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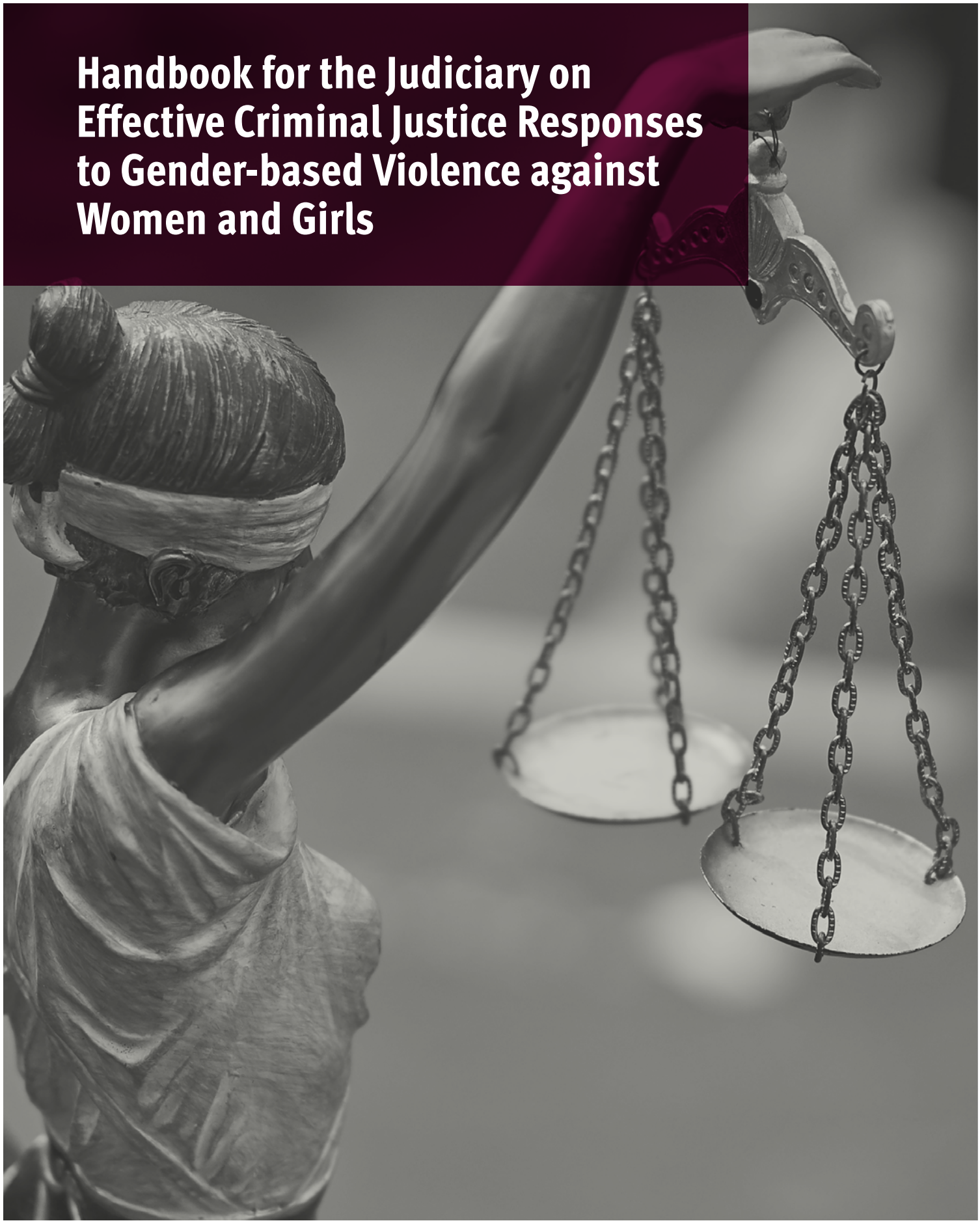
Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls



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Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls

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Abbreviations and acronyms

ADR	alternative dispute resolution
ASEAN	Association of Southeast Asian Nations
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CODI	Committee on Decorum and Investigation
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CETS	Council of Europe Treaty Series
CRPD	Convention on the Rights of Persons with Disabilities
CSO	civil society organizations
DV	domestic violence
DVICM	Domestic Violence Intervention Court Model
ECHR	European Court of Human Rights
ECLAC	Economic Commission for Latin America and the Caribbean
EHDVS	Emma House Domestic Violence Services
EVAW	ending violence against women
FMG/C	female genital mutilation/cutting
FJA	Federal Judicial Affairs
GBVAWG	gender-based violence against women and girls
GR	general recommendation
GRKWG	gender-related killing of women and girls
HEUNI	European regional institute in the United Nations Criminal Justice and Crime Prevention programme network
IAWJ	International Association of Women Judges
ICCPR	International Covenant on Civil and Political Rights
IDVA	independent domestic violence advisers
IPV	intimate partner violence
JCCD	Judicial Council on Cultural Diversity
JEP	Jurisprudence of Equality Programme
LGBTI	lesbian, gay, bisexual, transgender and intersex
NGO	non-governmental organization
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OSF	Open Society Foundation
PHILJA	Philippine Judicial Academy
SAARC	South Asian Association for Regional Cooperation
SDGs	Sustainable Development Goals
SGBV	sexual and gender-based violence
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNV	United Nations Volunteers
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
VAW	violence against women

VOM	victim-offender mediation
WA2J	Women's Access to Justice
WCC	Women's Centre for Change, Penang
WHO	World Health Organization

Glossary of terms

Bail hearings is a judicial proceeding where the court determines if a person charged with a criminal offence should be released on conditions pending trial, including cash bail or bond.
Committal hearing is a hearing where a judge or magistrates decides if the prosecution has enough evidence for a criminal case to go to trial.

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

Compensation means quantifiable damages resulting from the violence and includes both pecuniary and non-pecuniary remedies, such as an injunction. When compensation is not fully available from the offender or other sources, States should provide financial compensation.

Court dockets refers to the written list of judicial proceedings set down for trial in a court. In practice, a docket is a roster that the clerk of the court prepares, listing the cases pending trial.

Court staff includes the personal staff of the judge, including law clerks.

Criminal justice refers to a system that is derived from criminal law and focuses on concepts such as accountability of the person who commits a crime or offends public order/violates the rights of another; protection and compensation/redress of the victims; and fairness in terms of all parties. Criminal justice also refers to a mechanism for administering criminal justice that can provide a fair outcome and has appropriate capacity and authority.

De facto equality (substantive equality) consists of ensuring "equality of results" for women, which means that progress towards equality must bring about concrete outcomes or long-term changes in gender relations.

De jure equality (formal equality) requires that men and women must receive equal protection of their rights and be guaranteed equality of opportunity where they are situated. Equality of opportunity means that everyone should, at the outset, have the same opportunities so that they can realize their capabilities and participate in all areas of economic, social, political and cultural life as equals.

Discrimination is a difference in treatment based on certain grounds such as race, colour, language, religion, belief, caste, employment, political opinion, nationality, social origin, disability, age, location, region, indigenous and minority status, sex, gender, sexual orientation, gender identity, or other status, which has the purpose or effect of nullifying or impairing the enjoyment or exercise of rights. Discrimination may be direct (differentiated treatment which adversely affects the enjoyment of rights of one group in particular) or indirect (treatment that seems to be neutral, but whose consequences adversely affect the enjoyment of rights of one or more groups in particular).

Gender refers to the roles, behaviours, activities and attributes that a given society at a given time considers appropriate for men and women. In addition, "gender" refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context- and/or time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies, there are differences and inequalities between women and men in responsibilities assigned, activities undertaken and access to and control over resources and decision-making opportunities. Gender is part of the broader sociocultural context, as are other important criteria for sociocultural analysis, such as class, race, poverty level, ethnic group, sexual orientation and age.

Gender identity refers to each person's deeply felt internal and individual experience of their own gender, which may or may not correspond to the sex assigned at birth. This includes an individual's personal sense of their own body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, mannerisms and choice of personal pronouns (he/him; she/her; or gender-neutral and non-binary pronouns e.g. they). Gender identity is not restricted to male or female, as individuals may choose to identify as neither male nor female, as both male and female or as a third gender (irrespective of anatomy).

Gender-based violence against women and girls (GBVAWG) is violence directed towards, or disproportionately affecting women because of their gender or sex. This term makes explicit the gendered causes and impacts of the violence. Such violence takes multiple forms, including acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty. GBVAWG can be defined differently under national laws.

Gender equality refers to the equal rights, responsibilities and opportunities of women and men and girls and boys. Equality does not mean that women and men will become the same, but that their rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of women and men. Gender equality is not a women's issue; it should concern and fully engage men as well as women. Equality between women and men is seen as both a human rights issue and a precondition for, and indicator of, sustainable, people-centred development.

Gender-related killing of women and girls *(GRKWG)* refers to the killing of women and girls by their intimate partners or family members, "honour"-related killing of women and girls, dowry-related killing of women, killing of women in the context of armed conflict, gender-based killing of aboriginal and indigenous women, extreme forms of violent killing of women, killing as a result of sexual orientation and gender identity, killing of women due to accusations of sorcery and witchcraft, or killing of sex workers. In some countries GRKWG was criminalized as "femicide" or "feminicide" and has been incorporated as such into national legislation in those countries. Intimate partner/family-related homicides are one of the most visible and widely researched forms of GRKWG, with data from the 2018 UNODC Global Study on Homicide showing that 137 women across the world are intentionally killed by current or former intimate partners each day.

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

Gender sensitivity means using respectful and non-discriminatory language and taking into account the different situations, needs and attributes of women, men and others, in order to make sure behaviours, mindsets or programmes respect the human rights of all persons.

Gender stereotype is a generalized view or preconception about the attributes, characteristics or roles that are or ought to be possessed by or performed by women and men. A gender stereotype is harmful when it limits women's and men's capacity to develop their personal abilities, pursue their professional careers and make choices about their lives.

Gender stereotyping refers to the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or

men. Gender stereotyping is wrongful when it results in a violation or violations of human rights and fundamental freedoms.

Intimate partner violence is the most common form of violence experienced by women globally and includes a range of sexually, psychologically, physically and economically coercive and harmful acts used against adult women and adolescent girls by a current or former intimate partner, without her consent. Physical violence involves intentionally using physical force, strength or a weapon to harm or injure the woman. Sexual violence includes abusive sexual contact, making a woman engage in a sexual act without her consent, and attempted or completed sex acts with a woman who is ill, disabled, under pressure or under the influence of alcohol or other drugs. Psychological violence includes controlling or isolating the woman, humiliating or embarrassing her, or ensuring that she is in a constant state of fear, hypervigilance, or insecurity. Economic violence includes denying a woman access to and basic control over economic resources, including access to employment, such that she is controlled by, or becomes dependent on, her intimate partner.

Legal aid refers to legal advice, assistance and representation for victims and witnesses at no cost for those without sufficient means or when the interests of justice so require. Legal aid also includes access to legal information for victims.

Judge means any person exercising judicial power, however designated.

Judiciary refers to: (1) the branch of authority in a country which is concerned with law and the legal system; (2) the system of courts of justice in a country; and (3) judges collectively.

Judicial stereotyping is the practice of judges ascribing to an individual specific attributes, characteristics or roles by reason only of her or his membership in a particular social group and perpetuating harmful stereotypes through their failure to challenge those stereotypes.

Myths are widely held but false beliefs or ideas. Myths about GBVAWG are based on prejudices and harmful gender stereotyping.

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

Perpetrator refers to a person who has committed GBVAWG.

Recidivism refers to reoffending: a situation in which a person who is the object of a criminal justice intervention (sanction) commits a new criminal offence.

Reparations means to remedy, as far as possible, all consequences of an illegal act and re-establish the situation which would have probably existed if that act had not been committed. Reparations cover two aspects: procedural and substantive.

Restitution is defined as measures designed to restore the victim to her original situation before the violence.

Secondary victimization is the victimization that occurs not as a direct result of the criminal act but through the inadequate response of criminal justice institutions and providers to the victim.

Sex refers to anatomical sex characteristics, reproductive organs, hormonal and/or chromosomal patterns. While "sex" is often understood as a binary concept of either male or female, contemporary understanding of sex, informed by advancements in the study of genetics, reveals the natural occurrence of considerable variability in sex characteristics (sometimes referred to as intersex).

Victim refers to a woman or a girl impacted by violence against women or against whom violence has been committed. The term victim rather than "survivor" is used as the handbook focuses on the criminal justice process, where this term designates a legal status.

Women and girls will be predominately used in the handbook. This will also include persons who identify as women and girls. Girls are children, that is, below the age of eighteen.

Introduction

> "[W]hile there has been a marked ideological shift in the ways Judges adjudicate matters relating to gender-based violence and femicide in recent times … the fate of these victims should not be left to the off-chance that the individual Judges hearing their cases will be attuned to the sensitivities. There should be a formalization and standardization of these norms so that it is incumbent on the Courts to pay particular attention to the treatment of victims in these cases."[1]

1. The need for this handbook

Around the globe, women and girls who are victims of violence are raising their voices. The #MeToo movement has mainstreamed discussions about gender-based violence against women and girls (GBVAWG) and justice. This recent phenomenon rests on decades of work at the international, regional and national levels, by the United Nations, States and the women's movement to promote a comprehensive and multi-sectoral response to GBVAWG, including a gender-responsive criminal justice system. International standards have been established calling for the elimination of violence against women that includes the paramountcy of safety and dignity for victims and the empowerment of women while holding the perpetrators accountable for acts of violence. Furthermore, international standards on violence against children include a focus on gender-based violence and the specific needs and situation of girls.

The landscape of GBVAWG is being transformed. Many States are working on establishing positive conditions for women and girls to access criminal justice, such as reforming criminal laws and procedures, introducing institutional policies and building capacity for criminal justice professionals. However, this has not resulted in a dramatic reduction of GBVAWG. Such violence remains a highly prevalent, socially tolerated and largely unpunished crime.

The judiciary plays a critical role in the criminal justice response to GBVAWG. It is uniquely placed to ensure that relevant criminal laws, including those relating to gender-based violence are interpreted through the lens of international standards and norms; are effectively enforced; protect women and girls from violence, including from the recurrence of violence; hold perpetrators accountable; and provide effective reparations for victims. The judiciary is responsible for ensuring that the defendant's right to a robust defence does not eclipse the victim's rights to be treated with dignity and respect. Due to their position, judges have the ability to ensure that victims are not subjected to secondary victimization by the justice system. They are the ones who can take victims seriously and recognize the challenges that going through the justice system may entail, including damage to victims' reputations, in a context where their most intimate and violating traumas, their characteristics and behaviour are publicly discussed. However, judges come to the bench with their built-in and often strongly-held set of values and therefore have a duty to ensure that possible prejudices and harmful gender stereotypes do not influence proceedings or undermine gender-based violence victims' credibility. Judges are in a position to manage their courtrooms in a way that addresses biases leading to victim-blaming, disbelief or mistrust in the victim's story and ultimately, putting the victim on trial. As final arbitrators, judges have the power to protect abused women and girls, punish offenders and send a clear message to the community that such violence is not tolerated.

[1] President of the Supreme Court of Appeal in South Africa, statement of Justice Mandisa Maya, at the Gender Violence and Femicide Summit, Pretoria, 1 November 2018.

The Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls has been prepared by the United Nations Office on Drugs and Crime (UNODC) to contribute to raising awareness about and to fostering the use and application of relevant international standards and norms by the judiciary when dealing with criminal cases involving GBVAWG. This handbook complements the UNODC criminal justice handbook series, including existing handbooks and training materials for the police and prosecutors, as well as the "*Blueprint for Action: An Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women*" as contained in the UNODC publication *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women.*[2] It also supports the implementation of the United Nations Joint Programme on Essential Services for Women and Girls Subject to Violence.

2. Purpose and scope of the handbook

2.1 Purpose of the handbook

This handbook is meant to be a practical tool for the judiciary to enhance its knowledge, skills and institutional capacity in dealing with cases of GBVAWG. It aims to:

- Sensitize the judiciary to recognize and overcome structural discrimination and promote gender equality
- Enhance standards and behaviours of judges and improve judicial performance
- Improve access to justice for victims of gender-based violence and reduce the risk of their secondary victimization
- Promote the sharing of the good practices introduced by criminal courts around the world to help ensure that women and girls, as complainants, receive adequate protection and support during the criminal justice process

A note about terminology

This handbook uses the terminology **"judiciary"** to refer to both the system of courts of justice in a country and judges as a collective, whereas **"judges"** means any person exercising judicial power, however designated. Depending on the jurisdiction, this will include investigating judges, magistrates, judicial officers exercising judicial powers as well as judges of first instance, appellate and supreme courts.

Judges have a diverse range of mandates and roles that vary due to the legal tradition in their country. While judges face different duties and tasks depending on their State's legal system, whether they are from common law/adversarial systems, civil law/inquisitorial systems, sharia law systems or mixed systems, judges generally represent the authority of the State in adjudicating a criminal case against the defendant, ensuring the application of the law during a criminal trial. The inquisitorial system may have investigating judges with broad powers such as: interviewing the accused, victims and witnesses, visiting crime scenes; arresting and detaining suspects; and preparing the dossier (the case file) which is forwarded to the sitting judge, who may play a central role in questioning witnesses and calling evidence. In the adversarial system, judges may issue pretrial orders when the police want to take certain actions before the criminal trial, and at trial they act more like an impartial referee between the prosecutor and defence.

[2] See www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf

2.2 Scope and focus of the handbook

The scope of the handbook is purposefully broad to recognize the different roles and tasks of the judiciary in different legal systems around the world; the different national approaches to criminalization of the various forms of GBVAWG; and the different criminal procedures and evidentiary rules in place. This handbook aims to build on and complement existing global, regional and national tools for the judiciary, which are cross-referenced to avoid duplication.

The handbook will focus on the role of the judiciary in the formal criminal justice system at the domestic level. Issues such as how other legal domains (e.g. family law, civil protection regimes, immigration law) and informal justice systems and international tribunals handle cases of GBVAWG are beyond the scope of this handbook, other than an appreciation of how they impact the domestic criminal court and the need for harmonization.

For more information on informal justice responses and broader justice responses to GBVAWG, see UN Women, UNDP, UNODC and OHCHR, A Practitioner's Toolkit on Women's Access to Justice Programming.

For more information on the work of the International Criminal Court and tribunals, see International Criminal Tribunal for Rwanda, Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda.

The handbook dedicates particular attention to women and girls subjected to violence. While adults and children of both sexes can be and are victims of domestic violence and sexual violence, this handbook is focusing on the gendered nature of this violence, understanding that the majority of victims of sexual violence and intimate partner violence are female and the majority of perpetrators are male. This handbook will highlight the specific considerations for girls that are linked to their status as children, in line with international standards and norms, to ensure that they are not treated as adult women.

For information on violence against children, see UNODC, Handbook for Professionals and Policymakers on Justice in Matters Involving Child Victims and Witnesses of Crime; United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime Online Training. See also the United Nations Model Strategies and Practical Measures to Eliminate Violence Against Children in the Field of Crime Prevention and Criminal Justice.

This handbook will not specifically focus on people who define themselves as non-binary and may experience violence based on their gender identity. However, it recognizes that GBVAWG is a cause and consequence of gender inequality and maintaining patriarchy, which contributes to spreading stereotypes of women and men that rely on the gender binary and depends on the division of sexes into two distinct, hierarchically ranked categories. It is hoped that the knowledge and skills in this handbook will assist all people who are disempowered and victimized by gender inequality.

The handbook mainly addresses sexual violence and intimate partner violence, as these are the two forms of GBVAWG that are most prevalent and more commonly studied, but other forms of violence will also be covered as much as possible.

For information on trafficking in persons, see UNODC, Toolkit to Combat Trafficking in Persons; UNODC, Evidential Issues in Trafficking in Persons Cases: Case Digest.

The handbook also acknowledges that women and girls subjected to violence who participate in the criminal justice system are not only victims and witnesses but may also be alleged or recognized as offenders. The complex nature of violence against women can result in cases where criminal courts are dealing with a female accused or offender who is also a victim of intimate partner violence and hit back in retaliation or in self-defence, causing injury or death to the abuser.

For information on women as offenders, see UNODC, Handbook on Women and Imprisonment, 2nd Ed.; Training Curriculum on Women and Imprisonment Version 1.0; Tool on gender-sensitive non-custodial measures (forthcoming).

2.3 Methodology

This handbook is based on a desk review of existing global, regional and national tools for the judiciary on GBVAWG. The development of the handbook also benefited from responses received through a questionnaire sent to members of the international associations of judges mentioned in the acknowledgements above. Fifty-six responses were received from judges in different regions of the world (23 responses from the Americas and Caribbean; 8 responses from Asia and Pacific; 2 responses from the Arab States; 8 responses from East and Southern Africa; 9 responses from Europe and Central Asia; and 4 responses from West and Central Africa). The handbook was also reviewed by an expert meeting held in Vienna from 26 to 28 November 2018.

3. What does the handbook cover?

The handbook consists of three parts covering the conceptual framework, guidance for judges and effective institutional practices of the judiciary.

