtroom, requirements of confidentiality among participants and the absence of the defendant from the courtroom.

Article 216 of the Criminal Procedure Code enables the investigator to confront those interrogated persons whose statements significantly contradict each other. Such confrontation is required in cases where the statements are significantly contradictory. The application of Article 216 in cases of domestic and sexual violence must be minimised or engaged with the utmost sensitivity and victim-centred approach.

In the case of *Y. v. Croatia*, the ECtHR noted that the Istanbul Convention required States to adopt legislative measures to protect the rights of victims. It recalled that:

Such measures involve, inter alia, protection from intimidation and repeat victimisation, enabling victims to be heard and to have their views, needs and concerns presented and duly considered, and enabling them, if permitted by applicable domestic law, to testify in the absence of the alleged perpetrator. In addition, the EU Directive establishing minimum standards on the rights, support and protection of victims of crime provides, inter alia, that interviews with victims are to be conducted without unjustified delay and that medical examinations are to be kept to a minimum.

While recognising that the victim's testimony was the only direct evidence in the case, and thus the importance of a cross-examination for the defence, the Court held that: "a person's right to defend himself does not provide for an unlimited right to use any defence arguments"³²⁰. It thus held that:

³¹⁹ Council of Europe, Preventing and Combating Domestic Violence against Women: A learning resource for training law enforcement and justice officers, p. 78.

³²⁰ *Y. v. Croatia*, Application No. 41107/10, 2015, para 106.

since a direct confrontation between the defendants charged with criminal offences of sexual violence and their alleged victims involves a risk of further traumatising on the latter's part, in the Court's opinion personal cross-examination by defendants should be subject to most careful assessment by the national courts, the more so the more intimate the questions are.³²¹

The Court further concluded that cross-examination should not be used as a means of intimidating or humiliating witnesses.

Judges have a significant role in ensuring that the victim's role as a witness is not undermined or ridiculed, and that the court provides a safe environment for her testimony. Judges should be mindful of the tactics that perpetrators use to manipulate the justice system, and prevent the perpetrator from behaving in an inappropriate manner or making intimidating comments in the courtroom. During proceedings that concern domestic violence, which could include emergency intervention and protection order hearings, criminal trials or divorce and child custody hearings, judges should be especially aware of the possibility that the alleged perpetrator may use tactics to intimidate the victim or manipulate the legal process, such as: glaring, staring, making emotional appeals, etc. Judges should act decisively to stop such behaviours, by issuing warnings, reseating the parties or removing the perpetrator from the courtroom, if needed.

Perpetrators are more likely to deny the facts than to take responsibility for their abusive behaviour. They might lie, minimise or externalise the violence by blaming alcohol, stress or the victim for the abuse. Their defence will therefore likely be focused on requests for evidence (forensics, testimonies, etc.) The perpetrator might even request to open a procedure for a false allegation in order to avoid any consequences for their actions. Another in-court tactic used by perpetrators is to confess or to show recognition of the harm to the victim, in order to benefit from a mitigating factor. In such cases, the role of the judge is therefore crucial in promoting "zero tolerance" of domestic violence.

Judges should also refrain from making inappropriate comments. For example, in previous cases in Armenia, judges made the following discriminatory comments:

- ▶ "Have you lived there [in perpetrator's family] for the sake of a piece of bread?"
- ▶ "Tell the truth. What are you hiding?"
- ▶ "I cannot see a mother here."
- ▶ Addressing the adolescent son of a femicide victim: "How could you tolerate as an Armenian man that your mother talks with the Turkish man?"

A checklist can be helpful to facilitate the victim's in-court testimony:

- ▶ Apply for available measures that can facilitate victim's testimony at trial, those that permit the victim to avoid seeing the accused: screens, in camera hearings, pre-recorded video
 - ▶ Resolve any outstanding disclosure, scheduling and other procedural issues before the victim appears, in order to limit her time at court
 - ▶ Undertake approaches to reduce the victim's stress:
 - ▶ limit her evidence to the most relevant
 - ▶ allow for a short recess if the victim becomes too distressed to proceed
 - ▶ do not allow an unrepresented defendant to cross-examine the victim
 - ▶ if allowed, use a video-recorded interview as evidence in chief
 - ▶ Role play
-
- ▶ Trainer distributes "Hand-out 3 – Examples of terminology/phrases to avoid when dealing with a case of domestic violence" and facilitate a discussion on how legal and law enforcement professionals should communicate with victims in order to avoid blaming attitudes.
 - ▶ A sample scenario can be given to two groups of participants for role play in questioning victims and witnesses in the courtroom.
 - ▶ remove all unnecessary persons, including the perpetrator, whilst the victim gives her evidence

321 Y. v. Croatia, Application No. 41107/10, 2015, para 106.

4.3.2. VICTIMS' PROTECTION AND PROCEDURAL RIGHTS

4.3.2.1 INTERNATIONAL STANDARDS

When dealing with cases of violence against women and domestic violence, it is very important to ensure the protection of the victims. They frequently face re-traumatisation during criminal proceedings and are at a high risk of facing increased intimidation and violence by the perpetrator while the case is being examined. It is the State's obligation to ensure the safety of the victim as part of and during criminal proceedings. The failure to do so can cause a violation of the victim's fundamental human rights, including fair trial rights.

The role of law enforcement officials and judges is to make sure that the victim is informed of her rights and access to legal services. Victims must also be kept informed of the progress of the proceedings and the outcome of the case. Providing the victim with the necessary information about her rights and role in the criminal justice system is also likely to increase her trust and willingness to participate in the system, as well as to contribute to the timeliness of the proceedings.

The Istanbul Convention requires States to ensure that the victim's rights and interests are protected "at all stages of investigations and judicial proceedings," thus including their "special needs as witnesses".³²²

This entails:

- ▶ providing for their protection, as well as that of their families and other witnesses, from intimidation, retaliation and repeat victimisation;
- ▶ ensuring that victims are informed, at least in cases where they and their families might be in danger, when the perpetrator escapes or is released temporarily or definitively;
- ▶ informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case;
- ▶ providing victims with appropriate support services so that their rights and interests are duly presented and taken into account;
- ▶ ensuring that measures may be adopted to protect the privacy, confidentiality and the image of the victim.

The Istanbul Convention sets out the right of victims (and their families or legal representatives in the case of child victims) to be informed of developments in the investigations and proceedings in which they are involved as victims. In this respect, victims should be informed of their rights, the services at their disposal, the follow up given to their complaint, the charges, the general progress of the investigations or proceedings, their role and the outcome of the case.³²³

Law enforcement officials and judges should speak with female litigants, especially victims of violence, about plans for their safety and that of any family members. During preliminary interviews, law enforcement officials should explain the stages of the legal process and inquire about whether the victim/witness has given consideration to applying for a protection order. The discussion should include reviewing the steps she can take to ensure her safety throughout the legal process, taking into consideration the possibility that the offender will not be held in custody, or will be released on bail, and providing information about personal safety plans in open court. Such information is best conveyed through legal council or an advocate, or in in camera hearings.

The victim should be notified upon the release of the perpetrator from detention. Recall that in the *Branko Tomasic and Others v. Croatia* case, the Court found that the authorities had failed to assess the perpetrator's

³²² Article 56, Istanbul Convention.

³²³ Explanatory Report, para 286.

condition upon his release from prison, and the likelihood that he would act on prior threats. They thus failed to take “adequate measures [...] to diminish the likelihood of M.M. to carry out his threats upon his release from prison”.³²⁴

Justice sector actors must be aware of the available social services and support organisations for victims of violence, such as crisis centres and shelters, in order to make the appropriate referrals. These types of organisations can work more closely with the victim and assist her to develop a personal safety plan.

As with any risk assessment, law enforcement officials should be aware that existing risks are not static and can change very quickly. There are a number of factors or particular circumstances that can raise the level of risk, such as: separation, a court hearing and child contact, among others.³²⁵ Risk assessments must be updated continuously by the police so that the prosecutor can re-assess the changing situation and apply any necessary measures in response. On-going communication is thus required between police and prosecutors. For example, prosecutors and investigators must be made aware if the victim has requested an emergency intervention or protection order, if the order has been issued and if it has been violated by the perpetrator. This is particularly important where the breach of a protection order constitutes a criminal offence and should be included among the offences charged. It is thus of particular importance that co-ordination is ensured between on-going criminal and civil law matters³²⁶.

Pre-trial detention and establishing stricter conditions for release are two measures judges can apply to increase the safety of the victim. When balancing between the right of the perpetrator to release on bail and the victim’s right to safety, judges should balance the competing interests in favour of the victim’s safety. Safety measures should always be considered in the context of a risk assessment, using tools such as checklists or other standardised procedures, in close co-operation with the police and NGOs providing support and assistance to victims of violence. In high-risk cases, lethality assessments are critical, especially if no prior risk assessment has taken place. Crucially, the court must be able to access all relevant information from the diverse agencies involved in order to make decisions concerning victim protection. Judges should always take into consideration any concerns that are raised by the victim relating to her safety.

