



Preventing and Combating Violence against Women and Domestic Violence



**A Training of Trainer's Manual
for Prosecutors and Judges**



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Council of Europe project "Reinforcing the Fight Against Violence
against Women and Domestic Violence in Kosovo * – Phase II"

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Abbreviations and Acronyms

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CSO	Civil Society Organisations
DEVAW	United Nations Declaration on the Elimination of Violence against Women
DV	Domestic Violence
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EPO	Emergency Protection Order
EU	European Union
EVAW	Ending Violence against Women
GR	General Recommendation
LPDV	Law no.03/L-182 on Protection against Domestic Violence
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commission for Human Rights
PO	Protection Order
SDGs	Sustainable Development Goals
SOPs	Standard Operating Procedures
TEPO	Temporary Emergency Protection Orders
ToT	Training of Trainers
UN	United Nations
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
VA	Victim Advocates
VAW	Violence against Women

Glossary of key terms

Bail hearing is a judicial proceeding where the court determines if a person charged with a criminal offence should be released on conditions pending trial, including cash bail or securities.

Committal hearing is a hearing where a judge, more specifically the pre-trial judge, decides if the prosecution has enough evidence for a criminal case to go to trial.

Compensation means quantifiable damages resulting from the violence and includes both pecuniary and non-pecuniary remedies, such as an injunction (UN Inter-agency Essential Services Package).

Complainant is a legal term designating a person who has made a complaint of a crime which has not yet proven in court.

Domestic Violence, in this context, refers to “all acts of physical, sexual, psychological and 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” (Article 3(b), Istanbul Convention). Like the Istanbul Convention, this Manual focuses on the various forms of gendered-based violence committed against women, one of which is domestic violence. Acknowledging that domestic violence affects women disproportionately as well as recognizing that domestic violence can be committed against men and children, this Manual can be applied to all victims of domestic violence but pays particular attention to women victims.

Gender refers to “the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men” (Article 3(c), Istanbul Convention).

Gender-based violence against women refers to “violence that is directed against a woman because she is a woman or that affects women disproportionately” (Article 3(d), Istanbul Convention).

Gender-responsive justice means ensuring that the laws, the justice institutions, the justice processes and the justice outcomes do not discriminate against anyone on the basis of gender. It necessitates taking a gender perspective on the rights themselves, as well as an assessment of access and obstacles to the enjoyment of these rights by women and men and adopting gender-sensitive strategies for protecting and promoting them.

Gender sensitivity refers to the aim of understanding and taking into account the societal and cultural factors involved in gender-based exclusion and discrimination in the diverse spheres of public and private life. It focuses mainly on instances of structural disadvantage in the position and roles of women (European Institute for Gender Equality).

Gender-specific approach, according to the Istanbul Convention, implies recognising that violence against women and domestic violence are rooted in historically unequal power relations between women and men, and that in order to effectively address the problem, all measures taken should be aimed at achieving de jure and de facto equality between women and men.

Myths are widely held but false beliefs or ideas. Myths about gender-based violence against women and girls are based on prejudices and gender stereotyping.

Party to the Proceedings, according to the Kosovo* Criminal Procedure Code, includes the state prosecutor, the defendant and injured party. The defendant is not considered a party according to Article 392 of the Criminal Code of Kosovo*.

Perpetrator In this manual, the term “perpetrator” refers to a person who commits violence against women and domestic violence.

Secondary victimisation is the victimisation that occurs not as a direct result of the criminal act but through the inadequate response of criminal justice institutions and providers to the victim (UN Updated Model Strategies and Practical Measures).

Victim In this manual, the term “victim” refers to the woman who has been subjected to violence against women and domestic violence. This term “victim” designates a legal status in the criminal justice system and is used in order to recognise that women experiencing violence have been subjected to an act of violence and have a right to justice, protection, support and compensation. Using the term “victim” does not mean that victims are seen as passively “enduring” violence; it is important to acknowledge that victims try in many ways to prevent, resist and cope with the violence they experience. Victims are active in the process of prevention and intervention, not just objects of a process; they are “experts by experience” who need to be respected and empowered to be agents of change in their lives.

Victim Compensation Fund, according to the Kosovo* Criminal Procedure Code, it is a fund to which forfeited bail and other authorised assets under the law is deposited. Payments from the victim compensation fund shall be used to compensate crime victims as authorized under the law.

Victim-centred In accordance with the Istanbul Convention, this manual places the needs and rights of victims as the central priority and applies a gender-specific approach, recognising that violence against women and domestic violence constitute a violation of human rights and a form of discrimination, and as such need to systematically be tackled by specific measures.

Violence against women 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” (Article 3(a), Istanbul Convention).

Women The term “women” also includes girls under the age of 18 (Article 3(f), Istanbul Convention).

Women’s empowerment means empowering women to participate fully in all sectors of life and is seen as essential to build stronger economies, achieve internationally agreed goals for development and sustainability and improve the quality of life for women, men, families and communities (UN Women).

Vulnerable victim, according to the Kosovo* Criminal Code, is a victim of a crime who is a child, a physically or mentally handicapped person, a person suffering from diminished capacity, a pregnant woman, the elderly or a person whose relationship to and dependence on the offender make them particularly vulnerable to repeat victimisation, intimidation or retaliation.

Introduction

Violence against women and domestic violence in Kosovo* is highly prevalent and widespread reaching pandemic proportions. According to one report, there has been an increase in the reported number of murder cases that have resulted from domestic and gender-related violence in the past decade.¹ A survey conducted by the Kosova Women's Network in 2014-15 reported that 41% of women stated that they suffered some form of domestic violence, including physical, psychological and/or economic violence in the last 12 months, and 68% of women stated that they had suffered domestic violence in their lifetime.² The picture is less clear for other forms of violence covered by the Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention), such as rape, sexual assault, sexual harassment, stalking, early and forced marriages, female genital mutilation, forced abortion and sterilisation. Although no official statistics exist, non-governmental survey data (2015) shows that an estimated 64% of women have experienced some form of sexual harassment in their lifetime.³

Such violence is a serious violation of human rights. It is a violation of human dignity and, in its worst form, violates the right to life. It is also an extreme expression of inequality on the ground of sex. Police data (in 2016) indicates that women accounted for approximately 80% of domestic violence reported to the police, with the vast majority of perpetrators being current or former male partners and/or spouses.⁴ With this in mind, the majority of violence against women and domestic violence demonstrates the gendered nature of domestic violence.⁵

Similar to many countries, the Kosovar criminal justice system is still failing women victims of violence. This is due to loopholes in criminal legislation, poor enforcement of criminal laws and regulations, lack of proper capacity in the criminal justice system, discriminatory attitudes among criminal justice actors, including victim blaming attitudes, and lack of sufficient and sustainable dedicated resources. This failure results in a high level of cases of violence going unreported and unprosecuted, in a profound lack of confidence and trust in the criminal justice institutions, high levels of impunity for the perpetrators and a high percentage of victims whose needs for assistance, protection and redress are neither recognised nor met. Studies in Kosovo* find that violence against women and domestic violence remains largely under-reported, with one study of 2008 data estimating that 90% of cases go unreported in Kosovo* due to the view that it is a private matter, concerns of social stigma, fear of retaliation, lack of trust in the criminal justice system, and economic dependence on the perpetrator.⁶ Recent police data (2018/2019) reveals an increase in reporting which may indicate a rise in women's confidence in the criminal justice system's ability to respond to such violence; however, further study is needed.⁷ One study found that the rate of dismissed cases of domestic violence remains high, with over half of all criminal charges related to domestic violence being dismissed (51.5%) by Kosovo* courts in 2017, and only 40.4% of cases received guilty verdicts from the period of 2015-2018.⁸

Prosecutors and judges play a critical role in the justice response to violence against women and domestic violence. They are key to ensuring that Kosovo* complies with its international obligation of due diligence to prevent, investigate and punish acts of violence against women. Particularly, prosecutors and judges will

1 Qosaj-Mustafa, Ariana and Morina, Donjeta. 2018. "Accessing Justice for Victims of Gender Based Violence in Kosovo*: Ending Impunity for Perpetrators". Kosovar Institute for Policy Research and Development.

2 Kosova Women's Network. 2015. "No more Excuses. An Analysis of Attitudes, Incidence, and Institutional Responses to Domestic Violence in Kosovo*". Prishtinë/Priština.

3 Kosova Women's Network. 2016. Sexual Harassment in Kosovo*. Prishtinë/Priština.

4 Krol, Paula, Kabashi, Emine and Ramizi Bala, Ardita. 2017. "Mapping Support Services for Victims of Violence against Women in Kosovo*". Council of Europe at p. 3.

5 Krol et al, 2017. Mapping Support Services, p. 3.

6 Krol et al, 2017. Mapping Support Services, p. 3.

7 Kosovo* police data from 2018/2019 indicate an increase in reporting of 25%.

8 Qosaj-Mustafa et al. 2018. Accessing Justice.

be instrumental in implementing the decision of the National Assembly of Kosovo* of 25 September 2020 amending the Constitution to give direct effect to the Istanbul Convention. On a practical level, prosecuting and adjudicating gender-based violent crimes can be challenging and presents unique difficulties to prosecutors and judges whether they are new recruits or experienced professionals. Often there are a number of evidentiary challenges due to the nature of the violence (unpredictable, incremental over time, concealed to others). The police investigation may be substandard. Victims can be traumatised, uncooperative, and withdraw or recant their complaints. Criminal justice actors may employ gender bias or common myths surrounding violence against women when examining the credibility of the victim and the facts of the case. It is up to the prosecutors and judges to ensure that relevant criminal laws, including those relating to forms of violence against women and domestic violence are interpreted through the lens of international norms and standards; are effectively enforced; protect women and girls from violence, including from the re-occurrence of further violence; hold perpetrators accountable; provide for effective reparations for victims; and ensure that victims are not subjected to secondary trauma by the justice system.

Training prosecutors and judges can equip individual prosecutors and judges with the skills, knowledge and attitudes to respond to each case of violence against women and domestic violence in a gender-responsive way. Training can ensure that prejudices and gender stereotypes do not influence proceedings or undermine gender-based violence victim's credibility; that there has been meaningful and comprehensive investigations and assessments of all the evidence; that courtrooms are managed in a way that addresses biases that lead to victim blaming, disbelief in the victim's story and ultimately, put the victim on trial; and that perpetrators are appropriately punished. Training can also greatly contribute to shaping institutional cultures and practices that have proved ineffective in the past. Training can also support these professionals to instil a sense of trust in victims regarding the justice system.

This Training of Trainers' (ToT) Manual was conceived prior to, and developed during the COVID-19 pandemic. There is increasing evidence around the world that policies of isolation and confinement are leading to increased levels of domestic, sexual and gender-based violence, and along with closures of or restricted access to courts, there is heightened need for protection and justice for women subjected to this violence.⁹ It is appreciated that justice systems around the world are adopting innovative ways to respond to violence against women and domestic violence during COVID, for example, through the use of technology. Regardless of what justice strategies are being taken during this pandemic, now more than ever justice interventions need to be grounded in victim-centred, gendered and perpetrator accountability justice approaches. This ToT Manual focuses on training prosecutors and judges in how to be guided by these core principles.

Background

Providing an effective gender-responsive justice response to victims of violence against women and domestic violence is an important step towards the European Union (EU) integration of Kosovo*. The Istanbul Convention contains the most advanced standards for preventing and combating gender-based violence against women and ensuring victims' access to justice. The Istanbul Convention is now a part of Kosovo*'s Constitution, as per the 25 September 2020 vote of the Assembly of Kosovo* to amend the Constitution to give direct effect to the Istanbul Convention.¹⁰

The Constitution of the Republic of Kosovo* guarantees gender equality as a fundamental value. Kosovo* has taken significant steps to establish a legal and policy framework addressing violence against women in a bid to improve victim protection and support.¹¹ Kosovo* adopted its first law to combat domestic violence in 2010, Law no.03/L-182 on Protection against Domestic Violence (LPDV), which regulates protection measures for victims, establishes psychological and substance abuse treatment for perpetrators, and defines obligations for competent authorities. The LPDV is a civil law, meant primarily for ensuring the protection of victims and not to prosecute and penalise criminally. As such, no criminal sanctions are provided in the LPDV against the perpetrator, except in cases where a protection order is violated. The Criminal Code establishes offences for rape, sexual assault, stalking, forced marriage and forced abortion. Despite the progress achieved, developments have focused primarily on responding to domestic violence, with other forms of violence against women being dealt with marginally or absent altogether from policy-makers' agenda.

9 UN joint report. 2020. "Justice for Women amidst COVID-19" (UN Women, IDLO, UNDP, UNODC, World Bank and the Pathfinders for Justice); UNODC. 2020. "Coronavirus Disease (COVID-19) response – UNODC Thematic Brief on gender-based violence against women and girls".

10 Council of Europe Newsroom. 25 September 2020. "The Assembly of Kosovo* decides to apply the Istanbul Convention".

11 Krol et al. 2017. Mapping Support Services, p. 4.

1.1 Purpose of the Training of Trainers' Manual

This ToT Manual has been developed under the framework of the Council of Europe project “Reinforcing the fight against violence against women and domestic violence in Kosovo* – Phase II”. This manual has been specifically developed for the Academy of Justice and its trainers who deliver training to prosecutors and judges working with cases of violence against women and domestic violence. The primary purpose of this manual is to serve as a resource for trainers for planning and conducting interactive adult learning-centred training sessions for prosecutors and judges on effective responses when handling crimes involving violence against women and domestic violence.

The ultimate aim of the training is to sensitise prosecutors and judges to the issue of violence against women and domestic violence and to improve their capacity to respond effectively to such violence by fostering a victim-centred approach while holding perpetrators accountable and stopping the cycle of impunity. The overall objectives of the training are threefold:

- (1) To develop a better understanding by prosecutors and judges of the extent and nature of violence against women and domestic violence; the dynamics of such violence, its root causes and the concepts of gender equality and how to avoid common myths and misconceptions.
- (2) Familiarise prosecutors and judges with international standards, particularly the Istanbul Convention, and Kosovo* laws relating to key issues for responding to violence against women and domestic violence.
- (3) Enhance the knowledge and skills of prosecutors and judges to adopt a victim-centred approach and apply the laws and procedures in a gender-responsive manner, ensuring the protection and safety of women, empowering victims while holding perpetrators accountable.

1.2 Structure of the Training of Trainers' Manual

This ToT Manual is firmly grounded on the standards of the Istanbul Convention and is divided into three main parts, using a modular structure to cover a range of topics.

Part 1: Reflections on violence against women and domestic violence.

This part is divided into two modules which provide information for trainers to increase the understanding of prosecutors and judges of violence against women and domestic violence and the relevant international, regional and local legal frameworks for responding to such violence.

Part 2: The Role of Prosecutors and Judges in Responding to Violence against Women and Domestic Violence.

This part is divided into six modules which focus on the knowledge and skills that trainers will want to impart to frontline prosecutors and judges as they perform their roles along the justice continuum, from protection of the victims, assessment of the evidence in their work, the facilitation of the victim's testimony and the creation of an enabling courtroom environment, ensure the non-discriminatory application of evidentiary rules; sentencing and remedies, and the appropriateness of using mediation and reconciliation considering the dynamics of violence against women and domestic violence cases.

Part 3: Preparing for a Training

This part is divided into two modules which include tips and methodological guidance for trainers as well as how trainers can deal with emotional and personal experiences of violence.

1.3 Note to trainers

It is important for trainers who are using this manual to note that this is a resource tool that provides for a range of topics and interactive learning exercises and case studies. It is not a one size fits all training course but rather a resource tool for trainers who have been asked to prepare a course for prosecutors and judges on this subject. As this manual is relatively lengthy, trainers are encouraged to pick up different chapters to focus on for their different trainings, depending on the needs of the participants. However, that said, trainers should recognise the importance of grounding every training within the understanding of the dynamics of

gender-based violence, the core concepts and fundamental principles that frame a gender-responsive justice approach. It is suggested that the initial trainings focus on the first part of the manual, namely understanding the gendered nature of the violence and the international obligations in order to lay the ground for sensitised judges and prosecutors. Furthermore, subsequent trainings that cover specific aspects of prosecutors and judges' roles in these cases should build upon that foundation.

Training needs assessment. Before a specific training course is designed, the training team should conduct a training needs assessment to determine the knowledge and skills that should be the target of the particular training. For example, if the training is targeting newly appointed judges and prosecutors, the training team might want a basic introduction to all of the topics covered in this manual which can be integrated at different times during their basic training course. If the training is targeting experienced prosecutors and judges who have already received the introductory course and depending on their level of experience in handling these kinds of cases, the training team might want to focus on only one or two modules during a course in order to have sufficient time to delve more deeply into the issues. More on conducting a training needs assessment is covered in Part 3: Preparing for a Training.

Trainers' level of understanding. It is essential that facilitators of training sessions have a strong understanding of the dynamics of violence against women, the importance of a victim-centred approach and previous experience facilitating discussion about the issue. When facilitating sessions about the gender dynamics underpinning such violence, it might be helpful to collaborate with experts, such as non-governmental organisations providing assistance to survivors if available. Depending on the experience of the trainers in adult learning techniques and training of violence against women and domestic violence cases, some of the information in the manual can be passed over by the trainers. The level of detail in the knowledge section in each module is targeted to those who are not familiar with the subject matter. In addition, Part 3 provides basic information about adult learning principles, tips for pre-course preparation and training as well as conducting evaluations.

Structure of the modules. The modules are intended to be practical, concrete and useful. Each module contains a summary of key issues on the topic, references to applicable international and Kosovar* law and participatory exercises to assist trainers in preparing their own training course.

Training methodologies. Given that adults learn best when there are ample opportunities to participate, it is suggested that trainers use a number of and combine different methodologies to deliver the material, including:

- **PowerPoint presentation** - Slides help to vary the texture. They are there to make the presentation more intelligible, interesting, vivid and memorable.
- **Plenary discussions** - In order to involve participants to take an active role in the training, to help them relate their learning to their own work and to learn from each other's experience, questions to the plenary can generate discussion. The trainer can ask questions to a few individual participants and then ask other participants to comment on their responses. Flipcharts may be used to summarise the responses and the trainer may then comment on the interventions by the participants based on the trainer's experience and in line with international standards.
- **Group activities** - this can include small group exercises, case study discussions, simulations, etc. For these activities, the participants would be divided into smaller groups and given a task to complete within 15-30 minutes, depending on the complexity of the task. The groups are asked to write their findings on flipcharts and then one member of each group is asked to present the group's findings. Presentations will be followed by a general discussion, with the trainer intervening and commenting as appropriate. The conclusions of the discussion may be set out on a separate flip chart for ease of reference and to aid the memory of the training participants. Training participants should be encouraged to refer to their training materials during group activities.
- **Large group exercises** – this can include exercises such as brainstorming, role play, case scenario discussions or use of flash cards to generate discussion. Depending on the size of the group and the time allocated, these exercises could be modified to become small group exercises. However small group exercises usually require more time for the groups to report back to the plenary and for plenary discussion.
- **Audio-visual** - the use of audio-visual material such as short films, recordings, etc is encouraged to be used throughout the training. If any of the audio-visual aids includes any visual images of victims, their faces should be obscured on the image so that they cannot be identified.
- **Handouts** - handouts, including the pre- and post-training evaluations, case studies, and group exercises, etc. should be prepared in advanced. This can also include excerpts of international law and/or local law.

Note regarding using this Manual during a 2-day TOT workshop. While this ToT Manual is to be a resource for Kosovo* trainers who are conducting trainings for frontline Kosovo* prosecutors and judges and organised through the Academy of Justice, this manual will also be used to specifically conduct a 2-day ToT for future trainers. In a ToT workshop, the group of participants should preferably not exceed a maximum of ten persons. All the modules will be reviewed; however, given the timeframe of 2 days, some modules will be reviewed in more depth than others. This will be done in an interactive manner, inviting the active involvement of participants and providing them with time to ask questions, and engage in discussions based on their practical work and training experiences. The training methodology will combine lectures with using examples of some of the training methodology exercises set out in the manual, including case studies, exercises, videos and role plays. At the end of each session, time will be reserved for questions and answers, as well as any feedback.

1.4 Overview of Modules and Learning Objectives

It will be the responsibility of the trainers to organise in detail the sessions they need for any given training. This, of course, will depend of the length of the training, the level of understanding of the participants, and any previous training they have received. This resource manual should allow the trainers to develop trainings that range from a basic introductory course to more in-depth skill capacity development courses.

To assist the trainers to select the sessions they need, below is a summary of the learning objective for each module and session.

Part 1: Reflections on Violence against Women and Domestic Violence

The purpose of this part of the manual is to provide prosecutors and judges with a solid understanding of the specific issues pertaining to combatting violence against women and domestic violence. It provides a foundational understanding of gender, gender-based violence, the dynamics of gender-based violence and the impact of victimisation, myths and gender stereotypes and an overview of the relevant international instruments and applicable standards. This information underpins the rest of the training and is essential knowledge for the skills discussed in Part 2 of the manual. A better appreciation of the unique challenges victims of gender-based violence face can ensure that all prosecutors' and judges' dealings with victims are victim-centred and promote the empowerment of the victim.

Session	Learning objectives
Module 1: Understanding violence against women and domestic violence	
1. Explanation and definitions	By the end of the session, participants shall have the necessary knowledge and skills to: <ul style="list-style-type: none"> Understand the concept of gender equality when dealing with violence against women cases and to be able to distinguish between the terms "sex" and "gender". Define the term "violence against women" and appreciate that it is both a cause and a consequence of gender inequality.
2. Forms of violence	By the end of the session, participants shall have the necessary knowledge and skills to: <ul style="list-style-type: none"> Understand the various forms of violence against women and domestic violence and appreciate the gendered nature of such violence.
3. Understanding the dynamics of gendered violence against women and the impact of victimisation	By the end of the session, participants shall have the necessary knowledge and skills to: <ul style="list-style-type: none"> Appreciate the dynamics of gender-based violence against women and the impact of victimisation. Understand the power and control wheel and cycles of intimate partner violence.

4. Common myths and stereotypes about violence against women and domestic violence	By the end of the session, participants shall have the necessary knowledge and skills to: <ul style="list-style-type: none"> Identify common myths and realities faced by women and appreciate how this has an impact on decision-making by prosecutors, judges and victims.
5. Situation in Kosovo*	By the end of the session, participants shall have the necessary knowledge and skills to: <ul style="list-style-type: none"> Better understand the local situation of women victims of violence. Recent prevalence data on intimate partner and sexual violence in Kosovo*.
6. Importance of a victim-centred approach	By the end of the session, participants shall have the necessary knowledge and skills to: <ul style="list-style-type: none"> Understand what is meant by a victim-centred approach to addressing violence against women and domestic violence.
Module 2: International and Kosovo* legal frameworks for responding to violence against women and domestic violence	
1. International standards	By the end of the session, participants shall have the necessary knowledge and skills to: <ul style="list-style-type: none"> Gain knowledge and a good understanding of the international obligation of due diligence. Explain the importance of the criminal justice system in general and the role of prosecutors and judges in particular, for ensuring implementation of international obligations.
2. Istanbul Convention	By the end of the session, participants shall have the necessary knowledge and skills to: <ul style="list-style-type: none"> Identify the core principles and standards set forth in the Istanbul Convention.
3. Overview of relevant Kosovo* law and policies	By the end of the session, participants shall have the necessary knowledge and skills to: <ul style="list-style-type: none"> Identify the applicable laws in Kosovo* in order to effectively respond to violence against women and domestic violence. Compare their legal framework with the international recommendations regarding due diligence obligation.
4. Relevant jurisprudence at the International and European level	By the end of the session, participants shall have the necessary knowledge and skills to: <ul style="list-style-type: none"> Identify the key jurisprudence of the ECtHR and CEDAW Committee with regard to the effective application of the due diligence standard to investigations and prosecutions.
5. Techniques for prosecutors and judges on how to use International standards in their work	By the end of the session, participants shall have the necessary knowledge and skills to: <ul style="list-style-type: none"> Apply the applicable international standards in their work.

Part 2: The role of Prosecutors and Judges in responding to Violence against Women and Domestic Violence

The purpose of this part of the manual is to build on the foundational information contained in Part 1 and to emphasise the knowledge and skills required by prosecutors and judges in order for them to be able to provide a victim-centred, gendered and perpetrator accountability approach in the performance of their duties throughout the justice continuum. With a better understanding of the concepts and issues related to gender-based violence, this part aims to provide strong technical legal knowledge of the application of protection orders, supervising investigations, prosecutions, adjudication and sentencing.

Session	Learning objectives
1. Protection	<p>By the end of the session, participants shall have the necessary knowledge and skills to:</p> <ul style="list-style-type: none"> • Undertake threat assessments and risk analysis in violence against women cases. • Conduct pre-trial release hearings or make bail decisions considering the safety of the victim.
2. Working with victims as witnesses – Techniques to ensure a victim-centred approach	<p>By the end of the session, participants shall have the necessary knowledge and skills to:</p> <ul style="list-style-type: none"> • Effectively communicate with victims. • Appreciate the role of victims and understand their rights. • Conduct a gender sensitive interview of victims. • Understand and respond when dealing with uncooperative or recanting victims. • Recognise the need and how to apply for special measures to create enabling court room environments.
3. Assessing and evaluating the evidence	<p>By the end of the session, participants shall have the necessary knowledge and skills to:</p> <ul style="list-style-type: none"> • Ensure comprehensive investigation and collection of all relevant evidence has taken place. • Accurately assess the victim’s credibility and forensic evidence. • For prosecutors: exercise prosecutorial discretion in cases involving violence against women by evaluating relevant factors focusing on case characteristics and identify relevant issues surrounding charge assessment. • For judges: incorporate a gender perspective in fact determination and application of the law.
4. Combating the discriminatory use of evidentiary rules	<p>By the end of the session, participants shall have the necessary knowledge and skills to:</p> <ul style="list-style-type: none"> • Ensure gender sensitive application of evidentiary rules (sexual history; aggressive questioning; corroboration rule, etc).
5. Sentencing and remedies	<p>By the end of the session, participants shall have the necessary knowledge and skills to:</p> <ul style="list-style-type: none"> • Understand the need to ensure proportionate and dissuasive sentences in cases involving gender-based violence. • Steps to take to ensure sentences and remedies meet international standards.
6. Mediation and reconciliation	<p>By the end of the session, participants shall have the necessary knowledge and skills to:</p> <ul style="list-style-type: none"> • Understand the inappropriateness of using mediation and reconciliation in cases of violence against women and domestic violence cases. • Apply the Kosovo* Law on Mediation and the State Prosecutor’s Office guiding note on the use of alternative measures.

1.5 Literature

ECtHR jurisprudence

- Opuz v. Turkey, Application No. 33401/02, 2009
- Kontrová v. Slovakia, Application No. 7510/04, 2005
- Bevacqua and S. v. Bulgaria, Application No. 71127/01, 2008
- Branko Tomašić and Others v. Croatia, Application No. 46598/06, 2009
- Aydin v. Turkey, Application No. 23178/94, 1997
- E.S. and Others v. Slovakia, Application No. 8227/04, 2009
- X and Y v. the Netherlands, Application No. 8978/80, 1985
- M.C. v. Bulgaria, Application No. 39272/98, 2004
- Y. v. Slovenia, Application No. 41107/10, 2015

CEDAW jurisprudence

- A.T. v. Hungary, Communication No. 2/2003, CEDAW/C/36/D/2/2003
- V.K. v. Bulgaria, Communication No. 20/2008, CEDAW/C/49/D/20/2008
- Karen Tayag Vertido v. The Philippines, No. 18/2008, UN Doc. CEDAW/ C/46/D/18/2008
- Yildirim (deceased) v Austria, No. 6/2005, UN Doc. CEDAW/C/39/D/6/2005
- Goekce (deceased) v Austria, No. 5/2005, UN Doc. CEDAW/C/39/D/5/2005

International and regional instruments

- Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)
- UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- European Convention on Human Rights and Fundamental Freedoms (ECHR)
- UN Declaration on the Elimination of Violence against Women, (DEVAW)
- CEDAW, General Recommendation No. 19
- CEDAW, General Recommendation No. 33
- CEDAW, General Recommendation No. 35
- UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (UN Updated Model Strategies)

Laws and policies in Kosovo*

- Kosovo* Criminal Code, 2019
- Kosovo* Criminal Procedure Code, 2013
- Law on Protection Against Domestic Violence, 2010
- Administrative Instruction No. 12/2012 for determining the place and way of psychosocial treatment of perpetrators of domestic violence, 2012
- Administrative Instruction No. 02/2013 on the method of treatment to perpetrators of domestic violence with imposed mandatory medical treatment from alcoholism and addiction to psychotropic substances, 2013
- Kosovo* Strategy on Protection Against Domestic Violence and Action Plan 2016-2020
- Standard Operating Procedures on Protection against Domestic Violence, Government of Kosovo*, 2013
- Standard Operating Procedures for Increasing the Efficacy in the Treatment of Domestic Violence Cases, Kosovo* Prosecutorial Council and State Prosecutor, 2017
- Supreme Court of Kosovo*, Guidance on the Legal Qualification and Treatment of Domestic Violence Cases According to the Criminal Code of Republic of Kosovo*, 11 June 2020¹²

¹² See Guidance on the Legal Qualification and Treatment of Domestic Violence Cases According to the Criminal Code of Republic of Kosovo*, 11th June 2020. Available at https://supreme.gjyqesori-rks.org/wp-content/uploads/legalOpinions/27806_Udhezim%20-%20clesim%20juridik%20dhe%20trajtim%20i%20rasteve%20te%20Dhunes%20ne%20Familje%20sipas%20KPRK.pdf.

Studies and reports

- Kosova Women's Network. 2015. "No More Excuses. An Analysis of Attitudes, Incidence, and Institutional Responses to Domestic Violence in Kosovo*". Prishtinë/Priština.
- Kosova Women's Network. 2016. Sexual Harassment in Kosovo*. Prishtinë/Priština.
- Kosovo* Women's Network. 2018. "From Words to Action: Monitoring the Institutional Response to Gender Based Violence in Kosovo*".
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- Compensation to Victims of Crime: Response to Domestic Violence and Human Trafficking cases in Kosovo*. 2018. KIPRED, GLPS and Artpolis for EU Office in Kosovo*.
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Part 1: Understanding Violence against Women and Domestic Violence: Requirements of the International Standards Framework

1: Understanding Violence against Women and Domestic Violence

1.1 Explanation and definitions of violence against women and domestic violence

The definitions of “violence against women”, “gender-based violence against women” and “domestic violence” contained in the Istanbul Convention reflect the definition and understanding of violence against women defined in the UN Declaration of the Elimination of Violence.

Definitions as set out in 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).

Gender-based violence against women is violence that is directed against a woman because she is a woman or that affects women disproportionately.

Domestic violence refers to all acts of physical, sexual, psychological and 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.

Key points for judges and prosecutors to consider:

The gendered nature of the violence. Such violence is directed at the victim because she is a woman or is disproportionately perpetuated against women, in a social context of gendered hierarchy.

Particular attention to be paid to women victims of domestic violence. The Istanbul Convention recognises that domestic violence affects women disproportionately. While domestic violence is a broad term involving different social and psychological dynamics and power differentials and covers various forms, such as child abuse, elderly abuse and interpersonal or partner abuse, research has found that that domestic violence against adults is distinctly gendered.¹³ It disproportionately victimises women more than men, whilst men are over-represented as perpetrators. It is strongly related to socially determined power differentials between men and women. It is the gendered nature of partner-related violence that distinguishes intimate partner violence from violent crime in general as well as from other types of violence in the home such as child or elder abuse.

¹³ See Council of Europe, Committee of Ministers, 1037 Meeting, 8 October 2008. “European Committee on Crime Problems Feasibility study for a convention against domestic violence”.

Violence against women as a form of discrimination. The Istanbul Convention recognises the structural nature of violence against women, as both a cause and consequence of unequal power relations between women and men in all spheres. The unequal power relationships between women and men created and maintained by gender stereotypes is the basic underlying cause of violence against women. It is violence that encompasses a range of acts seeking to exert power and control over women and is “one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated”¹⁴

Gender equality as crucial for the prevention and response to violence. The Istanbul Convention is firmly based on the premise that only real equality between women and men and a change in power dynamics and attitudes can truly prevent violence against women and form the most effective response to such violence. The persistent attitudes and beliefs that see women as inferior to men and a culture of male domination socialises both men and women to accept, tolerate and even rationalise violence and to remain silent about such experiences. It is essential that judges and prosecutors understand these entrenched attitudes and traditional cultural assumptions about gender equality and gender roles in their response to crimes involving violence against women.

It is essential to have a solid understanding of concepts related to gender when responding to gender-based violence. Often there is confusion between the terms “sex” and “gender”. In many languages there is little or no linguistic distinction. While the term “sex” refers to biological and physical characteristics of men and women, gender is defined as the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men. Importantly the term “gender” applies to both women and men.

Gender roles are not determined at birth and not unchangeable, but shaped by the education of family, school, society, friends and the surrounding environment. For example, child rearing is often classified as a female role; however, it is a female gender role not a female sex role, as it can be done by both male and female. It is society that ascribes these roles.

Gender stereotypes are generalised views or preconceptions about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women. Gender stereotypes can reproduce unwanted and harmful practices and make violence against women acceptable. For example, if prosecutors and judges believe in such gender stereotypes, like women should dress modestly or women are sexually passive, then they will believe that immodestly dressed women are responsible for their own rape or women are disposed to submissively surrender to men’s sexual advances and this will have negative impact on how they respond to such cases.

Gender-responsive justice system to ensure women’s access to justice. Appreciating the gendered roles in Kosovo* contributes to judges and prosecutors’ understanding of the risks and victimisation of women, the realities women face in reporting certain crimes, how laws are applied by judges and prosecutors, whether the courts or prosecution agencies replicate gender inequalities or rather promote women’s participation and advancement within the criminal justice system¹⁵.

Key gender-related concepts

Gender means the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.

Sex refers to biological and physical characteristics of men and women.

Gender stereotype is a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women. Further, gender stereotypes are harmful when it limits women’s and men’s capacity to develop their personal abilities, pursue their professional careers and make choices about their lives. Harmful stereotypes can be both hostile/negative (e.g., women are irrational) or seemingly benign (e.g., women are nurturing). For example, the fact that child care responsibilities often fall exclusively on women is based on the latter stereotype.¹⁶

14 UN Committee on the Elimination of Discrimination against Women. 2017. General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 [hereafter CEDAW G.R. No. 35].

15 The Council of Europe has developed a HELP course (European Programme for Human Rights Education for Legal Professionals) on Women’s Access to justice: <http://help.elearning.ext.coe.int/>.

16 See UN Office of the High Commissioner for Human Rights. Gender Stereotyping at <https://www.ohchr.org/en/issues/women/wrgs/pages/genderstereotypes.aspx>.

Gender inequality refers to unequal treatment or perceptions of individuals based on their gender.

Gender equality refers to the equal rights, responsibilities and opportunities of women and men. Equality does not mean that women and men will become the same but that women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female.

Masculinity describes socially constructed attributes, behaviours and roles that pertain to men.

Differentiating between “gender” and “sex. Initially there is likely to be confusion between “sex” and “gender. Note to the trainers: it will be important to clarify and reinforce the distinction between the two words from the very outset.

Gender	Sex
Different roles and social aspects between male and female. Changeable.	Different biological and physical aspects between male and female. Unchangeable, except for surgical intervention.
Not born with it. Product of society, culture, tradition, shaped by teaching and learning.	Born with it.
Varies between regions, historic periods. Learned.	Universal: identical all over the world.
For example: childcare; men are rational vs women are emotional; men are the bread winners in the family.	For example: pregnancy and child birth; muscle mass/physical strength; growing beards.

1.2 Forms of violence against women and domestic violence

Violence against women and domestic violence is manifested in a continuum of multiple, inter-related and sometimes recurring forms – physical, sexual, psychological and economic harm and suffering. Such violence can be experienced in a range of settings, from private to public, and transcending national borders. All forms of violence against women and domestic violence are human rights violations; however, the Istanbul Convention calls for the specific criminalisation of certain forms (Articles 33 to 39).

- Physical violence refers to bodily harm suffered as a result of the application of immediate and unlawful physical force. It also includes violence resulting in the death of the victim.
- Psychological violence refers to any intentional conduct that seriously impairs another person's psychological integrity through coercion or threats.
- Stalking is any form of direct and indirect control and surveillance of the victim, with or without physical contact. It usually takes place after the end of the relationship, but it can occur while the relationship is still on-going. It can, amongst others, include threats and harassment, online or offline, following the person, spying causing the victim to fear for her or his safety.
- Sexual violence, including rape covers all forms of sexual acts performed on another person without her freely given consent and which are carried out intentionally. It includes non-consensual vaginal, anal or oral penetration of a sexual nature with any bodily part or object; other non-consensual acts of sexual nature; causing another person to engage in non-consensual acts of sexual nature with a third person. Unwanted acts of sexual nature between spouses are also covered.
- Forced marriage refers to physical and psychological force exerted on a victim to involuntarily enter into marriage. Luring a person to go abroad with the purpose of forcing this person to enter into marriage is also covered under the Istanbul Convention.
- Female genital mutilation consists of performing, assisting to perform or inciting, coercing or procuring the cutting, stitching or removal of part or all of the female external genital organs for non-therapeutic reasons.
- Forced abortion and forced sterilisation refer to the termination of a pregnancy or terminating a woman or girl's capacity to naturally reproduce without her prior and informed consent.
- Sexual harassment refers to verbal, non-verbal or physical conduct with a sexual nature and unwanted by the victim. Article 40 of the Istanbul Convention gives states parties the option to apply either criminal law or other sanctions (for instance, penalties under labour law).

This manual has a specific focus on the most common forms of violence experienced by women globally and that tend to be the most common cases seen by prosecutors and judges: namely domestic violence against women (intimate partner violence) and non-partner sexual violence. The topic of how the Kosovo* Criminal Code criminalises each form of violence will be addressed in Module 2.

Domestic violence against women / Intimate partner violence: includes a range of sexually, psychological, physically and economically coercive acts used against adult and adolescent women by a current or former intimate partner, without her consent, whether or not the perpetrator shares or has shared the same residence of the victim.

- Physical violence refers to bodily harm suffered as a result of the application of immediate and unlawful physical force. It also encompasses violence resulting in the death of the victim.
- Sexual violence includes abusive sexual contact, making a woman engage in a sexual act without her consent, and attempted or completed sex acts with a woman who is ill, disabled, under pressure or under the influence of alcohol or other drugs.
- Psychological violence reflects controlling behaviour that is expressed in a wide range of forms: intimidation through insults, humiliation, threats of any kind, and isolation from the victim's inner circle/ immediate family, etc. Psychological violence may also be linked to forms of economic violence such as deprivation or restriction of financial resources. According to the Istanbul Convention Explanatory Report, this refers to a course of conduct rather than a single event. It is intended to capture the criminal nature of an abusive pattern of behaviour occurring over time.
- Economic violence includes denying a woman access to and control over basic resources, including: time, money, transportation, food or clothing.

Physical and sexual assaults, or threats to commit them, are the most apparent forms of domestic violence and are usually the actions that allow others to become aware of the problem. However, regular use of other abusive behaviours by the perpetrator, when reinforced by one or more acts of physical violence, makes up a larger system of abuse. Although physical assaults may occur only once or occasionally, they instil the threat of future violent attacks and allow the abuser to take control of the woman's life and circumstances. Both economic and psychological violence pose distinct challenges for the legal system due to evidentiary issues, which are discussed in greater detail later in the manual.

Sexual violence /Non-partner sexual violence: refers to violence by a relative, friend, acquaintance, neighbour, work colleague or stranger that includes being forced to perform any unwanted sexual act. It includes sexual harassment and violence perpetrated against women and girls, frequently by an offender known to them, including in public spaces, at school, in the workplace and in the community.

1.3 Understanding the dynamics of gender-based violence against women and the impact of victimisation

There is a lot of misunderstanding and confusion around the behaviour of victims, both towards her reactions to the violence and why she is reluctant to participate in the criminal justice process. Understanding how the dynamics of gender-based violence against women and trauma can influence the victim's reactions to the violence and her subsequent willingness to participate with the criminal justice system can assist prosecutors and judges in effectively handling these cases. Ensuring a trauma-informed approach to gender-based violence is essential to effectively responding to these cases. This section raises common questions that many criminal justice professionals have and provides some points for you as trainers to answer them.¹⁷

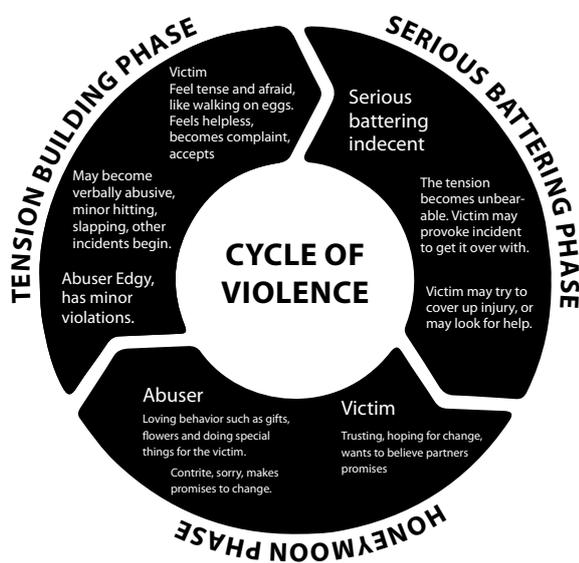
Q. Aren't victims of gender-based violence against women just like any other victims of crime? Unlike other victims of crime, experiencing gender-based violence is extremely traumatic. Studies show that a significant portion of victims of gender-based violence against women suffer from: significant mental trauma, such as post-traumatic stress disorder, depression and anxiety; feelings of being socially isolated; and experiencing low self-esteem. Gender-based violence against women negatively impacts on their sense of privacy, safety and well-being.

Q. Why don't domestic violence victims leave at the first instance of physical violence? Victims of intimate partner violence have often been isolated from family and friends, financially controlled, and experience psychological violence that reduces the woman's confidence and sense of self-worth which makes her feel

¹⁷ The questions and answers are inspired by Skinnider, E. 2019. Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-Based Violence against Women and Girls. UNODC.

that something must be wrong with her and not the abuser. By the time the abuser uses physical violence for the first time, often the victim feels she somehow deserves it. Then, after the violence, the abuser is contrite, apologetic with promises never to do it again. Understanding the cycle of domestic violence can assist prosecutors and judges when assisting the victim.

Diagram: Cycle of violence



Source: Lenore Walker. 1970.

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

Q. Why do victims stay with the abuser or return after to them they have left? There is a need to stop blaming victims for staying and start asking the question of why men abuse their intimate partners. Supporting victims requires an understanding of the different psychological, economic and social factors that make it difficult for some women to extricate themselves from violent relationships. Some of the complicated and varied reasons women do not leave their abusers include¹⁸:

- Danger and fear. Women fear they will be subjected to far worse violence if they leave. Research has found that the risk of intimate partner violence is increased within the context of a separation and that femicide may be triggered by an actual or even anticipated separation.¹⁹
- Shame, embarrassment or denial. Abuser can be well respected in the community which prevents others recognising or minimising the violence. They might be unwilling to reach out and confide in friends, family or the police, either out of shame and humiliation or fear that they will not be believed.
- Family or societal pressure. The victim might feel pressure to keep the family together for numerous reasons, including for the sake of children, religious or cultural beliefs.
- Financial reasons. Women stay due to lack of independent financial resources, lack of another place to go, or concerned about supporting her children. Women who work typically make less money and hold less prestigious jobs than men and are more responsible for childcare.
- Fear of losing custody of her children. Women may fear that her children will be taken away.

