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Guideline on Gender-Sensitive Approach for Adjudicating Gender-Based Violence Cases

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Introduction

Violence against women (VAW), including domestic violence, is one of the most serious forms of gender-based violations of human rights in Europe that is still veiled in silence.[1]Council of Europe adopted a number of conventions and recommendations, guiding and influencing gender equality developments in Europe and worldwide. This Guidelines is mainly built upon three Council of Europe documents: the European Convention on Human Rights, the Convention on Preventing and Combating Violence against Women and Domestic Violence and Gender Equality Strategy 2018-2023.

The Guidelines also makes references to the documents developed by the United Nations (the UN), in particular, to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and its Committee (CEDAW Committee) and the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice.

The European Convention on Human Rights (the ECHR) is Europe's core human rights treaty: Article 1 of the Convention guarantees the rights and freedoms it includes to everyone in the jurisdiction of the 47 member-States of the Council of Europe. This article has been the legal basis for *positive obligations* concept developed by the European Court of Human Rights (the European Court). The principle of non-discrimination on the basis of sex and gender is guaranteed by both Article 14 and Protocol 12 to the Convention. Furthermore, the jurisprudence of the European Court has played an important role in shaping and strengthening the international framework on VAW. The European Court's case law illustrates different ways in which Council of Europe member states have failed to diligently prevent, investigate and punish acts of VAW and domestic violence. The VAW cases concerned different articles of the Convention, such as Article 2 (right to life), Article 3 (prohibition of ill-treatment), Article 4 (prohibition of slavery and forced labour), Article 6 (fair trial), Article 8 (respect for private and family life), Article 14 (prohibition of discrimination). In those cases, the European Court

[1] See: *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, available at https://rm.coe.int/16800d383a (the Explanatory Report)

developed extensive case-law standards which can help to guide the judges in their daily work in adjudicating cases of gender-based violence.

The Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) is a far-reaching and comprehensive treaty that addresses human rights, gender equality and criminal law. The Istanbul Convention sets forth the minimum standards that State parties are required to implement to effectively address violence against women. Some of the core principles of the Istanbul Convention are particularly relevant for the purpose of these Guidelines:

- Prohibition of all forms of discrimination against women and implementation of special measures that are necessary to prevent and protect women from gender-based violence (Article 4)
- Due diligence in investigation, in prevention, in punishment and in provision of reparation (Article 5)
- Gender equality in policies and empowerment of women (Article 6)
- Victim-centred approach**:** placing the rights of the victim at the centre of all measures to prevent and combat VAW; treating victim with respect and sensitivity (Article 7)
- Gendered understanding of VAW (Preamble of the Istanbul Convention)

The Istanbul Convention has a two-pillar monitoring mechanism to assess and improve the implementation of the Convention: the independent Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), and the Committee of the Parties.

The Council of Europe Gender Equality Strategy 2018-2023 (the Equality Strategy) builds upon the vast legal and policy acquis of the Council of Europe as regards gender equality, as well as the achievements of the first Council of Europe Gender Equality Strategy 2014-2017. The new Strategy outlines the goals and priorities of the Council of Europe on gender equality for the years 2018-2023, identifying working methods and main partners, as well as the measures required to increase the visibility of results. The overall goal of the new Strategy is to achieve the effective realisation of gender equality and to empower women and men in the Council of Europe member States, by supporting the implementation of existing instruments and strengthening the Council of Europe acquis in the field of gender equality, under the guidance of the Gender Equality Commission. The focus for the period 2018-2023 will be on six strategic areas:

1) Prevent and combat gender stereotypes and sexism.
2) Prevent and combat violence against women and domestic violence.
3) Ensure the equal access of women to justice.
4) Achieve a balanced participation of women and men in political and public decision-making.
5) Protect the rights of migrant, refugee and asylum-seeking women and girls.
6) Achieve gender mainstreaming in all policies and measures.

This Guidelines refers mostly to the objectives no 1, 2 and 3 which are more relevant for the judges adjudicating criminal cases.

The Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW) is an international tool to which 189 States are party. The Committee overseeing the implementation of CEDAW plays an important role in fight against VAW, particularly through

its recommendations, issues affecting women to which it believes the States parties should devote more attention. Thus, in 1992, the Committee adopted General Recommendation no. 19 on Violence against women, asking States parties to include in their periodic reports to the Committee statistical data on the incidence of violence against women, information on the provision of services for victims, and legislative and other measures taken to protect women against violence in their everyday lives, including against harassment at the workplace, abuse in the family and sexual violence. The European Court referred to it in the case of *Opuz v. Turkey*, when interpreting domestic violence as discrimination against women. 25 years later the CEDAW Committee adopted General Recommendation no. 35, which updates rather than replaces General Recommendation no. 19. General Recommendation no. 35 is testament to the latter's predominance in the normative framework for combating the scourge that is gender-based violence against women and girls. The Committee's General Recommendation no. 28 on the Core Obligations of States Parties under Article 2 of the CEDAW) and no. 33 on Women's access to justice are of particular interest for the purposes of this Guidelines.

The updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (the UN updated Model Strategies and Practical Measures) were adopted by the UN in order to assist criminal justice systems and professionals in meeting their due diligence obligations, The document provides a comprehensive set of criminal justice strategies and measures which can assist criminal justice professionals in better addressing the needs of women and ensure their fair treatment in the justice system.

Violence against women

In principle, every person could fall victim of violence in the public or the private domain. However, violence against women stands out as a separate serious and complex phenomenon. Women worldwide are subjected to physical, including sexual violence, psychological and economic violence *because of* their gender. Violence accompanies a woman from childhood throughout her life, be it at school, home, work or elsewhere. If one abstracts away from legal discussions about when life begins and whether a fetus could be considered a person,[2] it is clear that VAW begins even before a baby girl is born - gender stereotypes are at the foundation of selective abortions.

The scale of VAW affecting the whole world is alarming. For example, according to the global estimates published by World Health Organisation (WHO), about 1 in 3 (35%) of women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime.[3] VAW affects all layers of society in terms of general well-being, health and safety, productivity and public expenditure. Children are often severely impacted by the violence against their mother, directly or indirectly by witnessing it. Besides, the economic high-cost falls on the society as a whole, not only on the victim.

Key definitions

Here is an overview of some key definitions used in the present Guidelines:

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[2] The Council of Europe documents do not recognise the right to life of a fetus.

[3] See: *Global and regional estimates of violence against women. Prevalence and health effects of intimate partner violence and non-partner sexual violence*, WHO, 2013.

- "**Violence against women**" and "**gender-based violence against women**"

According to Article 3 of the Istanbul Convention, "**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.

The same Article stipulates that "**gender-based violence against women**" means violence that *is directed against* a woman because she is a woman or that *affects women disproportionately*.[4]

Addressing VAW as a violation of human rights empowers victims as active rights-holders. Such recognition also clarifies the binding obligations on States to prevent, eradicate and punish such violence. Besides, to meet their human rights obligations States should seek to transform the social and cultural norms regulating power relations between women and men, and other linked aspects of subordination (see also the *"Violence against women as a form of discrimination"* section of the present Guidelines).[5]VAW is an extreme expression of inequality on the ground of sex. It is a violation of human dignity, and in its worst forms can manifest itself as a violation of the right to life.

- **"Domestic violence"** and **"intimate partner violence"**

Article 3 of the Istanbul Convention describes "**domestic violence**" as all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim. Although the term "domestic" may appear to limit the context of where such violence can occur, the violence can often continue after a relationship has ended. Therefore, a joint residence of the victim and perpetrator is not required to consider the violence as "domestic".

Domestic violence is considered one of the forms of VAW: even though all person can be victim of domestic violence, it affects women disproportionately (Article 2.1 of the Istanbul Convention). Therefore, the States must pay a particular attention to women in their efforts to combat domestic violence.

Furthermore, domestic violence is the most widespread form of the VAW.

Domestic violence **between current or former spouses or partners** is sometimes called **"intimate partner violence"**.

- **"Gender"** means the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men (Article 3 of the Istanbul Convention). Whenever this Guidelines refers to the terms "victim" and "women", that includes girls under the age of 18 too.
- "**Justice actors**": for the purposes of this Guidelines, the term "justice actors" is used as an umbrella term covering investigators, prosecutors and judges or other adjudicators.

Forms of violence against women

VAW manifests itself in many forms, such as:

- Domestic violence/intimate partner violence;

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[4] It is also important to note that the terms gender-based violence and VAW are often used interchangeably, due to the fact that gender-based violence mostly affects women and girls.

[5] See: *Preventing and Responding to Gender-Based Violence: Expressions and Strategies,* Sida, 2015.

- Sexual harassment (any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment);
- Rape, including widespread or systematic rape during armed conflicts;
- Forced marriage;
- "Honour" crimes;
- Stalking (intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety);
- Trafficking in women/forced prostitution;
- Female genital mutilation;
- Forced abortion and forced sterilisation, etc.

Forms of VAW are also differentiated according to the type of harm it inflicts or likely to inflict: physical, sexual, psychological violence or economic abuse. Typically, a victim is subjected to several forms of VAW. The following examples illustrate how forms of violence against women and girls overlap and intersect:[6]

- Intimate partner violence may include not only physical assaults, sexual violence and psychological abuse but also stalking, of which the latter takes place mostly in the post-separation period.
- Some women are coerced into prostitution by abusive partners.
- Child sexual abuse can be connected to early entry into the sex industry.
- Sexual abuse in childhood increases the likelihood of experiencing sexual violence and/or domestic violence as an adult.
- Forced marriage often includes coerced sex.
- Child marriage often results in forced sex.
- Trafficked women and girls are repeatedly raped.
- Victims of domestic violence are more likely to be repeat victims than other victims of crime.
- Domestic violence is likely to become more frequent and more serious the longer it continues and can result in death, which may meet the criminal elements of gender-related killings.
- Many perpetrators are known to the victim, despite the form the violence takes, i.e. intimate partners in domestic violence, parents in forced marriages, families in trafficking women and girls.