4.3.2.2 ARMENIAN LAW

Chapter 12 of the Criminal Procedure Code envisages protection for persons participating in criminal proceedings. According to Article 98, participants in criminal proceedings (witnesses, experts, victims, etc.) and persons who report a crime, whose testimony or disclosure may endanger the life, health, property, rights and legitimate interests of the person under protection or a member of his family, close relative, or close associate has the right to protection. Accordingly, the person participating in the criminal proceedings or reporting the crime, as well as his/her family members, close relatives and friends have a right to be protected.

Moreover, law enforcement officials must apply such protective measures of victims and witnesses ex officio, as well as upon the request by the persons in question. Protection measures are mandatory if the persons participating in the criminal proceedings or their close relatives were physically threatened in connection with their participation in the proceedings.³²⁷

Accordingly, Article 98.1 envisages measures of protection, including:

- ▶ official warning by the court or prosecution to the person who has engaged in threats of potential criminal liability;
- ▶ the protection of the personal data of the person under protection;
- ▶ the provision of security for the person under protection, and of his/her flat or other property;

³²⁴ Branko Tomasic and Others v. Croatia, Application No. 46598/06, 2009, para 60.

³²⁵ More detail on risk assessments can be found in the section on Protection.

³²⁶ Council of Europe, Preventing and Combating Domestic Violence against Women, A learning resource for training law enforcement and justice officers, 2016, p. 54.

³²⁷ Article 98(1), Criminal Code of Procedure.

- ▶ providing the person under protection the means of individualized protection, including warnings of existing threats;
- ▶ the use of means of control, wiretapping of telephone and other communications technology;
- ▶ the provision of personal security for the person under protection when visiting the body conducting criminal proceedings;
- ▶ choosing a measure of restraint against a suspect or an accused that will exclude the possibility of committing a crime or other offense against a person under protection;
- ▶ changing the residency of the person under protection;
- ▶ changing the identity documents or the appearance of the person under protection;
- ▶ changing the place of work, education or services of the person under protection;
- ▶ the removal of some persons from the courtroom or closing the proceedings to the public;
- ▶ questioning the person under protection in the courtroom without disclosing information about his/her identity.

V. SENTENCING AND REMEDIES

International human rights conventions, including Article 13 of the ECtHR, provide for the right to an effective remedy for persons whose human rights have been violated. The right to a remedy also constitutes an element of the due diligence standard as articulated in the Court's jurisprudence on Articles 2 and 3, as explored above. The right to a remedy encompasses both the imposition of proportionate and dissuasive sanctions and the availability of compensation. This section explores international standards and national law and practice on these issues.

In cases of violence against women, prosecutors and judges should ensure that the sentence reflects the serious nature of the crime.³²⁸ Sentencing in such cases should be fair, non-discriminatory, proportionate and consistent. Note that the primary goals of sentencing must be to prevent the reoccurrence of violence, to protect the victim and to hold the perpetrator accountable.³²⁹

5.1 PROPORTIONATE, DISSUASIVE SANCTIONS (CUSTODIAL SENTENCES, WITHDRAWAL OF PARENTAL RIGHTS)

5.1.1 INTERNATIONAL STANDARDS

According to Article 45 of the Istanbul Convention:

States Party shall 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.

According to the Explanatory Report, Article 45 is closely linked to Articles 33 to 41, which define the various offences that should be made punishable under criminal law.³³⁰ However, it applies to all types of sanctions, regardless of whether they are of a criminal nature or not. Article 45 thus requires the imposition of "effective, proportionate and dissuasive" sanctions for those crimes. This includes providing for prison sentences that can give rise to extradition, where this is appropriate³³¹. The drafters decided to leave it to the States to decide on the type of offence established in accordance with the Convention that merits a prison sentence. Sanctions must further be in accordance with Article 7 of the ECHR, which provides that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under

³²⁸ OHCHR, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo (A/HRC/14/22, 19 April 2010), paras 31, 85. See also, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of CEDAW, para 32, noting that "remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation, and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women".

³²⁹ Council of Europe, Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice, 2016, p. 84, available at: <https://rm.coe.int/training-manual-final-english/16807626a4>.

³³⁰ Explanatory Report, para 232.

³³¹ Under Article 2 of the European Convention on Extradition (ETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe sanction.

national or international law at the time it was committed".

One of the challenges for the criminal justice sector in ensuring effective protection for victims and sanctions for perpetrators results from the multiple claims brought during what is considered to be a continuing violation, and the fact that the diverse charges and protection mechanisms might be addressed by distinct courts (civil, administrative and criminal). Instituting multiple legal claims in different courts can obfuscate the on-going nature and severity of the violence, as a judge in one context may not appreciate the facts pertaining to diverse claims affecting the same parties before other courts. Another challenge relates to the judicial capacity to account for the on-going nature of the violence even when cases are being considered within one judicial division or competency, (e.g., criminal courts). This is often because charges are brought pertaining to single incidents of violence in light of the evidentiary challenges of supporting claims for on-going violence, as discussed above.

Case-law example:

In *A. v. Croatia*, the ECtHR found a violation of Article 8 in a case involving domestic violence in which, after experiencing domestic violence by her husband, the victim had initiated a number of legal proceedings (three criminal proceedings and four for minor offenses). These diverse proceedings resulted in the issuance of several protective orders, pre-trial detention, psychiatric and psycho-social treatment, and a prison term. Although some of the sanctions were implemented, the perpetrator did not serve prison sentences for two offenses (one of which included making death threats to A.).

The ECtHR found that the State had failed to adequately protect the victim's rights in light of the authorities failure to consider the different criminal and minor offenses proceedings concerning multiple violent acts committed by the same person against the same victim, thus failing to view the case history as a whole.

This case highlights the importance of coordination within the legal system and giving due consideration to the entire history of abuse and criminal history when determining the appropriate sanction. It also draws attention to the role of judicial oversight in ensuring that judgements are executed and sentences are served.³³²

States have addressed the necessity for coordination across judicial competencies and across agencies in different ways. Spain created specialised gender-based violence courts. These specialised courts are located in all regions of Spain, are operational 24/7 and enable the judge to impose a wide range of protection measures: criminal, civil (including family law) and social protection. In this way, a single judge maintains an overview of the entire case.

5.1.2 ARMENIAN LEGISLATION

In Armenia, the Domestic Violence Law does not envisage any sanctions in cases of domestic violence. Rather, domestic violence that involves criminal offences are covered under the Criminal Code. As noted above, not all forms of violence are recognised as criminal offences and are thus not subject to criminal sanctions. Other forms of domestic violence are sanctioned through the Family Code, resulting in the withdrawal of parental rights.

The scope of sentencing is set forth in Article 49 of the Armenian Criminal Code, which ranges from fines to life imprisonment. Judges are accorded wide discretionary power in sentencing in Armenia. For example, pursuant to Article 70, judges may hand down suspended sentences with no limitation. Given the absence of gender sensitivity in the Armenian justice system, this wide discretionary margin in sentencing may potentially negatively impact on the right of domestic violence victims to effective redress.

³³² Council of Europe, Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice, 2016, p. 85, available at: <https://rm.coe.int/training-manual-final-english/16807626a4>.

A number of well-known cases in Armenia illustrate these issues. The difficulty in accounting for the continuing nature of the violation is exemplified in the case of Hasmik Khachatryan, whose husband had been inflicting serious damage to her physical and psychological health for a period of nine years. In that case, the perpetrator was charged with torture and was sentenced to only 1.5 years of imprisonment. He was released on amnesty in the courtroom because the past history of abuse was overlooked³³³. The failure to account for the on-going nature of the violence resulted in an extremely low sentence in this case, which was neither proportionate, nor dissuasive.

In the case of Taguhi, the victim and her parents experienced physical and psychological violence committed by the perpetrator. Several incidents were reported to the police. However, the police and the judiciary failed to protect them from the violence. In January 2016, a criminal case was initiated and the perpetrator was charged under Article 119 of the Criminal Code for the infliction of severe physical and psychological pain and suffering.

The judge imposed a conditional sentence of 6-month imprisonment, pursuant to Article 70 of the Criminal Code, failing to consider evidence of the history of violence and the continuing imminent danger to the life and health of the victim. The husband continued stalking and harassing the victim and her parents. In July 2016, he axed and seriously injured the victim and her father; the victim's mother was axed to death.

³³⁴

According to NGOs working on this issue in Armenia, the sanctions imposed in domestic violence cases are exceedingly low due to judicial bias and the inappropriate application of mitigating circumstances, as discussed in greater detail, below.

Moreover, there are not any inter-court or inter-agency cooperation procedures or any special documents.

TIP FOR THE TRAINER

Taking into account international and national legal provisions on sanctions and remedies, the trainer can ask the participants to discuss the following;

- ▶ What forms of co-operation are needed between judicial bodies and law enforcement agencies?
- ▶ Which specific agencies need co-operation guidelines in order to ensure effective investigation, protection and sentencing?

³³³ Council of Europe, Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice, COUNTRY CHAPTER FOR AMENIA, 2016, p. 19, available at: <https://rm.coe.int/training-manual-for-judges-and-prosecutors-on-ensuring-women-s-access-/1680764286>.

³³⁴ CEDAW Task Force, Armenia non-government organizations' shadow report to CEDAW, 2016, p. 46, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ARM/INT_CEDAW_NGO_ARM_25449_E.pdf.