Part 1 covers the conceptual framework underpinning an effective judicial response to GBVAWG. It presents a broad overview of the extent and nature of gender-based violence globally, patterns and trends seen in recent research that has been conducted, the current realities faced by victims in seeking protection and accountability for the crimes committed, and the relevant international legal instruments that can assist the judiciary in making informed and human rights-compliant decisions in cases involving GBVAWG.

Part 2 covers the common challenges that judges face while dealing with criminal cases involving gender-based violence. This includes ensuring protection of victims during the criminal process; the treatment of victims; evidentiary issues; judicial decision-making; and sentencing.

Part 3 covers effective institutional practices to address GBVAWG, highlighting examples of national practices. It includes institutional practices in the areas of court infrastructure; training and capacity-building; delivering efficient justice service models; promoting gender equality within the judicial system; promoting female judges as a strategy; ethical rules and professional codes of conduct; and the importance of monitoring and evaluation.

Part 1

Part one:

Conceptual framework underpinning an effective judicial response to gender-based violence against women and girls

"Judges do not enter public office as ideological virgins. They ascend the Bench with a built-in and often strongly-held set of values, preconceptions, opinions and prejudices. These are inevitably expressed in the decisions they give, constituting 'inarticulate premises' in the process of judicial reasoning."[3]

Summary

While the role of the judiciary in criminal proceedings varies depending on their country's legal system, all judges have common responsibilities. These include applying and interpreting the domestic criminal legal framework; fact determination; protecting the rights of the defendant and victim; and, upon conviction, providing appropriate punishment. This part of the handbook develops a conceptual framework to assist judges in the performance of their duty when responding to GBVAWG. An effective judicial response requires incorporating a gender and human rights perspective into all judicial tasks.

Section 1 reviews recent research on the extent and nature of GBVAWG globally; the realities faced by victims in seeking protection and justice; understanding the trauma experienced by victims of gender-based violence; and the influence of harmful gender stereotyping on judicial decision-making. These are elements of a framework that judges can use in the conduct of their duties and in carrying out a context-driven analysis in order to move away from prejudicial generalizations of women victims of violence.

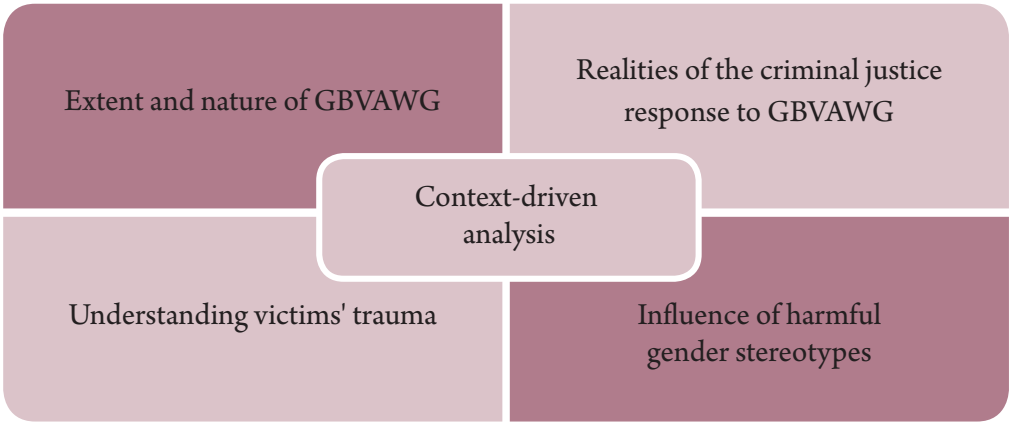
Section 2 covers key obligations under international law to assist the judiciary in making informed and human rights-compliant decisions in cases involving GBVAWG. It includes a discussion on integrating international law standards into different national legal systems, and how they can be applied.

[3] Edwin Cameron, "Judicial Accountability in South Africa", *South African Journal on Human Rights*, vol. 6, No. 2 (1990), p. 258.

1. Information needed for a context-driven analysis

Criminal laws and procedures should not be interpreted and applied in the abstract. Cases of GBVAWG are often treated differently from other offences, in terms of how the offences are conceptualized, processed, defended and adjudicated. In such cases, for judges, the application of a context-driven analysis, can increase their understanding of the phenomenon of gender-based violence; the realities women and girls are facing when seeking justice through criminal proceedings; as well as how harmful gender stereotypes may still be reflected in discriminatory laws and procedures or continue to influence the application of criminal law.

Figure I: Elements of a context-driven analysis



1.1 The extent and nature of gender-based violence against women and girls

GBVAWG is widespread, systematic and culturally entrenched.[4] Different forms are seen across the globe, including those manifesting in physical, sexual, psychological and economic harm. GBVAWG can occur within the family, the community, or be perpetrated or condoned by the State.

Defining gender-based violence against women and girls

The definition of GBVAWG has evolved in different international legal sources over the years. The most common definition that judges should be familiar with is from the United Nations Declaration on the Elimination of Violence against Women, which refers to: "[A]ny act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".[5]

Judges need to consider the gendered nature of GBVAWG, its scope as a social problem and the complexity of barriers in the public and private spheres. First, such violence is directed at the victim because she is a woman or girl, or it is disproportionately perpetrated against women or girls, in a social context of gendered hierarchy. It is violence that encompasses a range of acts seeking to exert power and control over women and girls and is "one of the fundamental social, political and economic means by

[4] United Nations, In-depth study on all forms of violence against women (A/61/122/Add.1).
[5] General Assembly resolution 48/104, of 20 December 1993.

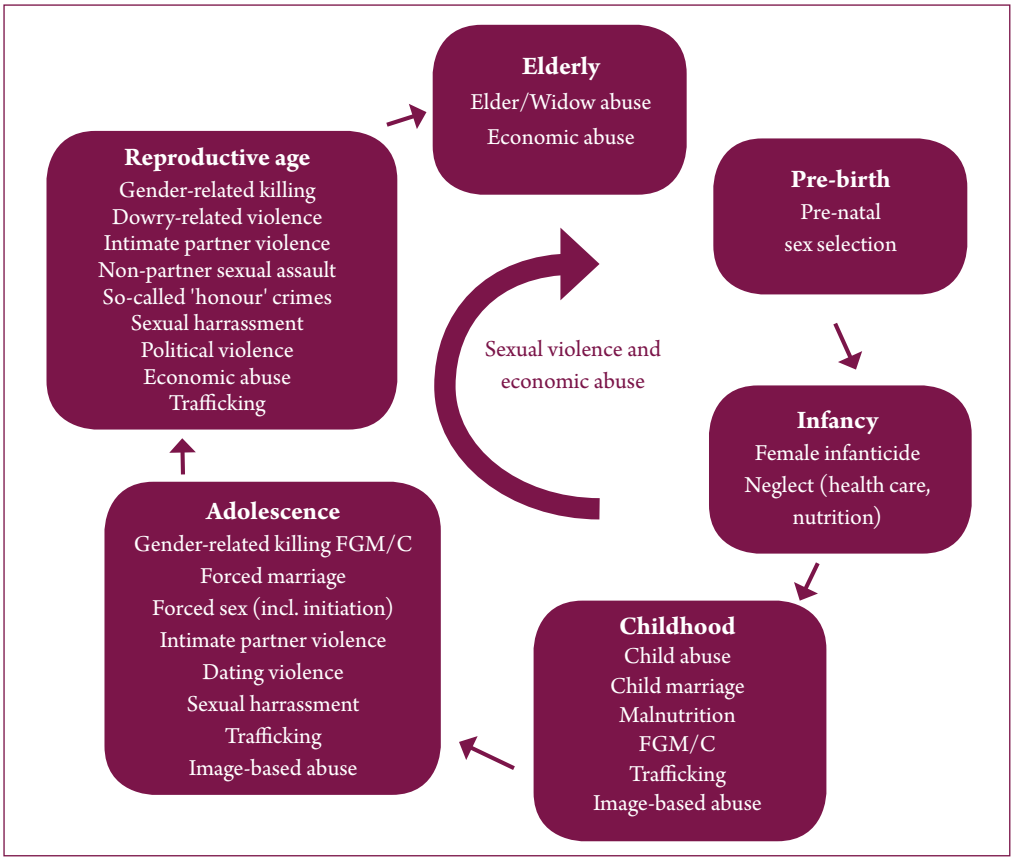
which the subordinate position of women with respect to men and their stereotyped roles are perpetuated".[6] Second, GBVAWG should be understood as a social problem, rather than an individual one, as it originates from a specific social context and requires comprehensive responses, which extend beyond specific events, individual perpetrators and victims. Finally, the definition addresses the historical gendered division between the public and private sphere, and challenges the traditional view that family and intra-familial relationships are private, even when characterized by violence.

Various types of gender-based violence against women and girls

GBVAWG takes multiple forms, including acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering for women and girls, threats of such acts, harassment, coercion and arbitrary deprivation of liberty.[7] Women and girls are at risk of different types of violence at all ages, from prenatal sex selection before they are born through to abuse of widows and elderly women. While all manifestations of GBVAWG are human rights violations, judges must look at their country's criminal legal framework to determine whether and how these forms of violence are defined as crimes.

A discussion as to how countries have criminalized the various forms of GBVAWG in their domestic criminal laws goes beyond the scope chosen this handbook. For more detail please see UNODC, Handbook on Effective Prosecution Response to Violence Against Women and Girls (pages 10-18) and UN Women, Handbook for Legislation on Violence against Women.

Figure II: Life cycle of gender-based violence against women and girls



[6] Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 (CEDAW/C/GC/35).
[7] Ibid.

The two most common forms of gender-based violence are: (1) non-partner sexual violence, including rape, sexual assault, unwanted sexual acts and sexual harassment perpetrated by a relative, friend, acquaintance, neighbour, work colleague or stranger; and (2) intimate partner violence, including physical, psychological, sexual and economic violence against adult and adolescent women by their current or former intimate partner.

There are some forms of violence targeting exclusively girls. These include early and forced marriage, female genital mutilation, statutory rape, sale of children, child sexual exploitation, and child pornography.

The types of violence women and girls experience have become increasingly complex, with increasing rates of violence committed using information and communications technology, such as online harassment, cyber-bullying, stalking and image-based abuse, as well as the production and circulation of child abuse materials.

Online gender-based violence against women and girls

Online GBVAWG has become increasingly common, particularly with the prevalent use of social media platforms and other apps.

- Technology has transformed many forms of gender-based violence into something that can be perpetrated across distance, without physical contact and beyond borders through the use of anonymous profiles to amplify the victims' harm.
- Different terms have been used to describe this kind of violence: "technology-facilitated violence against women"; "digital violence" or "cyber-violence".
- Such violence occurs across the digital space of social media, such as Instagram, Twitter, Facebook, Reddit, YouTube and Tumblr, smartphone functionalities, micro-blogging sites and messaging applications (such as WhatsApp, Snapchat, Messenger, Weibo and Line).
- It is often difficult to distinguish the consequences of actions that are initiated in digital environments from offline realities, and vice versa.
- Such violence can take many forms and target women and girls in multiple and different ways, due to the characteristics of information and communications technology, such as the rapid ("viral") sharing of messages or pictures; global search; and the persistence, replicability and scalability of information, which also facilitates the contact of aggressors with targeted women, as well as secondary victimization. New forms of violence against women through information and communication technology include "doxing", "sextortion" and "trolling". Some forms of violence against women carry the prefix "online", such as online mobbing, online stalking and online harassment. Pictures-based abuse (sometimes referred to as "revenge porn") is the non-consensual distribution of intimate images, and is a serious form of technology-facilitated GBVAWG.
- Many States already have or are currently updating their existing legal frameworks to address online violence against women. Most frequent legal instruments are cybercrime laws, criminal laws, laws on domestic violence and violence against women, hate speech laws and laws on data protection and privacy.

Source: Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective (A/HRC/38/47).

Common patterns and trends from research

Research reveals high prevalence of GBVAWG as well as common characteristics of different forms of gender-based violence. This can help judges tackle embedded myths and harmful gender stereotypes reflected in the criminal framework, in its legal and practical aspects.

High prevalence. Studies show that one out of three women worldwide is subjected to some sort of physical or sexual violence by men at least once in her lifetime.[8] Such high prevalence is consistent with studies from the perpetrators' perspective. For example, a regional study found that men who admitted having perpetrated physical and/or sexual violence varied from 26 per cent in Indonesia to 80 per cent in Papua New Guinea.[9] This study found that rape was mostly commonly motivated by a sense of sexual entitlement, men's belief that they have the right to sex, regardless of consent. In some countries rates of some forms of GBVAWG continue to remain high despite a decrease in other types of violence and non-violent crime.[10] Gender-related killing of women and girls is a global problem, but particular forms are highly prevalent in some countries and regions. For example, 12 women are murdered every day in Latin America and the Caribbean, including 7 in Mexico alone.[11]

Common characteristic: repeated victimization. Women and girls often experience a continuum of violence, including several manifestations of behaviours of gender inequality and patriarchal domination.[12] They are much more likely to experience repeated acts of violence rather than a one-off incident. This is true for intimate partner violence, which often involves a range of different types of violence, coercion and control, as well as for sexual violence, which often involves repeated assaults by the same and occasionally several perpetrators.[13] The idea of a continuum does not lead to a hierarchy of violence, but rather reflects the lasting complexity and cross-cutting experiences of harassment, violation, abuse and assault in women's and girls' lives. This means that GBVAWG is not necessarily anomalous or episodic but rather part of the norm for many women and girls in their everyday lives.

Common characteristic: a majority of perpetrators are known by their victims. In most forms of GBVAWG, most perpetrators are current and ex-intimates, family members, neighbours, work colleagues, friends and acquaintances.[14] This runs counter to the myth that "real cases" of GBVAWG are committed by strangers.

Common characteristic: violence is often trivialized. Often, inaccurate descriptions are used, such as "date rape" and it has been argued that even the concept of "domestic violence" is unhelpful. These additional qualifications, such as "domestic" or "date", divert the public's attention from their criminal nature and minimize the role of perpetrators.[15] This can result in a lack of appreciation for the history of violence endured by the victim, and ultimately decrease law enforcement or judicial action in response to the potentially lethal risks of such

[8] World Health Organization, *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* (2013), p. 17.

[9] Emma Fulu and others, *Why do some men use violence against women and how can we prevent it? Quantitative Findings from the United Nations Multi-country Study on Men and Violence in Asia and the Pacific* (UN Women, UNDP, UNFPA and UNV, 2013).

[10] For example, research in Canada shows that self-reported sexual violence rates have remained the same, despite a decrease in other types of violence and non-violent crime. See The Lawyer's Daily, "Sexual Assault Remains Steady, while other Crimes See Decline", 20 July 2017.

[11] Economic Commission for Latin America and the Caribbean, "ECLAC: At Least 2,795 Women Were Victims of Femicide in 23 Countries of Latin America and the Caribbean in 2017", 15 November 2018.

[12] The concept of the continuum of violence was first outlined by Liz Kelly, *Surviving Sexual Violence* (1988).

[13] Liz Kelly and others, *A Gap or a Chasm: Attrition in reported rape cases* (Home Office Research, 2005).

[14] Eileen Skinnider, Ruth Montgomery and Stephanie Garrett, The Trial of Rape: Understanding the Criminal Justice Sector Response to Sexual Violence in Thailand and Viet Nam (UN Women, UNDP and UNODC, 2017).

[15] Patricia Easteal, "Language, gender and 'reality': Violence against women", *International Journal of Law, Crime and Justice*, vol. 40 (2012), p. 328.

crimes. Globally, 38 per cent of all murders of women are committed by their intimate partners.[16] This contradicts the myth according to which "real" violence happens in public spaces, as often the most common locations for GBVAWG are private spaces such as the home of the victim or suspect.

Common characteristic: attitudes that support GBVAWG are persistent. One study found that nearly half of young people aged 16-24 (46 per cent) agreed that tracking a partner by electronic means without her consent was acceptable to some degree and that 41 per cent did not think that trying to controlling one's partner by denying her money was a form of violence against women.[17] A survey revealed that 44 per cent of men and 32 per cent of women in the general population believed that rape was a result of men's inability to control their sexual needs.[18]

Violence and women and girls who face multiple and intersecting forms of discrimination

GBVAWG is inextricably linked to other factors affecting women's lives. Stereotypes and prejudices based on a combination of factors, such as specific personal characteristics and situational circumstances, expose women and girls to a greater risk of being targeted by various forms of violence. The Committee on the Elimination of Discrimination against Women lists several intersectional discriminatory factors:[19]

Personal characteristics: ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, health status, disability, property ownership, sexual orientation and gender identity.

Situational circumstances: urban/rural location, illiteracy, trafficking of women, armed conflict, seeking asylum, being a refugee, internal displacement, statelessness, migration, heading households, widowhood, living with HIV/AIDS, deprivation of liberty, being a sex worker, geographical remoteness and stigmatization of women fighting for their rights, including human rights defenders.

The ability of women and girls facing multiple and intersecting forms of discrimination to access justice is inextricably linked to factors such as poverty, access to health and education, and recognition of their rights relating to land, resources and their status in society.[20]

[16] UNODC, *Global Study on Homicide* (2018); World Health Organization, *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* (2013), p. 17.

[17] Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2018).

[18] Natalie Taylor, "Juror Attitudes and Biases in Sexual Assault Cases" *Trends & Issues in Crime and Criminal Justice*, vol. 344 (2007), p. 3.

[19] Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 (CEDAW/C/GC/35).

[20] Study by the Expert Mechanism on the Rights of Indigenous Peoples on access to justice in the promotion and protection of the rights of indigenous peoples (A/HRC/27/65). See also the Report of the United Nations High Commissioner for Human Rights on the impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls (A/HRC/35/10).

Table 1. Violence and women and girls who face multiple and intersecting forms of discrimination

Vulnerable groups	Nature and extent of violence
Women and girls from indigenous and ethnic minority groups	• Reports on missing and murdered indigenous women and girls found that they experience disproportionately high rates of sexual violence and their harms are often overlooked by the justice system.[a] Other studies have noted high prevalence of intimate partner violence among indigenous women (e.g. seven times higher than the national average)[b] and they were more likely to experience severe abuse and for longer periods of time.[c] Indigenous women and girls have increased vulnerability to sexual exploitation and entry into the survival sex trade during the transition from rural to urban centres.[d] • If the group itself is forcibly "assimilated", women are highly vulnerable to politically motivated killings, unlawful detention, militarization of their ancestral territory, harassment, threats and intimidation, and gender-based violence. In addition, violence and discrimination against them result from poverty, dependence and particularly strong social mores concerning the obedient and submissive role of a woman. The individual rights of indigenous and minority women and girls are bound to the collective rights of the groups to which they belong.[e]
Women and girls with disabilities	• Women and girls with disabilities are three times as likely to experience physical and sexual violence and are especially vulnerable to being sexually assaulted while sleeping or while unconscious or incapacitated as a result of their disabilities or medication.[f] • They have less access to social services and support systems; they have low levels of confidence and self-esteem; they experience social isolation, fear of abandonment, and high levels of dependency on caregivers; they may fear losing custody of their children in intimate partner violence cases; fear of unjustified termination of parental rights may cause women with disabilities to stay in abusive relationships and women with cognitive disabilities may have more difficulty with long-term memory or remembering the sequence of events, which may make them appear less credible,[g] or prevent them from reporting at all.
Rural women and girls	• Rural women and girls often experience greater severity of physical abuse, greater frequency of violence, and remain trapped in abusive relationships longer than urban counterparts because they live much further away from available resources, and there is greater potential to physically isolate women and girls as a tactic of abuse and to prevent their escape.[h] • Geographical and social isolation impact on their ability to disclose, report, seek help and receive justice.[i]
Women and girls with HIV/AIDS	• Women and girls with HIV/AIDS are more vulnerable to poverty, deprivation of essential services and GBVAWG. If their partner dies and widows cannot assert their inheritance and property rights, they risk destitution, violence and, if they turn to sex work to survive, transmitting the disease.[j]
Women and girl migrants	• Women and girl migrants experience verbal, physical and sexual abuse, debt bondage and other serious human rights violations and are at higher risk to human trafficking. Depending on the context in which they live, they face barriers to accessing justice; routine harms such as unpaid wages, unsafe work conditions, inadequate rest, inhumane housing conditions, confiscation of identity documents by employers or contract substitution placing them at risk and allowing for fundamental changes in the nature or conditions of work.[k]

Table 1. Violence and women and girls who face multiple and intersecting forms of discrimination (*cont'd*)

Lesbian, bisexual and transgender women and girls	• Lesbian, bisexual and transgender women and girls face multiple forms of discrimination and violence, including targeted intimidation, hate crime, torture, murder, and rape, killing in private homes and public spaces, extortion by blackmailers who threaten to reveal their identity to the public, and abuse from officials including arbitrary arrest and detention.[l] Individuals who identify as a sex/gender other than the sex they were assigned at birth face particularly acute forms of discrimination in justice settings (including in court).

