

EHRAC GUIDE TO LITIGATING SELF-DEFENCE IN THE CONTEXTS OF DOMESTIC VIOLENCE AGAINST WOMEN

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Introduction

Gender-based violence against women remains pervasive in all countries, with high levels of impunity. The Special Rapporteur on torture has stressed that “domestic violence is neither an exceptional occurrence nor a matter of lesser importance, but in fact represents one of the predominant sources of humiliation, violence and death worldwide; roughly comparable to all of the killing and abuse caused by armed conflict”.¹

Although men may also be victims of domestic violence, domestic violence affects women disproportionately, as recognised by the international community.² According to UN Statistics, one in three women will experience physical and/or sexual violence by an intimate partner at some point in her life.³ The UNODC Global Study on Homicide (2019) concluded that “[a] total of 87,000 women were intentionally killed in 2017. More than half (50,000) were killed by intimate partners or other family members, meaning that 137 women across the world were killed by a member of their own family every day”.⁴ More than a third of these women (30,000) were killed by current or former partners.⁵

Evidence also indicates that the majority of women who kill their intimate partners are, in fact, defending their lives and/or the lives of their children from an attack within the context of domestic violence.⁶ However, despite the existence of legal defences, many women who try to protect themselves from imminent harm, or even death, face barriers to accessing justice and end up being convicted of and imprisoned for murder or other violent offences against life.⁷

This Guide is intended to assist practitioners with some experience of litigating these issues or of litigating internationally. It identifies the main obstacles to justice in these cases and sets out the international standards to assist practitioners in challenging and overcoming these obstacles to the extent possible in current legal frameworks. The issue of self-defence is a complex and many-sided issue. The primary focus of this Guide is on the criminal justice system’s response to women who use lethal defensive force within the context of domestic violence (see below Terminology and Scope Section). It is not intended to be an exhaustive analysis of this issue.

The Guide is divided into two sections: Section 1 identifies the main barriers to women’s access to justice in cases of self-defence in a context of domestic violence; Section 2 summarises the primary regional and international standards relevant to these cases. For additional resources in relation to

¹ UNGA, ‘Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (2019) UN Doc A/74/148, para 3.

² *ibid*, para 60; Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) (adopted 11 May 2011, entered into force 01 August 2014) CETS No 210, preamble.

³ WHO, ‘Devastatingly pervasive: 1 in 3 women globally experience violence’ (WHO, 09 March 2021) <<https://www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence>> accessed 29 October 2021; UN DESA Statistics Division, ‘Violence against women and the girl child’ <<https://worlds-women-2020-data-undesa.hub.arcgis.com/apps/50dd1b2d6167437693178836261522e6/explore>>

⁴ UNODC, ‘The Global Study on Homicide’ (2019) <https://www.unodc.org/documents/data-and-analysis/gsh/Booklet_5.pdf> accessed 29 October 2021, p. 10.

⁵ *ibid*.

⁶ Penal Reform International, ‘Women who kill in response to domestic violence’ (Penal Reform International, 2016) <https://cdn.penalreform.org/wp-content/uploads/2016/04/Women_who_kill_in_response_to_domestic_violence_Full_report.pdf> accessed 29 October 2021, p. 4. For Russia, see Zhukova, Kryukov, et al., ‘«Я тебя сейчас, сука, убивать буду». Большинство женщин, осужденных за убийство, защищались от домашнего насилия’ (Mediazona, 25 November 2019) <<https://zona.media/article/2019/11/25/women-105>> accessed 29 October 2021; for the Americas, see the Committee of Experts of the Follow-up Mechanism of the Belém do Pará Convention (Committee of Experts of the MESECVI), ‘General Recommendation N. 1 of the Committee of Experts of the MESECVI on Self-Defense and Gender-Based Violence according to Article 2 of the Belém do Pará Convention’ (2018) <https://www.oas.org/en/mesecevi/docs/MESECVI-CEVI-doc_249-EN.pdf> accessed 29 October 2021; for the UK, see Centre for Women’s Justice, ‘Women Who Kill: How The State Criminalises Women We Might Otherwise Be Burying’ (Centre for Women’s Justice, 2021) <https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/602a9a87e96acc025de5de67/1613404821139/CWJ_WomenWhoKill_Rpt_WEB-3+small.pdf> accessed 29 October 2021 and Prison Reform Trust, ‘«There’s a reason we’re in trouble»: Domestic abuse as a driver to women’s offending’ (Prison Reform Trust, 2017) <https://www.advancecharity.org.uk/wp-content/uploads/2020/04/Domestic_abuse_report_final_lo.pdf> accessed 29 October 2021.

⁷ *ibid*.

the litigation of self-defence in contexts of domestic violence, see the Useful Resources Section and the list of landmark cases on this issue at the end of the Guide.

For aspects not covered by this Guide the following may be helpful: European Human Rights Advocacy Centre (EHRAC) Guide to Litigating Cases of Violence Against Women: Domestic and Sexual Violence⁸ and EHRAC's Guide to Using the UN Convention on the Elimination of Discrimination against Women (CEDAW) Committee and Special Rapporteur on Violence Against Women.⁹

This Guide is written by Jessica Gavron (EHRAC's Legal Director) and Dariana Gryaznova (EHRAC's Legal Consultant) and was prompted an Expert Roundtable EHRAC convened on litigating self-defence in the context of domestic violence, bringing together litigators from Armenia, Azerbaijan, Georgia, Russia and Ukraine.¹⁰ We would like to thank Mari Davtyan, Tamar Dekanosidze, Olga Karacheva, and the Centre for Women's Justice, London, and in particular Katy Swaine Williams, for their valuable comments.

Terminology and Scope

Domestic violence – all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.¹¹

While this Guide primarily focuses on situations of women killing their male intimate partners in self-defence, much of the content is also applicable to situations of family violence as between relatives or any member of a household, within LGBT+ relationships and non-lethal violence in such contexts. However, it is important to note that each situation is unique and some barriers to justice may be country specific or exacerbated by intersectional forms of discrimination.¹²

Victim/Defendant – the Guide uses the term 'victim' when referring to women subjected to domestic violence, and the term 'defendant' when referring to a woman's participation in criminal proceedings as an offender. The term 'survivor' is not used because this is a legal guide that addresses the position of women within the criminal justice system.


⁸ EHRAC, 'EHRAC Guide to Litigating Cases of Violence Against Women: Domestic and Sexual Violence' (EHRAC, December 2020) <<https://ehrac.org.uk/wp-content/uploads/2021/09/EHRAC-Guide-to-Litigating-Cases-of-Violence-Against-Women-ENG.pdf>> accessed 29 October 2021. EHRAC, 'EHRAC Guide to Litigating Cases of Violence Against Women: Domestic and Sexual Violence' (EHRAC, December 2020) <<https://ehrac.org.uk/wp-content/uploads/2021/09/EHRAC-Guide-to-Litigating-Cases-of-Violence-Against-Women-ENG.pdf>> accessed 29 October 2021.

⁹ EHRAC, 'Guide to Using the UN CEDAW Committee and Special Rapporteur on Violence Against Women' (EHRAC, August 2018) <https://ehrac.org.uk/en_gb/resources/using-the-un-cedaw-committee-and-special-rapporteur-on-violence-against-women/> accessed 29 October 2021.

¹⁰ EHRAC, 'EHRAC Convenes First Virtual Expert Roundtable on Litigating Self-Defence in the Context of Domestic Violence' (EHRAC, 30 November 2020) <https://ehrac.org.uk/en_gb/ehrac-convenes-first-virtual-expert-roundtable-on-litigating-self-defence-in-the-context-of-domestic-violence/> accessed 29 October 2021.

¹¹ Istanbul Convention (n 2), art 3(b).

¹² CEDAW, 'General Recommendation No 35' (2017), para 12.



1. CRIMINAL JUSTICE RESPONSES TO WOMEN'S SELF-DEFENCE IN THE CONTEXTS OF DOMESTIC VIOLENCE AGAINST WOMEN: CURRENT BARRIERS TO JUSTICE

The main obstacles to justice identified below are based on an assessment of EHRAC's target countries,¹³ which, as formerly part of the Soviet Union, have similar definitions of self-defence, as well as similar criminal justice systems. Equally, many of these obstacles are relevant not only for these countries, but globally.¹⁴

Section 1.1 below outlines the structural problems created by gender-neutral legislation on self-defence;

Section 1.2 highlights evidential challenges in investigation and prosecution of self-defence in contexts of domestic violence that illustrate how the criminal justice system is failing women;

and Section 1.3 identifies the gender stereotypes that are a major obstacle to women's access to justice.

1.1. Legislative Obstacles: Negative Impact of Gender-Neutral Legislation on Self-Defence

There are two ways in which legislative frameworks can disadvantage or discriminate against women. The first is through explicitly discriminatory legal provisions. The second comprises gender neutral provisions that fail to take into account women's social and economic position in society and vis à vis men, and gaps in legislation concerning issues that disproportionately affect women.¹⁵ Gender-neutral legislative defences to criminal charges, including self-defence, are problematic in contexts of domestic violence, in that they do not reflect the reality and impact of ongoing purposive violence and make it difficult for women to obtain justice.

There are generally two forms of defence to a criminal charge of murder: complete defences, such as self-defence; and partial defences, such as diminished responsibility, excessive self-defence, loss of control or provocation, that do not completely absolve a defendant of guilt but may result in charges of a lesser crime such as manslaughter. These are separate to post-conviction mitigation, in which evidence of domestic violence can lead to a reduced sentence.

In most jurisdictions, including those in EHRAC's target region, a history of abuse is neither a defence in its own right nor formally recognised as a mitigating factor and in fact is often not raised or considered relevant evidence in the trial process. There is often a failure to identify the perpetrator of domestic violence as the primary aggressor. Women are therefore restricted by the terms or interpretation of existing general legal defences.

The main disadvantages of gender-neutral legislation are set out below.

1.1.1. Male-Constructed Definition of Self-Defence

Most current legal definitions of self-defence are predicated on the immediacy of the threat of harm and the proportionality of the response, both of which fail to encompass the specific dynamics of a context of domestic violence.¹⁶ Such legislation, as drafted and applied, ignores the reality of such

¹³ Armenia, Azerbaijan, Georgia, Russia, Ukraine.

¹⁴ E.g., see footnote 6.

¹⁵ Dr Shazia Choudhry, 'Women's Access to Justice: a Guide for Legal Practitioners' (CoE, October 2018) <<https://rm.coe.int/factsheet-womens-access-to-justice/16808ff44e>> accessed 29 October 2021, p. 5.

¹⁶ Penal Reform International (n 6), p. 5.

a context, for example:

- that a defensive reaction can be caused by a prolonged period of abuse, rather than one single attack;¹⁷
- that the final trigger for an abused women may not be life threatening or the most serious violence;¹⁸
- that a woman may not respond immediately during the attack due to the disparity in power/strength but may respond later, and therefore not in the perceived 'heat of the moment'.¹⁹

Where there is a time gap between the initial attack and the woman's response, courts generally interpret the defendant's actions as motivated retaliation rather than self-defence.²⁰ The right to self-defence is interpreted restrictively, as only applying to an immediate repulsion of an ongoing assault.

The law on self-defence therefore sets an unrealistic threshold for its application in cases where a woman is defending herself from an abusive partner. Historically, it was constructed and conceived for a 'reasonable man' in a context of male-on-male violence and therefore does not allow for recognition that:

- victims of domestic violence are particularly vulnerable,²¹ and domestic violence has a serious impact on a victims' mental state;²²
- there exists an imbalance of physical power between men and women;
- gender socialisation does not equip women with tools to respond 'reasonably' (in accordance with the male-constructed law on self-defence) to attacks, i.e., most women are not trained to respond to physical threats and to use weapons;²³
- domestic violence disproportionately affects women;²⁴
- victims of domestic violence are too often let down by the criminal justice system, which fails to use protective measures in cases involving women and girls,²⁵ so they believe that there is no protection or safety from the abuse; and
- while domestic abuse is often a cause of women's offending,²⁶ a history of domestic violence is frequently not recognised as relevant to the criminal charge.²⁷

Consequently, the gender-neutral law on self-defence fails to treat differently women whose situations of self-defence are significantly different to those of men.

¹⁷ Committee of Experts of the MESECVI (n 6), p. 4; Penal Reform International (n 6), p. 5.

¹⁸ Committee of Experts of the MESECVI (n 6), p. 5.

¹⁹ Penal Reform International (n 6), p. 4.

²⁰ Dariana Gryaznova, 'Право жертв домашнего насилия на необходимую оборону: стереотипы и предрассудки в решениях российских судов (The Right of Victims of Domestic Violence to Self-Defence: Stereotypes and Prejudices in the Decisions of Russian Courts)' (EHRAC, 06 October 2020) <https://ehrac.org.uk/en_gb/ehrac-convenes-first-virtual-expert-roundtable-on-litigating-self-defence-in-the-context-of-domestic-violence/> accessed 29 October 2021, p. 6.

²¹ *Talpis v Italy* App no 41237/14 (ECtHR, 2 March 2017), para 99; *T.M and C.M v the Republic of Moldova* App no 26608/11 (ECtHR, 28 January 2014), para 46.

²² WHO, 'Understanding and addressing violence against women' (WHO, 2012) <https://apps.who.int/iris/bitstream/handle/10665/77431/WHO_RHR_12.43_eng.pdf?sequence=1> accessed 29 October 2021, p. 5.

²³ Committee of Experts of the MESECVI (n 6), p. 7.

²⁴ See footnote 2.

²⁵ E.g., Centre for Women's Justice, 'CWJ Launch Super-Complaint: Police Failure To Use Protective Measures In Cases Involving Violence Against Women And Girls' (Centre for Women's Justice, 20 March 2019) <<https://www.centreforwomensjustice.org.uk/news/2019/3/20/cwj-launch-super-complaint-police-failure-to-use-protective-measures-in-cases-involving-violence-against-women-and-girls>> accessed 29 October 2021; Human Rights Watch, '«I Could Kill You and No One Would Stop Me»: Weak State Response to Domestic Violence in Russia' (Human Rights Watch, 2018) <https://www.hrw.org/sites/default/files/report_pdf/russia1018_web3.pdf> accessed 29 October 2021.