Violence against women as a form of discrimination

The fact that violence has a gendered dimension is internationally recognised. Thus, United Nations Declaration on the Elimination of Violence against Women describes VAW as *"…a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full*

[6] See: Kelly, L. and Coy, M., *Building Blocks: A Strategy and Action Plan for Addressing Violence Against Women and Girls in Thurrock,* March 2012, available at:

www.thurrock-community.org.uk/sericc/pdf/thurrock_vawg_201203.pdf

advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men."[7]
Also, the Istanbul Convention in Articles 4.2 and 4.3 emphasises that the enjoyment of the right to be free from violence is interconnected with the States' obligation to secure equality between women and men to exercise and enjoy all civil, political, economic, social and cultural rights.
The CEDAW Committee in its general recommendation on violence against women no. 19 helped to ensure the recognition of gender-based violence against women as a form of discrimination that "seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".[8] This approach was confirmed by the European Court in the case of *Opuz v. Turkey* (for more detailed discussion of the case see the "*Case reminder: protective measures*" section of the present Guidelines).
A *gender sensitive approach* is one that attempts to redress gender inequalities by considering the specificities of women's and men's experiences and needs. It requires paying attention to the different roles and responsibilities of women/girls and men/boys that are present in specific social, cultural, economic and political contexts. This approach is required if women are to be guaranteed universal human rights and to be free from discrimination.[9]
Special measures that are necessary to prevent and protect women from gender-based violence are not considered discrimination (Article 4.4 of the Istanbul Convention).

Impact on the victims

VAW can have a devastating effect upon the victim. The consequences can be short- and long-term, physical, psychological and social. There can be serious immediate and long-term implications for health and life functioning, including sexual and reproductive health, increased vulnerability to HIV/AIDS and other sexually transmitted infections, unwanted pregnancy and unsafe abortions, depression, anxiety, phobias, post-traumatic stress disorder, sleep disturbance, suicidal ideation and attempts, substance abuse problems, eating disorders, and difficulties at work and school. One of the structural impacts is that the threat of violence against women undermines and restricts women's participation in public life. Sexual violence has particularly serious consequences for the physical, mental and social well-being of victims, who are often ostracised by their communities.
Victims of VAW may exhibit a condition called **"battered woman syndrome"**. That condition describes a pattern of behaviour which develops as a result of repeated violence committed by an intimate partner. Battered woman syndrome is suffered by women who, because of repeated violent acts by an intimate partner, may suffer depression and are unable to take any independent action that would allow them to escape the abuse, including refusing to press charges or to accept offers of support.[10]

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[7] See: The United Nations Declaration on the Elimination of Violence against Women.

[8] See: the CEDAW Committee's General Recommendation No. 19 on violence against women, (1992) UN doc. CEDAW/C/1992/L.1/Add.15.

[9] Gender Equality Glossary for further definitions of gender-sensitive and gender-blind approaches, the Council of Europe, 2015.

[10] See: *Updated Model Strategies and Practical Measures for the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice*, the UN General Assembly resolution 65/228, annex, footnote 23 to paragraph 15(k).

A victim of VAW may repeatedly pass through a so-called **cycle of violence** composed of three phases:[11]

- ***A tension-building phase***: begins with anger, blaming and increased tension. Many women learn to recognize this phase and try to control it by becoming nurturing and attempting to keep the peace. In this phase the abuser is edgy, has minor explosions; may become verbally abusive. Minor hittings, slapping, other incidents begin. The victim feels tensed and afraid, like walking on eggs; feels helpless, becomes compliant, accepts blame. Often at this stage the threat of violence is not reported to the police or if reported, the case is minimized. This encourages the abuser to proceed to the next phase.
- ***A violence phase***: is the explosion of violence from the abuser. At this phase the tension becomes unbearable. The victim may provoke the incident to get it over with. Serious battering incident happens. The victim may cover up the injuries or look for help. For women who have experienced violence before, a threat of violence can be disabling. The victims may be grateful that the violence ends and may consider themselves lucky that it was not worse, no matter how bad their injuries are.
- ***"Honeymoon" phase***: is the contrite and loving stage of the cycle. Where the abuser displays loving and calm behaviour and often begs for forgiveness and promises to change; may offer gifts, flowers, do special gestures for the victim. The victim is trusting, hoping for changes, wants to believe the partner's promises.

Understanding the psychology of a victim and behaviour patterns displayed by her is crucial in adopting an intelligent and effective justice responses to VAW cases.

Consequences for the society

VAW has consequences not only for an individual victim, but also for the wider society. In particular, because it is a form of discrimination. VAW is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.

VAW causes pain, fear and distress, reduces the capacity of victimised women to contribute productively to the family, the economy and public life, and drains the resources of social services, the justice system, health care agencies and of employers – costs that must be seen both in terms of human suffering and of economic loss. In a broader view, it lowers the overall educational attainment, mobility and innovative potential of a significant proportion of the population: the women who are victimised, the children growing up witnessing the violence, and even the perpetrators who resort to destructive acts are restricted in their potential.[12]

Children who witness violence against women experience similar trauma and effects as the primary victim of the violence and are more likely to be future perpetrators or victims of such violence.[13]

States' obligations in combating VAW

According to the ECHR as interpreted by the European Court and the Istanbul Convention, the States have a **negative obligation** to refrain from engaging in any act of violence against women

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[11] See: *Handbook on effective prosecution responses to violence against women and girls*, the United Nations Office on Drugs and Crime, 2014.

[12] See: *Gender and Policy in France*, by Gill Allwood and Khursheed Wadia, 2009.

[13] See: *Handbook on effective prosecution responses to violence against women and girls*, the United Nations Office on Drugs and Crime, 2014.

and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation (see, for example, the case of *Aydin v. Turkey*; and Article 5.1 of the Istanbul Convention).

Apart from that obligation, the ECHR as interpreted by the European Court and the Istanbul Convention set out **positive obligations**: The States are required to *prevent* VAW and when they fail to do so and the violence occurs, they have to *protect* the victims and to *prosecute* the offence of violence.

Thus, the European Court held in numerous cases of domestic violence against women that national authorities have a positive obligation to take protective measures to prevent such violence, when the authorities "*knew or ought to have known*" at the time of the existence of a "*real and immediate risk*" to the life or health of an individual (see, for example, *Kontrova v. Slovakia* (31 May 2007) and *Hajduova v. Slovakia* (30 November 2010)). Authorities ought to intervene even when the threat from the potential aggressor has not yet materialised as physical violence (*Hajduova v. Slovakia*). Authorities may act *ex officio*, sometimes even against the expressed wish of the victim (*Hajduova v. Slovakia*). In some cases, temporary emergency protective measures may be taken (see, for example, *Bevacqua and S. v. Bulgaria* (12 June 2008).

- **Prevention**

The Istanbul Convention sets out a range of measures which the States must implement in order to prevent VAW. Those measures are, for example:

- to promote the right of women to live free from violence (Articles 4.1, 5.2 and 12).
- to promote or conduct awareness-raising on VAW, and to conduct relevant educational measures (Articles 13, 14 and 17);
- to provide or strengthen appropriate training for the professionals dealing with victims or perpetrators of VAW (Article 15);
- to set up or support treatment programmes aimed at preventing perpetrators from re-committing VAW (Article 16).

Since VAW requires State-wide effective, comprehensive and coordinated policies and a holistic response, **justice actors** also play certain role in its prevention. For example, when adjudicating VAW cases judges can ensure that culture, custom, religion, tradition or so-called "honour" is not be considered as justification for any acts of VAW. They also can, for example, order a perpetrator to attend a special treatment program aimed at adopting a non-violent behaviour. However, judges' role is more prominent when it comes to protective measures and prosecution of VAW. Therefore, the present Guidelines focuses on those aspects of the combat of VAW.

- **Protection**

One of the crucial elements of a State's positive obligation to protect against VAW is to criminalise the most serious forms of VAW and to make available **criminal law remedies**.

Positive obligations to protect against VAW also includes an obligation to make available **civil law remedies** for victims. The States must take the necessary legislative or other measures to provide victims with adequate civil remedies against the perpetrator. Adequate civil remedies must be provided also 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 of the Istanbul Convention). Victims' right to claim compensation from perpetrators must be ensured. Besides, 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 (Article 30 of the Istanbul Convention).
Article 18 of the Istanbul Convention requires the States to take the necessary legislative or other measures to protect all victims from *any further acts of violence*.
This Guidelines focuses on criminal law responses to VAW.

- **Prosecution**

Obligation to prosecution is ensuring that the most serious forms of VAW is **criminalised**, **effectively investigated** and **appropriately punished**. It is also called a procedural obligation. This obligation is discussed in detail in the present Guidelines (see also, Chapters below on *Criminal justice responses to violence against women*)
The Istanbul Convention also speaks about the obligation **to provide reparation** for acts of VAW (Article 5.2). The term "*reparation*" utilised the Istanbul Convention may encompass different forms of reparation under international human rights law such as restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition.