[a] Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women In Canada* (2009).
[b] Elizabeth Blaney and Nancy Janovicek, *Reflecting on Violence Prevention Programs in Rural Communities: Defining the Six Lenses/Analysis Screens* (2004).
[c] Atlantic Centre of Excellence for Women's Health Rural Research Centre and Transition House Association of Nova Scotia, *Positive mental health outcomes for women experiencing violence and abuse in rural and remote areas* (2011).
[d] Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada* (2014).
[e] Asia Indigenous People's Pact, *Indigenous Women in Southeast Asia: Challenges to their access to justice* (2013); Rachel Sieder and Maria Teresa Sierra, *Indigenous Women's Access to Justice in Latin America* (Christian Michelsen Institute, 2010).
[f] Janine Benedet and Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief", *McGill Law Journal*, vol. 52, No. 2 (2007), pp. 243-289.
[g] Johnathan Goodfellow and Margaret Camilleri, *Beyond Belief, Beyond Justice: The Difficulties for Victims/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice—Final report of State One of the Sexual Offences Project.* (Disability Discrimination Legal Service, 2003).
[h] Monica Campo and Sarah Tayton, *Domestic and Family Violence in Regional, Rural and Remote Communities: An Overview of Key Issues* (Australian Institute of Family Studies, 2015).
[i] Sarah Wendt and others, *Seeking help for domestic violence: Exploring rural women's coping experiences: State of the Knowledge Paper* (Australia's National Research Organisation for Women's Safety, 2015); Elizabeth Moore, "The Pilot Domestic Violence Intervention Court Model (DVICM): Toward Evidence-led Practice in Wagga Wagga in Rural Australia", New Scholarship in Human Services, vol. 8, No.1 (2009).
[j] Open Society Foundation, *Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services* (2007).
[k] Caritas Lebanon Migrant Centre, *Access to Justice of Migrant Domestic Workers in Lebanon* (2007); Caritas Lebanon Migrant Centre and Open Society Foundation, Migrant Workers' Access to Justice at Home: Indonesia (2013).
[l] International Gay and Lesbian Human Rights Commission, *Human Rights Abuses in Asia On the Basis of Sexual Orientation, Gender Identity and Gender Expression (2000-2009)* (2009); Sayoni, *Report on Discrimination against Women in Singapore based on Sexual Orientation and Gender Identity* (2011).

1.2 The realities of the criminal justice response to gender-based violence against women and girls

Many countries have reformed their criminal laws by introducing offences, revising criminal procedures and evidentiary rules to reflect the realities faced by women and girl victims of gender-based violence and to reduce secondary victimization by criminal justice institutions and processes. Despite these positive efforts, the criminal justice sector's response to GBVAWG is often deficient and does not function at the level required to address the severity, nature and extent of the problem. The persistence of gender-based violence is compounded by the fact that these crimes remain the most under-reported, and the least likely to end in conviction.[21] Even in cases where convictions are secured, victims of gender-based violence are typically those who are most re-victimized and re-traumatized by the criminal justice process, due to the insensitive or harsh treatment they experience from criminal justice officials.[22]

Attrition of cases and lack of effective measures to reduce impunity

While judges are often at the far end of the criminal justice chain and rely on the police and prosecutors to perform their duties in a gender-responsive manner, being aware of the "justice gaps" provides context for these cases.

[21] Holly Johnson and others, *Violence Against Women Survey: An International Perspective* (2008), p. 146; Joanna Lovett and Liz Kelly, *Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries* (2009).
[22] Elaine Craig, "The Inhospitable Court", *University of Toronto Law Journal*, vol. 66, No. 2 (2016).

*Very few cases come to the criminal court***.** Studies across the globe consistently show that only a minority of cases of GBVAWG are ever reported to the police, and an even smaller percentage of reported cases result in charges being laid against a perpetrator. Only a small fraction of those cases ever come before the criminal courts.[23] An international study found that generally fewer than 20 per cent of women reported the last incident of violence to police and the likelihood of charges being laid was between 1 per cent and 7 per cent of all victimized incidents.[24] A variety of barriers impede victims from reporting violence, including being treated with disrespect and insensitivity, being required to tell their stories multiple times, refusal by the police to receive reports or failure to investigate cases without delay and with due diligence, as well as a lack of victim-centred justice services.[25]

Low conviction rates. An international study found that the likelihood that cases will result in a conviction is just 1 per cent to 5 per cent.[26] In England, only 6.5 per cent of reported rapes resulted in a conviction and only 38 per cent of proceeded rape cases achieved convictions compared with 69 per cent of proceeded "violence against a person" cases in the same year.[27] Studies have found low reporting rates and conviction rates irrespective of whether the legal system is adversarial or inquisitorial. A regional study which looked at attrition rates in 11 European countries representing common and civil law jurisdictions, found that while over two thirds of European countries showed increasing rates of reporting, only a small proportion of countries matched increasing reporting with parallel increases in prosecution and conviction.[28]

Impunity. The vast majority of perpetrators of GBVAWG face no or insufficient legal consequences. In one study, 72 to 97 per cent of men who perpetrated rape did not experience any legal consequences.[29] In some countries GBVAWG cases have the highest rate of acquittals and the highest rate of overturn convictions by appellate courts.[30] Studies have also raised concerns about disproportionately lenient sentences in convictions involving GBVAWG. One study found that conditional sentences are more likely to be entered into for sexual assaults than for any other violent crime.[31] Another study found that many of the sentences in rape cases were inappropriate, for example correctional supervision and suspended sentences for adults convicted of rape.[32]

Wrongly held beliefs about false complaints. High rates of attrition of cases in some countries is due to a lack of understanding and overestimation by authorities of the number of false complaints. According to research, only between 2 per cent and 8 per cent of sexual assault complaints are false.[33] In practice, however, sexual violence cases are less likely than any other violence offences to be considered by police to be "founded" and are less likely to result in charges being laid against the suspect.[34]

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[23] Sue Triggs and others, *Responding to sexual violence: Attrition in the New Zealand criminal justice system* (New Zealand Ministry of Women's Affairs, 2009); Lisa Vetten and others, *Tracing Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng* (2008).

[24] Holly Johnson and others, *Violence Against Women Survey: An International Perspective* (2008), p. 146.

[25] Eileen Skinnider, Ruth Montgomery and Stephanie Garrett, The Trial of Rape: Understanding the Criminal Justice Sector Response to Sexual Violence in Thailand and Viet Nam (UN Women, UNDP and UNODC, 2017).

[26] Holly Johnson and others, *Violence Against Women Survey: An International Perspective* (2008), pp. 146-149.

[27] Sylvia Walby and others, *Physical and Legal Security and the Criminal Justice System: A Review of Inequalities* (Equality and Human Rights Commission, 2010).

[28] Joanna Lovett and Liz Kelly, *Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries* (2009).

[29] Emma Fulu and others, *Why do some men use violence against women and how can we prevent it? Quantitative Findings from the United Nations Multi-country Study on Men and Violence in Asia and the Pacific* (UN Women, UNDP, UNFPA and UNV, 2013).

[30] David M. Tanovich, "Criminalizing Sex at the Margins", *Criminal Reports*, vol 74, No. 6 (2010), pp. 86-95.

[31] Karen Busby, "Sex was in the air – Pernicious Myths and other problems with sexual violence prosecutions", in *Locating Law*, Elizabeth Comack ed. (Halifax, Fernwood Publishing, 2014), p. 259.

[32] Mercilene Machisa and others, *Rape Justice in South Africa: A Retrospective Study of the Investigation, Prosecution And Adjudication Of Reported Rape Cases From 2012* (Pretoria, 2017).

[33] Kimberly Lonsway and others, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assaults* (2009).

[34] Alberta Solicitor General, *Best Practices for Investigating and Prosecuting Sexual Assault* (2013), p. 89.

Lack of victim-sensitive approaches in court procedures

A key reason for attrition of cases is the treatment that victims receive in the criminal justice system. There is consistent evidence of secondary victimization by the criminal justice system in addition to a culture of impunity, both of which contribute to the lack of confidence in the criminal justice system by women subjected to violence. One survey found that victims are reluctant to report to the police because of the courtroom process itself.[35]

Re-traumatization by the criminal justice process. Many women view the response of the criminal justice system as being like a "second assault",[36] because of indifferent, insensitive or harsh treatment by the police, prosecutors and judges, where the violence is often minimized, dismissed or blamed on the victims. "There is no difference between being raped and giving evidence as a key witness at the trial of your alleged rapist, except that this time it happened in front of a crowd. Some victims have even suggested that this "second rape" is more traumatic than the first".[37] Studies highlight the complainant's perspective that they themselves are on trial, including comments that they could not distinguish between the lawyers who were prosecuting and those who were defending.[38] Victims have felt that they are rarely able to tell their story; that prosecution did not protect their reputation; and that discrediting information put forward by the defence often remained unchallenged.

Victims are rarely consulted in important decisions. Research shows that they are often left uninformed despite laws or policies guaranteeing they will be kept up to date; they receive little information about what to expect from the criminal justice system, leaving them with unrealistic expectations that cannot be met.[39]

*Victim-sensitive approaches in court are as important as the eventual outcome of the case***.** Some victims reported that their experiences in court gave them a sense of control or made them feel much safer. Even in cases resulting in acquittals, where the victim felt supported, informed and consulted throughout the process, none regretted pursuing the case even if they were disappointed in the outcome.[40] Another study found that the satisfaction of victims was directly proportional to the sensitivity and warmth they received at the hands of court personal.[41]

Understanding social and institutional barriers victims face

The judiciary has a role to play in understanding and rectifying the social and institutional barriers victims face to ensure that they respond appropriately to the needs of all women and girls. A court system that caters to the needs of the most vulnerable and traumatized will deliver better service to all using the system.

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[35] Statistics Canada, *Measuring Violence Against Women: Statistical Trends* (2013).

[36] Liz Kelly, "Promising Practices Addressing Sexual Violence", paper prepared for the United Nations Expert Group Meeting on "Violence against women: Good practices in combating and eliminating violence against women", 17-20 May 2005.

[37] Women's Centre for Change Penang, *Seeking More Effective Prosecution of Sexual Crimes: Background Paper for Dialogue with Prosecutors* (Malaysia, 2007).

[38] Liz Kelly, *Routes to (in)justice : a research review on reporting, investigation and prosecution of rape cases* (2001).

[39] Olivia Smith and Tina Skinner, "Observing Court Responses to Victims of Rape and Sexual Assault", *Feminist Criminology*, vol. 7, No. 4 (2012).

[40] Andrew R. Klein, *Practical Implications of Current Domestic Violence Research, Part II: Prosecution* (United States National Institute of Justice, 2008).

[41] K.D. Muller, *A Study to Determine the Satisfaction Level of Victims Accessing Services at Identified Sexual Offences Courts in South Africa* (2017).

Social and institutional barriers victims encounter in the criminal justice system

Judges should consider both social barriers as well as institutional barriers that victims have experienced in accessing criminal justice as this will impact victims as well as how judges themselves perceive them. Such barriers include:

- Social stigma and cultural views
- Family and community pressure
- Lack of legal knowledge and understanding of victims' rights
- Lack of interpreters and challenges in communication
- Lack of trust, or fear of criminal justice providers
- Fear of retaliation by the perpetrator and lack of protection measures
- Limited access to gender-sensitive criminal justice providers
- Fear that reporting violence will mean that authorities will remove children
- Lengthy delays in criminal trials
- Insensitive or indifferent treatment by criminal justice providers
- Trivialization of the violence
- Lack of privacy
- Financial consequences of participating in the criminal justice system (possibility of loss of job, absences from work, transportation, babysitting, cost of forensic exam, etc.)
- Rural and remote access (lack of transport, cost of travel and hotels)
- Burden to initiate formal report and prosecution is often on the victim
- Emphasis on mediation or informal settlement
- Lack of legal assistance and victim support
- Ineffective and insensitive investigations
- Challenges in the collection of evidence
- Lack of safety guarantees at the courthouse and during trials
- Traumatizing courts
- Over-reliance on physical evidence
- Challenges for women to give testimony in court
- Lack of dissuasive, effective and proportionate punishments

1.3 Understanding the dynamics of gender-based violence and trauma experienced by victims

Experiencing gender-based violence is traumatic and can lead to the victim feeling socially isolated. The reactions of women and girls subjected to gender-based violence can be misunderstood by the judiciary, including in cases where victims are reluctant to participate in criminal proceedings.

Studies show that a significant portion of victims of gender-based violence:

- Suffer from significant mental trauma, such as post-traumatic stress disorder, depression and anxiety
- Feel socially isolated
- Experience low self-esteem
- Have a compromised sense of privacy, safety and well-being

Understanding how the dynamics of gender-based violence and trauma can influence victims' reactions to violence, and subsequent participation with the criminal justice system, can assist judges in performing their judicial duties in a manner that prevents the impact of persistent myths and harmful gender stereotypes.

Frequently asked questions regarding victims of intimate partner violence

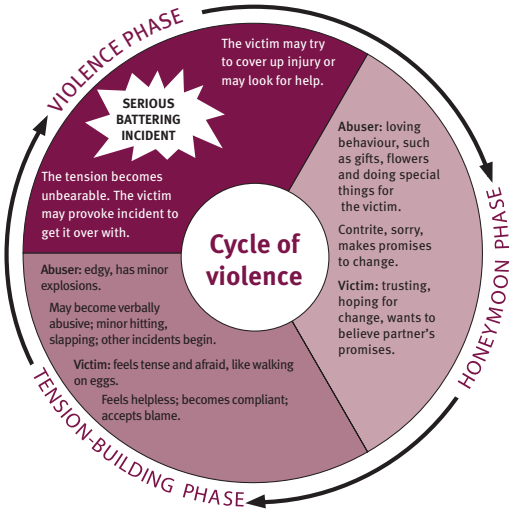
Q. Does intimate partner violence only occur in the context of cohabitation?

Women and adolescent girls are subjected to intimate partner violence in a broad range of settings. It is not necessary for a woman or girl to live with her intimate partner (or to have ever lived with her partner) for that partner to exercise control and violence of various kinds. For example, women and adolescent girls who end a relationship with an intimate partner can be subjected to physical abuse, sexual abuse, financial abuse and psychological abuse, all without having ever cohabited with the abusive partner.

Q. Why don't victims leave at the first instance of physical violence?

Victims have often been isolated from family and friends, financially controlled, and experience psychological violence that reduces women's confidence and sense of self-worth which makes them feel that something must be wrong with themselves and not with the abuser. When the abuser starts using physical violence, the victim often feels as if she somehow deserved it. In addition, after committing violence, the abuser may be contrite, apologetic and often promises never to do it again. In the 1970s, Lenore Walker developed the "cycle of violence" model to explain the dynamics of intimate partner violence.

Figure III: Cycle of violence: the three phases



There are three phases to intimate partner violence:

1. Tension building phase: begins with anger, blaming and increased tension. Many women learn to recognize this tension building phase and try to control it by becoming nurturing and attempting to keep peace. At this stage incidents are often not reported to police or, if reported, the case is minimized. This encourages the abuser to proceed to the next phase.

2. Violence phase: is the explosion of violence from the abuser. For women who have experienced violence before, a threat of violence can be disabling. The victims may be grateful that the violence ends and may consider themselves lucky that it was not worse, no matter how bad their injuries are.

3. Honeymoon phase: is the contrite and loving stage of the cycle. Following the violence, the abuser is affectionate and calm, and often begs for forgiveness and promises to change.

Source: Lenore Walker, *The Battered Woman* (Harper and Row, 1980).

Q. Why do victims stay with the abuser or return to them after they have left?

There is a need to stop blaming victims for staying and start asking the question of why men abuse their intimate partners. Supporting victims requires an understanding of multiple barriers standing in the way of a woman leaving. Research found that the reasons why women do not leave their abusers are complicated and can change over time.[42] Some of the reasons include:

- *Danger and fear*. Women fear being exposed to even more violence if they leave. Research corroborates this fear. The risk of intimate partner violence is increased within the context of a separation, and the killing by an intimate partner may be triggered by an actual or even anticipated separation.[43] One study found that in 76 per cent of cases, women were killed by their ex-partners or ex-spouses within the first year following their separation.[44] Women who have children may fear reprisals against their children through harmful practices and killing if they leave their partner.
- *Shame, embarrassment or denial*. Abusers are often well respected in their community, which prevents others from recognizing the violence or encourages them to minimize it. Family and social expectations also create pressure on the victim to return.
- *Practical reasons*. Women stay due to financial need, lack of other living options or because they are concerned about supporting her children. Women may also fear that their custody rights will be restricted or, depending on their immigration status, that they will be deported.
- *Other reasons*. Victims often love or care about the people who harm them. Keeping the family together may be important to the victim for numerous reasons, including for the sake of children, religious or cultural beliefs.
- *Lack of effective support from justice agencies*. Women may not able to receive help from the authorities, including the police, if services are not available, affordable or responsive to their needs.

Stockholm syndrome and intimate partner violence

The term "Stockholm syndrome" was coined in 1974 to describe a curious bond which developed between bank employee hostages and their captors. Understanding Stockholm syndrome helps judges to understand the behaviour of victims facing intimate partner violence that, in the absence of a clear understanding of the context, may appear irrational and self-destructive and attract victim-blaming. Stockholm syndrome explains the emotional bond between a victim and her abuser. Victims have a desire to survive chronic, inescapable trauma and abuse and therefore should not be viewed as having weak or defective personalities. In these cases, the bond emerges in a situation where the victim perceives the abuser as threatening her survival; the victim perceives the abuser as showing her some kindness, however small; the victim is isolated from outsiders; and the victim does not perceive a way to escape.

Source: Graham and others, Survivors of Terror: battered women, hostages, and the Stockholm syndrome (1988).

[42] See Michael A. Anderson, and others, "Why Doesn't She Just Leave?: A Descriptive Study of Victim Reported Impediments to Her Safety", *Journal of Family Violence*, vol. 18, No. 3, pp. 151-155; Naoki Yamawaki and others, "Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship with her Abuser, and the Decision to Return to her Abuser", *Journal of Interpersonal Violence*, vol. 27, No. 16 (2012), pp. 3195-3212.

[43] Joakim Petersson, J. and others, "Risk Factors for Intimate Partner Violence: A Comparison of Anti-social and Family-Only Perpetrators", *Journal of Interpersonal Violence*, vol. 34, No. 2 (2019).

[44] Deirdre Brennan, *The Femicide Census: Redefining an Isolated Incident* (Women's Aid, 2016).

Examples of how judges can apply trauma-informed approaches

Acknowledge the prevalence and impact of trauma. In one case, a woman filed a domestic violence complaint against her husband, left him and moved to her parents' home. The judge, from a civil law system, asked both parties to come to her office. The husband was 15 minutes late which allowed the judge to interview the victim alone regarding the incident. When the husband arrived, the judge was aware of the fear exhibited by the complainant, which was evident from her body language and avoidance of looking at her husband. When the husband asked her if she wanted to come home, she said yes. The judge was convinced that there had been violence and that the complainant was scared of her husband. The judge issued a decision requiring the husband to have no contact with the complainant, considering all the evidence. One week later, the husband killed his mother.

Create a sense of safety and remove burdens of seeking justice from the victim. In another case, a woman made a report against her husband which involved serious allegations of intimate partner violence. The day after the report was made and her husband was arrested, she requested the investigating judge to drop the case. The judge met the complainant and talked about the reasons for this request, from which the judge determined that the complainant was under pressure from the husband and his family. The judge refused to dismiss the case and released the husband before trial. The judge's superior disagreed with this decision; however, the judge convinced her superior that her approach was in line with international human rights law, which called on the primary responsibility for prosecution to be on the State and not the victim, and that this principle needed to be taken into account in the application of domestic law.

Source: Presentation delivered at the expert meeting to review a draft Handbook on Effective Responses by the Judiciary to Violence against Women, Vienna, 26–28 November 2018.

Q. All couples fight sometimes. How can I tell a dispute from actual intimate partner violence?

Intimate partner violence involves a pattern of coercion and control that one person exerts over another. It is typically not limited to one physical attack and it may not even involve a physical act. It can include repeated use of several forms of violence, including physical violence as well as intimidation, threats, economic deprivation, isolation, psychological and sexual abuse.

Table 2. Behaviours used by perpetrators to gain power and control over their victims

Using intimidation	Making her afraid by using eye contact, actions, gestures; words; smashing things; destroying her property; displaying weapons.
Using emotional abuse	Putting her down; making her feel bad about herself; insulting her; making her think she is crazy; playing mind games; humiliating her; making her feel guilty.
Using isolation	Controlling what she does, who she is seeing and talking to, what she reads, where she goes; limiting her outside involvement; using jealousy as a way to justify actions.
Minimizing, denying, blaming	Making light of the abuse and not taking her concerns about it seriously; saying or pretending the abuse did not happen; shifting responsibility for abusive behaviour, saying she caused it.

Using her children	Making her feel guilty about the children; using children as messengers; using visitation rights to harass her; threatening to take the children away.
Using male privilege	Treating her like a servant; making all the important decisions; acting like the "king of the castle"; being the one to define men's and women's roles.
Using economic abuse	Preventing her from getting or keeping a job; making her ask for money; giving her an allowance; taking her money; not letting her know about the family income or denying her access to it.
Using coercion and threats	Making and/or carrying out threats to hurt her; threatening to leave her, to commit suicide, to report her to welfare; making her drop charges; making her do illegal things; threatening to share intimate images online.