²⁶ See footnote 6

²⁷ E.g., Gryaznova (n 20), from p. 5.

1.1.2. Lack of Criminalisation of Domestic Violence

Another challenge is that not all jurisdictions criminalise all forms of domestic violence, e.g., non-fatal strangulation, asphyxiation, coercive and controlling behaviour.²⁸ Consequently, as one of the elements of self-defence is the existence of unlawful aggression, some jurisdictions struggle to recognise the right of self-defence against forms of violence which are not directly criminalised, and often not understood as problematic.

The lack of criminalisation of characteristic domestic violence behaviours creates additional challenges in that there will be no criminal record or indeed recognition of such conduct to support a defence of a history of violence. It is widely recognised that most incidents of domestic violence are unreported.²⁹ Therefore, evidencing such violence is already difficult.³⁰

1.1.3. Criminal Justice Systems' Response: Best Practice

The following analysis of best practice is based on the multi jurisdictional study (on Australia, Brazil, Hong Kong, India, Japan, Mexico, Poland, Spain and the United States) by Penal Reform International³¹ and draws on the forthcoming report by the Centre for Women's Justice (based in London) which summarises the self-defence laws of Australia, Canada, England and Wales, New Zealand and Russia.³²

While there is global awareness about the link between women's victimisation and their offending (in particular, 'battered woman syndrome' was recognised already in 1979, see below Section 2.2.3), only a handful of jurisdictions have developed more gender-sensitive approaches to female offenders who commit violent crimes against their abusers.

For example, in the United States of America:

- Defendants are able to refer to expert testimony to help juries to understand the behavioural pattern of abused women and how that abuse may affect the defendant's actions and conduct.³³
- In New Jersey, the law explicitly regards a history of abuse as being relevant to substantiate a defence of duress. However, duress is a partial defence that can reduce a murder charge to a manslaughter charge.³⁴
- Florida codifies 'battered woman syndrome' as a separate head of defence to criminal charges.³⁵
- There are examples in California State Law of historic crimes being reassessed because evidence of intimate partner battering would have led to the defendant being guilty of a lesser offence.³⁶
- Across each of the states there is a wide range of scholarship on the psychology of 'battered

²⁸ In particular, Azerbaijan and Russia have not ratified the Istanbul Convention. In the Russian legal system, there is neither stand-alone law on violence against women or domestic violence nor definitions of violence against women or domestic violence in legislation.

²⁹ UN Women, 'Facts and figures: Ending violence against women' <<https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes>> accessed 29 October 2021; see also T.M and C.M v the Republic of Moldova App no 26608/11 (ECtHR, 28 January 2014), para 60.

³⁰ Centre for Women's Justice, 'Women Who Kill' Report (n 6), p. 122.

³¹ Penal Reform International (n 6).

³² Centre for Women's Justice, (forthcoming in 2022) How the state criminalises victims of violence against women and girls (provisional title)

³³ Penal Reform International (n 6), p. 5.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

woman syndrome’ and battered women. In a judicial context, there is extensive discourse around the Sheehan case (New York).³⁷

In Australia, there has been a significant law reform across the country in response to a perception that ‘traditional’ defences to violent crimes tend to operate to the advantage of men and to the disadvantage of women suffering from ‘battered woman syndrome’ and the slow burn response (for more detail see Section 2.2.3 below).³⁸ Each Australian state and territory has its own independent Law Reform Commission, and there is also a Federal Australian Law Reform Commission. Many of these Law Reform Commissions have written reports on the issue of how the relevant criminal justice system responds to female offenders who have suffered a history of abuse, and in many cases, these reports have led to legislative reform.³⁹

For example:

- In Queensland, a specific partial defence to a charge of murder has been introduced: “killing for preservation in the context of an abusive relationship”.⁴⁰
- Victoria has introduced legislation to allow for the introduction of “social framework evidence” that permits evidence of the nature and dynamics of domestic violence to be adduced.⁴¹ Also, legislative reforms of 2014 introduced simpler tests for self-defence and new jury directions in respect of family violence.⁴²
- In Western Australia, the mandatory life term for murder has now been repealed and non-custodial sentences have been imposed for manslaughter committed by victims of abuse.⁴³ Also, in Western Australia, where provocation has been established in the context of manslaughter, a non-custodial sentence has been handed down.⁴⁴
- In New South Wales, case law suggests that a past history of abuse, including ‘battered woman syndrome’, has in practice been considered in sentencing, thereby resulting in short, or indeed non-custodial, sentences.⁴⁵

However, the implementation of legislation and sentencing guidelines are also fundamental in these cases. For example, while Russian legislation on self-defence does not prevent courts from taking into account the history and context of domestic violence,⁴⁶ where this is introduced it is generally disregarded⁴⁷ and acquittals are an exception to the accusatorial bias of the Russian justice system in this category of cases, even in the most appalling domestic violence cases.⁴⁸ As illustrated in Sections 1.2 and 1.3 below, evidential challenges and stereotypes in the justice system operate against women, even where there are progressive legislative provisions.

Therefore, despite these relatively positive examples, Penal Reform International’s 2016 Report ‘Women who kill in response to domestic violence’ concluded that “[i]n many jurisdictions, existing defences have proved ill-adapted to the situation of a woman suffering from battered woman syndrome or the slow burn reaction”.⁴⁹

³⁷ *ibid*, p. 19. Dan Bilefsky, ‘Wife Who Fired 11 Shots Is Acquitted of Murder’ (the New York Times, 06 October 2011) <<https://www.nytimes.com/2011/10/07/nyregion/barbara-sheehan-who-killed-husband-is-found-not-guilty-of-murder.html>> accessed 29 October 2021.

³⁸ Penal Reform International (n 6), p. 9.

³⁹ *ibid*, p. 18.

⁴⁰ *ibid*, p. 5.

⁴¹ *ibid*, p. 5.

⁴² *ibid*, p. 10.

⁴³ *ibid*, p. 7.

⁴⁴ *ibid*, p. 7.

⁴⁵ *ibid*, p. 7.

⁴⁶ Gryaznova (n 20), from p. 2.

⁴⁷ *ibid*, from p. 5.

⁴⁸ *ibid*, p. 21.

⁴⁹ Penal Reform International (n 6), p. 5

1.1.4. History of Abuse as a Mitigating Factor is a Matter of Judicial Discretion

In most jurisdictions, including those in EHRAC’s target region, there are no specific legislative provisions to consider a history of abuse as a mitigating factor, let alone as a factor relevant to a substantive defence. Since mitigation must be raised within existing criminal law frameworks, the extent to which a history of abuse is taken into account as a mitigating factor differs dramatically across jurisdictions.⁵⁰ Moreover, the weight that is given to the history of abuse largely remains at the discretion of the particular judge, which can be influenced by gender stereotypes (see Section 1.3).

1.1.5. Legislative Obstacles: Conclusion

In summary, legislation on self-defence is restrictive, and the implementation of this legislation is even more restrictive. Victims of domestic violence do not usually fit the conventional requirements of self-defence. Issues such as imminence of harm and the proportionality of self-defence as traditionally understood and applied create obstacles to justice for women who harm in these circumstances.

As a result, the criminal law is currently constructed, interpreted and implemented in a way that frequently convicts women in this situation of premeditated murder with the result that “women [victims of domestic violence] who kill their partners tend to serve longer prison sentences than men who perpetuate an extreme and lethal form of domestic violence” who are, by contrast, usually convicted of manslaughter (having been deemed to act without premeditation).⁵¹

The Istanbul Convention and CEDAW Committee highlight that formal equality, such as gender-neutral legislation on self-defence, is insufficient and a substantive equality approach is needed.⁵² In the CEDAW Committee’s view, “a purely formal legal or programmatic approach is not sufficient to achieve women’s de facto equality with men, which the Committee interprets as substantive equality”.⁵³

1.2. Evidential Challenges: Inability of Women to Give Their ‘Best Evidence’

Commonly encountered evidential challenges that constitute obstacles to justice and should be challenged include:

- i. the lack of gender-sensitive procedures in the legal system.⁵⁴ While the CEDAW Committee encourages states to ensure that justice system professionals handle cases in a gender-sensitive manner⁵⁵ to understand the level of pain and suffering experienced by women,⁵⁶ authorities and even lawyers often fail to build trust, to enable disclosure by women, and to fully investigate the background and context of the incident. This is one of the reasons why late disclosure of abuse by women is common, with some women only disclosing the abuse after they have been convicted.⁵⁷

⁵⁰ *ibid*, p. 5.

⁵¹ Elisabeth Duban, Dr Ivana Radačić, et. al., ‘Training Manual for Judges and Prosecutors on Ensuring Women’s Access to Justice’ (CoE, September 2017) <<https://rm.coe.int/training-manual-women-access-to-justice/16808d78c5>> accessed 29 October 2021, p. 92.

⁵² CEDAW, ‘General Recommendation No 33’ (2015), paras 6, 22; Istanbul Convention (n 2), art 1(1)(b).

⁵³ CEDAW, ‘General Recommendation No 28’ (2010), para 8.

⁵⁴ Choudhry (n 15), p. 6.

⁵⁵ CEDAW, ‘General Recommendation No 33’ (2015), para 15(c).

⁵⁶ CEDAW, ‘General Recommendation No 35’ (2017), para 17.

⁵⁷ Centre for Women’s Justice, ‘Women Who Kill: Executive Summary’ (Centre for Women’s Justice, 2021) <<https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/60280e0c38834d367d927c76/161323777>> accessed 29 October 2021, p. 6.

- ii. the perception that intimate partner violence is a private/family/unserious matter and/ or a series of isolated incidents. Therefore, the authorities fail to understand or gather evidence to establish a history of abuse. However, a woman who uses reactive violence to respond to domestic abuse does not cease to be a victim of domestic violence (see Section 2.2.2). Equally, women victims themselves often either do not think of raising their own history of abuse or deliberately do not disclose their victimisation, e.g., out of guilt at what they have done and “not wanting to speak negatively of the men they ‘loved’”⁵⁸ or the impact of the cultural and religious constraints on them.⁵⁹ Therefore, the authorities often fail to determine the primary or predominant aggressor.⁶⁰
- iii. the lack of understanding of characteristic behaviours of victims of domestic violence, including that victims of intimate partner violence can be uncooperative for various reasons⁶¹ or fail to share a history of abuse because they have problems identifying the perpetrator’s behaviour as abusive,⁶² or experience additional vulnerabilities due to cultural or religious constraints⁶³ or, with respect to migrant women, for fear of immigration services.⁶⁴
- iv. the grounding of the assessment by the prosecution and courts of the level of danger of the attack against women on the *actual consequences* of the attack, rather than victim/defendant’s perception of harm at the time and the potential harm that was averted by the defensive actions. In many cases, where forensic medical examination establishes that the injury caused to a woman did not constitute serious harm, a court concludes that the attack was not life-threatening and, therefore, denies a woman the right to self-defence using all means.⁶⁵ However, the very nature of the right of self-defence is to protect from harm – “the victim did not have to wait for the actual violence to be about to occur”;⁶⁶
- v. the failure to record or prosecute reports of domestic violence, including minimising the abuse suffered by a woman in the police protocol, leading to the determination that there are no signs of a crime;
- vi. the requirements of corroboration evidence for intimate partner violence;
- vii. the failure to provide women with psychological support to help victims speak about violence they suffered;
- viii. inappropriately narrow forensic psychological and psychiatric assessments that focus on whether a woman was able to control herself, has any mental disorders and needs compulsory medical measures and fail to include and conduct assessments of impact of intimate partner violence on a victim and its consequences. In particular, such assessments are often used to assess and undermine the credibility of a victim of domestic or sexual violence⁶⁷ (see below

⁵⁸ Centre for Women’s Justice, ‘Women Who Kill’ Report (n 6), p. 9.

⁵⁹ *ibid*, p. 121.

⁶⁰ UNODC, ‘Handbook on effective prosecution responses to violence against women and girls’ (UNODC, 2014) <https://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_effective_prosecution_responses_to_violence_against_women_and_girls.pdf> accessed 29 October 2021, p. 85.

⁶¹ *ibid*, p. 62.

⁶² Centre for Women’s Justice, ‘Women Who Kill’ Report (n 6), Appendix 2, p. 122.

⁶³ *ibid*, Appendix 2, p. 121.

⁶⁴ Prison Reform Trust, ‘Still No Way Out: Foreign national women and trafficked women in the criminal justice system’ (Prison Reform Trust, 2018) http://www.prisonreformtrust.org.uk/wp-content/uploads/old_files/Documents/Still%20No%20Way%20Out%20full%20report.pdf accessed 29 October 2021, p. 6.

⁶⁵ Gryaznova (n 20), p. 11.

⁶⁶ Committee of Experts of the MESECVI (n 6), p. 5.

⁶⁷ On practice in Georgia, see, e.g., See the joint alternative report of Equality Now and 11 Georgian NGOs on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence in Georgia in respect of sexual violence, submitted to the GREVIO Committee in October 2021., p. 18-19. Available at: <https://rm.coe.int/georgia-grevio-ngo-shadow-report-submitted-by-equality-now-and-partner/1680a43b50> (p. 140-141 of Annex 25). See also notes 76-79 below. And re sexual violence (mutatis mutandi domestic violence): The UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice Article 15 (d), (e), (f) and UN Women, Handbook for Legislation on Violence against Women, 2012, para. 3.9.6. Available at: https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2012/12/UNW_Legislation-Handbook%20pdf.pdf The International Criminal Court, Rules of

Section 2.4.4 regarding the use of expert evidence);

ix. the lack of any or adequate interpretation for women facing a language barrier in the judicial process, including access to qualified female interpreters.⁶⁸

As a result of these evidential obstacles, the experience of abuse is too often not reported, not adequately recorded and not actioned. It is therefore not properly documented, raised or understood by (in some cases) the defendant, their lawyer or the judiciary, which contributes to decisions that self-defence was neither justified nor proportionate.