Access to justice

Barriers to access to justice

Women encounter different types of obstacles with respect to access to justice within and outside the legal system.
Legal/institutional barriers to access of justice could be:

- discriminatory or gender-blind legal frameworks which do not take into account women's social situation;
- ineffective legal procedure: the lack of gender-sensitive procedures in the legal system;
- problematic interpretation and implementation of the substantive law;
- victim blaming by justice actors;
- gender stereotyping, false perceptions and bias by justice actors;
- lack of access to free or low-cost legal aid.

To those barriers of legal/institutional nature can be added several obstacles of social, psychological, cultural and economic nature, such as:

- general fear of "tarnishing the family's reputation", of being isolated from family and friends, the fear that children will be taken away;
- victim-blaming by the community;
- lack of awareness of one's legal rights and legal procedures;
- lack of financial resources;
- multiple discrimination. For example, immigration status of a victim can be a huge barrier to reporting VAW;
- complex needs arising from disability, substance abuse, mental illness or arising from the types of violence experienced can also be an obstacle for seeking justice.

The present Guidelines discusses in more detail the following barriers with respect to access to justice: some of the legal/institutional barriers, including lack of access to legal aid, multiple discrimination, victim blaming, stereotyping, including judicial stereotyping, and false perceptions, and secondary victimisation.

Legal and institutional barriers

Victims/survivors of VAW experience a number of challenges along the justice chain. Before criminal proceedings begin and during the investigation/pre-trial phase those challenges are, for example:[14]

Justice chain	**Challenges for women survivors of violence**
Prevention	Not all forms of violence against women may be criminalized (e.g., marital rape).
Early detection and reporting	The onus is often on the survivor to file charges, make a formal denunciation or specifically request prosecution, either in law or practice. Prevalent gender bias and stereotypes by law enforcement personnel results in non-reporting of GBV against women.
Investi-Gation	- Statutes of limitation or other legal prescriptions bar survivors from pressing charges after a certain period of time. - Survivors are often required to wait long hours at police stations. They are also interrogated numerous times by male police officers, examined by male forensic officers, treated disrespectfully and deprived of privacy when being interrogated and providing statements. - Circumstantial evidence is often inadmissible, making the survivor the sole source of evidence. - Evidentiary rules frequently treat physical evidence as essential to proceeding with a criminal charge, which is challenging in such cases where there is delayed reporting or the violence involved is psychological, emotional or economic in nature. - There is often no access to immediate, urgent or long-term protection measures, as well as risk assessments or safety plans for survivors. - Survivors are regularly required to testify several times and often in the presence of the accused. - The police may request payment for transportation and fuel (gas/petrol) to investigate the crime. - In many countries, survivors are given a set of forms by the police to submit to health services for medical examination (as part of the process of gathering evidence) as well as for purposes of prophylaxis care. -Sometimes such forms are not user-friendly for medical examiners and may not yield the required information that is needed for evidence purpose
Pretrial	Most survivors are unfamiliar with the criminal justice process, do not have access to legal aid services and are therefore uninformed of what is

[14] See: *A Practitioner's Toolkit on Women's Access to Justice Programming, Module 3, Ending Violence Against Women,* by the UN Women (2018), available at:

https://www.ohchr.org/Documents/Publications/PractitionerToolkit/WA2J_Module3.pdf

	expected of them.
Decision to prosecute	Criminal procedure and court administration generally do not allow for the particular vulnerability of women survivors to be taken into consideration, as such, their specific needs are often not accommodated.
Trial and sentencing	- Judicial practice or existing procedural requirements often lead to decisions that are not survivor-friendly, which results in alienating survivors from the process and leading them to withdraw the case or give up. Attrition rates thereby increase, and conviction rates decrease. - Evidentiary rules may allow cross-examination on sexual or personal history, require corroboration or allow for adverse inference resulting from delayed reporting.
Corrections	Survivors are not informed of the release of the offender, even when both survivor and offender are from the same community.

Access to legal aid

Judicial and administrative procedures are often highly complex. Crucial element in guaranteeing that justice systems are economically accessible to women is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law.[15]

According to Article 57 of the Istanbul Convention, the States must provide for the right to legal assistance and to free legal aid for victims of VAW under the conditions provided by their internal law.

The ECHR as interpreted by the European Court also requires provision of free legal aid to economically poor victims of crime or claimants in civil cases under certain conditions. The case of *Airey v. Ireland* (1979*)* demonstrated that the judicial remedies that can allow a victim of domestic violence to escape the violent situation through, *inter alia*, divorce or separation proceedings shall be accessible and effective in order to guarantee practical – not just theoretical or illusory – protection to the victim in a vulnerable position. Effective access may require that the victim is afforded legal aid due to the complexity of the case, the victim's unfamiliarity with the court proceedings but also from the point of view of the victim's lessened capacity to represent her interests due to her emotional involvement in the case.

In another case which was examined by the European Court, the case of *Balsan v. Romania*, both at the investigation level and before the courts the national authorities considered the acts of domestic violence as being provoked by the applicant herself and regarded them as not being serious enough to fall within the scope of the criminal law. Moreover, the applicant was denied the services of a court-appointed lawyer because the courts considered that legal representation for the victim was not necessary in such cases. On this point, the European Court stressed in its judgment 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. The European Court held that an approach such as the one taken by the authorities in the circumstances of the case – where the

[15] See: the CEDAW General Recommendation No 33, paragraph 36.

existence of acts of domestic violence had not been contested – deprived the national legal framework of its purpose and was inconsistent with international standards with respect to VAW and domestic violence in particular.

§ 294 of the Explanatory Report explains Article 57 of the Istanbul Convention concerning the legal aid as follows:
In the immediate aftermath of violence many victims of violence against women and domestic violence may be forced to leave all their belongings or jobs behind on a moment's notice. Judicial and administrative procedures are often highly complex, and victims need the assistance of legal counsel to be able to assert their rights satisfactorily. In these cases, it might be difficult for victims to effectively access legal remedies because of the high costs which can be involved in seeking justice. For this reason, the drafters believed it essential to place ***an obligation on Parties to provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law.***
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§ 53 of the Equality Strategy reads as follows:
Equal access to justice implies the right to an effective remedy, the right to a fair trial, the right to equal access to the courts, and ***the right to legal aid and legal representation****.*

Multiple discrimination

Even though violence against women occurs in all sectors of society, some groups of women are more vulnerable to violence and its consequences. Gender-based discrimination intersects with discrimination based on other forms of "otherness". **Multiple or intersectional discrimination** on the grounds of ethnicity, age, disability, sexual orientation or gender identity, among others, disproportionately marginalises particular groups of women.
Therefore, intersectionality is addressed as a transversal issue across the priority objectives of the Equality Strategy. The Council of Europe admits that women exposed to multiple and intersectional forms of discrimination **suffer more from inequality in access to justice**[16].
For example, a migrant woman may be reluctant to report and complain about acts of VAW because of a belief that her immigration status is or may be dependent on abusive partner/parent, a fear that work permit or labour status is tied to perpetrator e.g. employer, and a belief that protection is non-existent or limited.
Categories or groups of women who might be more vulnerable to VAW due to multiple discrimination are, for example:

- Women from minority communities and indigenous women
- Women with disabilities or mental illness
- Destitute women and homeless
- Women involved in the commercial sex trade
- Older women, widows and young women and girls
- Refugees, internally displaced and migrant women
- Women living in rural or remote communities
- Women living in institutions or in detention
- Women living in situations of armed conflict or in territories under occupation
- Women with HIV/AIDS

[16] See: The Equality Strategy 2018-2023, § 54.

- Lesbians and transgender persons
- Drug abuser women

Article 4.3 of the Istanbul Convention requires that the implementation of the Convention's provisions, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.

The European Court dealt with multiple discrimination in the case of *B.S. v. Spain* (24 July 2012). The case concerned a woman of Nigerian origin who was stopped by the police while working as a prostitute. The applicant complained in particular that the national police officers had verbally and physically abused her when stopping her for questioning. She further alleged that she had been discriminated against because of her profession as a prostitute, her skin colour and her gender. The European Court considered that the domestic courts had not taken into account B.S.'s special vulnerability inherent in her situation as an African woman working as a prostitute. The authorities had not taken all possible measures to ascertain whether or not a discriminatory attitude might have played a role in the events, *in violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 3* of the Convention.

Victim blaming

Attitudes, beliefs and behavioural patterns play an important role in adjudication of cases concerning VAW. Unfortunately, often **the responsibility is attributed to the woman, victim of violence**, and not to the male perpetrator. As a result, victims, rather than being treated with respect, confidentiality and professionalism, are *not believed* when telling their stories, or they are told they are lying about the abuse for some personal or legal advantages. Other example of blaming attitude is asking the victim *irrelevant* (for example, a question "what were you doing in that park in the middle of the night?") or even *intrusive questions* (for example, a question about past sexual experiences).

A form of empowering the victims is to treat them with attention and respect as well as to avoid victim blaming. This leads to an increased trust of the victims in the judicial system and increases the likelihood of reporting.