Judges can explicitly recognize the imbalance of power in intimate partner violence cases

In drafting decisions, judges can:

- Take note of the victim's perception of being subjugated or dominated by the offender; the dependency and lowered self-esteem of the less powerful person; the periodic and intermittent nature of the abuse; the clear power differential between the victim and the offender that combines with the intermittent nature of physical and psychological abuse to produce cumulative consequences.
- Interpret coping strategies and behaviours in accordance with the realities of social life associated with intimate partner violence, including: vulnerabilities due to gender and culture, socioeconomic status, sexual orientation, disability, legal status (such as immigration status), degree of access to support networks and to social, economic, and legal resources.
- Take judicial notice of how vulnerabilities produced by gender disparity in society influence the perceptions and actions of the victim and the offender in an intimate partner violence context.

Q. Why don't all victims of intimate partner violence want justice?

Women victims of intimate partner violence have different expectations from the criminal justice system. Some studies found that women subjected to intimate partner violence tend to become involved in the criminal process as a last resort and are usually looking for protection and an immediate cessation of a violent incident.[45] They do not necessarily want to go to criminal court. Illustrating that women have a range of justice needs, instances in which the criminal justice system focuses only on the current incident, can be seen to minimize the whole experience of the patterned use of coercion, intimidation and the use or threat of violence.[46] In a number of studies, women noted that the goals of the criminal justice system, that of punishment and retribution, are often at odds with the goals of women victims and in fact can contribute to feeling and being unsafe and worsen their personal and financial

[45] A number of studies have been reviewed in Holly Johnson and Jennifer Fraser, *Specialized Domestic Violence Courts: Do They Make Women Safer? Community Report: Phase I* (University of Ottawa, 2011).

[46] Praxis International, *A Report from the 2003 Domestic Safety and Accountability Audit: Prosecution Response to Misdemeanor Domestic Violence Cases Jackson Country, Oregon* (2003).

well-being.[47] There is a need to justice responses that comprehend the full picture of violence, and the complexity of risk and safety for the victim on a case-by-case basis.

Q. Why do victims turn reluctant or even hostile in court?

It is common for victims of intimate partner violence to refuse to testify, or withdraw their testimony. Past research indicated that victims recanted their stories out of fear of more violence. Recent research suggests that recantation or withdrawal of victim's testimonies are due to a complex emotional phenomenon by which the perpetrator minimizes his actions and gains the sympathy of the victim:

- Step one: "Strong and resolved". Here the victims are almost convinced that prosecuting the abuser will stop the violence.
- Step two: "Minimizing the abuse". The perpetrator tries to convince the victim that the incident was not that serious, tries to win her sympathy by presenting himself as the victim: as being in jail; being depressed, perhaps suicidal; and missing her and the children.
- Step three: "They don't understand us". Once he has gained her sympathy, they restart their previous loving relationship and enter into a dynamic of antagonism against the rest of the world, assuming that nobody else would understand them and their relationship.
- Step four: "Lie for me".
- Step five: Developing a plan to change her story.[48]

Table 3. Judicial approaches to reluctant or hostile victims

Negative approaches	Positive approaches
• Judges see the victim as perverting the administration of justice, making statements calling her gullible, dishonest or resorting to contrivances. • Judges ask the victim questions, such as "why don't you leave the defendant" (shifting the focus from the defendant's actions to the victim's actions, leading to victim-blaming). • Judges hold the victim/witness in contempt of court. • Judges recommend that charges be brought against the victim for being hostile and bringing false charges.	• Judges recognize that there are powerful reasons why victims of intimate partner violence may provide a retraction statement containing untruths and are ready in the appropriate circumstances to dismiss as unreliable the contents of a retraction statement. • Judges use legal options to allow the admission of original "truthful" accounts from victims as evidence in the case. • Judges rely on evidence available from other sources, including emergency call recordings; police videos, including from body-worn cameras; comprehensive statements from all first response officers; accounts from witnesses.

[47] A number of studies have been reviewed in Holly Johnson and Jennifer Fraser, *Specialized Domestic Violence Courts: Do They Make Women Safer? Community Report: Phase I* (University of Ottawa, 2011).

[48] Amy E. Bonomi and others, "'Meet me at the hill where we use to park': Interpersonal Processes Associated with Victim Recantation", *Journal of Social Science and Medicine*, No.73 (2011).

Q. How does intimate partner violence impact children?

Research indicates that children who witness intimate partner violence experience profound trauma, and adverse effects on brain development.[49] This has lifelong adverse effects. The Convention on the Rights of the Child provides that children have the right to protection from "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child" and that legislative and administrative decisions must be taken to ensure the provision of necessary protective measures.[50]

Frequently asked questions regarding sexual violence

Q. Why didn't she fight back?

Victims make quick decisions on how to react to sexual violence and ensure their survival. They respond initially at least, instinctively and reflexively. The part of the brain primarily responsible for detection of, and reaction to, a threat is called the amygdala. Threat detection and survival is given priority over all other brain functionalities. The human system will respond to the perceived threat in one or more of five predictable ways known as Fs: fight, flight, freeze, flop, and befriend. As the brain's first objective is to ensure the person's survival, it occurs at a time when the higher brain functions are suppressed. The victims will therefore react with behaviours that may seem illogical or irrational to a judge. In case of rape, a threat of death is immediate regardless of whether the rapist uses a deadly weapon. The fact that a victim ceased resisting the assault for fear of greater harm, or chose not to resist at all, does not mean that the victim gave consent. For example, asking a rapist to wear a condom is not indicative of consent. If victims assess that they are not in a position to remove themselves from danger, they often submit to the violence in order to avoid unnecessary or escalation of injuries. Each rape victim does whatever is necessary to do at the time in order to survive.

Table 4. Wide range of possible reactions to violence

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

Source: UNODC, *Resource Book for Trainers on Effective Prosecution Responses to Violence against Women* (2017).

[49] Areti Tsavoussis and others, "Child-Witnessed Domestic Violence and its Adverse Effects on Brain Development: A Call for Social Self-Examination and Awareness", Front Public Health, No. 178 (2014), p. 178.

[50] *Convention on the Rights of the Child*, New York, 20 November 1989, United Nations *Treaty Series*, vol. 1577, article 19.

Examples of case law reflecting gender-based myths and stereotypes

In 1999, the Italian Supreme Court (Cassazione) determined that a 45-year-old driving instructor did not rape an 18-year-old student, stating that "it should be noted that it is instinctive, especially for a young woman, to oppose with all her strength the person who wants to rape her and that it is illogical to say that a young woman would passively submit to a rape, which is a grave violence, for fear of undergoing other hypothetical and no more serious offences to her physical safety."[a]

Since the 1980s, the Supreme Court of the Philippines has issued a number of judgments holding that physical resistance is not an element to establish a case of rape, that people react differently under emotional stress, and that the failure of the victim to shout for help or try to escape does not negate the existence of the rape.[b] However, a lower level court acquitted a defendant of rape in 2005 on the grounds that the victim had opportunities to escape her attacker, relying on gender-based myths and stereotypes about rape and rape victims.[c]

[a] Alessandra Stanley, "Ruling on Tight Jeans and Rape Sets Off Anger in Italy", *New York Times,* 16 February 1999. For the full text, see https://www.altalex.com/documents/news/2007/04/04/cassazione-penale-sentenza-06-11-1998-n-1636.

[b] For an early example, see Supreme Court of the Philippines, *People vs. Cabradilla*, File No. L-33788, Judgment, 29 November 1984. For a recent example, see Supreme Court of the Philippines, *People v. Villalobos*, File No. 228960, Judgment, 11 June 2018.

[c] Committee on the Elimination of Discrimination against Women, *Karen Tayag Vertido v. The Philippines*, Communication No. 18/2008, Views, 17 July 2010.

Q. Is it really sexual violence if there are no visible injuries?

Along with the question of why the victim did not fight back is the belief that if a woman or girl suffered from sexual violence, medical evidence of her injuries will corroborate her statement. This myth sets an unrealistic standard for the victim and the medical community, as this is simply not the case in most incidents of sexual violence. While medical examinations can sometimes confirm sexual violence, they can never exclude it.[51] It is quite possible that sexual abuse leaves no discernable physical trace on the victim.

There are many reasons why definitive medical evidence is not forthcoming in most cases. Contrary to the myth that victims will immediately call for the pursuit and capture of the perpetrator and immediately report the incident, victims often delay disclosing the violence for weeks, months or even years. This means that the medical examination will also be delayed and any injuries may already be healed and indiscernible. Even where a medical examination is carried out soon after the incident, there may be no findings. Some forms of violence, such as unwanted sexual touching, creation of pornography and oral sex, do not generally result in physical findings. Moreover, vaginal tissue is elastic and full penetration by an object, a finger, or even a penis may cause no visible trauma. Redness or minor abrasions of mucous membranes may no longer be detectable within minutes or hours and sperm of the perpetrator may not be found, for example if ejaculation did not occur or if the victim took a shower, brushed her teeth or urinated.

Judges should take into special considerations when dealing with girl victims. They should be aware that forensic examiners may not be properly trained in conducting an age- and developmentally appropriate forensic interview. The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime provide important and authoritative guidance on providing child victims with effective responses

[51] Sousan Kreston, "An inconvenient truth: On the absence of definitive corroborative medical evidence in child sexual abuse cases", *Child Abuse Research in South Africa*, vol. 8, No. 2 (2007), pp. 81-96.

protecting their rights. More specifically, the guidelines set forth good practice with respect to children's right to be treated with dignity and compassion, the right to be protected from discrimination, the right to be informed, the right to be heard and express views and concerns, the right to effective assistance, the right to privacy, the right to be protected from hardship during the justice process, the right to safety, the right to reparation, and the right to special preventive measures.[52]

Further advice on the implementation of the guidelines is presented in the Handbook for Professionals and Policymakers on Justice in matters involving Child Victims and Witnesses of Crime.[53]

Q. Why didn't the victim report the violence promptly?

Each victim reacts differently after a violent act. She may try to dismiss or ignore what happened and even normalize it by having contact with the perpetrator in the future. She may only decide to report once she is supported by a family member or when a friend confirms that this behaviour is indeed wrong. If the perpetrator is considered as a trustful person, victims may take years to link their situation to violence and recognize it as such. Sexual violence victims often experience a profound sense of shame, stigma and violation.

One survey found that shame and embarrassment were the most common reasons for not reporting a sexual assault to the police. Victims worried about the negative consequences of reporting, that they would be blamed for the incident and feared being exposed to people's judgment and criticism. Another reason for not reporting was a lack of confidence in the criminal justice system, with two thirds of the participants stating that they were not confident in the court process.[54]

Q. Can she really be a victim of sexual violence if she doesn't act like she is upset?

Victims behave in a wide variety of ways after sexual violence. There is no unique response to sexual violence. Victims may appear calm or flat or distraught or overtly angry. They may react by self-medication, by engaging in high-risk sexual behaviour, by withdrawing from those around them or by attempting to regain control. In attempting to regain control, the victim may turn to social media to deal with post-traumatic stress. Victims may also remain friendly with the perpetrator, such as sending friendly text messages, although he sexually assaulted her. Many perpetrators are known to the victims, as they often may have worked to gain trust and appear benevolent to the victim. This relationship often does not end straight after an episode of sexual violence. Victims may think they played a direct role, that it was their fault or that they have little choice but to stay in contact if the offender is a boss, teacher or relative.

Q. Why do victims not recall what happened or appear to change their stories?

Research shows that traumatizing events are often experienced as a sure threat or a disruption of life, and produce an emotional shock that can modify the brain.[55] When an individual suffers from a traumatic experience, her usual balance is deeply altered and needs to be rebuilt, partly or fully, by incorporating the traumatic event in her memory. The repetition of trauma has a strong impact on the victim's reaction. An inability to recall timelines and details has been shown by neurobiological research to be not only legitimate but common. When the brain's defence circuitry is activated, the prefrontal cortex, which normally

[52] Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council resolution 2005/20, annex.

[53] UNODC and UNICEF, *Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime* (2009).

[54] Melissa Lindsay, *A Survey of Survivors of Sexual Violence in Three Canadian Cities* (Department of Justice Canada, 2014), p. 13.

[55] This research has been reviewed in UNODC, *Resource Book for Trainers on Effective Prosecution Responses to Violence against Women* (2017).

directs attention, can be rapidly impaired, affecting the information recorded in our memory.[56] This means that victims may remember certain things like a clock ticking or the carpet's colour but not the order of events. One researcher describes this experience as "like hundreds of tiny notes that are scattered across the desk, the bits of information may be accurate, but disordered and incomplete".[57]

Table 5. Case study on dealing with change of testimony by young female victim of rape

In one case, a court held that other evidence, including the medical report, could be used to secure a conviction, even after the rape victim turned "hostile" and denied the rape during the trial.

Positive aspects of the case:	Concerns about the case:
The court stated "A criminal trial is but a quest for truth. The nature of inquiry and evidence required will depend on the facts of each case. The presumption of innocence will have to be balanced with the rights of the victim, and above all the societal interest for preservation of the rule of law.... If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth.... The mere fact that [she] may have turned hostile, is not relevant and does not efface the evidence with regard to the sexual assault upon her and the identification of the appellant as the perpetrator."	The court held that a rape survivor turning hostile could be prosecuted for tendering false evidence without appreciating how the trauma, the lengthy court process and the intimidation by the perpetrator impacted on the victim. The court only refrained from ordering the prosecution of the victim because she was only 9 years old at the time of the rape, which happened 14 years earlier. The court stated that "Neither the accused nor the victim can be permitted to subvert a criminal trial by stating falsehood and resort to contrivances, so as to make it the theatre of the absurd" and stressed that the "Criminal justice system cannot be overturned by those *gullible witnesses* who act under pressure, inducement or intimidation."

Source: Supreme Court of India, *Gadhvi v State of Gujarat*, Case No. 913/2016, Judgment, 28 September 2018.

Q. Should I be concerned about high rates of false allegations?

There is a persistent myth that rates of false allegations are high and that most cases are unfounded. This dates back to a statement made by English jurist Sir Matthew Hale in the seventeenth century, according to whom "rape is an accusation easily made and hard to be proved and harder to be defended by the party accused, tho never so innocent". However, there is no evidence supporting this belief. As mentioned above, international research on false reporting on sexual violence cases suggests that false reporting happens in only 2 to 8 per cent of reported cases.[58] In addition, statistics reveal that very few cases of rape are actually reported to police due to shame, self-blame, fear of the perpetrator, the possibility of not being believed, social stigma, and a lack of trust in the criminal justice system's ability to

[56] James Hopper from Harvard Medical School as cited by Shaila Dewan, "She Didn't Fight Back: 5 (Misguided) Reasons People Doubt Sexual Misconduct victims", *New York Times*, 30 November 2017.

[57] Rebecca Campbell from Michigan State University as cited by Shaila Dewan, "She Didn't Fight Back: 5 (Misguided) Reasons People Doubt Sexual Misconduct victims", *New York Times*, 30 November 2017.

[58] Kimberly Lonsway and others, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assaults* (2009).

respond effectively to the victim's needs, without creating further trauma. Many other wrongly held beliefs intersect with this myth, including that women are fickle and spiteful; women are not particularly credible; women lie to protect their honour; women are vengeful and lie to restore a perceived injustice; women lie about sexual assaults to blackmail; and women have overactive imaginations.

Table 6. Judicial approaches to victims of sexual violence

Negative approaches	Positive approaches
• Judges ask or allow questions to the victim about the reasons of her behaviour or reaction. This shifts the focus onto the victim's actions rather than on the defendant's actions and leads to victim-blaming. • Judges make assumptions as to why they think the victim is seeking justice, considering money or revenge as her main motivations.	• Judges recognize the victim's trauma and speak to her in a way that will make her feel at ease. • Judges provide measures to keep the victim safe from the defendant and his family during the court proceedings. • Judges examine the facts of the case, not the victim's personal life or characteristics.

Frequently asked questions regarding gender-based violence against girls

Q. Can girls be subjected to intimate partner violence?

It is important to note that girls who have not yet reached the age of sexual consent are not to be considered victims of intimate partner violence. Rather, they are victims of child abuse and/or child sexual abuse (depending on the form/s of violence inflicted).

For girls who have reached the age of sexual consent, intimate partner violence can take any, or all, of the forms endured by adult women. Intimate partner violence refers to a broad range of sexual, psychological, physical, and financial abuses perpetrated by a former or current intimate partner against either adult women or girls who have reached the age of sexual consent. While these forms of violence affect both women and girls, it is important to recognize the range of developmental and structural considerations that shape the context/s in which intimate partner violence against girls occurs.

Childhood and adolescence are characterized by a range of developmental stages during which individuals progressively form a sense of their own aspirations and identity. Children and adolescents develop their sense of self in relational terms (i.e. in relation to their acceptance and validation by peers, family, and by potential or actual romantic or intimate partners). Through these various developmental stages, and as their capacities evolve, girls are often subjected to harmful gendered expectations that naturalize gender inequality and gender-based violence as facets of romance or love. For example, girls may be encouraged to accept that they are obligated to provide sexual pleasure to boys or men, and that their worth is tied to their chastity, their relationship status, their marital status, or their reproductive capability. These contradictory expectations often deny or determine girls' "choices" with respect to intimate relationships, including in instances where girls are subjected to intimate partner violence. Multiple studies indicate that sexual violence against adolescent girls is most commonly perpetrated by a romantic partner, while sexual violence against boys is found to be perpetrated by neighbours, schoolmates and friends,[59] or by a stranger.[60]

[59] Know Violence in Childhood, *Ending Violence in Childhood: Global Report* (2017), p. 49.

[60] Sarah Bott and others, "Violence Against Children in Latin America and the Caribbean: A Review of Population-Based Data Available for Measuring Progress Towards the Sustainable Development Goals", in *Violence Against Children: Making Human Rights Real*, Gertrud Lenzer ed. (London, Routledge, 2017), p. 183.

Gendered economic inequalities also play a role in shaping social and cultural expectations about intimate relationships. In some contexts, girls may become involved in intimate relationships, or remain in intimate relationships, because structural inequalities deny them other opportunities (girls may be denied inheritance, for example, or education, or prevented from participating in the formal economy). Additional structural issues, linked to gender inequality, limit the extent to which girls and women can exercise agency with regard to intimate partner relationships and parenting. Equal access to free or affordable contraception and other reproductive health services is necessary to allow girls and women to make independent decisions about their reproductive health, parenting, and relationship status. Comprehensive and accurate sex education is also an important protective mechanism, to ensure that girls are equipped with the knowledge that they need to make informed decisions about consent, about their own sexual and reproductive health, and about access to justice in situations of gender-based violence. Where girls and women are denied this knowledge, or the agency to make informed decisions about their own body, their choices about how to respond to intimate partner violence are also significantly constrained.

The Convention on the Rights of the Child recognizes that children require special protection due to their evolving physical and psychological maturity. Articles 19, 34 and 36 of the Convention require that State parties protect children (all those who have not attained the age of 18 years) from all forms of violence. Survey data on intimate partner violence underscore the importance of these human rights obligations to protect children from all forms of violence.

Q. If girls are not married, or living with their intimate partner, why don't they leave the relationship?

The restrictions that sociocultural and gendered expectations place on girls may encourage girls to endure violence, or to accept that the violence is somehow their fault. Girls may literally have no other option but to continue to endure the violence in order to satisfy parental or cultural expectations about the romantic relationship or marriage. In some contexts, girls who flee a violent relationship would be subjected to severe forms of retribution by members of their family, the family of the former partner, or by members of the community. Violence of this kind includes the maiming or killing of girls as so-called "honour"-based violence. Even in contexts where violent retribution of this kind is less likely, girls may still fear the consequences of ending the relationship, given the powerful gendered expectations that reduce a girls' worth to her chastity and/or relationship status.

Q. What role do sexting and image-based abuse play in intimate partner violence against girls?

In the digital era, image-based abuse (sometimes called "revenge pornography") has emerged as a particularly pernicious form of violence against women and girls. This form of violence involves a current or former intimate partner sharing, through social media or digital communications technology, intimate photographs of a partner or former partner without her consent.

Adolescents are particularly avid users of technology, and selfies and intimate selfies are now understood to be a common part of the experimentation and performativity that characterizes the developmental stages of adolescence and early adulthood.[61] While the taking of intimate images often occurs within romantic relationships, as an expression of affection or sexual attraction,[62] these images

[61] Karen Cooper and others, "Adolescents and self-taken sexual images: A review of the literature", *Computers and Human Behaviour*, vol. 55 (2016), pp. 706-716.

[62] Janis Wolak and David Finkelhor, *Sexting: A typology* (Durham University of New Hampshire, 2011).

can be used as a means of inflicting violence if the relationship ends. Image-based abuse is gendered, and should be considered as part of the continuum of violence against women and girls.[63] Entrenched sociocultural expectations about the importance of chastity, for girls and women, mean that the stigma and shame that accompany the circulation of intimate images causes disproportionate harm to girls and women. The harms of this form of violence should not be discounted because they are perceived to occur in the digital realm. The division between virtual and embodied harms is not clear-cut, and victims of image-based abuse endure myriad harms in their real lives.[64] The harms of this form of intimate partner violence are often exponential, as intimate images are shared broadly and often accompanied by derogatory gendered comments that inflict shame and profound psychological harm. In many cases, victims of image-based abuse are unable to recover or remove all intimate images from circulation – a situation which perpetuates harm for the long term.