The entire justice system can be viewed as a chain or series of interlinked steps.⁶⁹ Therefore, “a woman’s ability to progress along the justice chain depends on whether she encounters barriers on the way and the options she has to overcome them”.⁷⁰ This demonstrates the importance of a thorough examination of the background and context in cases of women killing their intimate partners.

1.3. Stereotypes: A Major Obstacle to Women’s Access to Justice

It is widely recognised that stereotypes and stereotyping have an appalling and pervasive effect on a woman throughout her life cycle.⁷¹ A gender stereotype is defined as “a generalised view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, men and women”.⁷² Stereotypes are recognised as a root cause of discrimination against women and structural gender-based violence against women, and are particularly pernicious in the context of domestic violence.⁷³ Gender stereotypes are perpetuated “through various means and institutions, including laws and legal systems” and “by State actors in all branches and at all levels of government and by private actors”.⁷⁴ The engagement of law enforcement authorities and judges in stereotyping is particularly harmful because it seriously compromises their impartiality and leads to decisions based on preconceived beliefs rather than relevant law, facts and enquiry. Stereotyping leads authorities to permit irrelevant or highly prejudicial evidence to be admitted and disregard relevant evidence.⁷⁵ Gender bias causes the experiences of women to be inadequately understood or considered, for instance, assessing a woman’s response against how a man would have acted or felt in a situation, or how a ‘normal’ woman ought to behave; exhibiting a lack of understanding of gender-based violence, such as the cycle of violence in the context of domestic violence or sexual assault and the impact on the victim.⁷⁶ It is also important to consider additional factors that can lead to intersectional discrimination, for instance stereotyping about how women in particular cultural or religious contexts might be expected to behave.⁷⁷

As referenced above, statistics demonstrate that majority of women who kill their partner do so in the course of defending themselves from an attack within the context of an abusive relationship.⁷⁸

Procedure and Evidence, Rule 70(d).

⁶⁸ Centre for Women’s Justice, ‘Women Who Kill’ Report (n 6), Appendix 2, p. 128.

⁶⁹ Duban (n 52), p. 16.

⁷⁰ *ibid*

⁷¹ ‘OHCHR-Commissioned Report: Gender Stereotyping as a Human Rights Violation’ (OHCHR, October 2013) <<https://www.ohchr.org/en/publications-and-resources>> accessed 29 October 2021.

⁷² *ibid*, p. 18.

⁷³ CEDAW, *X. and Y. v Russia* (CEDAW/C/73/D/100/2016), para 9.9; CEDAW, ‘General Recommendation No 19’ (1992), para 11; CEDAW, ‘General Recommendation No 35’ (2017), para 19.

⁷⁴ CEDAW, *X. and Y. v Russia* (CEDAW/C/73/D/100/2016), para 9.9.

⁷⁵ CEDAW, ‘General Recommendation No 33’ (2015), para 26; UNODC, ‘Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls’ (UNODC, 2019) <https://www.unodc.org/pdf/criminal_justice/HB_for_the_Judiciary_on_Effective_Criminal_Justice_Women_and_Girls_E_ebook.pdf> accessed 29 October 2021, p. 32.

⁷⁶ Choudhry (n 15), p. 29-30.

⁷⁷ Centre for Women’s Justice, ‘Women Who Kill’ Report (n 6), Appendix 2, p. 127.

⁷⁸ See footnote 2.

However, they often end up being convicted for murder. Underlying these convictions is the failure to apply a gender and context sensitive perspective and instead to entrench gender stereotypes in the interpretation of the apparently gender-neutral right of self-defence.

Common problematic preconceptions include:

i. intimate partner violence is still often considered by authorities to be a private matter. The authorities perceive crimes between intimates as less serious and often label intimate partner violence as a “personal enmity”, “squabble”, “conflict”, “scuffle”.⁷⁹ By overlooking the fact that intimate partner violence is a specific and systemic human rights violation which is nuanced and has serious consequences, the authorities underestimate the gravity and impact of harm caused by intimate partner violence and do not believe that victims were in danger of death or injury;

ii. the authorities perpetuate, reinforce and apply stereotypes about “ideal victims” of intimate partner violence and about women’s response to violence. Myths about ideal victims undermine the credibility of real victims and label their response unreasonable and unlawful. The most pervasive stereotype is the assumption that if a victim of intimate partner violence stayed in an abusive relationship, she was either comfortable with it or the abuse was not serious enough (the “why didn’t she leave?” myth).⁸⁰ There is a related myth that if a victim did not make a report to the police, she was not seriously worried for her safety;⁸¹

iii. the assessment of the ‘reasonableness’ of means employed by women to defend themselves is also subject to stereotypes. On the one hand, there is a perception that physical attack is a “man’s” privilege, and women should be weak, passive and helpless. Consequently, the authorities apply stereotypes to how a woman should behave in the course of repelling an assault, i.e., run away, seek help and not protect herself physically.⁸² On the other hand, women are expected to employ ‘reasonable’ means to repel attacks that, in practice, means that if an abuser is unarmed, it is disproportionate for a woman to use a weapon;⁸³

iv. the focus on the reputation, credibility and behaviour of the woman, including:

- the assumption, based on the lack of a gender perspective, that if a woman changes her statement, she is not credible or is trying to avoid criminal responsibility;
- the adverse conclusions drawn from a delay in reporting incidents of violence or underreporting of violence;
- the emphasis on a woman’s reputation, sexual or relationship history and behaviour.⁸⁴

Accordingly, gender stereotypes and the lack of application of a gender perspective result in an inaccurate and unrealistic evaluation of the behaviour of women in a situation of domestic violence when considering whether the requirements for self-defence have been met or not and, consequently, lead to miscarriages of justice. Moreover, the harmful effect of stereotyping may be further exacerbated by intersectional forms of discrimination, based on age, ethnicity, religion, language, disability, sexual or gender identity.⁸⁵ Practitioners should be aware of these hurdles and develop strategies for circumventing or overcoming them.

⁷⁹ Gryaznova (n 20) p. 5.

⁸⁰ *ibid*, p. 8; UNODC Handbook on effective prosecution responses to violence against women and girls (n 61), p. 36.

⁸¹ *ibid*, p. 37; Gryaznova (n 20), p. 8.

⁸² Gryaznova (n 20), from p. 13.

⁸³ *ibid*, from p. 14.

⁸⁴ For instance, a women’s substance use can be used as evidence to undermine her character, despite the fact that it is an established fact that use of legal and illegal substances is a common coping mechanism for abuse or trauma: see, e.g., Centre for Women’s Justice, ‘Women Who Kill’ Report (n 6), p. 81; Penal Reform Trust (n 6), p. 8.

⁸⁵ CEDAW, ‘General Recommendation No 35’ (2017), para 12.



2. RELEVANT INTERNATIONAL STANDARDS AND PRINCIPLES

This section contains regional and international standards and principles to assist lawyers litigating this type of case to address the obstacles outlined above:

- i. Obligation to expose and remove stereotypes;
- ii. Requirement of embedding a gender perspective to responses to domestic violence and self-defence in the contexts of domestic violence;
- iii. Interpretation of elements of self-defence in the contexts of domestic violence against women;
- iv. Standards on gathering and evaluation of evidence in cases of self-defence in the contexts of domestic violence against women;
- v. Importance of effective and gender-sensitive legal assistance in cases of self-defence in the contexts of domestic violence against women;
- vi. History of domestic violence as a mitigation in cases of self-defence in the contexts of domestic violence against women.

International law provides limited guidance explicitly addressing the use of self-defence in contexts of domestic violence against women. The most comprehensive articulation of standards specifically on this issue is General Recommendation No. 1 (2018) of the Committee of Experts charged with evaluating the implementation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women ('Belém do Pará Convention').⁸⁶ General Recommendation No. 1 directly addresses self-defence and gender-based violence according to Article 2 (concerning violence against women) of the Belém do Pará Convention (see sections below).

Prior to this, in 2010, the United Nations General Assembly in its Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice *inter alia* urged states to ensure that rules and principles of defence do not discriminate against women⁸⁷ and that claims of self-defence by women who have been victims of violence, particularly in cases of 'battered woman syndrome' are taken into account in investigations, prosecutions and sentences against them.⁸⁸ The General Assembly recognises that "battered woman syndrome is suffered by women who, because of repeated violent acts by an intimate partner, may suffer depression and are unable to take any independent action that would allow them to escape the abuse, including refusing to press charges or to accept offers of support".⁸⁹

The CEDAW Committee has to date addressed the issue of self-defence in 2015, in *X. v Timor-Leste* (see further below).⁹⁰ Ms. X. fatally stabbed her partner while trying to defend herself from his violent attack. At the time of writing this Guide, the European Court of Human Rights (ECtHR) has not yet addressed this problem.⁹¹

However, there exist general principles provided by regional and international instruments which can be applicable when litigating self-defence in the contexts of domestic violence against women. These will be covered in the Guide below.

⁸⁶ Committee of Experts of the MESECVI (n 6).

⁸⁷ UNGA Res 65/228 (2010) GAOR 65th Session, annex, para 15(d).

⁸⁸ *ibid*, para 15(k).

⁸⁹ *ibid*.

⁹⁰ CEDAW, *X. v Timor-Leste* (CEDAW/C/69/D/88/2015).

⁹¹ *Tunikova v Russia* App no 55974/16 (ECtHR, communicated on 28/06/2019). One of the applicants, a victim of domestic violence, was convicted of grievous bodily harm because, according to the national court, her use of force in self-defence had not been justifiable. However, the Court did not ask parties any questions regarding self-defence.

2.1. Obligation to Expose and Remove Stereotypes

Stereotypes influence all stages of the legal process: the investigation, trial and judgment phases and are a key factor in why law and policy are often applied in a manner that creates barriers to women who are seeking justice in the legal system.

CEDAW

Article 5 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, requires states to adopt gender sensitive approaches and combat myths and stereotypes. The CEDAW Committee recognises that gender stereotypes impede access to justice for women and in particular women survivors of violence⁹² and has named gender stereotyping as a primary obstacle preventing women from realising their right to access to justice.⁹³ The Committee has highlighted the fact that stereotypes affect the credibility given to women’s voices and influence investigation, trial and final judgment, thereby upholding a culture of impunity.⁹⁴ It has repeatedly indicated that the obligation to combat gender-based stereotypes is one of the three central obligations of state parties to eliminate discrimination against women⁹⁵ and urged state parties to expose and remove gender stereotypes which prevent women from exercising and claiming their rights.⁹⁶

Significantly, General Recommendation No 33 on Women’s Access to Justice obliges state parties to ensure women’s access to justice without discrimination in the sphere of criminal law regardless of their status either *as victims or as perpetrators of criminal acts*.⁹⁷ It also emphasises that

“Stereotyping and gender bias in the justice system have far-reaching consequences on women’s full enjoyment of their human rights. They impede women’s access to justice in all areas of law, and may particularly impact on women victims and survivors of violence. Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to these stereotypes. Stereotyping as well affects the credibility given to women’s voices, arguments and testimonies, as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far reaching consequences, for example, in criminal law where it results in perpetrators not being held legally accountable for violations of women’s rights, thereby upholding a culture of impunity. In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants”.⁹⁸

Additionally, the CEDAW Committee is clear that there should not be a conception of an “ideal victim”.⁹⁹ Judges should not create “inflexible standards of what women or girls should be or what they should have done” when they are confronted with a situation of violence,¹⁰⁰ nor should judges and prosecutors take a rigid approach about what they consider to be appropriate behaviour for

⁹² CEDAW, ‘General Recommendation No 33’ (2015), para 26.

⁹³ *ibid*, para 3.

⁹⁴ *ibid*, paras 26-28.

⁹⁵ CEDAW, ‘General Recommendation No 19’ (1992), para 11; CEDAW, ‘General Recommendation No 35’ (2017), para 19.

⁹⁶ CEDAW, ‘General Recommendation No 33’ (2015), para 7.

⁹⁷ *ibid*, para 47.

⁹⁸ *ibid*, para 26.

⁹⁹ CEDAW, R.P.B. v the Philippines (CEDAW/C/57/D/34/2011); CEDAW, Fatma Yildirim (deceased) v Austria (CEDAW/C/39/D/6/2005); Isatou Jallow v Bulgaria (CEDAW/C/52/D/32/2011); V.K. v Bulgaria (CEDAW/C/49/D/20/2008); Goekce v Austria (CEDAW/C/39/D/5/2005); CEDAW, O.G. v Russia (CEDAW/C/68/D/91/2015); CEDAW, X. and Y. v Russia (CEDAW/C/73/D/100/2016); CEDAW, S.L. v Bulgaria (CEDAW/C/73/D/99/2016); CEDAW, Karen Tayag Vertido v the Philippines (CEDAW/C/46/D/18/2008).

¹⁰⁰ CEDAW, Karen Tayag Vertido v the Philippines (CEDAW/C/46/D/18/2008), para 8.4.

women or penalise those who do not conform to those stereotypes.¹⁰¹ This is particularly relevant when authorities consider whether the requirements for self-defence have been met or not. In *X. v Timor-Leste*, the first CEDAW case on self-defence, the CEDAW Committee considered whether the authorities ensured that she received a fair trial, “without bias, discrimination or gender stereotyping”.