5.1.4 CHILD CONTACT, CUSTODY AND WITHDRAWAL OF PARENTAL RIGHTS

As indicated in Article 45(2) of the Istanbul Convention, other measures that can be adopted in relation to perpetrators, including the withdrawal of parental rights, if the best interests of the child, which may also pertain to the safety of the victim, cannot be guaranteed in any other way.

In particular, in cases of domestic violence against one parent that are witnessed by a child, it may not be in the best interest of the child to continue contact with the abusive parent.³³⁵ Ensuring contact with the abusive parent may not only have a negative impact on the child, but may also pose a serious risk to the safety of the victim, because it often gives the perpetrator a reason to contact or see the victim. The perpetrator's contact with the child may not be possible without resulting in a violation of an emergency barring or protection order. For this reason, the issuance of both types of orders should require interim orders on child contact and custody, including supervised visits.

In Armenia, the necessity of making interim determinations on child contact are contemplated in the issuance of the protection order in Article 8 of the Domestic Violence Law, but are not contemplated with respect to the issuance of the emergency intervention order. This gap can have potentially fatal consequences for victims of domestic violence and those within their care.

In Armenia, violence against a child can result in the withdrawal of parental rights. Article 36 of the Constitution provides for deprivation or restriction of parental rights only according to law, by the court's decision, and to ensure the child's vital interests. Article 59 of the recently amended Family Code provides the list of grounds upon which the court may withdraw parental rights. The Article primarily stipulates that in order to ensure the child's vital interests, both or one parent may be deprived of parental rights if they treat the child brutally by:

- ▶ periodically perpetuating physical violence against the child, which does not contain features of the crime envisaged by the Criminal Code of the Republic of Armenia,
- ▶ systematically imposing psychological violence on the child, including intentionally causing severe mental suffering, including the threat of physical, sexual abuse, systematic humiliation of dignity.

Article 59 of the Family Code also withdraws parental rights in the event of a conviction of a deliberate crime against the child. In other words, for violence not constituting a crime, presumably including indirect violence, the court has the discretion to withdraw parental rights; for violence involving crimes, the withdrawal is not discretionary.

According to Article 60, claims to deprive parental rights can be submitted to the court by:

- ▶ one of the parents,
- ▶ the guardianship and trusteeship body,
- ▶ those State and local authorities who have the responsibility to protect children's rights and interests.

Moreover, the law provides special procedures for the guardianship and trusteeship bodies and State and local authorities for submitting such claims. Article 60(1.1) stipulates that these bodies must apply to the court within one month of knowing about the grounds for deprivation of parental rights. The guardianship and trusteeship body must be present at the court hearings of these cases.

³³⁵ Explanatory Report, para 233.

5.2 MITIGATING AND AGGRAVATING CIRCUMSTANCES, JUDICIAL STEREOTYPING

5.2.1 INTERNATIONAL STANDARDS

According to Article 42 of the Istanbul Convention, States Parties must ensure that culture, religion, tradition or so-called "honour" cannot be used to justify any of the offences set forth in the Convention. Specifically, criminal law and criminal procedural law must not recognise justifications for criminal acts based on claims that they were committed to prevent or punish a victim's suspected, perceived or actual transgression of cultural, religious, social or traditional norms or customs for appropriate behaviour. Mitigating circumstances based on the alleged immoral behaviour of the victims violate Article 42.³³⁶

5.2.2 ARMENIAN LEGISLATION

Despite the fact that international observers, such as the Commissioner for Human Rights (2015), have expressed concern for the systematic breaches of the presumption of innocence and harsh criminal sanctions in Armenia, in the area of violence against women, conviction rates remain low and sanctions very lenient³³⁷.

Article 62 of the Criminal Code provides for mitigating circumstances based on the provocative behaviour, illegal or immoral behaviour of the victim. Articles 105 and 114 of the Criminal Code further attenuate the crimes of murder and injuries, respectively, when committed in a state of temporary insanity, which is defined as long depression that might be caused, inter alia, by immoral behaviour of the victim, mockery, serious insults or other immoral actions. A state of temporary insanity reduces the punishment by more than half. Although the word "honour" is not specifically used, recognising temporary "insanity" based on mockery or insults substantively reflects the same concept, in violation of Article 42.

With regard to these provisions, some observers have noted that the terms "heavy insult" and "violence" are ambiguous, and their interpretation remains at the "discretion of the given law-enforcement officer"³³⁸. As a result, cases of violence against women may result in relatively lower sentences compared to other non-domestic cases involving the same crimes.

The media and NGOs have drawn attention to cases in which such mitigating circumstances have been applied, such as the case of Diana Nahapetyan. The case involved the victim being kicked, hit with a glass vase, pulled into the kitchen by her hair and stabbed 21 times with kitchen knives by her husband, resulting in wounds to her lungs and liver and massive internal bleeding that led to her death. The first instance court of Ararat and Vayots Dzor sentenced her husband to 3.6 years of imprisonment based on the mitigating circumstance set forth in Article 105 of the Criminal Code that he was "in a state of insanity" because the victim had allegedly cheated on him³³⁹. In another case, the same court fined Vardan Jamalyan, who had been beating his wife Naira Zohrabyan for 11 years because, in his words, "she had been communicating with immoral women", and "the dinner was not ready upon his arrival" 50.000 AMD.³⁴⁰

Accordingly, references to the immoral behaviour, mockery or heavy insults on the part of the victim should not be used in cases of domestic violence and violence against women. Based on the gender stereotype,

³³⁶ See also, UN Women, Supplement to the Handbook on Violence against Women, 2011, page 5, stating that any legal provision that allows the behaviour of the victim to serve as a mitigating factor opens the door for stereotypes among law-enforcement officials.

³³⁷ Council of Europe, Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice, COUNTRY CHAPTER FOR ARMENIA, available at: <https://rm.coe.int/training-manual-for-judges-and-prosecutors-on-ensuring-women-s-access-/1680764286>.

³³⁸ Proactive Society and OSCE, Domestic Violence Survey in the Republic of Armenia, 2011, pp. 6-7, available at: <https://www.osce.org/yerevan/88229?download=true>.

³³⁹ See, CEDAW Task Force Armenia, Armenian Non-governmental organizations' shadow report to CEDAW, 2016, p. 46, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ARM/INT_CEDAW_NGO_ARM_25449_E.pdf.

³⁴⁰ Council of Europe, Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice, COUNTRY CHAPTER FOR ARMENIA, p. 19, available at: <https://rm.coe.int/training-manual-for-judges-and-prosecutors-on-ensuring-women-s-access-/1680764286>.

still prevalent in Armenia, that a woman lacking morality deserves violence,³⁴¹ Articles 105 and 114 of the Criminal Code contravene the Istanbul Convention. Any resulting disparate sentencing patterns can be found to constitute gender discrimination as they impede women's access to justice in concrete cases, as well as foster mistrust in the justice system.³⁴²

DISCUSSION

What is "immoral behaviour or actions" that can result in a state of insanity?

What is the relationship between violence based on jealousy, gender stereotyping?

The trainer must ensure that throughout the discussion, the negative impact of mitigating circumstances based on "immoral behaviour or actions" are highlighted, and that the risks of these vague regulations are once more brought to the attention of course participants.

5.2.3 AGGRAVATING CIRCUMSTANCES

5.2.3.1 INTERNATIONAL STANDARDS

Article 46 of the Istanbul Convention calls upon States to ensure that certain aggravating circumstances may be taken into account in sentencing. These include that:

- ▶ 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.

Thus, Article 46 requires States to ensure that violence committed in the family can be considered as an aggravating circumstance in determining the penalty when not already a constituent element of the offence.³⁴³ These aggravating circumstances should thus be within the national legal framework to enable judges to consider them when sentencing perpetrators of domestic violence, although there is no obligation for judges to apply them in a particular case.³⁴⁴

³⁴¹ In such cases, the woman's sexual history or an accusation of adultery often serves as justification for perpetrators' "state of insanity."

³⁴² Council of Europe, Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice: Armenia, 2016, p. 12, available at: <https://rm.coe.int/training-manual-for-judges-and-prosecutors-on-ensuring-women-s-access-/1680764286>.

³⁴³

³⁴⁴ Explanatory Report, paras 235, 236.

5.2.3.2. ARMENIAN LEGISLATION

Article 63 of the Criminal Code of Armenia provides a list of aggravating circumstances that can be applied in sentencing. However, it does not contain aggravating circumstances for the following:

- ▶ crimes committed against spouses, partners, other family members or cohabitants (Article 46(a) of the Convention);
- ▶ crimes committed in the presence of a child (Article 46(d) of the Convention);
- ▶ crimes committed with the use or threat of a weapon (Article 46(g) of the Convention).

The absence of the above-listed aggravating circumstances constitutes a gap in the availability of meaningful remedies in the form of proportionate and dissuasive sanctions in Armenia for victims of domestic violence.