Q. What is wrong with child marriage?

In contexts where girls are forced, or expected, to marry before the age of 18 years, girls bear an increased risk of experiencing intimate partner violence.[65] This risk sits alongside a number of other harms associated with child marriage, include increased risk of complications in childbirth, reduced educational opportunities, and barriers to employment.[66] UNICEF clarifies that child marriage is a human rights violation, with myriad harms for children.

Many factors interact to place a girl at risk of marriage, including poverty, the perception that marriage will provide "protection", family honour, social norms, customary or religious laws that condone the practice, an inadequate legislative framework and the state of a country's civil registration system. Child marriage often compromises a girl's development by resulting in early pregnancy and social isolation, interrupting her schooling, limiting her opportunities for career and vocational advancement and placing her at increased risk of domestic violence. Child marriage also affects boys, but to a lesser degree than girls.[67]

The relationship between age at first union and risk of intimate partner violence

Surveys conducted in Latin American countries found that a young age of union (marriage/cohabitation/partnering) was significantly associated with a higher risk of intimate partner violence in 7 of the 12 [Latin American] countries surveyed:

> "These surveys document substantial levels of partner violence against ever-partnered girls aged 15-19, with estimates of past year physical and/or sexual partner violence ranging from 9 per cent in El Salvador to 31.5 per cent in Colombia.... In that analysis, past year partner violence was highest among adolescents aged 15-19 compared with older women in almost all countries, and in a majority of countries, adolescents reported nearly twice the prevalence of partner violence reported by women aged 40-49".

Source: Sarah Bott and others, "Violence Against Children in Latin America and the Caribbean: A Review of Population-Based Data Available for Measuring Progress Towards the Sustainable Development Goals", in *Violence Against Children: Making Human Rights Real*, Gertrud Lenzer ed. (London, Routledge, 2017), p. 182.

[63] Anastasia Powel and Nicola Henry, "Sexual violence and harassment in the digital era", in *Palgrave Handbook of Australian and New Zealand Criminology*, Crime and Justice (London, Springer, 2017).
[64] Anastasia Powel and Nicola Henry, "Sexual violence and harassment in the digital era", in *Palgrave Handbook of Australian and New Zealand Criminology*, Crime and Justice (London, Springer, 2017), p. 208.
[65] UNICEF, *Ending child marriage: Progress and prospects* (2014).
[66] Ibid.
[67] UNICEF, *Child marriage* (2018), available at https://data.unicef.org/topic/child-protection/child-marriage/.

Q. What are the special needs of girl victims?

Girls can be exposed to extraordinary pressure from their abuser in order to ensure no criminal proceedings will be initiated. Even when the abuser is not a family member, pressure may be exerted by the family to withdraw the procedure. This can be related to considerations including the family's "honour", and to the girl's marriageability.[68]

Q. What should I do if it looks like the girl consented to sex?

It is of the utmost importance that judges recall that all children below the age of sexual consent are legally incapable of giving their consent. Any child (any person who has not attained the age of 18 years)[69] who has been sexually abused by an adult, is a victim, and inferences made by law enforcement, by the defence, by the victim herself, or by any other party do not indicate a legal or moral basis for consent, or detract from the seriousness of the adult-perpetrated crime. It should also be noted that in some jurisdictions the legal age of sexual consent is set very low. In such cases, judges should be reminded that all children (all persons who have not attained the age of 18 years)[70] have the right to protection from all forms of violence[71] including all forms of sexual coercion, exploitation, and abuse.[72]

In addition, most children facing sexual abuse or exploitation find themselves in situations where the abuser is in a position of power or authority, or is someone they trust. Children are very often taught to obey to those in positions of authority, including if they are their elders. In this last case, children are at high risk of being manipulated, coerced or forced into sex. Due to their evolving capacities, children often trust adults to guide them about acceptable behaviours and expectations. Therefore, adults bear all legal and moral responsibilities to refrain from manipulating children: children are not responsible for protecting themselves from sexual abuse. Furthermore, children develop their sense of self, and an understanding of their place in the world, in relational terms (to a greater extent than adults). In other words, children can be particularly vulnerable to external actions because they feel obliged to fit in. For girls, this is compounded by the prevalence, globally, of sociocultural factors that naturalize the specious assumption that women and girls bear an obligation to please men. At a time when girls are starting to develop their own sense of self, these gendered expectations, and a range of other structural inequalities, make girls particularly vulnerable to various forms of sexual abuse and exploitation.

The relationship between girls and adult male perpetrators is profoundly unequal. Judges should review their domestic criminal legislation with respect to how statutory rape is defined, noting the statutory age of sexual consent, and the provisions regarding abuse of trust or positions of power. Judges should be aware that perpetrators often target vulnerable females, which includes not only girls but also women with disabilities (physical and mental), and women in vulnerable positions. Notable factors here include that women and girls commonly have unequal access to economic resources, and these structural inequalities may make them particular targets for exploitation and abuse. Research shows that perpetrators are more likely to choose victims who have been previously sexually assaulted, but that victims who reported more than one assault were less likely to be believed.[73] It is very important that judges understand the way that these structural inequalities and sociocultural factors influence GBVAWG in their local context, and remain alert to the ways in which the defence may seek to blame child victims for the abuse they have endured at the hands of adult perpetrators.

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[68] Thu Huong Nguyen, *Rape experience and the limits of women's agency in contemporary post-reform Viet Nam* (2011).
[69] *Convention on the Rights of the Child*, New York, 20 November 1989, United Nations *Treaty Series*, vol. 1577, article 1.
[70] Ibid.
[71] Ibid., article 19; ibid., article 34.
[72] Ibid., article 19; ibid., article 34.
[73] Sheila Dewan, "Why Women Can Take Years to Come Forward with Sexual Assault Allegations", *New York Times*, 18 September 2018; Edmondson Bauer and others, *College-Aged But in the Streets: Young Adults who Experience Homelessness and Sexual Violence* (National Sexual Assault Coalition Resource Sharing Project, undated).

International law provides that all children should have access to special care and protection, due to the vulnerabilities associated with their age, and their evolving developmental and psychological maturity.[74] Judges have an important role to play in this respect.

Q. What is "grooming"?

Without an understanding of grooming techniques, judges may view the girl victim as a willing party to the sexual activity or a compliant victim. Grooming has been defined as a "process by which a person prepares a child, significant adults and the environment for the abuse of this child. Specific goals include gaining access to the child, gaining the child's compliance and maintaining the child's secrecy to avoid disclosure. This process serves to strengthen the offender's abusive pattern, as it may be used as a means of justifying or denying their actions".[75] The techniques involving grooming include the following:

- *Identifying the potential victim*. They are usually marginalized children who have low self-esteem and feel alienated from their family or community.
- *Building the trust of a child victim in order to exploit the child sexually*. The perpetrator builds trust and breaks down the child's defences and fosters secrecy by giving her gifts, playing games, pretending to share common interests, using flattery and reassuring the child's family.
- *Desensitizing and normalizing adult-child sex*. There is a gradual erosion of boundaries, often with escalating physical contact and/or engaging the child in inappropriate behaviour such as drinking alcohol or introducing pornography. This starts with "innocent" touching such as hugs, pats or kisses, tickling or stroking her hair and "accidental" touching, such as brushing against the child's breasts or genital area before moving to other forms of sexual abuse.

Table 7. Case study of positive and negative approaches towards grooming

In one case, the perpetrator appealed his conviction of several charges relating to sexual abuse of his adopted minor daughter, who had come to live with them at 7 years of age and who they adopted at 15 years. The sexual exploitation started when the child was 14 years old.

Negative approach – defence arguments	Positive approach – court of appeal reasoning
• The defence argued that in determining consent, the court should evaluate the complainant's behaviour in the context of the relationship that existed at the time of the commission of the offence. • Another defence argument was that the girl child consented to the sexual acts and even misled the perpetrator and offered herself to him. • Even if she did not consent, the defence argued that the defendant subjectively believed that she had consented.	• The Court dealt with the evidence holistically in finding that the complainant did not consent to the acts and that the defendant had the requisite mens rea to commit the offence. • The Court held that, on the facts, the girl had not displayed any particular conduct which indicated her lack of consent over and above her objections. However, any perceived acquiescence could not be construed as consent, as the defendant had slowly groomed her to ensure that she ultimately submitted. • The Court noted that the consent is to be active, and therefore mere submission is not sufficient.

Source: Supreme Court of Appeal of South Africa, *Mugridge v S*, File No. 657/12, Judgment, 28 March 2013.

[74] *Convention on the Rights of the Child*, New York, 20 November 1989, United Nations *Treaty Series*, vol. 1577, Preamble.

[75] Susan Kreston, "In harm's way: child pornography, grooming and the Sexual Offences Act of 2007", *Child Abuse Research: South African Journal*, vol. 10, No. 2 (2009), pp. 41-51.

1.4 Understanding the influences of myths and harmful gender stereotypes

The pervasiveness of GBVAWG suggests that it is deeply grounded in attitudes and behaviours. Many of the continuing problems faced by victims in accessing criminal justice are deeply rooted in underlying misogynistic views that have plagued women for centuries. These views can lurk subconsciously in the minds of both men and women and often emerge when confronted with notions of women's rights, autonomy and sexuality. Even after numerous reports and judicial training on myths and harmful gender stereotypes, judicial responses continue to be "hampered by persistent resistances to and inadequacies in understanding how gender power relations and deeply rooted attitudes and perceptions of women and men operate to subordinate and discriminate women."[76]

For more information on judicial stereotyping, see Simone Cusack, Eliminating Judicial Stereotyping (2014).

Consequences of myths and harmful gender stereotypes

While myths may vary among societies and cultures, the consequences of myths and harmful gender stereotyping follow a consistent pattern:[77]

- They serve to deny and/or trivialize violence perpetrated by men against women.
- They shift the blame from the perpetrator to the victim for the gender-based violence.
- They express a disbelief in claims of violence.
- They exonerate the perpetrator.
- They allude that only certain types of women and girls are "real" victims.
- They contribute to the oppression and social control of women and girls.

The wide-ranging impact of judicial stereotyping

- Distorts judges' perceptions of what occurred in a particular situation of violence or the issues to be determined at trial
- Affects judges' vision of who is a victim of gender-based violence
- Influences judges' perceptions of the culpability of persons accused of gender-based violence
- Influences judges' views about the credibility of witnesses
- Leads judges to permit irrelevant or highly prejudicial evidence to be admitted to court and/or affect the weight judges attach to certain evidence
- Influences the directions that judges give to juries
- Causes judges to misinterpret or misapply laws
- Shapes the ultimate legal result

Source: Commonwealth Secretariat and UN Women, *Judicial Resource Book on Violence against Women for Asia: Combating Violence against Women and Girls for Cambodia, India, Pakistan and Thailand* (2018).

[76] ASEAN Committee on Women, *Work Plan 2011-2015*, available at http://www.asean.org/storage/images/2012/publications/ACW%20Work%20Plan%202011-2015.pdf.

[77] Amy Grubb and Emily Turner, "Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming", *Aggression and Violent Behavior*, vol. 17, No. 5 (2012), p. 445.

These deeply embedded myths and harmful gender stereotypes disable the safeguards in the criminal justice system, influence the discriminatory application of criminal procedures and evidentiary rules that have developed out of beliefs about women and girls, and distort the conduct of judges, prosecutors and defence counsel. The damage of employing harmful gender stereotypes includes the denial of justice for victims of GBVAWG; secondary trauma to complainants; under-reporting for fear of how victims will be treated; low conviction rates; and the perpetuation of a sense that GBVAWG will be met with impunity.

Prejudicial myths impact how the violence is viewed and how the criminal justice system treats the victims as they go to court. Often, discrediting the complainant is the central strategy of the defence and takes the form of maligning her with harmful gender stereotypes, focusing on her behaviour, her outfit, her character, whether she immediately reported the incident, whether she spoke to a psychiatrist, her socioeconomic status, drug or alcohol use, lifestyle or marital status. This effectively denies victims of GBVAWG access to any form of justice and fundamentally jeopardizes the legitimacy of the system and the rule of law.

The role of trial judges in debunking harmful gender stereotypes

Judges of trials at first instances are regulators of the criminal trial. They are well placed to play a major role in dispelling these myths and harmful gender stereotypes and counteracting the ways in which myths promote victim-blaming and stigmatization of gender-based violence. Higher courts are in a position to recognize and denounce the use of myths in the lower courts. Judges should consider constantly asking themselves whether their conduct is grounded in harmful gender stereotypes about GBVAWG.

The role of the judiciary in challenging harmful gender stereotyping

1. Challenging decisions by lower courts that are affected by wrongful stereotyping
2. Challenging laws embodying stereotypes and resulting in breaches of constitutional or human rights guarantees
3. Challenging policies embodying stereotypes and resulting in breaches of constitutional or human rights guarantees
4. Awarding reparations that challenge stereotypes/stereotyping
5. Speaking out on wrongful judicial gender stereotyping

Source: Simone Cusack, Eliminating Judicial Stereotyping (2014).

Table 8. Catalogue of common myths and gender stereotypes

Broad categories[a]	Related myths/ gender stereotypes	Examples of how this is reflected in law and/or practice
She asked for it	In cases of sexual violence, a woman or girl's manner of dressing or behaving implies consent to sexual violence.	- A common defence tactic is to lead the court to focus on behaviour viewed as "morally suspicious" to cast doubt on the credibility of the complainant. *Example:* a defence lawyer asked the jury to consider the type of underwear worn by the complainant: "you have to look at the way she was dressed. She was wearing a thong with a lace front". (The defendant was acquitted).[b] - Judges allow questioning on irrelevant issues to the victim such as walking alone late at night, having a provocative outfit, flirting, wearing make-up, going to bars alone, drinking alcohol, leaving a drink unattended. - Judges shift their focus to the victim's behaviour and not the perpetrator's actions or the alleged incident. *Example:* a court found a defendant guilty of rape but did not impose imprisonment because, according to the judge, the 26-year-old victim and her friend wore "tube tops with no bra, high heels and plenty of make-up. … they made their intentions publicly known that they wanted to party".[c]
	In cases of intimate partner violence, a woman's action implies that she provoked her partner to violence.	- Some countries have a defence of provocation which allows perpetrators to escape criminal responsibility. - Judges shift their focus to the victim's behaviour and engage in victim-blaming. - Judges minimize or excuse the violence as being disciplinary to correct a wife's "bad" behaviour.
	In intimate partner violence cases, there is a belief that women should be submissive and obedient.	- There is a negative credibility assessment in cases where victims do not fit in this belief or stereotype. - It feeds into the previous myth, that if the victim had been submissive and obedient she would not have to be "corrected".
It wasn't really GBVAWG	"Real" rape is committed by a stranger with force or weapon.	- Judges narrowly define what counts as sexual violence and interpret certain criminal elements as requiring force or resistance. - Judges require victims to resist and therefore sustain visible injuries. - Laws or judicial decisions require corroboration of the victim's account and assume that if there is no physical evidence, sexual violence has not been proven. - If the incident does not fit into this myth – and most rapes do not – there is a belief according to which rape committed by a non-stranger is not rape.
	"Real" domestic violence is serious physical violence leading to serious injuries or death.	- Judges narrowly define offences of "assault", "intimidation" or "coercion" requiring victims to sustain visible injuries. - Judges do not consider psychological violence or economic abuse, as "real" intimate partner violence. - General criminal code offences in many countries deal with single incidents of physical violence and prevent or discourage judges from taking into account existing patterns of coercion and control involving various forms of violence.

He didn't mean to	Sexual violence is the result of men's uncontrolled desire.	- This myth denies and trivializes violence; it removes blame from the perpetrator and places it on the victim for causing lust, and it fundamentally mischaracterizes sexual violence as a matter of desire, rather than a crime that is about the exercise of power. - A common defence tactic relying on this myth is arguing that violence was a result of miscommunicated romantic signals and that men are only guilty of incompetent message-decoding rather than rape. *Example:* a court found a defendant guilty of rape but did not impose imprisonment, considering that he perceived the victim's behaviour as an invitation, making this "a different case than one where there is no perceived invitation. This is a case of misunderstood signals and inconsiderate behaviour".[d]
	Women's "no" really means "yes".	- Consent is misinterpreted to include implied consent. - A common defence strategy is to argue that sexual assault occurred as a result of honest but mistaken belief.
	Drugs, alcohol or mental illness are the main causes of intimate partner violence.	- The misconception of risk or contributing factors as main causes of violence shifts the focus away from the perpetrator's responsibility. - Expert reports are submitted to establish a causal link between drugs, alcohol or mental illness and the violent incident to prove the innocence of the defendant.
She wanted it	No woman would allow herself to be raped if she does not want to.	- Judges focus on the victim's behaviour instead of the perpetrator's actions. - In judicial fact determination, the absence of vaginal injury is often found as a fact that rape could not have occurred, as it assumes that if she was able to self-lubricate, she must have enjoyed the forced sexual act. - The "denim defence" – *Example:* a court ruling suggested that a woman could not be raped if she was wearing jeans because they would be impossible to remove unless she helped to remove them: "jeans cannot be removed easily and certainly it is impossible to pull them off if the victim is fighting against her attacker with all her force".[e] - *Example:* a defence lawyer arguing on implied consent considered that it was not possible to force a woman to perform oral sex – "one would think that would be consensual."[f]
	Good women are sexually chaste.	- Judges view women's testimony as suspect when assessing consent in sexual offence cases. - This myth is reflected in evidentiary rules or practices allowing for past sexual history; third-party records; cautionary rules.
	"Real" victims would react strongly to violence and fight back.	- Judges focus on the victim's behaviour, not the perpetrator's actions, and may conclude that lack of physical harm in sexual offence cases means consent was given. - Judicial assessment of the victim influenced by what judges believe is "rational" behaviour.

She lied	Women who have previously had sex are not trustworthy.	- Judges focus on the victim's behaviour instead of the perpetrator's actions. - Judicial allowance of past sexual history in cases where it is not relevant to the incident. - In assessing credibility of the victim, judges can make statements based on stereotyping, such as "girls are morally and socially bound not to indulge in sexual intercourse before a proper marriage and if they do so, it would be to their peril and they cannot be heard to cry later on that it was rape".[g]
	Victims make false allegations to avenge themselves or extort money.	- Judges focus on the victim rather than the perpetrator and his actions. - Biased judicial assessment of victims includes common ideas according to which women are fickle and spiteful, women are not particularly credible, women lie to protect their honour, are vengeful and lie to avenge a perceived injustice.
	"Real" victim would promptly seek help and report.	- Judges focus on delayed disclosure and may wrongly consider it as a relevant fact. - This myth is behind the rules of adverse inferences and prompt complaint requirements.
	The wife is lying to get an advantage in family law case, such as the custody of the children.	- Judges focus on irrelevant issues rather than on the credibility of the incident. - Judicial assessment of the victim is influenced by what judges view as possible grounds to create allegations.
GBVAWG is a trivial event	If a woman is willing to make out with a guy, there is no big deal if he goes a little further.	- If judges are banalising sexual violence, it reinforces the idea that women's bodies are perpetually available for men. - A common defence tactic is to imply that victims have just had sex and changed their minds. If a woman is not a virgin, then it should not be a big deal if her date forces her to have sex. - This myth wrongly implies that it is just sex; rape is not as big a problem as some feminists would like people to believe; being raped is not as bad as being mugged and beaten; women tend to exaggerate how much rape affects them. - This myth normalizes violence against women by men to the point that it is common practice.
	Women are emotional and often overact or dramatize.	- Judges require corroborating evidence. - Corroboration rules reflect that women are mistrusted.
	A husband is entitled to have sex with his wife at any time as she agreed to it in advance in the marriage contract.	- Judges trivialize marital rape. - This myth is based on a misinterpretation of consent in marriage or existing partnership.

GBVAWG is anomalous, rather than a deep-seated sociocultural problem	Sexual violence is not a common practice.	- Judges focus on irrelevant issues such as the perpetrator's previous display of love and affection for the victim. - This myth implies that rape is a misunderstanding as to whether a sexual assault actually occurred or not.
	Sexual perpetrators are perverts, ugly, seedy or insane strangers or belong to marginalized groups, such as visible minorities.	- Judges look at the perpetrator to determine if he looks "normal" rather than assessing the material evidence.

[a] These categories were developed by Diana L. Payne, D. and others, "Rape Myth Acceptance: Exploration of its Structure and its Measurements Using the Illinois Rape Myth Acceptance Scale", *Journal of Research in Personality*, vol. 33, No. 1 (1999), pp. 27-68.

[b] Heylin, Liam. 2018. "Counsel for man acquitted of rape suggested jurors should reflect on underwear worn by teen complaint", *Irish Examiner*, November 6, 2018.

[c] Mike McIntyre, "Rape victim 'inviting' so no jail: Judge rules woman's clothes, conduct ease blame on attacker", Winnipeg Free Press, 24 February 2011.

[d] Mike McIntyre, "Rape victim 'inviting' so no jail: Judge rules woman's clothes, conduct ease blame on attacker", Winnipeg Free Press, 24 February 2011.

[e] Alessandra Stanley, "Ruling on Tight Jeans and Rape Sets Off Anger in Italy", *New York Times,* 16 February 1999.

[f] Supreme Court of Canada, *R. v. Finney*, File No. 29344, Judgment, 10 June 2004.