The 20-year review of the Beijing Declaration and Platform for Action - a 2015 summary report prepared by the UN Women - reveals that social norms which perpetuate or justify discrimination and violence serve as a major obstacle to ending violence against women. It finds that victim blaming attitudes are widespread across all countries: data from 37 developing countries shows that 21% of women believe that a husband is justified in beating his wife if she argues with him. Similarly, 27% of women believe that a husband is justified in beating his wife if she neglects the children.[17] While those surveys collected data from women about their attitudes, surveys of men also reveal high levels of acceptance of violence against women. A 2010 survey conducted in 15 out of 27 countries of the European Union asked whether women's

[17] See: *The Beijing Declaration and Platform for Action Turns 20*, Summary Report, p. 21, the UN Women, (New York, 2015).

behaviour was a cause of domestic violence against women. The proportion of individuals who agreed with this statement averaged 52 per cent and ranged from 33 to 86% across countries[18]

Victim blaming in rape cases is of even greater dimension. The common false perception about rape is that the victim has either enjoyed it or wanted it, or she asked for it or brought in on herself or she lied or exaggerated. Judges may buy into victim blaming in an attempt to distance themselves from the victim and the crime thereby preserving the perception that they are safe if they do not make the same choices as the victim.[19]

Victim-blaming can lead to **secondary victimisation** of the victims of the VAW and specific measures must be taken to avoid this situation (see "*Measures to be taken to avoid secondary victimisation*" section of the present Guidelines)**.**

Stereotyping, judicial stereotyping and false perceptions

Gender stereotypes are preconceived social and cultural patterns or ideas whereby women and men are assigned characteristics and roles determined and limited by their sex. **False perceptions** are indicators of preconceived ideas and stereotypes.

Common false perceptions are often related to, for example:

- The victim's wish to leave the abusive partner
- Marital rape (for example, "a marital rape doesn't exist: it is a wife's obligation to have sex with her husband when he wants that")
- "Provocation" by the victim
- Expression of consent (for example, "she didn't resist, so she wanted to have sex")
- "Private matter" (for example, "violence at home is a family issue and other people and the state should not interfere" or "quarrels in a family is a usual thing")
- Economic independence of the victim (for example, "she has the resources, she could leave her abusive partner").

Here is an example of a false perception about a rape victim[20]

***Myth**:* Some women deserve to be raped, it is their fault. Either they're asking for it (sexy clothes incite men to rape), they wanted it, or they put themselves in dangerous situations (prostitution, drunk).

***Fact**:* Sexual violence is never the victim's fault. No other crime victim is looked upon with the same degree of blameworthiness, suspicion, and doubt as a rape victim. Victims who have been drinking, using drugs, dressing in a way that are perceive as provocative, being prostituted, or engaging in any other behaviour that may inappropriately cause victim blaming are not asking to be raped. Consent must be explicit. "No" means "No," no matter what the situation or circumstances. It doesn't matter if the victim was drinking or using drugs, if she was out at night alone, was lesbian, was sexually exploited, was on a date with the perpetrator, or if the perpetrators believed the victim was dressed seductively. No one

[18] See: Enrique Gracia, *Intimate Partner Violence against Women and Victim-Blaming Attitudes among Europeans*, Bulletin of the World Health Organization, vol. 92, No. 5, p. 380, the WHO, (Geneva, 2014).

[19] See: Handbook on effective prosecution responses to violence against women and girls, the United Nations Office on Drugs and Crime, 2014.

[20] See: *Handbook on effective prosecution responses to violence against women and girls*, the United Nations Office on Drugs and Crime, 2014.

asks to be raped. The responsibility and blame lie with the perpetrator who took advantage of a vulnerable victim or violated the victim's trust to commit a crime of sexual violence.

Persistent economic and social inequalities between women and men, gender bias and gender stereotypes result in unequal access of women and men to justice. Unfortunately, **stereotyping is manifested in the various stages of the legal process**: the investigation, trial and judgement phases. Judges, prosecutors, law enforcement officials and other actors can allow stereotypes to influence investigations, trials and ultimately the judgement.[21] Accordingly, the actors in the justice system can apply, perpetuate and reinforce stereotypes. Consequently, stereotypes are reason and consequence of the inequality.

Because stereotyping restricts the full development of the capacities of women and men, the Equality Strategy's first goal and objective is to prevent and combat gender stereotyping and sexism. In the strategic objective 3 of the Strategy, it is indicated that "cultural barriers, fear and shame also impact women's access to justice, as do discriminatory attitudes and the stereotypical roles of women as carers and men as providers, which still persist in civil and family law in many jurisdictions. The Council of Europe recognises that "these barriers may persist during investigations and trials, especially in cases of gender-based violence, and lead to high levels of **attrition** and even **under-reporting**".[22]

The Istanbul Convention requires the 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 men" (Article 12.1).
***
Article 42 of the Istanbul Convention requires the States to take the necessary legislative or other measures to ensure that in criminal proceedings initiated following the commission of any of the acts of VAW, **culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts**. This cover, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.
Article 42 also stipulates that incitement by any person of a child to commit any of the acts of VAW shall not diminish the criminal liability of that person for the acts committed.

The CEDAW Committee in its general recommendation no. 33 on women's access to justice emphasised that "women should be able to rely on a justice system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. Eliminating judicial stereotyping in the justice system is a crucial step in ensuring equality and justice for victims and survivors."[23]

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[21] See: *General Recommendation No. 33 on women's access to justice*, paras. 26-27, the CEDAW Committee. 2015.

[22] See: The Equality Strategy, 2018-2023, § 54.

[23] See: *General Recommendation no. 33 on women's access to justice*, para. 28, the CEDAW Committee, 2015.

Victim-centred approach

Victim safety and well-being are paramount goals of criminal justice response. A victim-centred approach to criminal justice system responses recognises that victims are central participants in the criminal justice process, and they deserve timely, compassionate, respectful and appropriate treatment.

Victims have **the right to be well informed** in order to make their own decisions about participation in all the stages of the criminal justice process. Victims know what they need and the risks they face. The criminal justice system response is to **assist them in managing risk** and **ensuring victim safety**. The criminal justice system, with all its procedural rules and policies, should be applied **in a manner that empowers** individual women who are victims of violence. Domestic violence, rape and sexual assault, sexual harassment and other forms of VAW often deprive women of their sense of control, autonomy, self-respect and personal privacy. The criminal justice system should seek to restore and reinforce those qualities, while **avoiding measures that re-victimize the victim**.[24]

Respecting victims' rights and having a gendered understanding when dealing with VAW, including domestic violence, are **core principles to be taken into consideration at all stages of the criminal proceedings.**

Judges examining VAW cases should take due account of social, psychological, economic and cultural barriers in front of the victims.

Application of victim-centred approach is not limited to the criminal justice system. This approach should be applied in all sectors where the State deals with VAW or victims of VAW, including the civil justice system. For example, Article 31 of the Istanbul Convention requires the States to ensure that, in the determination of custody and visitation rights of children, incidents of VAW are taken into account; and that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.

> Article 7 of the Istanbul Convention requires that the States undertake comprehensive and coordinated policies that place **the rights of the victim at the centre of all measures** aimed at preventing and combating VAW and are implemented by way of effective co-operation among all relevant agencies, institutions and organisations.

Measures to be taken to avoid secondary victimisation

Trial and trial-related practices often discourage victims from testifying and **re-traumatize** those who choose to do so. Even for those victims who are motivated to testify, trials can be an emotionally difficult experience for them as well as **putting them at further risk of violence**.

A victim's unease during criminal proceedings could be related to:

- unfamiliarity with the legal process;
- uncertainty as to whether she may be required to testify at trial, her shame and embarrassment of having to testify about intimate details in a public forum;
- fear of being in close proximity to the perpetrator and his family;
- fear of being harassed by the defendant in abusive cross examination.

[24] See: Handbook on effective prosecution responses to violence against women and girls, the United Nations Office on Drugs and Crime, 2014.

Justice actors dealing with VAW cases should consider requesting/applying special measures which may facilitate a victim's participation in the proceedings. Thus, the Istanbul Convention requires, that:

- Legal professionals were aware of the dynamics of VAW and ensure that the victim is informed about the legal proceedings and has the necessary protection measures are in place (Article 56)
- The use of insensitive or victim-blaming language or presenting irrelevant evidence relating to the sexual history or other conduct of the victim is not allowed in court proceedings (Article 54)
- - Possibility for governmental and non-governmental organisations and domestic violence counsellors to assist and/or support victims, at their request, during investigations and judicial proceedings is ensured (Article 55.2)

Here are examples of the special practical measures which may facilitate a victim's participation in the proceedings:[25]

Confidentiality measures measures designed to protect the identity of the victim from the press and public	**Victim support measures** measures designed to ease victim's experience during their testimony	**Privacy measures** special evidentiary rules designed to limit the questions that can be posed to a victim during her trial
Removing any identifying information such as names and addresses from the court's public records and media;	Permitting victims to testify in a manner that allows her to avoid seeing the accused (i.e. closed-circuit TV or screens)	Prohibiting questions about the victim's prior or subsequent sexual conduct
Using a pseudonym for the victim	Limiting the frequency, manner and length of questioning	Not requiring corroboration of the victim's testimony (according to national laws).
Prohibiting disclosure of the identity of the victim or identifying information to a third party	Permitting a support person, such as a family member or friend, to attend the trial with the victim	
Permitting victims to testify behind screens or through electronic or other special methods	A video-recorded interview with a vulnerable or intimidated witness before the trial may be admitted by the court as the witness's main evidence	
Allowing in camera proceedings or closed sessions during all or part of	Examination of the witness through an intermediary	

[25] See: Handbook on effective prosecution responses to violence against women and girls, the United Nations Office on Drugs and Crime, 2014.

the trial, i.e. during victim's testimony (excluding public		

The ECHR as interpreted by the European Court also requires adoption of a sensitive approach to victims of VAW during criminal proceedings and avoiding secondary victimisation (see the case-law reminder in the section *Balancing rights*, below)

Provision 15(c) of the UN Updated Model Strategies and Practical Measures states the following:
Member States are urged to review, evaluate and update their criminal procedures, as appropriate and taking into account all relevant international legal instruments, in order to ensure that women subjected to violence are enabled to testify in criminal proceedings through adequate measures that facilitate such testimony, protect their privacy, identity and dignity; ensure safety during legal proceedings; and avoid secondary victimization. In such jurisdictions where safety cannot be guaranteed to the victim, refusing to testify should not constitute a criminal or other offence.