With regard to violence committed in the presence of a child, it can sometimes be qualified as a form of particular cruelty in order to aggravate punishment for the crimes of, for example, Articles 104 (murder), 112 (infliction of wilful heavy damage to health), 113 (infliction of wilful medium-gravity damage to health), 119 (infliction of physical pain or mental illness) of the Criminal Code. However, this approach is not always consistently applied and a specific reference in the Criminal Code would establish legal certainty.³⁴⁵ Finally, the use of weapons is a constituent element in the definition of some offences under the Criminal Code, such as kidnapping (Article 131) or banditry (Article 175). In order for judges to be able to consider this element in cases involving domestic violence and violence against women, it should also be introduced as an aggravating circumstance, in Article 118 on battery, for example. The Criminal Code envisages all the other aggravating circumstances set forth in Article 46 of the Istanbul Convention.

Establishing aggravating circumstances for violence committed in the family would qualify offences such as physical or sexual assault in accordance with Article 46 of the Convention. It would further send a message to law-enforcement officials and the general public that domestic violence is no longer tolerated. It should be noted that establishing aggravating circumstances for crimes involving domestic violence does not prevent, or conflict with, a dedicated offence on domestic violence as, pursuant to Article 63.4 of the Criminal Code, aggravating circumstances do not apply to offences that already take them into account as constituent elements.

In order to bring the national legal framework in line with international standards, Armenia should introduce into its Criminal Code aggravating circumstances in line with Article 46 of the Istanbul Convention. This would complement existing aggravating circumstances that protect children, pregnant women and dependent persons.³⁴⁶

³⁴⁵ Council of Europe, Gap analysis of Armenian criminal law in light of the standards established by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 2016, p. 31, available at: <https://rm.coe.int/gap-analysis-armenian-law-eng/168075bac2>.

³⁴⁶ Article 63, Criminal Code.

5.2.3.3 JUDICIAL STEREOTYPING: GENDER BIAS IN DECISION-MAKING

Judges play a crucial role in the justice system's response to domestic violence. They are the final authority in civil and criminal law matters, and their decisions can have significant impact on the lives of the victim, the perpetrator, children and other family members. Judges are instrumental in conveying the message to the parties and society at large that the justice system takes domestic violence and violence against women seriously. While maintaining their impartiality, judges can educate families and communities, within the scope of their duties, that all forms of violence are unacceptable³⁴⁷.

Judicial stereotyping occurs when judges base their reasoning and/or the outcomes of decisions on preconceived beliefs rather than the facts of the case and a comprehensive inquiry. Judicial stereotyping not only impedes women's access to justice, but also breeds mistrust in the justice system, rendering it ineffective in addressing violence against women.

Examples of judicial stereotyping based on gender include:

- ▶ Concepts of the "ideal victim"
- ▶ Justifying violence based on woman's lack of morality based on:
 - ▶ Sexual history
 - ▶ Adultery
 - ▶ Provocative behaviour
 - ▶ Manner of dress
- ▶ Women are expected to keep the family together at all costs
- ▶ Women exaggerate the potential danger
- ▶ Women do not really want to leave their abusive husbands but simply want to warn them
- ▶ Women will reunite with their husbands in the end
- ▶ The State should not intervene in family issues
- ▶ Group discussion:
 - ▶ What are the attributes of an ideal victim?

Gender stereotypes often influence the judiciary in cases involving violence against women, constituting an impediment to women's access to justice. When gendered preconceptions of women's role in the family and in society, and traditional, gendered social norms related to women's sexuality and morality supersede evidence and law in the courtroom, it leads to biased outcomes. This is what occurred in the case *Karen Tayag Vertido v. The Philippines*, in which the CEDAW Committee found of violation of the victim's right to an effective remedy.³⁴⁸

Judicial stereotyping - a case study

In the case *Karen Tayag Vertido v. The Philippines*³⁴⁹, the CEDAW Committee determined that the Philippines had failed to comply with its obligation to ensure Ms Tayag Vertido's right to an effective remedy, which was implied under Article 2(c) of CEDAW. Article 2(c) requires States parties "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination".

³⁴⁷ Council of Europe, *Preventing and Combating Domestic Violence against Women: A learning resource for training law enforcement and justice officers*, 2016, p. 68, available at: <https://rm.coe.int/16805970c1>.

³⁴⁸ CEDAW, Communication No. 18/2008, 2010.

³⁴⁹ CEDAW, Communication No. 18/2008, 2010.

The Committee found that the victim, the Executive Director of the Davao City Chamber of Commerce and Industry in Davao City, who was raped by a senior professional colleague, the 60-year-old President of the Chamber, had been denied an effective remedy by the State due to extensive delays in the process, and because of numerous gendered stereotypes and myths relied upon throughout the trial court decision acquitting the accused. The CEDAW Committee observed that the decision acquitting the accused was based on several principles one of which - "an accusation for rape can be made with facility", reveals in itself a gender bias³⁵⁰.

The judge in the case acquitted the accused, finding that the victim should have should have fought off the accused once she had regained consciousness and while he was raping her. She also doubted the victim's account of events, disbelieving that the accused would have able to proceed to the point of ejaculation as he was in his 60s. The victim claimed that she had suffered re-victimisation by the State after she was raped. As a general matter, in its decision the Committee stressed that:

stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence.³⁵¹

The Committee assessed "the level of gender sensitivity applied in the judicial handling" of the case.³⁵² It found that in the national court's assessment of the credibility of the victim's version of events, the decision:

was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and 'ideal victim' or what the judge considered to be the rational and ideal response of a woman in a rape situation as become clear from the following quotation from the judgement:

"Why then did she not try to get out of the car when the accused must have applied the brakes to avoid hitting the wall when she grabbed the steering wheel? Why did she not get out or even shout for help when the car must have slowed down before getting into the motel room's garage? Why did she not stay in the bathroom after she had entered and locked it upon getting into the room? Why did she not shout for help when she heard the accused talking with someone? Why did she not run out of the motel's garage when she claims she was able to run out of the hotel room because the accused was still NAKED AND MASTURBATING on the bed? Why did she agree to ride in the accused's car AFTER he had allegedly raped her when he did not make any threats or use any force to coerce her into doing so?"³⁵³

The Committee found:

several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim. In this regard, the Committee views with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgement, such as the weight given to the fact that the author and the accused knew each other, constitute a further example of "gender-based myths and misconceptions".³⁵⁴

350 CEDAW, Communication No. 18/2008, 2010, para 8.5

351 CEDAW, Communication No. 18/2008, para 8.4.

352 CEDAW, Communication No. 18/2008, para 8.4.

353 CEDAW, Communication No. 18/2008, 2010, para 8.5.

354 CEDAW, Communication No. 18/2008, para 8.6

The Committee held that there should be no presumption that the victim consents if she does not physically resist unwanted sexual conduct, "regardless of whether the perpetrator threatened to use or used physical violence."³⁵⁵

It concluded that Ms. Tayag Vertido suffered "revictimisation through the stereotypes and gender-based myths relied upon in the judgement".³⁵⁶The Committee thus held that the Philippines had violated Articles 2(f) and 5(a) of the Convention, which ensure freedom from wrongful stereotyping.

In Armenia, both judicial reasoning and the existence of gender stereotypes in existing legislation result in biased decisions that impede women's access to justice. The clearest example of judicial bias in Armenia is the case involving the murder of Diana Nahapetyan's by multiple stabbings in 2012, in which the first instance court of Ararat and Vayots Dzor sentenced her partner to 3.6 years of imprisonment because it was argued that the murder was committed while the perpetrator was temporarily insane because the victim had cheated on her husband.³⁵⁷ The sentence in the case manifestly failed to reflect the gravity of the crime.

5.2.3.4 FINANCIAL DEPENDENCE

It should be noted that the imposition and enforcement of fines as punishment do not constitute a deterrent, as recognized by the ECtHR, and may not be considered as effective State intervention, in violation of the State's due diligence obligations. Increasing financial liabilities for vulnerable families are likely to exacerbate existing tensions and conflict. The imposition of fines, moreover, fails to reflect the gravity of the offence.

In the *Opuz v. Turkey* case, for example, the perpetrator stabbed the victim with a knife seven times which resulted in life-threatening wounds and her hospitalisation. On another occasion, he ran her and her mother down with a car. Following each of these assaults, Turkish authorities only temporarily detained him and then released him with fines. In Armenia, in 2016 the first instance court of Lori province fined a man 150,000 AMD who had constantly beaten his wife and children and had kept his 6-year-old daughter tied in the barn.³⁵⁸

5.3 COMPENSATION

5.3.1 INTERNATIONAL STANDARDS

According to Article 29 of the Istanbul Convention:

"Parties shall take the necessary legislative or other measures to provide victims with adequate civil remedies against the perpetrator. Parties shall take the necessary legislative or other measures to provide victims, in accordance with the general principles of international law, with adequate civil remedies against State authorities that have failed in their duty to take the necessary preventive or protective measures within the scope of their powers."

Article 29(1) aims to ensure that victims of any of the forms of violence covered by this Convention can obtain an adequate civil law remedy against the perpetrator through the national legal system. On the one hand, this includes civil law remedies such as injunctions, which allow a civil court to order a person to stop a particular

³⁵⁵ CEDAW, Communication No. 18/2008, 2010, para 8.5.

³⁵⁶ CEDAW, Communication No. 18/2008, 2010, para 8.8.