[g] High Court of Delhi, *Suo Motu Cognizance In Re: Order dated October 07, 2013 in SC No.34/2013*, File No. W.P. (C) 8066/2013, Decision, 19 December 2013.

SUMMARY OF POINTS TO CONSIDER WHEN UNDERTAKING A CONTEXTUAL ANALYSIS

1. Consider how the gendered nature of the violence can contribute to a complex relationship between victimization, self-blaming and feelings of shame, disempowerment and loss of control and trust in others.
2. Appreciate that the repeated nature of violence and its cumulative impact on the victim influences how she will react, not only to the violence but also to repeated exposure to the criminal justice system.
3. Appreciate the range of different potential reactions of victims when treating victims in your court. This will not only have an impact for the victims as to how comfortable they feel during the proceedings, but will also give them the opportunity to fully tell their story.
4. Consider how the context in which the violence takes place has an impact on your views as a judge of the seriousness of the violence. Be particularly aware of your beliefs regarding common myths, such as "real" cases of GBVAWG, and how this may influence your determination of facts.
5. Consider the case you are dealing with within the broader context of GBVAWG, understanding the social reality of GBVAWG and becoming familiar with the nature and extent of GBVAWG in your country.
6. Take on board the fact that only a very small percentage of cases involving GBVAWG actually lead to court proceedings and that there is a correlation between the judiciary's approach in dealing with cases of GBVAWG and the impact on high rates of underreporting and attrition throughout the criminal justice system.

7. Consider incorporating strategies to empower women who appear before you in court, such as:
   - Provide them with the best response possible.
   - Treat them with respect.
   - Ensure that their voices are being heard.
   - Guarantee timely responses.
   - Fulfil their right to information.
8. Consider how gender-based violence may affect different women to differing degrees or in different ways, particularly bearing in mind the aggravating negative impact of varying and intersecting forms of discrimination.
9. Make a connection between gender inequality and violence against women in your judicial reasoning.
10. Ensure that cases involving child victims are informed by an understanding that children below the age of majority cannot consent and, in such cases, children are victims of child sexual abuse or exploitation. Additional safeguards are needed to ensure child-sensitive responses to child victims and witnesses.

2. International commitments underpinning a judicial response to gender-based violence against women and girls

This section will briefly set out the key international legal instruments and main concepts, while more detailed information on the relevant international standards will be discussed throughout the other sections of the handbook. More detailed information about international law and the international and regional legal frameworks covering violence against women is included in the annex.

2.1 International obligations

States usually have an obligation to respect, protect and fulfil women's right to a life free from violence,[78] which includes the following obligations for State actors:

- Respect – refraining from committing acts of GBVAWG on the streets or in custodial settings; abstaining from enacting or implementing laws and policies that directly or indirectly deny women and girls equal treatment in law and practice
- Protect – exercising due diligence in preventing, investigating, punishing and redressing harm caused by private organizations
- Fulfil – ensuring an enabling environment where GBVAWG is prevented, and access to legal and social services are ensured in cases where violence occurs

For the judiciary, this means ensuring that women and girls have access to protective measures and remedies offered by justice mechanisms, and that they are not exposed to discrimination within these mechanisms; creating enabling environments that allow women and girls to participate in criminal justice processes; and taking measures to prevent retaliation against women and girls seeking recourse in the justice system. GBVAWG is encouraged or given tacit permission when States fail to take all appropriate measures to prevent acts of GBVAWG, when State authorities know or should know of the danger of violence, or fail to investigate, prosecute and punish the perpetrators and to provide reparation to the victims.[79]

[78] See Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, United Nations *Treaty Series*, vol. 1249, and the Declaration on the Elimination of Violence against Women (A/Res/48/104).

[79] Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 (CEDAW/C/GC/35).

Prevention and protection. Judges need to prevent further violence from recurring to victims and ensure effective protection throughout the criminal process. Therefore, victim safety and empowerment is a central consideration in any judicial decision with respect to criminal protection orders, pretrial detention or pretrial release, and special protection measures during trial.

Investigation and prosecution. The judiciary should ensure that investigations and prosecutions are undertaken according to legal requirements in an effective and diligent way. The exercise of judicial oversight is crucial to ensure that officials are held accountable for any infringement thereof.

Punishment and provision of redress and reparations. Punishment must be adequate, effective and dissuasive. Judges need to ensure that sentences send a message that such violence will not be tolerated, can prevent recidivism, rehabilitate the perpetrator, and denounce and deter GBVAWG. The judiciary should apply appropriate legal sanctions and provide reparations in all cases of GBVAWG. In doing so, women and girls' diversity and the risks of intersectional discrimination stemming from it should be taken into consideration.

Guidance by the Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women provides further guidance in some of its decisions[a] and general recommendations[b] as to what due diligence means for States:

- The legal definitions of acts of gender-based violence and relevant evidentiary rules should not be overly restrictive, inflexible or influenced by gender stereotypes.
- There should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.
- Judges should not be guided by notions of what women should be or what they should have done when confronted with a situation of rape, based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence.
- Judges should not pay undue attention to the fact that the woman and the alleged perpetrator knew each other, explaining that it indicates reliance on gender-based myths and misconceptions.

[a] Committee on the Elimination of Discrimination against Women, *V.K. v. Bulgaria,* Communication No. 20/2008, Views, 25 July 2011; Committee on the Elimination of Discrimination against Women, *Vertido v. Philippines,* Communication No. 18/2008, Views, 16 July 2010.

[b] Committee on the Elimination of Discrimination against Women, General Recommendations No. 35 (CEDAW/C/GC/35) and No. 33 (CEDAW/C/GC/33).

International legal instruments

Being aware of the international and regional treaties States have ratified or acceded to and the relevant international standards and norms adopted by the Member States of the United Nations can assist the judiciary in the performance of its duties. The main international instruments for dealing with GBVAWG are set out below in table 9.

Table 9. Main international legal instruments and their key elements

International human rights instruments	
Hard law (treaties, conventions)	**Soft law (declarations, guidelines)**
Convention on the Elimination of All Forms of Discrimination against Women Sets out discrimination against women as a violation of their human rights. The Committee on the Elimination of Discrimination against Women, in its General Recommendation No. 35 (2017) updating General Recommendation No. 19 (1992), frames GBVAWG within the overall context of discrimination and expands the definition to include specific acts of GBVAWG that can amount to torture or cruel, inhuman or degrading treatment.	United Nations Declaration on the Elimination of Violence against Women Defines GBVAWG and sets out its range and manifestations and the due diligence obligation of States to prevent and address such violence. Reiterates that women are entitled to the following rights: right to life; right to equality; right to liberty and security of the person; right to equal protection under the law; right to be free from all forms of discrimination; right to the highest standard attainable of physical and mental health; right to just and favourable conditions of work; right not to be subjected to torture.
International Covenant on Civil and Political Rights Includes the right to equality before the courts and to a fair trial (see Human Rights Committee General Comment No. 32).	Beijing Declaration and Platform for Action (1994) Expands the definition to violations of rights of women in situations of armed conflict and addresses the particular vulnerabilities of certain groups of women. Recognizes trafficking in women as a form of GBVAWG and includes specific commitments to eliminate it and assist victims.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment The Committee Against Torture recognizes GBVAWG as a form of torture and discrimination irrespective of the situation in which the violence takes place – whether in armed conflict or peacetime, in the home, the street or in places of detention.	Updated Model Strategy and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice Sets out guiding principles for all criminal justice responses (human rights-based; victim-centred; ensuring perpetrator accountability) and calls on States to criminalize and prohibit all forms of violence against women. Also includes strategies to improve investigations, evidentiary rules, court room procedures, and victims' rights.

Convention on the Rights of the Child Sets out the right of the child to be free of violence and sex-based discrimination; the right to protection, and right to participation, such as listening to children's views and respecting their evolving capacities.	Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime Sets forth good practices for dealing with child victims and witnesses of crime.
Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography Recognizes that particular groups, including girl children, are at greater risk of sexual exploitation and that girl children are disproportionately represented among the sexually exploited.	Model Strategies and Practical Measures of the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice Sets out the responsibilities of the criminal justice system, in cooperation with child protection and other agencies to prevent and respond to violence against children.
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Aims to prevent and combat human trafficking, protecting and assisting victims, and promoting cooperation among State Parties.	Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Covers principles dealing with victims of crime, access to justice and fair treatment, restitution, compensation, assistance and victims of abuse of power.
International humanitarian law instruments	
Geneva Convention IV relative to the Protection of Civilian Persons in Time of War and the Additional Protocols I and II Prohibits outrages upon personal dignity, in particular, humiliating and degrading treatment. Additional Protocol I provides that women shall be the object of special respect and be protected against rape, forced prostitution and any other form of indecent assault.	Declaration on the Protection of Women and Children in Emergency and Armed Conflict Calls on States to criminalize certain forms of violence against women prevalent in armed conflict.
International criminal law instruments	
The Rome Statute of the International Criminal Court Classifies certain forms of GBVAWG as crimes against humanity (e.g. rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity) as well as sexual violence as a constitutive act of genocide.	

Regional instruments

The judiciary should be aware of the relevant regional instruments and verify whether their State is a party to these regional instruments. Judges exercising their duties in Africa should see the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Judges working in the Americas should review the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará). For judges in South-East Asia, it is important to check the Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in ASEAN. Judges in European countries should review the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).

International instruments on judicial principles

Primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country. The importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice. Public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

- *United Nations Basic Principles on the Independence of the Judiciary*[a] are designed to secure and promote the independence of the judiciary and are addressed primarily to States.

- *The Bangalore Principles of Judicial Conduct*[b] set out principles which are intended to establish standards for ethical conduct of judges and include values such as independence, impartiality, integrity, propriety, equality, competence and diligence.

[a] *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August–6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2, annex.
[b] E/CN.4/2003/65, annex; see also Economic and Social Council resolution 2006/23, annex, adopted on 27 July 2006.

2.2 Judicial application of international law in domestic courts

The role of the judiciary in enforcing international law in domestic courts

Different approaches are used to incorporate international norms into domestic law.[80] In jurisdictions where treaties become part of domestic law once ratified and published in the official gazette ("self-executing"), the judiciary can enforce them directly. Other States require a distinct step (typically through the adoption of legislation) for international obligations to be incorporated into the domestic legal system, before the judiciary can enforce them. However, even when international law instruments have not been formally incorporated into domestic law, the judiciary still can and should consider using international norms and standards as authoritative guidance in interpreting relevant provisions under domestic law.

[80] For further information on theories concerning the relationship between international law and domestic law, see http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml#obo-9780199796953-0168-div1-0003

The importance of using international law in judicial decisions

The judiciary is in a position to acknowledge, at least in principle, the relevance of international standards for interpreting domestic law. The following are some arguments to assist judges in using international law when exercising their judicial function:

- The judiciary can refer to international law to ensure that the State's conduct is consistent with its obligations under international law.
- It is generally accepted that domestic law should be interpreted in a way which conforms to a State's international legal obligations. This is compatible with the principle of the rule of law.
- Judges can use their legal powers to ensure compliance with international obligations when faced with a choice between an interpretation of domestic law which would enable the State to comply with international law and one that would place the State in breach of international law.
- The judiciary can interpret domestic constitutional and legal rights, including the rights of equality and non-discrimination in a way that facilitates the full protection of all rights of women and girls under international law.
- The judiciary can rely on (constitutional) provisions dealing with non-discrimination in order to avoid applying discriminatory legal provisions, such as provisions allowing, tolerating or condoning forms of GBVAWG, including forced marriage; or laws that criminalize being lesbian, bisexual or transgender, women who engage in sex work, or women accused or recognized as having committed adultery.

Checklist for domestic application of international law

Did the State sign and/or ratify the relevant international instrument(s) and did the State enter any reservations?

- For a State to be legally bound by a treaty, convention, covenant, or protocol, the State must have ratified or acceded to the instrument.
- If a State has signed but not ratified the instrument, its obligation is to refrain, in good faith, from acts that would defeat the object and purpose of that instrument.
- If a State has entered reservations to the instrument, it may not be legally bound by those provisions that the reservation relates to, provided that the reservation is not incompatible with the object and purpose of the instrument (international law does not permit States to formulate reservations to a treaty that are incompatible with the treaty's object and purpose).

Is the instrument automatically incorporated into domestic law, or is it otherwise incorporated into domestic law through domestic legislation?

- Some States automatically incorporate ratified international instruments into domestic law (monist tradition) while others require that domestic legislation be enacted to give effect to treaty obligations (dualist tradition).

Even if the State has not signed and ratified a treaty, do any principles of customary international law or jus cogens norms apply to the issue in question?

- In addition to international agreements, sources of binding international law include customary international law. In order for something to be considered customary law, it must be demonstrated that:
  - i) There is a general practice among States; that is, that State's behaviour conforms to some consistent pattern; and
  - ii) The State is acting under the belief of a legal obligation to practise such behaviour (*opinion juris*).

Checklist for domestic application of international law *(cont'd)*

iii) A *jus cogens* norm is something that is recognized by the international community of States as peremptory, or non-derogable. These rules prevail over and invalidate conflicting international agreements. Jus cogens norms include: the right to life; right to be free from torture and other cruel, inhuman and degrading treatment or punishment; the prohibition of genocide and the prohibition of slavery.

When using international law in domestic cases, certain important rules may also apply and should be considered:

- The national Constitution or other higher domestic law may give priority to international law in the case of a conflict with domestic law or in the absence of domestic law.
- Courts may be required to consider international law as a result of common law principles that require that regulations be consistent with international law.
- Determine the meaning and status of relevant international norms; if an international norm is relevant and nothing in legislation overrides it, or if inconsistency can be fairly resolved, the court should interpret to preserve the maximum scope for both; but if a conflict is unavoidable, then the court must choose the prevailing norm according to the hierarchy of laws applicable to its domestic system.

Source: Adapted from a checklist developed by Avon Global Centre for Women and Justice.

Case study on the judicial application of international law in domestic courts

As part of its judgment in a case concerning the division of land in the estate of a polygamous man, a court noted the following points:

- "Is international law relevant for consideration in this matter? As a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties…[including] CEDAW … [and] the African Charter of Human and Peoples' Rights. …"
- "It is in the context of those international laws that the 1997 amendment to section 82 of the constitution becomes understandable. The country was moving in tandem with emerging global culture, particularly on gender issues."
- "There has of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation."
- "Principle 7 of the Bangalore Principles […states]: It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law."
- [Refers to other case law in which it was stated:] "… ratification of such (instruments) by [a] nation State without reservations is a clear testimony of the willingness by the State

to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute."

Source: Court of Appeal at Eldoret, Kenya, *Rono. v. Rono*, File No. AHRLR 107, Judgment, 29 April 2005.

2.3 Useful concepts from the international standards for the judiciary

"... all judicial bodies are required to refrain from engaging in any act or practice of discrimination or gender-based violence against women; and to strictly apply all criminal law provisions punishing this violence, ensuring all legal procedures in cases involving allegations of gender-based violence against women are impartial and fair, and unaffected by gender stereotypes or discriminatory interpretation of legal provisions, including international law. The application of preconceived and stereotyped notions of what constitutes gender-based violence against women, what women's responses to such violence should be and the standard of proof required to substantiate its occurrence can affect women's right to the enjoyment of equality before the law, fair trial and the right to an effective remedy..." – Committee on the Elimination of Discrimination against Women, General Recommendation No. 35.

There are several existing tools that provide fuller descriptions of international law which are listed in the annex. This section focuses on four concepts from international law that can assist the judicial decisions in domestic criminal court cases in which human rights are engaged.

Figure IV: International law concepts that can assist the judiciary

First useful concept: ensuring gender equality and non-discrimination

GBVAWG is a form of discrimination and an assault to women's and girls' right to their personal security, physical and psychological integrity. In interpreting or enforcing domestic law, judges could in their decision-making consider the following key aspects of gender equality and non-discrimination:

- Gender equality is a fundamental human right, but also a necessary foundation for a peaceful, prosperous and sustainable world.[81]

[81] United Nations Sustainable Development Goals, available at http://www.un.org/sustainabledevelopment/sustainable-development-goals/.

- GBVAWG is one of the most serious barriers to the achievement of equality between men and women as well as a manifestation of systematic marginalization of women and girls throughout society.
- There is an interdependence and link between GBVAWG and women's enjoyment of other rights and freedoms in equality with men.
- An essential aspect of gender equality is equal protection of the law. Equal protection and benefit of the law is not only fundamental to justice but also a feature of judicial performance strongly linked to judicial impartiality.[82]
- Inherent to the principle of gender equality is the concept that all human beings, regardless of their sex, are free to develop their personal abilities, pursue professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.[83]
- The operation of harmful gender stereotypes in decision-making violates the principle of substantive equality by denying individuals protection based on irrelevant considerations and by denying individuals the capacity to be judged on their own circumstances and experience.

Bangalore Principles of Judicial Conduct - Value 5: Equality

Principle: ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

[82] UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (2007), para. 184.

[83] Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 (CEDAW/C/GC/28), para 22.

Table 10. Incorporating the principle of gender equality in cases involving GBVAWG

Negative approaches	Positive approaches
• A judge may use an unfair generalization about human behaviour instead of carefully considering what happened on this occasion. This has a distorting effect on the truth-seeking functions of the trial.	• Emphasize the role of the right to equality in overcoming prejudicial stereotypes in society. • Make a clear connection between substantive equality and excluding stereotyping. • Characterize the banishment of unfair stereotyping in such cases as protecting both women's equality and the truth-seeking functions of the trial.
Example of linking gender inequality to GBVAWG in a judgment "[S]exual assault is in the vast majority of cases gender-based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women."[a]	

[a] Supreme Court of Canada, *R. v. Osolin*, File No. 22826, Judgment, 16 December 1993, para. 33

Second useful concept: balancing the rights of the accused and the victim

The judiciary plays a key role in the protection of human rights and freedoms. It can ensure that victims obtain effective remedies, reparations and protection and that perpetrators are brought to justice. The judiciary can also ensure that anyone suspected of a criminal offence receives a fair trial according to international standards. The Bangalore Principles note that it is the duty of a judge to discharge the judicial functions with due respect for the principle of equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring that they each receive a fair hearing. In terms of addressing gender-based discrimination, the judge has a role to play in ensuring that the court offers equal access to men and women.[84]

[84] UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (2007), para 185.

Table 11. What are the rights that need to be balanced?

Rights of the accused[a]	Rights of the victim[b]
• The right to a fair trial and public hearings by an independent and impartial tribunal in the determination of any criminal charges. • The right to be presumed and treated as innocent, unless and until the accused is convicted according to law in proceedings which meet minimum requirements of fairness. • The burden of proving the charge rests on the prosecution, and a court may not convict unless it has been proven beyond reasonable doubt that the accused was guilty of a crime. • The right to legal aid. • The right to be tried without undue delay, while having adequate time and facilities for the preparation of their defence and to communicate with counsel. • The right to be tried in their presence. • The right not to be compelled to testify against himself or to confess guilt. • The right to examine witnesses against them, as well as the right to call and question witnesses. The right to challenge the evidence against the accused enhances the likelihood that the verdict will be based on all relevant evidence.	• The right for women to access justice includes the right to equal benefit and protection of the law. It is seen as a critical pathway for the achievement of gender equality and essential to the realization of their rights, including the right to security. • The right to fair treatment includes treating victims with compassion and respect in order to preserve their dignity and protect them against degrading treatment and invasion of privacy. • The right to an effective remedy and reparations. • The right to universal dignity and autonomy and the State's corresponding duty to provide witness protection and to respect and protect the rights of victims of GBVAWG. • The right to legal aid. • The obligation of due diligence requires effective laws and investigations to protect women from violent crimes and against traumatic trial experiences.

[a] See International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations *Treaty Series*, vol. 999, article 14. Article 14(1) stipulates that "all persons shall be equal before the courts and tribunals" and that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The Human Rights Committee, the body in charge of monitoring State compliance with the Covenant, has unequivocally stated that the right to be tried by an independent and impartial tribunal "is an absolute right that may suffer no exception" (A/48/40 (Part II), p. 20).

[b] Although there is no specific international convention on human rights for victims, these rights are enshrined in various international and regional instruments, such as the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/Res/40/34, annex.

The rights of the accused and the victim are both important and should be enforced on an equal basis. There may, however, be cases where these rights are incompatible and need to be balanced. Although the right balance between protecting victims and ensuring the due process rights of those accused is not always easy to find, the following guidelines may be useful:

- *Ensure that equality is a key consideration.* This is particularly important when balancing the accused's rights to a fair trial, presumption of innocence and to examine witnesses, with the

victim's rights to equal benefit and protection of the law, treatment with dignity, privacy and effective remedy.

- *Follow the Bangalore Principles*. When determining how far the right to a fair trial extends, consider that the Bangalore Principles provide that a judge shall not knowingly permit those subject to the judge's influence, direction or control to differentiate between persons concerned in a matter before the judge on any irrelevant ground.[85] Judges shall also require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds.[86]
- *Acknowledge that trials can become so intimidating or intrusive as to violate victims' rights***.** The judiciary should consider ways to ensure that court procedures and practices are less traumatic for the victims.
- *Recognize the gendered and derogatory constructions inherent in the law*. This is particularly important when it comes to certain evidentiary rules in cases involving GBVAWG. The judiciary may consider what is at the heart of many relevant criminal laws, procedures and evidentiary rules. What must a woman reveal about herself to access justice, and how do these revelations subject her to further victimization? Is there a gendered legacy of privacy that continues to influence judicial determinations of the admissibility of sexual history evidence and access to confidential records or influence decisions to accord protection against invasive credibility probing? How much do we need to know about any complainant to determine whether she is credible?