18 See Anderson, M., et al 2003. "Why Doesn't She Just Leave?: A Descriptive Study of Victim Reported Impediments to Her Safety" Journal of Family Violence 18, no. 3, 151-155 and Yamawaki, N., et al. 2012. "Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship with her Abuser, and the Decision to Return to her Abuser" Journal of Interpersonal Violence 27, iss. 16, 3195-3212.

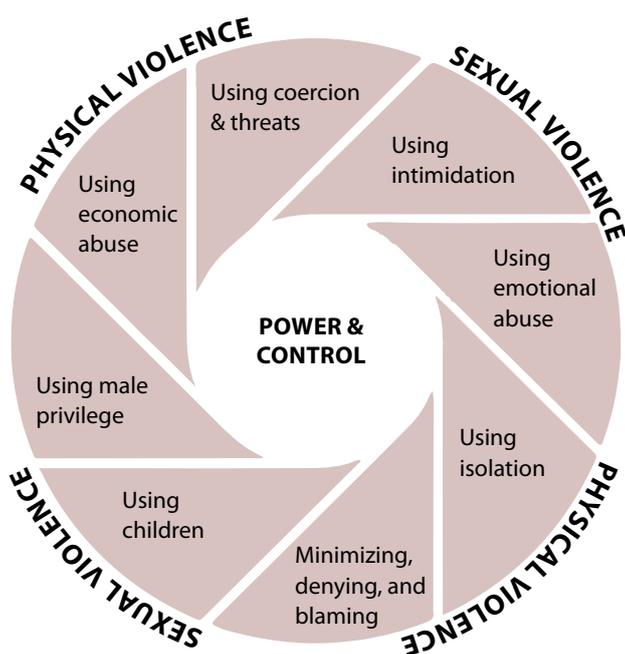
19 Petersson, J. et al. 2016. "Risk Factors for Intimate Partner Violence: A Comparison of Anti-social and Family-Only Perpetrators" Journal of Interpersonal Violence, 1.

Love. Victims often love or care about the people who harm them. They may call in the police to stop the violence rather than wanting the abuser to end up in the criminal justice system.

Lack of effective support from justice agencies. When victims report violence to the police or other justice agencies and they do not receive effective protection and support, they will likely drop or withdraw their case. If the violence continues, they may not report if they do not have any trust that the justice system can help them.

Q: All couples fight sometimes. How can I tell a dispute from intimate partner violence? Intimate partner violence is all about exerting dominance and control over another person. Perpetrators choose this pattern of coercion and violence in order to get what they want and maintain control. It is not just one physical attack and it might not even involve a physical act. It can include repeated use of a number of forms of violence, including physical violence as well as intimidation, threats, economic deprivation, isolation, psychological and sexual abuse. Perpetrators often make very calculated decisions about when to use violence, how much violence to use and where to use the violence. The power and control wheel developed by the Domestic Violence Intervention Project provides a useful illustration of a common pattern of domestic violence (see the diagram below). This pattern often starts with intimidation, humiliation and threatening behaviour and reinforced by establishing control over another person's life through isolation, manipulation, and by placing limits on their personal choices and freedoms.

Diagram: The Wheel of Power and Control



Using intimidation: Making her afraid by using looks, actions, gestures, smashing things, destroying her property, displaying weapons.

Using emotional abuse: Putting her down, making her feel bad about herself, calling her names, making her think she is crazy, playing mind games, humiliating her, making her feel guilty.

Using isolation: Controlling what she does, who she sees and talks to, what she reads, where she goes, limiting her outside involvement, using jealousy to justify actions.

Minimising, denying, blaming: Making light of the abuse and not taking her concerns about it seriously, saying the abuse didn't happen, shifting responsibility for abusive behaviour, saying she caused it.

Using her children: Making her feel guilty about the children, using the children to relay messages, using visitation to harass her, threatening to take children away.

Using male privilege: Treating her like a servant, making all the big decisions, acting like the 'master of the castle', being the one to define men's and women's roles.

Using economic abuse: Preventing her from getting or keeping a job, making her ask for money, giving her an allowance, taking her money, not letting her know about or have access to family income.

Using coercion and threats: Making and/or carrying out threats to hurt her, threatening to leave her, to commit suicide, to report her to welfare, making her drop charges, making her do illegal things.

Source: *The Duluth Model Domestic Violence Intervention Project*

Q. Why don't all domestic violence victims want justice? Some women have become involved in the criminal process after all other resources have been exhausted and are usually looking for protection and an immediate stop to a particular incident of violence. They do not necessarily want to go to criminal court. However,

for others, when the criminal justice system only focuses on the current incident, this can minimise the whole experience of the patterned use of coercion, intimidation and the use or threat of violence. For other women, the goals of the criminal justice system, that of punishment and retribution, are often at odds with the goals of women victims and in fact can contribute to feeling and being unsafe and worsen their personal and financial well-being.

Q. Why do domestic violence victims turn reluctant or even hostile in court? It is common for victims of intimate partner violence to refuse to testify or to recant and testify that the incident did not happen. The cycle of violence and power and control wheel diagrams can help prosecutors and judges understand why victims might withdraw their complaints. Victims call the police during the acute phase of the violence, only to withdraw it during the honeymoon phase, and in light of the many psychological and social barriers that prevent women from leaving. Research suggests that there is a sophisticated emotional appeal by the perpetrator designed to minimise their actions and gain sympathy of the victim.²⁰

- Step one: strong and resolved. Here the victims are almost resolved to see the abuser prosecuted for his actions in the first or second telephone call, but the calls continue.
- Step two: minimising the abuse. The perpetrator tries to convince the victim that the incident was not that serious, tries to gain her sympathy casting himself as the victim: suffering in jail, depressed, perhaps suicidal, and missing her and the children.
- Step three: they don't understand us. Once he has gained her sympathy, they bond over their love and join together to fight the world that doesn't understand.
- Step four: Lie for me.
- Step five: developing a plan to change her story.

Q How does intimate partner violence impact children? Children who witness domestic violence experience adverse effects on brain development.²¹ They have psychosocial maladaptation, such as post-traumatic stress disorder that is associated with demonstrable changes in the anatomic and physiological make up of their central nervous system. Individuals with these changes do not function well in society and have serious medical, sociological and economic issues in the future.

Q. Why didn't a rape victim fight back? Rape victims make split-second decisions about how to react in order to survive. The part of the brain primarily responsible for detection of, and reaction to, a threat is called the amygdala. The brain's objective is survival and it occurs at a time when the higher brain functions are suppressed. This means the victims will react with what might seem illogical or irrational behaviours to a prosecutor or judge. To a rape victim, a threat of violence or death is immediate regardless of whether the rapist uses a deadly weapon. The fact that a victim ceased resistance to the assault for fear of greater harm or chose not to resist at all does not mean that the victim gave consent. If victims assess that they are not in a position to remove themselves from danger, they often submit to the violence in order to avoid unnecessary or escalation of injuries. Each rape victim does whatever is necessary to do at the time in order to survive. The human system will respond to the perceived threat in one or more of five ways²²:

- Fight: Some victims resist and fight back.
- Flight: Some victims are able to flee the violence. This does not minimize the intent of the violence or the trauma experienced by the victim.
- Freeze: Some victims respond to the trauma of sexual violence through the psychological phenomenon of dissociation, which is sometimes described as "leaving one's body," while some others describe a state of "frozen fright" in which they become powerless and completely passive. Physical resistance is unlikely in victims who experience dissociation or frozen fright or among victims who were drinking or using drugs before being assaulted.
- Flop: Some victims lose musculature tension and both their body and mind become malleable, especially where the victim is physically unable to resist the attacker. The victim believes that if the violence is to occur the likelihood of surviving it will increase if her body yields.
- Befriend: – Some victims, such as women being raped by an acquaintance, may ask for a condom to avoid becoming pregnant or contracting sexually transmitted infections.

20 Bonomi, A.E. 2011. "Meet me at the hill where we use to park': Interpersonal Processes Associate with Victim Recantation" Social Science and Medicine.

21 Tsavoussis, A. et al 2014. "Child-Witnessed Domestic Violence and its Adverse Effects on Brian Development: A Call for Social Self-Examination and Awareness" Front Public Health 2014: 2: 178.

22 UNODC. 2017. "The Resource Book for Trainers on Effective Prosecution Responses to Violence against Women".

Q. Why didn't the victim report violence promptly? In addition to the range of reactions victims can have during the violent incident, victims can also react very differently after the violent incident.

- Victims might try to dismiss or ignore what happened and even normalise it by having contact with the perpetrator in the future.
- Victims might only decide to report when supported by a family member or friend confirming that this is not normal behaviour but wrong behaviour. Particularly if the perpetrator is someone they trusted, it can take years for victims to even identify what happened to them as violence.
- Victims, who often experience a profound sense of shame, stigma and violation, might only decide to report when they feel adequately supported.
- Victims might not report at all if they are worried about the negative consequences of reporting, that they will be blamed for the incident or their lives will be open to judgments and criticism.
- Victims will not report if they lack confidence in the criminal justice system.

Q. Why would victims lack confidence in the criminal justice system? People working in the criminal justice system view it as objective and unbiased and can be surprised to hear that many female victims lack confidence in the system. It is important for prosecutors and judges to understand how the criminal justice system can constitute a barrier for women seeking protection and justice. The lack of gender sensitivity, lack of understanding about the nature of gender-based violence and discriminatory treatment of victims by criminal justice actors can and often result in the secondary victimisation of victims. There are certain moments in the criminal justice process, from initial contact to adjudication, that can result in re-traumatisation of the victim. These include:

- Interviews by insensitive, indifferent or even hostile criminal justice actors and having to go through multiple interviews.
- Lack of legal assistance and knowledge and understanding of their rights.
- Lack of interpreters and challenges in communication.
- Intrusive forensic testing, often done by male forensic examiners who are not specifically trained in handling such victims.
- Onus is often on the victim to initiate the formal report and prosecution.
- Emphasis on mediation or informal settlement.
- Overreliance on physical evidence and inadequate or insensitive investigation.
- Testifying and having to re-testify.
- Lack of in-court protection, confrontation with the accused.
- Lengthy delays in the process, postponements and continuances.
- Decisions based on judicial stereotypes.

Q. Is it really sexual violence if there are no visible injuries? Along with the question of why the victim did not fight back is the belief that if a woman or girl has been the victim of sexual violence, medical evidence of her injuries will be able to conclusively corroborate her statement. This misperception sets an unrealistic standard for both the victim as well as the medical community as this is simply not the case in most incidents of sexual violence. While medical examinations can sometimes confirm sexual violence, it can never exclude it.²³ It is completely possible to be sexually abused and yet have the abuse leave no discernible physical trace on the victim. Some of the common reasons why definitive medical evidence is not forthcoming in the majority of cases:

- Delay in reporting. It is not uncommon for victims to delay disclosing the sexual violence for weeks, months or even years. This means that the medical examination will also be delayed and any injuries might already be healed and indiscernible.
- The type of violence may be consistent with no medical findings. Unwanted sexual touching, creation of pornography and oral sodomy do not generally result in physical findings. Also, vagina redness or minor abrasions of mucous membranes may not be detectable within minutes or hours, and there may be lack of sperm if the victim has washed, urinated or brushed her teeth.
- Elasticity. The hymen's tissue is elastic and full penetration by an object a finger or even a penis may cause no visible trauma.
- Offender and victim typology. Frequently the perpetrator is known to the victim and force is not generally used.

²³ Kreston, S. 2007. "An inconvenient truth: On the absence of definitive corroborative medical evidence in child sexual abuse cases". Child Abuse Research in South Africa, 8(2), 81-96.

Q. Can she really be a victim of sexual violence if she doesn't act like one? There is a common misperception that a "real" rape victim will be extremely upset when talking about the rape. It is important for prosecutors and judges to understand that victims behave in a wide variety of ways after the sexual violence. There is no one response to sexual violence.

- Victims may appear calm or flat or distraught or overtly angry.
- Later, victims may react by self-medication, by engaging in high-risk sexual behaviour, by withdrawing from those around them or by attempting to regain control.
- Victims might turn to social media to deal with post-traumatic stress and in an attempt to regain control.
- Victims might also stay friendly with the perpetrator, such as sending friendly text messages to the same man she says sexually assaulted her. Many perpetrators are known to the victims, and these men have worked to gain trust and appear benevolent to the victim. This relationship does not disappear overnight, even after an episode of sexual violence.
- Victims may think it was their fault or they may have little choice but to stay in contact if the offender is a boss, teacher or relative.

Q. Why do victims not recall what happened or appear to change their stories? Research shows that traumatising experiences are often experienced as a sure threat, or a disruption of life and produce such an emotional shock that can modify the brain.²⁴ When an individual suffers a traumatic experience, her usual balance is altered so decidedly that it must be rebuilt, partly or fully, by incorporating the memory of that traumatic event such as it was or modified. Repetition of trauma has a strong impact on the victim's reaction. An inability to recall timelines and details has been shown by neurobiological research to be not only legitimate but common. When the brain's defence circuitry is activated, the prefrontal cortex, which normally directs attention, can be rapidly impaired, affecting what information is recorded in memory.²⁵ So victims may remember certain things like a clock ticking or carpet colour but not the order of events.

Q. Should I be concerned about high rates of false allegations? There is a persistent misperception that there are high rates of false allegations and that most rape cases are unfounded. This is fed by beliefs that women are fickle and spiteful, women are not particularly credible, women lie to protect their honour, women are vengeful and lie to avenge a perceived wrong; women lie about sexual assaults to perpetrate blackmail, women have overactive imaginations and so on. However, it is important for prosecutors and judges to know that the evidence does not support this belief. According to a 2009 review of international research on false reporting of sexual violence cases suggests that false reporting happens in only 2-8% of reported cases (of which it is estimated that less than 10% of cases are actually reported).²⁶ In addition, as previously noted, statistics reveal very few cases of rape are actually reported to police due to shame, self-blame, fear of the perpetrator, the possibility of not being believed and the social stigma. The disincentives are also disincentives to falsely reporting a rape.

Q. What should I do if it looks like the girl is a willing party? Judges and prosecutors need to remember that girls are most often sexually exploited by an adult in a position of power or authority or by someone whom they trust. In the context of sexual relations involving children, any appearance of consent to such conduct is deserving of elevated scrutiny, with particular attention to be paid to the fact that the person giving consent is a child. The inequalities in the relationship are of great importance in understanding the construction, nature and scope of the child's apparent consent to any sexual relations. Between girls and adult male perpetrators there is an unequal relationship between them. Judges and prosecutors should be aware that perpetrators often target vulnerable females, which includes not only girls but also women with disabilities (physical and mental), and women in vulnerable positions, such as sex workers.

Q. What is 'grooming'? Without an understanding of grooming techniques, prosecutors and judges might view the girl victim as a willing party to the sexual activity or a compliant victim. Grooming has been defined as "A process by which a person prepares a child, significant adults and the environment for the abuse of this child. Specific goals include gaining access to the child, gaining the child's compliance and maintaining the child's secrecy to avoid disclosure. This process serves to strengthen the offender's abusive pattern, as it may be used as a means of justifying or denying their actions."²⁷ The techniques involved in grooming include:

24 This research has been reviewed in UNODC. 2017. "The Resource Book for Trainers on Effective Prosecution Responses to Violence against Women".

25 Hopper, J. Harvard Medical School as cited in Dewan, S. 2017 "She Didn't Fight Back: 5 (Misguided) Reasons People Doubt Sexual Misconduct victims". The New York Times.

26 Lonsway, K. et al 2009. "False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assaults". 3:1 The Voice 1.

27 Kreston, Susan. 2009. "In harm's way: child pornography, grooming and the Sexual Offences Act of 2007". Child Abuse Research: South African Journal, 10(2):41-51.

- Identifying the potential victim. They are usually marginalised children who have low self-esteem and feel alienated from their family or community.
- Lowering the sexual inhibitions of a child victim in order to exploit the child sexually. The perpetrator builds trust and breaks down the child's defences by giving gifts, playing games, pretending to share common interests, use of flattery and reassuring the child's family.
- Desensitising and normalising adult-child sex. There is a gradual erosion of boundaries, often with escalating physical contact and/or engaging the child in inappropriate behaviour such as drinking alcohol or introducing pornography. This starts with 'innocent' touching such as hugs, pats or kisses, tickling or stroking her hair and 'accidental' touching, such as brushing against the child's breasts or genital area before moving to sexual abuse.
- Establishing a bond between the perpetrator and the victim, resulting in the greatly reduced likelihood of the child disclosing the abuse. This includes making the child feel special, sharing secrets and special activities, such as outings together.

1.4 Common myths and stereotypes about violence against women and domestic violence

There are many myths and gender stereotypes about violence against women and domestic violence which can have serious negative impact on the protection and justice provided to victims. These myths are incorrect beliefs that are not based on evidence but on preconceived ideas and stereotypes. They develop in part because it can be difficult to understand why one person would hurt another, particularly in the context of an intimate relationship. If these myths are formally or informally embraced by the criminal justice institutions, this can lead to: secondary victimisation; the justification of unique case treatment such as corroboration requirements and the admissibility of victim character evidence; the downplaying of the perpetrator's responsibility and criminality; the denial or trivialisation of violence perpetrated by men against women; and victim blaming.

Myths and gender stereotypes disable the safeguards in the criminal justice system, influence the discriminatory application of criminal procedures and evidentiary rules that have developed traditionally out of beliefs about women and girls, and distort the conduct of judges, prosecutors and defence counsel. Consider the wide-ranging impact of prosecutorial and judicial stereotyping:

- Distort their perceptions of what occurred in a particular situation of violence or the issues to be determined at trial.
- Focuses their attention on the victim's behaviour and personal characteristics rather than the perpetrator's actions which generally results in suspicion of the victim's claim of gender-based violence against women.
- Affect their vision of who is a "real" victim of gender-based violence against women.
- Influence their perceptions of the culpability of persons accused of gender-based violence against women.
- Influence their views about the credibility of witnesses.
- Lead prosecutors to submit / not object to, and judges to permit the admission of irrelevant or highly prejudicial evidence to court and/or affect the weight judges attach to certain evidence.
- Influence the assessment of evidence.
- Cause them to misinterpret or misapply laws.
- Shape the ultimate legal result.

It is therefore important for prosecutors and judges to be aware of these myths and gender stereotypes; constantly ask themselves whether their conduct and decision-making in cases involving violence against women and domestic violence is grounded in gender stereotypes; and actively play a role in dispelling these myths and counteracting the ways in which myths promote victim blaming in their day to day tasks. It is essential that prosecutors and judges focus on assessing the credibility of the incident and the perpetrator's actions and not solely on the credibility of the victim.

Myth	Reality	Points to raise in discussion
Rape myths and realities		
<p>Rape is a crime of lust or passion.</p> <p>✓ Similar myth: rape happens only to young, pretty or desirable women.</p>	<p>Rape is an act of violence and aggression in which the perpetrator uses sex as a weapon to gain power and control over the victim.</p> <p>✓ There is no "typical" sexual assault victim. Sexual violence can happen to anyone, regardless of sex, race, age, etc...</p>	<ul style="list-style-type: none"> ✓ This myth falls into the broad category of "he didn't mean to" which sees sexual violence as a result of men's uncontrolled desire. ✓ This myth denies and trivialises violence. It removes the blame from the perpetrator and places it on the victim for causing lust, and it fundamentally mischaracterises the sexual violence as a matter of desire, rather than a crime that is about the exercise of power. ✓ A common defence tactic in rape trials to redefine the rape as sex and try to capitalise on the mistaken belief that rape is an act of passion that is primarily sexually motivated. ✓ Another common defence tactic is to argue that violence was a result of miscommunicated romantic signals and that men are only guilty of incompetent message de-coding rather than rape. ✓ Important to draw the legal and common sense distinction between rape and sex. ✓ There is no situation in which an individual cannot control his sexual urges. ✓ Sexual excitement does not justify forced sex and a victim who engages in kissing, hugging, or other sexual touching maintains the right to refuse sexual intercourse. ✓ The belief that sexual assault victims are attractive, young or sexually inexperienced is often related to the mistaken belief that rape is about sex, rather than violence, and that the attractiveness of the victim is one of the causes of the assault. ✓ Although there is no typical sexual assault victim, studies indicate that certain groups are victimised at higher rates than others. Victimisation is not based on whether the victim is attractive but rather on vulnerability and availability.

<p>Rape more often involves a stranger, physical force and physical injury.</p>	<p>Rape more often involves someone the victim knows, without visible physical injury.</p>	<ul style="list-style-type: none"> ✓ This myth feeds into the belief that if the circumstances do not meet this idea of “real” rape then it wasn’t really rape. ✓ Research finds that victims are more likely to be sexually assaulted by someone she knows (e.g. friend, date, intimate partner, classmate, neighbour, or relative) than by a stranger; many of the unwanted and forced acts that take place during a sexual assault do not result in visible non-genital injuries; and most adult rape victims do not have any non-genital injuries from sexual assaults. ✓ If prosecutors and judges believe this myth, they narrowly define what counts as sexual violence and interpret certain criminal elements as requiring force or resistance. ✓ This myth means they require victims to resist and therefore sustain visible injuries. Thus they require corroboration of the victim’s account and assume if there is no physical evidence, sexual violence has not been proven.
<p>When a woman’s chastity is threatened, she violently resists, attempts to escape or screams for help.</p>	<p>When a woman is being raped, she may freeze, flop or try to make friends with the rapist.</p>	<ul style="list-style-type: none"> ✓ Victims make split-second decisions about how to react to sexual violence in order to survive. The human system will respond to the perceived threat in one or more of five predictable ways: friend, fight, fright, freeze and/or flop. Each rape victim does whatever is necessary to do at the time in order to survive. ✓ This myth is supported by many other misconceptions, such as: if a woman is raped without resisting she must have wanted it to happen; no woman would allow herself to be raped if she does not want to; and good women are sexually chaste. ✓ Believing in this myth means prosecutors and judges focus on the victim’s behaviour instead of the perpetrator’s actions, and may conclude that lack of physical harm means consent was given.

<p>Some women deserve to be raped, it is their fault.</p> <p>Either they are asking for it (sexy clothes incite men to rape), they wanted it, or they put themselves in dangerous situations (prostitution, drunk).</p>	<p>Women never deserve to be raped.</p>	<ul style="list-style-type: none"> ✓ Sexual violence is never the victim's fault. ✓ No other crime victim is looked upon with the degree of blameworthiness, suspicion, and doubt as a rape victim. ✓ Consent must be explicit. "No" means "No," no matter what the situation or circumstances. ✓ It does not matter if the victim was drinking or using drugs, if she was out at night alone, was sexually exploited, was on a date with the perpetrator, or if the perpetrators believed the victim was dressed seductively. No one 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. ✓ A common defence tactic is to lead the court to focus on behaviour that is viewed as "morally suspicious" to cast doubt on the credibility of the complainant. ✓ If prosecutors and judges believe this myth, they will allow questioning on irrelevant issues to the victim such as walking alone late at night, having a provocative outfit, flirting, wearing make-up, going to bars alone, or drinking alcohol.
<p>Women seek to avenge slights or to extort money often fabricate rape charges.</p>	<p>Women do not often falsely report rape.</p>	<ul style="list-style-type: none"> ✓ The mistaken belief that most sexual assault allegations are false is unfortunately common. Significantly, research indicates that only 2 to 8 % of sexual assault cases involve false reporting. ✓ Many reports are classified as false where there has been: delayed reporting; victim indifference to injuries; vagueness; or a victim's attempt to steer away from unsafe details, suspect description or location of offence; and inconsistencies in the victim's statement. ✓ There is an over-estimation of the scale of false allegations by both police and prosecutors. ✓ This feeds into a culture of scepticism and leads to poor communication and loss of confidence between victim and the criminal justice system.

<p>A victim's inconsistencies mean she is not credible.</p>	<p>Inconsistencies are common and can be explained or avoided through appropriate responses.</p>	<ul style="list-style-type: none"> ✓ The belief that many victims are false place unreasonable requirements on victims to demonstrate that they are real and deserving victims. ✓ Aware of the myths themselves, many victims adjust their initial account in order to appear believable. ✓ If this is understood through the lens of myths, then the prosecutor will see the inconsistency as making a false complaint or as creating evidentiary problems. ✓ The trauma might affect the victim's ability to coherently or fully recount her experience. ✓ Being supported at the initial interview enables the victim to be more relaxed and develop trust for full disclosure of the incident.
<p>A victim will report everything at the first available opportunity.</p>	<p>Victims often need to feel safe and supported before reporting.</p>	<ul style="list-style-type: none"> ✓ The trauma experienced by the victim causes her to feel unsafe. ✓ They often only report after they have arrived at a safe location or after they have talked to family, friends or support persons.
<p>Intimate Partner violence myths and realities</p>		
<p>Domestic violence is only perpetrated by a strong man against a weak woman.</p>	<p>Relative physical strength or weakness is not the issue, power and control are.</p>	<ul style="list-style-type: none"> ✓ Far from being a powerless victim, a woman involved in a violent relationship often displays enormous resources of strength in the way she learns to live with fear, navigate unpredictability, and sense her partner's moods to protect herself and her children.
<p>Domestic violence is caused by alcohol and drug abuse.</p>	<p>Drugs and alcohol are considered risk factors but not the cause of violence.</p>	<ul style="list-style-type: none"> ✓ This believe leads to the misunderstanding that if the perpetrator undergoes treatment for alcohol abuse, he will stop the violence. ✓ Although alcohol and drugs are often associated with domestic violence, they do not cause the violence. ✓ Many perpetrators do not drink or use drugs, and those who do, usually do not show aggression towards unknown people, colleagues or bosses, but direct violence at their partners. ✓ Perpetrators often use intoxication as an excuse or argument not to have to take responsibility for their actions. ✓ It is important to realise that domestic violence and alcohol/drug abuse are two separate issues and need to be treated independently.

<p>It cannot be that bad or otherwise she would leave.</p>	<p>There are many practical reasons why women stay in a violent relationship.</p>	<ul style="list-style-type: none"> ✓ Victims may be afraid of the repercussions if they attempt to leave; afraid of becoming homeless; worry about losing their children; and fear poverty and isolation. ✓ Women stay in violent relationships for emotional reasons ranging from love to terror. Some women return to their partners because they believe that their partner will change and the abuse will end. ✓ Often, before the first physical assault, the abuser uses control tactics, such as isolation of the victim from social and family connections, threats, financial dependency, and by doing this the abuser has degraded the victim to the point that she lacks self-confidence necessary to leave or appropriately respond to the violence. ✓ Another explanation is that fear and uncertainty activate the attachment behavioural system. In traumatic situations, the victim turns to a person she is closest to, which is often the abuser. ✓ This myth feeds into the belief that “real” domestic violence is serious physical violence leading to serious injuries or death. When prosecutors and judges believe this, they narrowly define offences of “assault”, “intimidation”, “coercion” requiring the victims to sustain visible injuries and do not consider psychological violence or economic abuse as “real” domestic violence.
<p>Even if acts of violence take place in relationships, these are isolated episodes.</p>	<p>Domestic violence usually involves a pattern of on-going physical, psychological, sexual or economic violence.</p>	<ul style="list-style-type: none"> ✓ This myth sees domestic violence as single incidents rather than a pattern of coercion and control involving various forms of violence. ✓ Every single episode of violence needs to be properly investigated, and if necessary prosecuted, and those affected by it need to be offered help and support. ✓ Domestic violence is characterised by a cycle of violence that consists of intimidating and degrading behaviour, threats, attacks, control, disempowering and lowering the self-esteem of the victim. ✓ Domestic violence is characterised by an increase in frequency and severity of actions that if not effectively stopped puts the victim at higher risk. ✓ It is very unlikely that the perpetrator will stop since he does not believe or does not want to believe that his actions are wrong.
<p>Domestic violence is a private issue for families.</p>	<p>Domestic violence is a crime that affects communities and society as a whole.</p>	<ul style="list-style-type: none"> ✓ Violence against women and girls violates the law in most countries. This means that domestic violence is behaviour that the community does not accept. It is important for abusers to receive the message from the community. ✓ Some legislation considers the fact that the violence occurs in the family as an aggravating factor.

Men who abuse are violent because they cannot control their anger and frustration.	Abusers are very much in control and use violence to control the victim.	<ul style="list-style-type: none"> ✓ Domestic violence is intentional conduct, and abusers are not “out of control”. ✓ Their violence is carefully targeted to certain people at certain times and places. ✓ They generally do not attack their bosses or people on the street, no matter how angry they may be. ✓ Abusers also follow their own internal rules about abusive behaviours. They often choose to abuse their partner only in private, or may take steps to ensure that they do not leave visible evidence of the abuse. ✓ They use acts of violence and a series of behaviours, including intimidation, threats, psychological abuse, isolation, etc to coerce and to control the other person. ✓ They choose their tactics carefully: some destroy property, some rely on threats of abuse, and some threaten children.
Husbands cannot rape their wives.	Husbands do rape their wives.	<ul style="list-style-type: none"> ✓ Rape occurs whenever sexual contact is not mutual, when choice is taken away. Any man who disregards a women’s ‘no’ is raping her.
There is no point in helping women because they go back to the abuser.	All victims, including those who go back to the abuser require protection, support and justice.	<ul style="list-style-type: none"> ✓ This misunderstanding feeds into victim blaming. ✓ Women victims of violence are not masochistic. ✓ If and when they return to their abusers it is because they have not been helped sufficiently and found it more difficult to undertake any actions and make decisions on their own, than to go on suffering in silence. ✓ Going back should not be interpreted as evidence that the abuser has really changed; such a case is very rare. Instead, prosecutors and judges should ask what went wrong in protecting the victim.
If it was really serious she would come to court to provide evidence.	Many reasons may prevent her from coming to court.	<ul style="list-style-type: none"> ✓ A woman might withdraw her complaint or participation in the criminal justice system for a number of reasons. ✓ Withdrawing support for the prosecution of her abuser may appear to be her safest short-term choice in a context of many difficult choices. ✓ She may perceive it as the only way to keep herself and her children safe. The victim might be in the honeymoon phase of the cycle of domestic violence. ✓ A comprehensive understanding of the cycle of violence helps prosecutors who are assisting the victims.

Source: Adopted from UNODC. 2017. “The Resource Book for Trainers on Effective Prosecution Responses to Violence against Women” with additions from Baldray, A. and Duban, E. 2016. “Improving Effectiveness of Law Enforcement and Justice Officers in Combating Violence against Women and Domestic Violence: Training of Trainers Manual”. Council of Europe.

1.5 Prevalence and attrition rates of violence against women and domestic violence in Kosovo*

A common reaction by prosecutors and judges who attend a course on violence against women and domestic violence can be “why the focus on violence against women?” “Aren’t there more urgent criminal justice priorities?” Providing participants with information on the extent of the violence in Kosovo* and the rates of attrition in violence against women cases in their criminal justice system can provide a good basis for responding to these questions as well as for the subsequent training modules on the role of the judges and prosecutor in the criminal justice chain.

Some information and statistics on the general situation of women in Kosovo*

- Women are overrepresented in unpaid domestic care work, and the informal economy. Only 12% of women of working age were employed in 2015 (39% for men), and they continue to be discriminated against in terms of lower pay.²⁸
- Although women and men have equal ownership and inheritance rights to property, in 2016 women accounted for only 15.6% of property owners.²⁹
- In politics, women remain underrepresented and discriminated against. Currently in 2020, women make up only 34% of all members of the Kosovo* Parliament.³⁰
- After the regular local elections held for Municipal Assemblies and Mayors in October 2017, all 38 municipalities are headed by men.³¹
- According to the latest labour survey (2016-2017), 80% of women are not economically active (compared to 34.7% of men)³². Reasons for this great non-economic activity include unpaid household chores, especially childcare.³³
- Women’s unemployment remains high, with 36.6% of unemployed women compared to 28.7% of men in 2016-2017.³⁴
- Unemployment among young people also remains a major problem in Kosovo*, especially for young girls, of whom 63.5% are unemployed, compared to 48.4% of young men who are unemployed (2016-2017 statistics).³⁵

Some information and statistics on the prevalence and attitudes of violence against women in Kosovo*

- Gender-based violence against women, especially domestic violence, and sexual harassment remain widespread. While, social, judicial, administrative and service-based data collection practices are extremely weak in relation to all forms violence against women in Kosovo*, the available information indicates that violence against women is widespread.³⁶
- Regarding domestic violence, police data indicates that in 2016 women accounted for 80% of 1247 cases of domestic violence reported to the police. However, authorities and women’s organizations estimate that the number of victims to be much higher, with the Agency for Gender Equality estimating that up to 90% of cases were unreported in 2008.³⁷
- According to another survey conducted in 2017, 64% of women have experienced sexual harassment, including harassment at work, school, university, home and in public places.
- According to a 2015 survey conducted by the Kosova Women’s Network, 41% of women stated that they suffered some form of domestic violence, including physical, psychological and/or economic violence in 2014; 68% of women stated that they had suffered domestic violence in their lifetime.³⁸

28 Krol, Paula, Kabashi, Emine and Ramizi Bala, Ardita. June 2017. “Mapping Support Services for victims of violence against women in Kosovo*.” Council of Europe.

29 Kosovo* National Strategy on Property Rights. October 2016, available: http://www.kryeministri-ks.net/repository/docs/SKDP_17_10_2016_ENG.pdf.

30 See for example, Manual on Gender Sensitivity of Judges, USAID Property Rights Project for Kosovo* Academy of Justice, Qosaj Mustafa, Ariana and judge Emine Kaciku, December 2018.

31 Ibid.

32 Women and Men in Kosovo, Kosovo Statistical Office, 2016-2017. Available at <https://ask.rks-gov.net/media/4582/women-and-man-2016-2017.pdf>.

33 See Women and Men in Kosovo, Kosovo Statistical Office, 2016-2017. Available at <https://ask.rks-gov.net/media/4582/women-and-man-2016-2017.pdf>.

34 Ibid.

35 See for example, Manual on Gender Sensitivity of Judges, USAID Property Rights Project for Kosovo* Academy of Justice, Qosaj Mustafa, Ariana and judge Emine Kaciku, December 2018.

36 European Commission. 2014. Kosovo* Progress Report.

37 Statistics provided by the Agency for Gender Equality, see also Agency for Gender Equality (2008). Security begins at home. Prishtinë/Priština as cited in Krol, Paula, Kabashi, Emine and Ramizi Bala, Ardita. June 2017. “Mapping Support Services for victims of violence against women in Kosovo*.” Council of Europe.

38 While men also stated they suffered from domestic violence, practically the entirety of men respondents stated having done so at the hands of their parents and other family members, excluding partners/spouses. In the case of women respondents the vast majority of perpetrators were parents or partners/spouses. See Kosova Women’s Network. 2015. No more Excuses. An Analysis of Attitudes, Incidence, and Institutional Responses to Domestic Violence in Kosovo*. Prishtinë/Priština

- The 2015 survey also revealed that 21% of Kosovars find it acceptable for a husband to sometimes hit his wife, and 32% think that “it is natural that physical violence sometimes happens when a couple argues”.³⁹
- There is little information available about the extent of sexual violence, including rape as this is rarely reported by victims.
- Although no official statistics exist, non-governmental survey data from 2015 shows that an estimated 64% of women have experienced some form of sexual harassment in their lifetime.⁴⁰
- This 2015 data also revealed that 74% of Kosovars believe that women bring sexual harassment on themselves by dressing or acting provocatively, and that 41% think that young women like to be harassed.⁴¹
- The phenomenon of child and early marriages in Kosovo* is relatively rare but continues to be prevalent among Roma, Ashkali and Egyptian communities; and among other communities, for example in rural and diaspora communities.⁴²
- Other forms of violence against women covered by the Istanbul Convention such as stalking, female genital mutilation, forced abortion and sterilisation, and crimes committed in the name of so-called “honour”, are also insufficiently documented.⁴³

Consequences of violence against women: the high social and individual cost of violence against women

- Violence against women can have a devastating effect upon the victim, families and society.
- Consequences can be short and long term, physical, psychological and social.
- For the victim, 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, difficulties at work and school.
- There can also be a negative impact on the psychological, social and economic development of the families. Children who witness violence against women experience similar trauma and effects as to the primary victim of the violence and are more likely to be future perpetrators or victims of such violence.
- The harmful consequences include far-reaching consequences on the community and State. Violence against women hampers productivity, reduces human capital and undermines economic growth.
- One of the structural impacts is that the threat of violence against women undermines and restricts women’s participation in public life.

Some information and statistics on realities of women involved in the criminal justice system

- Studies across the globe illustrate that only a minority of cases of violence against women are ever reported to the police and an even smaller percentage of reported cases result in charges laid against a perpetrator, and only in a small fraction of those cases is there a conviction.⁴⁴
- Under-reporting is a concern in Kosovo* as cited in numerous reports.⁴⁵
- The judicial response towards acts of domestic violence remains poor. The rate of dismissed cases of domestic violence remains high as during the year 2017 there were over half of all criminal charges dismissed related to domestic violence cases (51.5%) by Kosovo* courts. Further, during the first six months of 2018, there were total 15.1% cases were dismissed. For the monitored period for 2015-2018, only 40.4% of cases received guilty verdicts. This slow response by the criminal justice system to domestic violence cases has led to the overall occurrence of impunity for perpetrators of domestic violence.⁴⁶

39 Ibid.

40 Kosova Women’s Network. 2016. Sexual Harassment in Kosovo*. Prishtinë/Priština.

41 Ibid.

42 UNFPA. 2012. Child marriage in Kosovo*.

43 Krol, Paula, Kabashi, Emine and Ramizi Bala, Ardita. June 2017. “Mapping Support Services for victims of violence against women in Kosovo*”: Council of Europe.

44 Johnson et al. 2008. Violence Against Women: An International Perspective (HEUNI); UN Women (2012) Progress of the World’s Women: In Pursuit of Justice: 2011-2012. UN: New York.

45 Krol, Paula, Kabashi, Emine and Ramizi Bala, Ardita. June 2017. “Mapping Support Services for victims of violence against women in Kosovo*”: Council of Europe. Ariana Qosaj-Mustafa and Donjeta Morina. 2018. Policy Report - Accessing Justice for Victims of Gender Based Violence in Kosovo*: Ending Impunity for Perpetrators.

46 Ariana Qosaj-Mustafa and Donjeta Morina. 2018. Policy Report - Accessing Justice for Victims of Gender Based Violence in Kosovo*: Ending Impunity for Perpetrators.

1.6 The importance of ensuring a victim-centred, gendered-responsive and perpetrator accountability approach

Prosecutors and judges are called on to apply a victim-centred, gendered-responsive and perpetrator accountability approach, not only to fulfil international obligations, but first and foremost to make sure that victims seeking help feel truly supported by the justice system. Respecting victim's rights and having a gendered understanding when dealing with violence against women and domestic violence are core principles of the Istanbul Convention to be taken into consideration at all stages of the criminal justice process. Victims who feel safe, well supported and empowered are more likely to continue to participate and engage with the criminal justice process which contributes to a better likelihood that perpetrators will be held accountable and the impunity will be stopped.

Key concepts

A victim-centred approach is defined as the systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a non-judgmental manner. The victim's wishes, safety, and well-being take priority in all matters and procedures. In other words, victim safety and well-being are paramount goals of a criminal justice response. A victim-centred approach, as opposed to a system-centred one, puts the needs of the victims at the core of any criminal justice intervention and recognises that they deserve timely, compassionate, respectful and appropriate treatment.

A gender-responsive approach refers to ensuring that the laws, the justice institutions, the justice processes and the justice outcomes do not discriminate against anyone on the basis of gender. It necessitates taking a gender perspective on the rights themselves, as well as an assessment of access and obstacles to the enjoyment of these rights by women and men and adopting gender-sensitive strategies for protecting and promoting them.

A perpetrator accountability approach refers to a criminal justice response that shifts the focus away from discrediting the victims to enhancing evidence-gathering and case-building and ensuring consistency in investigation, prosecution and punishment, while ensuring a fair trial. This means measures that encourage reporting and maximising the victim's cooperation with the criminal justice system; early case building and addressing potential evidential weakness; developing comprehensive prosecutorial strategy; creating an enabling courtroom environment.

Prosecutors and judges are crucial to the provision of a comprehensive and victim-centred response. In light of the historic ineffectualness of the criminal justice system to respond to violence against women and domestic violence cases, this section highlights some techniques that prosecutors and judges can use to integrate these approaches in their everyday work.

The essential elements of a victim-centred approach are:

- Promoting communication with victims that is empowering and avoids secondary victimisation.
- Informing the victim of her rights.
- Ensuring safety and protection for the victim and her family.
- Ensuring effective support and assistance to the victim.

The techniques for prosecutors and judges in delivering a victim-centred approach are covered in Part 2 of this Manual.

1.7 Options for exercises

Below are a number of possible options for delivering the material in this module. Based on the background and experience of the trainees, you can decide whether you need to start with the basic concepts of gender before moving to exercises on understanding the dynamics of violence and victimisation and techniques to apply a victim-centred approach.

Exercises on the concept of gender

If the participants have a limited understanding of the concepts of gender, gender roles, gender stereotypes, gender discrimination and gender equality, then you might consider spending some time discussing these terms. Having a solid understanding of concepts related to gender is essential when responding to gender-based violence.

Option 1: Brainstorming exercise – plenary discussion

Questions to the plenary:

1. What are the characteristics of women and men? Which of the female/male characteristics can or cannot be changed? Which characteristics can both male and females have?
2. What are some examples of gender stereotypes?
3. What are some examples of gender stereotypes related to gender-based violence against women?
4. Why is violence against women referred to as gender-based violence?

Facilitators notes:

Q1: What are the characteristics of women and men? If participants are having difficulty, give examples, and ask them to work it out: pregnancy and childbirth; child rearing; muscle mass/physical strength; breastfeeding; men are rational, women are emotional; baldness, boys are better at science and math than girls; physical stamina; changing voices at puberty; girls are more gifted at sewing; growing beards. After the list is completed, go through each item. Ask which of the female/male characteristics can or cannot be changed? Which characteristics can both male and females have? For example, if under the heading of “women,” such characteristics of “patient” or “caring” are mentioned, ask if men can also be “patient” or “caring”. If so, mark that characteristic with a “yes” or with a “+” sign. Characteristics that cannot be changed, should be marked with a “no” or “-” sign. Highlight the difference between “sex” and “gender” from the examples provided and provide the group with the definitions of these terms.

Q2. What are some examples of gender stereotypes?

- *Women always patient / emotional/nurturing. Men always strong / rational / logical.*
- *Women should be mothers, they should be the ones concerned with matters related to bearing and rearing of children.*
- *Men are the breadwinners, they work hard and so should not have to be involved in child-rearing.*

Q3. What are some examples of gender stereotypes related to gender-based violence?

- *Men cannot control their sex drive.*
- *There are good women and there are bad women.*
- *A sexy outfit is evidence of sexual availability.*
- *Women say ‘no’ when they mean ‘yes’.*
- *Violence against women is a private matter.*
- *Women deserve to be beaten; it shows that the man is the master.*
- *Real victims cannot resume her normal activities after the alleged violation.*
- *Real victims do not forget details.*

Q4. Why is violence against women referred to as gender-based violence?