³⁵⁷ Pursuant to Article 105 of the Criminal Code.

³⁵⁸ Council of Europe, Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice, COUNTRY CHAPTER FOR ARMENIA, p. 19, available at: <https://rm.coe.int/training-manual-for-judges-and-prosecutors-on-ensuring-women-s-access-/1680764286>.

conduct, to refrain from a particular conduct in the future or to compel a person to take a particular action.³⁵⁹ Civil law remedies may also include court orders that specifically address acts of violence, such as barring orders, restraining orders and non-molestation orders as referred to in Article 53 of the Istanbul Convention.³⁶⁰ As the Explanatory Report highlights, all civil law orders should be issued following an application by the victim or a third party, and cannot be issued ex officio.³⁶¹

According to Article 30 of the Istanbul Convention, States must ensure that victims:

have the right to claim compensation from perpetrators for any of the offences established in accordance with this Convention. 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 redress for compensation awarded from the perpetrator, as long as due regard is paid to the victim's safety.³⁶²

Although the scope of the foreseen State compensation is limited to "serious" injury and impairment of health, this does not preclude States from providing for more generous compensation arrangements, nor from setting higher and/or lower limits for any or all elements of the compensation to be paid by the State.³⁶³ The reference to the "victim's safety" requires States to ensure that any measures taken to claim redress for compensation from the perpetrator give due consideration to the consequences of these measures for the safety of the victim. This covers situations where the perpetrator may want to avenge her or himself against the victim for having to pay compensation to the State.³⁶⁴

At the same time, Article 29(2) ensures that victims are provided with remedies against State authorities that have failed in their duty to take the necessary preventive or protective measures. These remedies include, inter alia, civil law actions for damages, including non-pecuniary damages³⁶⁵, which must be available for negligent and grossly negligent behaviour by State actors.³⁶⁶

5.3.2 ARMENIAN LEGISLATION

With respect to compensation in cases of domestic violence, the general rules covering compensation under civil and administrative law apply. According to Article 17 of the Civil Code, a person whose rights have been violated has a right to full compensation. Armenian civil and administrative legislation foresee compensation for both material and moral damages.³⁶⁷

Critically, here are no provisions providing for the compensation of non-pecuniary damages from the perpetrator. Furthermore, there are no means for holding the State liable in cases in which no compensation is available from the perpetrator. Consequently, there are significant limitations to victims obtaining compensation as an effective remedy in Armenia in violation of international standards.

Armenian civil and administrative legislation both foresee compensation for material and moral damages.³⁶⁸ According to Article 18, losses inflicted due to the illegal acts or omissions of State and local self-governing **bodies or their officials** shall be compensated by the State. Moreover, Article 162.1 of the Armenian Civil Code

³⁵⁹ Explanatory Report, para 157.

³⁶⁰ Explanatory Report, para 158.

³⁶¹ Explanatory Report, para 158.

³⁶² The terms "bodily injury" and "impairment of health" encompass injuries that result in the death of the victim, and serious psychological damages caused by acts of psychological violence, respectively.

Explanatory report, para 166.

³⁶³ Explanatory Report, para 166.

³⁶⁴ Explanatory Report, para 169.

³⁶⁵ See, *Kontrová v. Slovakia*, Application No. 7510/04, 2005, para 64, finding a violation of Article 13 of the ECHR where the victim had no access to a claim for non-pecuniary damages against the State for the negligence of police officers in preventing the death of her children by her former husband.

³⁶⁶ Explanatory Report, para 162.

³⁶⁷ Article 162.1, Civil Code of RA.

³⁶⁸ Article 162.1, Civil Code of RA.

envisages the concept of non-pecuniary damage and their compensation. According to Article 162.1, non-pecuniary damages apply to physical or mental suffering that arises from a person's decision, act or omission that infringes upon the material or intangible benefit of his/her family, or of his/her personal property or non-pecuniary rights.

Article 162.1 also envisages that in cases involving the death or incapacity of a person, his/her spouse, parent, adoptive father, child, adopted child, guardian or trustee shall have the right to claim compensation for non-pecuniary damages, if the criminal prosecution authority or the court has confirmed that the decision, act or inaction of the authority has violated the rights envisaged in the Armenian Constitution and the ECHR. The following rights would be covered:

- ▶ Right to life
- ▶ Right to be free of torture inhuman or degrading treatment
- ▶ Right to respect for private and family life
- ▶ Right to a fair trial
- ▶ Freedom of thought, conscience and religion
- ▶ Right to liberty and security
- ▶ Freedom of assembly and association
- ▶ Right to effective remedies
- ▶ Protection of property.

However, the potential of obtaining a remedy under Article 162.1 recognizing the authorities' failure in their due diligence obligations in line with the jurisprudence of the ECtHR, as explained in the summaries of specific cases throughout this manual, remains highly unlikely.

Moreover, the Law on Administration and Administrative Proceedings stipulates responsibility for damage caused by the public administration. According to Article 95, damage resulting from failures by the administrative authorities shall be subject to reimbursement in accordance with the provisions of Section 15. Pursuant to Article 95, no compensation shall be paid until the legal act, action or inaction of the administrative body by which the person was damaged was declared as unlawful in the prescribed manner, with the exception of cases provided by Article 109 of this Law (Compensation in case of person's death). According to article 97 damage is compensated by the means of eliminating the consequences of administrative damage or by way of monetary compensation. The law envisages also grounds and procedure for non-pecuniary damage compensation. According to Article 104 in case of non-pecuniary damage caused by unlawful administration by limiting the freedom of the individual, his inviolability, the inviolability of the home, the violation of his or her personal or family life, by damaging his honour, good reputation, or dignity that person shall have the right to demand compensation in cash or liquidation of the consequences of the damage caused to the non-pecuniary damage. In the given cases the claim for damages should be submitted to the administrative body whose administration has been caused.

VI. MEDIATION AND RECONCILIATION

6.1 INTERNATIONAL STANDARDS

Article 48 of the Istanbul convention bans mandatory alternative dispute resolution procedures in relation to cases of violence against women. It requires States: “to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention”. CEDAW’s General Recommendation No. 33 on women’s access to justice goes further and recommends that States “[e]nsure that cases of violence against women, including domestic violence, are under no circumstances referred to any alternative dispute resolution procedures.”³⁶⁹

As the Explanatory Report describes, victims of domestic violence “can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator”³⁷⁰ Indeed, mediation and reconciliation practices assume that the parties approach the process with equal resources and power. Cases of violence against women, especially domestic violence, involve unequal power relationships based on acts of assault, violent intimidation, and/or controlling, abusive or humiliating behaviour. As a result of these concerns, in many parts of the world mediation practices have been prohibited in cases of intimate partner violence. Informal justice mechanisms can also pose serious risks to victims, who may agree to return to a perpetrator only to face escalating forms of violence.

Furthermore, traditional gender norms can negatively impact women’s agency in mediation. In these processes, women often risk giving up their individual rights so as to preserve the harmony of the social group. The CEDAW Committee notes that the use of mediation may lead to further violations of the victims’ rights “and impunity for perpetrators due to the fact that [reconciliation] often operate[s] with patriarchal values, thereby having a negative impact on women’s access to judicial review and remedies.”³⁷¹

Other factors such as corruption, government policies and priorities, and mediators’ weak skills can impact the efficacy of mediation. The absence of gender sensitivity among mediators is a big concern. The CEDAW Committee specifically recommends that “alternative dispute settlement procedures do not restrict access by women to judicial and other remedies in all areas of law, and does not lead to further violation of their rights.”³⁷²

The most important point raised as a measure of quality in reconciliation procedures is whether the victim is truly at the centre of these practices. Good practice has recognised that to improve informal mediation systems, practitioners should build on the strengths of the existing system and include:

- ▶ Increasing the participation of women in the mechanisms;
- ▶ Providing comprehensive training to all mediators and other participants in the mechanisms;
- ▶ Increasing engagement from civil society organisations to alter power inequities;
- ▶ Strengthening links with the formal justice system.

6.2 ARMENIAN LAW

Armenian criminal law provides for the possibility of reconciliation in cases involving private prosecution, such as those involving light injuries or battery. Importantly, the national legislative framework provides for diverse and conflicting possibilities between civil procedure, criminal procedure and the Domestic Violence Law. Under Articles 35 and 36 of the Criminal Procedure Code, reconciliation between the victim and the accused

³⁶⁹ CEDAW, General recommendation on women’s access to justice, CEDAW/C/GC/33, para 58(c).

³⁷⁰ Explanatory Report, para 252.

³⁷¹ CEDAW, General recommendation on women’s access to justice, CEDAW/C/GC/33, para 57.

³⁷² CEDAW, General recommendation on women’s access to justice, CEDAW/C/GC/33, para 58(b).

excludes the institution of a criminal case, prevents its prosecution or allows for a termination of the proceedings. In accordance with the procedural law, the Criminal Code envisages under Article 73 the exemption of criminal liability in cases of reconciliation with the victim in “non grave crimes”.

While domestic violence is now subject to public prosecution³⁷³, pursuant to the Domestic Violence Law, such cases can also be reconciled with the written consent of both of the parties.³⁷⁴ There is no legal obligation for the victim to enter into a reconciliation process or to accept an offer for reconciliation, and the Law requires the support centre to terminate the conciliation process if there is a reasonable belief that the victim's decision to participate was influenced by threats.