¹⁰²

The European Court of Human Rights

The ECtHR has also engaged in dismantling various stereotypes about women and domestic violence. ¹⁰³In *Kalucza*, it challenged the stereotype of an ‘ideal victim’ and the expectation that women should be weak, passive and helpless.¹⁰⁴ The Court was critical of the rejection by national courts of requests by the applicant for restraining orders against her abusive partner on the basis that the applicant was also violent towards him, commenting that, “if it could not be ordered in cases of mutual assaults, then the aim of providing effective protection to victims would be seriously undermined. *The possibility that the victim acted in legitimate self-defence cannot be ruled out at that stage*” (emphasis added).¹⁰⁵

It has highlighted on several occasions that an investigation should be thorough, open-minded, unbiased and consider all possible leads in the case¹⁰⁶ and “in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible”.¹⁰⁷ Likewise, a fair trial and the proper administration of justice require that a judicial decision: adequately states the reasons on which it is based;¹⁰⁸ does not ignore specific, pertinent and important points raised by the applicant;¹⁰⁹ and contains “a specific and explicit reply to the arguments which are decisive for the outcome of the proceedings”.¹¹⁰ Reasons provided for domestic court decisions cannot be “automatic or stereotypical”¹¹¹ otherwise the decision falls short of obligations under Article 6(1).

In *D.J. v Croatia*,¹¹² the Court confronted stereotypes about how women should behave, concerning an allegation of rape. The Court found a violation of Articles 3 and 8 in relation to the lack of effective investigation when a judge dropped a rape charge because the alleged rape victim did not fit the description of an ‘ideal’ rape victim. The Court stressed that the judge’s negative opinion about the applicant predetermined his decision in the case and raised “a question of appearances as to the judge’s objectivity and impartiality in respect of his continued conduct of the investigation”.¹¹³

In *J.L. v Italy*,¹¹⁴ the Court found that secondary victimisation of a victim of sexual assault, on account of comments in the reasoning of the judgment that were guilt-inducing, moralising and conveyed sexist stereotypes, constitutes a violation.

See further the Useful Resources Section of this Guide for international guidelines and reports on removing stereotypes.

¹⁰¹ CEDAW, ‘General Recommendation No 33’ (2015), paras 26, 29(c(ii)).

¹⁰² CEDAW, *X. v Timor-Leste* (CEDAW/C/69/D/88/2015), para 6.2.

¹⁰³ Lourdes Peroni and Alexandra Timmer, ‘Gender Stereotyping in Domestic Violence Cases: An Analysis of The European Court of Human Rights’ Jurisprudence’ in Eva Brems and Alexandra Timmer (eds), *Stereotypes and Human Rights Law* (Intersentia 2016).

¹⁰⁴ *Kalucza v Hungary* App no 57693/10 (ECtHR, 24 April 2012).

¹⁰⁵ *ibid*, para 66.

¹⁰⁶ *Durmaz v Turkey* App no 3621/07 (ECtHR, 13 November 2014).

¹⁰⁷ *Mikheyev v Russia* App no 77617/01 (ECtHR, 26 January 2006), para 107.

¹⁰⁸ *Boldea v Romania* App no 19997/02 (ECtHR, 15 February 2017).

¹⁰⁹ *Nechiporuk and Yonkalo v Ukraine* App no 42310/04 (ECtHR, 21 April 2011), para 280; *Rostomashvili v Georgia* App no 13185/07 (ECtHR, 08 November 2018), para 59; *Zhang v Ukraine* App no 6970/15 (ECtHR, 13 November 2018), para 73.

¹¹⁰ *Moreira Ferreira v Portugal* No 2 App no 19867/12 (ECtHR, 11 July 2017), para 84.

¹¹¹ *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 24 January 2017), para 210.

¹¹² *D.J. v Croatia* App no 42418/10 (ECtHR, 24 July 2012).

¹¹³ *ibid*, para 102.

¹¹⁴ *J.L. v. Italy* App no 5671/16 (ECtHR, 27 May 2021).

2.2. Requirement to Embed a Gender Perspective in Responses to Domestic Violence and Self-Defence in the Contexts of Domestic Violence

2.2.1. Principles of a Gender Perspective¹¹⁵

Despite the fact that domestic violence is acknowledged to be a global phenomenon, efforts to respond to it are still often hindered by a lack of gender perspective, misconceptions and myths. Domestic violence is different to any other situational violence because domestic violence comprises prevalent behaviours and objectives to control, intimidate, and humiliate, often on an escalatory trajectory with known triggers. Therefore, domestic violence requires a contextualised understanding of the dynamics and recognition of a purposeful pattern of behaviour and impact, rather than a series of isolated acts.

Specifically relating to domestic violence, this gender perspective entails the recognition that:

- domestic violence is not a private issue. It is well established that domestic violence is a serious human rights violation and always amounts to cruel, inhuman or degrading treatment or punishment and can constitute physical or psychological torture, as confirmed by both the CEDAW Committee, the Special Rapporteur on torture and the ECtHR.¹¹⁶ All forms of domestic violence have serious consequences to victims' physical and mental health;¹¹⁷
- incidents of domestic violence should be viewed as a continuum of harm, and the overall violence regarded as a chain of connected events;¹¹⁸
- victims of domestic violence are particularly vulnerable, and they often fail to report incidents, and a more robust response from the State is required;¹¹⁹
- domestic violence takes many forms, including psychological violence¹²⁰ which constitutes a serious violation by itself even if it did not materialise into concrete acts of physical violence;¹²¹
- Where there is a lasting situation of domestic violence, there can hardly be any doubt about the immediacy of the danger posed to the victim;¹²²
- Domestic violence is by its very nature cyclical, recurring in time with a tendency to

¹¹⁵ For more information, see EHRAC Guide to Litigating Cases of Violence Against Women: Domestic and Sexual Violence (n 8).

¹¹⁶ CEDAW, 'General Recommendation No 35' (2017), paras 1-2, 16; UNGA, 'Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2019) UN Doc A/74/148, para 10; Bevacqua and S. v Bulgaria App no 71127/01 (ECtHR, 12 June 2008), para 83; Opuz v Turkey App no 33401/02 (ECtHR, 09 June 2009), para 144. For more information, see EHRAC Guide to Litigating Cases of Violence Against Women: Domestic and Sexual Violence (n 8).

¹¹⁷ WHO, 'Violence against women: a 'global health problem of epidemic proportions'' (WHO, 20 June 2013) <<https://www.who.int/news/item/20-06-2013-violence-against-women-a-global-health-problem-of-epidemic-proportions>> accessed 29 October 2021.

¹¹⁸ Opuz v Turkey App no 33401/02 (ECtHR, 09 June 2009), para 111.

¹¹⁹ T.M and C.M v the Republic of Moldova App no 26608/11 (ECtHR, 28 January 2014), paras 46, 60.

¹²⁰ Istanbul Convention (n 2), art 3(b), 33.

¹²¹ Hajduová v Slovakia App no 2660/03 (ECtHR, 30 November 2010), para 49; Valiulien v Lithuania App no 33234/07 (ECtHR, 26 March 2013), para 69; Polshina v Russia App no 65557/14 (ECtHR, 16 June 2020), para 28; Volodina v Russia (no. 2) App no 40419/19 (ECtHR, 14 September 2021).

¹²² Tkheldize v Georgia App no 33056/17 (ECtHR, 8 July 2021), para 53.

escalate.¹²³ The cycle of violence has been identified as consisting of three phases:¹²⁴

i. tension-building phase: an abuser becomes irritable, possessive, demanding and more prone to react negatively to any trivial frustration. Many women learn to recognise this phase and try to control it by trying to “keep peace”. This stage is rarely reported to police for various reasons (see page 26 below). An abuser is therefore not deterred to proceed to the next stage;

ii. violence phase: is the explosion of violence from the abuser. For women who have experienced violence before, even a threat of violence can be disabling. Usually, this phase is paired with victim blaming, i.e., that violence is a woman’s fault. Victims may be grateful that the violence ends and may consider themselves lucky that it was not worse, no matter how bad their injuries are;

iii. honeymoon phase: an abuser demonstrates a loving behaviour and promises that it will never happen again. Because of false hope, a woman usually withdraws charges.

More generally, the ECtHR has recently acknowledged in *Volodina v Russia* that “[s]ubstantive gender equality can only be achieved with a gender-sensitive interpretation and application of the Convention provisions that takes into account the factual inequalities between women and men and the way they impact women’s lives”.¹²⁵ In the same vein, the CEDAW Committee recommended state parties to incorporate a gender perspective in all aspects of the justice system.¹²⁶

2.2.2. Women Who Kill in Response to Abuse as Victims of Domestic Violence

A woman who uses reactive violence to respond to domestic abuse does not cease to be a victim of domestic violence. Consequently, the standards enshrined in international instruments and jurisprudence, including the CEDAW Convention, the European Convention on Human Rights (ECHR) and the Istanbul Convention, are applicable.¹²⁷ Under international law, states have the due diligence obligation to take measures to protect women and girls from violence, to prosecute acts of violence, and prevent further acts of violence.¹²⁸ States also have an obligation to ensure that they have full access to justice, redress for the harm they suffered as a result of violence, support and appropriate services. A failure to do so puts a state in violation of its international obligations:¹²⁹

- the ECtHR has found that the failure to appreciate the seriousness and extent of the problem of domestic violence goes beyond a simple failure or delay to deal with violence against women and amounts to a repetition of acts condoning such violence and reflecting a discriminatory attitude towards victims on account of their sex;¹³⁰
- CEDAW’s General Recommendation 35 states that “[t]he failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women when

¹²³ GREVIO, ‘Third Party Intervention - Kurt v Austria’ (CoE, 2020) <<https://rm.coe.int/grevio-inf-2020-3-third-party-intervention-kurt-v-austria/pdfa/16809987e9>> accessed 19 January 2021, para 9.

¹²⁴ The “Cycle of Violence” was developed by Lenore Walker in 1979 following interviews with 1,500 victims of family and domestic violence, see L.E. Walker, *The Battered Woman* (New York: Harper & Row, 1979); UNODC Handbook on effective prosecution responses to violence against women and girls (n 61), p. 37.

¹²⁵ *Volodina v Russia* App no 41261/17 (ECtHR, 09 July 2019), para 111.

¹²⁶ CEDAW, ‘General Recommendation No 33’ (2015), para 29(a).

¹²⁷ For more information, see EHRAC Guide to Litigating Cases of Violence Against Women: Domestic and Sexual Violence (n 8).

¹²⁸ CEDAW, ‘General Recommendation No 35’ (2017).

¹²⁹ E.g., in Georgia, civil courts have established the liability of Government bodies (the Ministry of Internal Affairs and the Prosecutor’s Office) for failing to protect women from domestic violence and awarding moral damages; see *A and B v Georgia* App no 73975/16 (ECtHR, pending judgment).

¹³⁰ *Balsan v Romania* App no 49645/09 (ECtHR, 23 May 2017), paras 85-88; *Volodina v Russia* App no 41261/17 (ECtHR, 09 July 2019), para 132; *Opuz v Turkey* App no 33401/02 (ECtHR, 09 June 2009), para 200; *Eremia v the Republic of Moldova* App no 3564/11 (ECtHR, 28 May 2013), para 89.

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/survivors of such acts, provides tacit permission or encouragement to acts of gender-based violence against women. These failures or omissions constitute human rights violations”;¹³¹

- the Inter-American Court has stressed that “when an act of violence against a woman occurs, it is particularly important that the authorities in charge of the investigation conduct it in a determined and effective manner, taking into account society’s obligation to reject violence against women and the State’s obligation to eliminate it and to ensure that victims have confidence in the State institutions for their protection”.¹³²

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)¹³³ sets out the following basic rights that States should consider ensuring to all victims of crime and abuse of power:

- victims should be treated with compassion and respect for their dignity;¹³⁴
- victims are entitled to access the criminal justice system and have prompt redress;¹³⁵
- victims should be informed of their rights, their role and the scope, timing and progress of their case and the disposition of their case;¹³⁶
- victims should be allowed to express their views and concerns and to have them presented and considered at appropriate stages of the criminal case;¹³⁷
- victims should have proper assistance throughout the legal process;¹³⁸
- measures should be taken to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as their families, from intimidation and retaliation;¹³⁹
- unnecessary delays in the disposition of cases should be avoided;¹⁴⁰
- victims are to be entitled to fair restitution and compensation;¹⁴¹
- victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.¹⁴²

Notably, in *X. v Timor-Leste*¹⁴³ the CEDAW Committee firstly considered whether the State party fulfilled its obligation under the CEDAW to protect Ms. X. from domestic violence prior to the fatal incident.¹⁴⁴

Therefore, a woman who uses reactive violence to respond to domestic abuse has a right to have the incidents of domestic violence against her investigated in accordance with the above-mentioned existing standards. In these cases, the history of domestic violence is key to a woman’s offending and requires investigation.

¹³¹ CEDAW, ‘General Recommendation No 35’ (2017), para 24(b).

¹³² Inter-American Court of Human Rights *Fernandez Ortega et al. v Mexico* (2011) Series C No 224, para 193.

¹³³ UNGA, ‘Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’ (1985) UN Doc 40/34.

¹³⁴ *ibid*, para 4.

¹³⁵ *ibid*

¹³⁶ *ibid*, paras 5, 6(a).

¹³⁷ *ibid*, para 6(b).

¹³⁸ *ibid*, para 6(c).

¹³⁹ *ibid*, para 6(d).

¹⁴⁰ *ibid*, para 6(e).

¹⁴¹ *ibid*, para para 8.

¹⁴² *ibid*, para 14.

¹⁴³ CEDAW, *X. v Timor-Leste* (CEDAW/C/69/D/88/2015).

¹⁴⁴ *ibid*, paras 6.3-6.4.