- *Violence against women is referred to as gender-based violence because it evolves in part from women’s subordinate gender status in society.*
- *Unequal power relationships between women and men created and maintained by gender stereotypes is the basic underlying cause of violence against women.*
- *The persistent attitudes and beliefs that see women as inferior to men and a culture of male domination socialises both men and women to accept, tolerate and even rationalise violence and to remain silent about such experiences.*

Option 2: Small group exercise to discuss terminology

This exercise could be used if the trainees already have some familiarity with the subject matter and serve as a review.

Instructions: In advance, on flash cards, put down one term per card – “sex”; “gender”; “gender stereotype”; “gender equality”; “violence against women” and “domestic violence”. Make up as many cards as participants, using the terms more than once. During the training session, hand out one flash card per participant. Ask the participants to pair up with someone they have not met before. Give them five to ten minutes to discuss with each other how they would define the term on one of the flash cards. Then ask them to switch to the other card for discussion, for the same amount of time. Bring them back to plenary and review each term (use the material in the module).

Exercises on the forms of violence against women and domestic violence

Option 1: Group exercise to discuss short case scenarios regarding criminalisation of different forms of violence against women

Preparatory instructions: select a number of short case scenarios from below or prepare your own using the examples below as inspirations. Put them on a handout or on PowerPoint slides.

Instructions: Ask the plenary for volunteers to share how this case would be dealt with according to their local laws. Use follow-up questions to highlight similarities or differences with the international recommendations.

1. During a second date, a woman goes up to the man’s apartment for a drink. Once inside the home, he has anal sex with her despite her pleas of no. There is no visible bodily injury.

Facilitator’s notes:

- *This raises the discussion of the criminal elements regarding prohibited acts of rape; and consent versus forced based and under which conditions it likely will be prosecuted.*
- *Regarding the range of prohibited acts: the traditional definition of rape remains in some states, which means the crime is completed only at the time of vaginal sexual intercourse and excludes other forms of sexual violence. Legal reforms have broadened the definition in various states. This might include any act of sexual penetration, of whatever kind and by whatever means.*
- *Regarding the issue of forced based versus absence of consent, in some countries, rape must be compelled by force or threat to constitute sexual intercourse, which excludes rape of a person who is not in the position to offer resistance. In other states, the law focuses on a lack of consent rather than on the use of force, defining sexual assault as any non-consensual contact. This can potentially shift the burden of proof to the person who acted recklessly without regard to consent or used other forms of pressure than physical force. Note the Istanbul Convention which provides that consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances. Other states have provisions which expand on a range of circumstances in which consent is immaterial, such as sexual assault by an individual in a position of authority (e.g. in a correctional facility) or in certain relationships (e.g. ongoing psychotherapist-patient relationship). Other states have provisions for a broad range of coercive circumstances around consent such as intimidation or fraud. Some states have expanded this to include: by trickery or artifice or by taking advantage of a person who is not in a position to give free consent or to offer resistance.*

2. A husband has sex with his wife while she is asleep.

Facilitator’s notes:

- *This raises the discussion of the criminal elements that constitute marital rape as well as issues of consent, honest belief, etc. Also which conditions it likely will be prosecuted.*
- *Marriage is not a defence to the crime of sexual violence in many jurisdictions. In these jurisdictions, a spouse may be criminally prosecuted for the crime of sexual assault for any non-consensual sexual contact with his wife.*

3. During a lecture, a young university student is crowded in her seat by two male students who touch her breast and take her hand and force her to touch one of the men's crotches.

Facilitator's notes:

- *This raises the discussion of what constitutes the criminal elements of sexual assault and under which conditions it likely will be prosecuted.*
- *Some states have broadly defined sexual assault to mean any sexual act, attempt to obtain a sexual act, sexual comments or advances, which are not consensual, or acts to traffic a person's sexuality, using coercion, threats of harm or physical force, by any person regardless of relationship to the victim, in any setting, including but not limited to home, work and school.*
- *Regarding sexual assault against girls, in establishing sexual crimes against children, states vary in how they define the age of consent, or in other words, the minimum age at which a person is considered to be legally competent to consent to sexual acts. The relevant age may also vary by the type of sexual act or relationship between the parties, for instance where there was a position of trust or dependency versus both parties being minors.*

4. An ex-boyfriend is stalking his former girlfriend. He leaves her numerous emails, texts, phone messages, showing up outside her place of work, at her home and she often sees him on the street. He says that he loves her, will not stop till she is his and she will be never be with anyone else. She is fearful of him.

Facilitator's notes:

- *This raises the discussion of the offence of stalking / sexual harassment and under which conditions is likely will be prosecuted.*
- *Regarding sexual harassment, a few states have criminalised sexual harassment, while other states prohibit such conduct in labour codes or in gender equality laws. The CEDAW General Recommendation No. 19 notes that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace. Such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her connection with her employment, including recruitment or promotion, or when it creates a hostile working environment. Sexual harassment can take place in the workplace, schools, streets, public transport and social situations. It includes flashing, obscene and threatening calls and online harassment.*
- *Regarding stalking, only a handful of states have adopted a specific law against stalking. Other states might use the offence of harassment to cover acts of stalking. An element of the criminal offence often refers to a course of conduct or series of actions that may differ in kind, which taken as individual incidents may not amount to criminal behaviour and seem no more than a nuisance, but as a series, they constitute systematic intimidation and often the constant presence of threat and the danger of escalation into life threatening attacks.*

5. A man regularly yells at his wife, calling her lazy, saying he must discipline her often to make her a better wife, and he has often "disciplined" her by hitting her. She feels constantly intimidated and fearful. In the latest incident, he grabs her by the neck and chokes her until she loses consciousness.

Facilitator's notes:

- *This raises the discussion of constitute criminal elements of forms of domestic violence (physical and psychological violence) and under which conditions is likely will be prosecuted.*
- *What is the level of physical harm and whether certain harms are seen as less serious? For example some countries do not criminalise physical harm that is less than a certain percentage or that does not result in incapacitation of less than a certain number of days. While others have defined offences such as gross violations of integrity.*
- *At the national level, states vary in their criminal justice approach to intimate partner violence and domestic violence, in general. The call for criminalisation in the international standards and norms does not necessarily mean that the form of violence against women appears as a specific named offence in the criminal or penal codes. Generally, the position is that violence should be considered violence regardless of whether*

it is committed by a spouse, an acquaintance or a stranger. However, there is a concern that the approach to violence against women in the home and family, the very place where women should be able to expect safety and security, has not been effective, allowing for impunity and tolerance. It is therefore crucial to take effective measures to curb violence against women in the family. Generally, the crimes covering domestic violence are defined in gender neutral language, covering both female and male victims, although the majority of victims are female.

- While intimate partner violence/domestic violence includes a range of controlling and coercive behaviours, not all of them may be defined as crimes. Most states do not have intimate partner violence/domestic violence as a specific criminal offence that covers a pattern of coercion and control, rather the criminal law focuses on isolated incidents of violence and often generally only covers physical violence (e.g. provisions for assault or injury to a person's life, health, and physical integrity).
- States should ensure that the legal definition fully captures the experiences of intimate partner violence/domestic violence in all its manifestations – for example consider criminalising repeated or habitual violence (pattern of a series of violations) rather than limiting the definition to isolated action. Experiences of intimate partner violence can involve repeated acts involving all or some forms of violence [Examples: Viet Nam Penal Code s. 151 (old version) and Swedish Penal Code, Chapter 4, section 4(a)].

6. A man has been controlling his wife's movements. He does not allow her to see her family and friends, is extremely jealous of other men looking at her and will tell her often that he will kill her if she leaves him. She has been missing work more and more because she is not feeling well. Her family, when they do try to see her, say that she has no affect and if she does, she is jittery and nervous.

Facilitator's notes:

- This raises the discussion of constitute criminal elements of psychological violence and under which conditions is likely will be prosecuted.
- Psychological or economic violence as a crime appears to be more difficult to define, and some jurisdictions require a certain threshold to meet before the conduct becomes criminal. In other words, some acts which constitute intimate partner violence/domestic violence can either be criminal or civil wrongs or both.

7. A man forces his live-in girlfriend to have what he describes as adventurous sex, using an object to penetrate his girlfriend; she is not a willing partner.

Facilitator's notes:

- This raises the discussion of the definition of partner - common law relationship and sexual violence.
- Intimate partners should be defined as expansively as possible. Definitions should encompass current or former spouses or partners, whether or not there is or has been cohabitation, partners of same sex, individuals with family relationships to one another and members of the same household.

Option 2: Short video clip – understanding the issue of consent in sexual violence offences

Show a short video clip explaining the meaning of consent with drinking tea. This video was developed by the Thames Valley Police. Animation courtesy of Emmeline May at rockstardinosaurpirateprincess.com and Blue Seat Studios. Copyright © 2015.

Link: <https://www.youtube.com/watch?v=pZwvrxVavnQ>

Instructions: Show the video and ask the plenary to share their reactions to the film and how this relates to their own work.

Exercises on understanding the dynamics of gender-based violence and the impact of victimisation

Option 1: Short video clip – trauma and the brain

Show a short video clip explaining the effects of trauma on the brain. Or consider inviting an expert on this subject matter to provide more detailed information on victimisation.

This video was made by developed by mediaco-op: <http://mediaco-op.net/>.

Link: <https://www.youtube.com/watch?v=4-tcKYx24aA>

Instructions: Show the video and ask the plenary to share their reactions to the film and how this relates to their own work.

Facilitators notes regarding points to cover and to explain what this animation illustrates:

- How someone who has experienced rape or sexual assault might react in a police interview
- How a professional might respond to a service user if they do not know the effects of trauma
- How this can affect information and evidence gathering, and attitudes to victims
- How 'secondary' trauma can affect workers
- The three main parts of the brain and what each part does
- How the brain responds to danger – the survival instinct
- How instinctive 'fight', 'flight' and 'freeze' responses protect us
- Indicators of trauma
- New trauma-informed techniques for professionals to use, and a demonstration

The main takeaways:

- *Trauma response is the brain in survival mode*
- *Repeated abuse can make trauma symptoms worse*
- *In response to trauma, people can react in unexpected ways*
- *Trauma is a normal human response to abnormal events*
- *When working with service users, start from memories and move to the present; start from feelings and then move to the facts*

Option 2: Small group exercises with a case study

[Case adopted from UNODC. 2017 Resource book for trainers on effective prosecution responses to violence against women and girls]

Sara has been married to Nick for 15 years. In the beginning of their marriage, Nick told Sara not to work outside the home. He discouraged her from visiting her mother or any of her former friends. He controls the family finances, and Sara is provided with a small allowance for the groceries and requiring her to account for it. He regularly criticises her cooking, her cleaning and her parenting skills. The first slap occurred after a year of their marriage. Sara felt she had deserved the hit for being such a poor wife. Nick was very remorseful about the slap and swore he would never do it again. However, after that first incident, he continued to beat her regularly over the years, with increasing intensity.

Five years ago, after one particularly bad beating when Nick beat and choke Nita until she fell to the floor unconscious, their son called the police. A month after that incident Sara had asked the prosecutor to drop the case. She told the prosecutor that she did not want to go to court as her husband has promised never to be violent towards her again and the violence had not been very serious. The prosecutor agreed with her and had told her at the time how important it was to keep the family together and he advised her not to anger her husband anymore. Since then the police received three more calls from the son, as the beatings become progressively more violent. However, each time the police would tell Sara that since she had withdrawn her complaint in the past, they would not waste their time as she would likely withdraw her complaint again.

The most recent incident involved Nick pulling a knife and attacking Sara in front of their neighbours. Police interviewed Sara in the hospital and submitted the file to the prosecutor. The prosecutor decided to initiate criminal charges against Nick as he considered that the case was strong, with the medico-legal report and the witness statements of the neighbours. Sara again asked the prosecutor to drop the charges, but the prosecutor told her that he is proceeding due to the serious nature of the violence.

After Nick was charged, he did not allow Sara to return home after she was discharged from the hospital. She moved back to her parent's home in rural Kosovo*, about 50 kms from Pristina. The prosecutor sent the indictment of Nick to the judge; however, Sara did not hear anything for six months. Then one day a police officer brought a summons to her parent's house which required her attendance in court the next day at 8:00 am. She was very apprehensive when she read the summons. She and her mother had to get the 5:00 am bus to Pristina to get to the courthouse on time. When they arrived, they saw Nick standing in front of the court building with his lawyer and his family around him. This made Sara more apprehensive as she wondered if she should have a lawyer and if she could be charged herself. The clerk told them to sit down in the hallway outside the courtroom till they were called. Nick and his lawyer entered the court room. Sara and her mother waited two hours with nothing to drink or eat; they were afraid to leave the bench where they had been told to wait. When her name was called out loud enough that everyone in the hallway could hear, she entered the courtroom. Her mother sat in the public area. Sara felt scared by the formality of the judge and the other court staff sitting on the podium. She did not know what to expect. The judge asked her several questions in formal language. She had only nodded to answer as she did not understand his questions but she wanted to be polite. Then she was asked to leave the courtroom again. She did not have any news for nearly two months and it was only when a former neighbour told her that Nick was free and that he was saying that if he met her again he would make her pay for what she had done that she understood her was not in jail.

Instructions: Divide the large group into four smaller groups. Each group is to answer two questions:

- Q1. How has Sara been victimised? (look at initial victimisation and secondary victimisation)
- Q2. What concrete suggestions does your group put forward that could have improved the treatment of Sara by the prosecutors and hence the likelihood of a successful prosecution?

Each group to nominate a rapporteur who will present their answers to the plenary.

Facilitators notes regarding points to cover;

- *Primary victimisation: forms of intimate partner violence: physical violence; psychological violence; economic dependence.*
- *Cycle of violence: honeymoon phase; escalation of violence; perception of uncooperative victim.*
- *Secondary victimisation: attitudes: blaming her for his violence and advising her to modify her behaviour to limit the violence; minimising the violence; belief that she does not care so why should they, waste of police and prosecutors' resources.*
- *Secondary victimisation: structural set up of the courts, lack of support, lack of preparation for trial and information, lack of privacy, her name yelled out in public courthouse.*
- *Lack of protection: lack of concern for her safety.*

Exercises on common myths and stereotypes

Option 1: Large group exercise

Trainers could choose eight to ten myths/realities and write them on separate flashcards. Ask for volunteers to pick one flashcard and read it aloud. Ask them for their opinion as to whether true or false, myth or reality. Then ask the rest of the participants if they agree or disagree in order to lead to a discussion.

An option for conducting the exercise more actively and if there is space: have the group stand up and move to one side of the room. You will read out a statement, and those who think the statement is a myth will move across the room. Those who think it is a fact will stay where they are. Afterwards, one person from each group will explain why they chose the way they did.

Option 2: Large group brainstorming

Trainers prompt a group brainstorming session about the prevailing myths surrounding violence against women and domestic violence by asking the following questions:

- Q1: Are there common myths about violence against women and domestic violence that you know of?
- Q2: What do these myths assume about the causes of violence against women and domestic violence?
- Q3: How do these myths impact the work of prosecutors and judges?

Use the material in this module to assist you in this discussion.

Option 3: Video clip with plenary discussion

Show a short video clip “James is Dead” produced by Blue Seat Studios.

Link: <https://www.youtube.com/watch?v=Op14XhETfBw>

Instructions: Show the video and using the following questions, have a discussion about common myths about rape.

Facilitators notes regarding points to cover:

- *Do you think society questions the validity of victims of non-gender-based violence the same way as female victims of gender-based violence?*
- *Do you think we are still living in a time when we question the validity of sexual assault victims like this?*
- *What are some of the myths or gender stereotypes that this video raises?*
 - Was he there alone? This is a common belief in rape cases. Blame the victim for putting themselves in a vulnerable position. The reality is that the majority of rape happens inside the victim’s own home usually by someone known and trusted in the victim’s life.
 - Was he drinking? Drinking is not asking to be victimised nor does drinking excuse someone who chooses to victimise another person. That is often the case in rape cases, if the victim is drinking she is blamed for the assault but if the perpetrator is drinking, they’re not to blame.
 - What were they wearing? Puts the blame of women and assumes she is asking for it, deserved it or had it coming because of what she is wearing.
 - He was so friendly.
 - Maybe he really wanted this to happen? In this question, we are not wondering what the victim did to encourage their rape but rather questioning that it was even rape to begin with. So moved from victim blaming to denying that they were assaulted in the first place.
 - The perpetrator is such a nice guy. Reflects the myth that perpetrators of violence are perverts and monsters rather than understanding that any individual has the capacity to commit a crime. It doesn’t matter how nice they are or how good looking.
 - Poor guy who was accused. How often do perpetrators of rape receive sympathy, his life might now be ruined, he might go to jail, his reputation is tarnished. He’s the real victim here.
 - All of these questions rear their heads with a shocking degree of frequency, by society, by the police, by prosecutors and judges.
 - What is a result of these myths?
 - Victim blaming – shifts the blame from the perpetrator into the victim. This video tries to capture the absurdity of victim blaming in sexual assault cases.
 - Imagine that: a horrendous act is committed against an innocent person, but in response, people express doubt. Focus on the victim’s characteristics (too friendly) or behaviour (drinking, going to a party alone, not wearing appropriate clothing...). Did his behaviour somehow encourage his own murder? He could have prevented it if he just done X, Y and Z, right?
 - This video emphasis how ridiculous these questions sound when heard in this context.
 - Why do the rules that apply to one type of violence so greatly differ from the rules applied to another?

2. International, Regional and Kosovo* legal frameworks for responding to Violence against Women and Domestic Violence

In recent decades, developments in international law to promote a comprehensive and multi-sectoral response to violence against women, including a gender-responsive criminal justice system, have had an increasing influence on national legal systems in Europe, and thereby also on the day to day performance of Kosovo* prosecutors and judges' duty. Prosecutors and judges play essential roles in upholding international and regional obligations, norms and standards to effectively prevent and respond to violence against women in the exercise of their duties. The Kosovo* Constitution gives direct effect to international and regional standards, including the Istanbul Convention as of 25 September 2020, thereby requiring prosecutors and judges to ensure compliance with its provisions in their work. Knowledge of international and regional rights and norms is also important to assist prosecutors and judges adopt a victim-centred approach, where the paramountcy of safety and dignity for victims and the empowerment of women is core while holding the perpetrators accountable for the violence. Given that this is meant to assist practical training for prosecutors and judges, this module provides a brief overview of key international, regional and Kosovo* documents, a focus on the types of information that may be beneficial for prosecutors and judges at the domestic level, and techniques on how to use international and European standards in their work. More detailed information on the relevant Istanbul Convention standards and local laws will be discussed throughout the rest of the Manual.

2.1 International standards

For many years, violence against women, and more specifically domestic violence, was considered outside the realm of state responsibility because perpetrators were usually private persons, in many cases husband, rather than actors working on behalf of the state. Since the 1990s; however, violence against women, including domestic violence, has received international attention by the international community and, subsequently international law. A number of key international instruments have been adopted obliging states to respect, protect and fulfil women's right to a life free of violence. The main international instruments for dealing with violence against women are set out below.

Table: Main sources of obligations and guidance for the prosecution and judiciary under international law

International human rights sources

Hard law (treaties, conventions)

Convention on the Elimination of All Forms of Discrimination against Women (1979)

- Sets out discrimination against women as a violation of their human rights.
- Includes CEDAW General Recommendation No. 35 on gender-based violence against women (2017) updating General Recommendation No. 19 on violence against women (1992), and frames “gender-based violence against women” within the overall context of discrimination; expands the definition to include specific acts of gender-based violence against women that can amount to torture or cruel, inhuman or degrading treatment. Includes CEDAW General Recommendation No 33 on women’s access to justice.
- Articulates the following individual rights: the right to life and personal integrity; the right not to be tortured or to cruel, inhuman or degrading treatment or punishment; the right to equal protection under the law/due process; the right to equality in the family; the right to the highest standard of attainable physical and mental health.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

- The Committee Against Torture recognises violence against women as a form of torture and discrimination irrespective of the situation in which the violence takes place – whether in armed conflict or peacetime, in the home, the street or in places of detention.

Soft law (declarations, guidelines)

UN Declaration on the Elimination of Violence against Women (1993)

- Defines “violence against women” and sets out range and manifestations of VAW. Reiterates that women are entitled to the following rights: right to life; right to equality; right to liberty and security of the person; right to equal protection under the law; right to be free from all forms of discrimination; right to the highest standard attainable of physical and mental health; right to just and favourable conditions of work; right not to be subjected to torture.

Beijing Declaration and Platform for Action (1994)

- Expanded the definition to violations of rights of women in situations of armed conflict and recognised the particular vulnerabilities of certain groups of women

UN Updated Model Strategy and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (2010)

- Sets out guiding principles for all criminal justice responses (including victim-centred; perpetrator accountability) and calls on states to criminalise and prohibit all forms of violence against women. Also includes strategies to improve investigations, evidentiary rules, court room procedures, and victim’s rights.

UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

- Covers principles dealing with victims of crime, access to justice and fair treatment, restitution, compensation, assistance and victims of abuse of power.

Key concepts from international instruments for prosecutors and judges to keep in mind

These standards articulate the concept of **due diligence** in the context of violence against women. States are required to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women whether those actions are perpetrated by the state or by private person. According to CEDAW General Recommendation No 35, the failure of states to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims of such acts, provides tacit permission or encouragement to acts of gender-based violence against women.

For prosecutors and judges, this means:

- *Prevention and protection.* Prosecutors and judges need to prevent further violence from recurring to victims whose cases are before them and ensure effective protection throughout the criminal process. This means that any decisions being made by prosecutors and judges with respect to protection orders, pre-trial detention or pre-trial judicial release and special protection measures during trial should have as a central consideration the safety of the victim.
- *Investigation and prosecution.* Prosecutors and judges should ensure that the police function effectively in practice to ensure proper and effective investigations. Prosecutors, and the judges who hold prosecutors accountable during the trials, are to ensure fair and effective prosecutions are done. The primary obligation to pursue prosecution is on the prosecutor and not on the victim and should be done in a timely manner, with the avoidance of re-victimisation and pursuing of justice and accountability of the perpetrator for the violence.
- *Punishment and provision of redress and reparations.* Prosecutors and judges should ensure that the punishment is adequate, effective and dissuasive and that victims have access to adequate and appropriate redress. The sentences should send a message that such violence will not be tolerated, be capable of preventing recidivism, rehabilitate the perpetrator and denounce and deter violence against women and domestic violence.

Within the broader due diligence standards, prosecutors and judges have a key role to play to ensuring women have **access to justice** when they are victims of violence. The right of access to justice is multidimensional, and encompasses “justiciability, availability, accessibility, good-quality and accountability of the justice systems and provision of remedies for victims”.⁴⁷ Access to justice includes access to both criminal and civil justice.

International instruments, along with regional instruments, have been essential in bringing about a **change in attitudes** from regarding violence against women, particularly domestic violence against women, as a private matter committed with widespread impunity, to treating the issue as a matter of public concern. Most importantly, such standards established the prohibition of violence against women in international human rights law by focusing on, and addressing, discrimination and violence against women, and protecting the human rights of women on an equal footing with those of men.

A note about the UN Updated Model Strategies and Practical Measures

The international community has agreed to model strategies and practical measures that states should introduce to meet their international obligation of due diligence: the UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (UN Updated Model Strategies).⁴⁸ It provides a series of broad recommendations covering substantive, procedural, and operational issues of the criminal justice system as well as calling for comprehensive, coordinated, and multidisciplinary responses. These have been further articulated in the UNODC Blueprint for Action: An Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women (hereinafter ‘Blueprint’)⁴⁹ and the UN Inter-agency Essential Services Package for Women and Girls Subjected to Violence.⁵⁰

- **Criminal laws.** All forms of violence against women are criminalised and prohibited; that criminal laws are comprehensive and effective in eliminating violence against women; and remove any provision that allow or condone violence against women or increase the vulnerability or re-victimisation of women who have been subjected to violence.
- **Investigations.** Investigations should be carried out with a gender perspective, consider the specific vulnerabilities and the victims’ needs, and use techniques that minimise intrusion into the lives of the victims while abiding by standards for the collection of evidence.
- **Investigations and prosecutions.** Investigations and prosecutions should be initiated *ex officio* (i.e. by virtue of one’s office) and without delay by competent authorities.
- **Evidentiary rules.** Evidentiary rules should be non-discriminatory, allow the admission of all relevant evidence and preclude the admissibility of the defence of ‘honour’ or ‘provocation’. Evidence of prior acts of violence by the perpetrator should also be considered during court proceedings.

47 CEDAW General Recommendation No 33 on women’s access to justice, CEDAW/C/GC/33, 23 July 2015, para 14.

48 General Assembly resolution 65/228, annex.

49 Contained in UNODC. ‘Strengthening Crime Prevention and Criminal Justice Response to Violence against Women’. 2014.

50 UN Women, UNFPA, WHO, UNDP and UNODC ‘Essential Services Package for Women and Girls Subjected to Violence: Core Elements and Quality Guidelines, Module 3 Justice and Policing’. 2015. <<http://www.unwomen.org/en/digital-library/publications/2015/12/essential-services-package-for-women-and-girls-subject-to-violence>>

- Victims' rights. Victims should be enabled to testify through measures that protect their privacy, identity and dignity while ensuring their safety and avoiding secondary re-victimisation. Victims should be enabled to speak to a female officer and should be informed of the offender's release from detention or imprisonment.
- Exercise of powers. The exercise of powers by police, prosecutors and other criminal justice officials should be in line with the rule of law and codes of conduct and that such officials should be held accountable for any infringement thereof through appropriate oversight and accountability mechanisms.

2.2 Istanbul Convention

The 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) is the most far-reaching development in the long line of instruments and standards in this field. It is a comprehensive and complex treaty – it is, at the same time, a human rights treaty, a criminal law treaty and an instrument for promoting greater gender equality. The convention, seen as the “gold standard”, provides for a legally binding definition of violence against women and minimum standards and measures states authorities need to implement in order to effectively respond to violence against women and domestic violence. Building squarely on international standards, CEDAW principles, case law and best practices, the Istanbul Convention provides the most comprehensive and detailed blueprint for action in this field.

Core principles of the Istanbul Convention

- The due diligence standard. States are to act with due diligence to promote and protect individuals' rights and to ensure that all human rights violations are treated as illegal acts. For prosecutors and judges this means they are obliged to diligently prevent and investigate acts of violence, to punish violence under national law, and to provide reparations to victims (Article 5).
- Gender equality as crucial for the elimination of violence against women. Recognising that combatting violence against women is not merely a crime control issue, the Istanbul Convention calls for a comprehensive set of measures, all of which are premised on the understanding that such violence cannot be eradicated without investing in greater equality between women and men. Only real equality between women and men, where women and men have the same rights and responsibilities, the same opportunities and that their contribution to society is equally valued and respected; and a change in power dynamics and attitudes can truly eliminate violence against women. For prosecutors and judges and the justice institutions they represent, the Istanbul Convention aims at changing attitudes and eliminating stereotypes not only at the level of individuals, but also at the level of institutions. It does so, for example, by placing the obligation on States Parties to conduct regular awareness-raising campaigns (Article 13), introduce teaching material at all levels of education (Article 14), regularly train all professionals in contact with victims including legal professionals (Article 15), set up perpetrator programmes (Article 16), and involve the private sector and the media as partners in tackling violence (Article 17).
- Victim-centred approach. The Istanbul Convention makes it clear that in order for victims to receive the most effective support possible, their rights, needs and safety must be placed at the forefront of all interventions. This means offering protection and support when women at risk need it most, treating them with respect and sensitivity, and empowering them to make informed decisions that best reflect their interests. This requirement is further reinforced by the prohibition to discriminate on any grounds when providing protection and support to victims (Article 4, paragraph 3). Ensuring that victims' needs are met also implies taking into account the needs of women made vulnerable by particular circumstances (Articles 12, paragraph 3 and Article 18, paragraph 3). Vulnerable groups may include pregnant women and women with young children, disabled women, including those with mental or cognitive impairment, women living in rural or remote areas, substance abusers, sex workers, women of national or ethnic minority background such as Roma women, migrants – including irregular migrants and refugees, lesbian, bisexual and trans-women. Prosecutors and judges should protect the rights and take into consideration the interests of victims, including their special needs as witnesses, throughout investigative and judicial proceedings (Article 56); and adopt special measures to address all types of barriers to justice, such as supplying information to victims about their rights and about legal procedures, providing support services and also by adopting new procedures and approaches that increase victims' safety

during court processes.

- A gendered understanding of domestic violence. In line with the recognition of the structural and gendered nature of violence against women and the fact that domestic violence disproportionately affects women, the Istanbul Convention requires state parties to apply a gender lens when addressing domestic violence as the overwhelming majority of victims of domestic violence are women and girls. This does not mean that men do not experience domestic violence or that they do not need support. In fact, the provisions of the Istanbul Convention have been drafted in gender neutral language, which means that any of its provisions can be implemented with a view to supporting and protecting men and boys who experience any of the forms of violence covered by the convention, with the exception of female genital mutilation and forced abortion (Article 2, paragraph 2).
- Addressing the needs of children as victims and witnesses of violence against women, including domestic violence. While it is important to recognise that most victims of domestic violence are women, it is equally important to recognise that many of these women have children. In some cases, the violence is directed at both, women and children. In other cases, children are not targeted themselves but witness violence against their mothers. For this reason, the Istanbul Convention includes several provisions that address this matter. It requires all measures of protection to take into account the relationship between victims, perpetrator, children and their wider social environment. The aim is to avoid a situation where victims and their needs are addressed in isolation or without acknowledging their social reality (Article 18, paragraph 3). The Istanbul Convention also calls for specialist support for children in such situations (Articles 22, 23 and 26) based on their needs. Prosecutors and judges should afford child victims and child witnesses special protection at all stages of investigations and judicial proceedings (Article 56). The best interest of the child must be the guiding principle when children come in contact with the justice system as a result of violence against women, including domestic violence.
- Coordinated and multi-agency approach. Due to the complex nature of violence against women and domestic violence, no single agency or institution can successfully tackle them on its own and isolated policies are not sufficient in responding to such a complex and multi-faceted problem. Prosecutors and judges should join forces with law enforcement authorities, victim support services, child protection agencies, non-governmental organisations and other relevant partners to develop a comprehensive and coordinated response to combating gender-based violence. The Istanbul Convention requires that in providing support to victims and witnesses, states parties must provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities (Article 18, paragraph 2). It also recognises the work and expertise of non-governmental organisations in this field and asks states parties to co-operate effectively with these organisations (Article 9).

The 4 Pillars (4 P's)

The Istanbul Convention includes a comprehensive legal and policy framework for the protection and assistance to all victims of violence against women and domestic violence.

- Prevention. The convention has a strong focus on the prevention of violence against women and domestic violence. In this regard, states parties have obligations defined in the convention such as training professionals in contact with victims or running awareness-raising campaigns regularly. The convention also calls on all members of society, particularly men and boys, to help end violence against women and domestic violence.
- Protection. The convention also sets measures to protect and support victims. It includes provisions toward the victims to help them easily access services (e.g. free-of-charge helplines, shelters, rape crisis or sexual violence referral centres) and toward perpetrators.
- Prosecution. The convention defines and criminalises a wide range of forms of violence against women and domestic violence: physical violence; psychological violence; stalking; sexual violence, including rape; early and forced marriage; female genital mutilation; forced abortion; forced sterilisation.
- Integrated policies. The convention asks states parties to develop and implement comprehensive and coordinated policies involving government agencies, NGOs, as well as national, regional and local parliaments and authorities to ensure more effective results.

2.3 Overview of relevant Kosovo* law

Domestic violence and other forms of violence against women in Kosovo* applicable laws, are forms of violence against women that encompasses a wide range of possible unlawful acts, many of which can be captured under generic offences such as, inter alia: murder, assault, light and grievous bodily injuries, rape, acts against sexual integrity, sexual harassment and others. Kosovo* has passed a domestic violence law in 2010, dealing only with issuance of protection orders under Kosovo* civil proceedings. The Law only criminalises breaches of protection orders. Further until the recent amendments of the Kosovo* Criminal Code of Kosovo* in 2019 there was no specific definition of domestic violence in Kosovo*. The recent amendments provide for a specific definition under Article 248 of the Criminal Code of Kosovo*.

The Criminal Code, Article 248 defines domestic violence

1. Whoever commits physical, psychological or economic violence or mistreatment with the intent to violate the dignity of another person within a domestic relationship shall be punished by fine and imprisonment of up to three (3) years.

2. When any act in the Criminal Code is committed within a domestic relationship, it will be considered an aggravating circumstance.

3. Every member of the family who exerts physical, psychological, sexual or economic violence or mistreatment against another member of his/her family shall be punished by a fine and imprisonment of up to three (3) years.

According to the recently adopted Supreme Court of Kosovo* Guidance on the Legal Qualifications of the Domestic Violence acts foreseen under the Criminal Code of Kosovo* adopted in 2019, following interpretations are provided to detail the definitions of psychological or economic violence as first time mention in the Criminal Code.

Psychological violence can include constant control, verbal abuse, isolation, humiliation or emotional abuse through swearing, insulting, blackmailing, intimidating, stalking and constantly monitoring of a victim, degrading treatment, intimidation or similar forms of control or keeping a victim under constant emotional distress by putting them under reasonable fear of using violence against them or persons in a family relationship. All these in most cases constitute elements found in one of criminal offenses provided for by the Criminal Code and, when making the qualification and deciding about these criminal offense, one has to determine whether the elements of a specific criminal offense have been met or whether this type of violence should be qualified under Article 248 of the Criminal Code.⁵¹

Economic violence includes denying access to or controlling basic resources by restricting the means necessary for living, denying access to medical services, education or employment, damaging property or other forms of pressure in order to keep a person in a dependent economic position. Economic violence can be expressed as a single form of pressure or combined with other forms of abuse or violence, and in particular with psychological violence. For example, one such element can be found in the criminal offense of rape under Article 227 paragraph 4.10.1 which contains sexual violence and an element of economic abuse of the victim "... by abusing his or her control over the financial, family, social, health, employment, educational, religious or other circumstances of such person or a third person".⁵²

As indicated in the elaborate of these two forms of violence, all elements refer to actions of the perpetrator that ultimately impact the economic or psychological well-being of the victim. Therefore, in order to prove psychological or economic violence, the behavior and actions of the perpetrator as well as the methodology for exercising continuous control by the perpetrator should be assessed instead of only assessing the impact that such actions may have had on the victim. This is because the impact is a consequence of actions that constitute psychological and economic violence that lead in various forms of psychological and economic violence against the victim.

The above analysis will serve to provide an understanding of the elements of one or the other form of violence. If it is considered necessary to engage an expert then the question addressed for the purpose of determining psychological violence should be as following: "Are the perpetrator's acts of violence of the kind that may have

51 The Supreme Court of Kosovo*, Guidance on Legal Qualification and Treatment of Domestic Violence Cases According to the Criminal Code of the Republic of Kosovo*, June 2020, pp. 3 and 4.

52 Ibid, p.4.

a psychological effect on the victim, rather than just if the victim has a psychological disorder as in this case we are not dealing with determination of the level of responsibility or the level of damage for the purpose of determining restoration". It is suggested that the expert be assigned mainly in cases where there is a need to summon an expert who, through documented scientific aspects, could clarify the impact that trauma, experienced as a result of domestic violence, may have on the victim's brain and their reactions after the traumatic event, especially during contact with a range of institutional stakeholders.⁵³

There are also a number of criminal offences within the Criminal Code of Kosovo* which fall within the definition of domestic violence and attract harsher punishments especially against a person with whom the perpetrator is in a family relationship or a family member.

- Article 163(3) - Slavery, slavery-like conditions and forced labor
- Article 173(1.3) - Aggravated murder
- Article 182(2) - Harassment (includes reference to a former family member or current family member)
- Article 227(4.9) - Rape
- Article 229(3.9) - Sexual Assault
- Article 230(3.9) - Degradation of sexual integrity from Article 230

Unlike the above articles, the situation is much clearer in these articles where the existence of a family relationship between the perpetrator and the victim automatically makes it a qualified crime. It is important to emphasize in particular that under the new Code the term 'family relationship', which was not expressively mentioned before, has been added in Article 227 (Rape) covering the situation of marital rape (using the internationally recognized term). This provision automatically increases the severity of the sentence, which is also the case for two other articles related to criminal offenses against sexual integrity.

Other relevant articles where some form of reference is made on family members:

Article 183(1-3) - Sexual harassment (or otherwise in a position of authority over the person, or in a position of dependency). If we are to analyze the article on sexual harassment, although it does not directly refer to the vulnerable victim or the existence of a family relationship, all three paragraphs 1, 2 and 3 contain elements that meet the requirement of dependence and the purpose of commission of crime:

Article 183(1-3) - Sexual harassment

Paragraph 1 "... a person who is vulnerable due to ... dependency ..."

Paragraph 2 "... which aims at or effectively constitutes a violation of the dignity of a person, which creates an intimidating, hostile, degrading or offensive environment"

Paragraph 3 "... the perpetrator is ... in a position of authority over that person ..."

The above elements combined with the aggravating circumstance of the existence of family relationship, according to Article 70(2.14), lead to assessment of the gravity of the criminal offense and consequently to a more serious sanction for the perpetrator.⁵⁴

As can be seen from the above analysis, the qualification of a criminal offense committed within a family relationship, against a family member or a vulnerable victim as a principle should be based on the underlying offense or offenses (if there is more than one offense of committed), rather on Article 248, if all the elements of that criminal offense have been met. This is in line with the spirit of the Criminal Code which, as seen above, in any case where a certain criminal offense was committed within a family relationship, the sanction is more severe than that for other forms within the same article or in relation to Article 248 (Domestic violence).⁵⁵

Prosecutors and judges must look to the Kosovo* Criminal Code for the generic and specific offences that can be used to prosecute acts related to the dynamics of domestic violence cases. The Criminal Code lacks any specific mechanism to take into account the gendered nature as well as specific gendered dynamics involved in these crimes. However, the nature of domestic violence and appreciating the dynamics of power and control is offered through the institutional mechanism of the Victim's Advocates who generally represent victims of crime.

⁵³ The Supreme Court of Kosovo*, Guidance on Legal Qualification and Treatment of Domestic Violence Cases According to the Criminal Code of the Republic of Kosovo*, June 2020, pp. 3 and 4.

⁵⁴ Ibid.

⁵⁵ Quoted directly at pages 6-7 of the Supreme Court of Kosovo*, Guidance on Legal Qualification and Treatment of Domestic Violence Cases According to the Criminal Code of the Republic of Kosovo*, June 2020.

The Criminal Code defines vulnerable victims as “a victim of a crime who is a child, a physically or mentally handicapped person, a person suffering from diminished capacity, a pregnant woman, the elderly or a person whose relationship to and dependence on the offender make them particularly vulnerable to repeat victimisation, intimidation or retaliation. Therefore, special attention is paid to the dynamics of domestic violence cases by defining **a person whose relationship to and dependence on the offender make them particularly vulnerable** to repeat victimisation, intimidation or retaliation (Article 113(39), Definitions of the Criminal Code of Kosovo*). Further, the new definition of “vulnerable victim” provided for by Article 113(39) of the Criminal Code of Kosovo*, 2019, refers to a vulnerable victim as “... **a person whose relationship to and dependence on the offender make them particularly vulnerable to repeat victimization, intimidation or retaliation.**” So if we analyze the second part of this definition, we find that it is precisely these elements that are most frequently expressed characteristics in cases of domestic violence. This is because this definition provides all those elements which are reflected in the “power and control wheel” as a characteristic of domestic violence.⁵⁶

Other articles of the Criminal Code which provide for the commission of a criminal offense against a vulnerable victim

Some of the articles do not foresee a family relationship or family member, but refer to the vulnerable victim. Hereunder we will list some of the most relevant articles of the Criminal Code for the most common forms of violence against women and domestic violence and the way in which they are provided for in separate articles of the Criminal Code:

- Article 180(3) - Female Genital Mutilation
- Article 181(4) - Threat
- Article 184(3) - Assault
- Article 185(3) - Light bodily injury
- Article 186(4) - Grievous bodily injury
- Article 192(2.4) - Coercion
- Article 193(2.1) - Unlawful deprivation of liberty⁵⁷

All of the above articles do not refer to the family member but to the vulnerable victim. This implies that the condition of the victim’s relationship or dependence on the perpetrator must be met and that it is this relationship or dependence that makes that person “... *particularly vulnerable to repeat victimization, intimidation or retaliation*”. Therefore, in addition to elements provided for the respective criminal offense, one should analyze whether there is an element of dependence on the perpetrator. If this element is missing, then there is no immediate reference to paragraph referring to vulnerable victim, as the existence of dependence is a key element in determining which paragraph should be referred to. In cases where a victim cannot be considered a vulnerable victim according to the above principle, the prosecutor should request the court to consider taking into account aggravating circumstance from Article 70(2.14) of the Criminal Code of Kosovo*.⁵⁸

While the Criminal Code of Kosovo*, under Article 248 states that various forms of physical, sexual, emotional and psychological acts are recognised as acts of the domestic violence definition; the Criminal Code does not specifically define these terms. However, it refers to the definitions described in the Law on Protection against Domestic Violence of 2010. The Criminal Code states that domestic violence, physical, psychological, sexual or economic violence, for purposes of this Code is the same defined as in the provision of Article 2 sub-paragraph 1.2 of the Law no. 03/L-182 Law on Protection against Domestic Violence.

The Law on Protection against Domestic Violence defines these acts under Article 2, paragraph 1.2

One or more intentional acts or omissions when committed by a person against another person with whom he or she is or has been in a domestic relationship, but not limited to:

- 1.2.1. Use of physical force or psychological pressure exercised towards another member of the family;
- 1.2.2. Any other action of a family member, which may inflict or threaten to inflict physical pain or psychological suffering;

⁵⁶ Quoted at page 5 of the Supreme Court of Kosovo*, Guidance on Legal Qualification and Treatment of Domestic Violence Cases According to the Criminal Code of the Republic of Kosovo*, June 2020.

⁵⁷ Quoted directly from page 6 of the Supreme Court of Kosovo*, Guidance on Legal Qualification and Treatment of Domestic Violence Cases According to the Criminal Code of the Republic of Kosovo*, June 2020

⁵⁸ Ibid.

- 1.2.3. Causing the feeling of fear, personal dangerousness or threat of dignity;
- 1.2.4. Physical assault regardless of consequences;
- 1.2.5. Insult, offence, calling by offensive names and other forms of violent intimidation;
- 1.2.6. Repetitive behaviour with the aim of derogating the other person;
- 1.2.7. Non-consensual sexual acts and sexual ill-treatment;
- 1.2.8. Unlawfully limiting the freedom of movement of the other person;
- 1.2.9. Property damage or destruction or threatening to do this;
- 1.2.10. Causing the other person to fear for his or her physical, emotional or economic wellbeing;
- 1.2.11. Forcibly entering removing from a common residence or other person's residence; and
- 1.2.12. Kidnapping.

Cases that can be treated based on Article 248 according to the Supreme Court Guidance on the legal qualifications of acts of domestic violence in accordance to the recent Criminal Code of Kosovo* 2019

Based on the analysis above we can see that the purpose of the legislator was to have Article 248 serve more for reference and qualification of these forms of violence as domestic violence rather than use Article 248 to sanction all criminal offenses committed within the family relationship.⁵⁹ This is because this would otherwise be acting in contradiction with the internationally recognised principles which require effective, proportionate and dissuasive sanctions for such crimes. Therefore, the Supreme Court of Kosovo* in its recent interpretation of the Criminal Code of Kosovo* Article 248 has concluded that the purpose of Article 248 is to cover the lightest forms of domestic violence. In any case where the elements of any underlying offense have not been met, as a result of the degree of violence exercised or the lack of evidence for that element, the qualification of the offense should be in accordance with Article 248.