According to the Domestic Violence Law, reconciliation is to be conducted by the support centres, during the period of emergency intervention or protection orders, and pursuant to procedures established by the Competent Authority, namely, the Ministry of Labour and Social Affairs. Consequently, according to the Law, reconciliation is available to the parties of a domestic violence dispute for a limited period, the 20 days of a reconciliation order, and up to one year during a protection order. Article 10(5) precludes reconciliation in cases involving minor victims or victims with no legal capacity. The precise procedures for fostering reconciliation have not yet been adopted.

Significantly, reconciliation can serve a basis to revoke emergency intervention and protection orders. Either the victim or the perpetrator can request the police or court to revoke the emergency intervention or protection order if conciliation is reached.

Pursuant to Article 184(1) of the Civil Procedure Code, the first instance court or court of appeal has right at any stage of proceedings, by the agreement of parties or by their own motion to refer the case for mediation. Article 184(2) provides that if there is a high possibility to resolve the case, the court can sua sponte refer the case to mediation not exceeding 4 hours. In other words, the court can refer a case to mediation without the parties agreement, in contravention of Article 48 of the Istanbul Convention.

Informal encouragement to reconcile is also reportedly commonly used in Armenia, including for domestic violence cases. NGOs report that in many cases, law enforcement officials pressure victims to reconcile with perpetrators, using victim blaming and gendered stereotypes to deter them from seeking assistance from the criminal justice system. There are thus concerns that the use of reconciliation in Armenia, even when formal reconciliation procedures are adopted, will impede women's access to justice.

The reconciliation process for victims currently envisaged in the Domestic Violence Law runs counter to the recommendations of the Istanbul Convention and CEDAW. It remains to be seen whether the procedures developed by the Ministry of Labour and Social Affairs will be gender sensitive and victim-centred in line with the Istanbul Convention.

373 Article 10, Domestic Violence Law.

374 Article 10, Domestic Violence Law.

VII. Annexes

HAND-OUT 1

MYTHS AND FACTS ABOUT DOMESTIC VIOLENCE

PLEASE ANSWER THE FOLLOWING QUESTIONS

► A major cause of domestic violence is alcohol and drug abuse. If the perpetrator undergoes treatment for alcohol abuse, he will stop the violence.

Answer: True False

► Men are victims of domestic violence as often as women are.

Answer: True False

► Men who commit violence are violent because they cannot control their anger and frustration.

Answer: True False

► Mediation is the solution for domestic violence.

Answer: True False

► People who are religious do not perpetrate domestic violence and do not become victims.

Answer: True False

► Domestic violence does not affect children living in the family, it is a problem that concerns only adults.

Answer: True False

► Victims have done something to cause the abuse.

Answer: True False

► Domestic violence only affects women from certain backgrounds.

Answer: True False

► Authorities should do everything they can to keep a family together.

Answer: True False

HAND-OUT 2

MYTHS AND FACTS ABOUT DOMESTIC VIOLENCE

- ▶ A major cause of domestic violence is alcohol and drug abuse. If the perpetrator undergoes treatment for alcohol abuse, he will stop the violence.

Answer: False. Although alcohol and drugs are often associated with domestic violence, they do not cause the violence. Many perpetrators do not drink or use drugs, and those who do, usually do not show aggression towards unknown people, colleagues or bosses, but direct violence at their partners. Perpetrators often use intoxication as an excuse or argument not to have to take responsibility for their actions. It is important to realise that domestic violence and alcohol/drug abuse are two separate issues and need to be treated independently.

- ▶ Men are victims of domestic violence as often as women are.

Answer: False. Official data provided by the Police of RA indicates that mostly women become victims of domestic violence. In addition to affirming that violence against women, including domestic violence against women, is a distinctly gendered phenomenon, the Domestic Violence³⁷⁵ Law clearly recognise that men and boys may also be victims of domestic violence and that this violence should also be addressed.³⁷⁶

- ▶ Men who commit violence are violent because they cannot control their anger and frustration.

Answer: False. Domestic violence is intentional conduct, and perpetrators are not “out of control”. Their violence is carefully targeted at certain people, during certain moments and in certain places. Perpetrators generally do not attack their bosses or people on the streets, no matter how angry they might get. Perpetrators also follow their own internal rules about abusive behaviour. They often choose to abuse their partners only in private, or may take steps to ensure that they do not leave visible evidence of the abuse. Perpetrators also choose their tactics carefully—some destroy property, some rely on threats of abuse, and some threaten children. Studies also indicate that in fact, some perpetrators become more controlled and calm as their aggressiveness increases.

- ▶ Mediation is the solution for domestic violence.

Answer: False. Mediation is NOT recommended for couples trying to end the violence in their relationship due to the specific dynamics of power and control underlying the violence.³⁷⁷ Best practice shows that perpetrators should attend specialised programmes on adopting non-violent behaviour in interpersonal relationships, and victims should be supported by specialised centres and a domestic violence advocate. In cases of separation, mediation is NOT recommended in order to “teach” the couple bilateral communication and/or to agree on child custody or divorce.

- ▶ People who are religious do not perpetrate domestic violence and do not become victims.

Answer: False. Perpetrators can be religious people, including priests and parsons. Many victims have deeply held religious beliefs, which may encourage them to keep the family together at all costs.

- ▶ Domestic violence does not affect children living in the family; it is a problem only between adults.

375 Human Rights Defender's annual communication 2016, 2017, pp. 242, 305, available at: <http://www.ombuds.am/resources/ombudsman/uploads/files/publications/b5220dd0b83b420a5ab8bb037a1e02ca.pdf>, and, <http://www.ombuds.am/resources/ombudsman/uploads/files/publications/28731eccde752a30c70feae24a4a7de7.pdf>.

376 Explanatory Report, para 27.

377 Explanatory Report, paras 251, 252.

Answer: False. Domestic violence has a significant impact on children living in the household. Children who grow up in violent families exhibit serious emotional and psychological problems from exposure to domestic violence. As a coping strategy, some children might have a tendency to identify with the perpetrator and to lose respect for the victim, which can lead to the trans-generational cycle of violence.

- ▶ Victims have done something to cause the abuse.

Answer: False. Perpetrators are responsible for their behaviour and choose their actions. Abuse is NEVER the fault of the victim.

- ▶ Domestic violence only affects women from certain backgrounds.

Answer: False. While it is true that certain groups of women are particularly vulnerable to some forms of violence or face particular barriers in accessing justice, domestic violence does not discriminate on any ground. It affects women from all levels of society, whether rich or poor, educated/uneducated, regardless of migrant status, religion, sexual orientation and ethnicity. Significantly, a direct ratio was discovered between the level of education and victimisation in Armenia. The lower the level of educational attainment, the higher the possibility of suffering from domestic violence. In Armenia, 26.3% of the victims of domestic violence have not completed years education; 19.5% have completed 8 years of education; 18% have completed secondary education; 13.6% of the victims have secondary professional education; and, 13.6% have attained high education. The reason underlying this statistical data is that women with no higher or professional education typically are not likely to find jobs with decent wages, and are thus economically more dependent on men. Also, such women are less likely to challenge the existing stereotypes, learn about their rights and seek justice.

- ▶ Authorities should do everything they can to keep a family together.

Answer: False. The safety and the needs of the victim must come first, and should precede any other considerations. Forcing or influencing a victim to go back to the abusive relationship can have severe consequences, including death. If the perpetrator has not been held accountable for his actions or if the root causes of violence have not been addressed, violence will most likely continue.

HAND-OUT 3

EXAMPLES OF TERMINOLOGY/PHRASES TO BE AVOIDED WHEN DEALING WITH A CASE OF DOMESTIC VIOLENCE

- 1▶ "It's only domestic."
- 2▶ "It can't be that bad, if it were, you would have left."
- 3▶ "What did you do to make him hit you?"
- 4▶ "He's never hit you, so it's not really abuse, is it?"
- 5▶ "Why don't you just leave?"
- 6▶ "I don't believe X would do something like that, he's always so charming and attentive to you."
- 7▶ "It must be the stress of work that caused it."
- 8▶ "Don't be such a nag."
- 9▶ "If he stops drinking/using drugs, he will stop being violent."

HAND-OUT 4

CASE STUDY A

B. and A. had been in a relationship for 3 years at the time of this incident. There had been past incidents of violence during the relationship but B. had never reported any of them to the police. She didn't report them because A. always seemed very remorseful after each incident. He blamed the violence on the stress of his job and the fact that B. was always 'nagging' him about his drinking and drug consumption. On the day of the incident, B. was treating A. to a night out because it had been his birthday during the week. They decided to go away to a hotel for the weekend. On the way up, B. gave A. her bank card and pin number to withdraw some cash for the weekend. When they arrived at the hotel, A. started smoking cannabis. When B. complained, he started shouting at her that it was his birthday and he could do what he wanted. B. continued to argue with him and A. punched her in the face, breaking her nose in the process. The manager of the hotel came to their room because of the noise. He saw that B. was upset and he saw that her nose was bleeding. He asked her what had happened and she told him that A. had punched her in the face and had broken her nose. The manager told A. that he was going to call the police and A. punched the manager in the face as well, breaking his glasses and cutting him above his left eye. A. ran out of the room, whilst the manager was calling the police. When the police arrived, they searched the hotel for A. and found him at the cash machine in the hotel lobby. He had B.'s bank card and had withdrawn some money from her account. The police informed A. of B.'s and the manager's statements. He admitted hitting B. and the manager. He also admitted to taking the money out of B.'s bank account. A. was arrested by the police and charged with causing bodily harm to B. and the manager. B. came to court with him and said that she wanted to withdraw her statement and that she did not want to pursue the case anymore.