Table 12. Examples of balancing the rights of the defendant with the rights of the victims

The European Court on Human Rights ruled that prohibiting defendants from representing themselves in sexual violence cases in England and Wales did not impinge on their fair trial rights.[a]

The Supreme Court of Canada ruled that "[a]n appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence. [...] [T]he right to make full answer and defence does not include the right to information that would only distort the truth-seeking goal of the trial process".[b]

The European Court on Human rights ruled that trials do sometimes become so intimidating or intrusive as to breach articles 3 or 8 in their own right and that courts must try harder to ensure that procedures are less traumatic.[c] The rights of defendants and victims are both important and no one set of rights should prevail, and both sets of rights should be afforded equal respect.[d]

The Bar Code in England recognizes the need for defence lawyers to promote and protect fearlessly by all proper and lawful means a client's best interests but stresses the importance of not causing undue harm to witnesses or knowingly misleading the court.[e]

The Supreme Court of Canada recognized the need to factor in the equality and privacy rights of sexual assault complainants when assessing an accused's right to make full answer and defence through cross-examination or evidence admissibility/production.[f]

[a] Patricia Londono, "Positive obligations, criminal procedure, and rape cases", *European Human Rights Law Review*, vol. 12 (2007), pp. 158-171.
[b] Supreme Court of Canada, *R. v. Mills*, File No. 26358, Judgment, 25 November 1999.
[c] Jonathan Doak, *Victims' rights, human rights, and criminal justice: Reconceiving the role of third parties* (2008).
[d] Olivia Smith and Tina Skinner, "Observing court responses to victims of rape and sexual assault", *Feminist Criminology*, vol. 7, No. 4 (2012).
[e] Bar Council, *Code of conduct of the bar of England and Wales* (2004).
[f] Supreme Court of Canada, *R. v. Osolin*, File No. 22826, Judgment, 16 December 1993.

[85] Bangalore Principles of Judicial Conduct, Principle 5.4.
[86] Ibid., Principle 5.5.

Third useful concept: not condoning harmful gender stereotyping

International law requires States to take all appropriate measures to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[87] The judiciary, in the performance of its judicial duties, has the responsibility to avoid relying on harmful gender stereotypes. Judges also have a responsibility to actively expose and eliminate harmful gender stereotypes.

The Bangalore Principles instruct judges to make every effort to recognize, demonstrate sensitivity to and correct attitudes based on stereotypes, myths or prejudice by considering the following guidelines:[88]

- Continually examine how these deeply embedded myths continue to have a profound influence on the legal response to GBVAWG despite the changes to the criminal law framework, not only in the application of the law but also in judicial decision-making.
- Continually ensure that those in courtrooms, both prosecutors and defence lawyers, do not perpetuate these myths in their examinations in chief and cross of witnesses.
- Continually be aware of the lasting existence of myths and stereotypes at all levels of the criminal justice system, leading to discrediting victims and filtering cases out of the system. When such cases finally reach the court, after many points of attrition, judges should not dismiss the case so easily, basing their decisions on law and relevant facts in evidence, rather than myths and stereotypes.
- Strive to ensure that a judges' conduct is such that any reasonable observer would have justifiable confidence in the impartiality of the judge. This includes a call to judges not to manifest views or prejudice towards any person or group on irrelevant grounds (such as sex),[89] in the performance of judicial duties, by word or conduct, and do not make improper and insulting remarks to the victims.
- In addition, be aware of and understand diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").[90]
- It is the judge's duty – besides recognizing, and being familiar with, cultural, racial and religious diversity in society – to be free of bias or prejudice on any irrelevant grounds. A judge should attempt by appropriate means to remain informed about changing attitudes and values in society.[91]

Examples of promoting the prohibition of harmful gender stereotypes

The Bangkok General Guidance for Judges on Applying a Gender Perspective in Southeast Asia (2016)[a] aims, in part, to assist judges in the identification of situations where same and/or differentiated treatment can lead to discrimination against women and contribute to a judicial system that guarantees women's access to justice. It highlights a number of common stereotypes that judges should be careful to avoid, including such myths as "good women are sexually chaste", "being alone at night or wearing certain clothes make women

[87] Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, United Nations *Treaty Series*, vol. 1249, article 5(a).
[88] UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (2007), para 184.
[89] Bangalore Principles of Judicial Conduct, Principle 5.2.
[90] Ibid.
[91] UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (2007), para. 186.

responsible for being attacked", "testimonial evidence provided by women who are sexually active may be suspect when assessing 'consent' in sexual offence cases" and "lack of evidence of physical harm in sexual offence cases means consent was given".

The Committee on the Elimination of Discrimination against Women, in Karen Tayag Vertido v Philippines, found that the national judgment referred to a number of myths when interpreting and applying the crime of rape in the Revised Penal Code. It pointed out that, while the law did not impose upon the victim the burden of proving resistance, the court's decision showed that the judge did not apply these principles. In particular, harmful gender stereotypes led the court to consider the victim's resistance at one time and submission at another time as being problematic with regard to her credibility; the court noted that the victim was not "a timid woman who could easily be cowed"; and held the belief that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. The Committee found that to expect the victim to have resisted in the situation at stake reinforced in a particular manner the myth that women must physically resist the sexual assault. In this regard, the Committee stressed that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence. The Committee noted: "stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general".[b]

The Court of Appeal of Kenya challenged the stereotype that women are not trustworthy persons and therefore likely to fabricate allegations of sexual assault. "It is noteworthy that the same caution is not required of the evidence of women and girls in other offences. Besides there is neither scientific proof nor research finding that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences. And yet courts have hitherto consistently held that in sexual offences testimony of women and girls should be treated differently."[c]

As noted by a former justice of the Supreme Court of Canada, "even the notoriously cautious courts are beginning to recognize that it is imperative that all jurists go beyond myths and stereotypes in order to ensure that justice is done – we need to "debunk" these myths. Debunking is more than simply being able to recognize myths and stereotypes. It is about exposing the ideological and cultural foundations of the myths and stereotypes prevalent in each culture and eradicating these fictions from the reasoning of all those who interpret our general culture, and, in particular, those in positions of power who contribute to their reinforcement".[d]

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[a] International Commission of Jurists, *The Bangkok General Guidance for Judges on Applying a Gender Perspective in Southeast Asia* (2016).

[b] Committee on the Elimination of Discrimination against Women, *Karen Tayag Vertido v. The Philippines*, Communication No. 18/2008, Views, 17 July 2010, para. 8.4.

[c] Court of Appeal of Kenya *Mukungu v. Republic*, File No. AHRLR 175, Judgment, 30 January 2003.

[d] The Honourable Madame Justice Claire L'Heureux-Dubé, "Beyond the Myths: Equality, Impartiality, and Justice", *Journal of Social Distress and the Homeless*, vol. 10, No. 1 (2001), p. 88.

Fourth useful concept: confirming the guiding principles of victim-centredness and promotion of offender accountability

In 2010, through a resolution adopted by the General Assembly, the international community unanimously agreed to a set of strategies and measures that States could introduce to meet their international obligation of due diligence: the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (hereinafter "updated Model Strategies and Practical Measures").[92]

Further guidance on how to implement this normative instrument is articulated in the UNODC Blueprint for Action: An Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women (hereinafter "Blueprint")[93] and the United Nations Inter-agency Essential Services Package for Women and Girls Subjected to Violence.[94]

Table 13. Guiding Principles from the updated Model Strategies and Practical Measures

Human rights-based	Judges should be aware of the wider dynamics of gender inequality which create gender-specific vulnerabilities that further keep women behind, such as economic and legal dependency, and counter the negative gender stereotyping that have traditionally minimized violence against women. This includes practices ensuring that women can be treated with dignity and respected during the criminal justice process, while ensuring the defendant's right to a fair trial.
Victim-centred	An essential feature of judicial practices is that they put the needs of the victims at the core of any intervention, and they empower women. This includes criminal justice practices that prioritize the victim's physical and psychological safety; assist victims in their engagement with the criminal justice process rather than holding them responsible for their often well-justified "reluctance" to cooperate with the criminal justice system; counter the persistent climate of tolerance and victim-blaming; and reduce experiences of secondary victimization.[a]
Ensure offender accountability	An important characteristic of judicial practice is that the judiciary contributes to take effective action to hold the perpetrators accountable. Such practices include actions that penalize perpetrators of violence, and maximize the victim's cooperation in the criminal justice process.

[a] Victim-centred approaches should be guided by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (A/Res/40/34, annex) and, where children are concerned, the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20, annex).

[92] A/Res/65/228, annex.

[93] Contained in UNODC, *Strengthening Crime Prevention and Criminal Justice Response to Violence against Women* (2014).

[94] UN Women, UNFPA, WHO, UNDP and UNODC, *Essential Services Package for Women and Girls Subjected to Violence: Core Elements and Quality Guidelines* (2015), Module 3 Justice and Policing.

SUMMARY OF POINTS TO CONSIDER

1. The gendered nature of violence and the focus on GBVAWG as a form of discrimination and obstacle to gender equality under International law underscore the importance of using a gendered lens in all judicial tasks.
2. The emphasis on a victim-centred approach in the updated Model Strategies and Practical Measures reinforces the importance of understanding the victim, the dynamics of victimization and trauma-informed responses.
3. Good practice involves continually questioning whether your actions are grounded in equality; seek to balance the rights of the defendant and the victim; do not condone stereotypes; and are both victim-centred and directed at promoting offender accountability.

Part 2

Part two:

Effective responses in criminal cases involving gender-based violence against women and girls: the role of judges

Summary

Part two discusses judicial duties when handling criminal cases involving GBVAWG. Keeping in mind that the users of this handbook will be judges working in systems with different legal traditions, this part reviews some of the common issues all judges may face in such cases. However, users should keep in mind that this information needs to be read within the context of their own domestic legal frameworks. The common issues covered in this part include the protection of victims; the treatment of victims; evidentiary issues; judicial decision-making; and sentencing. It also raises other considerations judges may have such as restorative justice; dealing with women victims as defendants; and the need to harmonize criminal proceedings with other legal matters. For each topic, the relevant international standards are reviewed along with contextual information to provide a better understanding of these issues, common gender stereotypes and challenges faced by judges as well as the victims. Guidance is provided as to how judges could consider performing their duties in accordance with the international standards and trauma-informed judicial practices.

1. The role of judges in protecting victims during the criminal process

Judges have a responsibility to protect victims that come before them during criminal proceedings. While understanding that the protection of women and girls who experienced violence is critical irrespective of a criminal case, and that many jurisdictions have comprehensive civil protection regimes that are independent of the initiation of any legal case, a full discussion of these civil law protection regimes is beyond the scope of this handbook. However, civil protection order regimes will be referred to in relation to the need to harmonize non-criminal protection measures when determining criminal protection measures.

Relevant international standards regarding the duty to protect	
Provision 15 of the updated Model Strategies and Practical Measures urges Member States to:	
•	Provide the police and courts authority with the power to issue and enforce protection and restraining or barring orders, including removal of the perpetrator from the domicile, prohibiting further contact, issuing child support and custody orders, and to impose penalties for breaches of those orders. If such powers cannot be granted to the police, there is a need to ensure timely access to corresponding decisions by the court. Such protection measures should not be dependent on the initiation of a criminal case.
•	Provide comprehensive services and protection measures that ensure the safety, privacy and dignity of victims and their families, without prejudice to the victim's ability or willingness to participate in the criminal case.
•	Protect victims from intimidation and retaliation during the criminal justice process, including by establishing comprehensive witness and victim protection programmes.
Provision 16 urges Member States to:	
•	Conduct risk assessments that indicate the level or extent of harm that victims may be subjected to, based on their vulnerability, the threats to which they are exposed, the presence of weapons and other determining factors.
Provision 18 urges Member States to:	
•	Provide efficient and easily accessible procedures for issuing restraining or barring orders and ensuring that victims are not held accountable for breaches of such orders.
•	Ensure children who witness violence in the family are seen as victims of violence and provided with protection, care and support.

1.1 Addressing victims' immediate protection needs

Effective immediate protection can empower women and girls to access justice and enable them to stay safely engaged in the criminal justice process. By virtue of their position, judges have the ability to take appropriate measures to address the victim's fear of retaliation or further violence or escalation of violence. It is vital to secure the victim's immediate safety through whatever criminal justice measures that may be available to the judiciary. In addition to ensuring the safety of the victim, adequate protection outside of court procedures can contribute to the effectiveness of the criminal trial.

Understanding the protection needs of victims in cases of gender-based violence against women and girls

One of the reasons women and girl victims engage with the criminal justice system is to stop the violence and prevent violence from recurring and escalating, as well as to prevent threats of violence, intimidation and harassment. Their protection needs can be both urgent and long-term, as well as situational. Once the victim reports, she may experience specific threats and pressure to drop the case, as well as be exposed to more violence as retaliation for engaging the criminal justice process.

Table 14. Research findings regarding women and girls' protection needs

The protection needs and considerations may differ depending on the different forms of GBVAWG	
Intimate partner violence cases	Victims cite fear for their safety and the safety of their family as among the leading reasons for victims to drop out of the criminal justice process.[a] For women, safety can mean "living free from violence, having autonomy to negotiate daily life decisions, being confident that children's routines will be maintained, and living without constant fear and denigration".[b] Women and their families are often at greatest risk of violence after their departure, or the offender's forced departure from the family home. Added to this is the possible detrimental effect of their social and economic well-being because of seeking help for violence.
Heightened concerns of GRKWG	The act of approaching the justice system, such as reporting a crime, dramatically increases the victim's risk of serious injury or death at the hands of her intimate partner.[c] In one review of death caused by intimate partner violence, almost two thirds of the victims had a known history of being subjected to intimate partner violence and one third previously made at least one report to the police before the homicide occurred, while very few victims had a protection order.[d] There are death predictors of lethality which include: history of domestic violence; actual or pending separation; obsessive behaviour; depressed perpetrator; prior threats or attempts to commit suicide; escalation of violence; prior threats to kill the victim; prior attempts to isolate the victim; victims who had an intuitive sense of fear; and a perpetrator who was unemployed. In 80 per cent of cases of killing by intimate partner reviewed by one study, there were seven or more risk factors identified; in 12 per cent of the cases there were four to six risk factors; in only 1 per cent of cases no risk factors were identified.[e]
Sexual violence cases	Victims of sexual violence at schools are more likely to drop out due to, in part, feelings of being unprotected from perpetrators who can be students at the same schools.[f]
Stalking cases	There is a close relationship between stalking and GRKWG. One study from the USA found that 54 per cent of female intimate partner victims of murder had already reported being stalked to police.[g] Reports of stalking are often not taken seriously by law enforcement; many investigations are poorly run and do not give victims legal protection. A study from the United Kingdom found that such violence was trivialized, the consequences for the victims were minimalized and the victims felt blamed for receiving abusive messages on social media because they were on social media. Police failed to recognize repeated signs of a stalker, by treating each complaint in isolation rather than as part of a pattern, therefore failing to appreciate the full scale of the harm suffered by the victim.[h] A study from the USA found that 25 per cent of victims were asked to resign or were fired from their jobs due to stalking.[i]
Trafficking cases	Human trafficking often involves organized criminal groups, and this raises protection concerns not only for the direct victim but also for family members of the victi, who may be exposed to retaliatory measures.

Table 14. Research findings regarding women and girls' protection needs (*cont'd*)

Honour-related cases	"Honour"-based violence includes punishment of girls and women for sexual or societal indiscretions which bring shame on the family. It usually relies on brothers' and young men's responsibility to monitor young women within the community. Even victims of rape often endure "honour"-based violence, such as forced marriage, as punishment for being raped,[j] sometimes reinforced through discriminatory laws allowing perpetrators to escape criminal responsibility by marrying the survivor.[k] Girls worry that filing a report may aggravate the prior situation. Authorities avoid taking up such issues as they consider acts of "honour"-based violence as part of the victim's "culture". Failure to recognize an "honour"-based ground seriously compromises the victim's safety.[l]
Online GBVAWG	Issues of protection from further GBVAWG, especially online violence (such as image-based abuse), can be more widespread involving others, rather than only the defendant. Where possible, judges should consider making orders against the defendant as well as service providers to remove electronic images and stop their distribution. If there is no cybercrime legislation, protection orders similar to stalking or harassment cases need to be considered.

[a] Andrew Klein, *Practical Implications of Current Domestic Violence Research, Part II: Prosecution* (United States National Institute of Justice, 2008).
[b] Hart, 1998, cited in Holly Johnson and Jennifer Fraser, *Specialized Domestic Violence Courts: Do They Make Women Safer? Community Report: Phase I* (University of Ottawa, 2011).
[c] Jennifer G. Long and others, *Model Policy for Prosecutors and Judges on Imposing, Modifying and Lifting No Contact Orders* (Battered Women's Justice Project, 2010).
[d] British Columbia Coroners Services Death Review Panel, *A Review of Intimate Partner Violence Deaths 2010-2015* (2016).
[e] Megan Byrne, *1990-2015: 25 years of femicide*, (Ontario, Ontario Association of Interval and Transition Houses, 2016).
[f] The Centre for Public Integrity, *Sexual assault on campus: A frustrating search for justice* (2010).
[g] Andrew Klein, *Practical Implications of Current Domestic Violence Research* (United States National Institute of Justice, 2008).
[h] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, *Living in Fear – the police and CPS response to harassment and stalking* (2017).
[i] Katrina Baum and others, *Stalking Victimization in the United States* (United States Bureau of Justice Statistics, 2009).
[j] Anushree Tripathi and Suriya Yadav., "For the Sake of Honour: But Whose Honour - Honour Crimes against Women", *Asia-Pacific Journal on Human Rights & Law*, vol. 5, No. 2 (2004).
[k] UN Women, *Equality in Law for Women and Girls by 2030* (2019).
[l] Finnish League for Human Rights, *Violence and conceptions of honour: Summary of the study report on honour-based violence and measures for intervention in Finland* (2016).

Types of protection measures available at the pretrial stage

Judges in criminal courts may be able to impose different protection measures depending on the criminal legal framework in their countries.

Table 15. Range of protection measures from least to most restrictive (may not be available in all jurisdictions)

Criminal protection orders/peace bonds	Interim judicial release/ bail	Pretrial detention
• Orders that are initiated in a criminal court, but the standard of proof for issuing them is lower than in a criminal trial. • Judge must be satisfied that the woman has reasonable grounds to fear personal injury or damage to her property. • The order generally lasts a determined time frame (e.g. 12 months) during which the alleged perpetrator is required to keep the peace and be of good behaviour. • The order may carry a range of conditions that take into account the victim's safety concerns (discussed below). • If the alleged perpetrator does not agree with the order, criminal proceedings will ensue, or if he fails to comply with the order during the time period, he may be imprisoned.	• Interim judicial release may be ordered where a person who has been charged with a crime and is in custody is brought before a judge who determines that he can be released from detention pending trial. • It is usually the prosecutor's duty to show cause why the defendant should be detained pending trial and convince the judge that there are grounds that the defendant will not show up to trial or there are concerns that he will commit further violence or intimidate a witness. • Judges have a duty to be aware of and consider all relevant facts concerning the risk of the defendant being violent towards the victim. • The order may carry a range of conditions that takes into account the victim's safety concerns.	• Pretrial detention may be required according to legislation depending on the type of criminal offence charged. • Judges may order pretrial detention at an interim judicial release/bail hearing based on a determination of whether there is sufficient risk of violence or concerns that the defendant will not obey imposed release conditions.

Pretrial hearings regarding protection – a checklist

Judges may want to consider the following guidelines when determining the appropriate protection measures:

1) *Victim-centred approach.* How can judges take into account the victim's views on protection and her safety concerns?

   - Protection measures should restore a women's sense of self-worth since victims commonly share a sense of shame and guilt after the violence. This means that a crucial principle of any protection measure is the need to respect women's rights, dignity and privacy.

- Judges can inform women and girls and seek their views. Protection should not be offered in a paternalistic manner, but should afford women safety so that they can develop their own strengths and strategies for coping with violence.
- The victims should have the chance to provide her views during the hearing, whether through the prosecutor, or through her own lawyer.
- Consider whether judges can ask the victim directly about her fears of future violence and the basis for that fear, as well as her opinion on the likelihood that the defendant will obey the terms of release.
- It is important for judges to realize that victims may not be able to express the level of risk, due to extreme levels of fear, cultural barriers to disclosure, immigration issues or language barriers, or fear of losing custody of their children or of being separated from them for their protection.
- Victims should be notified of the application for bail, which may impact their safety.