For illustration purposes, the Supreme Court Guidance provides the example of a hypothetical situation from Article 248: *After a dispute, the perpetrator hits the victim, his brother, on the head. The victim files the case to the police, but he was not treated by any doctor for the blow to his head, thus there is no medical report.* In absence of a medical report and ascertainment of injuries suffered, the defendant will be prosecuted for the criminal offense of domestic violence under Article 248. Whereas, paragraph 1 or 3 can be added depending on whether the blow was made with the intention of violating his dignity.⁶⁰

One case where there are two options for qualification of a criminal offence can be found in criminal offences against property, for example Article 321 (Destruction or damage to property).⁶¹ Paragraph 1 of Article 321 mirrors some of the elements of economic violence under Article 248 and clarified in point II.b of this Guidance. This paragraph sanctions destruction, damage, or rendering unusable the property of another person, and the sanction foreseen is a fine or imprisonment of up to 1 year. Although Article 248 sanctions economic violence as one of the forms on how domestic violence can be expressed, in line with the principles elaborated above, the qualification of the criminal offence committed against the family member, shall be done in accordance with the underlying offence (article 321 in this case), in all cases when it appears as isolated property offence. While, it is important to stipulate that in situations when the offence committed was done with the purpose of violating dignity, as form of pressure, economic and psychological violence against the victim, in these cases the qualification is done in accordance with Article 248 of the Criminal Code.⁶²

Chapter XX of the Criminal Code of Kosovo* further defines the following terms for crimes against sexual integrity:

1. Term “Consent” means:

- ...1.1 the voluntary agreement of a person who has reached the age of sixteen (16) years to engage in the sexual act in question;
- ...1.2 the voluntary agreement of two persons who have reached the age of fourteen (14) years and where difference in their ages does not exceed two (2) years to engage in the sexual act in question.

⁵⁹ Ibid.

⁶⁰ Supreme Court Guidance for Legal Qualification of Domestic Violence related articles in the Criminal Code of Kosovo*, adopted June 2020.

⁶¹ Ibid.

⁶² Ibid.

2. No consent is obtained where:

...2.1 such person expresses, by word or conduct, a lack of agreement to engage or to continue to engage in the sexual act;

...2.2 the agreement is expressed by the words or conduct of a person other than the victim;

...2.3 the agreement of the victim was obtained by deception, fear or intimidation, where such means do not involve the use of force, serious threat or exploitation as provided for in paragraph 3 of Article 227 of this Code; or

...2.4 such person is incapable of agreeing to the sexual activity because of diminished mental or physical capacity or intoxication by alcohol, drugs or other substances.

3. No action under paragraphs 1 and 2 of this Article shall be interpreted as limiting the circumstances in which there is no consent.

4. Term **“Sexual act”** means penetration however slight of any part of the body of a person with a sexual organ or an object for sexual purpose or the penetration however slight of the anal, oral or genital opening of a person with any object for a sexual purpose, or any other part of the body or any part of an animal.

5. Term **“Subjecting another person to a sexual act”** means the commission of a sexual act on another person by the perpetrator, or inducing another person to commit a sexual act on the perpetrator or a third person or inducing a third person to commit a sexual act on another person.

6. Term **“Private parts”** means the breasts of a woman, the penis, vagina and/or anus.

7. Term **“Touching”** means any direct or indirect contact, where there is no penetration, between the body of a person with any part of the body of another person or with an object.

Further, rape is defined as a criminal offence of a person subjecting another person to a sexual act without such person's consent. For offences including marital rape, the Criminal Code of Kosovo* increases the imprisonment from five (5) to fifteen (15) years if the crime is committed by the perpetrator who is the parent, adoptive parent, foster parent, step parent, grandparent, uncle, aunt or sibling of the person or shares a **domestic relationship with the victim (Article 227, paragraph 4.9)**. Domestic relationship is further defined as a relationship in between persons that are engaged or were engaged or are married or were married or are in extra marital union or were in extra marital union or are co-habiting in a common household or were co-habiting in a common household; who use a common house and who are related by blood, marriage, adoption, in-law or are in a guardian relationship, including parents, grandparents, children, grandchildren, siblings, aunts, uncles, nieces, nephews, cousins; or who are the parents of a common child (Article 113).

Sexual assault in a domestic relationship is also provided for a higher imprisonment. Sexual assault is defined as acts of persons touching a person for a sexual purpose or induces such person to touch the perpetrator or another person for a sexual purpose, without the consent of such person. In a domestic relationship this act is punishable from 3 to 10 years of imprisonment (Article 229, paragraph 3.9). Also, degradation of sexual integrity is defined as acts of persons inducing another person to expose the private parts of such person's body, to masturbate or to commit another act that degrades such person's sexual integrity, without the consent of such person. This is punishable for persons in a domestic relationship by imprisonment of one to ten years (Article 230, paragraph 3.9).

Table: Overview of criminalising violence against women in the Istanbul Convention and Kosovo*

Psychological violence	Article 33, Istanbul Convention: Intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats.
	Offence under Kosovo* Criminal Code: Whoever commits physical, psychological or economic violence or mistreatment with the intent to violate the dignity of another person within a domestic relationship shall be punished by fine and imprisonment of up to three (3) years (Article 248 (1)).
Stalking	Article 34, Istanbul Convention: Intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her to fear for her safety.
	<p>Offence under Kosovo* Criminal Code: 1. Whoever engages in a pattern of repeated and unwanted attention or communication with the intent to harass, intimidate, injure, damage property or kill another person or his or her children, family, relatives or pets or whoever places another under surveillance with the intent to harass, intimidate, injure, damage property or kill another person or his or her children, family, relatives or pets; and in the course thereof, places that person in reasonable fear of death, grievous bodily injury, serious damage to property or substantial emotional distress shall be punished by a fine or imprisonment up to three (3) years (Article 182(1)).</p> <p>2. When the offense provided for in paragraph 1 of this Article is committed against a former or current domestic partner or a former or current family member, the perpetrator shall be punished by imprisonment of six (6) months to five (5) years (Article 182 (2)).<?></p>
Physical violence	Article 35, Istanbul Convention: Intentional conduct of committing acts of physical violence against another person.
	<p>Offence under Kosovo* Criminal Code: 1. Whoever commits physical, psychological or economic violence or mistreatment with the intent to violate the dignity of another person within a domestic relationship shall be punished by fine and imprisonment of up to three (3) years (Article 248(1)).</p> <p>2. When any act in the Criminal Code is committed within a domestic relationship, it will be considered an aggravating circumstance (Article 248(2)).</p> <p>3. Every member of the family who exerts physical, psychological, sexual or economic violence or mistreatment against another member of his/her family, shall be punished by a fine and imprisonment of up to three (3) years (Article 248(3)).</p> <p>Also, under the Criminal Code of Kosovo*, crimes of assault, light bodily injury, grievous bodily injury against a vulnerable victim, various punishments apply (Articles 184,185 and 186).</p> <p>The Criminal Code of Kosovo* considers murder of a pregnant woman, child or family a member<?>as an aggravating murder with a punishment of imprisonment of not less than ten (10) years or of lifelong imprisonment.</p>

<p>Sexual violence, including rape</p>	<p>Article 36, Istanbul Convention: a) Intentional conduct of engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.</p> <p>b) Intentional conduct of engaging in other non-consensual acts of a sexual nature with a person.</p> <p>c) Intentional conduct causing another person to engage in non-consensual acts of a sexual nature with a third person.</p> <p>Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.</p> <p>Apply to acts committed against former or current spouses or partners.</p> <p>Offence under Kosovo* Criminal Code: Rape. Whoever subjects another person to a sexual act without such person's consent shall be punished by imprisonment of two (2) to ten (10) years. If the offense provided for in paragraph 1 or 2 of this Article is committed against a person under the age of sixteen (16) years, the perpetrator shall be punished by imprisonment of five (5) to twenty (20) years. Further, if the offense provided for in paragraph 1 or 2 of this Article is committed against a person under the age of fourteen (14) years, the perpetrator shall be punished by imprisonment of at least ten (10) years (Article 227).</p> <p>Sexual assault. Whoever touches a person for a sexual purpose or induces such person to touch the perpetrator or another person for a sexual purpose, without the consent of such person, shall be punished by a fine or by imprisonment of up to one (1) year (Article 229).</p> <p>Degradation of sexual integrity. Whoever induces another person to expose the private parts of such person's body, to masturbate or to commit another act that degrades such person's sexual integrity, without the consent of such person, shall be punished by a fine or by imprisonment of three (3) months to one (1) year (Article 230).</p>
<p>Forced marriage</p>	<p>Article 37, Istanbul Convention: 1. Intentional conduct of forcing an adult or a child to enter into a marriage.</p> <p>2. Intentional conduct of luring an adult or a child to the territory of another State for the purpose of forcing them to enter into a marriage.</p> <p>Offence under Kosovo* Criminal Code: Whoever compels another person to enter into a marriage or enters into a marriage with a person whom he or she knows to be compelled into the marriage shall be punished by imprisonment one (1) to eight (8) years. There are additional aggravating circumstances such as marriage of a child, or child beneath 14 years of age, etc. by a parent, guardian or another person exercising parental authority. In such cases the punishment can go up to minimum 15 years' imprisonment (Article 239)</p>

<p>Female Genital mutilation</p>	<p>Article 38, Istanbul Convention: a. Intentional conducts of excising, infibulating or performing any other mutilations to the whole or any part of a woman’s labia, labia minora or clitoris.</p> <p>b. Intentional conducts of coercing or procuring a woman to undergo any of such acts.</p> <p>c. Intentional conducts of inciting, coercing or procuring a girl to undergo any of such acts.</p> <p>Offence under Kosovo* Criminal Code: 1. Whoever, for non-medical reasons, partially or totally removes or permanently alters the external female genitalia, shall be punished by imprisonment from six (6) months to five (5) years (Article 180(1)).</p> <p>2. Whoever incites or assists a female to subject herself to procedures referred to in paragraph 1 of this Article, shall be punished by imprisonment up three (3) years (Article 180(2)).</p> <p>3. Whoever commits the offence referred to in paragraphs 1 or 2 of this Article against a vulnerable victim, shall be punished by imprisonment from one (1) to eight (8) years (Article 180(3)).</p> <p>4. When the offence provided for in paragraphs 1 or 2 of this Article results in the death of the victim, the perpetrator shall be punished by imprisonment of five (5) to fifteen (15) years (Article 180(4)).</p>
<p>Forced abortion and forced sterilisation</p>	<p>Article 39, Istanbul Convention: a. Intentional conduct of performing an abortion on a woman without her prior and informed consent.</p> <p>b. Intentional conduct of performing surgery which has the purpose or effect of terminating a woman’s capacity to naturally reproduce without her prior and informed consent or understanding of the procedure.</p> <p>Offence under Kosovo* Criminal Code: Whoever, for non-medical reasons, removes or disables in any manner a person’s reproductive organs without that person’s consent, with the effect of leading to sterilisation, shall be punished by imprisonment of one (1) to eight (8) years (Article 179(1)).</p> <p>When the offense provided for in paragraph 1 of this Article results in grievous bodily injury, serious impairment to health or the death of the person, the perpetrator shall be punished by imprisonment of five (5) to fifteen (15) years (Article 179(2)).</p>
<p>Sexual harassment*</p>	<p>Article 40, Istanbul Convention: 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.</p> <p>Offence under Kosovo* Criminal Code: 1. Whoever sexually harasses another person, in particular a person who is vulnerable due to age, illness, disability, addiction, pregnancy, a severe physical or mental disability, shall be punished by a fine or imprisonment of up to three (3) years (Article 183(1)).</p> <p>2. Sexual harassment shall mean any form of unwanted verbal, non-verbal or physical conduct of a sexual nature which aims at or effectively constitutes a violation of the dignity of a person, which creates an intimidating, hostile, degrading or offensive environment (Article 183(2)).</p> <p>3. When the offence provided for in paragraph 1 of this Article is committed by a perpetrator who is a teacher, a religious leader, a health care professional, a person entrusted with such person’s upbringing or care or otherwise in a position of authority over the person, the perpetrator shall be punished of imprisonment of six (6) months to three (3) years (Article 183(3)).</p>

* The Istanbul Convention allows for States to take either criminal or other legal sanctions to prevent and respond to sexual harassment.

2.4 Relevant jurisprudence at the International and European level

Given that the Kosovo* Constitution stipulates that international human rights standards, such as the European Convention on Human Rights are directly applicable in its territory, this section summarises some of the key jurisprudence from the CEDAW Committee and the European Court of Human Rights. Cases only reach these courts or committees when national remedies are exhausted. The decisions from these bodies can assist prosecutors and judges in applying and interpreting the national laws to ensure compliance with their international obligations. Below are brief summaries of some of the key decisions. It is recommended for prosecutors and judges to read the case in full when referring to them in their work.

Relevant jurisprudence from the European Court of Human Rights⁶³

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

Domestic violence is a form of gender-based violence and constitutes a form of discrimination. The due diligence principle is upheld.

Facts: The applicant and her mother were assaulted and threatened over many years by the applicant's husband H.O., at various points leaving both women with life-threatening injuries. With only one exception, no prosecution was brought against him on the grounds that both women had withdrawn their complaints, despite their explanations that H.O. had harassed them into doing so, threatening to kill them. He subsequently stabbed his wife seven times and was given a fine equivalent to about 385 euros, payable in instalments. The two women filed numerous complaints, claiming their lives were in danger. H.O. was questioned and released. Finally, when the two women were trying to move away, H.O. shot dead his mother-in-law, arguing that his honour had been at stake. He was convicted for murder and sentenced to life imprisonment but released pending his appeal, whereupon his wife claimed he continued to threaten her.

Decision: The ECtHR found a violation of Article 2 (right to life) concerning the murder of H.O.'s mother-in-law and a violation of Article 3 (prohibition of inhuman or degrading treatment) concerning the state's failure to protect his wife. Turkey had failed to set up and implement a system for punishing domestic violence and protecting victims. The authorities had not even used the protective measures available and had discontinued proceedings as a "family matter" ignoring why the complaints had been withdrawn. There should have been a legal framework allowing criminal proceedings to be brought irrespective of whether the complaints had been withdrawn. The ECtHR also found – for the first time in a domestic violence case - violations of Article 14 (prohibition of discrimination), in conjunction with Articles 2 and 3, as the violence suffered by the two women was gender-based; domestic violence mainly affected women and it was encouraged by discriminatory judicial passivity. Despite reforms in the field (Law no. 4320), the unresponsiveness of the judicial system and impunity enjoyed by aggressors indicated that Turkey was not committed to tackling the problem: police officers tried to persuade women to drop their complaints, delays were frequent and courts mitigated sentences on the grounds of honour or tradition.

Kontrová v. Slovakia, Application No. 7510/04, 2005

Police's failure to launch a proper investigation based on victim's declaration and the action of a police officer who assisted her in modifying her complaint so that it could be treated as a minor offence.

Facts: On 2 November 2002 the applicant filed a criminal complaint against her husband for assaulting her and beating her with an electric cable, providing a medical certificate documenting that her injuries left her unfit to work for 6 days. She later returned to the police station with her husband to withdraw the complaint. The police reduced the criminal charge to a minor offence. The following month a relative of the victim called the police to indicate that the husband had locked himself into the apartment with a shotgun and threatened to kill himself and their two children. The victim also called the police. When the police arrived the perpetrator had already left the scene. The applicant filed a complaint the next day. A few days later, the husband shot their two children and himself. The applicant received no compensation.

Decision: The ECtHR found a violation of Article 2 (right to life) of the European Convention on Human Rights, concerning the authorities' failure to protect the children's lives, and a violation of Article 13 (right to an effective remedy) of the Convention, concerning the impossibility for their mother to obtain compensation.

⁶³ These summaries are adapted from the European Court of Human Rights Press Unit. 2011. Factsheet – Violence against Women.

Bevacqua and S. v. Bulgaria, Application No. 71127/01, 2008

Recognised and advanced the due diligence standard when finding the authorities failed in their duty when considering domestic violence to be a "private matter".

Facts: The applicant, who claimed she was regularly battered by her husband, left him and filed for divorce, taking their three-year-old son (also an applicant) with her. However, she maintained that her husband continued to beat her. She spent four days in a shelter for abused women with her son but was allegedly warned that she could face prosecution for abducting the boy, leading to a court order for shared custody, which, she stated, her husband did not respect. Pressing charges against her husband for assault allegedly provoked further violence. Her requests for interim custody measures were not treated as priority and she finally obtained custody only when her divorce was pronounced more than a year later. The following year she was again battered by her ex-husband and her requests for a criminal prosecution were rejected on the ground that it was a "private matter" requiring a private prosecution.

Decisions: The ECtHR found a violation of Article 8 (right to respect for family life) given the Bulgarian authorities' failure to adopt the measures necessary to punish and control the applicant's husband. The ECtHR also stressed that considering the dispute to be a "private matter" was incompatible with the authorities' obligation to protect the applicants' family life.

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

The government failed to demonstrate that "the compulsory psychiatric treatment ordered in respect of M.M. during his prison term was actually and properly administered".

Facts: The applicants are the relatives of a baby and mother whose husband/father killed both them and himself one month after being released from prison, where he had been held for making those same death threats. He was originally ordered to undergo compulsory psychiatric treatment while in prison and after his release, as necessary, but the appeal court ordered that his treatment be stopped on his release.

Decision: The ECtHR found a violation of Article 2 (right to life) concerning the deaths of the mother and child: the Croatian authorities had not followed the order for continued psychiatric treatment; the government had failed to show that the husband had even received psychiatric treatment in prison; and, he did not undergo a psychiatric assessment prior to his release. The ECtHR also found that the state had failed to conduct a thorough investigation into the possible responsibility of their agents for the deaths.

Aydın v. Turkey, Application No. 23178/94, 1997

The state failed to conduct an effective investigation, in part, due to the appearance that the prosecutor's primary concern in ordering three medical examinations in rapid succession was to establish whether the applicant had lost her virginity, rather than on whether the applicant was a rape victim.

Facts: The applicant, a young Turkish woman of Kurdish origin (aged 17 at the relevant time) was arrested without explanation and taken, along with two other members of her family, into detention. She was blindfolded, beaten, stripped naked, placed in a tire and hosed with pressurised water before being raped by a member of the security forces and then again beaten for about an hour by several people. The day after being released, the victim, her father and sister went to the public prosecutor's office where they filed a complaint. They were sent to the state hospital for forensic tests, where the victim was subjected to a virginity test. The doctor confirmed that the hymen had been torn and that the victim had bruising on her inner thighs. The next day public prosecutor sent the victim to a second hospital to determine when she had lost her virginity; the doctor had estimated a week before the examination. No swab was taken. Neither of the forensic doctors were sufficiently qualified experts. A month later, the prosecutor took a second statement from the victim and sent her for a third examination of her virginity. The date of the torn hymen could not be determined. The victim received a letter that the investigation had produced no evidence of the rape. She further claimed that the family was intimidated and harassed by the authorities to coerce them into withdrawing their complaint before the European Court of Human Rights.

Decision: The ECtHR stressed that the rape of a detainee by a state official had to be considered an especially grave and abhorrent form of ill-treatment which left deep psychological scars on the victim. The applicant must have felt debased and violated both physically and emotionally as a result of the sexual assault. The ECtHR found that both the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture, in violation of Article 3

(prohibition of torture). In addition, an allegation of rape by an official in custody required that the victim be examined with all appropriate sensitivity by independent doctors with the relevant expertise. That did not occur, rendering the investigation deficient and denying the applicant access to compensation, in violation of Article 13 (right to an effective remedy).

E.S. and Others v. Slovakia, Application No. 8227/04, 2009

A restraining order, as opposed to a barring order, did not provide the applicants with adequate protection and therefore did not amount to an effective domestic remedy.

Facts: In 2001 the applicant left her husband and lodged a criminal complaint against him for ill-treating her and her children and sexually abusing one of their daughters. He was convicted of violence and sexual abuse two years later and sentenced to 4 years imprisonment. Her request for her husband to be ordered to leave their home, a council flat of which they were joint tenants, was dismissed, however, the court finding that it did not have the power to restrict her husband's access to the property (she could only end the tenancy when divorced). They suggested she could apply for a restraining order. The applicant and her children were therefore forced to move away from their friends and family.

Decision: The ECtHR found that Slovakia had failed to provide the applicant and her children with the immediate protection required against her husband's violence, in violation of Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life). Execution of this judgment is ongoing.

X and Y v. the Netherlands, Application No. 8978/80, 1985

State's positive obligation to interfere when it comes to effective protection and respect the right for private or family life.

Facts: A girl with a mental handicap was raped, in the home for children with mental disabilities where she lived, the day after her sixteenth birthday (which was the age of consent for sexual intercourse in the Netherlands) by a relative of the person in charge. She was traumatised by the experience but deemed unfit to sign an official complaint given her low mental age. Her father signed in her place, but proceedings were not brought against the perpetrator because the girl had to make the complaint herself.

Decision: The ECtHR recognised that there was a gap in the law. The ECtHR found a violation of Article 8 (right to respect for private life), emphasising that it was "indispensable" for the Netherlands criminal legal system to provide an effective deterrent in such cases.

M.C. v. Bulgaria, Application No. 39272/98, 2003

Obligation to effectively prosecute any non-consensual sexual acts, even where the victim has not physically resisted. It held that an essential element in rape/sexual abuse is lack of consent.

Facts: 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.

Decision: The ECtHR found violations of Articles 3 (prohibition of degrading treatment) and 8 (right to respect for private life), noting the universal trend towards recognising lack of consent as the essential element in determining rape and sexual abuse. 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. Stressing that states had an obligation to prosecute any non-consensual sexual act, even where the victim had not resisted physically, the ECtHR found both the investigation in the case and Bulgaria law to be defective.

Y. v. Slovenia, Application No. 41107, 2015

The interests of the defence are to be balanced against those of witnesses or victims called upon to testify.

Facts: This case involved the alleged sexual assault of a fourteen-year-old girl by a family friend, aged 55. Reported to the police by a priest with whom the victim's mother spoke, the police first questioned Y in July 2002.

The applicant alleged that X had attempted to have sexual intercourse with her various times, including while she was sleeping, that he had groped her, had performed oral sex on her and had forced her to do the same to him. Gynecological evidence regarding the applicant did not show conclusively that she had had sexual relations with Y; however, psychological examinations showed that she exhibited symptoms consistent with sexual victimisation. Criminal proceedings were begun against X and 12 hearings were held at first instance in the case. At one of these hearings, X cross-examined Y. He personally asked her over one hundred questions, including asking her to confirm that she could cry on cue, that she had actively sought his company and that she had confided in him that she wished to dominate men sexually. X frequently repeated his questions and disputed the accuracy and credibility of the answers provided by Y. The applicant grew agitated and cried, wherefore three recesses were ordered by the court. After one of these recesses, X asked the applicant whether she would feel better if they just went out to dinner. Ultimately, X was acquitted – in application of the ‘*in dubio pro reo*’ principle – on the basis of medical evidence that contradicted Y’s account of events. The symptoms of trauma exhibited by the applicant, the first-instance court furthermore held, could have stemmed from another source, such as the inappropriate behaviour of her former stepfather.

Decision: The ECtHR held that the duty to investigate requires authorities who are capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, such as witness testimony and forensic evidence, and a requirement of promptness and reasonable expedition is implicit in this context. While the ECtHR recognised national courts were faced with the difficult task of having to decide such cases on the basis of irreconcilable statements and without any physical evidence supporting “either side’s version of events, it found a violation based on the unexplainable and lengthy “periods of complete inactivity”. As regards the conflicts between the interests of the defence and those of witnesses in criminal proceedings, the ECtHR has already held on several occasions that criminal proceedings should be organised in such a way as not to unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify, or their interests coming generally within the ambit of Article 8 of the Convention. Thus, the interests of the defence are to be balanced against those of witnesses or victims called upon to testify.

CEDAW jurisprudence

The CEDAW Committee has also addressed cases involving domestic and sexual violence, for those States that have ratified the Optional Protocol. These include, inter alia:

A.T. v. Hungary, Communication No. 2/2003, CEDAW/C/36/D/2/2003

Facts: The author alleged that she had been subjected to regular severe domestic violence and treatment by her common law husband and the father of her two children (L.F.) from 1998 onwards, even after he left the couple’s family home. Although L.F. had allegedly threatened to kill the author and rape the children, the author did not go to a shelter because one of her children is severely brain-damaged and reportedly no shelter in the country is equipped to take in a fully disabled child together with their mother and sister. The author reported several incidents when she was beaten severely, leading to 10 medical certificates including one incident after which she was hospitalised for one week. In proceedings regarding L.F.’s access to the family home, following the author’s decision to change the locks to prevent him from gaining access, the Court found in his favour, and the decision was upheld by the regional court when she appealed. She filed for division of the jointly owned property and instituted criminal proceedings against L.F. but these lasted years, failed to issue a protection order or detain the perpetrator were still pending by the date of her initial submission on 10 October 2003. As a victim in the proceedings she had no access to the relevant court documents. No assistance was provided from child protection authorities, despite her requests by phone, letter and in person.

Decision. The CEDAW Committee found that the State party had failed to meet its obligations under the Convention to protect the petitioner against domestic violence on the basis that Hungary’s legal and institutional arrangements fell short of international standards, and available domestic remedies were ineffective to protect her against her violent former partner. The Committee opined that a delay of over three years in legal proceedings from the dates of the incidents in question amounted to an unreasonably prolonged delay, particularly considering that the author has been at risk of irreparable harm and received threats to her life during that period. With regard to the civil proceedings, it stated: “Women’s human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to pri-

vacy." It also observed the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family". It also condemned the low priority afforded by national courts to domestic violence cases.

V.K. v. Bulgaria, Communication No. 20/2008, CEDAW/C/49/D/20/2008

Facts: The perpetrator only provided the victim with enough money for the family's basic needs. As they were living in Poland for his job, she could not work and thus was economically dependent. She was treated like a housekeeper, was not allowed to communicate freely with her friends and family. For years, she felt humiliated and depressed. When she insisted on returning to work, her husband ceased their financial maintenance "in an attempt to make her 'behave' and 'obey'". After numerous violent incidents, including against a women's centre staff member assisting the victim when she tried to contact her son, whom the husband had locked at home, the victim returned with her children to Bulgaria where she applied for a protection order. An emergency order was applied but the protection order was denied after a hearing because no violent incidents had occurred within the month preceding the application.

Decisions: The CEDAW Committee found that the state had required too high a level of violence to be proved before issuing an order. The Committee decided that when assessing whether a protection order should be granted, national courts should take account of all forms of gender-based violence affecting an applicant, not just life-threatening violence. Courts should also be aware that many forms of violence, particularly domestic violence, are courses of conduct which take place over time. Failure to take this into account violates women's rights not to be subjected to gender stereotyping.

Karen Tayag Vertido v. The Philippines, Communication No. 18/2008, UN Doc. CEDAW/ C/46/D/18/2008

Facts: The author, the Executive Director of the Davao City Chamber of Commerce and Industry in Davao City, was raped in a hotel room by a senior professional colleague, the 60-year-old president of the Chamber of Commerce, who she thought had a gun. The judge in the case acquitted the accused, finding that the victim should have should have fought off the accused once she had regained consciousness and while he was raping her, and therefore must have consented to sexual contact. She also doubted the victim's account of events, disbelieving that the accused would have able to proceed to the point of ejaculation as he was in his 60s. The victim claimed that she had suffered re-victimisation by the state after she was raped. The author made a strong and detailed case outlining the many "rape myths" that were included in this trial process.

Decision: CEDAW Committee determined that the Philippines had failed to comply with its obligation to ensure Ms Tayag Vertido's right to an effective remedy. In finding violations of articles 2(f) and 5(a), the Committee affirmed that CEDAW requires states parties to 'take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women'. It also stressed that: "...stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or... have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim...". The CEDAW Committee found that the trial judge's decision contained 'several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the creditability of the victim' and many of the judge's comments focused on the personality and behaviour of the author, even though these issues are not part of the definition of the crime of rape. It concluded that Ms. Tayag Vertido suffered "re-victimisation through the stereotypes and gender-based myths relied upon in the judgement".

Yildirim (deceased v Austria and Goekce (deceased) v Austria, Communication No. 6/2005, UN Doc. CEDAW/C/39/D/6/2005 and Communication No. 5/2005, UN Doc. CEDAW/C/39/D/5/2005

Facts: Both applicants were murdered by their husbands after suffering prolonged domestic violence, including threats to kill. In both cases, the state took some action against the perpetrators, but it was not sufficient to prevent them murdering the applicants.

Decision: The CEDAW Committee expanded on the content of the standard of positive action required by the state's duty of due diligence for the actions of non-state actors. The CEDAW Committee noted that Austria had "established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness raising, education and training, shelters, counselling for victims of violence and work with perpetrators." These formal measures, while necessary, were nonetheless found to be insufficient by

themselves when the political will they expressed, was not supported by state actors in adherence to Austria's due diligence obligations. ...in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned [model]...must be supported by state actors, who adhere to the state party's due diligence obligations. Paragraph 12.1.2 (common to both cases).

2.5 Techniques for prosecutors and judges on how to use International and European standards in their work

A state can use a number of methods for international law instruments internally. Kosovo* appears to be a monist state as its constitution allows in principle for the direct incorporation of international norms into domestic law. It is important for prosecutors and judges to know how a treaty is implemented, that is, how it is given force under domestic law.

Prosecutors and judges can consider applying the provisions of international treaties either directly or as interpretative standards.

- Direct application of international standards. In monist countries where treaties are part of domestic law, the judiciary can apply them directly and that means prosecutors can use international standards in their arguments at trial.
- Indirect application by using international standards as interpretive guides. The prosecution and the judiciary can and should consider using international norms and standards as guidance in interpreting domestic law.

Both the prosecution and the judiciary are in a position to acknowledge, in principle, the relevance of international standards for interpreting domestic law. They should be taking into account international law where it is necessary to ensure that the state's conduct is consistent with its obligations under international law. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a state's international legal obligations.

Tips for prosecutors in applying international law in their work

- ✓ Ask if it is relevant to consider international law in this matter. Refer to the Constitution, as well as argue that as a member of the international community, Kosovo* subscribes to international customary law and instruments.
- ✓ Refer to the 25 September 2020 National Assembly of Kosovo decision to amend the Constitution to give direct effect to the Istanbul Convention.
- ✓ Argue before the courts that international law is automatically part of domestic law except where it is in conflict with domestic law. And even on the absence of implementing legislation, international law can be applied by state courts where there is no conflict with existing state law.
- ✓ Argue that Kosovo* has shown a willingness to be bound by the provisions of international law.
- ✓ Since there is that willingness, if an issue comes before this court which is not covered by local legislation but would be covered by such international instrument (e.g. CEDAW, Istanbul Convention), ask the court to take judicial notice of such standards in deciding the case.

Tips for judges in applying international law in their work

- ✓ Determine the meaning and status of relevant international norms; if international norm is relevant and nothing in legislation overrides it, or if inconsistency can be fairly resolved, the court should interpret to preserve the maximum scope for both; but if conflict is unavoidable, then the court must choose the prevailing norm according to the hierarchy of laws applicable to their domestic systems.
- ✓ When faced with a choice between an interpretation of domestic law which would enable the state to comply with international law and one that would place the state in breach of international law, judges have the inherent ability to follow the first choice.

- ✓ Interpret the rights of equality and non-discrimination to the greatest extent possible in ways which facilitate the full protection of all rights for women.
- ✓ Do not apply existing legal provisions that discriminate against women, such as particular provisions that allow, tolerate or condone forms of violence against women and domestic violence.
- ✓ Refer to the 25 September 2020 National Assembly of Kosovo decision to amend the Constitution to give direct effect to the Istanbul Convention.

2.6 Options for exercises

Option 1: Small group discussion - Case study

Instructions: Divide the large group into smaller groups. Assign each group the same case study (see below). Each group is to answer the following questions:

- What do you think the errors were in the authorities' response to the A.'s complaints?
- Did these errors reach the threshold of failing to exercise due diligence? If yes, when and why?
- Was the treatment of A. by the national authorities discriminatory based on her gender?

Facts

[Based on the *Balsan v Romania* case from European Court of Human Rights, Application No. 49645/09, 2017]

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

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

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

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

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

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

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

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

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

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

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

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

Facilitators notes, the ECtHR's decision:

- *In its assessment, the ECtHR noted that the physical violence was documented in several police reports and forensic medical reports, the latter indicating that the applicant needed from two to ten days medical care. It rejected the government contention that the violence suffered by the applicant did not reach the minimum threshold to invoke Article 3. It stated: "the ill-treatment of the applicant, which on three occasions caused her physical injuries, combined with her feelings of fear and helplessness, was sufficiently serious to reach the required level of severity under Article 3 of the Convention and thus impose a positive obligation on the Government under this provision".*
- *The ECtHR thus examined "whether the national authorities have taken all reasonable measures to prevent the recurrence of the assaults against the applicant's physical integrity". In this regard, it noted that they were well aware of the violence perpetrated against the applicant for almost one year, as she had made emergency calls to the police, filed criminal complaints and petitioned the head of the police; her complaints were always accompanied by forensic reports, which were never contested. The ECtHR thus concluded that the Romanian authorities were obliged to respond to her complaints. The ECtHR also observed that the applicant "had at her disposal a legal framework allowing her to complain about the domestic violence and to seek the authorities' protection".*
- *With regard to the application of the legal framework, the ECtHR recalled that the investigation into the first violent incident began a month later, and after the occurrence of other violent incidents. Although applicant*

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

- The ECtHR observed that the applicant's appeal of this decision was dismissed, and that the District Court acquitted the perpetrator of all charges of bodily harm since he had been provoked and was not a danger to society. The ECtHR further observed that the national court did not address the withdrawal of the statement of the parties' daughter, nor did the authorities address the applicant's request for protective measures. It noted that the national court applied a slightly increased administrative fine, despite the fact that the first fine had no deterrent effect, as the violence continued.⁹³
- In assessing the criminal proceedings as a whole, the ECtHR concluded "with concern that both at the investigation level and before the courts the national authorities considered the acts of domestic violence as being provoked and regarded them as not being serious enough to fall within the scope of the criminal law". It found that the approach taken by the national authorities "deprived the national legal framework of its purpose and was inconsistent with international standards with respect to violence against women and domestic violence in particular".
- With respect to the decision to deny the applicant the appointment of a free legal aid lawyer, as it was not "necessary" in these types of cases, the ECtHR recalled its prior holdings that "in certain circumstances the state's procedural obligations to ensure the effective participation of the victims in the investigation of their complaints of ill-treatment may extend to the issues of providing effective access to free legal representation".
- Finally, the ECtHR noted that six additional complaints were filed in the first half of 2008, which the national authorities dismissed due to lack of evidence or as not sufficiently severe. The ECtHR thus found a violation of Article 3.
- The ECtHR considered on its own motion the application of Article 14. It reiterated its holding that the "failure by a state to protect women against domestic violence breaches their right to equal protection under the law and that this failure does not need to be intentional". It stressed that the Istanbul Convention defined violence against women as a form of discrimination.
- The ECtHR then reviewed the factual elements of this case: that the applicant was subjected to violence and death threats by her husband, of which the authorities were aware; and its holding: that the authorities: deprived the national legal framework of its purpose by their finding that the applicant provoked the domestic violence against her, that the violence did not present a danger to society and therefore was not severe enough to require criminal sanctions, and by denying the applicant's request for a court-appointed lawyer.
- It found that the authorities' passivity in the case was further demonstrated by their failure to consider any protective measures, despite her repeated requests to police, prosecutors and the courts. It opined that the authorities should have examined her case more attentively in light of the vulnerability of victims of domestic violence.
- The ECtHR went on to observe statistics demonstrating the social tolerance of domestic violence in Romania, viewed as normal, and that only a few of the reported cases are investigated by police. It observed that number of reported cases continues to grow, in which the majority of victims are women, and that there are an insufficient number of shelters for victims, including eight counties with no shelters. The ECtHR underscored that the government failed to demonstrate any monitoring of the impact of its activities in this field, nor monitoring of the implementation of the law and national strategy. The ECtHR opined that: the combination of the above factors demonstrates that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence in Romania and that their actions reflected a discriminatory attitude towards the applicant as a woman.
- In light of the prima facie evidence that domestic violence affects primarily women, the ECtHR considered that "the general and discriminatory passivity of the authorities created a climate that was conducive to domestic violence". It found that the criminal law system did not have "an adequate deterrent effect capable of ensuring the prevention of unlawful acts" by the perpetrator in this case, thus violating the applicant's rights. It concluded that despite the adoption of the law and national strategy to combat domestic violence "the overall unresponsiveness of the judicial system and the impunity enjoyed by aggressors . . ." demonstrated a lack of commitment to combating domestic violence. It thus found a violation of Article 14 in conjunction with Article 3.

Option 2: Small group discussion - Case study

Instructions: Divide into smaller groups. Review the facts of the case contained in Handout (extract from Opuz v Turkey).

Ask 2 groups to answer the following questions:

- Q1. Do you think the state failed to exercise due diligence?
- Q2. If yes, when and why?

Ask 2 other groups to answer the following questions:

- Q1. How would this case be dealt with according to your domestic laws? (In terms of applicable criminal offences and criminal procedures)?
- Q2. List any issues/gaps in the criminalisation or criminal process when comparing to international legal and policy framework recommendations?

Facts

[Extract from Opuz v Turkey, European Court of Human Rights, 2009]

Nahide Opuz married H.O. in 1995 and shortly thereafter H.O. began regularly abusing Opuz and her mother, threatening to kill them both. The local prosecutor filed criminal charges, however, the court dismissed the cases after she and her mother withdrew their complaints out of fear for their safety. This cycle of violence, followed by a failure of local authorities to initiate criminal proceedings against H.O., was repeated numerous times over the next several years, with the attacks becoming progressively more violent. In February 1998, H.O. pulled a knife and attacked Opuz, her mother and her sister, incapacitating each for several days. The local prosecutor decided not to file charges against H.O. because of lack of evidence. A month later, H.O. drove his car into Opuz and her mother, causing serious injuries. Following repeated death threats from her husband, Opuz filed for divorce and requested police protection. The local prosecutor filed criminal charges and H.O. was placed in detention. In October 1998, however, Opuz and her mother again withdrew their complaints out of fear of retaliation. Due to the seriousness of the alleged acts, the local court convicted H.O. and sentenced him to 3 months imprisonment, but this was later reduced to a fine. In October 2001, H.O. stabbed Opuz seven times with a knife. After this incident, the mother's attorney petitioned the local prosecutor's office, noting that both Opuz and her mother had been previously compelled to withdraw complaints against H.O. because of his continuous death threats. However, no further charges were filed against him. In March 2002, Opuz's mother was attempting to move to another community when H.O. shot and killed her with a gun in front of a witness. H.O. was charged with and convicted of murder and sentenced to life imprisonment. The local court lowered the sentence to 15 years in light of H.O.'s good behaviour during trial. Pending appeal, however, the local court released H.O.

Part 2: The role of Prosecutors and Judges in responding to Violence against Women and Domestic Violence

1. Protection

Prosecutors and judges have responsibility to provide protection for victims that come before them during the criminal proceedings. It is important for them to understand that the protection of women who have experienced violence is critical in its own right, irrespective of a criminal case. Like many jurisdictions, Kosovo* has a comprehensive civil protection regime that is independent of initiation of any legal case. This module covers protection in terms of assessing risk and preparing safety plans, as an essential component to a victim-centred approach as well as the protection measure options that are available to prosecutors and judges (both criminal and civil court judges).

One of the reasons women victims engage with the criminal justice system is to stop the violence and prevent violence from re-occurring and escalating, as well as prevent threats of violence, intimidation and harassment. Their protection needs can be urgent and long term as well as situational. Fear is cited as among the leading reasons expressed by victims for opposing prosecutions. Victims may experience specific threats and/or pressure from the perpetrator against prosecution, while others fear that the perpetrators will become more violent if they report and participate in the criminal justice process. Research indicates that victims of violence against women and domestic violence' fears are accurate. Studies show that women who are separating from their partners are at much higher risk of domestic violence and those who leave their abusers are as or more likely to be re-abused as those who remain.⁶⁴ Violence typically escalates in both frequency and severity after separation. Prosecutors and judges should be aware that separation is not a protective factor, rather research shows a significant spike in serious and deadly violence risk during the period of separation, identifying the perpetrators loss of control over their partner as a trigger.⁶⁵ The most dangerous time period is the days and months after the alleged perpetrator discovers that the victim might attempt to separate from him or terminate the relationship or disclose the abuse to others, especially the legal system.

Attention to victim safety is at the heart of all interventions. A victim-centred response requires appropriate measures to address the victim's fear of retaliation or fear of further violence or an escalation of violence and to assist them in managing risk and ensuring victim safety. It is vital to secure the victim's immediate safety through whatever criminal justice measures might be available in Kosovo*.

1.1. International standards

The Istanbul Convention requires states to "take the necessary legislative or other measures to protect all victims from any further acts of violence (Article 18(1)). It requires not only a legislative framework to ensure emergency barring orders and protection orders, but also an inter-agency mechanism to ensure that protection, judicial remedies and support services are effectively implemented in an integrated manner (Article 18(2)). Protection measures should be: based on a gendered understanding of violence against women and domestic violence; focused on the human rights and safety of the victim; based on an integrated approach

⁶⁴ UNODC 2014. Handbook on Effective Prosecution to Responses to Violence against Women and Girls.

⁶⁵ Petersson, J. et al. 2016. "Risk Factors for Intimate Partner Violence: A Comparison of Anti-social and Family-Only Perpetrators"

which takes into account the relationship between victims, perpetrators, children and their wider social environment; aim at avoiding secondary victimisation; aim at the empowerment and economic independence of women victims of violence; allow for a range of protection and support services to be located on the same premises; and address the specific needs of vulnerable persons (Article 18(3)). Protection measures should never be dependent on the victim's willingness to press charges or testify against the perpetrator (Article 18(4)).