Victim's rights

To break down barriers to justice the Istanbul Convention stipulates a number of safeguards for a victim of VAW, in particular:

- Adequate and timely information on available support services and legal measures in a language they understand (Article 19)
- Access to services facilitating their recovery from violence including, where necessary legal and psychological counselling, financial assistance, housing education, training and assistance in finding employment (Article 20)
- The availability of civil remedies including the right to claim compensation from perpetrators for VAW offences (Articles 29 and 30)
- For investigations and proceedings to take place without undue delay (Articles 49 and 50)
- The right to be heard and to be informed of the progress of the proceedings;
- The right to have services of an interpreter;
- Protection measures for the victim and her family during judicial investigations and proceedings (protection from intimidation and retaliation; information on their rights and support services available; information on escape or release of the perpetrator; protection of privacy and image; no contact with perpetrator where possible; etc. (Article 56)
- Right to legal assistance and free legal aid for victims under the conditions of their internal law (Article 57)

Alternative dispute resolution

Many States provide or encourage mediation or various other forms of **alternative dispute resolution** (ranging anywhere from quasi-judicial mechanisms, to arbitration to informal mediation or facilitation forum), particularly for domestic violence. It has sometimes been portrayed as positive for women, as it tends to be lower in cost than secular mainstream judicial processes and can be a faster, more flexible process and generally more accessible to women,

particularly rural women[26]. However, it should be handled with particular caution. The Istanbul Convention requires that **mandatory** alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of VAW be prohibited (Article 48). The CEDAW Committee went **further** and called on all States parties to the CEDAW Convention to ensure that cases of VAW, including domestic violence, "are **under no circumstances referred to any alternative dispute resolution procedures**"[27]. Special considerations should be taken into account, with reference to international human rights law, in determining if any alternative dispute resolution is able to provide effective remedies and reparation:

- Women should participate as adjudicators.
- The mechanism should aim to uphold human rights, including women's right to equality.
- Women should receive information about their various options for different forums.
- Women should be free to choose the forum for resolving their dispute.
- There should be equality of arms between the woman and perpetrator using these processes.

Criminal justice response to the violence against women: pre-trial phase

The criminal justice system has a leading role in efforts to prevent and respond to VAW. Criminal legislation sets the standards for what society deems unacceptable conduct, and provides criminal justice officials with the authority to investigate, prosecute and punish gender-based crimes. The objectives of any criminal justice system in cases involving violence against women should be to ensure the victim's safety while holding the perpetrator accountable for his actions, and to send a clear message to society that VAW will not be tolerated.

Criminalisation of VAW

The Istanbul Convention specifically requires criminalisation of the following forms of VAW:

- Psychological violence (Article 33)
- Sexual violence, including rape (Article 36)
- Physical violence (Article 35)
- Forced marriage (Article 37)
- Stalking (Article 34)
- Female genital mutilation (Article 38)
- Forced abortion and forced sterilisation (Article 39)

Besides, the Istanbul Convention requires the States to ensure that sexual harassment be subject to *criminal* or *other legal sanction* (Article 40).

In practice criminal justice response is expected in relation to virtually all forms of VAW because they are intrinsically associated with some degree of either physical, psychological or sexual violence, or even all three.

Effective investigation standards

Article 49.2 of the Istanbul Convention establishes an obligation of the States to ensure that the investigation and prosecution of cases of all forms of VAW are carried out in an **effective manner**. According to the Explanatory Report, this means, for example:

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[26] See: *Women's Access to Justice for Gender-Based Violence*, a Practitioners' Guide no. 12, International Commission of Jurists, 2016

[27] General Recommendation no. 33, "General recommendation on women's access to justice", UN Doc CEDAW/C/GC/33 (2015), paragraph 58(c)

- establishing the relevant facts;
- interviewing all available witnesses;
- conducting forensic examinations, based on a multi-disciplinary approach using state-of-the-art criminal investigative methodology to ensure a comprehensive analysis of the case.

The cases of VAW should be assigned low priority as this contributes significantly to a sense of impunity among perpetrators and has helped to perpetuate high levels of acceptance of such violence.[28]

Measures to ensure effective investigation and prosecution must be taken in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence (Article 49.2 of the Istanbul Convention Investigation). It means that those measures must not be prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 ECHR (see also "*Balancing of the rights*" section of this Guidelines).

The Istanbul Convention requires that prosecution of VAW crimes be accompanied among others by the following safeguards:

- Investigations and judicial proceedings must be carried out **without undue delay** (Article 49.1)
- The rights of the victim must be taken into consideration during all stages of the criminal proceedings (Article 12)
- Excuses on the grounds of culture, custom, religion or so-called "honour" are unacceptable for any act of violence (Article 42);
- Victims have access to special protection measures during investigation and judicial proceedings (see the section on "Measures to be taken during the trial")
- Law enforcement agencies must respond **immediately** to calls for assistance and manage dangerous situations adequately
- All the offences constituting VAW must apply **irrespective of the relationship between the victim and the perpetrator** (Article 43).
- Investigations into or prosecution of offences constituting VAW **should not be wholly dependent upon a report or complaint filed by a victim** and that proceedings may continue even if the victim withdraws their complaint (Article 55, see, also, the case of *Opuz v. Turkey*, 2009).

In *B. V. V. Belgium*, the European Court concluded unanimously that there had been a violation of the procedural aspect of Article 3 ECHR. Authorities are required to carry out an effective investigation, to make a **prompt use** of all available opportunities to establish the facts, and as appropriate, the circumstances surrounding the alleged acts of rape and indecent assault. The investigating authorities have therefore a duty **to assess the credibility of the accusations** and **clarify the circumstances of the case** while observing the requirements of **promptness and reasonable expedition**.

Article 58 of the Istanbul Convention requires that **the limitation period** for initiating any legal proceedings with regard to the offences constituting sexual violence, including rape, forced marriage, female genital mutilation, forced abortion and forced sterilisation continue for a period of time that is sufficient **to allow for the efficient initiation of proceedings after the victim has reached the age of majority**. Hence this obligation applies in relation to child victims, who

[28] See: Explanatory Report, cites above, § 255

are often unable, for various reasons, to report the offences perpetrated against them before reaching the age of majority. The expression "for a period of time sufficient to allow the efficient initiation of proceedings" means, firstly, once these children become adults, they must have a sufficiently long time to overcome their trauma, thus enabling them to file a complaint and, secondly, that the prosecution authorities must be in a position to bring prosecutions for the offences concerned.[29]

Prosecution of sexual violence cases, including rape cases

Prosecution of sexual violence has many functions, including deterrence, justice for victims and affirming the principle of gender equality and women's human rights.

In ***X and Y v. the Netherlands*** (26 March 1985), the European Court found that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on the second applicant was insufficient. This was a case where fundamental values and essential aspects of private life were at stake. **Effective deterrence was indispensable in this area and it could be achieved only by criminal-law provisions.** Observing that the Dutch Criminal Code had not provided her with practical and effective protection, the European Court therefore concluded, taking account of the nature of the wrongdoing in question, that the second applicant had been the victim of a violation of Article 8 of the Convention.

Consent for sexual intercourse must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.

In ***M.C. v. Bulgaria*** (4 December 2003) the applicant, aged 14 (which was the age of consent for sexual intercourse in Bulgaria), was raped by two men; she cried during and after being raped and was later taken to hospital by her mother, where it was found that her hymen had been torn. Because it could not be established that she had resisted or called for help, the perpetrators were not prosecuted. The European Court found a violation of Article 3 ECHR (prohibition of torture) and Article 8 ECHR (right to respect for private life) of the Convention. It Court highlighted States' positive obligation **to prosecute** any non-consensual sexual act, even where the victim **has not physically resisted**, as well as the requirement to enact effective legislation to criminalise acts of VAW. Furthermore, the European Court noted that an **essential element in determining rape and sexual abuse is the lack of consent.** Victims of sexual abuse, especially young girls, often failed to resist for psychological reasons (either submitting passively or dissociating themselves from the rape) or for fear of further violence.

The Istanbul Convention incorporates this judgement and requires state parties to adapt their criminal legislation on sexual violence and rape to focus on the lack of consent as a constituent element of the crime (Article 36.2). It also stipulates that the States must take the necessary legislative or other measures to ensure that the provisions criminalising sexual violence also apply to acts committed against **former or current spouses or partners** as recognise d by internal law (Article 36.3). The criminal offences of sexual violence and rape must be applicable to all non-consensual sexual acts, irrespective of the relationship between the perpetrator and the victim. Sexual violence and rape are a common

[29] See: Explanatory Report, cited above, § 296

form of exerting power and control in abusive relationships and are likely to occur during and after break-up[30]

Interview process

Consideration should be given to the gender of the interviewer (and any interpreter where used) and/or reassurance of the victim. Wherever possible interviews should be conducted without delay and plain language should be used. Victims should be offered the option of having a trusted person present. Interviewers should be alert to issues caused by trauma, memory loss, lack of focus, inconsistent recall and particularly, profound emotional response. Delayed reporting of gender-based violence is common and should not affect the decisions to investigate or prosecute. Do not assume that simply because a woman has delayed in reporting she is not telling the truth. Although evidence could have been lost owing to the delay a full investigation should be undertaken, and the available evidence gathered and reviewed. Similarly, once an offence is reported, delays in pursuing proceedings can cause victims to withdraw allegations or refuse to testify.