2.2.3. Women Who Kill in Response to Abuse as Defendants

In general, female offenders differ from male offenders:¹⁴⁵

“The circumstances in which women commit criminal offences are different from men. A considerable proportion of women offenders are in prison as a direct or indirect result of the multiple layers of discrimination and deprivation, often experienced at the hands of their husbands or partners, their family and the community”.¹⁴⁶

Women’s offending is often driven by their experience of domestic abuse.¹⁴⁷ In particular, “[o]ffending can be a ‘by-product’ of abuse, resulting from the victim’s attempts to survive”.¹⁴⁸ The cyclical, recurrent and escalatory nature of domestic violence against women together with the psychological impact of such violence explains why at some point women may fight back. Research demonstrates that a trigger to active defensive actions is feeling “trapped within the relationship at the time of the incident” and reaching a “tipping point”.¹⁴⁹

It is therefore important that the impact of domestic violence on a woman offender should be assessed by a qualified expert who can explain to the court the particular situation of a woman subjected to repeated violent acts, her psychological state, and the means she used to protect herself (on the importance and use of expert witnesses, see below Section 2.5). Below is a brief summary of existing theories of the psychological impact of domestic abuse on women victims to assist practitioners to better understand the circumstances which may trigger women’s use of lethal violence and to support the defences of provocation, self-defence or acting under duress:

The impact of domestic abuse on a woman has been analysed and described in different ways. ‘Battered Woman Syndrome’ was developed by psychologist Lenore Walker in 1979.¹⁵⁰ This syndrome describes the cycle of violence a woman is exposed to (see above page 20) and its impact on her that creates a situation of “learned helplessness”. Learned helplessness is a theory which suggests that the randomness and apparent unavoidability of a woman’s beatings lead her to accept her fate and to develop a number of common characteristics, such as low self-esteem, self-blame for the violence, anxiety, depression, fear, general suspiciousness and the belief that only she can change her predicament. ‘Battered woman syndrome’ has been relied on in trials of women who killed in self-defence to explain how a history of domestic violence may contribute to a woman’s self-defence reactions. The United Nations General Assembly cites it as a defence to be taken into consideration during the investigation, prosecution and trial processes in its Updated Model Strategies.¹⁵¹ However, this term and the theory behind it have been criticised for pathologising abused women, and the conception of battered woman syndrome has now been recognised as a sub-category of post-traumatic stress disorder.¹⁵²

More recently the focus is on “intimate partner violence and its effects”, based on other theories such as “coercive control”,¹⁵³ developed by a domestic violence expert, Professor Evan Stark, to explain the impact of intimate partner abuse on women and abused women’s reactions. In particular, coercive control refers to a systematic pattern of behaviour to establish dominance over another

¹⁴⁵ Duban (n 52), p. 91.

¹⁴⁶ Penal Reform International, ‘Briefing: Access to Justice: Discrimination of Women in Criminal Justice Systems’ (Penal Reform International, January 2012) <<https://cdn.penalreform.org/wp-content/uploads/2013/08/BRIEFING-Discrimination-women-criminal-justice.pdf>> accessed 29 October 2021, p. 1.

¹⁴⁷ See footnote 6.c

¹⁴⁸ Prison Reform Trust, ‘Prison Reform Trust briefing on the Draft Domestic Abuse Bill: Pre- legislative scrutiny’ (Prison Reform Trust, April 2019) <http://prisonreformtrust.org.uk/wp-content/uploads/old_files/Documents/Consultation%20responses/Draft%20domestic%20abuse%20bill%20pre-legislative%20scrutiny%20submission%20FINAL.pdf> accessed 29 October 2021, para 3.5.

¹⁴⁹ Centre for Women’s Justice, ‘Women Who Kill: Executive Summary’ (n 58), p. 4.

¹⁵⁰ L.E. Walker, *The Battered Woman* (New York: Harper & Row, 1979).

¹⁵¹ UNGA, ‘Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice’ (2010) UN Doc A/RES/65/228, para 15(k).

¹⁵² WHO, ‘ICD-11 for Mortality and Morbidity Statistics: 6B40 Post traumatic stress disorder’ (WHO) <<https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/2070699808>> accessed 29 October 2021.

¹⁵³ Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (New York: Oxford University Press, 2007).

person through psychological abuse including manipulation, humiliation, isolation and control. As a result, individuals experiencing coercive control are often isolated, entrapped with the relationship and afraid for their own safety and safety of their loved ones. Moreover, coercive control can instil fear even in the absence of physical violence and can continue after the relationship ends.¹⁵⁴

The criminalisation of coercive and controlling behaviour in England and Wales in 2015 led to a significant development in the case-law concerning killing in contexts of domestic abuse in England, as tested in the case of Sally Challen.¹⁵⁵ During her first trial for murder, neither the defendant herself nor her legal team focused on the abusive behaviour of Sally Challen's husband but nonetheless argued 'diminished responsibility'. She was convicted of murder in 2011 and sentenced to life imprisonment. In 2017, after the introduction of the Law on Coercive and Controlling Behaviour,¹⁵⁶ a new team of lawyers appealed based on fresh psychiatric and expert evidence demonstrating that Sally Challen was a victim of controlling behaviour during her marriage. In June 2019, she pleaded guilty to manslaughter and was sentenced to 14 years and released from prison due to the fact she had already served an equivalent sentence. Her case has resulted in the re-opening of several murder cases on a similar basis.¹⁵⁷

Experts like Professor Evan Stark liken coercive control to being taken hostage¹⁵⁸ and victims may develop similar behavioural patterns as hostage victims, including the "Stockholm syndrome".¹⁵⁹ Victims of domestic violence may also develop the "slow burn reaction" in which "women in a situation of abuse tend not to react instantly to the abuse, partly for psychological reasons but also because of the physical mismatch between the abuser and the victim, which makes an imminent response seem futile or even more dangerous to the victim".¹⁶⁰

It is recognised that domestic violence against women has a serious impact on victims. They are generally under stress and some experience severe trauma. Psychological consequences of domestic violence include high levels of depression, anxiety, feelings of vulnerability, loss of confidence, panic attacks, difficulties to sleep and concentrate.¹⁶¹ It should be understood that victims of domestic violence respond to threat or trauma in different ways, in particular those identified as 'Flight, Fight, Freeze, Flop and Friend' defensive survival behaviours:¹⁶²

Fight: I am bigger, stronger and can win against the person. I will stand my ground and win;

Flight: I am smaller and will not win, I can get away though so I'm going to run;

Freeze: I can't get away and I can't win, I'll freeze because if I don't respond they may lose interest and go away;

Flop: They aren't going away, if I stay frozen it's going to hurt more so I'll flop and play dead,

¹⁵⁴ Melissa E. Dichter, Kristie A. Thomas, et. al., 'Coercive Control in Intimate Partner Violence: Relationship with Women's Experience of Violence, Use of Violence, and Danger' (NCBI) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6291212/>> accessed 29 October 2021.

¹⁵⁵ R v Challen [2019] EWCA Crim 916; Justice for Women, 'Sally Challen' <<https://www.justiceforwomen.org.uk/sally-challen-appeal>> accessed 29 October 2021.

¹⁵⁶ Crown Prosecution Service, 'Controlling or Coercive Behaviour in an Intimate or Family Relationship' <<https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship>> accessed 29 October 2021 (see Section '3.1 Section 76 of the Serious Crime Act 2015 - Controlling or Coercive Behaviour in an Intimate or Family Relationship').

¹⁵⁷ Hannah Summers, 'Murder cases reopened in wake of Sally Challen appeal' (Guardian, 10 July 2021) <<https://www.theguardian.com/society/2021/jul/10/cases-reopened-in-wake-of-sally-challen-appeal>> accessed 29 October 2021; Ministry of Justice, 'Guidance: Domestic Homicide Sentencing Review: Terms of Reference' (GOV.UK, 2 November 2021) <<https://www.gov.uk/government/publications/domestic-homicide-sentencing-review-terms-of-reference/domestic-homicide-sentencing-review-terms-of-reference>> accessed 24 November 2021.

¹⁵⁸ Women's Aid, 'What is Coercive Control?' <<https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/>> accessed 29 October 2021.

¹⁵⁹ Rosa Logar and Branislava Marvánová Vargová, 'Effective Multi-agency Co-operation for Preventing and Combating Domestic Violence' (CoE, September 2015) <<https://rm.coe.int/16806ee730>> accessed 29 October 2021, p. 36.

¹⁶⁰ Penal Reform International (n 6), p. 4.

¹⁶¹ WHO, 'Violence against women: a 'global health problem of epidemic proportions'' (WHO, 20 June 2013) <<https://www.who.int/news/item/20-06-2013-violence-against-women-a-global-health-problem-of-epidemic-proportions->> accessed 29 October 2021.

¹⁶² Cotswold Centre For Trauma Healing, 'How PTSD Occurs' <<https://cotswoldcentrefortraumahealing.co.uk/how-ptsd-occurs/>> accessed 29 October 2021.

then it will be over and they'll go away;

Friend: I can't stop it, maybe if I keep them on my side and keep them happy they won't hurt me as much".¹⁶³

This may explain why victims of domestic violence do not fight back immediately as traditionally expected with self-defence. Therefore, special diligence in dealing with victims of domestic violence is required in the context of proceedings against women who have injured or killed their partners to adequately assess how systematic abuse can impact a woman and take account of this during investigation, prosecution and sentencing.

2.3. Interpretation of Elements of Self-Defence in Contexts of Domestic Violence Against Women

2.3.1. Existence of Illegal Aggression

While not all jurisdictions directly criminalise all forms of domestic violence against women, all international instruments recognise domestic violence against women to be a serious human rights violation¹⁶⁴ and require states to criminalise all forms of domestic violence.¹⁶⁵

Although often disregarded by the authorities, psychological violence has long been recognised as a specific form of violence against women by international legal instruments¹⁶⁶ and jurisprudence.¹⁶⁷ In particular, in the view of the Special Rapporteur on torture,¹⁶⁸ not only physical violence but also psychological and emotional violence, including coercive control, amount to cruel, inhuman or degrading treatment or punishment and even to torture. The Istanbul Convention requires states to criminalise psychological violence.¹⁶⁹

Therefore, according to international standards, all forms of domestic violence are illegal.

2.3.2. Imminence of Threat and Current Existence of Violence

The Committee of Experts of the Follow-up Mechanism of the Belem do Para Convention (MESECVI) advocates for an assessment of the imminence of threat that includes a gender perspective, taking account of the ongoing nature of intimate partner violence that represents a 'continuously violent situation', in which violence can occur at any time and can be triggered by any circumstances, and the fact that the woman "suffers from the constant fear, anxiety, and worry that she will be attacked

¹⁶³ Alison Woodward, 'How the Brain Works in Response to a Traumatic Event' (Sexual Trauma and Recovery Service - Dorset Rape Crisis, 31 January 2020) <<https://www.starsdorset.org/blog/how-the-brain-works-in-response-to-a-traumatic-event-fight-flight-freeze-flop-friend>> accessed 29 October 2021.

¹⁶⁴ See footnote 117.

¹⁶⁵ CEDAW, 'General Recommendation No 35' (2017), para 29; Istanbul Convention (n 2), from art 33.

¹⁶⁶ CEDAW, 'General Recommendation No 35' (2017), paras 14, 29; Istanbul Convention (n 2) art 3(a), 3(b), 33.

¹⁶⁷ Hajduová v Slovakia App no 2660/03 (ECtHR, 30 November 2010), para 49; Valiulien v Lithuania App no 33234/07 (ECtHR, 26 March 2013), para 69; Polshina v Russia App no 65557/14 (ECtHR, 16 June 2020), para 28; Volodina v Russia (no. 2) App no 40419/19 (ECtHR, 14 September 2021).

¹⁶⁸ UNGA, 'Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2019) UN Doc A/74/148, para 34.

¹⁶⁹ Istanbul Convention (n 2), art 33.

at any moment”.¹⁷⁰ Consequently, it concludes that since ongoing domestic violence represents a continuum of harm, “the requirement to prove an imminent threat should address more than just the exact moment of the attack, as the action does not take place at one isolated moment in time, but rather is but one incident within a continuum of violence wherein the beginning is easily identifiable, but the end cannot be specifically determined”.¹⁷¹ It is therefore “not unreasonable to believe that women who are the victims of regularly occurring violence, and those who expect it at any moment, believe that their attacker intended to kill them”.¹⁷²

The Committee of Experts of the MESECVI provides by way of example several judgments delivered by state parties of the Belem do Para Convention which reflect this gender perspective. In particular, the Supreme Court of Chile held that the imminent threat of domestic violence suffered by the plaintiff meant that the victim did not have to wait for the actual violence to be about to occur, noting that, “there is no need to wait until the other acts first” and that, “it is not necessary that the attack against the person take place in order for the victim to defend themselves, it is enough that they fear an imminent danger in order to take appropriate measures to avoid it”.¹⁷³

A similar approach is taken by the Council of Europe. The definition of ‘immediate danger’ provided by the Explanatory Report to the Istanbul Convention acknowledges this context: “any situations of domestic violence in which harm is imminent or *has already materialised and is likely to happen again*” (emphasis added).¹⁷⁴ The Court applied a similar interpretation in the fatal domestic violence case of *Opuz v Turkey*, where it held that “[w]hen examining the history of the relationship, it was obvious that the perpetrator had a record of domestic violence and there was therefore a significant risk of further violence”¹⁷⁵ and that the violence should be considered a chain of interconnected events.¹⁷⁶ Judge Pinto de Albuquerque echoes the Istanbul Convention definition in his observation that “the recurrence and escalation inherent in most cases of domestic violence makes it somehow artificial, even deleterious, to require an immediacy of the risk. Even though the risk might not be imminent, it is already a serious risk when it is present”.¹⁷⁷

Recently the Court explicitly endorsed this approach in *Tkheldize v Georgia*: “[w]here there is a lasting situation of domestic violence, there can hardly be any doubt about the immediacy of the danger posed to the victim”.¹⁷⁸

The UNODC Handbook on effective prosecution responses to violence against women and girls provides the following guidance:

“Were her actions necessary to prevent imminent harm? In cases involving a long history of domestic violence, patterns of violence often emerge and victims become adept at identifying “red flags” that indicate imminent violence. Specifically, conduct that initially appears benign to prosecutors may, as a result of history and experience, signal imminent danger. The level of justifiable force increases when used in response to imminent danger of unlawful deadly force”.¹⁷⁹

“Remember that victims of violence may be aware of, and react to, subtle behavioural indicators of the abuser’s pending violence. The challenge in evaluating these precursors to violence is that they often do not rise to the level of physical “aggression” as that term is normally defined. The victim may react with more aggressive assaultive conduct against the abuser in an effort

¹⁷⁰ Committee of Experts of the MESECVI (n 6), p. 4.