Table: Relevant Articles regarding Protection in the Istanbul Convention

Article	Provision	Points to cover
Article 50 – Immediate response, prevention and protection	Parties shall take necessary legislative or other measures to ensure that the responsible law enforcement agencies respond to all forms of violence covered by the scope of this Convention promptly and appropriately by offering adequate and immediate protection to victims	Adequate and immediate protection can range from civil protection measures (e.g. emergency barring orders, restraining and protection orders) to criminal protection measures (peace bonds, pre-trial release on conditions; pre-trial detention).
Article 51 – risk assessment and risk management	<p>1. ...ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and if necessary, to provide coordinated safety and support.</p> <p>2. ... ensure that the assessment duly takes into account, at all stages of the investigation and application of protective measures, the fact that perpetrators of act of violence possess or have access to firearms.</p>	<p>Risk assessment must be done with a view to managing the identified risk in a coordinated manner.</p> <p>Prosecutors and judges should ensure risk assessments are done and if not, do such assessments themselves.</p> <p>Risk assessments can be utilised by prosecutors and judges in the criminal process when setting pre-trial release.</p> <p>Risk assessments can be utilised by civil court / family court judges when deciding on civil protection order.</p>
Article 52- Emergency barring orders (EMOs)	...ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk.	<p>EBOs represent a paradigm shift; rather than asking victims to seek a safe place from violence, it shifts the burden to the perpetrator, who is ordered to leave the residence and not to contact the victim.</p> <p>The modalities of EBOs are left up to the state's discretion and must be considered as only one way to meet the victim's protection needs (which may range from immediate to long term).</p> <p>EBOs are not intended to function as replacements for other measures, such as arrest, detention and prosecution.</p> <p>EBOs are to be imposed for "a sufficient period of time," which generally ranges in other states from 10 days to 4 weeks.</p> <p>Its issuance should not be contingent upon the commission of an offence, nor linked to proof of criminal responsibility.</p> <p>EBOs can be issued by the police, a court or another designated authority. The EBO can also be qualified under civil, criminal or administrative law.</p>

<p>Article 53 – Restraining or protection orders (POs)</p>	<p>1. ... ensure that appropriate restraining or protection orders are available to victims of all forms of violence covered....</p> <p>2. ... ensure that the restraining or protection orders are:</p> <p>Available for immediate protection and without undue financial or administrative burdens placed on the victim;</p> <p>Issued for a specified period or until modified or discharged.</p> <p>Where necessary, issued on an <i>ex parte</i> basis which has immediate effect;</p> <p>Available irrespective of, or in addition to, other legal proceedings;</p> <p>Allowed to be introduced in subsequent legal proceedings</p> <p>3. ... ensure that breaches of restraining or protection orders shall be subject to effective, proportionate and dissuasive criminal or other legal sanction.</p>	<p>With regard to the rights of the perpetrator, it should be underscored that the perpetrator's temporary inability to access his/her right to property and private and family life cannot supersede the victim's rights to life, and the right to physical and mental integrity.</p> <p>The POs issued in a particular case should be proportionate, as reflected by a risk assessment.</p> <p>POs should be subject to due process and judicial review. That is, the order should be issued in writing, and contain both the content of the restriction(s) and duration. If the perpetrator is not heard on the spot by the police, he or she should have the right to be heard promptly. Perpetrators should also have the right to appeal.</p> <p>The existence of a PO should be allowed to be introduced in any other legal proceeding in order for any other judge presiding over legal proceedings against the same person knowns of such an order.</p> <p>The victim is not restrained by a PO. Victims should not be sanctioned for breaches to the EBO, including by a termination of the order.</p> <p>EBOs and POs must be monitored by: police patrols, initiating contact with the victim and electronic monitoring for perpetrators prone to violating an order or for high-risk victims.</p> <p>Violations of EBOs or protection orders should result in criminal or administrative sanctions. Fines are viewed as counterproductive as they may be paid for out of the family budget and are not an effective deterrent.</p>
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Victims frequently face re-traumatisation during criminal proceedings and are at a high risk of facing increased intimidation and violence by the perpetrator while the case is being examined. The Istanbul Convention provides that it is the state's obligation to ensure the safety of the victim as part of and during criminal proceedings. The failure to do so can cause a violation of the victim's fundamental human rights, including fair trial rights.

In order to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, the Istanbul Convention calls on states to (Article 56):

- Provide for their protection, as well as that of their families and witnesses from intimidation, retaliation and repeat victimisation.
- Ensure that victims are informed, at least in cases where the victim and family might be in danger, when the perpetrator escapes or is released temporarily or definitively.
- Inform them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their cases.
- Enable victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, need and concerns presented, directly or through an intermediary, and considered.
- Provide victims with appropriate support services so that their rights and interests are duly presented and taken into account.
- Ensure that measures may be adopted to protect the privacy and the image of the victim.
- Ensure that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible.
- Provide victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence.
- Enable victims to testify, according to the rules provided by their internal law, in the courtroom without

being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.

- Afford to child victims and child witnesses of violence against women and domestic violence appropriate, specialised protection measures taking into account the best interests of the child.

1.2 Kosovo* legal framework

Kosovo* still lacks a definition of gender-based violence within its criminal and civil proceedings. However, Kosovo* Law on Protection from Domestic Violence as of 2010⁶⁶ provides for the detailed definition of domestic violence in civil proceedings and also sets out the grounds for issuance of protection orders. The definition of domestic violence in line with the Law on Protection against Domestic Violence has also been reflected in the recently amended Criminal Code of Kosovo* in 2019 and the new definition of domestic violence as defined in Article 248. According to Kosovo* Law on Protection against Domestic Violence, there are three kinds of protection orders to be issued:

- Protection Order (PO);
- Emergency Protection Order (EPO) and;
- Temporary Emergency Protection Orders (TEPO).

The protection orders differ based on the issuance authority, measures to be imposed as well as the length of the protection orders. The POs are issued only in regular court sessions, provide for a wide number of measures to be issued and last up to 12 months. The EPOs are issued also by courts, may last up to 15 days until the issuance of the regular PO and also courts may issue a number of wide measures. Differently, the TEPOs are only issued by the police and last until the hours when the courts resume their regular working hours. If the request comes in late Friday, the TEPO may last until the official hours of the courts resume on Monday morning, lasting 48 hours during the weekend. According to the Kosovo* Law on Protection against Domestic Violence, breaches of protection orders and also recidivist cases are considered criminal offences and should be *ex officio* prosecuted.⁶⁷

There has been on-going criticism that courts tend to use and render more civil proceedings foreseen under the Law on Protection against Domestic Violence than criminal proceedings.⁶⁸ The use of POs requested by the victim and their dependent children or other interested parties representing the victims such as victim advocates or social workers (in cases where children need to be protected), do not prevent the courts to also initiate criminal proceedings.⁶⁹

Further, under Article 53 of the Kosovo* Constitution, fundamental freedoms and human rights are to be interpreted in accordance with the ECtHR. According to article 22, CEDAW provisions and use of ECtHR case law supersedes internal legislation. So far, Kosovo* courts have rarely used the ECtHR case law in their judicial practice. Only in the murder of Diana Kastrati has the Kosovo* Constitutional Court quoted the violation of the Kosovo*'s state obligation to protect her life, in line with Article 2 of the European Convention on Human Rights and cited the jurisprudence of the ECtHR case law.⁷⁰ This decision by the Constitutional Court also triggered a response by the Kosovo* Judicial Council. They drafted a decision that required judges to issue protection orders in a timely manner.⁷¹

Another policy exists to enhance the coordination and the roles of various institutions in offering protection to victims of domestic violence in Kosovo*. The Standard Operating Procedures (SOPs) for the Protection from Domestic Violence in Kosovo*⁷² define further the institutional responsibilities foreseen under the Law on Protection against Domestic Violence and other legal acts accordingly. According to the SOPs, the Kosovo* police should protect victims and investigate cases reported. Further, they also have to guide the victim throughout the process and respond to threats and acts of domestic violence (including the execution and any violation of the protection orders). The police should also make use of proportionate measures to protect the victims of domestic violence, detaining the suspected perpetrator with the purpose of preventing further violence. The

66 Previously UNMIK Regulation 2003/12 on Protection from Domestic Violence, adopted in 2003 also defined Protection Orders. The Basis for the new Kosovo* Law in 2010 was taken from the UNMIK Regulation 2003/12.

67 See Articles 25 and 26 of the Kosovo* Law on Protection against Domestic Violence-2010.

68 See for example US Embassy Report of the Evaluation Report on the Implementation of the Strategy and Action Plan against Domestic Violence (2011-2014), 2015. Available at https://abgj.rks-gov.net/assets/cms/uploads/files/Ambasada_Raporti%20anglisht.pdf.

69 See also Article 26, paragraph 2 of the Kosovo* Law on Protection against Domestic Violence-2010.

70 See Constitutional Court of the Republic of Kosovo*, Judgement in Case No. KI 41/12, "Gezim and Makfire Kastrati against Municipal Court in Prishtina and Kosovo* Judicial Council 2013, at: gjk-ks.org/wpcontent/uploads/vendimet/gjkk_ki_41_12_ang.pdf.

71 Decision Nr. 22/2012 of the Kosovo* Judicial Council.

72 Agency for Gender Equality, "Standard Operation Procedures for Protection from Domestic Violence in Kosovo*", 2013, at: <https://abgj.rks.gov.net/Portals/0/Procedurat%20Standarte%20t%20Veprimit%20p%20Mbrojtje%20nga%20Dhuna%20n%20Familje.pdf>.

police should also conduct the initial identification interview of the victim that is also recorded in the Basic Data Forms that are part of the SOPs. The Basic Data Forms could also be requested and used by the prosecutorial services to determine the risk assessment levels of the victim. Interviews with the victims according to the SOPs should be conducted in rooms that provide comfort and security for the victim, in order for the police to build a trusting relationship with the victim and be able to promptly and effectively provide assistance. There have been criticisms that both the police and prosecution do not provide nor request regular, up-to-date and valid risk assessments for domestic violence cases. In particular, the police fail to conduct regular and valid risk assessments during and after the issuance of protection orders.

Kosovo* still does not provide for SOPs for addressing the overall needs of gender-based violence against women victims. In particular, the institutions are not aware of the protection measures to be followed when assessing and protecting victims of rape, sexual assault, sexual harassment, or other forms of violence against women.

In 2017 the Kosovo* Prosecutorial Council and the State Prosecutor issued the Standard Operating Procedures to Enhance the Efficacy of Prosecutorial Services in responding to Domestic Violence Acts.⁷³ The SOPs have the aim to enhance the response and the effective delivery of the prosecutorial services mandate in protecting victims of domestic violence only. The SOPs appoint a number of specialised prosecutors related to domestic violence in basic courts. Each prosecution service will accordingly enhance the capacities of the specialised prosecutors to deal with domestic violence cases as well as enhance coordination mechanism within the prosecutorial services. The appointments take into account the previous experiences of prosecutors to deal with the sensitive cases of domestic violence as well as aim to enhance case management capacities of prosecutors in accordance with the Kosovo* Strategy and Action Plan against Domestic Violence (2016-2020) requirements.⁷⁴ Although the prosecutorial services have appointed prosecutors to handle and prioritise domestic violence cases, the judiciary has not appointed judges to handle specific domestic violence cases in criminal proceedings. This could lead to domestic violence cases being handled by untrained judges that do not understand the dynamics of domestic violence cases.⁷⁵

1.3 Risk assessments and safety plans

Assessing risk, dangerous behaviour and lethality

In order to ensure the safety, privacy and dignity of victims and their families at all stages of the criminal justice process, prosecutors and judges must be fully informed with respect to the potential risks and threats. Risk assessment refers to the process of determining the level of risk for escalated violence and managing the risk to the victim. Often jurisdictions have developed a risk assessment tool to be used by criminal justice actors to assist them in identifying particularly dangerous perpetrators that need close supervision. Prosecutors and judges need to know whether a risk assessment has already been done by the police and if not, they need to know how to conduct a risk assessment. The information and analysis from the risk assessment tool can be used in various ways, including setting pre-trial release (bail); making charging decisions; and considering diversion and sentencing. However, it should be noted that the criteria for charging should not be confused with the criteria for determining future risk. Perpetrators charged with minor offences are as likely to be as dangerous as those charged with more serious offences.

There are many risk and danger assessment methods, which assess lethality risk and/or risk of repeated violence. The majority consist of checklists of markers for risk, sometimes referred to as red flags. Here is an example below of the key risk factors⁷⁶:

Category 1 risk factors:

- Frequency
- Pregnancy
- Previous incidents / contraventions
- Separation
- Severity

⁷³ See Nr.763, Kosovo* Prosecutorial Council Regulation, 2017.

⁷⁴ Ssee Article 1, paragraph 2 of the KPC Regulation 763:2017.

⁷⁵ Access to Justice for Victims of Gender-Based Violence in Kosovo*. 2018. Ariana Qosaj-Mustafa and Donjeta Moring for EU Funded project EIDHR, implemented by KIPRED, Artpolis and GLPS.

⁷⁶ Queensland Protective Assessment Framework, information from the UNODC Expert Group Meeting in Vienna, November 2018.

- Sexual violence
- Significant changes of circumstance
- Strangulation
- Threats to kill
- Use of weapons

Category 2 risk factors:

- Alcohol / drug misuse
- Animal cruelty
- Child abuse
- Controlling behaviour
- Cultural considerations
- Mental health issues
- Defendant history of violence
- Ongoing conflict
- Significant damage / destruction of property
- Stalking
- Suicidal
- Violent threats

Risk and danger assessment tools should be used by justice professionals to foster a conversation with the victim, rather than as a checklist or a collection of discrete data. Victims know far more about what they need and the risks they face. However, it is critical to remember that, while victims are accurate reporters of risk factors for lethality, they consistently underestimate their own risk for future assaults. Effective immediate protection can empower women to access criminal justice and enable them to stay safely engaged with the criminal justice process. In discussing with the victim the potential risks she faces, prosecutors can learn more about the context in which the particular abuse occurred and fill in the larger context and pattern in which this particular incident occurred. This will assist them in better protecting the victim as well as strengthening the criminal case.

For judges, when they determine the appropriate protection measure, they need to take into account the victim's views on protection and safety concerns. Protection should not be offered in a paternalistic manner but should be viewed as a means to afford women safety so that they can develop their own strengths and strategies for coping with violence. For example, judges can ask the victim directly about her fears of future violence and the basis for that fear, as well as her opinion on the likelihood that the defendant will obey the terms of release.

Planning for victim safety

Prosecutors and judges should ensure that victims have an appropriate safety plan in place. In many instances, victims are assisted by a support worker, advocate or legal counsel to develop a detailed and personalised safety plan. However, this may not always happen. Prosecutors and judges have an obligation to protect high-risk victims.⁷⁷ This means that they should be involved in supporting a victim to devise a safety plan that identifies the options and resources available and to outline how she will protect herself and her family in a variety of settings and circumstances. Some considerations regarding safety plans:

- Should complement formal protection measures such as protection orders.
- Be based on risk assessments.
- Be timely developed, implemented and evaluated.
- Be personalised to the situation of the victim (do not use a one-size-fits-all approach).
- Be known and supported by the victim's family members, friends and community resources.
- Cover every aspect of the victim and her family's life, including home, school, work, in transit, online and in social situations.
- Be reviewed and updated on an on-going basis.

⁷⁷ Council of Europe.2011. Explanatory Note to the Council of Europe Convention on preventing and combating violence against women and domestic violence.

1.4 Deciding on effective protection measures: some considerations for Prosecutors and Judges

Some considerations for prosecutors

Prosecutors need to have all the information regarding potential risks before making any decisions:

- In order to ensure the safety, privacy and dignity of victims and their families at all stages of the criminal justice process, prosecutors must be fully informed with respect to the potential risks and threats.
- Prosecutors need to know whether a risk assessment has already been done (as in many cases the police are responsible for conducting threat assessment and risk analysis or this is done by an inter-agency group). If not done, prosecutors need to know how to conduct a risk assessment that indicates the level or extent of harm a victim may be subjected to, based on her vulnerability, threats, the presence of weapons and other determining factors.
- Prosecutors should be aware that risk assessment are not static and can change quickly. There are a number of factors or particular circumstances that can raise the level of risk, such as: separation, a court hearing and child contact, among others. Risk assessments must be updated continuously so that the prosecutor can re-assess the changing situation and apply any necessary measures in response.
- Ongoing communication is thus required between police and prosecutors. For example, prosecutors and investigators must be made aware if the victim has requested an emergency intervention or protection order, if the order has been issued and if it has been violated by the perpetrator. This is particularly important where the breach of a protection order constitutes a criminal offence and should be included among the offences charged.
- Prosecutors should inquire about whether the victim/witness has given consideration to applying for a protection order.
- Prosecutors should have a discussion with the victim which should include reviewing the steps she can take to ensure her safety throughout the legal process, taking into consideration the possibility that the defendant will not be held in custody, or will be released on bail, and providing information about personal safety plans in open court.

The victim's safety should be central to any decision taken by the prosecutor, particularly as relates to bail or conditional release pending trial:

- Prosecutors should consider the following conditions to a peace bond/criminal protection order or conditions on bail / pre-trial release, depending on the case:
 - No contact provisions (no contact with the victim and any other designated witnesses or persons, such as the victim's children). This can include restriction of movement of the defendant, for example victim's home, work or school.
 - Prohibition of third parties contacting the victim on behalf of the defendant.
 - Refrain from committing any criminal offences.
 - Travel restrictions (e.g. not allowed to leave the jurisdiction of the court without prior court order or required to relinquish passport to court).
 - Have no possession of firearms, ammunition, explosives or weapons.
 - For sexual assault charges, request DNA and/or HIV/STD testing of the defendant.
 - House arrest.
 - Reporting condition (e.g. regularly reporting to probation or a pre-trial service).
 - Maintaining full employment.
 - Refraining from the use of alcohol or illegal substance, attend alcohol treatment programme.
 - Wearing of a Global Positioning System (GPS) monitoring ankle bracelet.
 - Compliance with any civil protection orders.
 - Abstain from driving a car (if one has been used in committing the offence of criminal harassment).
 - If harassment involved the use of computer or other electronic device, consider imposing a condition limiting or prohibiting use or possession.

- In certain cases, prosecutors should be seeking pre-trial detention. Bail should be opposed in cases in which there is a risk of further violence. For example, if there is a pattern of reoffending protection orders, then the prosecutor might consider requesting pre-trial detention.
- Prosecutors should recall the *Yildirim v. Austria* case, where the CEDAW Committee found that the prosecutor's decision not to detain the perpetrator who had threatened to kill the victim on multiple occasions, because it had seemed "too invasive" at the time, violated the state's due diligence obligations.

Steps prosecutors should take when conducting pre-trial release / bail hearings:

- 1. Seek victim input regarding risk.
- 2. Check past history of suspect.
- 3. Prepare relevant and complete material/information for the court pre-trial hearing.
- 4. Appear and argue at the initial appearance and pre-trial release hearing.
- 5. Prosecutors should notify the victim if and when the defendant is released and give the victim a copy of the order outlining the conditions of release and information of who to contact if the defendant breaches any condition. Recall that in the *Branko Tomasic and Others v. Croatia* case, the European Court of Human Rights found that the authorities had failed to assess the perpetrator's condition upon his release from prison, and the likelihood that he would act on prior threats. They thus failed to take "adequate measures [...] to diminish the likelihood of M.M. to carry out his threats upon his release from prison".

Prosecutors should consider certain factors in cases where the victim requests modification or dropping of conditions:

- Prosecutors need to understand that there could be a number of reasons for the victim to request dropping a no-contact order and be careful in agreeing to lift or modify the non-contact order.
- It is important for prosecutors to speak to the victim and obtain accurate information to determine her motivation in seeking the termination or modification of a no-contact order.
- Prosecutors, while empathising with the victim, should shift the focus onto the perpetrator's responsibility to have done something to justify the lifting of the no contact order. If the perpetrator has done nothing to address his violence since the incident, the prosecutor should point this out to the court.

Considerations when there has been a breach of conditions:

- If the defendant violates a no-contact order or breaches pre-trial release conditions, the prosecutor should consider whether any new offences, in addition to the conditions being breached, have been committed.
- Remember that if there is a condition of no-contact, it does not matter if the victim has agreed to or initiated any contact with the defendant. It is the perpetrator who is subject to the pre-release conditions. The defendant, and not the victim, is responsible for complying with any conditions until released from those conditions by the authorities.
- Violation of criminal no-contact orders, or conditions of release, can be prosecuted as contempt or as additional crimes.
- The prosecutor should also seek pre-trial detention or argue greater restriction upon release.

Considerations when breach of civil protection order:

- While prosecutors are generally not involved in civil protection regimes, a breach of civil protection orders are criminal offences and need to be taken seriously.

Some consideration for criminal court judges during pre-trial hearings

Pre-trial detention and establishing stricter conditions for release are two measures judges can apply to increase the safety of the victim. When balancing between the right of the perpetrator to release on bail and the victim's right to safety, judges should balance the competing interests in favour of the victim's safety:

- Judges need to have as much information as possible regarding the situation and the individuals involved when deciding on which protection measure is appropriate in each case.

- Courts should seek any risk and lethality assessments done. Crucially, the court must be able to access all relevant information from the diverse agencies involved in order to make decisions concerning victim protection. If no risk assessment is done, judges should ensure that they seek such information during the hearing that allows them to make a risk assessment themselves. In some jurisdictions it might be possible to call an expert witness to advice on risk factors.
- The onus is often on the prosecutor to show cause why the defendant should be detained pending trial and the judge must be convince that there are ground that the defendant will not show up to trial or there are concerns that he will commit further violence or intimidate a witness.
- Judges have a duty to be aware of and consider all relevant facts concerning the defendant's risk of violence to the victim. They should always take into consideration any concerns that are raised by the victim relating to her safety.
- Judges should be aware that defendants charged with minor offences are as likely to be as dangerous as those charged with more serious offences, especially in intimate partner violence and stalking cases.
- Judges should be aware that separation is not a protective factor, rather research shows a significant spike in serious and deadly violence risk during the period of separation, identifying the perpetrators loss of control over their partner as a trigger.
- Pre-trial detention should be imposed when the judge determines there is sufficient risk of violence or concerns that the defendant will not obey imposed release conditions.
- Criminal judges should ensure harmonisation with other non-criminal justice proceedings to allow for effective protection.

Conditions judges can impose to reduce the risk to the victim if the defendant is released pending trial:

- Judges should take into account the victim's views regarding the appropriate conditions. Protection should not be offered in a paternalistic manner but should be viewed as a means to afford women safety so that they can develop their own strengths and strategies for coping with violence.
- Judges may want to ask the victim directly about are her fears of future violence and the basis for that fear, as well as her opinion on the likelihood that the defendant will obey the terms of release.
- Range of conditions include:
- Prohibiting further violence or threats of violence, personally or through another (third party communications).
- Prohibiting harassing, annoying, telephoning, contacting or any other communication with the victim, directly or indirectly.
- Barring from the victim's residence, regardless of ownership, and having a police escort when the perpetrator is gathering his personal belongings.
- Prohibiting further contact with the victim and other affected parties, inside or outside the domicile; stay away from residence, school, place of employment or any other place.
- Prohibiting possession of firearms or deadly weapon.
- Requiring perpetrators to undergo intervention programmes (programmes designed to take responsibility for their actions not alcohol or drug abuse programmes).
- Judges could consider monitoring of protection orders through the use of electronic ankle bracelets or requiring defendant to regularly report to law authorities or to attend civil society organisation programmes, where available.

Criminal consequences of breaching criminal and civil protection orders:

- Research shows that men routinely violate such orders, often with serious consequences for the victim but with little or weak legal consequences for the perpetrators.⁷⁸
- Breaches need to be treated seriously. Judges ought to recognize the patterned nature of the coercive and abusive nature of the violence. Remember, breaching a protection order is considered a lethality assessment factor as well as the fact that shows that the perpetrator has failed to comply with a court order.

⁷⁸ Skinnider, E. 2014. "Justice Sector's Response to Violence against Women and Girls: Background Paper". For the Global Technical Consultation on essential policing and justice sector services to respond to violence against women and girls.

- Judges ought to consider that the defendant has not only committed a criminal offence of breaching a court protection order, he has also likely committed other criminal offences in doing so, such as committing further violence or uttering threats.
- Be cautious of condoning stereotypes. Judges should question whether they are engaging in victim blaming, believing that the victims themselves are responsible for breaching the civil protection order or enticing the defendant to do so. Protection orders can only be breached by the defendant as he is the one obligated by the order. The victims should not be held responsible for any breaches.

Some considerations for judges issuing civil protection orders

- In assessing a victim's request for a protection order, judges should recall the case of *V.K. v Bulgaria*, where the CEDAW Committee noted that gender-based violence "is not limited to acts that inflict physical harm, but also covers acts that inflict mental or sexual harm or suffering, threats of any such acts, coercion and other deprivations of liberty".
- Judges should not only focus on the latest incident of violence when deciding whether the violence meets the required threshold. They need to understand the pattern of coercion and control in domestic violence cases and how all forms of violence can violate the integrity of the victim.
- If judges are asked to review emergency protection orders or a condition of the protection order application before them is seeking to have the perpetrator barred from the residence, they should recall *A.T. v Hungary* where the CEDAW Committee held that "women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy". This means that a women's right to be protected from further violence trumps the perpetrator's property rights. In Kosovo*, it is common for the common residence to belong to the husband or his father, and this is reflected in Article 11 of the Law on Protection against Domestic Violence which provides that the court may impose measures as ordering the perpetrator to allow the protected party to use living premises shared, or a part of the premise or ordering the perpetrator to pay for rent of temporary living premise of the protected party or to pay alimony to the protected party and any children, for whom the domestic violence perpetrator has an obligation to support.⁷⁹ However, given the guidance from the CEDAW Committee on this issue, the courts should conduct a risk assessment before ordering the victim to share residence with the perpetrator.

Some considerations for family court judges

- Custody claims are sometimes used as a pretext by abusers in order to get into contact with the victim and/or the children. This can have dire consequences for both. For this reason, incidents involving domestic violence should be taken into account in the determination of custody and visitation rights of children.
- The issuance of an emergency barring order or a protection order should automatically result in an interim determination concerning the custody of children and visitation rights. This means that the perpetrator's custody and/or visitation rights should be automatically suspended upon the issuance of a protection order.
- This is because the exercise of the perpetrator's custody and visitation rights cannot jeopardise the rights and safety of victim and children.
- The need for a protective order and other safety measures must thus be assessed on a regular basis. It is important to remember that there are several situations that can raise the level of risk, such as separation or divorce, a court hearing and child contact, among others.

1.5 Options for exercises

Option 1: Role play exercise –lethality assessment

Instructions: Explain that this exercise will involve a role play that illustrates a discussion between a first responder officer, Officer Abazi and the victim, Ms Dibra. While the participants are watching, they should write down the lethality indicators Officer Abazi asks Ms. Dibra about during the interview.

⁷⁹ Kosovo* Law on Protection against Domestic Violence, Article 11.

Part 1: After the role play, reconvene the large group and lead a guided discussion with participants on the following questions:

- What lethality indicators did Officer Abazi ask about?
- What do you think Officer Abazi did well?
- What could he have improved?
- Is there anything else you noticed?

Part 2: Protective measures - Using the same role play facts, in small groups have them prepare arguments for a bail hearing and their position – if detention or pre-trial release and if so what conditions.

Sample role play on Lethality Assessment [could consider videotaping]

[Adapted from Presentation on Lethality at the Inter-Balkan Conference on Strategies to Combat Domestic Violence, L. Frederick, November 1997]

Ms Dibra called the police after a particularly brutal attack by her husband. The police arrived at her home, removed the husband to the police station and Officer Abazi went to the neighbour's house where Ms Dibra was to speak to her. He initially questioned her about what happened and now was focusing on additional questions.....

Officer: I know this is a difficult time for you, but I need to ask you a few more questions so I can assess what danger your husband might be to you, how difficult the situation is and what has one on before. Do you have children?

Ms Dibra: Yes, one daughter.

Officer: Did she witness the incident?

Ms Dibra: No. She was in her room.

Officer: She was not involved in any way?

Ms Dibra: No

Officer: Do you know if your husband was abused as a child by a family member?

Ms Dibra: I don't know

Officer: Did he witness physical abuse of his mother?

Ms Dibra: It is possible. He told me his parents fought a lot.

Officer: Does he show remorse for hurting you? Is he sorry when you fight?

Ms Dibra: Sometimes

Officer: Did he assault you when you were pregnant?

Ms Dibra: Yes

Officer: Has your husband ever been convicted of assaulting you in the past five years?

Ms Dibra: No

Officer: Has he been convicted of assaulting somebody else in the past two years, someone other than your family?

Ms Dibra: Not that he's told me about

Officer: Does he commit nonviolent crimes, like stealing or something like that?

Ms Dibra: No

Officer: Does he have a history of violence to people who are not family members?

Ms Dibra: No

Officer: Has he experienced any unusually high stress in the past 12 months? Financial problems?

Ms Dibra: We argue a lot about money. He recently lost his job. He has not been able to find another one and we haven't been able to pay our electricity bill.

Officer: Can we talk a little about tonight? Do you have injuries? It looks like your neck is a little red.

Ms Dibra: Yes. He started hitting me in the face and then threw me against the wall. I fell and he started kicking me. He put his hands around my neck, and I guess you could say he started to strangle me. I passed out, I think. I remember waking up and seeing him eating his dinner. I grabbed my daughter, ran out of the apartment and called the police from a neighbour's apartment.

Officer: Do you want to go to the hospital?

Ms Dibra: No, I don't think he hurt me that much. I feel fine.

Officer: Was a weapon involved, when he assaulted you tonight?

Ms Dibra: No, not tonight.

Officer: Has he threatened you with a weapon in the past?

Ms Dibra: Yes, he has threatened me with a knife before.

Officer: Does your husband have access to a gun or any other type of weapon?

Ms Dibra: He doesn't have a gun, but his best friend is in the military and he could easily get one from him.

Officer: Could you describe past violence, past injuries you may have had during fights with your husband?

Ms Dibra: He started beating me about 5 months after we were married. He usually just hits me or pushes me down and kicks me, maybe twice a month. A few times, if we were in the kitchen, he's grabbed a knife and threatened me, but he has never actually stabbed me.

Officer: Do you feel he is becoming increasingly more violent, brutal or dangerous towards you?

Ms Dibra: Yes, he has been much more violent ever since he lost his job.

Officer: When did that happen?

Ms Dibra: About two months ago.

Officer: How frequently has he hurt you in the last couple of weeks?

Ms Dibra: I think he is now punching or pushing me around maybe twice a week. It has gotten much more frequent and although it isn't always serious, he is much more brutal than he used to be.

Officer: Have your injuries as a result of your husband's violence ever required medical attention?

Ms Dibra: Yes, I've been to the hospital once. They fixed a cut on my face. I haven't gone again because I'm afraid that if my husband will find out and be angry.

Officer: Has he ever forced sex on you or used sexual coercion?

Ms Dibra: Yes

Officer: Do you believe that he may seriously injure or kill you at some point?

Ms Dibra: I've been worried about that a lot lately. He seems to be getting angry all the time. Tonight,

he came home late and exploded because his dinner was cold, even though I told him I could warm it up for him.

Officer: Has he ever threatened to kill you?

Ms Dibra: He threatened to kill me tonight. He said there was no point in me being around if I couldn't even be a good wife and mother.

Officer: Has he threatened to kill himself?

Ms Dibra: Not exactly, but he has been very depressed since he lost his job. It was so important to him. One time, he said that if he couldn't find a new job, there wasn't any reason to keep living.

Officer: Does he use drugs or alcohol?

Ms Dibra: He has been drinking much more since he lost his job. If he beats me when he is drunk, he usually hurt me much more than when he is sober.

Officer: From what you have told me, it sounds like there may be a serious risk of being harmed seriously or killed. Although there is no way to predict when an abuser will kill his wife, there are some indicators that may be associated with a greater risk of that happening. Some of these indicators include threats of suicide and murder, use of alcohol, escalation of the violence in severity and frequency, strangling, and the availability of weapons. I want to talk to you about the risk you may be in if your husband gets out of jail so that you can understand better the choices and options that are available to you. You, though, are the only one who can make decisions about what course of action is best. Are there people you can ask for help? Do you have a car, a phone? What about friends or family you can phone?

Ms Dibra: Yes, I can call my mother. Maybe I can stay with her for a few days so that I can think about what to do.

Officer: I think it might be a good idea for you to go to the hospital, even if you don't feel at the moment that you have been seriously injured. You may have injuries that are not apparent right now. You said he tried to strangle you. Are you having problems breathing?

Ms Dibra: I didn't think so, but now that you ask, yes, it is a bit difficult to breath and my throat is feeling worse.

Officer: Do you want me to drive you to the hospital.

Ms Dibra: Yes, maybe that would be a good idea.

Option 2: Small group exercise – case study

Instructions: Divide the group into small groups, with prosecutors and judges in separate groups. Based on the case study, ask the prosecutors to prepare submissions on behalf of the prosecution regarding their position at a pre-trial release hearing and ask the judges to prepare their decision from a pre-trial release hearing.

Questions: What would be your position/decision – detention or pre-trial release? If pre-trial release what conditions would you seek/order?

Case study

[From UNODC 2017. "The Resource Book for Trainers on Effective Prosecution Responses to Violence against Women"; adapted from a Canadian case.]

P is charged with unlawful confinement, assault and threatening his four children and his wife, V. P was arrested just before midnight on 23 October, at the family home by police responding to an incomplete emergency call. He was seen by a psychiatrist within 36 hours of his arrest and the psychiatrist's report was sent to the prosecutor. The report notes that Mr. P acknowledged a lengthy history of alcohol abuse and admits to drinking the evening of 23 October. The report also noted that it appeared Mr. P was suspicious of his wife. He had read some of her emails to a friend in London, who had been a classmate of hers at London School of

Economics where she had studied for her master's many years ago. Mr P was deemed fit to stand trial and was not mentally ill.

The victim, V, has been married to the accused for 10 years. During this time he would drink to excess and physically and verbally abuse his wife. The situation got worse in early 2010 when the accused's drinking increased and he started using drugs. His wife and daughters noticed that he was more ill-tempered and angered very quickly and his aggression towards his family was described as "scary". For several months before the offences, the victim was communicating via email with an old friend (male). She has been asking the accused for a separation for months before but he had refused to discuss it with her, getting angry when she broached the subject.

Approximately a week before the offence, the accused went onto the computer and found the emails between his wife and this man, who they had both known since university. He became withdrawn, angry and confrontational with the entire family and his alcohol and drug consumption increased. On the evening of the incident, P was shouting at V and throwing things around in the living room of the house. He told her that he had deleted the man from her account and had sent a message to the man's wife. He hit the wall in the living room with his belt, threw a framed picture of his oldest daughter on the floor and kicked things on the floor around. V was frightened by his behaviour and went into one of the two bedrooms to avoid him. He came to the room and continued yelling at her. He hit her at least twice on the head with an open hand. He pushed her. All the children came into the room and the accused was out in the living room. He was still drinking and they heard him screaming. He went into the kitchen and then came into the room where she and the four children were located carrying a drill, a screw, a propane blow torch and a lighter. He said "we'll all just die" or "I'm gonna lock you in and you can all die" or "we can all die in this room together". He was pointing the lighter at the children and victim. V tried to grab the door but the accused was too strong. He slapped his eldest daughter. Then he started screwing the door to the room shut. V and her children were terrified and scared for their lives. One child managed to get a cell phone and dial 911. The accused saw this and tried to grab the phone which allowed V to get out the door. V went to a second bedroom to gather some clothes so that they could leave the house. The accused followed her trying to keep her in that room telling her that nobody's getting out. It was at this point that the police responded to the hang up 911 call. The accused was arrested and taken to jail. During the search of the residence, police found a propane blow torch, a butane lighter, an electric drill and a 10 cm screw on the dresser in the bedroom. They located a gun in a holster in the closet.

P was interviewed by police and denied that he had any intention of wanting to hurt his children and wife. When asked what made him go into the room and say that he was going to kill them, he said "I don't know". When asked if he had any remorse for what had happened the night before, he said no.

Points to make

In the discussion mention that this is an actual case in Canada and that the following is from the judge's decision:

- *The judge characterised the events as very serious and stated that the material presented to him at the bail hearing satisfies that the accused appeared determined to cause harm or worse to himself and his family.*
- *The judge's decision to detain the accused on the secondary ground. Reflects the law's concern about the risks posed to victims of spousal assaults.*
- *Previous cases differentiated between types of spousal assaults. At one end of the spectrum is the offender who repeatedly assaults and causes bodily harm as an expression of rage, jealousy, cruelty or control. Some victims feel unable, for financial, psychological, religious or other reasons to end the relationship and opt instead to deal with and even accept continuation of abuse. Other victims respond by ending the relationship and turning to the law for justice and protection. Some offenders will not accept the loss of the relationship or the loss of the control over the victim and respond by stalking or continuing their assaultive behaviour. These situations are dangerous and require vigilance in considering whether to grant bail pending trial.*
- *The judge determining bail must understand the circumstances of the offence and the background of the offender in order to decide whether the offender is likely to resort to further violence or intimidation if released.*
- *The judge in this case considered all the past actions of the accused and considered the circumstances of the offences charged in measuring the risks to V and her children and determined that the risks were too great to warrant release before trial.*
- *Other cases referred to mention that domestic violence cases require the court to be especially vigilant in bail applications. This is because, unlike many other crimes, there is a continuing relationship and a greater likeli-*

hood of repetition. Moreover, at the time of separation or planning of separation or when court intervention causes a separation, the risk of further physical injury actually increases; some studies have indicated that the risk increases dramatically.

- Refers to the tools developed to do risk assessments: *The Manual for the Spousal Assault Risk Assessment Guide (SARA)*, which is a clinical checklist of risk factors for spousal assault. Another one is *B-SAFER (Brief Spousal Assault Form for evaluation of Risk)*.
- Consistent with research, the most common risk factors involved with a domestic homicide are a prior history of domestic violence and an actual or pending separation.

Potential follow-up exercises

Q: Using the same case study, ask how prosecutors and judges should approach a request by a victim of intimate partner violence to modify or terminate the condition of no-contact?

Q: Using the same case study, ask how prosecutors and judges should approach a violation of the no-contact order?

2. Working with victims as witnesses: techniques to ensuring a victim-centered approach

Applying a victim-centred approach in practice entails that during all interactions, victims are treated with courtesy, respect, sympathy and sensitivity to the fact that they have experienced violence. Prosecutors and judges should appreciate that very often victims are required to describe incidents of violence a number of times before finally appearing in court, and this process can cause them renewed trauma, embarrassment or frustration; they may forget details over time. Given the historical scepticism victims have often faced, prosecutors and judges need to be mindful of any biases they have. This module provides tips for prosecutors and judges for developing techniques to ensure a victim-centred approach when engaging with victims. It also covers specific issues such as managing reluctant witnesses and how to create an enabling courtroom environment for victims.

2.1 International standards

Article	Istanbul Convention	UN Updated Model Strategies
Victim-centred approach	Calls on states to develop measures that take into account and address the specific needs of persons made vulnerable by particular circumstances and place the human rights of all victims at their centre (Article 12(3)).	Guiding principle that all criminal justice responses are to be human rights based, manage risk and promote victim safety and empowerment while ensuring offender accountability (Article 13(a)).
Rights of the victim	Investigations and judicial proceedings are to be carried without undue delay while taking into consideration of the rights of the victim during all stages of the criminal justice proceedings (Article 49(1)).	States are to take into account all relevant international legal instruments including the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Article 18).
Balancing victim's and accused' fair trial rights	In order to ensure effective investigations and prosecution of offences established in accordance with the Convention, law and measures need to be in conformity with fundamental principles of human rights and have regard to the gendered understanding of such violence (Article 49(2)).	
Ex officio prosecution	For certain forms of violence (i.e. physical violence, sexual violence, force marriage, female genital mutilation, forced abortion and forced sterilisation), investigations into or prosecution of such offences shall not be wholly dependent on a report or complaint filed by a victim and that the proceedings may continue even if the victim withdraws her statement or complaint (Article 55).	The primary responsibility for initiating investigations and prosecutions lies with the police and prosecution authorities and does not rest with the women subjected to violence, regardless of the level or form of violence (Article 15(b)).

<p>Support throughout the criminal justice process</p>	<p>Victims, at their request, should have available government and non-government organisations and domestic violence counsellors to assist and support them during the investigations and judicial proceedings (Article 55(2)) as well as legal assistance, including free legal aid for victims who are eligible under domestic law (Article 57).</p>	<p>Comprehensive services are provided and protection measures are taken when necessary to ensure the safety, privacy and dignity of victims and their families at all stages of the criminal justice process, without prejudice to the victim's ability or willingness to participate in an investigation or prosecution (Article 15(i)).</p> <p>To ensure that women subjected to violence have full access to the civil and criminal justice systems, including access to free legal aid, where appropriate, court support and interpretation services (Article 18(h)).</p>
<p>Enabling victims to testify</p>	<p>...protect the rights and interests of victims, including their special needs as witnesses, in particular by: enabling victims to testify, according to the rule provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably, through the use of appropriate communication technologies, where available (Article 56(i)).</p>	<p>Women subjected to violence are enabled to testify in criminal proceedings through adequate measures that facilitate such testimony by protecting the privacy, identity and dignity of the women; ensure safety during legal proceedings; and avoid secondary victimisation. In jurisdictions where the safety of the victim cannot be guaranteed, refusing to testify should not constitute a criminal or other offence (Article 15(c)).</p>

Balancing between the rights of the accused and the rights of the victim

Prosecutors and judges play key roles in the protection of human rights, both for the victims and the accused.

- Victims' rights – the right to access justice, the rights to equal benefit and protection of the law; the right to fair treatment; the right to an effective remedy and reparation; and the rights to universal dignity and autonomy and the state's corresponding duty to provide witness protection and to respect and protect the rights of the victim of gender-based violence against women.
- Accused persons' rights – the right to a fair trial, presumption of innocent unless and until convicted according to law; the burden of proof beyond a reasonable doubt rests with the prosecution; and the right to full answer and defence.

In discharging their duties, prosecutors and judges must respect the principle of equal treatment of parties, by avoiding any bias or discrimination, and balance between protecting victims and safeguarding the due process rights of the accused to ensure that they each receive a fair hearing. There needs to be an acknowledgment that trials can become extremely intimidating or intrusive so as to violate victim's rights and this is often due to gendered and derogatory constructions that are inherent in the application of the law. Prosecutors and judges should ensure that criminal laws, procedures and evidentiary rules are not interpreted and applied in ways that discriminate against the victim. An example of such a balance is found in the jurisprudence of the European Court which rules that banning defendants from representing themselves in sexual violence cases in England and Wales did not impinge on fair trial.⁸⁰ The European Court has ruled that trials do sometimes become so intimidating or intrusive as to breach Articles 3 or 8 in their own right and so courts must try harder to ensure that procedures are less traumatic.⁸¹ Defendants' rights and victim's rights are both important and it seems that "no one set of rights should prevail, and both sets of rights should be afforded equal respect."⁸²

The European Court of Human Rights noted that the Istanbul Convention required states to adopt legislative measures to protect the rights of victims. In *Y v Croatia*, the Court expounded on victims' rights to include: protection from intimidation and repeat victimisation; enabling victims to be heard and to have their views, needs and concerns presented and duly considered; enabling them, if permitted by applicable domestic law,

80 Londono, P. 2007. "Positive obligations, criminal procedure, and rape cases". *European Human Rights Law Review*, 2, 158-171.

81 Doak, J. 2008. "Victims' rights, human rights, and criminal justice: Reconciling the role of third parties". Oxford, UK.

82 Smith, O and Skinner, T. 2012. "Observing court responses to victims of rape and sexual assault" *Feminist Criminology*, vol. 7, no. 4, pp. 298-326.

to testify in the absence of the alleged perpetrator; conducting interview with victims without unjustified delay; and keeping medical examinations to a minimum.⁸³ Specifically in that case, the victim's testimony was the only direct evidence in the case. The ECtHR recognised the importance of cross-examination for the defence, but that this does not equate to an unlimited right to use any defence arguments. Rather, the court found that cross-examination should not be used as a means of intimidating or humiliating witnesses.