"**Battered women syndrome**", which was discussed earlier, also has to be taken into consideration by the relevant authorities. Justice actors should be aware of the impact of trauma and make adjustments to enable the victim to tell her story:

- Attention to the potential for re-traumatisation.
- Dissociation may occur as a psychological self-defence strategy.
- The profound sense of shame and violation experienced by victims of sexual violence may influence their ability to explain what has happened.
- Open questions are crucial but must be asked in a respectful way.
- Cultural considerations concerning gender, subject matter and narrative style must be taken into consideration where relevant.

Charging decisions

- **Exercising prosecutorial discretion**

In many States prosecutors control the doors to the courthouse, deciding who will be charged and what charges will be filed. However, this is not the situation in all jurisdictions. In some States and for some crimes, it is the police who make the charge. However, it is generally the prosecutors' responsibility to approve the charge or decide whether the criminal case should be forwarded or not to the courts. The extent to which prosecutorial discretion exists varies among criminal justice systems. The exercise of the discretion to prosecute or not is onerous as the decision can have serious consequences for the suspect, the victim and the community.

- **Evidence based or absent-victim prosecution**

As it was discussed earlier, victims of VAW experience a number of obstacles in access to justice, in particular psychological obstacles. That often results either in reluctance to report and complaint about violence or in withdrawal of a complaint. Therefore, justice actors should employ special strategies to deal with evidence-based prosecutions or what are also called "absent-victim" prosecutions. For example, prosecutors should plan to instruct police during the investigation to collect corroborating evidence such as physical evidence, medical records, forensic reports, anthropological evidence, and the testimonies of psychologists and other expert

[30] See: Explanatory Report, § 194

witnesses. Prosecutors should plan to use the above evidence and other trial strategies to strengthen cases in which a victim is unavailable to testify.

Article 55 of the Istanbul Convention provides for the obligation of the State to ensure that investigations shall not be wholly dependent upon the report or complaint filed by a victim and that any proceedings underway may continue even after the victim has withdrawn his or her statement or complain. (On this question, see also the section on *Balancing rights* section of the Guidelines)

Pretrial release

The safety of victims must always be justice actors' primary concern in any decisions (e.g. decisions relating to arrest, pretrial detention and bail) taken by them. Involvement in the criminal justice system may be extremely dangerous for some victims. They may be at great risk of intimidation, further harm and retaliation. Justice actors should be knowledgeable about the various risks certain victims might face, whether from abusive partners or from organized criminal groups. Protective measures should take into account the physical and emotional needs of the victim. While such measures are usually applied before the trial in order to ensure that the victim will be available for the criminal trial, these measures should continue as long as they remain necessary (see, also, the section on *Protective measures* of the Guidelines)

Cases where victims of VAW are charged with crimes

Given the complex nature of violence against women cases, particularly those occurring in the family, prosecutors might come across cases where they believe female victims of violence are the ones to be arrested or charged with a crime. This might be, for example, in circumstances where victims of human trafficking are charged with prostitution-related crimes or where victims of domestic violence are charged with assault or murder as a result of hitting back in retaliation or in self-defence causing injury to the abuser. It is very challenging to deal with cases where the victim is charged with a crime against the abuser, especially if the jurisdiction has mandatory or no drop policies or pro-prosecution policies curtailing the prosecutor's discretion.

Treating victims of VAW as offenders often has devastating consequences for the victims. Prosecutors are uniquely situated to prevent or at least minimize these negative consequences. At the same time an adequate and victim-centred judicial control over the prosecutors' actions is an important safeguard against those consequences.

To deal effectively with such complex cases justice actors should make a contextual analysis which includes, for example:[31]

- Determining whether the defendant is a victim of violence.
- Evaluating evidence of self-defence and dismissing the case where self-defence can legitimately be established.
- Conducting an informed "predominant aggressor" analysis.

Provision 15(k) of the UN Updated Model Strategies and Practical Measures: *Member States are urged to review, evaluate and update their criminal procedures, as appropriate and taking into account all relevant international legal instruments, in order*

[31] See: Research cited in Greipp, J. P., Meisner, T. G. and Miles, D. J., *Intimate Partner Violence Victims Charged with Crimes: Justice and Accountability for Victims of Battering Who Use Violence Against their Batterers*, Aequitas (2010).

*to ensure that ... **claims of self-defence** by women who have been victims of violence, particularly in cases of battered women syndrome, are taken into account in investigation, prosecution and sentencing against them.*

Protective measures

Article 50 of the Istanbul Convention requires law enforcement agencies to promptly and appropriately react by offering **adequate and immediate protection to victims** (§1) and calls for their prompt and appropriate engagement in the prevention of and protection against all forms of violence (§2), including the employment of preventive operational measures and the collection of evidence.

According to the Explanatory Report, compliance with this obligation includes, for example, the following:

- the right of the responsible law enforcement agencies to enter the place where a person at risk is present;
- the treatment and giving advice to victims by the responsible law enforcement agencies in an appropriate manner;
- hearing victims without delay by specially-trained, where appropriate female, staff in premises that are designed to establish a relationship of trust between the victim and the law enforcement personnel.

Many perpetrators threaten their victims with serious violence, including death, and have subjected their victims to serious violence in the past. It is therefore essential that any risk assessment and risk management consider **the probability of repeated violence**, notably deadly violence, and **adequately assess the seriousness of the situation**. Article 51 of the Istanbul Convention establishes the obligation to ensure that all relevant authorities, not limited to the police, effectively assess and devise a plan to manage the safety risks a particular victim faces on a case-by-case basis, according to standardised procedure and in cooperation and coordination with each other.

Article 52 of the Istanbul Convention, concerns **emergency barring orders**. It requires the States to take the necessary 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. Article 53 of the Istanbul Convention provides for **restraining or protection orders** and establishes a number of criteria for such orders to ensure that they serve the purpose of offering protection from further acts of violence. A restraining or protection order may be considered complementary to a short-term emergency barring order. Its purpose is to offer a fast legal remedy to protect persons at risk of VAW by prohibiting, restraining or prescribing a certain behaviour by the perpetrator.

This wide range of measures covered by such orders means that they exist under various names such as restraining order, barring order, eviction order, protection order or injunction. Despite these differences, they serve the same purpose: *preventing the commission of violence and protect the victim*. In the Istanbul Convention the term restraining or protection order is used as an umbrella category.

The European Court's case-law on the alleged failure by authorities to provide adequate protection against domestic violence demonstrates the importance the European Court attributes to ordering protective measures.

In the ***Opuz v. Turkey***, despite numerous requests of the applicant's mother and the applicant herself to order protective measures against the applicant's violent husband, no action was taken by the authorities and the applicant's mother was killed by the violent husband. During the communication of the case with the Government, the applicant's lawyer informed the European Court that the applicant's life was in immediate danger, given the authorities' continuous failure to take sufficient measures to protect her client. Only following the transmission of this complaint and the European Court's request for an explanation in this respect, the local authorities have now put in place specific measures to ensure the protection of the applicant[32].
In ***Talbis v. Italy***, the European Court observed in that case that, whilst, in the context of domestic violence, protection measures are in principle intended to avoid a dangerous situation **as quickly as possible**, 7 months elapsed before the applicant was heard. **Such a delay could only serve to deprive the applicant of the immediate protection required by the situation.** Even though during the period in question the applicant was not subjected to further physical acts of violence, Court could not disregard the fact that the applicant, who was being harassed by telephone, was living in fear while staying at the shelter. In this case the European Court found a violation of Article 2 on account of murder of the applicant's son, a violation of Article 3 on account the domestic authorities' failure to protect the applicant from domestic violence and a violation of Article 14 in conjunction with Article 2 and 3 of the Convention.
In a recent case, ***Balsan v. Romania*** despite the fact that the applicant asked the domestic courts to order protective measures for her, specifically, to forbid her husband from entering their apartment or coming near her the courts did not respond to that request. The only sanction imposed on the applicant's husband was a slightly increased administrative fine. The European Court observed that that measure did not have the deterrent effect necessary to be considered as a sufficient safeguard against further ill-treatment of the applicant in the current case because her husband continued to assault her even after the adoption of such a measure by the prosecutor. The European Court held that bearing in mind the particular vulnerability of victims of domestic violence, the authorities should have looked into the applicant's situation more thoroughly.

Presentation of the charges and the duty of the Prosecutor

The culmination of the prosecutor's work is the presentation of the charges. If a case has been poorly investigated, leading to inappropriate charges being put to the court it is unlikely that the judge will be able to pass an adequate sentence. If the victim is also disappointed with the sentence, it is unlikely that she will trust the criminal justice system on another occasion, which will in its turn create a general mistrust by the VAW victims towards judiciary. Charges put before the court should be given careful consideration in order to reflect the behaviour of the perpetrator. Prosecutors should also ensure that the charges reflect the seriousness and extent of the offending, give the court adequate powers to sentence and impose appropriate post-conviction orders, enable the case to be presented in a clear and simple way and reflect the impact of the alleged offence on the victim.