PROSECUTORS/INVESTIGATORS

You are the prosecutor/investigator in this case and have to answer to this questions:

- ▶ Is it in the public interest to pursue this case?
- ▶ Do you have enough evidence to pursue the case?
- ▶ Do you agree with the charges that A. faces? If not, what charges would you bring?
- ▶ How will you respond to B.'s request to withdraw her statement?

JUDGES

You are the judge in this case:

- 1▶ Which protection measures would you apply for B.?
 - ▶ Pre-trial detention?
 - ▶ Removal of A. from the common residence?
 - ▶ A no-contact ban?
- 2▶ The case of B. and A. is now set for trial. There are 5 witnesses for the prosecution: B., the hotel manager, two police officers and a doctor. The only witness for the defence is A. At the last minute, B. refuses to participate in the court proceedings or to testify.
 - ▶ How would you react if the victim refused to participate in the court proceedings?
 - ▶ What could you do to facilitate B.'s testimony at trial?
- 3▶ Finally, B. changes her mind and, before the trial starts, the prosecution makes an application for B. to give her evidence from a different location.
 - ▶ What information do you need in order to help you make a decision on B.'s application to testify?
 - ▶ Which evidence will be particularly relevant?
- 4▶ You have heard evidence from all of the witnesses and were satisfied so that you are sure that A. committed the crimes he was charged with. You have adjourned the case for sentencing.

- ▶ What information would you need from the prosecutor to help you issue an appropriate sentence?
- ▶ What factors would you take into account in sentencing A.?
- ▶ What other measures are available in addition to sentencing A.

HAND-OUT 5

CASE STUDY B

A. was 58, lived in P town, was married to N.C, and they had four children. On 24 June and 3 September 2016, N.C. physically assaulted A.

In the report drafted on 24 June 2016, the police officer on duty mentioned that when he had arrived at the scene of the incident he had found that N.C. had locked A. out of their joint residence.

A forensic medical certificate issued on 28 June identified numerous bruises on A.'s face, arms, back and thorax, which required five to six days of medical care.

A second forensic medical certificate, issued on 6 September 2016, stated that A. had several bruises on her arm and thighs. It was possible the injuries had been caused on 3 September. They required two to three days of medical care.

On 8 September, A. was again physically assaulted by her husband. After the arrival of the police, A. was taken to hospital by ambulance. She was diagnosed with an open facial trauma and a contusion of the nasal pyramid. According to a forensic medical certificate issued on 13 September 2016, the injuries might have been caused by impact with or on a hard object, and required nine to ten days of medical care.

In their duty reports for the above dates, the responding police officers noted that she had been injured in a domestic dispute, and that they had informed her that she could lodge formal complaints against N.C.

On 3 August and 2 October, A. lodged complaints with the prosecutor's office attached to the P town District Court, alleging that she had been physically assaulted by her husband in their home, in the presence of their children, on 24 June, and 3 and 8 September. She attached copies of the medical certificates drawn up after the incidents.

On 28 August, A. also sent a letter to the H County police chief, in which she alleged that she had been the victim of repeated acts of violence by her husband, who often assaulted her in the presence of their children. She mentioned that on several occasions, N.C. had locked her out of their home and she had asked for help from the police in solving these problems.

On 11 September, A. gave a detailed statement describing the three assaults to the policeman in charge of the investigation. She stated that on 24 June her husband had come home around noon and had started punching her in the face and head and threatened to kill her. She had managed to flee, but when she had returned an hour later her husband had refused to let her back into the apartment. A. also mentioned that N.C. had told the children not to speak about it.

In statements dated 12 September, A.'s mother and brother told the police that throughout 2016, A. had very often come to their house, complaining that N.C. had beaten her, threatened to kill her or that he had locked her out of their apartment.

On 15 November, A.'s and N.C.'s adult daughters, C.B. and C.C., told the police that A. used to drink and became aggressive when she got drunk. They also stated that their father had not hit their mother. C.C. mentioned that although she earned her own living, her father had always given her money. Her mother, on the other hand, had constantly been short of money and had debts to banks.

On 19 November, N.C. was questioned by the police. He stated that he had argued with the applicant over their divorce, but had not laid a hand on her. He added that A. had not been cleaning the house properly and had a drinking problem. He also stated: "I did not hit her so hard as to cause her injury," and, "she may have fallen in the bathroom". N.C. alleged that the medical certificates submitted by A. had been forged.

On 13 and 19 December, A. wrote to the head prosecutor of the prosecutor's office attached to the P town District Court, complaining that N.C., who had moved out of their apartment and had taken two of the children with him, had threatened to kill her when they had accidentally met on the street a week before. A. stated that she feared for her life and asked for the proceedings to be speeded up and for protection from N.C.

On 19 December, the prosecutor's office attached to the P town District Court decided not to press criminal charges against N.C. and imposed an administrative fine of 50 Euros on him. The prosecutor found that A. had provoked the disputes after drinking alcohol and referred to N.C.'s statements and those of A.'s two adult daughters. As regards the alleged threats, it was considered that A. had failed to prove her accusations.

The prosecutor concluded that, although N.C. had committed the crime of bodily harm, his actions had not created any danger to society because he had been provoked by A., had no previous criminal record and was a retired person.

A.'s complaint against that decision was rejected as ill-founded on 25 March 2017.

On 21 April 2017, A. lodged a complaint against the prosecutors' decisions of 19 December 2016 and 25 March 2017 with the P town District Court, asking that N.C. be charged with bodily harm, be convicted and ordered to pay non-pecuniary damages for the suffering she had endured. She alleged that the administrative fine, which N.C. had refused to pay, had not had a deterrent effect on him as he had continued to assault her after the prosecutor's decision of 19 December 2016. She also asked the court to impose criminal sanctions on him and requested permission to submit a recording of a conversation with N.C. in order to prove that she had been assaulted and threatened by him in September 2016.

In the last paragraph of her submission, A. stated that she feared for her life and asked the court to "punish N.C. as provided for by law ... to forbid him from entering the apartment ... and to forbid him from coming near her ..."

At the second hearing before the P town District Court, A. requested a court-appointed lawyer because she did not have the financial means to hire one. The court dismissed the application, finding that the subject matter of the case did not require representation by a lawyer.

By an interlocutory judgment of 23 June 2017, the P town District Court decided to partially quash the prosecutor's decision of 19 December 2016 in respect of the crime of bodily harm and the penalty imposed for it and to examine that part of the case on the merits. The prosecutor's findings in respect of the threats were upheld. The recording was not admitted as evidence because the court considered that it had no relevance to the case.

A. and N.C. gave statements before the court. N.C. explained that on 8 September 2016, A. had been drunk and had threatened him with a knife. In order to defend himself, he had pushed her but he denied having ever hit A. On 10 February 2018, the court heard a statement from their daughter, C.B., who testified as follows:

My father used to hit my mother [the applicant] and us, the children, many times. He used to do it when he had not come home at night and my mother asked him where he had been. Then he would get angry and hit her. The main reason he got angry was lack of money ... Even after July 2017, when I moved out of my parents' apartment, my mother continued to be hit by my father; I saw some of these incidents personally. Before 2016, my mother used to drink alcohol, but it was within normal limits, and in 2016 she stopped drinking. I retract the statement I gave during the criminal proceedings because I gave it under threat from my father.

On 17 February 2018, the P town District Court decided to acquit N.C. of the crime of bodily harm. The court considered that C.B.'s statement could not be taken into consideration, without mentioning any reasons for that decision. The court concluded as follows:

A. has not proved her allegations that on 24 June, 3 September and 8 September ... she was physically assaulted by the defendant. The court considers, also in view of the evidence collected during the criminal investigation, that such assaults by the defendant took place principally because of the injured party's alcohol consumption and because she was not taking adequate care of her four children. The defendant's acts are not so dangerous to society as to be considered crimes and he shall therefore be acquitted of the three counts of bodily harm and shall pay an administrative fine of 120 Euros

The court further dismissed A's claims for damages as ill-founded, without giving reasons. No mention was made in the judgment of A's request for protective measures made in her complaint of 21 April 2017.

A. lodged an appeal on points of law against that judgment. She alleged that N.C. was a violent person who continued to assault her, even after being punished with an administrative fine by the prosecutor on 19 December 2016.

On 12 May 2018, the H County Court dismissed as ill-founded A's appeal on points of law. The court held that the acts of violence committed by N.C. had been provoked by A. and had not reached the level of severity required for them to fall within the scope of the crime of bodily harm. For the same reason, an award for damages was not justified.