2.2 Kosovo* legal framework

Victim Advocates (VAs) are tasked with protecting the rights of victims according to Kosovo* laws and ensuring the victim-centred approach in the criminal proceedings involving women as well as during the procedures for the issuance of protection orders. The VAs are part of the State Prosecutor Offices, according to the Kosovo* Criminal Code and Criminal Procedure Code, and are an essential element of the 2013 SOPs on the protection against domestic violence. The VAs work within the legal framework, which includes ensuring that investigations and judicial proceedings are to be carried without undue delay as per the Criminal Procedure Code, free legal aid is to be provided to victims of domestic violence,⁸⁴ and light and grievous bodily injuries are prosecuted *ex officio*, including violations of protection orders by the perpetrators issued in civil proceedings.

Their responsibilities include:

- The power to pursue representation in criminal court on behalf of a victim (Article 63 of the Kosovo* Criminal Procedure Code).
- The obligation to pursue criminal charges when the evidence demonstrates the existence of a criminal act and the prosecution fails to pursue an investigation.
- To ensure the considerations on the rights of the victim during all stages of the criminal justice proceedings.
- To ensure that the rights and interests of victims are protected, including their special needs as witnesses. This can be done by enabling victims to testify, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably, through the use of appropriate communication technologies, where available.
- The obligation to advise the victims of their right to apply for damages according to the punitive damages form foreseen under Article 218 of the Criminal Procedure Code of Kosovo*.
- To ensure that the victim is informed of the opportunity of filing in the declaration of damages caused in order to be considered by the court as party in the criminal procedure and that the victim has access to these standard forms. If the victim decides to complete this form, they shall do this within the timeline (from early investigation stages and up to 60 days from the pressing of charges). The victim may be assisted by the authorised representative and the police in completing this form.

2.3 Techniques to ensure a victim-centred approach when engaging with victims

2.3.1 How to communicate with victims to avoid secondary victimisation

Communication that promotes the dignity and respect of victims

All communication with victims should be geared towards empowering them to overcome their traumatic experience with violence and threats of violence and enabling them to endure the legal proceedings. It is recommended that all communications should be respectful, not contribute to secondary victimisation and be age appropriate.

Pointers to be considered when prosecutors and judges are communicating with victims⁸⁵:

- Ensure all communications with victims are non-judgmental, empathetic and supportive.

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

⁸⁴ See Article 31 of the Kosovo* Law on Free Legal Aid, available at [http://www.md-ks.net/repository/docs/Ligji_per_ndihme_juridike_falas_\(anglisht\).pdf](http://www.md-ks.net/repository/docs/Ligji_per_ndihme_juridike_falas_(anglisht).pdf).

⁸⁵ UN Inter-agency Essential Services Package for Women and Girls Subjected to Violence: Module 3 on Justice and Policing.

- Validate what has happened to the victim throughout the process. It is important the victim feels that her report of violence is taken seriously and that she is treated with respect and as deserving of the best possible response.
- Exercise patience and give the victim time to tell her story in her own words.
- Victims need to have a sense that her voice is being heard. This means she has an opportunity to express her story; be listened to and have her story accurately recorded; have a positive experience with the criminal justice actors; and be able to tell how the violence has impacted her.
- It may be necessary to remind the victim that she is not being blamed for the violence.
- All communications should be done in plain language that is patiently explained.
- It may be necessary to explain why her participation in interviews and as a witness is a critical element of the legal case.
- In cases of domestic violence, it may be useful to speak to the victim about the cycle of violence, how common it is in order to ensure her that she is not the only one experiencing this violence, and the fact that such violence often escalates in severity if nothing is done to hold the abuser accountable and provide him with treatment he needs.
- The victim's privacy must be maintained and all her information should be confidentially maintained as according to the law.

Communication tips for prosecutors when interviewing victim

The testimony of the victim is often the most important piece of evidence in cases of violence against women and domestic violence and remains the central piece of evidence put forth by prosecutors. Due to the nature of these kinds of crimes, the violence often occurs in a private space, there is usually no other witness to the violence. Given the importance of this evidence, care needs to be taken when interviewing victims in a victim-centred approach so as not to cause secondary victimisation as well as in ensuring the perpetrator is held to account. In addition, prosecutors should be seeking the victim's perception of risk or immediate threat of violence and her input regarding any conditions of pre-trial release.

Prosecutors should meet the victim and her lawyer, if she has one, as early as possible in order for:

1. Case building. Effective communication with the victim at the very start is key to assisting the victim to provide a clear account of what happened. This will enable prosecutors to make better informed decisions about how to proceed with the case.
2. Rapport building with the victim. This will enable the prosecutor to build trust with the victim. The victim needs to know that she is being listened to and that her changing justice needs are being understood and addressed.
3. Empowering the victim. Information and the way it is communicated can empower her to make informed decisions regarding her engagement with the justice system.

Prepare the setting of the interview

- ✓ Chose an appropriate place for the interview. Ideally the interview should take place in a neutral environment, where the victim feels safe and comfortable and should afford privacy. The interview locations should not be in an interrogation room at the police station or where the victim could come into contact with the perpetrator.
- ✓ Make arrangements for the victim's comfort. Provide tissues, drinking water, etc.
- ✓ If necessary, select an independent and competent interpreter. Interpreters that are independent and competent are crucial for prosecutors dealing with victims whose language differs. Flawed interpretations can easily lead to confusion, misunderstandings and unjustified concerns about witness credibility.
- ✓ If possible, make arrangements for any children that may accompany the victim.
- ✓ Organise a team interview. If at all possible, the prosecutor and a victim advocate should conduct the interview together. The victim advocate will provide support as she goes through the trauma of recounting the violation.

- ✓ Consider allowing the victim to be accompanied to meetings by a lawyer and/ or support person. In allowing for a support person that is a relative or friend, consider whether the presence of such a person could be considered harmful.
- ✓ Consider making recordings of the interview with the victim (audio and visual if possible), not only because it could be potential evidence of the victim's psychological state but also to reduce the need for additional interviews.
- ✓ Consider whether the prosecution agency can accommodate a victim's request to speak to a prosecutor of a specific gender.

When interacting with the victim

- ✓ It is important that you put the victim at ease by using safe and supportive language.
- ✓ Listen carefully to the victim. Give her time to tell you what happened.
- ✓ Victims might need to be reminded that the violence was not her fault.
- ✓ Permit free narrative by the victim. Give the victim time to tell you what happened in her own words (i.e. unstructured interview). Then when there are things left out of what you wanted to explore you can always come back to them with open ended questions. When you ask a question, allow silence in the conversation for the victim to compose her thoughts.
- ✓ Ask questions clearly and in a non-judgmental or accusatory way.
- ✓ Do not use technical legal language.
- ✓ While it is important to show compassion during the interview do not become over emotional. You want to ensure that the victim has control over the flow of information and avoid the risk of imposing your own personal views of what the victim means to say.
- ✓ Do not express frustration or annoyance if the victim has difficulty recalling facts or providing clear answers. Keep in mind both what you say and what you communicate through body language.
- ✓ Pay attention to signs of trauma, anxiety, or stress and offer reassurance when needed.
- ✓ Never ask her to repeat her story unnecessarily or ask unnecessary questions. Unfortunately, victims are often asked to repeat their story over and over again – to the police, doctor, psycho-social worker, and judges. Telling her story can be traumatic. Wherever possible, limit the number of times she is forced to recount the events of the crime.
- ✓ Do not make promises that you cannot keep. The victim might seek reassurances from you that you cannot provide. For example, she might not want you to share parts of the report to others, but you will be required legally to provide the statement to others, such as the defence.
- ✓ Be honest about the challenges of the legal process. Prosecuting a case can take a long time and this can be difficult for a victim. If she testifies (and in most cases you will need her testimony), she will likely be subject to an unpleasant cross-examination. However, prosecutors should be sensitive to the fact that the victim might feel she is being discouraged to continue with the case.
- ✓ Try to understand the victim's challenges. Victims might have multiple problems, as perpetrators often choose victims that are already vulnerable. They might have difficulties making choices about being a witness. They may have low self-esteem or may be reliving the past. They may be experiencing anxiety or aggression. They may feel isolated. They may be unable to express their needs or unable to plan for the future. They may be trying to please everyone. Be patient and take the time with them.
- ✓ Always ask the victim about safety concerns. Establish the risk or immediate threat of violence and obtain the victim's input as to any conditions of pre-trial release or protection measures required.
- ✓ Be prepared to provide information or referrals to support services. Make a directory with local resources for the victim.
- ✓ In concluding the interview, ensure the victim is aware of your approachability.

Essential information to provide

- ✓ Explain the victim's role in the legal process, including the stages of the criminal trial, the timing, what she will be expected to do as a witness, and whether any special procedures will be used (e.g. video testimony, screens). A victim is most likely to be unfamiliar with the legal system. Let her know that there may be a considerable period of time between the present interview and the court appearance. Explain how her statement will be used in the court process and that the defence will get a copy of it.
- ✓ It is important to patiently explain why she has been called for the interview. Consider that by the time you meet with her, she may already be frustrated by how many individuals have asked very personal questions.
- ✓ Explain the role of the prosecutor during the criminal proceeding, including how she or he will inform the victim about the status of the case, about sentencing, possible appeals and parole hearings.
- ✓ Explain the role of the defence counsel and the kinds of questions that the victim may be asked at trial. This prepares the victim for challenging cross examinations. Solicit information that can help the prosecution prepare to respond to defence arguments. Prosecutors should not discuss the evidence of the case with the victim as there may be objections raised by defence as to "coaching the witness". However, it is good practice to review the victim's statement with her in order to refresh her memory.
- ✓ Explain the role of the other courtroom actors, such as the judge, the court clerk, etc.
- ✓ Explain the victim's rights and options.

Communication tips for judges when interacting with victim

Judges' interactions with victims are generally limited to witness testimony in court (during pre-trial hearings or at trial). Judges may question witnesses, and they also have power to control the type of questioning that is posed. All judges should keep in mind that the victim/witness may have had earlier interactions in court (e.g. at the indictment, bail hearing, or in concurrent civil cases) and so should be prepared to clearly explain the legal process that is happening at the moment, the possible outcomes, and the consequences for the victim. When engaging and interacting with victims, judges need to understand that the women have been victims of gender-based violence as well as frequently victims of secondary victimisation. Most victims of gender-based violence suffer devastating trauma caused by the violence itself, feelings of shame, humiliation and powerlessness. Unfortunately, many victims have also experienced their participation in criminal proceedings as a 'second assault', leading to re-traumatisation. All judges play a critical role in minimising the factors that contribute to secondary victimisation and re-traumatisation. This can be done by incorporating a gender-sensitive and victim-centred approach in their engagement/interactions with victims.

Pointers for judges when communicating with victims

- ✓ Promoting the victims' voice. For many victims of intimate partner violence who have long been silenced by their abusive partners or for victims of sexual violence who have been silenced by feelings of shame, the possibility of putting into words their own experiences can lead them to start leaving behind the subordination and violence they have been subjected.
- ✓ Listen carefully to the victim.
- ✓ Be proactive in asking about specific details. A victim can act complacent in the courtroom, or accept responsibility for violence, even when she does not agree.
- ✓ Do not ask unjustly intrusive questions, embarrassing, or overtly repetitive questions.
- ✓ Understanding the feelings of shame. Victims of violence against women and domestic violence are more likely to experience feelings of embarrassment and shame than victims of other violent offences. Shame can be a particularly debilitating emotion – one that diminishes an individual's sense of self-worth and increases feelings of powerlessness. Judges should not add to these feelings of shame.

Demeanour in the courtroom

- ✓ Treat victims with dignity and respect. It is the judge who sets the tone and creates the environment for a fair trial in his or her court.
- ✓ Do not express frustration or annoyance if the victim appears to be not cooperative. Keep in mind both what you say and what you communicate through body language.
- ✓ Be sensitive to the language that you use and what it conveys to victims and the perpetrators, especially when making rulings.
- ✓ Ensure that statements made from the bench and courtroom demeanour (non-verbal communication) demonstrates that the court take violence against women and domestic violence cases seriously.

Essential information to provide

- ✓ Explain the victim's rights and options.
- ✓ Explain the purpose of the particular hearing and the process.
- ✓ When concluding, inquire about whether the victim would like an escort to ensure safety when leaving the court.

Ensuring confidentiality

- ✓ Keep personal information about the victim completely confidential. Redact personal information (such as the address of the victim) from any court documents that will be filed and made public. Only share information about the offence when it is necessary to provide assistance and intervention (such as a referral), and even then, only with the written permission of the victim.

2.3.2 Informing the victim of her rights

Victim's rights and empowerment should be at the centre of all measures adopted by prosecutors and judges. Prosecutors and judges should keep in mind that the victims may not have received any professional advice or information about the law or about the kinds of legal services that are available to them, and should, therefore, be prepared to provide relevant information about her rights, remedies and how to access legal assistance.

The Istanbul Convention calls on states to ensure that victims have certain rights:

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

Victims have certain rights and need to be informed of those rights. Victims need to be well informed in order to make their own decisions about participation in all the stages of the criminal justice process. It is not recommended merely to read a list of rights to victims. It is more effective to have a conversation with the victim about the relevant criminal processes, her obligations and her rights, which would allow her to ask questions. Such conversations should take place as early as possible. Prosecutors and judges should check to see if any women's organisations in Kosovo* have developed "know your rights" brochures, leaflets or educational videos. They could then coordinate with such organisations to make these materials available to victims that

come into the prosecution office and courts. A good practice is to explain to the victim her rights in person and to provide written material that the victim can consult later.

Information about victim's rights includes the following⁸⁶:

- ✓ The right to be treated with compassion and respect for their dignity.
- ✓ The right to access the criminal justice system and have prompt redress.
- ✓ The right to fair restitution and compensation, including making a claim for compensation for damage in criminal cases.
- ✓ The right to express their views and concerns and to have them presented and considered at appropriate stages of the criminal case, including: making proposals concerning the evidence; reviewing records and becoming familiar with them and making proposals for further investigations; and to be heard in preliminary hearings, the main hearing and making a concluding speech.
- ✓ The right to have proper assistance throughout the legal process, including legal aid if the victim meets the eligibility requirements.
- ✓ The right to information about their rights, their role and the scope, timing and progress of their case and the disposition of their case, including information about release of the accused/convicted person from custody or escape from custody; the status of their complaint, the progress of investigations or proceedings, their role in the proceedings and the outcome of the case.
- ✓ The right to safety, including the right to apply for protection measures.
- ✓ The right to support, including the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

2.3.3 Protecting, supporting and assisting the victim

Irrespective of whether the victim is engaged with the criminal justice system, they need to feel protected and supported. Protection issues have already been discussed in Module 1 of Part 2. This section covers pointers for prosecutors and judges in providing support and assistance to victims.

A victim-centred approach seeks to minimise re-traumatisation associated with the criminal justice process by providing the support of victim advocates and service providers, and empowering victims as engaged participants in the process. Violence against women and domestic violence 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-victimise the victim. Support and assistance to victims should counter the climate of tolerance to violence against women, social passivity and victim-blaming and acknowledge how these crimes, given their unique characteristics, have a traumatic and disempowering impact on victims.

Prosecutors and judges need to be aware that victims will have both immediate support needs as well as longer-term ones. They will need assistance in going through the criminal justice system, as well as assessing other services, which might include shelter, health care, social services, counselling, education and job care. A victim who feels well supported will likely be more engaged in the criminal case than a non-supported victim and this will improve outcomes in legal proceedings. However, it is important to remember that the provision of services should not be dependent upon the victim's willingness to press charges or to testify, and the services must be able to address the needs of vulnerable persons, including child victims.

The Istanbul Convention requires that measures to prevent and combat violence against women not be only comprehensive but also coordinated between all relevant state authorities and the civil society (Article 7). Judges and prosecutors should be actively involved in outlining protocols for cooperation. Prosecutors and judges should consider:

⁸⁶ This includes the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34, annex; and the UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice.

- Never assume that the police have already informed victims about the support and assistance resources available to them in their community.
- Prosecutors and judges can arrange to make informational brochures from local service providers available in their prosecution offices and in the court buildings. Ideally in safe locations, such as women's toilets.
- Justice professionals and prosecutors, in particular, can make referrals to non-justice sector support services provided by local organisations, either government agencies or non-governmental organisations that are specialised in violence against women, such as shelters and crisis centres.
- Justice sector actors should develop independent relationships with victim assistance organisations in the community.
- If possible, prosecutors and judges should participate in many forms of community outreach and education in order to increase public confidence in the legal system and encourage reporting.

2.4 Managing reluctant witnesses

One of the challenges raised by prosecutors and judges in many countries is that victims of violence against women and domestic violence can seem extremely reluctant to be witnesses during the criminal case and sometimes can become even hostile witnesses. Studies show, however, that a majority of intimate partner violence victims support the prosecution, even while they may express ambivalence about the prosecution publicly in court. Even in studies where the majority of victims opposed prosecution, after trial they had changed their minds, with some reporting that the court experience gave them a “sense of control” or made them “feel much safer”⁸⁷ Research has also found that victims’ preference of how the case should be prosecuted is not good predictor of re-abuse. Victims who wanted charges dropped were just as likely as those who did not want them dropped to be re-abused (re-victimised). Prosecutors should not be convinced to drop the case under the belief that the victim will be safe from further violence.

Victims who are supported and treated in a respectful and compassionate manner and empowered by skilled professionals are not only less likely to withdraw support from the process at a later date, but also more likely to feel able to tell what they know in a clear and coherent manner. Prosecutors should not allow victim opposition to automatically stop them from prosecuting cases. They should appreciate that the more prosecution-related burdens are placed on victims, the less likely they are to cooperate. For example, requiring the victim to sign a complaint in order to file charges, or attend a charging conference within days of the arrest of the abuser. Conversely, the more victims are supported and protected, and the reduction of victim vulnerability pending trial, the more cooperative victims were.

Tips for prosecutors in managing reluctant victims

In addition to the earlier points regarding the need for sensitive communication, providing the victim with information, protection and support, below are some more tips on how to manage a reluctant victim:

- Understand the victim’s reluctance and try to address it, if possible.
- Recognise that victim recantation and refusal to cooperate are often the outcome of threats by the abuser.
- Communicate to her that you both share the same goal, that of ending the violence in her life. Ensure her that you do not expect her to leave the abuser, as that is her decision, not yours.
- Explain how it is the court that can hold him accountable and offer him court ordered programmes to provide him opportunity to change.
- Consider whether you should call an expert witness at the trial to explain the reason why the victim is uncooperative at court, recants her statement or fails to appear.
- Do not react by threatening to prosecute or by prosecuting the victim.
- Consider subpoenaing the victim to testify in the case. Subpoenas are useful because they shield the victim from pressure from the abuser; she can tell him that it is not her decision to testify. However, it should be noted that not all victims will comply with the subpoena and forcing a victim to comply with a subpoena is not advisable as a general rule.
- Consider submitting the victim’s testimony transcript taken by a preservative measure as evidence.

⁸⁷ These studies are discussed in more detail in UNODC. 2014. Handbook on Effective Prosecution to Responses to Violence against Women and Girls.

- Explain to the victim that you can seek measures to facilitate her testimony in the court, such as CCTV or screens so she does not have to face the accused.
- Prepare to proceed with the case without victim testimony. Prosecutors and police should build their cases so that they can be proved without the testimony of the victim (e.g. prior statements, emergency communications such as emergency call records, photos of the victim, the defendant and the scene of the crime).
- Continuity of the prosecutor and meeting the victim in person.

Tips for judges in managing reluctant victims

- Create a sense of safety for the victim during the trial.
- Allow the victim's testimony transcript taken in the presence of a judge and the defence counsel, in such a way as can be admitted as evidence later in the court even without the victim's trial testimony or against the victim's will.
- Allow for special measures that facilitate the victim's testimony in court.
- Recognise that there are powerful reasons why victims of intimate partner violence might provide a retraction statement containing untruths. In appropriate circumstances, dismiss as unreliable the contents of a retraction statement.
- Allow admission of original 'truthful' accounts from victims as evidence in the case.
- Consider evidence available from other sources to corroborate these original 'truthful' accounts, including emergency call recordings; police body worn videos; comprehensive statements from all first response officers; accounts from witnesses.

The following checklist developed by Women Against Violence Europe is intended to assist the court in discovering the reasons why the victim is reluctant or refuses to testify and in finding out whether a victim has been coerced or intimidated into asking for the charges being dropped.⁸⁸

- Why do you feel reluctant (or refuse to) testify?
- When did you become reluctant (or decide to refuse) to testify?
- Were you living with the defendant when the incident happened?
- Are you now living with the defendant?
- (If not) Does the defendant know where you are staying?
- Are you financially dependent on the defendant?
- Do you and the defendant have children together?
- Have you discussed the case with the defendant?
- Has the defendant promise to do something for you if you do not testify?
- Is that promise to do something the reason you do not wish to proceed/or testify?
- Has the defendant or anyone else threatened you, your children or your family and told you not to testify?
- Is there some other reason you are afraid of the defendant?
- (If possible) Are you aware that this court/the civil court can issue an order telling the defendant to stay away from you and have no contact with you and your family? (If possible) Are you aware that if the case is prosecuted, that the defendant can be required to get counselling, pay for your damages, and stay away from you and your family?
- (If injuries are visible) How did you receive the injuries (allude to police reports, medical reports, photos, injuries still visible in court, etc.)?
- Have you talked about your desire not to testify with the local women's shelter/counselling centre/a victim's services?
- If not, would you be willing to talk to them?

⁸⁸ WAVE (2000). Training programme on combatting violence against women. Available at: <http://www.wave-network.org/content/wave-training-programme-combating-violence-against-women-0>.

2.5 Creating an enabling courtroom environment

Trial and trial-related practices often discourage victims from testifying and re-traumatise 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. Criminal courts, procedures and trials can be seen as formal and traditional. Prosecutors and judges have a better chance at reducing the anxiety of the victims if they have an understanding of how this institutionalised setting and its practices can contribute to the inhospitable conditions faced by victims and expose them to re-victimisation. Some of the factors that contribute to inhospitable conditions for victims are unavoidable. For instance, victims must, out of necessity, describe to people they do not know (the judge, prosecutors and defence counsel) the details of the violence and defence must have some opportunity to ask them questions. However, prosecutors and judges have a duty to consider what steps they can take to minimise the negative impact for the victim in having to go to court. Consider how the formality required by all participants in a trial impacts the victims who are expected to remain deferential to the judges and lawyers while often being subjected to intimate, humiliating and aggressive questioning. Judges and prosecutors should be allowing witnesses to seek clarification, express concern or contribute to the direction of the exchange and prevent cross examination that is needlessly repetitive or irrelevant. Even the physical space and courtroom aesthetic are designed to elevate the legal professionals from the laity. The physical design of some courtrooms could be reconsidered in order to make the victim feel more comfortable as a witness.

Creating an enabling courtroom environment will ensure that a victim feels safe and supported and this can contribute to the facilitating the victim's testimony at trial. Victims are more likely to testify and feel better about their experience with protective or "special" measures in place that can help create the conditions for safe and effective testimony. These measures can assist vulnerable and intimidated witnesses give their best evidence in court and help to relieve some of the stress associated with giving evidence. Stress can affect the quantity and quality of their testimony. Different jurisdictions have different ranges of special measures designed to ease victims' experiences of the trial and facilitate their testimony. Prosecutors and judges should be aware of the special measures available in Kosovo*. For prosecutors, they should consider making an application for special measures and be ready to respond to arguments by the defence regarding how these measures effect the defendant's right to a fair trial. For judges, they must satisfy themselves that the special measure or a combination of measures is likely to maximise the quality of the witness evidence.

Prosecutors and judges should consider the following:⁸⁹

Safe and friendly court room environment

- Permit a support person such as family member, friend or professional support person to be with the victim during the trial process. In the case of the girl victim, measures should be taken to appoint specialists and family members to accompany the girl, and a guardian to protect the girl's legal interests.
- Provide for user friendly and fit-for-purpose court environments, including waiting areas.
- Remove all unnecessary persons, including the alleged offender, whilst the victim gives her evidence.
- Take appropriate measures to ensure no direct contact between victim and accused, using court-ordered restraining orders or ordering pre-trial detention.
- Notify appropriate authorities in the case of or suspicion of the victim being harmed or at risk of being harmed during the trial or hearing process.

Protection of privacy, integrity and dignity

- Apply for available measures that can protect the victim's privacy, integrity and dignity, including: limit or ban public present at the trial, for example, in-camera trials or closed trials and limit or restrict media publishing of personal information of victims.
- Object to or disallow any misstatements or attempts to intrude too far on the witnesses' safety (such as matters that could tend to reveal the witnesses' identity).
- Remove any identifying information such as names and addresses from court's public record or use a pseudonym for the victim.

⁸⁹ These points are summarized from the UN Essential Service Package for Women and Girls Subjected to Violence: Justice and Policing Module 3.

- In the case of the girl victim take appropriate measures to: maintain confidentiality and restrict disclosure of information relating to the girl's identity and involvement in the process; and exclude public and media from courtroom during the girl's testimony, where permitted by national law.

Opportunity for full participation

- Apply for and/or where possible allow for available measures that can facilitate the victim's testimony in trial/hearing: measures that permit the victim to testify in a manner that allows her to avoid seeing the accused, for example screens, behind closed doors, closed circuit television (CCTV).
- Adopt case management approaches that ensure the victim has an opportunity to fully participate in the proceedings with the least amount of secondary victimisation: reduce unnecessary delays; and promote practices that issues not in dispute are agreed upon and admitted at the start of the trial/hearing.
- Undertake approaches and ways to reduce the victim's stress: limit her evidence to relevant evidence; allow for short recess when she is too distressed to proceed; identify options to avoid or minimise direct examination of the victim by the defendant, where possible; if allowed, have the examination conducted through an intermediary; if allowed, use video-recorded interview as evidence in chief.
- In the case of the girl victim, use child-sensitive procedures, including interview rooms, modified court environments and take measures to ensure hearings and interviews are limited and are scheduled at times of the day appropriate to the age of the girl and separate from the accused.

Ensuring the quality of the victim's evidence

The reality in many criminal trials involving violence against women and domestic violence is that the defendant decides not to provide testimony, as is their right, with his defence counsel leading the complainant through the defendant's version of events in a way to put an alternative story to the factfinders to create reasonable doubt. Defence questioning techniques are to present certain evidence in certain ways, rather than gathering all the available evidence in a balanced manner. They primarily manipulated evidence by asking closed questions to control what information becomes public.

There are numerous factors that influence the quality and quantity of evidence provided by victims as witnesses. Prosecutors and judges should consider the following pointers to enhance the victim's ability to tell her story in court:⁹⁰

- ✓ Asking open questions and avoiding leading or suggestive questions.
- ✓ Controlling inappropriate questioning, as this reduces the quality of evidence heard.
- ✓ Being aware that the demeanour of the person asking the questions - more authoritative demeanours make vulnerable witnesses less able to recall accurate information and less willing to disclose information.
- ✓ Use of pre-recorded video evidence, while arguably more compatible with inquisitorial than adversarial approaches to testimony, is found in some adversarial jurisdictions.
- ✓ Makes trials more about conversations than battles and allows greater reliance on written evidence gained pretrial.
- ✓ Allowing the victim her own lawyer. The duties could range from acting as an intermediary during questioning to, at least partially, address manipulation to providing advocacy and representation throughout the whole legal process, including sentencing and compensation decisions.

Strategies for limiting aggressive questioning and improper questioning based on myths and gender stereotypes

Given that the direct confrontation between the defendants and their alleged victims involves a risk of further traumatising of the victim, prosecutors and judges play a significant role in ensuring that the victim's role as a witness is not undermined or ridiculed, and that the court provides a safe environment for her testimony. Questioning techniques by defence, such as extensive repetition, frequent interruption, closed questions, and demanding precise recollection of peripheral details, are common defence tactics in cases involving violence

⁹⁰ Taken from UNODC. 2019. Handbook for the Judiciary on effective criminal justice response to gender-based violence against women and girls.

against women and domestic violence. Prosecutors and judges should be mindful of defence tactics to intimidate or humiliate the victim, such as using unfair, unnecessary, repetitive, aggressive and discriminatory questioning. They both have a role to play to decisively stop such behaviour, by raising objections (by prosecutors) or issuing warnings or disallowing that line of questioning (by judges).

Prosecutors and judges should consider the following:

- Understand how violence against women and domestic violence is different from other offences, including appreciating the stereotypes surrounding these cases and the challenges victims face in accessing justice in these cases.
- Balance the victim's right to equal protection before the law and privacy with the defendant's right to full answer and defence. While the defence has the right to test the case for inaccuracies and inconsistencies that could render the testimony unreliable, such right is not absolute and does not give defence the right to use gender stereotyping to malign her behaviour, her dress and her character.
- Argue that all lawyers have an ethical duty not to discriminate, advocate in good faith and not mislead the court. While not introducing false evidence, defence lawyers who uses harassing and improper questioning to put forward a defence grounded in stereotypes is misleading.

Prosecutors and judges should also refrain from making inappropriate comments based on myths and gender stereotyping.

2.6 Options for exercises

Option 1: Develop role play script or video –good and bad approaches

The Academy of Justice could develop short film clips of good and bad approaches highlighting how prosecutors and judges handle victims of violence against women which could be used to facilitate a discussion of the material in this module. One example could be to develop various role play scenarios that highlight common examples of improper questioning of the complainant during trials in Kosovo*. For example this could include:

- Questioning by the defence about the victim's unemployment used to portray her as lazy and draw on class stereotypes to undermine her credibility.
- Questioning by the defence and prosecutor of a victim worked as a prostitute. Defence could subject her to many stereotypes throughout the trial and created the idea of her as an 'undeserving' victim. Even when the prosecution objected to this description, he framed his response that the victim's prostitution "doesn't make her a second- class victim and she should be *treated* like a normal person".
- Questioning by the judge to a complainant of rape, 'why couldn't you just put your knees together' shifts the blame on her and is based on stereotypes around the theme of 'she wanted it'.

Option 2: Small group discussion - Case study

[Adopted from case study from UNODC. 2017. Resource book for trainers on effective prosecution responses to violence against women and girls.]

Instructions: Divide the large group into smaller groups, each one made up of one profession. Assign the groups of prosecutors, scenario 1 or 2. Assign the groups of judges, scenario 3 or 4. Each group is to answer the following questions:

- How would you proceed?
- What options would you have and which ones would you consider and why?

Facts

Police received a telephone call from Ms. Laci advising that her neighbour's 9-year-old son, Nick, had come to her door crying that his father and mother were fighting. The police could hear crying in the background. The police were dispatched immediately to the address. When the police arrived at the address given, they saw Ms. Laci at the neighbouring home in front of her open door with a young boy who appeared upset. She pointed out the house where the boy had run from. The little boy asked the police to help his mother.

As the police approached the front door, they could see through the window a woman on the floor of the kitchen not moving and a man eating at the table. Upon knocking, the man answered the door, smelling of alcohol, was red in the face and sweating, and laughing. He pointed to his wife, saying "there is my lazy wife, sleeping as usual". The police check the woman on the floor, she was awake, appeared distraught and her front blouse was torn down the front. The police asked how she was. She said she was okay. Her voice was breathless and raspy. The police explained that there had been a report of a disturbance at this residence and that the police were there to check on the safety of the occupants.

One police officer took the woman's statement. Ms. Abazi reported that her husband had come home late that evening. When he walked in the door, she could see that he was angry and drunk. He asked her where his dinner was. She had put it away over an hour ago as it was getting cold sitting out. She was just about to go to the kitchen to reheat it when he grabbed her from behind and started hitting her in the face. He then threw her against the wall. She fell and he started kicking her. The last thing she remembered was his hands on her throat.

The other police officer took the husband to the police car to question him. On the way to the car, the husband uttered spontaneously, "I hardly touched her". Once at the car, the husband said "she deserved it, she is always late with his dinner, I am the one working hard all day to earn the money to feed and clothe her and the children and the very least she could do was have supper ready in time."

Scenario 1: Ms Abazi and her son stay in the shelter for three days and while she is in the shelter, she gets a visit from her husband who apologizes and wants her to return home. She sends a letter to the prosecutor which reads: "Please drop the charges against Mr. Abazi. He has not drunk anything since that night and we can handle this ourselves. There is no reason to waste everyone's time. The whole thing was blown up way too big. I am not worried about him unless he is drinking".

Scenario 2: The prosecutor is meeting the victim the day of the trial. The trial is set for 9:30 am and the prosecutor has arranged a meeting with the victim for 8:00 am. The victim enters the prosecutor's office. She will meet the prosecutor's eyes and says in a very quiet voice that she does not want to proceed with the charges.

Scenario 3: The judge presiding during the criminal trial notices Ms Abazi enter the courtroom in a timid and fearful manner. On the witness stand she is having difficulties answering the prosecutor's questions in chief with Mr. Abazi glaring at her from the defence table.

Scenario 4: On the witness stand during the criminal trial, Ms Abazi turns to the judge and says "I withdraw my statement".

3. Assessing and evaluating the evidence

Often it is the police who have the main responsibility for the investigation process and the collection of evidence. However, prosecutors, and to a certain extent judges, have a role in ensuring that the investigators are abiding by the standards for evidence collection. Each profession must then assess the collected evidence in the performance of their duty, whether this is in the decision to prosecute and the selection of charges by prosecutors or in the judicial assessment of the facts in accordance with the law, legal reasoning and crafting judicial decisions by the judges.

Cases involving violence against women and domestic violence can be challenging. Many of the offences covered by the Istanbul Convention are perpetrated by family members, intimate partners or persons in the immediate social environment of the victim. This means that often the incident of violence happens in private with no witnesses; the victim has feelings of shame, fear and helplessness which can contribute to delayed reporting and consequently problems with potential physical evidence such as forensic exams, feelings of uncooperativeness with authorities or being unable to fully recollect the violence due to trauma. The victim's statement is a crucial piece of evidence, and must be carefully recorded, however, there is also an over-reliance on the victim's statement, often to the detriment of early and meaningful case building by the police which results in a lack of comprehensive evidence collection. In cases of sexual violence, there is also an over-reliance on physical evidence, resulting often in the practice where the case will not proceed if there is no forensic report. This module offers some considerations for both prosecutors and judges to improve the effectiveness of evaluating and assessing evidence in these cases.

3.1 International standards

Prosecutors and judges are given some guidance by the international norms and standards from the soft law instrument that has been specifically drafted for states to improve their criminal justice response to violence against women. Important evidence such as testimonies by other family members, the victim's actions and statements when they were first in contact with the police, physical and medical evidence collected once reporting the crimes to the police or evidence collected at the scene of the crime by the police should be accordingly prioritised by prosecutors in line also with the requirements of the Istanbul Convention. Specifically, the Istanbul Convention requires states to establish effective and timely investigation and prosecution of cases by law enforcement and prosecution by collecting relevant facts, interviewing different available witnesses, as well as using state-of-the-art forensic examination methods in order for cases of domestic violence to be prepared before the court.

UN Updated Model Strategies and Practical Measures	
Collection of evidence	To develop and implement policies and appropriate responses regarding the investigation and collection of evidence that take into account the unique needs and perspectives of victims of violence, respect their dignity and integrity and minimise intrusion into their lives while abiding by standards for the collection of evidence (Article 16(e)).
Assessing credibility	The credibility of a complainant in a sexual violence case is understood to be the same as that of a complainant in any other criminal proceeding (Article 15(e)).
Evidence of prior acts of violence	Evidence of prior acts of violence, abuse, stalking and exploitation by the perpetrator is considered during court proceedings, in accordance with the principles of national criminal law (Article 15(g)).
Use of alcohol	People who perpetrate acts of violence against women while voluntarily under the influence of alcohol, drugs or other substances are not exempted from criminal responsibility (Article 15(f)).

3.2 Kosovo* legal framework

Domestic violence. As domestic violence is considered a violation of human rights, according to Kosovo* prosecutorial policies cases related to these investigations should be treated with priority.⁹¹ In cases when domestic violence is reported after working hours, on-call prosecutors should be appointed for each Basic Prosecution Courts. The interviews of witnesses are conducted by the specialised prosecutors for domestic violence appointed in all Basic Prosecution Courts, who undertake the necessary risk assessments and evaluation jointly with the police and follow the relevant policies and procedures for cases of recidivisms as well as violations of protection orders, as followed by the Office of the State Prosecutor.⁹² Jointly with the Victim Advocates, the specialised prosecutors should also ensure that the victims are informed of their right to file for declaration of damages, in order for victims to be eligible for state compensation in case the damages are not decided in the initial criminal proceedings.⁹³ Further, prosecutors are recommended to keep information related to the case, such as the name of the perpetrator and the victim, including former case history if available, former episodes of violence including criminal and civil proceedings information against the perpetrator. The victims should be informed on the course of the proceedings at all times.

Sexual violence. Incidents of rape and other forms of sexual violence remain heavily underreported with official police data showing that during 2015-2018 there were only 15 cases of rape reported in Kosovo*.⁹⁴ There are currently no Standard Operating Procedures on crimes related to sexual violence, often leading to the uncoordinated response of institutions involved. In cases where victims do not want to report rape immediately, there are no means for them to store the forensic evidence as Kosovo* lacks specialised support systems for rape victims such as Rape Crisis Centres and Sexual Referral Centres.⁹⁵ The legislation of Kosovo* does not foresee the creation of Rape Crisis Centres or Sexual Referral Centres. The minimum standards in Europe are to have one sexual referral centre per 400,000 women and one rape crisis centre per 200,000 women.⁹⁶ Currently, only one institution performs medical examinations on victims of sexual violence, namely the Department for Forensic Medicine. These examinations are conducted only if there is an official request for investigation by prosecutorial services and cannot be accessed directly by victims. Moreover, the collection of forensic evidence is very much time dependent. Currently, as only the Department for Forensic Medicine in Prishtina/Priština can conduct such examinations, transporting victims from other regions to Prishtina/Priština may lead to the loss of valuable evidence.⁹⁷ Further, there are no gender-sensitive services for victims of violence where they could seek counselling and undergo forensic examinations. The police frequently engage in inadequate responses and victim blaming attitudes towards the victim. The victims are faced with the tough decision of whether they want to report the violence or not. In cases where they do not want to report the violence immediately, there are no means of storing the forensic evidence for a later point in time.

3.3 Ensuring a comprehensive investigation and collection of all relevant evidence

Prosecutors, more so than judges, have a role in ensuring comprehensive investigations and collection of relevant evidence. While the investigative process is largely conducted by police, prosecutors perform an active role in scrutinising the lawfulness and propriety of investigations and the gathering of evidence, and in monitoring the observance of human rights by investigators, at least in deciding if a prosecution should commence or continue. Judges may also have some role to play during the investigative stage when asked to order search warrants, or production of documents. Studies have shown that in certain types of violence against women cases, such as rape cases, little attempts are made to build cases rather more focus was on discrediting the victim and not proceeding with the case.⁹⁸ Prosecutors should not use evidential difficulties to dismiss cases if they find that these difficulties are due to lack of care and commitment in the investigative process as a result of police perceived stereotyping and myth relying attitudes. Ensuring that all available evidence has been collected can mean that the prosecutors and the judges can reduce their reliance on the victim's testimony, reduce her risk of retaliation by the perpetrator and increase the likelihood of a successful prosecution.

Prosecutors must have the knowledge and skills to assist the investigators ensure a thorough investigation is conducted. This includes promoting evidence building that focuses on the credibility of the allegation rather

91 See Regulation Nr. 763 of the Kosovo* Prosecutorial Council and State Prosecutors Office, on increasing efficacy in handling domestic violence cases.

92 Ibid, Article 4 Appointments and Case Management, Regulation of the KPC, Nr. 763, 2017.

93 Ibid, pg. 4.

94 See for example Access to Justice Report for Victims of Gender Based Violence, KIPRED 2018, funded by the EU Office in Pristina.

95 Ibid.

96 Krol et al for Council of Europe, Mapping support services for victims of violence against women in Kosovo*.

97 See for example Access to Justice Report for Victims of Gender Based Violence, KIPRED 2018, funded by the EU Office in Pristina.

98 Du Mont, J and White, D. 2007. "The uses and impact of medico-legal evidence n sexual assault cases: a global review. WHO.

than the credibility of the victim. A comprehensive investigation might allow the prosecutor to proceed without the victim's testimony, which requires an evidence-based prosecution. Such cases should be constructed on corroborating evidence, such as physical evidence, medical experts, and the testimony of expert witnesses. Prosecutors should be pro-active in exploring possible forms of evidence and a checklist can be useful, as seen in the table below.

Types of possible evidence				
Statements	Photographs	Medical/Forensic	Observation / documentation	Other evidence
Victim	Victim's injuries, with victim's consent	Top to toe examination of victim for injuries, evidence of force	Utterance of suspect	Cell phone calls
Neighbour	Suspect's injuries, if any (e.g. offensive injuries or injuries inflicted in self-defence by victim)	Swabs of potential areas of physical contact	Victim's demeanour	Any previous history that can be relied upon as bad character including in relation to other partners
Eyewitnesses	Scene of the crime (disrupted or destroyed objects, blood stains)	Body examination of suspect	Suspect's demeanour	Emergency call recordings
Witnesses as to how victim is behaving before/after the incident (e.g. capable of consenting)		Crime scene evidence forensic examination (fingerprints, body fluids, footprints)	Torn clothing	Cell phone mapping
Teachers		Hospital/emergency room records	Smeared makeup	Voice message tapes
Colleagues at work		Toxicology (alcohol levels) including back calculation	Disarray in house	Letter or Email correspondence; change in behaviour/mood
Friends at school		Victim's spontaneous utterances made to medical staff	Victim's injuries (using diagram)	Social network
				CCTV evidence
				Weapons
				Family court files

Source: Skinnider, E. 2014. Handbook on effective prosecution responses to violence against women and girls. UNODC, p. 73.

3.4 Pointers in assessing evidence

3.4.1 Assessing the credibility of the victim

It is not unusual that in cases involving violence against women and domestic violence there may be little physical evidence to connect the suspect to the crime or no witnesses that can corroborate the victim's testimony. Often the likelihood of conviction depends primarily on the victim's ability to articulate what happened and to convince the prosecutor to proceed with the prosecution and the judge to convict.

Be aware of how myths and stereotypes inform credibility assessments

Myths and stereotypes continue to inform credibility assessments of the victim, from whether she behaved 'rationally' at the time of the violence to how she comports herself during the criminal trial. Prosecutors and

judges need to be aware how they characterise the complainant's behaviour as "good choices" and how these are often based on a construction of the "ideal victim". They also need to appreciate how they are evaluating what the complainant is telling them by the manner in which they give it. The complainant's attributes, decisions and comportment when she is on the stand might not fall into their views as to what a "good" witness or "credible" witness would say or not.

The challenge in dealing with inconsistent statements

One of the main challenges heard from many prosecutors and judges is that they are often faced with considering the issue of inconsistent statements of the complainant. Prosecutors and judges need to consider:

- The violence can impact the victims' ability to coherently or fully recount her experience or emotional numbness can complicate responsiveness to questioning.
- Victims often have to provide various statements to a number of authorities before speaking to prosecutors or before appearing before the judge at trial.
- Statements might be taken by untrained officers, in places where she might not feel safe or supported, not be recorded properly or in a coherent or comprehensive manner. For instance, if the victim has been questioned by a male police officer, she might feel uncomfortable and this can affect her ability to recount her experience.
- Victims might have given her statement in one language but was translated into another language which might not accurately transcript which she said or paraphrased her story incorrectly.
- There could be a time lag between any of her statements, e.g. from the first statement and the criminal trial. It is not uncommon for victims to attempt to manage their lives by not revisiting the trauma.