Information prosecutors should provide to the courts during pretrial release hearing[33]

[32] see § 174, *Opuz v. Turkey*

[33] Handbook on effective prosecution responses to violence against women and girls, United Nations Office on Drugs and Crime, 2014

Key information in domestic violence cases
• Whether there is a history of violence
• Whether the victim fears further violence and the basis for that fear
• The victim's opinion on the likelihood that the accused will obey a term of release, particular a no-contact order
• Whether the accused has a history of alcohol or drug problems, or mental illness
• Whether the accused has a history of breaches of judicial orders
• The details of all previous domestic violence charges and convictions
• Evidence that the accused possesses firearms, weapons (such as licence, registration)

Key information in sexual violence cases
• The view of the victim regarding risk of danger, threats or pressure
• Whether the accused has a criminal record
• Whether the accused has a history of breaches of judicial orders
• The degree of violence implicit in the charge
• A threat of violence the accused may have made to any person

Key information in trafficking in persons cases
• Review the case to identify if there is a need for anonymity of victim (in jurisdictions where this is permitted)
• Explain risk to the victim if suspect is released
• Whether the accused has an organized criminal group affiliation
• Explain fear of victim and protection measures already in place for victim affiliation, i.e. if victim is being considered or being processed for witness protection programmes

Key information in harassment cases
• Present the history of the harassment, as well as any past incident of abuse or criminal conviction
• Advise the court of any indicators of high risk as reflected in the circumstance of the allegations, the relationship between victim and accused (a risk assessment should be done and presented to court)
• Present any available psychological assessment of the accused (i.e. is there a history of sexual deviancy, obsessive behaviour?)
• Whether the victim fears further violence if the accused should be released and, if so, the basis for that fear
• The victim's opinion on the likelihood that the accused will obey a term of release, particular a no-contact order
• Whether the accused has a history of alcohol or drug problems, or mental illness
• Whether the accused has a history of breaches of judicial orders (consider calling police officer)
• Evidence that the accused possesses firearms, weapons (such as licence, registration)

Criminal justice response to the violence against women: trial phase

Private matter or matter of public interest?

As it was discussed earlier, stereotypes and false perceptions are one of the obstacles that victims of VAW face in accessing justice (see "*Stereotyping, judicial stereotyping and false perceptions*" section of this Guidelines). A belief that certain forms of gender-based violence (for example, domestic violence or forced marriage) are a private matter and that other people or the state should not interfere is one of the false perceptions. The high costs of violence also underline that

gender-based violence is a **social**, a **public** and **no longer a private problem**, and that it urgently needs to be addressed, as society as a whole, governments, individuals, organisations and businesses pay for it.[34]

The ECHR as interpreted by the European Court requires the States to take active measures against acts of VAW. In the case of ***Opuz v. Turkey***, the European Court noted, as regards the Government's argument that any further interference by the national authorities would have amounted to a breach of the victims' rights under Article 8 of the Convention, its ruling in a similar case of domestic violence, (***Bevacqua and S. v. Bulgaria***, 12 June 2008[35]), where it held that the authorities' view that no assistance was required as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' rights. The European Court added that, in some cases, 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]. The seriousness of the risk to the applicant's mother rendered such intervention by the authorities necessary in the present case.

Evidence issue

Typically, behaviour of victims of VAW differs from that of victims of other violent crimes. In particular, victims of VAW may display, *inter alia*, the following:

- being ashamed or embarrassed of what they have experienced, especially in cases of sexual abuse or rape
- being ashamed or embarrassed to reveal details of their intimate life
- reluctance to complain against their perpetrators
- fear of retaliation by their perpetrators
- fear of being rejected by their families and communities if what they have experienced is revealed
- emotional attachment to their perpetrators
- self-blaming

These differences in behaviour pose specific evidentiary problems and require special responses. Besides, proceedings concerning VAW must be free from influence of gender-based stereotypes (for example, stereotypes about how a woman should behave and dress, prejudices related to her sexual history).

In situations where the child victim of VAW does not want to testify or it is considered too traumatic for the victim, it is necessary to consider whether the victim's out-of-court statements

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[34] See: *Combating violence against women: Stocktaking study on the measures and actions taken in Council of Europe member States* (2006), available at https://rm.coe.int/168059aa52

[35] In this case, the first applicant was a mother of the second applicant. She suffered several incidents of violence by her former husband, Mr N. The European Court emphasised that the authorities' failure to impose sanctions or otherwise enforce Mr N.'s obligation to refrain from unlawful acts was critical in the circumstances of this case, as it amounted to a refusal to provide the immediate assistance the applicants needed. The European Court also stressed that the authorities' view that no such assistance was due as the dispute concerned a "private matter" was incompatible with their **positive obligations to secure the enjoyment of the applicants' Article 8 rights (respect for private and family life).**

[36] The European Court refers here to *K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, § 81, 17 February 2005)

could be accepted (see: the sections on *Measures to be taken to avoid secondary victimisation* and *Balancing of the rights* of the present Guidelines).
Here is *some of the particular issues* related to evidence in VAW cases.

- **Using expert witnesses**

Generally speaking, issues that give rise to the need for expert testimony in cases involving VAW include the following:

- Issues relating to popular myths regarding violence against women
- Issues relating to the victim's perplexing behaviour (i.e. behaviour caused by post-traumatic stress disorder, dynamics of domestic violence or sexual abuse)
- Issues relating to medical and forensic issues such as DNA evidence, criminalist work (serology, fingerprints), sexual assault nurse examiners, physicians, etc.

Expert witnesses can explain common victim behaviour, the effects of violence on victims and assist fact finders in evaluating their credibility when the victims' actions might not be what judges or jurors expect. In **absent-victim prosecutions**, expert witnesses can explain why the victim is hostile or reluctant to participate. The expert witness can also explain patterns of typical behaviour consistent with **battered women's syndrome**.

- **Limiting reference to sexual history and conduct of the victim**

Many jurisdictions prohibit - by adopting so-called rape shield laws - the introduction of evidence of the victim's sexual behaviour that is unrelated to the incident being prosecuted. Typical rape shield laws provide that in a prosecution of rape, reputation or opinion evidence of the alleged victim's prior sexual conduct is not admissible. The prohibition in question serves to prevent the defence from abusing the criminal justice system to harass the victim. This is also to rebut the traditionally held notion that a woman who has consented to sex previously is more likely to have consented to the incident in question. Even in the absence of a specific rape shield law reference to sexual history of the victim only be permitted only when it is relevant and necessary (Article 54 of the Istanbul Convention).

- **No adverse inference from delay in reporting** should be drawn and delay should not be held against the victim and her credibility[37]. It is not uncommon for women victims of violence to delay reporting the violence to the authorities. There can be legitimate reasons why the victim chooses to delay reporting, and an expert witness can be called to explain this behaviour.

Balancing of the rights

Judicial practice or existing procedural requirements often lead to decisions that are not victim-friendly, which results in further traumatisation, alienating victims from the process and sometimes leading them to withdraw the complaint or to be uncooperative. For example, evidentiary rules may allow cross-examination on sexual or personal history, require corroboration or allow for adverse inference resulting from delayed reporting (for more detailed review of harmful judicial practices and existing procedural requirements see "Evidentiary issues" chapter of the present Guidelines).

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[37] see Handbook on effective prosecution responses to violence against women and girls, United Nations Office on Drugs and Crime, 2014; see also Updated Model Strategies and Practical Measures for the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, UN General Assembly resolution 65/228, annex, provision 15(e): "... no adverse inference should be drawn solely from a delay of any length between the alleged commission of a sexual offence and the reporting thereof…")

Protection of a defendant's right to fair trial is crucial in criminal proceedings. But that does not mean that the rights and interests of victims might be overlooked. assessment of fairness of criminal proceedings presupposes due regard to the **rights of the defence** but also to the **interest of the public and the victims** in seeing crime properly prosecuted and, where necessary, to the **rights of witnesses**.

The ECHR as interpreted by the European Court requires that a victim of VAW be provided with the protection necessary to strike an **appropriate balance** between her rights and interests, including her right to have her intimate aspects of life respected, and the defence rights of an alleged perpetrator (see, for example, the case of *Y v. Slovenia, in the box*).

Y. v. Slovenia, 28 May 201

Law – Article 8: The Court had to examine whether the respondent State had afforded sufficient protection of the applicant's right to respect for her private life, and especially for her personal integrity, with respect to the manner in which she had been questioned during the criminal proceedings against her alleged sexual abuser. In so doing, it had to s**trike a fair balance between the rights of the applicant as a victim called upon to testify in criminal proceedings, protected by Article 8, and those of the defence, namely the right of the accused to call and cross-examine witnesses set out in Article 6 § 3 (d)**. Unlike the position in other similar cases previously examined by the Court, which had all been brought by the accused persons, in the present case the Court had to examine this issue from the perspective of the alleged victim.

In the instant case, the interests of securing a fair trial required X to be provided an opportunity to cross-examine the applicant, especially as the applicant's testimony at the trial provided the only direct evidence in the case and the other evidence presented was conflicting.

However, given that criminal proceedings concerning sexual offences were perceived as a very unpleasant and prolonged experience by the victims, and that a direct confrontation between those charged with sexual abuse and their alleged victims involved a risk of further traumatisation for the victims, personal cross-examination by the defendant had to be subject to the most careful assessment by the national courts. Indeed, several **international instruments, including European Union law, provided that certain rights should be granted to victims of, inter alia, sexual abuse**, including the duty of the State to protect them from intimidation and **repeat victimisation** when providing testimony of the abuse. In this respect, the Court noted that the applicant's questioning had stretched over four trial hearings held over seven months, a lengthy period which in itself raised concerns, especially given the absence of any apparent reason for the long intervals between the hearings. Moreover, at two of those hearings X had personally cross-examined the applicant, continuously contesting the veracity of her answers and addressing her with questions of a personal nature. In the Court's view, those questions were aimed at attacking the applicant's credibility as well as at degrading her character. However, despite the duty incumbent on the judicial authorities to oversee the form and content of X's questions and comments and, if necessary, to intervene, the presiding judge's intervention had been insufficient to mitigate what had clearly been a distressing experience for the applicant.