On 19 February and 21 April 2018, A. made five complaints to the P town police concerning new incidents of assault or threats by N.C., to which she attached medical reports.

In the meantime, on 27 March, A. asked the H County police to apply the measures provided by law in order to stop the constant assaults by N.C. She stressed that she felt that her life was in danger. This letter was not taken into consideration. The prosecutor found that it could not be considered as a formal complaint because, unlike the other complaints, it did not refer to a specific assault. A. made a similar request to the police on 11 April.

On 29 September, the prosecutor's office attached to the P town District Court decided not to press charges against N.C. for the five incidents described by A. N.C. was however punished with an administrative fine of EUR 25.

The applicant did not lodge any further complaints against the above-mentioned decision.
Relevant national legislation

Article 91

Administrative sanctions

In cases where there is no criminal responsibility, one of the following administrative sanctions may be applied:...

c) a fine between EUR 3 and 500.

Article 180

Bodily harm

1 ▶ Injuries or any other violent actions which cause physical pain are subject to imprisonment of between one and three months or a fine.

1.1 ▶ If the actions provided for in paragraph 1 are committed against family members the penalty is imprisonment of between six months and one year or a fine.

2 ▶ Violent actions that have caused injuries needing medical care of up to 20 days for recovery are punishable by imprisonment of between 3 months and two years or by a fine.

2.1 ▶ If the actions provided for in paragraph 2 are committed against family members the penalty is imprisonment of between one and two years or a fine.

3 ▶ A criminal case shall be initiated upon complaint by the injured party in the situations provided for in paragraphs (1) and (2); the criminal case may be initiated of the authorities own motion.

Art. 193

Threats

“Any threat that a criminal offence shall be committed against a person or against the person’s husband/wife or close relative, if it has the effect of causing that person acute distress, is punishable by imprisonment of between three months and one year, or by a fine. The penalty applied shall not exceed the sanction provided by the law for the offence which was the object of the threat.

The Law on preventing and combating domestic violence provides for measures to protect victims of domestic violence. One measure offers shelter in special centres, while the courts also have the power to order the aggressors to be held in a psychiatric institution or undergo medical treatment, or to ban them from entering the family home. Protective measures could be taken at the request of the victim, or by the authorities or courts of their own motion. The law also provides that personnel specialised in investigating cases of domestic violence have to be appointed at local level by ministries and other public administration authorities.

Article 2

- 1) Domestic violence is any intentional physical or verbal act committed by a member of a family which causes physical, psychological, sexual or pecuniary damage to another member of the same family.
- 2) Domestic violence includes restricting the rights and fundamental freedoms of a woman.

Article 16

1▶ The authorities responsible for investigating cases of domestic violence have the following main tasks:

- ▶ to monitor domestic violence cases ... ; to collect and store information on those cases; to ensure access to this information for the judicial authorities ...
- ▶ to identify situations of risk and to guide the parties involved in a conflict towards specialist services;
- ▶ to guide the parties into mediation;

2▶ In cases of domestic violence the police shall intervene at the request of the victim, of another member of the family, of an authority or on their own motion.

3▶ The police shall immediately notify the competent local authority about the victim's situation

Questions

- 1▶ What do you think the errors were in the authorities' response to the A.'s complaints?
- 2▶ Which Articles of the ECHR would apply to this case? Which standards would the ECtHR apply?
- 3▶ Was the treatment of A. by the national authorities discriminatory based on her gender?

Questions for the facilitators:

- ▶ Did the violence meet the threshold to apply Article 3?
- ▶ Identify the relevant evidence that was presented in this case.
- ▶ Did the forensic medical documents constitute sufficient proof of the A.'s injuries?
- ▶ Did N.C. commit a crime if A. provoked him?
- ▶ Did the authorities correctly apply national legislation?
 - Application of a fine
 - Increased sanctions for committing bodily harm against family members
 - Request for protection order barring the perpetrator from her residence
 - Delays
- ▶ Which international standards were violated?
 - Lack of judicial reasoning
 - Justification of the crime based on provocations and gendered stereotypes
 - No remedy (compensation)
 - No protection was provided despite A.'s repeated requests

HAND-OUT 7

Table B. Exposure to physical violence by intimate male partner:
Women (Lifetime Prevalence)

Percentage of ever-partnered women who filled out a self-administered questionnaire and reported having ever been subjected to the following acts of physical violence by intimate male partners, by background characteristics

Acts of violence	Men	Acts of violence	Women
	(self-reports of violence against female partner)		(reports of experience of violence from their male partner)
	N=696		N=767
Psychological violence/Emotional abuse		Psychological violence/Emotional abuse	
Insulted a partner or deliberately made her feel bad about herself	49.4%	Partner insulted or deliberately made her feel bad about herself	43.6%
Belittled or humiliated a partner in front of other people	3.7%	Partner belittled or humiliated her in front of other people	9.8%
Done things to scare or intimidate a partner on purpose (for example, by the look, by yelling and smashing things)	10.1%	Partner did things to scare or intimidate her on purpose (for example, by the look, by yelling and smashing things)	9.2%
Threatened to hurt a partner	4.3%	Partner threatened to hurt her	4.5%
Hurt people the partner cares about as a way of hurting her, or damaged things of importance to her	3.7%	Partner hurt people she cares about as a way of hurting her, or damaged things of importance to her	4.0%
Percentage of men who perpetrated psychological violence against a female intimate partner	53.3%	Percentage of women subjected to psychological violence by a male intimate partner	45.9%

Physical violence		Physical violence	
Slapped a partner or thrown something at her that could hurt her	12.9%	Partner slapped her or thrown something at her that could hurt her	10.3%
Pushed or shoved a partner	11.4%	Partner pushed or shoved her	7.5%
Hit a partner with a fist or with something else that could hurt her	4.1%	Partner hit her with a fist or with something else that could hurt her	4.6%
Kicked, dragged, beaten, choked or burned a partner	1.7%	Partner kicked, dragged, beaten, choked or burned her	2.8%
Threatened to use or actually used a gun, knife or other weapon against a partner	2.9%	Partner threatened to use or actually used a gun, knife or other weapon against her	0.6%
Percentage of men who perpetrated physical violence against a female intimate partner	17.4%	Percentage of women subjected to physical violence by a male intimate partner	12.5%

Economic abuse		Economic abuse	
Prohibited a partner from getting a job, going to work, trading or earning money	19.3%	Partner prohibited her from getting a job, going to work, trading or earning money	19.5%
Taken a partner's earnings against her will	0.8%	Partner took her earnings against her will	2.9%
Thrown a partner out of a house	2.1%	Partner threw her out of a house	2.2%
Kept money from earnings for alcohol, tobacco or other things for yourself when knowing that the partner was finding it hard to afford the household expenses	2.8%	Partner kept money from earnings for alcohol, tobacco or other things for himself when knowing that she was finding it hard to afford the household expenses	3.0%
Percentage of men who perpetrated economic abuse against a female intimate partner	20.8%	Percentage of women subjected to economic abuse by a male intimate partner	21.3%

Background characteristic	Slapped/ thrown at (QW6)	Pushed/ shoved by partner (QW7)	Punched by partner (QW8)	Kicked/ dragged choked/burned by partner (QW9)	Threatened/ assaulted with weapon (QW10)	Number of women N=634
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Age

18-24	14.0%	12.5%	8.3%	5.2%	6.3%	96
25-34	14.3%	16.2%	7.9%	5.7%	4.7%	190
35-49	13.5%	17.9%	10.5%	8.0%	5.7%	227
50-59	15.0%	17.5%	10.0%	9.2%	7.4%	121

Education

Basic	*	*	*	*	*	7
Secondary	15.0%	15.1%	9.4%	8.1%	6.7%	236
TVET	10.6%	14.5%	7.3%	5.1%	4.0%	177
Higher	15.5%	19.3%	10.2%	7.5%	6.5%	214

Marital status

Registered marriage	11.6%	12.8%	7.5%	5.0%	3.8%	423
Unregistered marriage	16.0%	22.7%	9.3%	5.2%	5.2%	76
Informal union	*	*	*	*	*	6
Boyfriend (not living together)	*	*	*	*	*	7
Single	11.8%	9.7%	9.7%	9.8%	9.8%	61
Separated/ divorced	(42.1%)	(43.2%)	(29.0%)	(26.3%)	(13.2%)	38
Widowed	*	*	*	*	*	23

Residence

Yerevan	15.3%	18.1%	12.1%	9.2%	6.7%	239
Other urban areas	12.5%	15.9%	8.1%	5.4%	5.4%	186
Rural areas	14.1%	15.3%	7.1%	6.2%	5.3%	209

Employment status**

Never worked	15.6%	13.9%	8.9%	6.6%	5.7%	122
Student	(12.9%)	(3.6%)	(10.7%)	(10.7%)	(10.7%)	28
Unemployed	12.5%	16.3%	8.2%	7.4%	6.0%	267
Legally employed	12.8%	19.3	9.1%	6.3%	5.6%	142
Informally employed	22.2%	24.5%	14.5%	9.1%	5.4%	56
Childcare or other leave	*	*	*	*	*	17
Total	14.1%	16.5%	9.3%	7.1%	5.9%	634