Inconsistencies in a statement should not automatically undermine the victim's allegations or suggest that she is unreliable or dishonest. In fact, inconsistencies are to be expected. It is difficult to imagine that anyone could maintain consistency with respect to insignificant details when retelling an incident that occurred months or more likely even years prior. It is sensible to assume that inconsistencies on minor details actually increase credibility. In assessing inconsistencies, prosecutors and judges should be cautious about placing too much weight and importance on the contradictions between what a witness says in court and previous statements. They should adopt a culture of believing the victims, unless the contrary is clearly indicated.

Shift the focus to assessing the facts of the violent incident

The inordinate focus on the conduct of the victim when assessing the evidence, when deciding to prosecute or not, or to convict or not, results in shifting the focus away from assessing the facts around the violence incident itself and the conduct of the defendant. The result is to downplay the defendant's conduct and responsibility while shifting the blame towards the victim.

3.4.2 Forensic evidence issues

The fact that some forms of violence against women and domestic violence usually leave physical evidence can be both a benefit (corroborate victim's account; identify perpetrator) and a challenge (not always available or collected, delayed reporting, compromised, lack of capacity of forensic examiner). Prosecutors and judges should be guided by the UN minimum standards set out in the Essential Services Package to ensure that any decision not to proceed is not based solely on the fact that there is no medico-legal report or that the report is inconclusive.⁹⁹ The reason for this is that there can be a number of challenges related to forensic evidence:

Tendency for overreliance. The overreliance on forensic evidence is based on the assumption that there was a single "truth" to be uncovered and that scientific evidence is the most legitimate method of finding it. This does not fit well if the form of violence is psychological violence which may not produce forensic evidence.

Wrong interpretation in the absence of forensic evidence. There are numerous reasons why there has been no forensic evidence. This includes both the situation where the forensic exam was done (e.g. delayed reporting; untimely exam; victim might have washed or gone to toilet, compromising the evidence; insensitive or non-age appropriate exam; state does not have the capacity to collect and/or analyse) and where there was no forensic exam done (e.g. difficulties in accessing; refusal of the victim to undergo an intrusive forensic exam).

⁹⁹ UN Essential Services Package for Women and Girls Subjected to Violence: Module 3: Justice and Policing.

Lack of certainty. There is a spectrum of physical findings produced by violence. Some physical findings are quite specific for abuse, while other findings are nonspecific and can vary due to so many factors, such as type of object or body part used, amount of force, use of lubricants, time elapsed before the exam, etc. The forensic examiners might not be trained to perform gender-based violence against women exams; the collection of evidence might not be done correctly or completely.

Interpreting forensic evidence based on myths and gender stereotypes. Placing reliance on forensic evidence is based on the presumption that women will fight back when faced with any form of violence and as a result there will be evidence of physical force or a struggle. Forensic evidence that shows that the victim was previously sexually active can undermine her credibility and be used to argue that the violence did not occur.

Prosecutors and judges should be aware that the forensic reports should not conclude whether rape has occurred, but rather describe the examination. Remember rape is not a medical condition, it is a legal definition. They need to know how to interpret the forensic report. Some considerations:

- ✓ Be sensitive to the many reasons why victims might not undergo forensic examination.
- ✓ A lack of physical injuries does not mean that no violence has occurred.
- ✓ Not to see forensic evidence as indispensable to conviction.

3.5 Specific considerations for prosecutors when assessing evidence

3.5.1 Exercising prosecutorial decisions

Prosecutors are generally the ones that control the doors to the courthouse, deciding who will be charged and what charges will be filed. The exercise of the discretion whether or not to prosecute is an onerous one as the decision can have serious consequences for the victim, for the suspect and for the community. In exercising their discretion, the prosecutor must assess the merits of a case relative to the elements of possible criminal offences; the adequacy and quality of the evidence; the likelihood of conviction; and whether there is a public interest in prosecuting.

Determining the adequacy of the evidence for a case. Prosecutors should base their judgment on the strength of the evidence and not be swayed by other extraneous and irrelevant factors. Studies indicate that prosecutors often include in their assessment irrelevant characteristics of the complainant and the suspect. The prosecutor's subjective evaluation of the character and credibility of the victim is often one of the key factors in determining whether to prosecute or not. Therefore, it is important that prosecutors are aware of any bias in how they assess the victim's character, behaviour and credibility and ensure that their assessment is not based on stereotypes of "ideal victims" and "rational behaviour". The United Nations Essential Services Package for Women and Girls Subject to Violence notes that evaluating evidence should focus on the credibility of the allegation rather than the credibility of the victim.

Prosecutors should pay great attention on how they assess the following:

- The perpetrator-victim relationship.
- The victim's characteristics.
- The suspect's characteristics.
- The case characteristics.

Likelihood of conviction. Prosecutors' assessments of convictability are based primarily on legal factors: the seriousness of the offence; the strength of evidence in the case; and the culpability of the suspect. Studies have found that prosecutors are more likely to file charges when they believed the evidence is strong (e.g. if there was physical evidence to connect the suspect to the crime), the suspect is culpable (e.g. if the suspect had a prior criminal record), and the victim is blameless (e.g. if there were no questions about the victim's character or behaviour at the time of the incident).

Public interest factors. Once the evidential stage is evaluated, then the prosecutor is called on to look at whether prosecution is required in the public interest. This involves considering legitimate concerns of the community and balancing this with the wishes of the victim. It is generally in the public interest to proceed

with a prosecution where the allegations are serious in nature, considerable harm was caused to the victim and the alleged offender's degree of culpability is significant. Given the prevalence of violence against women and domestic violence and the harmful effects it has on the individual, the family and the community, the prevailing approach should be to always find a public interest in prosecuting such cases.

While it is important to involve the victim in the decision whether or not to prosecute, there is a need to balance victim's agency with removing the need for victims to initiate prosecution and to prevent the abuser from using violence or threats to pressure the victim to halt the prosecution. Prosecutors should always inform the victim of their decision whether to prosecute or not.

3.5.2 Selecting appropriate charge

Often the criminal law provides prosecutors with a choice of charges in these cases. Therefore, the prosecutor may have discretion in determining what crime to charge and what level of seriousness. Prosecutors should consider the following when determining the appropriate charge¹⁰⁰:

- Charges should reflect the seriousness of what took place, any element of premeditation or persistence in the suspect's behaviour, the provable intent of the suspect and the severity of injury (physical and psychological) suffered by the victim.
- Bear in mind that different charges may provide the court with the power to impose pre-trial detention as well as impose a suitable sentence.
- Consider all charges that could result from a patterned use of intimidation, coercion and violence (the perpetrator might have committed more than one offence). Consideration should be given to what other crimes may be charged along with the main offence.
- Consider adding the charge of violating a court order in situations where there was a protection order or restraining order in effect at the time of the offence.
- Seek out other information on the suspect's history and use it in charging decisions. Prior violations against the same victim, if probable and within the statute of limitations, may be charged as separate counts.
- Charge the case as an aggravated assault by a trusted person in cases of intimate partner violence or non-stranger sexual assault.
- Consider whether stalking charges are available if there is a history of patterned use of intimidation.
- Consider whether other charges should be included that stem from a defendant's action after police arrival on the scene, such as obstruction of justice, disorderly conduct, or assault of a police officer.
- Consider whether the defendant's behaviour after the initial criminal charges have been filed result in new charges, such as witness tampering or witness intimidation.

3.5.3 Proceeding with the prosecution *ex officio*

The European Court of Human Rights in *Opuz v Turkey* provide guidance as to the factors prosecutors should consider in deciding to proceed with an *ex officio* prosecution after the withdrawal of complaints by the victim¹⁰¹:

- the seriousness of the offence;
- whether the victim's injuries are physical or psychological;
- if the defendant used a weapon;
- if the defendant has made any threats since the attack;
- if the defendant planned the attack;
- the effect (including psychological) on any children living in the household;
- the chances of the defendant offending again;
- the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved;
- the current state of the victim's relationship with the defendant and the effect on that relationship of continuing with the prosecution against the victim's wishes;

¹⁰⁰ Points are taken from: UNODC 2017. Resource Book for trainers on effective prosecution responses to violence against women and girls.

¹⁰¹ *Opuz v. Turkey*, Application No. 33401/02, 2009, para 138.

- the history of the relationship, particularly if there had been any other violence in the past; and
- the defendant's criminal history, particularly any previous violence.

3.6 Specific considerations for judges when assessing evidence

Incorporating a gender perspective in judicial decision making requires the judge's assessment of the facts in accordance with a careful understanding of the law, free from any gender biases and gender stereotyping influences. This not only applies to the decision itself but also to the process by which the decision is made, including when assessing the evidence.

3.6.1 Fact determination and interpreting the evidence

In assessing the evidence, judges, like most people, tend to think in terms of stories and experiences that they are familiar. This can lead to assumptions regarding what they consider is "rational" behaviour and assist them in determining which witness testimony they believe. Unfortunately, many of the stories that we learn since childhood tend to reflect existing power imbalances and gender roles in society. This has an impact on how judges assess evidence in decision making. Judges need to ensure in fact assessment that they reject any myth or gender stereotyping. Judge should be questioning whether the behaviour that they expect by the victim or defendant conforms to myths or gender stereotypes.

Judges need to examine the context in which the facts took place. They should:

- Consider the dynamics of the form of violence: intimate partner violence; sexual violence; stalking; honour-related violence.
- Identify situations of power between the parties and ask whether there is a power imbalance.
- Avoid shifting from a focus on the actions and state of mind of the accused to an interrogation of the victim's state of mind and what she did and did not do during the incident.
- In assessing the credibility of the victim, have an understanding of the victims of gender-based violence against women, the effects of trauma and the power dynamics that characterise such violence.
- If possible, judges should assess the gaps in the evidence needed for a comprehensive fact assessment and if they have the power, order the prosecutor to produce further evidence.

3.6.2 Applying and interpreting the law

Part of assessing the evidence is that it is done in conjunction with applying and interpreting the law. The judges need to question whether the legal provisions reflect any myths or stereotypes about violence against women and domestic violence. Judges ought to be aware that they should not apply existing legal provisions that discriminate against women or provisions that allow, tolerate or condone forms of gender-based violence against women. Judges need to appreciate the history and context of the reformed laws. Judges should not allow extreme interpretations of procedural rules without challenging this in their courtroom. In applying and interpreting the law, judges should question whether it is necessary to challenge the gender neutrality of the law. They should consider whether the law is biased against women or whether the differential impact of the neutral laws has a discriminatory effect on women as compared to men. Judges ought to be aware of international law obligations in order to contribute to making informed and human rights compliant decisions.

Keep in mind:

- With respect to sexual violence offences, many commonly accepted rape myths lead to narrow interpretations of what counts as sexual offences and elements of the crime, irrespective how the crime has been defined. When the sexual violence offence is based on lack of consent, this provides the potential for a contextual analysis of the power relations within which sexual interactions unfold. Judges should look for agreement rather than relying upon acquiescence. Be careful of how myths, such as the myth that women who have previous sexual experience are more likely to have consent, influence the judges' assessment of the evidence and the application of the law.
- Regarding intimate partner violence, when there is no specific criminal offence for domestic violence, the general criminal code provisions such as physical assault, threats, or sexual offences are applied.

The challenge for judges is that these offences generally focus on the latest single incident rather than encompassing the typical pattern of coercion and control.

When interpreting and applying the law, they should be guided by:

- An interpretation that promotes, rather than harms, the values of gender equality, autonomy and security of the person.
- Discount myths and stereotypes about women and violence against women and domestic violence.
- Be guided by international law and domestic laws which incorporate international obligations.

3.6.3 Incorporating a gender perspective in the judicial reasoning and crafting of the judgment

Judges are to apply an interpretation of the law that promotes substantive equality and one that is not based on myths or gender stereotypes. Judges should consider:

- Understanding that although ‘beyond reasonable doubt’ is a high standard of proof, it only requires the absence of ‘reasonable’ doubt and does not mean the absence of any doubt at all, and the presumption of innocence does not mean that doubt about the defendant should be ignored. Studies have found in cases of violence against women there appears to be extreme interpretations of ‘beyond a reasonable doubt’ and burden of proof.¹⁰²
- Identifying and avoiding judicial reasoning which is based on stereotypes.
- Focusing on proven facts rather than inferences by way of a generalisation.
- Before inferences are drawn, “the question should be whether the underlying generalisation is misleading, discriminatory, and one that should be eliminated from the fact determination process.
- Crafting gender-sensitive judicial decisions, which are those framed in terms of women’s equality, security interests and affirming women’s autonomy and dignity.
- Avoid language that use or rely on stereotypes when crafting the judgment and use inclusive language.

3.7 Options for Exercises

Option 1: Case study

[Adapted from Council of Europe, 2016. “Preventing and Combating Domestic Violence against Women: A learning resource for training law enforcement and justice officers”]

Instructions: Divide the group into small groups, consisting of all prosecutors or all judges. For prosecutors, the questions involve the public interest in pursuing a case *ex officio*, gathering relevant evidence, and determining the appropriate charges against the perpetrator. For judges the questions involve assessing the facts and applying and interpreting the laws and making judicial decision.

Case – the Facts

Nick and Sara had been in a relationship for 3 years at the time of this incident. There had been past incidents of violence during the relationship but Sara had never reported any of them to the police. She didn’t report them because Nick always seemed very remorseful after each incident. He blamed the violence on the stress of his job and the fact that Sara was always ‘nagging’ him about his drinking and drug consumption. On the day of the incident, Sara was treating Nick to a night out because it had been his birthday during the week. They decided to go away to a hotel for the weekend. On the way up, Sara gave Nick her bank card and pin number to withdraw some cash for the weekend. When they arrived at the hotel, Nick started smoking cannabis. When Sara complained, he started shouting at her that it was his birthday and he could do what he wanted. Sara continued to argue with him and Nick punched her in the face, breaking her nose in the process. The manager of the hotel came to their room because of the noise. He saw that Sara was upset and he saw that her nose was bleeding. He asked her what had happened and she told him that Nick had punched her in the face

¹⁰² Horowitz, I. & Kirkpatrick, L. 1996. “A concept in search of a definition: The effects of reasonable doubt instructions on certainty of guilt standards and jury verdicts. *Law and Human Behaviour*, 20, 655-670.)

and had broken her nose. The manager told Nick that he was going to call the police and Nick punched the manager in the face as well, breaking his glasses and cutting him above his left eye. Nick ran out of the room, whilst the manager was calling the police. When the police arrived, they searched the hotel for Nick and found him at the cash machine in the hotel lobby. He had Sara's bank card and had withdrawn some money from her account. The police informed Nick of Sara's and the manager's statements. He admitted hitting Sara and the manager. He also admitted to taking the money out of Sara's bank account. Nick was arrested by the police and charged with causing bodily harm to Sara and the manager. Sara came to court with him and said that she wanted to withdraw her statement and that she did not want to pursue the case anymore.

Questions for the Prosecutors

- Q1. Is it in the public interest to pursue this case?
- Q2. Do you have enough evidence to pursue the case?
- Q3. Do you agree with the charges that Nick faces? If not, what charges would you bring?
- Q4. Do you have enough evidence to pursue the case?
- Q5. How will you respond to Sara's request to withdraw her statement?

Additional information for prosecutors

You are the prosecutor preparing the case of Nick and Sara for trial. The police have told you that Sara is very nervous about the trial. Nick and his family have been bombarding her with telephone calls and texts, threatening to kill her if she continues with the case. She is very afraid because Nick keeps a gun in the house and has threatened to kill her and commit suicide if she ever tries to leave him. Sara has told the police that she is going to come to court with Nick on the day of the trial and withdraw her statement because of her fear. She says that ever since Nick has been arrested and charged by the police that he has been scarier than she has ever seen him. Sara asks the police if there is any way she could give evidence against Nick without being in the same room as him?

- Q6. Does this additional information change the way in which you would handle Sara saying that she wants to withdraw her statement?
- Q7. If it would change your mind about how to handle Sara's withdrawal, what options are available to you?
- Q8. Would you consider any further charges against Nick?

Questions for the Judges

During the pre-trial stage:

- Q1. Which protection measures would you apply for Sara? Pre-trial detention? Removal of Nick from the common residence?

At the trial stage: There are 5 witnesses for the prosecution: Sara, the hotel manager, two police officers and a doctor. The only witness for the defence is Nick. At the last minute, Sara refuses to participate in the court proceedings or to testify.

- Q2. How would you react if the victim refused to participate in the court proceedings?
- Q3. What could you do to facilitate Sara's testimony at trial?
- Q4. When finally, Sara changes her mind and, before the trial starts, the prosecution makes an application for B. to give her evidence from a different location, what information do you need in order to help you make a decision on Sara's application to testify?
- Q5. Which evidence will be particularly relevant?

Option 2: Case study – plenary discussion

[Adapted from Council of Europe. 2016. "Preventing and Combating Domestic Violence against Women: A learning resource for training law enforcement and justice officers"]

Case – the facts

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

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

Instructions: facilitate a plenary discussion. Start off with asking: What could have been done differently in this case?

Continue the discussion in the plenary and consider framing the discussion around these following questions:

- Was enough evidence gathered during investigation?
- Were there really no other witnesses to the facts?
- Did something go wrong during Sara's interview with the police?
- Would it have turned out differently if Sara was represented by a lawyer or supported by a counselling centre?
- Did Nick put pressure on Sara in the run-up to the trial?
- How could that have been prevented?
- Has a victim-centred and gendered approach been adapted?
- Was any consideration given to the set up in the court room?
- In cases of violence against women and domestic violence alongside pre-trial custody and/or bail conditions, barring/restraining and protection orders could be considered.
- Did Sara get access to proper support and assistance?

4. Combating the discriminatory use of evidentiary rules

Cases involving violence against women and domestic violence are, of course, subject to the rules of evidence and procedure laid down in the law. Prosecutors and judges play an essential role in ensuring the non-discriminatory interpretation and application of evidentiary rules. This includes ensuring that all relevant evidence is brought before the courts. This means that prosecutors develop a prosecution strategy and build their case and that judges efficiently manage the case before them.

4.1 International standards

	Istanbul Convention	UN Updated Model Strategies
Evidentiary rules are non-discriminatory and allow for all relevant evidence to be before court	... ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour (Article 42.1)	Evidence rules are non-discriminatory; all relevant evidence can be brought before the court; rules and principles of defence do not discriminate against women; and 'honour' or 'provocation' cannot be invoked by perpetrators of violence against women to escape criminal responsibility (Article 15(d)).
Complainant's sexual history	... ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary (Article 54).	The introduction of the complainant's sexual history in both civil and criminal proceedings is prohibited when it is unrelated to the case (Article 15(e)).
No adverse inference		No adverse inference is drawn solely from a delay of any length between the alleged commission of a sexual offence and the reporting thereof (Article 15(e)).

4.2 Kosovo* legal framework

Under Kosovo* legal framework, the Kosovo* Criminal Procedure Code Article 62, victim's or injured parties have specific rights guaranteed during criminal proceedings. The following rights are protected such as the right of the injured party or victim to be treated with respect by the police, state prosecutors, judges or other body conducting the criminal proceedings; if an injured party of a crime can be identified, the police and state prosecutor or other body conducting the criminal proceedings shall contact the injured party in a reasonable manner and inform him or her that he or she is an injured party; the injured party has the status of a party to

the criminal proceeding; and the injured party has the right to a reasonable, court-ordered restitution from a defendant or defendants who have admitted to or been adjudged to be guilty for the financial, physical and emotional harm caused by the commission of a criminal offence for which the defendant or defendants have been adjudged guilty. Further, under Article 63,2 the injured party or the victim may be represented by a victim advocate. Further, once an investigation has been initiated, the state prosecutor shall interview and take pretrial testimony from witnesses, authorise the taking of expert testimony and reports, and shall collect other evidence as authorized by law (Article 119 of the Criminal Procedure Code of Kosovo*). During the investigation, the injured party may request the state prosecutor to take or preserve evidence that may or could be reasonably expected to demonstrate the harm caused by the criminal offence, the pain and suffering by the victim, or other costs associated with the criminal offence. Also, the state prosecutor shall lawfully obtain all tangible evidence, if possible, prior to taking relevant pretrial testimonial. Such tangible evidence shall include, but is not limited to:

- a) tangible evidence obtained at the scene of the crime; b) tangible evidence seized from the search of the premises of the defendant, c) tangible evidence seized from the search of the person of the defendant prior to or during his or her arrest, d) photographs of or forensic reports about tangible evidence, or e) any other tangible evidence lawfully obtained under criminal proceedings whose existence and form provide evidence relevant to the investigation.

Also during the investigation, the victim, victim's representative or victim advocate may request the state prosecutor to take or preserve pretrial testimony that may or could be reasonably expected to demonstrate the harm caused by the criminal offence, the pain and suffering by the victim, or other costs associated with the criminal offence (Article 122). In addition, the criminal proceedings also allow for expert analysis whereas the victim or victim advocate may request the state prosecutor to take expert testimony (Article 139).

4.3 Non-discriminatory interpretation and application of evidentiary rules

Prosecutors and judges have a duty to ensure non-discriminatory interpretation and application of evidentiary rules. Both have a role in ensuring that all relevant evidence is brought before the court, as well as objective to or disallowing irrelevant evidence being brought before the court.

4.3.1 Considerations regarding relevancy

For evidence to be admissible it must be relevant (i.e. when it has any tendency in reason to make the fact that it is offered to prove or disprove either more or less probable), material (i.e. if it is offered to prove a fact that is at issue in the case) and competent (i.e. if it meets requirements of reliability). Because a common defence tactic is to focus on irrelevant and peripheral details, relying on myths and gender stereotypes to attack the victim's credibility, prosecutors and judges need to:

- Recognise common myths and gender stereotyping in defence's line of questioning that attempt to cast doubt on the victim's credibility merely by focusing on behaviour that is viewed as 'morally suspicious', such as walking along late at night; dressing provocatively, drinking alcohol.
- Understand the distorting effect of evidence grounded in myths and gender stereotypes. Examine the prejudicial effects of evidentiary rules and the ways in which this type of evidence reinforces gender inequalities. For instance, evidence introduced to prove that the complainant is sexual promiscuous in order to suggest that she is more likely to make a false allegation and is generally less trustworthy or evidence that she is dressed a certain way to suggest that she is more likely to consent to the sexual act.
- Query the relevancy of this line of questioning during the trial and stop prejudicial defence questioning. Ask if the evidence's probative value is substantially outweighed by a danger of unfair prejudice, confusing the issue, misleading the trier of fact, or wasting time?
- If the line of questioning has been allowed, then assess whether the evidence is relevant and explicitly call out the use of myths and gender stereotypes.

4.3.2 Considerations regarding the admissibility of sexual history evidence

Another common strategy for defence counsel is to introduce evidence concerning the victim's sexual history. Defence lawyer's direct and indirect use of sexual history evidence remains a powerful tool to undermine the credibility of the prosecution's chief and often the only witness, the complainant. Allowing such evidence based on the myth that unchaste women are less worthy of belief (that they are less credible) and unchaste women are more likely than chaste women to consent (that they have consented to the sex).

Prosecutors and judges should consider:

- Intervening to prevent the introduction of inadmissible evidence on the victim's prior sexual conduct and consent.
- Seeking to hold closed hearings in the event that there are questions about the admissibility of sexual history evidence.
- Avoid the use of myths and gender stereotyping in arguing or determining admissibility.
- Provide detail legal reasoning as to why sexual history evidence is not relevant, connecting this issue with gendered inequality or the prejudicial effects of sexual history evidence.

4.3.3 Considerations regarding prompt complaint requirements or practices

Prompt complaint requirements are procedural or evidentiary rules or practices that refer to the timeframe between the incident of violence and when the report is made. Sometimes statute of limitations provisions require the victim to report the crime within a set number of days, weeks or months or else prosecution will be barred by law. Other provisions may include a rule where an adverse inference can be made as a result of delay on the part of the victim in making a report. Even when there is no explicit rule, defence lawyers and even judges continue to make reference to the delay in reporting and how this is a factor for consideration of a complainant's credibility. Research counters the argument that delayed reports are somehow less truthful.¹⁰³

Prosecutors and judges should consider:

- Intervening to prevent cross-examination about the victim's credibility based on the introduction of delayed reporting.
- Avoiding the use of myths and gender stereotyping in assessing the lack of physical evidence due to late reporting is fatal to the case.
- Avoiding using language in judgments that implies the victim is blamed for delayed reporting.
- Providing detail legal reasoning as to why no adverse inference should be drawn solely from a delay in reporting.

4.3.4 Considerations regarding corroboration requirements or practices

Corroboration requirements are provisions or practices that prohibit convictions solely on the basis of a victim's testimony and require corroborating evidence such as physical, medical or forensic evidence or the testimony of additional witnesses that supports the victim's testimony. This is linked to the cautionary rule which requires courts to treat the evidence of a victim of sexual violence with special caution and to take special care if grounding a conviction on the basis of such evidence alone. In cases tried by juries, the court provides a cautionary instruction to the jury. Traditionally corroboration requirements and cautionary rules where they existed only related to sexual violence offences. Even where a country has removed the rule regarding corroboration requirements, as required by international law, a common practice by defence is to frame the question of how to apply reasonable doubt in 'he said/ she said' cases as weighing in favour of the defendant, no matter the assessment of the credibility of the incident based on the victim's testimony. Studies also show that courts remain reluctant to convict solely on the basis of the victim's testimony.¹⁰⁴

103 International Commission of Jurists. 2015. *Sexual Violence against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice*.

104 International Commission of Jurists. 2015. "Sexual Violence against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice".

Prosecutors and judges should consider:

- Intervening to prevent cross-examination about the victim's credibility based on the lack of corroborating evidence.
- Avoiding the use of myths and gender stereotyping in assessing the lack of physical evidence.
- Appreciating that there is no need for corroborating evidence when objectively determining credibility issues. Medical evidence is not required as corroboration.
- Not dismissing victim's testimony as not credible unless the contrary is clearly indicated.
- Understanding that there is no need for a medical examination.
- Stop analysing whether the victim could have fought back in arguments or judgments.

4.3.5 Considerations regarding propensity evidence of defendant

Propensity evidence, sometimes referred to as evidence of the defendant's bad character, is usually only admitted if determined to be relevant. It might be excluded if its probative value is outweighed by its prejudicial risk.

Prosecutors and judges should consider:

- Submitting or admitting propensity evidence where it has sufficiently high probative value to outweigh its prejudicial risk.
- Balancing between the risk that the fact finder, hearing that the defendant has committed other misconduct, will be unduly influenced by the propensity evidence, will give it too much weight, and be too ready to convict versus the relevancy and probative evidence that if kept out might risk the perpetrator going free.

4.3.6 Considerations regarding the use of expert witnesses

Expert evidence can assist prosecutors and judges in providing context for a better understanding of the dynamics of gender-based violence, why the victims behaved in certain ways, and the myths and gender stereotypes around these cases. The general rule regarding expert witnesses is that they can only be called to give evidence of issues that are outside the expertise of the court. They cannot be used to bolster a case that is already weak. Each case must be taken on its own merits and an expert should only be called where they can legally assist the court.

Prosecutors and judges should consider whether the use of an expert witness¹⁰⁵:

- Will inform the court of commonly known characteristics of abuse victims so that they can compare the behaviour of the victim to that profile.
- Will reduce the likelihood that the court will develop negative feelings against the victim based on myths and gender stereotyping.
- Will enable the court to examine the facts without interference of bias or emotion.
- Challenge the plausibility of the victim's account at trial, not to bolster the victim's own personal qualities of truth-telling or falsehood.
- Explain why victims retract and give the court reason to assess in-court retractions.
- Assist the court in evaluating credibility, not enhancing that credibility.

4.4 Special considerations for prosecutors

4.4.1 Developing a prosecution strategy and preparing for trial

Prosecuting cases involving violence against women and domestic violence requires special approaches at each stage of the criminal justice process – from developing a strategy to post-conviction monitoring. These cases also require prosecutors to take a proactive approach to ensuring for comprehensive investigations and the collection of evidence as well as being preparing a strategy for presenting evidence at trial. One of the

¹⁰⁵ UNODC. 2014. Handbook on Effective Prosecution Response to Violence against Women and Girls. P. 112.

main challenges to building a strong case for trial in these cases is the fact that in a large number of cases, the victim ends up not supporting the prosecution. As previously discussed, this is due to a number of very good reasons.

An important aspect of case preparation is to anticipate and plan for the possible introduction of prejudicial, embarrassing or harmful evidence by the defence. Particular attention should be paid to evidence that may be damaging to the witness, but which is not relevant or has no probative value in the case (for example, evidence of past sexual conduct, reputation, of substance abuse, etc.) Very often, intrusive questioning in cases of violence against women is used in order to present evidence based on stereotypes and assumptions about women's behaviour, dress and private life. Prosecutors must be ready to object to, and shield victims/witnesses from, negative character evidence that may be prejudicial and unrelated to the incident(s) being prosecuted.

Prosecutors need to consider the following when developing a strategy for trial:

- These cases should proceed on a timely basis. Delays and protected criminal proceedings have a negative impact on victims, can increase the risk of retaliation, contribute to long-term mental suffering as well as make her feel disconnected to with the criminal case. This might contribute to the victim's reluctance to continue with the criminal case.
- While the decision to prosecute *ex officio* is an option, prosecutors need to be supportive to the victims who fear or mistrust the criminal justice system. They need to take the time to explain the criminal justice process, including evidentiary rules in order to encourage them to continue their participation.
- Prosecutors need to have a plan on how they will oppose potential use of discriminatory defence tactics, using the research and knowledge about the dynamics of gender-based violence against women and common myths and gender stereotyping.
- Prosecutors need to be creative about other sources of evidence, particularly if they are concerned that the victim might withdraw. For example, evidence from other corroborating witnesses, independent medical evidence, photographic evidence and evidence of police officers who attend the scene.

4.5 Special consideration for judges

4.5.1 Efficient court case management

Judges should monitor the proceedings and intervene if the attention shifts toward questioning the victim's character and credibility, rather than establishing the guilt or innocence of the accused. Indeed, a case based on evidence beyond the statements of the victim is less vulnerable to challenges concerning her credibility.

Judges should consider:

- Recall the case of *Y v. Slovenia* where the European Court of Human Rights found that the judge failed in preventing the defence personally cross-examined the 14-year-old victim of sexual assault, asking her over 100 questions during four hearings spanning over a seven-month period.¹⁰⁶
- Be aware that as a judge, the manner in which you express your views in courtrooms can shape expectations for justice held by victims, perpetrators, court personnel and other actors involved in investigations and legal proceedings.
- Make sure that decisions and statements from the bench and courtroom demeanour demonstrates that the court take violence against women and domestic violence seriously.
- Treat victims with courtesy, compassion, dignity and sensitivity, even if they are not present.
- Consider the victim and her family's safety and her needs for support at all levels, at all times.
- Develop clear and written protocols detailing the procedure to handle a case.
- Mitigate the harmful effects of a forensic system, limiting the number of times the victim has to repeat her account.
- Admitting the testimony of the victim as sufficient evidence.

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

4.5 Options for exercises

Option 1: Role play / develop short videos

Develop short scenario role plays or videos in which defence counsel tries to apply evidentiary rules in a discriminatory manner (using examples from the Kosovo* courts). Then facilitate discussion as to how the application is discriminatory and what steps prosecutors/judges can take in response.

5. Sentencing and remedies

5.1 International standards

International standards provide for the right to an effective remedy for persons whose human rights have been violated. The right to a remedy, which encompasses both the imposition of effective, proportionate and dissuasive sanctions and the availability of compensation, also constitute elements of the due diligence standard. In cases of violence against women and domestic violence, prosecutors and judges should ensure that the sentence reflects the serious nature of violence against women and domestic violence and the gravity of the crimes committed. Sentencing in such cases should be fair, non-discriminatory, proportionate and consistent. The primary goals of sentencing must be to prevent the reoccurrence of violence, to protect the victim and to hold the perpetrator accountable.

The table below provides an overview of the international standards on sentencing and remedies, highlighting both the Istanbul Convention provisions and the standards in the UN Updated Model Strategies and Practical Measures.

	Istanbul Convention	UN Updated Model Strategies
Sanctions	<p>Article 45 (1) ... ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness. These sanctions shall include, where appropriate, sentences involving the deprivation of liberty which can give rise to extradition.</p> <p>Article 45(2) Parties may adopt other measures in relation to perpetrators, such as:</p> <p>Monitoring or supervision of convicted persons;</p> <p>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.</p>	<p>Article 17 (a) ensure sentencing policies:</p> <p>hold offenders accountable for their acts related to violence against women;</p> <p>denounce and deter such violence;</p> <p>stop violent behaviour;</p> <p>promote victim and community safety, including by separating the offender from the victim, as well as from society where necessary;</p> <p>take into account the impact on victims and their family members of sentences imposed on perpetrators;</p> <p>provide sanctions that ensure that the perpetrators are sentenced in a manner commensurate with the severity of the offence;</p> <p>provide reparations for harms caused as a result of the violence; and</p> <p>promote the rehabilitation of the perpetrator, including a sense of responsibility in offenders and where appropriate, reintegration of the perpetrator into the community.</p>

Aggravating factors	<p>Article 46 ... ensure that the following circumstances, insofar as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sentence:</p> <p>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;</p> <p>the offence, or related offences, were committed repeatedly;</p> <p>the offence was committed against a person made vulnerable by particular circumstances;</p> <p>the offence was committed against or in the presence of a child;</p> <p>the offence was committed by two or more people acting together;</p> <p>the offence was preceded or accompanied by extreme levels of violence;</p> <p>the offence was committed with the use or threat of a weapon; the offence resulted in severe physical or psychological harm for the victim;</p> <p>the perpetrator had previously been convicted of offences of a similar nature.</p>	<p>Article 17(b) To ensure that their national laws take into account specific circumstances as aggravating factors for sentencing purposes, include for example, repeated violent acts, abuse of a position of trust or authority, perpetration of violence against a spouse or a person in a close relationship with the perpetrator, perpetration of violence against a person under 18 years of age.</p>
Notification	<p>Article 56.b ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively.</p>	<p>Article 17(c): ensure the right of a victim of violence to be notified of the offender's release from detention or imprisonment.</p>
Taking into account victimisation		<p>Article 17(d): take into account, in the sentencing process, the severity of the physical and psychological harm and the impact of victimisation, including through victim impact statements.</p>
Full range of sentencing		<p>Article 17(e): make available to the courts, through legislation, a full range of sentencing dispositions to protect the victim, other affected persons and society from further violence, and to rehabilitate the perpetrator, as appropriate.</p>

Perpetrator treatment programmes	<p>Article 16 ... to set up or support programmes aimed at teaching perpetrators of domestic violence to adopt non-violent behaviour in interpersonal relationships with a view to preventing further violence and changing violent behaviour patterns.</p> <p>Article 16.2 to set up or support treatment programmes aimed at preventing perpetrators, in particular sex offenders, from re-offending.</p>	<p>Article 17(f and g): develop and evaluate treatment and reintegration / rehabilitation programmes for perpetrators of different types of violence against women that prioritise the safety of the victims; and ensure that judicial and correctional authorities, as appropriate, monitor perpetrators' compliance with any treatment ordered.</p>
Compensation	<p>Article 30(1) ... ensure that victims have the right to claim compensation from perpetrators for any of the offences established in accordance with this Convention.</p> <p>(2) Adequate state compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or state-funded health and social provisions. This does not preclude parties from claiming regress for compensation awarded from the perpetrator as long as due regard is paid to the victim's safety.</p>	<p>Article 17(a) provide reparations for harms caused as a result of the violence;</p>
Civil remedies	<p>Article 29(1) ... provide victims with adequate civil remedies against the perpetrator.</p> <p>(2) ... to provide victims with adequate civil remedies against state authorities that have failed in their duty to take the necessary preventive or protective measures within the scope of their powers.</p>	

Effective, proportionate, dissuasive sanctions

Sanctions, whether they are of a criminal or civil nature, are to be effective, proportionate and dissuasive (Article 45, Istanbul Convention). It is up to the government to decide on the type of offence that merits a prison sentence. In terms of what considerations prosecutors and judges should be taking in order to ensure for effective, proportionate and dissuasive sanctions in cases of domestic violence, which often involve a pattern of coercion and control involving ongoing and different forms of violence, but different legal proceedings focusing only on the most recent incident of violent, guidance can be had from the European Court of Human Rights. In *A v. Croatia* the ECtHR found that the state failed to adequately protect the victim's rights in light of the authorities failure to consider the different criminal and minor offences proceedings concerning multiple acts committed by the same person against the same victim, thus failing to view the case history as a whole.¹⁰⁷ This case highlights the importance of coordination within the legal system and giving due consideration to the entire history of abuse and criminal history when determining the appropriate sanction.

The ECtHR also provides guidance in terms of imposing fines and enforcing fines as punishment in domestic violence cases. The case law provides that the imposition and enforcement of fines as punishment do not constitute a deterrent and may not be considered as effective state intervention, in violation of the state's due diligence obligations. Increasing financial liabilities for vulnerable families are likely to exacerbate existing tensions and conflict. The imposition of fines, moreover, fails to reflect the gravity of the offence.

¹⁰⁷ *A v Croatia*, European Court of Human Rights.

Aggravating circumstances

Violence committed in the family is to be considered as an aggravating circumstance in determining the penalty when not already a constituent element of the offence. These aggravating circumstances should thus be within the national legal framework to enable judges to consider them when sentencing perpetrators of domestic violence, although there is no obligation for judges to apply them in a particular case.

Compensation

The scope of state compensation called for in the Istanbul Convention is limited to “serious” injury and impairment of health, this does not preclude states parties from providing more generous compensation arrangements, nor from setting higher and/or lower limits for any or all elements of the compensation to be paid by the state. The reference to the “victim’s safety” requires states parties to ensure that any measures taken to claim redress for compensation from the perpetrator give due consideration to the consequences of these measures for the safety of the victim. This covers the situation where the perpetrator may want to avenge himself against the victim for having to pay compensation to the state.

5.2 Kosovo* Legal Framework

According to Kosovo* legislation any case of murder in cases affecting vulnerable victims including, children, pregnant women or family members, are considered as cases of aggravated murder (Article 173), and a punishment of imprisonment is foreseen of not less than 10 years or of life-long imprisonment.¹⁰⁸ Also, any person committing **physical, psychological or economic violence or mistreatment** with the intent to violate the dignity of another person within a domestic relationship shall be punished by fine and imprisonment of up to three (3) years. If such acts in the Criminal Code are **committed within a domestic relationship**, it will be considered as an aggravating circumstance under Kosovo* Criminal Code Article 248.

Further, the SOPs for Victim Protection and Assistance within the State Prosecutor’s Office strengthen the basis for victim compensation in Kosovo*.¹⁰⁹ These SOPs provide that in the event victims are not able to obtain compensation from the defendant they have the option of seeking compensation from the state. Moreover, the SOPs list the European Directive on the Compensation of Victims of Violent Crimes as a relevant international document. In 2015 Kosovo* adopted the Law 05/L-036 on Crime Victim Compensation with concrete steps to compensate victims of crime.¹¹⁰ This law regulates the right to financial compensation for victims of violent crimes as well as their dependents for certain violent crimes, including human trafficking, rape, the sexual abuse of children, murder and domestic violence cases. However, the Commission on victims of crime compensation may decide positively on applications beyond these cases, if they find particular vulnerability of the victim of crime.

The list of damages to be compensated includes serious physical injuries and disturbances to mental health, losing the capacity to work, hospitalisation expenses and expenses related to other medical aspects, funeral expenses and damages for destroyed medical devices as well as procedural expenses for filling out the compensation application.¹¹¹ According to reports, at the time of writing this manual, no victim of domestic violence has benefited by the State Commission for Compensation of victims of crime and only two victims of trafficking in human beings have received compensation.¹¹²

108 A punishment of imprisonment of not less than ten (10) years or of life long imprisonment shall be imposed on any person who: 1.1 deprives a child of his or her life; 1.2 deprives a pregnant woman of her life; 1.3 deprives a family member of his or her life; (Article 173 of the Criminal Code of Kosovo*).

109 State Prosecutor’s Office, Standard Operating Procedures for Victim Protection and Assistance Office, 2013. Available at: www.pshks.net/repository/docs/No.1202.2013_Directive_on_SOP_FOR_THE_VPAO.pdf.

110 Assembly of the Republic of Kosovo*, Law No. 05/L-036 on Crime Victim Compensation, 2015, at: <http://www.kuvendikosoves.org/common/docs/ligjet/05-L-036%20a.pdf>.

111 See Compensation to Victims of Crime: Response to Domestic Violence and Human Trafficking Cases in Kosovo*, KIPRED 2018. Available at http://www.kipred.org/repository/docs/Final_English_Version_141863.pdf.

112 See “Compensation to Victims of Crime: Response to Domestic Violence and Human Trafficking cases in Kosovo”, KIPRED, GLPS and Artpolis for EU Office in Kosovo*. 2018. Available at http://www.kipred.org/repository/docs/Final_English_Version_141863.pdf.

5.3 Some considerations for Prosecutors and Judges

Considerations for prosecutors

While sentencing is a decision for the court, generally prosecutors have a duty to offer assistance to the sentencing court in reaching its decision as to the appropriate sentence.¹¹³ Prosecutors should consider:

- Requesting a sentencing hearing and ensuring that the court has all the information it needs to sentence appropriately. Prosecutors have a duty to ensure that the court has proper information for sentencing and also to provide advice and recommendations, which could include information about aggravating factors or a victim impact statement.
- Ensuring that the court considers a risk-assessment of offender dangerousness at the time of sentencing. Prosecutors should ensure that when making recommendations, they consider offering information about the results of a risk assessment. Prosecutors should ensure that they apply for appropriate ancillary orders which need to take into account the victim's needs, including their future protection.
- Ensuring that the court hears from the victim at the time of sentencing. Prosecutors should prepare the victim for a sentencing hearing and explain her options for providing input. The victim should describe, whether in a victim impact statement or other means, her opinion for sentencing of the perpetrator, describe how she and her family and friends have been affected by the crime and raise any other concerns that she believes are relevant to sentencing or in need of public expression (e.g. if she believes there is continued risk). There might be a variety of ways available to the victim to discuss the impact of the violence on her life including: orally addressing the court; writing a letter to the judge; submitting a victim impact statement; having family, friends and members of the community address the court (orally or in writing); or cooperating with the probation officer or court appointed officer who is conducting a pre-sentence report. Victim impact statements can be useful tools to "re-focus a judge's attention on the harm caused to the victim and to the community at the time of sentencing. Having the opportunity to express herself might assist in the victim's recovery".¹¹⁴
- Recommending a sentence that considers the nature and gravity of the offense, the history of sexual and physical abuse, previous efforts at rehabilitation, the defendant's character and current rehabilitative needs as well as the interests of the community in protection and punishment. Prosecutors should be prepared to supply the court with relevant authorities, precedent cases, or drawing attention to sentencing guidelines.
- Being alert to arguments in mitigation that detract from the character of a witness and be ready to challenge anything which is misleading, untrue or unfair. Prosecutors should be prepared to challenge arguments made by defence counsel for reducing sentencing for "honour-related" crimes, or where the victims are viewed as particular "types", such as sex workers or a non-virgin.