As to the applicant's claim that X's counsel should have been disqualified from the proceedings as he had been consulted by her on the sexual assaults shortly after the

alleged events took place, the Court found that the applicable domestic law, or the manner in which it had been applied in the present case, had not taken sufficient account of the applicant's interests. This was so because the negative psychological effect of being cross-examined by X's counsel had considerably exceeded the apprehension the applicant would have experienced if she had been questioned by another lawyer. Moreover, any information he might have received from her in his capacity as a lawyer should have been treated as confidential and should not have been used to benefit a person with adverse interests in the same matter.

The Court also noted the inappropriateness of the questions put to the applicant by the gynaecologist appointed by the district court to establish whether she had engaged in sexual intercourse at the material time. In this regard, the authorities were required to ensure that all participants in the proceedings called upon to assist them in the investigation or the decision-making process treated victims and other witnesses with dignity and did not cause them unnecessary inconvenience. However, the appointed gynaecologist not only lacked proper training in conducting interviews with victims of sexual abuse but had also addressed the applicant with accusatory questions and remarks exceeding the scope of his task and of his medical expertise. As a consequence, the applicant had been put in a defensive position unnecessarily adding to the stress of the criminal proceedings.

Even though the domestic authorities had taken a number of measures to prevent further traumatisation of the applicant, such measures had ultimately proved insufficient to afford her the protection necessary to strike an appropriate balance between her rights and interests protected by Article 8 and X's defence rights protected by Article 6 of the Convention.

The Court also found unanimously a violation of Article 3 on account of the failure of the authorities of the respondent State to ensure a prompt investigation and prosecution of the applicant's complaint of sexual abuse.

Use of absent-witness statements

Normally a defendant should have an opportunity to question a witness against him/her during the trial, including a victim. That is one of the principles of the fair trial. However, as was discussed above, a victim of VAW may be absent from the trial and unavailable for cross-examination in the courtroom. Under certain conditions **out-of-court statements of a non-attending witness** can be accepted without breaching a defendant's right to fair trial. Thus, according to the European Court's approach in ***Schatschaschwili v. Germany*** [GC], it is necessary to answer to the following questions in order to assess fairness of the proceedings in which statements made by a witness who had not been present and questioned at the trial were used as evidence:

1. Whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence?

In VAW cases a judge may consider that avoidance of the victim's traumatisation could serve as a good reason for not insisting on her attendance at the trial.

2. Whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction? Whether the evidence of the absent witness **carried significant weight** for the defendant's conviction?

In cases in which the evidence given by an absent witness was the sole or the decisive basis for the applicant's conviction, and in cases in which it was unclear whether the evidence in question was the sole or decisive basis but nevertheless the evidence in question carried significant weight and its admission might have handicapped the defence it is necessary to review the existence of sufficient counterbalancing factors. The extent of the counterbalancing factors necessary in order for a trial to be considered fair will depend on the weight of the evidence of the absent witness.

3. Whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair?

Counterbalancing factors must permit a fair and proper assessment of the reliability of the untested evidence of an absent witness.

Here are some of those safeguards:

- The courts must show that they are aware that the statements of the absent witness carry less weight.
- The courts must provide detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available.
- To show, at the trial hearing, a video recording of the absent witness's questioning at the investigation stage in order to allow the court, prosecution and defence to observe the witness's demeanour under questioning and to form their own impression of his or her reliability.
- Availability at the trial of corroborative evidence supporting the untested witness statement. Such evidence may comprise, inter alia, statements made at the trial by persons to whom the absent witness reported the events immediately after their occurrence, further factual evidence secured in respect of the offence, including forensic evidence, or expert opinions on a victim's injuries or credibility.
- Supporting an absent witness's statement could be the fact that there were strong similarities between the absent witness's description of the alleged offence committed against him or her and the description, given by another witness with whom there was no evidence of collusion, of a comparable offence committed by the same defendant. This holds even more true if the latter witness gave evidence at the trial and that witness's reliability was tested by cross-examination.
- The possibility offered to the defence to put its own questions to the witness indirectly, for instance in writing, in the course of the trial.
- To have given the alleged perpetrator or defence counsel an opportunity to question the witness during the investigation stage. Where the investigating authorities had already taken the view at the investigation stage that a witness would not be heard at the trial, it was essential to give the defence an opportunity to have questions put to the victim during the preliminary investigation
- The defendant must further be afforded the opportunity to give his own version of the events and to cast doubt on the credibility of the absent witness, pointing out any incoherence or inconsistency with the statements of other witnesses.
- Where the identity of the witness is known to the defence, the latter is able to identify and investigate any motives the witness may have for lying, and can therefore contest effectively the witness's credibility, albeit to a lesser extent than in a direct confrontation.

Sentencing. Aggravating and mitigating circumstances

The ECHR as interpreted by the European Court and the Istanbul Convention require that offences constituting VAW be punished by effective, proportionate and dissuasive **sanctions**, taking into account their seriousness (Article 45 of the Istanbul Convention).

Other measures that could be adopted in relation to perpetrators may include the following:

- monitoring or supervision of convicted persons;
- withdrawal of parental rights, if the best interests of the child, which may include the safety of the victim, cannot be guaranteed in any other way.

If the **payment of a fine** is ordered, due account shall be taken of the ability of the perpetrator to assume his or her financial obligations towards the victim (Article 48 of the Istanbul Convention).
The following circumstances, so far as they do not already form part of the constituent elements of the offence, should, in conformity with the relevant provisions of domestic law, be taken into consideration as **aggravating circumstances** in the determination of the sentence in relation to the offences constituting VAW (Article 46 of the Istanbul Convention):

- 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.

Article 42 of the Istanbul Convention states that nobody will be allowed to validly invoke what he or she believes to be an element of his or her culture, religion or other form of personal reason to justify the commission of what is simply an element of a violence against women.

The European Court's case-law on VAW

The ECtHR has examined a significant number of cases of violence against women committed by both state actors and private individuals.
Please find some of the cases below:
Ill-treatment in detention: Juhnke v. Turkey (2003)

Police violence: Aydin v. Turkey (1997); Y.F. v Turkey (2003); Maslova and Nalbandov v. Russia (2008); Yazgul Yilmaz v. Turkey (2011); B.S. v. Spain (2012); Izci v. Turkey (2013); Afet Sureyya Eren v. Turkey (2015); Dilek Aslan v. Turkey (2015)
Rape and sexual abuse: X and Y v. the Netherlands (1985); Aydin v. Turkey (1997); M.C. v Bulgaria (2003); Maslova and Nalbandov v. Russia (2008); P.M. v. Bulgaria (2012); I.G v. The Republic of Moldova (2012); M. and Others v. Italy and Bulgaria (2012); P. and S. v. Poland (2012); D.J. v. Croatia (2013); O'Keeffe v. Ireland (2014); W. v. Slovenia (2014); M.A. v. Slovenia and N.D. v. Slovenia (2015); S.Z. v. Bulgaria (2015); I.P. v. the Republic of Moldova (2015); Y. v. Slovenia (2015); B.V. v. Belgium (2017); M.G.C v. Romania (2016).

Domestic violence against women: Kontrova v. Slovakia (2007); Branko Tomašić and Others v. Croatia (2009); Opuz v. Turkey (2009); A v. Croatia (2010); Haiduova v. Slovakia (2010); Kalucza v. Hungary (2012); Eremia and Others v. the Republic of Moldova (2013) ; Mudric v. the Republic of Moldova (2013) ; B. v. the Republic of Moldova (2013); N.A. v. the Republic of Moldova (2013); Valiuliene v. Lithuania (2013); T.M. and C.M. v. the Republic of Moldova

(2014); Durmaz v. Turkey (2014); Rumor v. Italy (2014); Civek v. Turkey (2016); Halime Kilic v. Turkey (2016); M.G v. Turkey (2016); Talpis v. Italy (2017); Balsan v. Romania (2017)

Violence by private individuals, who are not intimate partners or family members: Sandra Janković v. Croatia (2009); Ebcin v. Turkey (2011).

Risk of ill-treatment in case of expulsion for fear of female genital mutilation: Collins and Akaziebie v. Sweden (2008, decision on admissibility); Izevbekhai v. Ireland (2011, decision on admissibility); Omeredo v. Austria (2011, decision on admissibility), Sow v. Belgium (2016); Bangura v. Belgium (2016, strike-out decision)

Crimes in the name of honour: A.A. and Others v. Sweden (2012); R.D. v. France (2016).
Social exclusion N. v. Sweden (2010); W.H. v. Sweden (2015, Grand Chamber); R.H. v. Sweden (2015).

Trafficking in human beings L.R. v. the United Kingdom (2011, strike-out decision); R.D. v. France (2011, decision on admissibility); F.A. v. the United Kingdom (2013, decision on the admissibility); O.G.O. v. the United Kingdom (2014, strike-out decision), Rantsev v. Cyprus and Russia (2010); L.E. v. Greece (2016).

Balancing of rights: Y. v Slovenia. (See also S.N. v. Sweden, 34209/96, 2 July 2002, Information Note 44; Aigner v. Austria, 28328/03, 10 May 2012;

For summaries of the cases, please also see Factsheet on Violence against women https://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf
and on Domestic Violence
https://www.echr.coe.int/Documents/FS_Domestic_violence_ENG.pdf