¹⁷¹ *ibid*, p. 4.

¹⁷² *ibid*

¹⁷³ *ibid*, p. 5.

¹⁷⁴ Explanatory Report to the Istanbul Convention, para 265.

¹⁷⁵ *Opuz v Turkey* App no 33401/02 (ECtHR, 09 June 2009), para 134.

¹⁷⁶ *ibid*, para 111.

¹⁷⁷ *Valiulienė v Lithuania* App no 33234/07 (ECtHR, 26 March 2013), Concurring Opinion of Judge Pinto de Albuquerque.

¹⁷⁸ *Tkheldize v Georgia* App no 33056/17 (ECtHR, 8 July 2021), para 53.

¹⁷⁹ UNODC Handbook on effective prosecution responses to violence against women and girls (n 61), p. 85.

to prevent an impending assault”.¹⁸⁰

2.3.3. Reasonableness and Proportionality of Means Used by Women to Repel Attacks

In many cases, the authorities tend either to define the means used by women to repel an attack as disproportionate or to assess a woman’s actions against how a man would have acted in a similar situation, or assess how a ‘normal’ women would have behaved. In particular, women are often charged with premeditated murder because the fact that they used a weapon, such as a knife, is considered evidence of planning and preparation.¹⁸¹

2.3.3.1. Reasonableness and Proportionality of Tools Used

The authorities must include a gender perspective when they consider options available to women defending themselves, i.e., that, “the proportionality of the response is linked to the ongoing nature of the aggression suffered”.¹⁸²

Consideration should be given to the fact that a woman is unlikely to be able to defend herself with her bare hands, even if an abuser is unarmed. The apparent “disproportionality” between the nature of an attack and the means of self-defence used by women can be explained and understood by the following common factors at play: i) the likely disparity in size and strength between men and women; ii) gender socialisation which does not teach women how to respond to physical attacks or handle weapons;¹⁸³ iii) the impact of the dynamic of the cycle of violence on women’s mental state which deters women from reacting in accordance with the masculine standards presented by traditional criminal law;¹⁸⁴ iv) women fear that an attacker will recover quickly and will be more violent.¹⁸⁵ The historical inequalities between men and women also play a part here and need to be considered.

The Feasibility Study into Equal Access of Women to Justice commissioned by the Council of Europe’s Gender Equality Commission highlights that “[t]he existing concepts of self-defence are ill-equipped to capture the reality of women who have been subjected to physical, sexual and psychological violence for years and simply do not dare to directly confront their abuser without a weapon”.¹⁸⁶

It is notable that in the UK, while the assessment of self-defence depends on whether the degree of force used was reasonable based on the circumstances as the person believed them to be (‘honest belief’), there is a heightened self-defence law for householders, permitting them to use disproportionate (but not grossly disproportionate) force against an intruder provided it is considered reasonable.¹⁸⁷ In deciding whether the force might be regarded as ‘disproportionate’ or ‘grossly disproportionate’ the court will consider the individual facts of each case including the personal circumstances of the householder and the threat (real or perceived) posed by the offender. To date, despite calls for reform of the law to include victims of domestic violence, this provision applies only to those protecting their property from an intruder.

¹⁸⁰ *ibid.*

¹⁸¹ Duban, Davtyan, Frolova, ‘Research On Preventing And Combating Violence Against Women And Domestic Violence Including In Situations Of Social Disadvantage In The Russian Federation’ (CoE, April 2020) <<https://rm.coe.int/publication-research-on-vaw-and-dv-in-situations-of-social-disadvantage/16809e4a04>> accessed 29 October 2021, p. 36.

¹⁸² Committee of Experts of the MESECVI (n 6), p. 5.

¹⁸³ *ibid.*, p. 7.

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid.*, p. 6.

¹⁸⁶ Gender Equality Commission, ‘Feasibility Study Equal Access of Women to Justice’ (CoE, 28 May 2013) <<https://rm.coe.int/1680597b1d>> accessed 29 October 2021, para 33.

¹⁸⁷ Criminal Justice and Immigration Act 2008, Section 76 (5A) (provision came into force 25 April 2013).

2.3.3.2. Expectations About What Women Should Have or Could Have Done Instead of Defending Themselves

It is not uncommon that the judicial authorities, reaching the conclusion that the requirements of self-defence were not met, pass comment on what a woman should or could have done instead of using physical force, e.g., separate from her partner, report him to authorities, run away etc.¹⁸⁸

The Committee of Experts of the MESECVI rebuts such presumptions:

“[w]omen victims of gender-based domestic violence cannot be obliged to “put up with it” and not defend themselves. When the violence occurs within a marriage or a domestic partnership that, by definition, implies unity between the two parties, this obligation ceases to exist between the two and the women is not obliged to tolerate abuse or be forced to abandon her home instead of defending herself”.¹⁸⁹

The Committee provides the example of the decision of the Supreme Court of Argentina which held that

“all these suggestions – report him to the authorities, flee with her daughter, separate from her husband – reside in an “ideal” world. Reality, supported by statistics, shows exactly the opposite, and is reflected in the objective and subjective impossibility of an easy escape from the cycle of domestic violence. These suggestions contradict the content of international instruments and internal regulations on the topic, as sustained by the Supreme Court, who found, “this affirmation [...] to discredit an assumption of self defense, that, because of the mere presence of the women in the home she shared with the deceased – a presence assumed to be voluntary – promotes the belief that she submitted voluntarily to a hypothetical illicit attack, and not only ignores the provisions of international conventions and internal norms that address the issue, but also directly contradicts their content”.¹⁹⁰

It is widely accepted in international standards and guidelines that adverse conclusions should not be drawn if a woman did not leave the relationship and/ or did not report violence immediately or at all to the authorities. The UN Handbook on effective prosecution responses to violence against women stresses that delayed reporting of gender-based violence is common and should not affect the commitment of prosecutors.¹⁹¹ According to UN Women, less than 40% of women who experience violence seek help of any sort. Less than 10% of those women who seek help go to the police.¹⁹² A crime survey conducted in the United Kingdom found that on average a woman experiences 35 incidents of domestic violence before her first call to the police.¹⁹³

In particular, the UN General Assembly has called on states not to draw any adverse inference from any delays between the alleged offence and the reporting of that offence.¹⁹⁴ The UN Handbook for Legislation on Violence against Women similarly provides that legislation should prohibit “drawing any adverse inference from a delay of any length between the alleged commission of violence and the reporting thereof”.¹⁹⁵ Such a delay may be due to a variety of reasons, including: fear of

¹⁸⁸ Gryaznova (n 20), from p. 13.

¹⁸⁹ Committee of Experts of the MESECVI (n 6), p. 6.

¹⁹⁰ Supreme Court of Justice of Argentina in the case of ‘Leiva Maria Cecilia, simple homicide’ 1 November 2011, cited in Committee of Experts of the MESECVI (n 6), p. 5-6.

¹⁹¹ UNODC Handbook on effective prosecution responses to violence against women and girls (n 61), p. 43.

¹⁹² UN Women, ‘Facts and figures: Ending violence against women’ <<https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes>> accessed 29 October 2021.

¹⁹³ Keir Starmer, ‘Domestic Violence: the facts, the issues, the future - Speech by the Director of Public Prosecutions, Keir Starmer QC’ (CPC, 4 December 2011) <<https://web.archive.org/web/20120504115444/https://www.cps.gov.uk/news/articles/domestic-violence-the-facts-the-issues-the-future/>> accessed 29 October 2021.

¹⁹⁴ UNGA, ‘Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice’ (2010) UN Doc A/RES/65/228, para 15(e).

updated model strategies and practical measures on the elimination of violence against women in the field of crime prevention and criminal justice paragraph 15(e).

¹⁹⁵ Department of Economic and Social Affairs Division for the Advancement of Women ‘Handbook for Legislation on Violence against Women’ (2012) (UN Handbook for Legislation on Violence against Women <<https://www.unwomen.org/sites/default/files/Headquarters/>

stigmatisation; fear of humiliation; fear of not being believed; fear of retaliation; financial or emotional dependence on the perpetrator; distrust in criminal justice mechanisms; lack of access, including geographical, to responsible institutions; and lack of specialised criminal justice personnel.¹⁹⁶

According to the UN Handbook on effective prosecution responses to violence against women and girls, fear of retaliation is justified:

“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 on domestic violence indicates that victims’ fears are accurate. Often reporting and testifying against the perpetrator might be seen as ending the relationship, an act that dramatically increases the victim’s risk of serious injury or death at the hands of her intimate partner. Studies show that women who are separating from their partners are at a much higher risk of domestic violence. Other studies show that those who leave their abusers are as or more likely to be re-abused as those who remain with them”.¹⁹⁷

Distrust of the criminal justice system is also a recognised factor by both UN and the Council of Europe institutions, which document victims’ unsatisfactory or hostile experiences with a law enforcement system that fails to protect them or blames, or shames them:¹⁹⁸ “[m]any women who kill violent partners report past failures of criminal justice system agencies to support them as victims of men’s violence”.¹⁹⁹

Therefore, women’s strategies that are often labeled by authorities as ‘passivity’ or ‘inaction’ can in fact be the result of a thorough assessment about how to protect themselves and/or their children: “[s]taying in violent relationship can paradoxically be one of the strategies to minimise the risk of violence escalation. Separation is one of most reliable risk factors for severe violence. ... Therefore, victims need external support and a safety plan in order to improve their safety while leaving a violent partner”.²⁰⁰

2.4. Standards on Gathering and Evaluation of Evidence in Cases of Self-Defence in the Contexts of Domestic Violence Against Women

2.4.1. Gender-Sensitive Case Management and Gender-Sensitive Interactions

According to the CEDAW Committee, good quality of justice systems requires that “justice systems are contextualized, dynamic, participatory, open to innovative practical measure, gender-sensitive, and take account of the increasing demand for justice by women”.²⁰¹

[Attachments/Sections/Library/Publications/2012/12/UNW_Legislation-Handbook%20pdf.pdf](#)> accessed 29 October 2021), para 3.9.6.

¹⁹⁶ *ibid.*

¹⁹⁷ UNODC Handbook on effective prosecution responses to violence against women and girls (n 61), p. 42-43.

¹⁹⁸ *ibid.*, p. 43; Centre for Women’s Justice, ‘Women Who Kill: Executive Summary’ (n 58), p. 3; Duban (n 52), p. 83.

¹⁹⁹ Centre for Women’s Justice, ‘Women Who Kill: Executive Summary’ (n 58), p. 3.

²⁰⁰ Rosa Logar and Branislava Marvánová Vargová, ‘Effective Multi-agency Co-operation for Preventing and Combating Domestic Violence’ (CoE, September 2015) <<https://rm.coe.int/16806ee730>> accessed 29 October 2021, p. 41.

²⁰¹ CEDAW, ‘General Recommendation No 33’ (2015), para 14(d).

The United Nations Model Strategies and Practical Measures on the Elimination of Violence against Women urge states 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 minimize intrusion into their lives while abiding by standards for the collection of evidence”.²⁰² In addition, victims of violence should have a right to speak to a female officer.²⁰³

These requirements of applying a gender perspective are especially relevant to cases of self-defence in the contexts of domestic violence. The research conducted by the Centre for Women’s Justice outlined that in this type of case:

- “Many of the women interviewed described their experiences of being met by first responders and taken into police custody. For many, this period was characterised by intense shock and complex trauma responses, including initial memory loss, dissociation and suicidal feelings”;²⁰⁴
- “Women who killed their abuser are likely to be traumatised when they first engage with criminal justice agencies”;²⁰⁵
- “Women experience difficulties in disclosing abuse, particularly sexual abuse, to male lawyers, and women feeling intense guilt at what they had done and not wanting to speak negatively of the men they ‘loved’”;²⁰⁶
- Women have the problem of identifying a perpetrator’s behaviour as abusive and making a disclosure.²⁰⁷

As a result, “in many cases women may plead guilty upon charge by the police, not realising that their experience of domestic abuse could be a reason for them not to be prosecuted”.²⁰⁸

These women, despite being the offender, are also victims of domestic violence (see Section 2.2.2) and may well display characteristics of those subjected to violence. The UNODC Handbook on effective prosecution responses to violence against women and girls highlights that women who suffer violence “may not behave like victims of other crimes and prosecutors should not expect them to. The victims may be perceived as hostile or uncooperative or even unbelievable to prosecutors”.²⁰⁹ The Council of Europe’s Training Manual on Women’s Access to Justice provides similar guidance for judges and prosecutors.²¹⁰

Therefore, a gender-sensitive approach requires authorities to recognise signs of distress during interactions with women, who remain victims of domestic violence despite their status of an offender, and avoid any secondary victimisation. The CoE Training Manual on Women’s Access to Justice specifies that it is a good practice to ask a woman about her preference about the sex of the prosecutor assigned to her case, and authorities should make efforts to accommodate women’s wishes about the presence of a family member, friend or NGO advocate.²¹¹

These requirements are applicable to all stages of the case, including at a trial stage. The UNODC Handbook on effective prosecution responses to violence against women requires gender sensitivity

²⁰² UNGA, ‘Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice’ (2010) UN Doc A/RES/65/228, para 16(e).

²⁰³ *ibid*, para 16(l).

²⁰⁴ Centre for Women’s Justice, ‘Women Who Kill’ Report (n 6), p. 33.

²⁰⁵ *ibid*, p. 8.

²⁰⁶ *ibid*, p. 9.

²⁰⁷ Centre for Women’s Justice, ‘Women Who Kill: Executive Summary’ (n 58), p. 6.

²⁰⁸ Prison Reform Trust, ‘Prison Reform Trust briefing on the Draft Domestic Abuse Bill: Pre- legislative scrutiny’ (Prison Reform Trust, April 2019) <http://prisonreformtrust.org.uk/wp-content/uploads/old_files/Documents/Consultation%20responses/Draft%20domestic%20abuse%20bill%20pre-legislative%20scrutiny%20submission%20FINAL.pdf> accessed 29 October 2021, para 3.8.