Some considerations for judges

It is the responsibility of judges to determine the appropriate sentencing for cases involving violence against women and domestic violence. They are key in holding perpetrators accountable and the judgments and sentences they issue reflect the tolerance / intolerance of such violence in the society. Judges should consider the following when dealing with cases involving violence against women and domestic violence¹¹⁵:

- In determining the offence category, consider which categories of harm and culpability the offence falls into – and the category range of sentences prescribed. This includes considering the harm (e.g. severity of the psychological or physical harm; additional degradation; vulnerable victim) and the culpability (e.g. previous violence against the victim, abuse of trust, recording of the offence, offence motivated by the gender of the victim).
- Recognising biases when considering aggravating factors and mitigating factors. For example, practices show existing bias behind the practice of considering violent crimes committed by strangers as being more reprehensible than violence crimes committed by persons known to the victim or where repeat-

¹¹³ These points are adapted from 2014. Handbook on Effective Prosecution Responses to Violence against Women and UNODC. 2017. Resource book for trainers on effective prosecution response to violence against women and girls.

¹¹⁴ UNODC. 2014. Handbook on Effective Prosecution Responses to Violence against Women, p. 123.

¹¹⁵ These points are adapted from UNODC. 2019. Handbook for the judiciary on effective criminal justice responses to gender-based violence against women and girls.

ed incidents of intimate partner violence are seen as common and the court applies the same penalty for each assault without considering the deterrent effect in applying increased sanctions for repeated incidents. In terms of mitigating factors, judges should be careful to consider the usual factors such as no previous conviction or previous good character as this does not reflect the reality of violence against women and domestic violence.

- In determining a sentence in respect of the offence of rape, the judge should not consider the following to justify a lesser sentence: the complainant's previous sexual history; an apparent lack of physical injury to the complainant; or any relationship between the accused person and the complainant prior to the offence being committed.
- Determining if there is a need to consider making additional orders, such as orders for rehabilitation or intervention treatment programmes. Such treatment or rehabilitation programmes may be part of sentencing, and be in addition to other penalties, including imprisonment or probation. Such orders recognise that simply removing a perpetrator from a situation does not ameliorate the real issue of re-victimisation, whether it is victimising the same victim or finding someone new to victimise. These types of orders as part of sentences focus on the changing of the behaviour of the perpetrator through rehabilitation which seeks to prevent him from repeating violent behaviour.
- In considering whether a rehabilitation or intervention treatment programme is appropriate, judges should consider such an order be part of a conviction rather than an alternative to a sentence that would be entered into the criminal record; require court supervision and court sanction if offenders do not satisfactorily complete the programme; programmes commit to working within a gendered structural analysis of violence against women as opposed to a simplistic or individualised anger management or alcohol/drug abuse paradigm, and accredited with an organisation that supports victim feedback as to whether the violence continues; such programme must prioritise victim safety.
- In ordering the sentence, judges should formulate clear reasons as to why such a sentence is effective, proportionate and dissuasive.

Some considerations for prosecutors and judges when considering effective, proportionate and dissuasive sanctions¹¹⁶

- Favour more intrusive dispositions. Research shows that more intrusive sentences (such as incarceration, work release, electronic monitoring and conditioned probation) significantly reduced re-arrest for domestic violence over the less intrusive sentences of fines or suspended sentences without probation.
- Take into account the whole prior criminal record. When considering the appropriate sentence, consider both the history of violence against women and domestic violence and the entire criminal history, as both indicate risk of re-abuse as well as general criminality. Some disposition studies reflect that domestic violence dispositions differ from standard sentencing patterns in that they often only focus on whether there is an abusive history and tend to disregard prior criminal history that are not domestic violence related. However, research suggests that both the domestic violence history and non-related criminal histories indicate risk of re-abuse as well as general criminality.
- Take into account "failure to appear". Studies indicate that perpetrators who do not show up for court appearance are more at risk for re-abuse than those who do show.
- Exercise caution in recommending conditional discharges for "first" offenders¹¹⁷. There are some studies that show that a minimum of a quarter of "first" offenders who are diverted or given dispositions without guilty findings will re-abuse or violate the terms of their conditional release.
- Register sex offenders, where available registry meets human rights standards and provides for individualised assessments.
- Consider the negative impact of fines on the victim. Imposing fines on a convicted perpetrator may interfere with their obligation to pay child support to the victim.
- Consider whether there are aggravating factors. Aggravating factors should enhance sentences.
- Any perpetrator treatment/rehabilitation programmes that is part of a sentence needs to be closely monitored and enforced. Convicted perpetrators ordered to treatment should be subject to court supervision and court sanctions if they do not satisfactorily complete treatment programmes. These pro-

¹¹⁶ The research noted in this section is discussed in further detail in UNODC. 2014. Handbook on Effective Prosecution Responses to Violence against Women.

¹¹⁷ The term 'offender' is used here rather than the broad term 'perpetrator', as this point refers to those perpetrators who have been convicted of the crime. It is important to note that a first time offender may not be a first time perpetrator of violence against women or domestic violence.

grammes need to therefore have adequate funding and resources to ensure timely monitoring and immediate enforcement. To increase programme participation, consider post-dispositional compliance hearings as well as the placement of offenders on supervised probation.

- Consider the effectiveness of perpetrator treatment/rehabilitation programmes. Research indicates programmes that incorporate alcohol and/or drug treatment adds to the likelihood of reduction in re-abuse as many perpetrators abuse alcohol and drugs. According to some studies, there is no evidence that anger management or couples counselling programmes effectively prevent court mandated offenders from re-abusing or committing new offences after treatment. Longer programmes are considered more effective than shorter programmes. However, some research suggests that treatment programmes as such are not likely to protect most victims from further harm from higher risk abusers.
- Restitution and reparations. Where the internal legal system permits the victims can file an application for reparations within a trial procedure on criminal matters, include an order of restitution to the victim who suffered loss as a proximate result of the perpetrator's criminal conduct.

5.4 Options for exercises

Option 1: Small group exercises

Instructions: Divide the group into small groups of prosecutors and judges. Ask each group to develop sentencing guidelines for their profession for cases involving violence against women and domestic violence. You may want to choose one form of violence, such as intimate partner violence or rape.

Option 2: Case study

[Case study adapted from the Council of Europe Training Manual on Preventing and Combating Violence against Women and Domestic Violence in Armenia]

Instructions: Divide the group into small groups of prosecutors and judges. Ask each group to review the case study and answer the appropriate questions.

Case study

Sara and Nick had been in a relationship for 3 years at the time of this incident. There had been past incidents of violence during the relationship but Sara had never reported any of them to the police. She didn't report them because Nick always seemed very remorseful after each incident. He blamed the violence on the stress of his job and the fact that Sara was always 'nagging' him about his drinking and drug consumption. On the day of the incident, Sara was treating Nick to a night out because it had been his birthday during the week. They decided to go away to a hotel for the weekend. On the way up, Sara gave Nick her bank card and pin number to withdraw some cash for the weekend. When they arrived at the hotel, Nick started smoking cannabis. When Sara complained, he started shouting at her that it was his birthday and he could do what he wanted. Sara continued to argue with him and Nick punched her in the face, breaking her nose in the process. The manager of the hotel came to their room because of the noise. He saw that Sara was upset and he saw that her nose was bleeding. He asked her what had happened and she told him that Nick had punched her in the face and had broken her nose. The manager told Nick that he was going to call the police and Nick punched the manager in the face as well, breaking his glasses and cutting him above his left eye. Nick ran out of the room, whilst the manager was calling the police. When the police arrived, they searched the hotel for Nick and found him at the cash machine in the hotel lobby. He had Sara's bank card and had withdrawn some money from her account. The police informed Nick of Sara's and the manager's statements. He admitted hitting Sara and the manager. He also admitted to taking the money out of Sara's bank account. Nick was arrested by the police and charged with causing bodily harm to Sara and the manager.

During the criminal trial, evidence for the prosecution included oral evidence from witnesses, Sara, the hotel manager, the police who attended the scene and a doctor. The defence did not call any evidence. Nick was convicted of causing bodily harm to Sara and the manager.

Questions for the prosecutors:

You have conducted a successful prosecution and Nick has been convicted for the crimes he was charged with. The judge has adjourned the case for sentencing.

- Q1. What information would you need to present during the sentencing hearing?
- Q2. What steps would you take to prepare for the sentencing hearing?
- Q3. What is your recommendation for an appropriate sentence and your arguments to support your recommendation?

Questions for the judges:

You have convicted Nick for the crimes he was charged with. You have adjourned the case for sentencing.

- Q1. What information would you need from the prosecutor to help you issue an appropriate sentence?
- Q2. What factors would you take into account in sentencing Nick?
- Q3. What other measures are available in addition to sentencing Nick?

6. Mediation and reconciliation

Alternative dispute resolution processes are common in family law matters but can also be found in some states' criminal justice systems. The terminology around alternatives methods, particularly those used in the criminal justice system can be confusing. This may, in part be due to using the term 'dispute' in situations of violence, particularly domestic violence, which have historically been seen as merely private matter disputes rather than as criminal matters. The more common terms used in criminal justice systems are diversion and restorative justice. Diversion is related to the formal court process and do not operate within a different way of thinking about the crime or the system. A restorative justice framework is a way of thinking outside of the system, allowing for a more community-based, holistic response to crime.

Terminology

Alternative dispute resolution is understood as methods of resolving disputes alternative to judicial decisions (paragraph 251 of the Explanatory Report of the Istanbul Convention).

Mediation is a form of alternative dispute resolution, where typically an impartial third party, the mediator, assists the parties to negotiate a settlement.

Conciliation is a form of alternative dispute resolution, where a third party, who is usually but not necessarily neutral, meets with the parties both separately and together in an attempt to settle their disputes.

Diversion means any action that suspends criminal justice case processing of the charge, with one or more of the following results: no charges filed, charges dismissed, or charges expunged. The diversion decision can be taken by the police, prosecutors or courts. Diversionary programmes are also known as 'alternative measures' or 'extra-judicial measures'.

Restorative justice recognises how crime affects the victim and community and focuses on repairing the damage caused by the offence and making reparations to the community and to the victim and returning the offender to a productive place in the community.

6.1 International standards

The Istanbul Convention prohibits mandatory alternative dispute resolution processes, including mediation and reconciliation, in relation to cases of violence against women (Article 48). CEDAW's General Recommendation No. 33 on women's access to justice goes further and recommends that states "[e]nsure that cases of violence against women, including domestic violence, are under no circumstances referred to any alternative dispute resolution procedures".¹¹⁸ The CEDAW Committee specifically recommends that "alternative dispute settlement procedures do not restrict access by women to judicial and other remedies in all areas of law, and does not lead to further violation of their rights."

While the drafters of the Istanbul Convention did not question the advantages of alternative methods in many civil and criminal matters, they wished to emphasise the negative effects these can have in cases of violence against women and domestic violence, in particular if participation in such alternative dispute resolution methods is mandatory and replaces adversarial court proceedings. As the Explanatory Report describes, victims of domestic violence can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator. Mediation and reconciliation practices assume that the parties approach the process with

¹¹⁸ CEDAW's General Recommendation No. 33 on women's access, para 58.

equal resources and power. Cases of violence against women, especially domestic violence, involve unequal power relationships based on acts of assault, violent intimidation, and/or controlling, abusive or humiliating behaviour. As a result of these concerns, in many parts of the world mediation practices have been prohibited in cases of intimate partner violence.

6.2 Kosovo* Legal Framework

Reconciliation attempts remain widespread across institutions and to some extent, the services providers, including shelters for providing assistance and protection to domestic violence victims. However, under the Kosovo* Law on Mediation adopted in August 2018, mediation in cases of domestic violence is strictly prohibited.¹¹⁹ Until June 2016, many of the prosecutors used alternative measures to reconcile cases of domestic violence. Accordingly, only in June 2016, the State Prosecutors' Office released a guiding note prohibiting the use of alternative measures such as reconciliation in domestic violence cases.¹²⁰ According to this guideline, this was needed because the Prosecutors' Office noticed that in cases of violations of protection orders that should be prosecuted *ex officio* as well as in domestic violence cases, prosecutors frequently sent these case to a certified reconciliatory body. Therefore, the guidelines contain an explanation as to why reconciliation should not be used, using the cyclical patterns of domestic violence perpetrators as justification. Nevertheless, while the guide prohibits the use of reconciliation as an alternative measure, it has not halted individual prosecutors from mediating between parties. Indeed, one of the chief prosecutors of the Basic Prosecution in Kosovo* stated that the guide had stopped official mediation, but individual prosecutors continue to mediate between parties, contrary to the explicit requirements of the guide and the Kosovo* Law on Mediation.¹²¹

6.3 Some considerations for Prosecutors and Judges

While the international standards clearly prohibit mandatory alternative dispute measures, it is not clear how prosecutors and judges should apply non-mandatory alternative measures in cases involving violence against women and domestic violence.

Considerations for prosecutors and judges regarding when to use non-mandatory alternative measures in these cases

- The starting position is that alternative measures, including diversion, are NOT appropriate in these cases.
- If it is to be allowed, it should be done in only extraordinary circumstances and with extreme caution.
- Alternative practices, such as conciliation, mediation, diversion or restorative justice, can be detrimental because of the power imbalance and safety risks for women interacting with perpetrators during face to face meetings.
- Violence against women cases need to be taken seriously and being mindful of the traditionally weak responses by the criminal justice system to this violence.
- Mediation should never be considered if there is a big gap in power between the victim and the perpetrator.
- There is a need to be very aware of the dynamics of domestic violence, particularly the history of power and control in intimate partner violence situations, where the victim is not only in an unequal position of power but has been traumatised, including psychologically.
- The main concern is for the safety of the victim, particularly in a situation of power imbalance. This unequal situation puts pressure of the victim who may fear worse if she does not go along with the abuser's suggestion to mediate.
- Another concern is that mediation is seen as a soft option which continues the historical trivialisation of intimate partner violence by the criminal justice system.

119 Assembly of the Republic of Kosovo*, Law No. 06/L-009 on Mediation, 2018, at: <https://md.rksgov.net/desk/inc/media/078A2A69-F572-4826-AC20-61937AADD2FA.pdf>.

120 Office of the State Chief Prosecutor, Guideline 360/16, June 2016.

121 Access to Justice for Victims of Gender-Based Violence in Kosovo*, 2018. Ariana Qosaj-Mustafa and Donjeta Moring for EU Funded project EIDHR, implemented by KIPRED, Artpolis and GLPS.

Guidelines if alternative measures, such as diversion or restorative justice, are to be used in criminal cases

- Any alternative measures used must, at the very least, be premised on an acknowledgement of responsibility for the offence.
- An agreement to make amends for the crime, such as compensating the victim.
- Consider agreeing only if the accused agrees to attend a diversion or treatment programme that encourages the accused to take responsibility of their action and examine the accused's attitudes and beliefs towards women.
- If diversion or rehabilitation/treatment programmes exist, then prosecutors and judges should only refer them if operators of such programmes work with victim services to enable feedback from the victim on recurrence of violence and only if justice officials provide continuous monitoring of compliance with regular, formal reviews and immediate reports to probation offices and police if violence reoccurs.
- The alternative measure must be grounded in an understanding of the context and complexities of violence against women and pay particular attention to the safety and needs of the victim.

The UN-Interagency Essential Services Package for Women and Girls Subjected to Violence: Core Elements and Quality Guidelines suggest minimum criteria for referring to restorative justice.¹²² These standards note that mediation or restorative justice should only be allowed where procedures are in place to guarantee no force, pressure or intimidation has been used. Minimum requirements include:

- The process must offer the same or greater measures of protection of the victim's safety as does the criminal justice process.
- The perpetrator has accepted responsibility.
- The justice service provider (e.g. the prosecutor or judge) approves.
- The mediators are trained and qualified.
- A validated risk assessment has determined that the woman is not at high risk.
- The victim is fully informed of the process and she approves of the mediation.
- The victim freely consents to participate.

An example of good practice where a state has issued guidelines or applying restorative justice in cases involving violence against women and domestic violence is below:

The Canadian Working Group Recommendations for Restorative Justice in Violence against Women Cases¹²³

Restorative Justice (RJ) should not be used in spousal abuse cases except in the following circumstances:

- the RJ process offers the same or greater measures of protection of the survivor's safety as does the criminal justice process;
- the referral to the RJ process is made after the perpetrator has been charged with a crime and with the approval of the prosecutor;
- trained and qualified personnel, using validated risk assessment tools, determine that the case is not high-risk (in other words, if after consideration of a variety of factors, including any history of violence, threats of serious violence, prior breaches of protective court orders, the use or presence of weapons, employment problems, substance abuse and suicide threats, the offender is assessed to be at low risk of re-offending and therefore of low risk of harm to the survivors' safety, as well as that of her children and other dependents, both throughout and after the process); and
- the survivor is fully informed of the proposed RJ process and her wishes are taken into consideration.

In addition, the following conditions and requirements apply:

- i) survivor consent is required and survivor support must be provided where the survivor will be asked to participate in the alternative justice process;

122 UN Women, UNFPA, WHO, UNDP and UNODC. 2015. "Essential Services Package for Women and Girls Subjected to Violence: Core Elements and Quality Guidelines, Module 3 Justice and Policing".

123 Department of Justice, Canada "Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation" (2001) available at www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/pol/spo_e-con_a.pdf.

- ii) the offender fully accepts responsibility for his actions;
- iii) the RJ process is part of a programme approved and overseen by government for the purpose of providing RJ responses to spousal abuse;
- iv) the RJ process is transparent (e.g. it maintains formal records of the actions taken by those engaged in the process) and is undertaken in a timely and reasonable manner;
- v) the RJ process has the capacity to deal with spousal abuse cases and is delivered and supervised by persons possessing the requisite skill, training and capacity, including the ability to recognise and address any power imbalances, as well as cultural differences; and
- vi) the possibility of criminal conviction and sentence remains if the process fails.

The Working Group found that the use of RJ processes in violence against women cases should also be supported by the following activities: development and delivery of ongoing training for those involved in conducting risk assessment and the delivery and supervision of the alternative justice processes and programmes, including criminal justice personnel; development and application of validated risk assessment tools for spousal abuse cases; and ongoing monitoring and evaluation of alternative justice responses, including those used in spousal abuse cases, against new evidence-based research on the effectiveness of these processes, their ability to ensure the safety of the survivor and her children, and their ability to reduce the likelihood of re-offending.

6.4 Options for exercises

Questions to the plenary

- Q. What are the pros and cons to diversion or restorative justice? In particular in cases involving violence against women and domestic violence?
- Q. Is diversion or restorative justice allowed in your jurisdiction?
- Q. If yes, do you have guidelines for using diversion or restorative justice in cases involving violence against women?

Part 3: Preparing for a training

1.0 Trainer's Toolbox: Tips and Methodological Guidance for Trainers

1.1 Preparing for the Training

There are a number of steps to take in preparing for a specific training course. It should be noted that this Manual has been developed following a training needs assessment conducted by the Council of Europe in conjunction with the Academy of Justice. This manual responds to the identified performance requirements and the knowledge, skills and abilities needed by prosecutors and judges in handling cases involving violence against women and domestic violence.

Step 1: Learning about the participants in advance

It is important for trainers to know how many participants will attend the course and to get an understanding of the trainees' background and level of experience.

A. Gather what information you can from the Academy of Justice, such as:

- How many people will be at the training?
- Who are they?
- What is their understanding of the subject? (E.g. new recruits, junior or senior professionals)
- What is their age, gender and educational background?
- Are there any special needs that you need to be aware of?
- Do they know each other?

B. Send a pre-training questionnaire to all participants

The participants should be asked to fill in a brief questionnaire with a two-fold objective:

- To assess the participants' current level of knowledge and experience on the topic; and
- To investigate specific issues of their interest/concern.

This information will assist you in planning which modules to focus on and the type of activities / training methodologies to use. For example, pair work is more difficult with large groups, and more debrief time will be needed the more participants are in the course

Step 2: Establishing the training team and dividing the training responsibilities

Training on violence against women is an intensive and emotionally challenging issue. It is suggested that the training be delivered by a team of trainers. It is important to identify the training coordinator and all co-trainers and facilitators and have their input when designing the course programme. There needs to be agreement as to the training roles and who will do what. Each trainer needs to adapt this training material to the

sessions to which they are formally assigned and in keeping in mind the time limitations set out in the course programme. Trainers should think about what practical examples they might want to give to the participants, based on their professional experience, to assist them in implementing the relevant human rights standards in their daily work.

Step 3: Sending training kits to participants in advance

The participants should receive the training kit and ideally the finalised Training Curriculum before the opening session.

The training kit could be made up of relevant publications and handouts for their additional reading. Consider including:

- ✓ A Trainee's version of this Manual which includes the information sections of each Module.
- ✓ A copy of the Istanbul Convention.
- ✓ UN Essential Services Package for Women and Girls Subject to Violence – Module 3: Justice and Policing

Step 4: Prepare for each teaching session

Before you begin a course, you need to ensure that all supplies and equipment are on hand and in working order. It is advisable to arrive at least 1 hour before the start of the session, so you can be prepared for any eventuality. Here is a sample list of supplies/equipment that may be needed:

- Note taking pad/pencil for each participant
- Easels (flip chart stand) with adequate supply of paper and a variety of colour markers
- A4 paper
- Projector (optional)
- Video equipment if appropriate (optional)
- Trainee's kit for each participant (if not distributed prior to training course)
- Name cards for each participant
- Comfortable chairs, if possible, and a friendly seating arrangement (e.g. U shape or small tables)
- Break-out rooms close by, or large rooms with the possibility to hold at least 4 small groups
- An agenda for each participant
- Water and glasses
- Copies of handouts

Be completely prepared and set up when participants arrive. From the time the first participant arrives, the trainers' focus should be on them, not on their preparation. This is a time to help the participants feel comfortable about their new learning environment.

1.2 Training tips during the course

Tips for conducting the opening session of the training course

The purpose of this session is to welcome the participants to the training course, discuss the purpose and objectives of the course, and to help participants relax and to create a learning environment.

- ✓ It is nice to greet the participants at the door as they come into the room and welcome them to the training course. You might want to provide each arrival with any material, a name card and ask each participant to write his or her name on the card.
- ✓ Have one trainer introduce the basic purpose of the training (e.g. why is there the need for such training), inform participants what to expect from the training course, briefly introduce the training schedule and familiarise them with all the resources and course material to ensure that they are fully involved in appreciating its benefits, thereby promoting active and responsive learning.

- ✓ Consider conducting an icebreaker exercise for the introduction of participants / trainees. Icebreakers are structured exercises designed to relax participants, introduce them to each other and energize them in what is normally an unduly formal atmosphere or situation. Icebreakers are not normally related to the subject matter.
- ✓ There are a numerous ways to conduct icebreakers. Here are two examples: (1) Pair people up together. Give them 60 seconds to exchange some information about themselves (can be guided by a PowerPoint slide) and then ask each one to introduce his or her partner; (2) Invite each participant to introduce himself or herself. Ask them to mention their name, position, interest in the topic, and lastly, ask a fun question, for example, if they could have dinner with anyone, alive or dead, who would it be and why. This exercise is meant to help them learn each other's names and personal and professional information as well as to lower inhibitions by allowing them to share personal information.
- ✓ In addition to explaining to the participants the training objectives, you might also want to ask a few participants what their expectations are and note down the points on a flip chart. Mark the expectations that are repeated, if any, to show the frequency and what expectations they have in common.
- ✓ In explaining the course schedule, you should also explain why it is structured in the way that it is. In particular, you could highlight that it is intended to be participatory, active participation is encouraged and interactive training techniques will be used and participants' knowledge, expertise and practical experience provide an added value to the course and will be drawn on during the course. Emphasise that the training is relevant and helpful to prosecutors and judges in their daily work; it is not a theoretical discussion, but is intended to help them as they go about their regular duties.
- ✓ Spend a few minutes discussing group rules – the rules that will govern how the participants will work with each other during the training course. You might want to ask the participants about what their ideas are for group rules for the training course. List them on a flip chart, and during the training course, the trainer can refer to the list of ground rules and bring the group back on focus. Keep the flip chart posted on the wall throughout the workshop.
- ✓ Ask the group what they think of rules around: working together; interruptions and timekeeping. Possible group rules could include:
 - Turn mobile phones to silent
 - Start on time in the morning
 - Return promptly after breaks
 - Value other people's opinion
 - Be constructive in comments
 - Only one person to speak at a time
 - Confidentiality of participants to be respected

Tips for starting and ending each instruction day

At the start of each training day, you could:

- ✓ Check-in with participants to see if there are any outstanding questions, issues or concerns from the previous module or day.
- ✓ Ask participants what is one thing that stood out for them on the previous day.
- ✓ Orient participants to the planned schedule for the module or day, including times for breaks and planned time the day/lesson will end.

At the end of each training day, you could:

- ✓ Review key learning from the day. This can take the form of a guided discussion, recorded on flipchart paper, in which participants themselves identify key learning points from the day/lesson.
- ✓ Check-in with participants to see if there are any outstanding questions, issues or concerns from the day/lesson.
- ✓ Orient participants to the schedule and topics to be covered on the following day.

Working as a training team during the course

- ✓ Participate in daily pre- and post-course briefings with the rest of the training team.
- ✓ Attend and participate in all course sessions.
- ✓ Meet with the session co-trainers/facilitators the day before each scheduled presentation to plan roles and activity.
- ✓ Deliver presentations and facilitate discussion, adhering to specified time limits, based on the training materials, for the topics assigned to each trainer as a session presenter.
- ✓ Make practical recommendations, based on the trainers' professional experience, during discussion periods and in working groups, including during sessions for which other trainers are not the session presenter.
- ✓ Ensure that any comments or recommendations made are consistent with the international standards set out in the training materials.
- ✓ Participate in a final debriefing session with the rest of the training team.

Timekeeping

- ✓ It is important for you to stick to the published times unless they agree with the participants to vary the timings.
- ✓ If sessions overrun, participants get restless and tend not to concentrate.
- ✓ You must carefully monitor the time and move things on if discussions are going on for too long or if groups have not returned from small group activities.
- ✓ You will need to be flexible in using the material – speeding up or slowing down depending on how the session is going. Some discussion points can be dropped and others added to regulate the time available.

1.3 A Note about Adult Learning Principles

Characteristics of adult learners

Keep in mind the following principles of adult learning when conducting your trainings.

Experience. The trainees will include prosecutors and judges who have accumulated a foundation of life experience and professional knowledge upon which to draw. They also bring a wide variety of attitudes, opinions, ages, responsibilities and concerns as well as may have differing degrees of openness to the subject matter. The participants will have a tremendous ability to assist the facilitator as knowledgeable resources when discussing various aspects of the course material, including the law and prosecutorial and judicial practices.

- ✓ Tips for trainers: You could begin most sessions with requests for participants to tell you what they know or think about each subject and allow time for discussion rather than lecturing.
- ✓ Tips for trainers: Keeping in mind that adults may bring pre-conceived ideas to the training, consider using a facilitative approach to surface these ideas and defuse them early in the session. You could acknowledge their statement respectfully, then ask the group what others think about it. It is quite likely that others in the group will disagree and that will lead to a deeper discussion and challenging of the belief. The group discussion should be able to help the participant who made that statement arrive at a different understanding. Allowing the group to challenge biased statements are more powerful than if the facilitator contradicts them.

Autonomy. Adults will decide for themselves what is important to learn and are self-directed in their learning. They enjoy a democratic, collaborative and participatory environment.

- ✓ Tips for trainers: Use techniques that allow adults to learn concepts independently.

Relevancy. Adults learn what they want to learn, what they are interested in and what they think will be useful to them in their work.

- ✓ Tips for trainers: Use case studies and examples that are relevant to the participants and facilitate discussions based on practical experiences.

Problem-solving orientation. Typically, the participants want information and skills that can be applied to the real world. This course should be providing answers to the problems they experience in their work in dealing with these challenging cases. Remember they are busy professionals and likely not interested in learning for the sake of learning.

- ✓ Tips for trainers: You should demonstrate to them how a lesson or a concept can immediately be tied into their real-world experience as prosecutors or judges working with women who are victims of violence.

Peer acceptance. Adults learn best from those of similar age and background and generally have a need for association and acceptance.

- ✓ Tips for trainers: Allow participants lots of opportunity to share what they know, and have experienced with the subject matter, with others in the group.

Respect. Adults learn when they are treated with respect for their skills, abilities, experience and ideas.

- ✓ Tips for trainers: Treat them as equals, as people who have responsibility for their own learning and actions.
- ✓ Tips for trainers: Acknowledge the breadth of experience they bring to the group and allow them to voice their opinions freely. Listen, respectfully, to their experiences as prosecutors and judges responding to incidents of violence against women.

Individual Pace. Adults learn at different rates, according to their education level, personality and learning style.

- ✓ Tips for trainers: You need to allow for individual learning rates.

Factors that influence how quickly people learn

Intellectual and Experiential. Adults learn best through discovery. Tests have shown that adults remember:

- ✓ Tips for trainers: Demonstrating skills, facilitating interactive discussions and table-top activities, and using case studies and role plays are ways to actively engage learners above and beyond relying on lectures.

Environmental. Lighting, sound, temperature and seating can all influence learning. Sitting in a hard chair for many hours without interaction will slow the learning process dramatically. Adults, and especially in this context, prosecutors and judges are usually moving about and involved with lots of different activities in any given day.

- ✓ Tips for trainers: Use lots of small groups, pair work, discussion and other techniques to keep the class varied and interesting.

Sociological. Adults have high levels of observation and reasoning. This means in adult education all are learners and all are teachers.

- ✓ Tips for trainers: Use group discussion as much as possible, rather than isolating people from each other with paper and pencil exercises. Use pairs and small groups. Group discussion also helps adults to learn by discovery.

1.4 Evaluation

There are numerous ways to evaluate the training course as well as to evaluate the impact of the training. Often extensive and mid- to long-term evaluations of the impact of training are limited due to limitations in resources. Two evaluation approaches will be discussed here.

Training course evaluation

The purpose of this evaluation is to solicit participant feedback that will help you and other trainers better meet the needs of future groups. This includes feedback on the learning environment, approaches to and method of instruction, and the learning materials. In this form, feedback is anonymous. Annex 1 contains a sample training evaluation form that you can copy or adapt for your own use.

- ✓ **Tips for trainers:** When handing out the feedback form, you should encourage participants to provide as many constructive comments as possible.

Pre- and post-test to evaluate participants level of awareness

At the beginning of the training course, you might want to request participants to take a short test measuring their knowledge and understanding related to violence against women and the roles and responsibilities of prosecutors in dealing with gender-based violence cases. The purpose of the test is to estimate whether the participants' awareness has risen in general – not to judge or evaluate any individual participants. The results of each participant will therefore be confidential. The pre- and post- training test contains the same questions. Annex 2 contains a sample of a pre/post-test with answers.

1.5 More tips on being an effective trainer

Principles of effective training

To be an effective trainer/educator of adults, facilitators need to:

- ✓ **Make learning relevant.** Relate their learning to what they already know. Use realistic examples that relate to prosecutors and judges in Kosovo*. The best way to do this is to ask the group for examples when required.
- ✓ **Ask questions.** One of the most important skills of a great facilitator is to ask questions, rather than to deliver information. Use open-ended questioning techniques in discussions. Allow space for experience in the discussion, as participant sharing their experiences help others grow and enrich the group's learning.
- ✓ **Keep people active.** The rule of thumb is that there should be a change of pace or activity approximately every 20 – 30 minutes.
- ✓ **Provide opportunities for doing.** Role play, simulation, discussion, case study...these activities provide an opportunity for people to practice the theory or skill they have just learned. The debriefing of these activities provides an opportunity for feedback and reinforcement.
- ✓ **Training supported by easy to use tools.** Participants should be provided with checklists and guides in forms that they can easily apply to their work after the training.
- ✓ **Conduct the training in an informal environment.** Choose seating arrangements that allow participants to see and interact with each other easily. Round tables, U-shapes and hollow square arrangements work well, depending on the size of the group.
- ✓ **Provide variety and humour.** Adults often learn in direct proportion to the amount of fun they are having. Use energizers and openers that allow people to interact and connect in a relaxed way. It may not seem that violence against women has any room for humour, but even in a training course with such serious content, there is a place for lightness and humour – so long as it is respectful and appropriate.

- ✓ **Serve as the facilitator of the learning process.** Before telling the participants anything, ask them what they already know about the topic. Let the group do the work. The facilitator can be responsible for any information that was missed, or errors in the answers. Steer, do not push. Guide and prompt, do not tell.
- ✓ **Inform participants of the learning objectives.** Adults do not like surprises in training, lest they risk a loss of face or be caught off guard. Explain all objectives thoroughly, and ensure the instructions and suggestions are understood clearly.
- ✓ **Give and solicit feedback.** Ask participants for their opinions and ideas. What did they learn? How will they apply the information in the field as prosecutors and judges? What did they learn that they will immediately use? The art of asking questions is the mark of excellent feedback.
- ✓ **Use repetition.** Repeat an idea using different learning modalities. Repetition brings familiarity, and familiarity leads to transference and a better chance that participants will use the information when they return to their jobs.
- ✓ **Keep the discussion focused on topic.** Remind the group about important points. Emphasise and summarise the main ideas throughout the module. Summarise the discussion and link relevant ideas. Keep the discussion on topic by focusing on principles rather than opinions.
- ✓ **Acknowledge when you do not know the answer or if the question will be dealt with later.** If you do not know something, you need to say so. Ask if someone else in the room can give input. If necessary, do some additional research and find a few minutes later to respond to any unanswered questions. If there is a question that will be discussed in later sessions, you could write the question on a flip chart page and post it somewhere in the classroom. This will remind you to ensure that in the appropriate session, this question will be answered. Once the question is answered, they can cross it out, giving a bold visual cue that it has been answered.
- ✓ **Be positive, but realistic.** Encourage the group to see the many options they have to support victims and survivors of abuse and violence. At the same time, be sensitive to the limitations of what they can do with finite time, skills, and budget. Talk about making choices to take action and make sure to include that the primary choice to take action is always in the hands of the victim/survivor.

2. Dealing with emotional and personal experiences of violence

Coping with your own experiences of violence

If you have experienced violence in a relationship yourself, whether as a victim, friend, or perpetrator, you may find it very hard to run a training course about violent relationships. It may help you to talk to someone you trust about your feelings before you start the training. Whether you have experienced a violent relationship or not, you should think about how you will deal with attitudes to violence which are not the same as your own. As a facilitator, it is your responsibility to create a learning environment that encourages everyone to participate. This can be difficult if people disagree with what you say about the issues, and if you are not able to stay emotionally neutral.

Tips to help you prepare for talking about violence against women

- ✓ Clarify to yourself your feelings about violent relationships.
- ✓ If you choose to share your experiences and opinions, make sure you tell the group that these are your personal ideas. Other people may not share them, and you need to accept this.
- ✓ Think about how you may feel and what you might do if someone in the group shares a personal story that reminds you of your own life. Be aware that talking about violence can bring up strong and uncomfortable feelings for you as well as for participants in the training session.
- ✓ “Debrief” with someone you trust after the session to talk about your feelings. This could be a friend or family member.

Dealing with hostility

Violence against women is an intensely personal and emotional subject. If someone becomes angry, withdrawn, sad, or tearful, you need to have a plan for how to deal with this. For example, you might stop the training and talk privately one to one with the person or refer the person to appropriate resources. You will need to be very flexible with the timing of exercises and breaks, being sensitive to the emotional load in the group, but recognising the need to cover a lot of content.

To deal with resistance and hostility, you will need to be open about your expectations for the course. It is critical to explain to participants how you want them to help you create a safe environment for sharing. Reinforce that there will be no judging of opinions or points of view. There will be acceptance that everyone in the group is in a different relationship with this topic and must approach the topic from where they are. Not everyone will change his or her mind within one module or one week. Do not get drawn into arguments, but instead encourage participants to respectfully debate the issues with each other, using the principles of human rights and the rule of law as guidelines.

Tips to help you deal with hostility:

- ✓ Remain neutral and resist reacting strongly to participants' opinions.
- ✓ Be an active listener.
- ✓ Ask questions instead of making demands.
- ✓ Encourage open communication.
- ✓ Keep the group focused on the issue.
- ✓ Create an atmosphere of respect and safety for all.

Dealing with questions from participants who are resistant to the training

Q: Men are also victims of violence, so why are we talking only about violence against women?

A: The training's focus on improving the justice response to violence against women (emphasising the gendered nature of the violence) does not mean that CoE or the Government of Kosovo* minimises violence experienced by men. However, our focus on VAW recognises a couple of things. (1) Experiences of risk factors associated with crime and victimisation is gendered - men and women experience crime differently. Studies generally find that males are more often the victims of homicides and assaults, apart from sexual assault of which women are most often the victims. Men generally experience violence in the public sphere, whereas women are more likely to experience violence and abuse inside the private domestic sphere, perpetrated by someone they know, often by their own partner. (2) Traditionally, criminal law and justice systems have been developed mainly by men and for men based on their experiences of crime and implemented predominately by men (as police, prosecutors and judges). Study after study has shown the failure of the criminal justice system to respond effectively to female victims of violence in a gender-responsive manner.

Q: Men are also victims of domestic violence, so why are we talking about women all the time?

A: This is a true statement, however global statistics, as well as data from Kosovo*, indicate that in the vast majority of cases (8/9 out of 10) men are perpetrators of domestic violence and women are victims. This is the reason why the training, has a specific focus on violence against women, which is a specific form of gender-based violence.

Q: The problems are with the laws and when those weaknesses are address, the justice system will be improved.

A: While there is always room for legal reform to improve the laws, it is not possible to legislate for every situation, and no country has been able to come up with the "perfect law" to address violence against women and domestic violence. Studies show that even with a robust legal framework, implementation of those laws can be challenging for many reasons (e.g. lack of capacity of justice actors, discriminatory attitudes, lack of specialized infrastructure, etc). Prosecutors and judges can play a critical role in ensuring that the current legislation is interpreted through the lens of international norms and standards, is not influenced by gender stereotyping and is effectively enforced in a way that minimizes secondary victimisation to the victim.

Dealing with the Emotional Aspects of Violence

Violence against women affects almost everyone in some way. It can be emotional and difficult for people to discuss topics that touch them personally. One way of dealing with this is to agree on group norms at the beginning of the course to help shape discussion. As discussed, establish group rules at the beginning of the training course.

Tips to help a group cope if people express emotions during the course

- ✓ Remind the group that violence can bring up strong feelings of hurt, anger, and despair. These are normal feelings.
- ✓ Decide how the group can show support: allow them to share feelings, take a break, give them time to talk to you or someone else privately.
- ✓ Have counselling referrals on hand if anyone feels the need to talk to someone after the course.

Support for you, the trainer

When you are working with, thinking and talking about violence against women, you may find that your emotions and energy get used up very quickly. It is easy to feel disillusioned when a problem like violence against women and domestic violence is so big and seemingly impossible to fix.

Tips for you to find ways to get the support you need.

- ✓ Take time to relax.
- ✓ Talk to someone you trust or see a professional counsellor if you feel you need an unconditional listening ear.
- ✓ One way to help you deal with your feelings is to identify them, label them (for example "I feel anger", or "I feel regret"), and know what they are. This will help you to understand the feelings and see them in context. When you understand why you feel the way you do, you will have a better sense of control over your emotions.

Annex 1: Sample end of training evaluation form

Name of training _____

Date _____

Location _____

The organisers of this training are very interested in obtaining your views about the training course in order to improve its effectiveness. Your answers will be anonymous. Comments you make may be used verbatim in the trainers' final report.

Please take a few minutes to complete this evaluation before leaving the training course.

1. How did you feel about this training course?

[]	[]	[]	[]	[]
Very	Somewhat	Neither	Quite	Very
dissatisfied	dissatisfied	satisfied nor	satisfied	satisfied
		dissatisfied		

2. Please comment on why you felt this way.

3. What helped you to participate in this training course?

4. What hindered you from participating more fully in this training course?

Please indicate your LEVEL OF AGREEMENT with each of the following statements. **Circle** the number that best represents your level of agreement.

1=Strongly Disagree 2=Moderately Disagree 3=Don't Know
4=Moderately Agree 5=Strongly Agree

6. The training course content was relevant to my work as a prosecutor/judge
Disagree 1 2 3 4 5 Agree

7. The training course objectives were understandable.
Disagree 1 2 3 4 5 Agree

8. The training course objectives were met.
Disagree 1 2 3 4 5 Agree

9. The training course tasks were relevant to the course objectives.
Disagree 1 2 3 4 5 Agree

10. The time allocated to tasks was appropriate.
Disagree 1 2 3 4 5 Agree

11. The written materials were informative and useful.
Disagree 1 2 3 4 5 Agree

12. The training course was well designed.
Disagree 1 2 3 4 5 Agree

13. The training course leaders were effective.
Disagree 1 2 3 4 5 Agree

GENERAL IMPRESSIONS:

14. This training course was an enjoyable experience.
Disagree 1 2 3 4 5 Agree

15. This training course was a valuable experience.
Disagree 1 2 3 4 5 Agree

16. This training course met my expectations
Disagree 1 2 3 4 5 Agree

17. The training course content was new to me.

Disagree 1 2 3 4 5 Agree

18. I would recommend this training course to colleagues.

Disagree 1 2 3 4 5 Agree

19. Compared with other training course you have attended would you say that this course was:

[] [] [] [] []
excellent above average average below average poor

Reasons:

20. In your view, were there any extrinsic factors affecting the conduct and success of this course (e.g. days when held; absence of key groups; key individuals etc.)

21. Please rate the amount of time given to the following areas by ticking the box that matches your view:

	Not enough time	Sufficient time	Too much time
Lectures			
Group work			
Discussion			
Experience sharing			
Expressing your views			

GENERAL COMMENTS:

22. What did you find most useful about this training course that will help you with your work?

23. How would improve this training course?

24. What are the major strengths or major weaknesses of the training course? What elements did you especially like? What elements did you especially dislike?

Thank you for your participation and your advice on this form.

Please hand this form to a Course Leader before leaving.

Annex 2: Answers for the pre/post test

1. A woman who has been beaten by her husband might be reluctant to participate in the criminal justice system for a number of reasons. (check all which apply)

- She fears of retaliation from her husband
- She is ashamed at what the community will think
- She does not want her husband to be removed from the home
- She loves her husband
- She does not believe that the police can protect her

2. In a case where the victim reports rape, if she had agreed to go to the accused's apartment for a drink, is this strong evidence that she consented to the subsequent sexual intercourse?

- Yes
- No

3. You have received a file involving a woman who has been injured and who gave a statement to the police stating that her husband assaulted her. If you receive a voice message from the woman telling you she wants to withdraw the case, should you respect her wishes and decide not to proceed?

- Yes
- No

4. A victim is beaten by her husband by being punched, kicked and choked, and hospitalized for 5 days for a broken leg. The only evidence in the file includes a report from her family doctor, a statement from her 9 year old son who witnessed the incident and the victim's statement. Would you decide to prosecute?

- Yes
- No

5. Risk factors for lethal violence include which of the following:

- Unemployment
- Threats of suicide
- Jealous behaviour

6. The majority of rape cases involve strangers, physical force and physical injury.

- True
- False

7. The victim's past sexual history with others is relevant to her credibility in a rape case.

- True
- False

8. Victims are knowledgeable about the criminal justice system and their role in it.

- True
- False

9. The police have taken an initial statement from a victim of sexual violence. You subsequently interview the victim. The day after your interview, you realize you have follow-up questions, so you arrange for another interview. This is good practice.

- True
- False

10. It is a good practice to allow a victim of a sexual offence to have a support person beside her when she is being interviewed and when she testifies in court.

- Yes
- No

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