²⁰⁹ UNODC Handbook on effective prosecution responses to violence against women and girls (n 61), p. 41.

²¹⁰ Duban (n 52), p. 48.

²¹¹ *ibid*, p. 74.

even from jurors – “prosecutors want to select jurors who have a realistic understanding of the dynamics of violence against women as these jurors are more likely to be fair and perhaps even educate other jurors during deliberation”.²¹²

In *X. v Timor-Leste*, the first CEDAW case on self-defence, the CEDAW Committee considered whether the authorities ensured that the applicant received a fair trial, “without bias, discrimination or gender stereotyping”.²¹³ In particular, in this case, the Committee concluded that one of the first things the authorities should do is to provide a woman with appropriate medical care and psychological support.²¹⁴ Specifically, the Committee stated the need to “provide the author with psychosocial support after her arrest appropriate to a person claiming to have been attacked and to have killed in self-defence”.²¹⁵

The CEDAW Committee requires that “[a]ppropriate protective and support services should be provided for victims”.²¹⁶ The UN General Assembly has called on States to “ensure that adequate medical, legal and social services sensitive to the needs of victims are in place to enhance the criminal justice management of cases involving violence against women”.²¹⁷

2.4.2. Authorities Must Be Pro-Active in Collecting Evidence and In Exploring the Range of Potential Evidence

This requirement comes from the three premises identified above: i) the history of domestic violence is crucial to women’s offending; however, ii) for many reasons intrinsic to their situation, including fear, or emotional or economic dependency, victims of domestic violence may be uncooperative; also, iii) women often struggle to identify a perpetrator’s behaviour as abusive and disclose it. Therefore, from the outset, determining the primary or predominant aggressor may not be self-evident.

Consequently, the authorities should take a pro-active approach to ensuring that the barriers that women face in accessing justice are removed in cases concerning gender-based violence.²¹⁸ For example, in *X. v Timor-Leste*, the CEDAW Committee stated that authorities had to collect evidence that would have aided the applicant’s defence, requiring a concrete effort from the authorities in self-defence cases.²¹⁹ In practice, this means that authorities should actively explore various types of non-victim/corroborating evidence even if an incident occurred without witnesses,²²⁰ e.g., signs of violence; police records; emergency call recordings; statements of neighbours, relatives or other witness accounts; history of previous incidents; previous reports on domestic violence that were not pursued; character evidence about an abuser; previous communications between a woman and abuser (letters, notes, emails, SMS messages, social media posts, etc); expert testimonies (such as from health practitioners or social workers); CCTV recordings; photographs of the injury and scene (including photographs of property damage); medical history/reports (including history of emergency treatment as well as reports that show a history of abuse).²²¹ Therefore, authorities must be pro-active in collecting specific types of evidence and in exploring the range of potential evidence.²²² At the same time, while the authorities must be pro-active in gathering evidence, this does not mean that the victim should be taken to lack credibility (see below Section 2.4.3).

²¹² UNODC Handbook on effective prosecution responses to violence against women and girls (n 61), p. 117.

²¹³ CEDAW, *X. v Timor-Leste* (CEDAW/C/69/D/88/2015), para 6.2.

²¹⁴ CEDAW, *X. v Timor-Leste* (CEDAW/C/69/D/88/2015), para 6.5.

²¹⁵ *ibid*

²¹⁶ CEDAW, ‘General Recommendation No 19’ (1992), para 24(b).

²¹⁷ UNGA, ‘Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice’ (2010) UN Doc A/RES/65/228, para 19(g).

²¹⁸ Choudhry (n15), <https://rm.coe.int/factsheet-womens-access-to-justice/16808ff44e> p. 15

²¹⁹ CEDAW, *X. v Timor-Leste* (CEDAW/C/69/D/88/2015), para 6.5.

²²⁰ CEDAW, ‘General Recommendation No 33’ (2015), para 51(i). CEDAW, ‘General Recommendation No 33’ (2015), para 51(i).

²²¹ Duban (n 52), p. 79.

²²² *ibid*.

While acts of violence against women are not documented precisely in many countries,²²³ the collection of medical and forensic evidence is an important duty of public authorities and they must ensure proper collection and submission to court of medical and forensic evidence, where possible.²²⁴ Therefore, such cases require immediate medical assessments²²⁵ and documentation of injuries.

All this information may give some insight into the circumstances preceding a woman's use of lethal force. In particular, if there is a reason to suspect that a defendant is a victim of abuse, a contextualised analysis should be conducted which includes:

“Determining whether the defendant is a victim of domestic violence. Look beyond the current case and obtain information about the complainant's and defendant's entire relationship. Examine the defendant's motive and intent in using violence. Was the violence out of fear, anger, controlled? Ask other allied professionals, such as coordinated community response committees, if there is one, to obtain additional information. Check the criminal history of both, including the charged and the uncharged.

Evaluating evidence of self-defence and dismissing the case where self-defence can legitimately be established. While it is the defendant's burden to raise self-defence at trial, prosecutors must become aware of any evidence that suggests that a defendant may have acted in self-defence when determining whether to file criminal charges. Review the complainant's and defendant's statements, the emergency call, witness' statements, pictures of physical injuries or other evidence collected at the scene as this may establish that the defendant's actions were defensive in nature. Accurately evaluating and charging these cases requires prosecutors to understand each person's use of violence within the context of their relationship. Were her actions necessary to prevent imminent harm?”.²²⁶

The Updated Model Strategies and Practical Measures urge states to review, evaluate and update their criminal procedures, as appropriate and taking into account all relevant international legal instruments, in order to ensure that “[e]vidence 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”.²²⁷

2.4.3. Prohibition of Corroboration Requirements for Victims of Domestic Violence

While the authorities must be pro-active in gathering evidence, this does not mean that the victim should be taken to lack credibility. A problematic feature of incidents of self-defence in the context of domestic violence is that there are usually no witnesses, as domestic violence primarily takes place in the home. Consequently, two of the most serious obstacles to women's access to justice are: i) that lack of medical evidence, including visible physical marks, is perceived to diminish the severity of reported violence and/or the threat responded to; ii) that inconsistencies in women's testimonies are perceived to be evidence the women are lying. These two obstacles are addressed below.

The statement of the victim in situations of domestic violence is crucial evidence and burdensome evidential and corroboration requirements in the context of domestic violence operates as an obstacle

²²³ Department of Economic and Social Affairs Division for the Advancement of Women 'Handbook for Legislation on Violence against Women' (2012) (UN Handbook for Legislation on Violence against Women <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2012/12/UNW_Legislation-Handbook%20pdf.pdf> accessed 29 October 2021), para 3.2.4.

²²⁴ *ibid.*, para 3.9.5.

²²⁵ Including where appropriate psychological assessments (see above Section 1.2 (viii) above re problems with psychological assessments).

²²⁶ UNODC Handbook on effective prosecution responses to violence against women and girls (n 61), p. 85.

²²⁷ UNGA, 'Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice' (2010) UN Doc A/RES/65/228, para 15(g).

to justice and protection and such laws and practices are widely condemned. The CEDAW Committee has reiterated the importance of ensuring that states should review rules of evidence, in particular in cases of violence against women, to ensure that “evidentiary requirements are not overly restrictive, inflexible or influenced by gender stereotypes”.²²⁸ In particular, the Committee recommends abolishing discriminatory barriers of access to justice, including “corroboration rules that discriminate against women as witnesses, complainants and defendants by requiring them to discharge a higher burden of proof than men in order to establish an offence or to seek a remedy”.²²⁹

It is a long-settled principle of international law that judges may rely on the evidence of a single witness (the victim) to enter a conviction without the need for corroboration.²³⁰ International guidelines echo this, requiring that corroboration requirements for sexual violence cases, including corroborating the statement of the survivor, be eliminated.²³¹ The International Commission of Jurists emphasises that, in particular, requirements of prompt complaint, corroboration and the cautionary principle embody underlying harmful stereotypes and incorrect assumptions that constitute obstacles to justice for survivors of sexual violence and should be removed.²³² The same harmful assumptions are evident in situations of domestic violence and the elimination of such practices is equally applicable to the investigation and prosecution of domestic violence cases.

2.4.3.1. Lack of Visible Marks Does Not Prove That There Was No Violence

There are two main reasons why a lack of medical evidence should not constitute proof there was no violence: i) domestic violence takes many forms, not all forms of domestic violence leave visible marks, e.g., psychological violence or even some forms of physical violence such as choking. Nonetheless, all forms of domestic violence constitute serious human rights violations and may even amount to torture;²³³ ii) in many cases the authorities fail to conduct a forensic medical examination.

The UN Handbook on Legislation on Violence Against Women sets out reasons for the lack of such evidence: “forensic and medical evidence may not be available in court proceedings for a variety of reasons, including complainants’ lack of knowledge regarding the importance of such evidence; ... lack of ... personnel trained in the collection of evidence in cases of violence against women in a manner sensitive to the complainant/survivor ... It is therefore important that legislation also allow for the prosecution and conviction of an offender based solely on the testimony of the complainant/survivor”.²³⁴

The Committee of Experts of the MESECVI advocates a gender perspective on the investigation of crimes of killing in self-defence in the context of domestic violence and draws on the general standards set by the Inter-American Court as helpful for the valuation of evidence in these cases:

- the statement of the victim is essential, and the existence of documented proof of means of the alleged attack cannot be expected;²³⁵
- while all efforts must be made by authorities to collect medical evidence, the lack of medical

²²⁸ CEDAW, ‘General Recommendation No 33’ (2015), para 51(h).

²²⁹ *ibid*, para 25(a)(iii).

²³⁰ See International Criminal Tribunals for the former Yugoslavia: Haradinaj et al., Appeal Judgment, paras 145, 219; Tadic, Appeal Judgment, para 65; Bagilishema, Appeal Judgment, para 79; Dragomir Milosevic, Appeal Judgment, para 215; Kupreskic, Appeal Judgment, para 220; Lukic & Lukic, Appeal Judgment, para 375.

²³¹ UNODC Handbook on effective prosecution responses to violence against women and girls (n), p. 101; UN Handbook for Legislation on Violence against Women (n 61), para 3.9.7.1.

²³² International Commission of Jurists, ‘Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice’ (ICJ, April 2015) <<https://www.icj.org/wp-content/uploads/2015/04/Universal-GenderStereotypes-Publications-Thematic-report-2015-ENG.pdf>> accessed 29 October 2021, from p. 11.

²³³ See footnote 117.

²³⁴ Department of Economic and Social Affairs Division for the Advancement of Women ‘Handbook for Legislation on Violence against Women’ (2012) (UN Handbook for Legislation on Violence against Women <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2012/12/UNW_Legislation-Handbook%20pdf.pdf> accessed 29 October 2021), para 3.9.5.

²³⁵ Committee of Experts of the MESECVI (n 6), p. 11.

evidence does not diminish the veracity of the reported act;²³⁶

- the lack of visible marks does not prove that no violence has taken place;²³⁷
- victims cannot be expected to show all the presumed abuse suffered;²³⁸
- the statement of a victim of domestic violence must be considered as evidence during the investigation and trial, including in the absence of other physical or documented evidence of the alleged attack.²³⁹

Therefore, the absence of a medical examination, or visible injuries, or physical evidence should not become an obstacle to the recognition of women's right of self-defence.

2.4.3.2. Authorities Should Not Make Adverse Conclusions from Inconsistencies in Women's Testimony and from the Late Disclosure of Abuse

As demonstrated above, victims of domestic violence may not behave as victims of other crimes. Research conducted by the Centre for Women's Justice showed that in this type of case "late disclosure of abuse is common, with some women only disclosing the abuse after they have been convicted".²⁴⁰ Moreover, their research demonstrated that when women "finally do make full and frank disclosures, usually after much counselling and support from specialist organisations, their initial silence or denial of abuse usually counts against them".²⁴¹

The UNODC Handbook on effective police responses to violence against women records that "[m]any women are so nervous upon arrival at a police station that they have difficulty relating a narrative with a beginning, middle and end".²⁴² The UNODC Handbook on effective prosecution responses to violence against women and girls further specifically dismantles the myth that a victim's inconsistencies mean she is not credible:

"The belief that many victims are false places 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".²⁴³

The reasons for an initial lack of disclosure can vary. Women may deliberately not disclose their victimisation out of guilt at what they have done or "not wanting to speak negatively of the men they 'loved'",²⁴⁴ or the impact of the cultural and religious constraints on them,²⁴⁵ or they may not fully understand that what they have experienced is abuse (this is a particular issue with coercion and control).²⁴⁶

The Committee of Experts of the MESECVI, drawing on case-law standards involving torture and sexual violence as comparable trauma to domestic violence, concludes that:

²³⁶ *ibid.*

²³⁷ *ibid.*

²³⁸ *ibid.*, p. 10.

²³⁹ *ibid.*, p. 13.

²⁴⁰ Centre for Women's Justice, 'Women Who Kill: Executive Summary' (n 58), p. 6.

²⁴¹ Centre for Women's Justice, 'Women Who Kill' Report (n 6), p. 121.

²⁴² UNODC, 'Handbook on Effective police responses to violence against women' (UNODC, 2010) <https://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_Effective_police_responses_to_violence_against_women_English.pdf> accessed 29 October 2021, p. 59.

²⁴³ UNODC Handbook on effective prosecution responses to violence against women and girls (n 61), p. 34.

²⁴⁴ Centre for Women's Justice, 'Women Who Kill' Report (n 6), p. 9.

²⁴⁵ *ibid.*, p. 121.

²⁴⁶ *ibid.*, p. 122.

- imprecise recall does not mean that the reports are false or that the acts lack credibility;²⁴⁷
- “when women do file a complaint, it is reasonable to expect that there will be inconsistencies in their testimony. ... It is well known that gender-based domestic violence is traumatic for the victims”.²⁴⁸

2.4.4. Importance of Expert Evidence

Expert witnesses can play a vital, even determinative, role in a case. Considering that litigating self-defence in the contexts of domestic violence against women is very complex and little understood, lawyers may want to instruct an expert to explain the dynamics and impact of the cyclical violence on the victim/offender. Experts can explain specific issues that are beyond the knowledge and experience of authorities, including investigators, prosecutors, judges and jurors, the lack of understanding of which can negatively impact their ability to impartially evaluate the evidence presented at trial. It is therefore important that the expert instructed has significant expertise in the relevant area and does not demonstrate any gender-bias.

Experts can assist with:

- commonly known characteristics of victims of domestic violence;
- dynamics of domestic abuse, including why leaving an abusive relationship or seeking help may lead to further abuse or even death;
- why there may be no corroborating evidence of a woman’s account of her abuse;
- the impact of domestic violence upon victims;
- issues relating to widespread and persistent myths regarding domestic violence, such as the myth of how a ‘typical’ victim of domestic violence behaves;
- issues relating to victims’ behaviour, including:
 - o why a victim is hostile or reluctant to participate in proceedings;
 - o why inconsistencies in testimonies are common;
 - o why allegations may have previously been withdrawn, or why it may take time for a woman to disclose what has happened;
- understanding the complex phenomenon of domestic violence trauma syndrome, post-traumatic stress disorder, the cycle of violence experienced by victims of abuse;
- highlighting and questioning inconsistencies and inaccuracies in the evidence and conclusions provided by authorities. In particular, what may have been done by authorities incorrectly or incompletely, for instance identifying whether state-appointed experts provided opinions within the areas of their expertise and whether those experts reflect bias and further reinforce gender stereotypes;
- explaining the cultural context in which the alleged offence took place, as well as the build-up and aftermath.

According to well-established case-law of the ECtHR, it is a violation of Article 6 if a national court refused to call witnesses whose statements can influence the outcome the trial²⁴⁹ or clarify an

²⁴⁷ Committee of Experts of the MESECVI (n 6), p. 11.

²⁴⁸ *ibid*, p. 10.

²⁴⁹ *Perna v Italy* App no 48898/99 (ECtHR, 06 May 2003) para 29.

uncertain situation which constituted the basis of charges.²⁵⁰

Ideally, the aim of an expert opinion in this type of case is to facilitate an understanding of the situation of a victim of domestic violence and eliminate gender-based myths, misunderstandings and bias of judges, prosecutors and jurors. For more information on how to instruct an expert, see EHRAC Guide to Instructing Expert Witnesses.²⁵¹

2.5. Importance of Effective and Gender-Sensitive Legal Assistance in Cases of Self-Defence in the Contexts of Domestic Violence Against Women

As referenced above, women in this situation may plead guilty upon charge by the police, not realising that their experience of domestic violence could provide them with a defence, partial defence or be a reason not to prosecute.²⁵² Therefore, gender-sensitive legal assistance is extremely important.

In *X. v Timor-Leste*, the Committee required the authorities to inform the applicant of her rights, provide counsel at her first interview or collect evidence that would have aided her defence and ensure that legal assistance provided by a counsel is effective and gender-sensitive.²⁵³ The Committee stressed that legal aid and public defences must be “accessible, sustainable and responsive to the needs of women” and provided “in a timely, continuous and effective manner at all stages of judicial or quasi-judicial proceedings”²⁵⁴ and legal aid and public defence providers are competent and gender-sensitive.²⁵⁵

The ECtHR holds that an applicant must be expressly informed about her right to remain silent²⁵⁶ and legal aid must be made available for her at all stages of proceedings from the initial police questioning (and even before the first police interview), through the trial and appeal stages. Not to do so may constitute a violation of the right of the defence under Article 6 § 3(c).²⁵⁷

²⁵⁰ *Kasparov and Others v Russia* App no 21613/07 (ECtHR, 03 October 2013) paras 64-65.

²⁵¹ EHRAC, ‘EHRAC Guide to Instructing Expert Witnesses’ (EHRAC, December 2020) <https://ehrac.org.uk/en_gb/resources/ehrac-guide-to-instructing-expert-witnesses/> accessed 29 October 2021.

²⁵² Prison Reform Trust, ‘Prison Reform Trust briefing on the Draft Domestic Abuse Bill: Pre- legislative scrutiny’ (Prison Reform Trust, April 2019) <http://prisonreformtrust.org.uk/wp-content/uploads/old_files/Documents/Consultation%20responses/Draft%20domestic%20abuse%20bill%20pre-legislative%20scrutiny%20submission%20FINAL.pdf> accessed 29 October 2021, para 3.8.

²⁵³ CEDAW, *X. v Timor-Leste* (CEDAW/C/69/D/88/2015), para 6.5.

²⁵⁴ CEDAW, ‘General Recommendation No 33’ (2015), para 37(a).

²⁵⁵ CEDAW, ‘General Recommendation No 33’ (2015), para 37(b).

²⁵⁶ *Stojkovic v France and Belgium* App no 25303/08 (ECtHR, 27 October 2011) para 54.

²⁵⁷ *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008) paras 54-55; *Shabelnik v Ukraine* App no 16404/03 (ECtHR, 19 February 2009) para 57.

2.6. History of Domestic Violence as a Mitigation in Cases of Self-Defence in the Contexts of Domestic Violence Against Women

“Many women who kill their abusers are imprisoned for long periods, at great cost to themselves and to their families”.²⁵⁸ However, international standards require, at least, that women should have a right to present their history of abuse as evidence and that it should be taken into account as a mitigating factor in sentencing. In particular, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (“the Bangkok Rules”) provides:

- Gender-specific options for diversionary measures and pre-trial and sentencing alternatives shall be developed within Member States’ legal systems, taking account of the history of victimisation of many women offenders and their caretaking responsibilities;²⁵⁹
- Appropriate resources shall be made available to devise suitable alternatives for women offenders in order to combine non-custodial measures with interventions to address the most common problems leading to women’s contact with the criminal justice system. These may include therapeutic courses and counselling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; and educational and training programmes to improve employment prospects. Such programmes shall take account of the need to provide care for children and women-only services;²⁶⁰
- “When sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history ..., in the light of women’s caretaking responsibilities and typical backgrounds”.²⁶¹

It is recognised that for sole carers of children, a role still overwhelmingly held by mothers, “[e]ven a short period of incarceration may have damaging, long-term consequences for the children concerned and should be avoided, unless unavoidable for the purposes of justice”.²⁶² Notably, the UK Government has established an independent review of sentencing in domestic homicides in the light of concerns about gender disparities in sentencing.²⁶³

²⁵⁸ Centre for Women’s Justice, ‘Women Who Kill’ Report (n 6), p. 13.

²⁵⁹ UNGA, ‘United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)’ (2010) UN Doc A/RES/65/229, rule 57.

²⁶⁰ *ibid*, rule 60.

²⁶¹ *ibid*, rule 61.

²⁶² Penal Reform International, ‘Briefing: Access to Justice: Discrimination of Women in Criminal Justice Systems’ (Penal Reform International, January 2012) <<https://cdn.penalreform.org/wp-content/uploads/2013/08/BRIEFING-Discrimination-women-criminal-justice.pdf>> accessed 29 October 2021, p. 6; See also Prison Reform Trust Report: Invisible Women: Understanding women’s experiences of long-term imprisonment (2021) http://www.prisonreformtrust.org.uk/wp-content/uploads/2022/02/invisible_women.pdf

²⁶³ Ministry of Justice, ‘Guidance: Domestic Homicide Sentencing Review: Terms of Reference’ (GOV.UK, 2 November 2021) <<https://www.gov.uk/government/publications/domestic-homicide-sentencing-review-terms-of-reference/domestic-homicide-sentencing-review-terms-of-reference>> accessed 24 November 2021.



CONCLUSION & USEFUL RESOURCES

Conclusion

Given the systemic and structural nature of violence against women and the litigation challenges addressed in this Guide, it is fundamental to embed a gender perspective to ensure women's access to justice. A gender perspective in litigating self-defence in the contexts of domestic violence against women necessitates: applying a gender perspective at every level while assessing whether the requirements of self-defence have been met by women; interpreting existence of illegal aggression, imminence of threat and current existence of violence and reasonableness and proportionality of means used by women to repel attacks from a gender-sensitive perspective; ensuring the provision of psycho-social support and providing the circumstances to facilitate full disclosure of domestic abuse; ensuring this history is meaningfully taken into account throughout the investigation and any subsequent trial; and identifying and defying gender stereotypes. The authorities should ensure the remedies that are available *de jure* are available *de facto* to achieve substantive quality as provided by the CEDAW Committee and the Istanbul Convention.²⁶⁴

²⁶⁴ See footnote 53 .

Useful Resources

General Recommendation N. 1 of the Committee of Experts of the MESECVI on Self-Defense and Gender-Based Violence according to Article 2 of the Belém do Pará Convention (2018)

<https://www.oas.org/en/mesecvi/docs/MESECVI-CEVI-doc.249-EN.pdf>

‘Women who kill in response to domestic violence: How do criminal justice systems respond?’ (a multi-jurisdictional study for Penal Reform International, 2016)

https://cdn.penalreform.org/wp-content/uploads/2016/04/Women_who_kill_in_response_to_domestic_violence_Full_report.pdf

‘Women Who Kill: How The State Criminalises Women We Might Otherwise Be Burying’ (Centre for Women’s Justice, 2021)

<https://www.centreforwomensjustice.org.uk/women-who-kill>

Amicus Brief in Support of Ms. Gulzhan Pasanova (the Clooney Foundation for Justice, Covington & Burling LLP, et al., 2020)

<https://cfj.org/wp-content/uploads/2020/05/CFJ-Amicus-Brief-in-Support-of-Pasanova-G.-12-May-2020-English.pdf>

EHRAC Guide to Litigating Cases of Violence Against Women: Domestic and Sexual Violence (2020)

<https://ehrac.org.uk/wp-content/uploads/2021/09/EHRAC-Guide-to-Litigating-Cases-of-Violence-Against-Women-ENG.pdf>

EHRAC’s Guide to Using the UN CEDAW Committee and Special Rapporteur on Violence Against Women (2018)

https://ehrac.org.uk/en_gb/resources/using-the-un-cedaw-committee-and-special-rapporteur-on-violence-against-women/

EHRAC Guide to Instructing Expert Witnesses (2020)

https://ehrac.org.uk/en_gb/resources/ehrac-guide-to-instructing-expert-witnesses/%20

‘There’s a reason we’re in trouble»: Domestic abuse as a driver to women’s offending’ (Prison Reform Trust, 2017)

https://www.advancecharity.org.uk/wp-content/uploads/2020/04/Domestic_abuse_report_final_lo.pdf

Handbook on effective prosecution responses to violence against women and girls (UNODC, 2014)

https://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_effective_prosecution_responses_to_violence_against_women_and_girls.pdf

Handbook on Effective police responses to violence against women (UNODC, 2010)

https://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_Effective_police_responses_to_violence_against_women_English.pdf

Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls (UNODC, 2019)

https://www.unodc.org/pdf/criminal_justice/HB_for_the_Judiciary_on_Effective_Criminal_Justice_Women_and_Girls_E_ebook.pdf

Useful Resources

Training Manual for Judges and Prosecutors on Ensuring Women’s Access to Justice (2017). See also Annex 3 to the manual: Selected Resources on Gender Equality and Women’s Access to Justice
<https://rm.coe.int/training-manual-women-access-to-justice/16808d78c5>

OHCHR – Gender Stereotyping Section
<https://www.ohchr.org/en/publications-and-resources>

The Right of Victims of Domestic Violence to Self-Defence: Stereotypes and Prejudices in the Decisions of Russian Courts
https://ehrac.org.uk/en_gb/resources/the-right-of-victims-of-domestic-violence-to-self-defence-stereotypes-and-prejudices-in-the-decisions-of-russian-courts/

How the State Criminalises Victims of Violence Against Women and Girls (forthcoming in 2022), Centre for Women’s Justice, London

Landmark Cases

1. Valérie Baco – France (BBC, ‘Valérie Bacot: Freedom for abused French woman who killed husband’ (BBC, 25 June 2021) <<https://www.bbc.com/news/world-europe-57609494>> accessed 29 October 2021).
2. Sally Challen – UK. Murder cases reopened in wake of Sally Challen appeal (Justice for Women, ‘Sally Challen’ <<https://www.justiceforwomen.org.uk/sally-challen-appeal>> accessed 29 October 2021).
3. Khachaturyan sisters (still pending) – Russia (Matthew Luxmoore, ‘How the killing of an abusive father by his daughters fuelled Russia’s culture wars’ (Guardian, 10 March 2020) <<https://www.theguardian.com/world/2020/mar/10/khachaturyan-sisters-killing-of-abusive-father-russia-trial-family-values>> accessed 29 October 2021).
4. Barbara Sheehan – USA (Dan Bilefsky, ‘Wife Who Fired 11 Shots Is Acquitted of Murder’ (the New York Times, 06 October 2011) <<https://www.nytimes.com/2011/10/07/nyregion/barbara-sheehan-who-killed-husband-is-found-not-guilty-of-murder.html>> accessed 29 October 2021).
5. For the Americas, the Committee of Experts of the Follow-up Mechanism of the Belém do Pará Convention (Committee of Experts of the MESECVI), ‘General Recommendation N. 1 of the Committee of Experts of the MESECVI’ (2018) <<https://www.oas.org/en/mesecvi/docs/MESECVI-CEVI-doc.249-EN.pdf>> accessed 29 October 2021.
6. For Australia, Canada, England and Wales, New Zealand, see the upcoming report ‘How the State Criminalises Victims of Violence Against Women and Girls’ (Centre for Women’s Justice, due to be published in January 2022).



EHRAC **European Human Rights
Advocacy Centre**

Middlesex University
The Burroughs Hendon
NW4 4BT
Tel: +44 208 411 2826
www.ehrac.org.uk
ehrac@mdx.ac.uk

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