2) *Victim safety is paramount.* How do judges assess the risk to determine which protection measure is appropriate in each case?
   - Judges need to have as much information as possible regarding the situation and the individuals involved when deciding on which protection measure is appropriate in each case.
   - Understanding and carefully assessing the well-known risk factors (see table 16 below) can help judges determine risks of repeated and/or lethal violence.
   - The judge should inquire as to whether the police or prosecutor has conducted a risk assessment in the case. If they have, they should ensure that this information is before them during the pretrial hearing. If not, depending on the jurisdiction, they may be able to request that the police or prosecutor conduct a risk assessment. If this is not possible, the judge should ensure that they seek such information during the hearing that allows them to make a risk assessment themselves. In some jurisdictions it may be possible to call an expert witness to advise on risk factors.
   - Judges should be aware that defendants charged with minor offences are as likely to be as dangerous as those charged with more serious offences, especially in intimate partner violence and stalking cases.
   - Judges should be aware that separation is not a protective factor; rather, research shows a significant spike in serious and deadly violence risk during the period of separation, identifying the perpetrator's loss of control over their partner as a trigger.[95]
   - Non-fatal strangulation is an important risk factor for homicide of women. One study found that prior non-fatal strangulation was reported in 45 per cent of attempted homicides and 43 per cent of homicides.[96] It was associated with greater than six-fold odds of becoming an attempted homicide and over seven-fold odds of becoming a completed homicide. Strangulation can cause serious, significant, permanent or even fatal damage to a victim's throat or brain.[97] Only half of victims have visible injuries and of these only 15 per cent could be photographed. Death can occur days or weeks after the attack due to carotid artery dissection and respiratory complications.

[95] Joakim Petersson, J. and others, "Risk Factors for Intimate Partner Violence: A Comparison of Anti-social and Family-Only Perpetrators", *Journal of Interpersonal Violence*, vol. 34, No. 2 (2019).

[96] Nancy Glass and others, "Non-fatal strangulation is an important risk factor for homicide of women", *Journal for Emergency Medicine*, vol. 35, No. 3 (2008), pp. 329-335.

[97] Training Institute for Strangulation Prevention, *Strangulation in Intimate Partner Violence Fact Sheet* (2017), available at https://www.familyjusticecenter.org/resources/strangulation-intimate-partner-violence-fact-sheet/.

Table 16. Relevant information to collect in the risk assessment

There are several risk assessment tools available. For further information, see the UNODC Handbook on effective prosecution response to violence against women and girls.

Category 1 risk factors	Category 2 risk factors
Frequency	Alcohol/drug misuse
Pregnancy	Animal cruelty
Previous incidents/contraventions	Child abuse
Separation	Controlling behaviour
Severity	Cultural considerations
Sexual violence	Mental health issues
Significant changes in circumstance	Defendant history of violence
Strangulation	Ongoing conflict
Threats to kill	Significant damage/destruction of property
Use of weapons	Stalking
	Suicidal
	Violent threats

Source: Queensland Protective Assessment Framework, available at https://www.police.qld.gov.au/corporatedocs/OperationalPolicies/Documents/OPM/Chapter9.pdf.

3) *Types and range of conditions.* What conditions can judges consider imposing to reduce the risk to the victim if the defendant is released pending the criminal trial?

- Judges should consider a wide range of conditions, depending on what is provided for in their legislation. This could include:
  - Prohibiting further violence or threats of violence, personally or through another party (third-party communications).
  - Prohibiting harassing, annoying, telephoning, contacting or any other communication with the victim, directly or indirectly.
  - Barring from the victim's residence, regardless of ownership, and having a police escort when the perpetrator is gathering his personal belongings. (While this type of condition has become more common in non-criminal protection orders, some countries are seeking to expand the available bail conditions to include exclusive residence conditions.)
  - Prohibiting further contact with the victim and other affected parties, inside or outside the domicile; stay away from residence, school, place of employment or any other such place.
  - Prohibiting possession of firearms or deadly weapons.
  - Requiring perpetrators to undergo intervention programmes.

4) *Effective monitoring.* What conditions can judges consider imposing that can ensure effective monitoring of protection orders?

- Judges could consider monitoring of protection orders through the use of electronic ankle bracelets or requiring defendants to regularly report to law authorities or to attend treatment and reintegration/rehabilitation programmes, where available.

5) *Harmonize all protection orders.* How can criminal judges ensure harmonization with other non-criminal justice proceedings to allow for effective protection?

- In the determination of criminal protection measures, judges need to be aware that irrespective of the criminal process, victims might have also gone to the police, social workers or other courts (such as civil courts or family law courts) to seek protection or to deal with other legal issues such as child custody and access.
- Criminal judges should ensure that they have before them all information, including existing protection orders, child custody and access orders, to ensure that they can make informed determinations of protection needs for the victim and her children, prioritizing safety and protection over family law issues.
- Ensure that all protection orders are registered in existing databases of protection orders, which can then be checked by the judge before such hearings.

Bail hearings in Australia

Following the killing of Theresa Bradford in Queensland in 2017, new legislation was passed within five days, the Bail (Domestic Violence) and Another Act Amendment Bill 2017, which reversed the legal onus whereby police and prosecution were hitherto required to argue why a person should not be granted bail and kept in custody. The law now requires defendants to show cause why they should be granted bail on violent intimate partner offences and victims must be notified of an application for bail that may impact their safety. Furthermore, courts can order defendants to be fitted with GPS tracking devices as a bail condition and allows for an urgent appeal right for victims.

Theresa Bradford had been attacked by her estranged husband in November 2016. He went to the hardware store and bought duct tape, rope and piping to make a strangulation device one week before the attack. During the attack, he tied her to a chair in front of her four children and punched her until she passed out. The defendant was charged and released from custody on bail. Within the month, he killed her and then killed himself.

1.2 Protection issues during court proceedings

Safety at court in criminal proceedings is critical. If the victim does not feel safe, it is likely she will become unwilling to continue her participation. Feeling unsafe also negatively impacts her ability to recount facts and her experience. It is thus crucial to identify victims who are vulnerable to secondary and repeat victimization by the criminal justice system itself, to intimidation, and to retaliation during the court procedures, whether this is during the investigative judge's interview, a committal hearing or during the criminal trial.

Once victims are identified, judges have a duty to provide appropriate measures to protect them. Victims themselves may not be aware of the availability of such protective measures, so the onus is on the judges to raise this issue. The exact nature of such measures will be determined through individual assessment, taking into account the wishes of the victim, as well as the availability of measures in the jurisdiction.

Judges can consider a range of measures to enhance protection. This may include the following options:

- Requiring physical separation of complainant witnesses from defendants. This could include the use of court volunteers to provide information on arrival to victims giving

evidence about safe rooms. It may also involve permitting victims to testify via remote closed-circuit television.

- Minimizing victims' levels of fear during the hearing. To address this issues, the presence of security (e.g. bailiff) in the courtroom is crucial. Support persons could also assist victims of violence who have heightened levels of fear. Another useful measure is the distortion of the victim's voice.
- Protection from disclosure of a victim's identity. This could include a media ban and ensuring that names or other details allowing the identification of the victim are redacted when uploading the court case online.

Example of a positive approach by judges in protecting child victims

In one case, a court stated: "In criminal proceedings dealing with a sexual offence against a child the court is obliged to protect the child complainant in every possible way without, of course, undermining the rights of an accused person to a fair trial. This protection must surely mean that the identity of the child should be protected, for that would service the best interests of the child. Identifying the child compromises the future of the child and places him/her at risk of being ridiculed or pitied and this diminishes the dignity of the child as well as that of his/her parents. The harm suffered by the child is unnecessary and avoidable by simply protecting the identity of the child. Thus, to avoid this unnecessary harm from ensuring it is incumbent on courts to never reveal the identity of the child."

Source: South Gauteng High Court, *Masuku v S*, Case No. A261/16, Judgment, 6 September 2018.

1.3 Criminal consequences of breaching protection orders (civil and criminal orders)

Protection orders can increase the safety of women and girls, particularly when there are swift consequences for any violations. However, research shows that men routinely violate such orders, often with serious consequences for the victim but with few or weak legal consequences for the perpetrators.[98] In several countries, the trend has been to criminalize breaches of civil protection orders, usually with proposed punishments ranging from fines to imprisonment. In some countries, where there has been a breach of the civil protection order, in addition to a criminal sentence, the criminal courts can vary the protection order, which then becomes a criminal protection measure.

Judges may find the following guidance useful:

- *Treat breaches seriously*. Judges ought to recognize the pattern of the coercive and abusive nature of the violence. They have a responsibility to consider the lethality assessment factors mentioned above, and the fact that the defendant has not complied with a court order in considering pretrial detention.
- *Consider broader patterns of behaviour*. In many cases, the defendant has not only breached a court protection order, but is also likely to have committed other criminal offences in doing so, such as committing further violence or uttering threats.

[98] Eileen Skinnider, "Justice Sector's Response to Violence against Women and Girls", background paper prepared for the United Nations global technical consultation on essential policing and justice sector services to respond to violence against women and girls, 1–4 July 2014.

- *Be cautious of condoning stereotypes*. Judges should question whether they are engaging in victim-blaming, believing that the victims themselves are responsible for breaching the protection order or enticing the defendant to do so. It is important to remember that protection orders can only be breached by the defendant as he is the one obligated by the order. Victims should not be held responsible for any breaches.

Protection considerations: Does the victim in the criminal case require protection?

Fact determination and interpretation of evidence

1. In which context did the facts take place?
   - Look at the dynamics of the form of violence: intimate partner violence; sexual violence; stalking; "honour"-based violence.
   - Determine the level of risk to the victim, using risk assessment tools.
2. Does the behaviour that judges expect from the victim or defendant conform to myths or harmful gender stereotypes?
   - Reflect whether you would expect the same behaviour if the victim was a man (or the defendant was a woman).
   - Review the common myths and gender stereotypes in cases of GBVAWG (above).
   - Ask yourself: "What biases may I have?"; "What impact does this have in the judicial proceedings?"; "What will I do about this?".

Applicable law

3. What protection measures are available to the judge under national law?
4. Do the legal provisions reflect any myths or stereotypes about gender-based violence?
5. What is the relevant international law?
   - Prioritize safety concerns in all court decisions relating to the release of the suspect or defendant.
6. Look at case law (national as well as comparative from other countries, if possible) that promotes substantive equality on this issue, without condoning myths and harmful gender stereotypes.

Judicial reasoning

7. Apply an interpretation of the law that promotes substantive equality and is not based on myths or harmful gender stereotypes.
8. Balance between the victim's right to protection and the defendant's right to a fair trial.
9. Adopt a victim-centred approach that promotes offender accountability.
   - A victim-centred criminal justice response requires judges to place victims at the centre of consideration when performing their judicial tasks, emphasizing practices that effectively address the protection of victims from further harm. Not only is the victim's safety and well-being a stand-alone objective, putting victim safety and dignity at the core of any criminal justice intervention is likely to increase her willingness to cooperate with the criminal justice system.[99]

[99] UNODC, "Blueprint for Action: An Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women", in UNODC, *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women* (2014), available at https://www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf.

2. The role of the judge while interacting with victims

This section focuses on the role of judges while interacting with victims, taking into account that women are not only victims of gender-based violence but frequently also of secondary victimization, which is the victimization that occurs not as a direct result of the criminal act but through the inadequate response of criminal justice actors and institutions.[100] Most victims of gender-based violence suffer devastating trauma caused by the violence itself, including feelings of shame, humiliation and powerlessness. Unfortunately, many victims also experience their participation in criminal proceedings as a "second assault", leading to re-traumatization.[101]

Updated Model Strategies and Practical Measures

Provision 15 urges Member States to:

- Ensure that victims are enabled to testify in criminal proceedings through adequate measures that facilitate such testimony by protecting the privacy, identity and dignity of the women.
- Avoid secondary victimization in legal proceedings.

Depending on the legal tradition, judges will encounter victims at different stages of the criminal justice system. In the adversarial system, victims will be before a judge as they provide oral evidence, both at committal hearings as well as criminal trials. In the inquisitorial system, evidence at trial is mostly written rather than oral, which may be considered advantageous for victims because they do not then have to attend trial. However, victims in that system are subjected to questioning in front of an investigating judge and questioned by defence counsel during pretrial hearings. Even though pretrial hearings and trials can be conducted quite differently, depending on the country's legal traditions, judges will be involved to varying degrees in the victim's interview, testimony and participation with the criminal justice system. Irrespective of which legal system is in place, all judges play a critical role in minimizing secondary victimization and re-traumatization and in addressing the contributing factors. This can be done by incorporating a gender-sensitive and victim-centred approach in their engagement/interactions with victims.

2.1 Responding to a traumatized victim

When interacting with victims of GBVAWG who are traumatized, judges can consider strategies that promote a gender-sensitive and victim-centred approach.

Promoting the victim's right to be heard. Victims of intimate partner violence, who might have long been silenced by their abusive partners, and victims of sexual violence who have been silenced by the impacts of trauma, may find that the opportunity to articulate their own experiences help them to move beyond the violence to which they have been subjected. Giving victims a voice and the feeling of being believed can be a transformative experience for them. The notion of testimony is associated with the possibility of granting a voice to those who have been harmed and denied in their capacity as bearers of rights and autonomous subjects.[102]

Treating victims with dignity and respect. It is the judge who sets the tone and creates the environment for a fair trial in his or her court. All who appear in court are entitled to be dealt with in a way that respects their human dignity and fundamental human rights. The criminal laws in some countries

[100] Updated Model Strategies and Practical Measures, Provision 15 (c).
[101] Mary P. Koss, "Restoring Rape Survivors: Justice, Advocacy, and a Call to Action", Annals of the New York Academy of Science, vol. 1087 (2006), p. 218–22.
[102] Judith Butler, *Giving an Account of Oneself* (Fordham University Press, New York, 2005).

provide that extra care and sensitivity should be taken where the witnesses are young, and/or have been adversely affected or traumatized by the relevant offences.[103]

Understanding the feelings of shame. Victims of GBVAWG are more likely to experience feelings of embarrassment and shame than victims of other violent offences.[104] Shame can be a particularly debilitating emotion – one that diminishes an individual's sense of self-worth and increases feelings of powerlessness.[105] In undertaking a complete analysis of the evidence, judges ought to be aware of how the trauma can cause these intense feelings of shame. They should consider whether their inferences arising from the complainant's testimony of feelings of shame, self-blame and regret are based solely, or primarily, on myths about how an ideal victim responds to the experiences of violence. Judges should not add to these feelings of shame. For example, judges should be careful to not reinforce the ideas of shame or perpetuate harmful stereotypes by making sympathetic comments about the victim's loss of virginity.

Example of positive and negative approaches to interpreting feelings of shame

In one case, the complainant and the accused were teenage cousins. After a party at the accused's home, the complainant, somewhat drunk, went to sleep in the accused's bed. The complainant testified that over her protests, the accused had sexual intercourse with her. She washed, stayed awake until early morning, then woke her sister and went home. The complainant wrote a poem about the incident and posted it on a website, which was reproduced in the trial judgment. The accused testified and denied all sexual contact with the complainant.

Trial judge decision: The trial judge found that certain phrases in the poem about "first taste, so bittersweet" and "evil invading her body, it's too late, regret" were inconsistent with the experience and emotions of a rape victim. As the trial judge said: "'Regret' conjures an image of someone who has made a decision and wishes she had not made it. 'Regret'. Why should she regret if she has been raped? Why should she regret if she has been violated? … Hardly the words that describe an incident that is so damaging to her that she cannot cope with it."

Prosecution: The prosecutor on appeal argued that the trial judge failed to consider the entire context, including the victim's testimony. If he had done so, he would have considered the possibility that the emotions described in the poem were consistent not only with experimentation, but also with the victim of a sexual assault by a trusted member of one's family.

Possible approach: A gender-sensitive and victim-centred approach may provide the context within which it may make sense for a rape victim to feel regret about a sexual assault and to use the word "bittersweet" to describe a non-consensual encounter. Before concluding that the poem's words and the complainant's behaviour were capable of raising reasonable doubt, the Court should consider whether the inferences necessary to sustain that doubt were based solely, or primarily, on myths about how an ideal victim avoids sexual assault and responds to the experiences of being assaulted.

Source: Supreme Court of Canada, *R. v. H. (J.M.)*, File No. 33667, Judgment, 6 October 2011.

Understanding how court proceedings reinforce feelings of powerlessness and anxiety. For victims, engaging in a criminal process that requires them to talk publicly, over and over again, about the most intimate details of their victimization in the presence of strangers, can cause them to re-live these feelings of trauma and violation. It is useful for judges to examine how criminal procedures

[103] See, e.g., Singapore, Code of Practice for the Conduct of Criminal Proceedings, Section 19.

[104] Marie E. Vidal and Jenny Petrak, "Shame and Adult Sexual Assault: A Study with a Group of Female Survivors Recruited from an East London Population", *Sexual and Relationship Therapy*, vol. 22 (2007), p. 159.

[105] John P. Wilson and others, "Post-traumatic Shame and Guilt" (2006), *Trauma, Violence, & Abuse*, vol. 7 (2006), p. 124.

themselves require the victim to play a subordinate role, which can be disempowering and reinforce the very social dynamics that cause them to experience powerlessness and anxiety as a result of the violence in the first instance.

Examples of how court proceedings can reinforce feelings of powerlessness

There is often an obvious power differential in criminal proceedings, which can exacerbate the loss of control and power caused by the violence. The victim is often alone in the witness stand, usually not allowed to have a trusted individual beside her for support, at the centre of attention with the judge and lawyers asking questions that she is obliged to answer. She must remain in this vulnerable position until she is given permission to leave. It is therefore not surprising that many victims view the criminal process as being as traumatic as the violence itself and have little to no faith that the courtroom processes and procedures will be gender-sensitive and trauma-informed.

Source: Rebecca Campbell and others, "Preventing the 'Second Rape': Rape Survivors' Experiences with Community Service Providers", *Journal of Interpersonal Violence*, vol. 16 (2001), pp. 1253-1255.

Understanding displays of emotion. Emotion is often perceived as central to evaluating victims as witnesses. This ignores the fact that people react differently and express themselves in different ways. Myths and harmful gender stereotypes feed into judges' understanding of how victims should behave. Visible distress is often portrayed as the "logical" reaction to gender-based violence, which homogenizes victims and is based on normative judgments about certain ways of communicating. If victims are not visibly upset, they are often considered at least partly culpable. Other times, if they are visibly upset they may be viewed with caution and as having a bias against the defendant.

Example of judicial attitudes towards the victim's demeanour based on a lack of understanding of the impact of trauma

A trial court, in its decision, inferred that the complainant's dislike for the defendant that she expressed in a letter might have given reason for her to fabricate the complaints of violence. This decision ignores the trauma experienced by sexual assault victims and the normal reaction to sexual abuse of feelings of anger. In this decision, the Court took what was most likely a part of the victim's healing experience and interpreted it in such a way that it was used to discredit her.

Source: Supreme Court of Canada, *R. v. Sanichar*, File No. 34720, Judgment, 24 January 2013.

Identify and use available special measures to facilitate victims' participation. Studies show a significant percentage of victims of GBVAWG believed that special measures enabled them to give evidence they would not otherwise have been able to give and that their anxiety about the court experience fell significantly when special measures were used.[106] Many jurisdictions have introduced a number of special measures, such as using screens, giving evidence via video link or playing the recorded police interview, removal of formal legal dress and emptying the public gallery, which have proven successful in

[106] Liz Kelly, "Promising Practices Addressing Sexual Violence", paper prepared for the United Nations Expert Group Meeting on "Violence against women: Good practices in combating and eliminating violence against women", 17-20 May 2005.

reducing anxiety in victims.[107] Other jurisdictions have reformed their laws to allow female victims to refuse confrontation with the defendant. Further details are covered in part three.

Special considerations for girl victims

When interacting with girl victims of GBVAWG, judges can consider several strategies that promote a gender- and child-sensitive approach. This should be based on an understanding that girl victims face issues additional to feelings of trauma and powerlessness. For example, girls who were abused by a family member often experience betrayal and fear. They may bear additional trauma from having faced disbelief when they disclosed to the non-offending partner or caretaker or they may have a misplaced sense of guilt for breaking up the family.

Given their age, evolving capacities, and the trauma they have experienced, girl victims require that judges demonstrate great care and sensitivity. Children experience events, think, speak and behave differently from adults. Judges need to be aware that children have a different vocabulary. When speaking with girl victims, judges should use short and simple sentences, age appropriate language and questions with only one meaning.

For more guidance on how to deal with child victims, see UNODC, Handbook for Professionals and Policy Makers on Justice in Matters Involving Child Victims and Witnesses of Crime; United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime Online Training

At all stages of proceedings, it is important to treat girls with dignity, respect and in a way that is appropriate to both their chronological and developmental age, as well as their competence. Recognizing the girl as a victim of trauma, judges can consider ways to reduce the girl child's anxiety in criminal proceedings. For example, judges should take the time to build rapport with the girl. They could also consider having on hand toys, such as teddy bears, to calm her during the trial.

Additional special measures can facilitate the testimony of the girl child. Depending on the jurisdiction, judges can consider the following measures:

- Allowing the child to testify via an intermediary. Judges should ensure that the intermediaries are qualified and understand that their role is to ensure the victim understands the questions being asked and for the judge, prosecutor and defence lawyer to understand victims' responses. For example, the intermediary can ask defence counsel to rephrase overly complicated questions.
- Allowing the child to answer questions and describe what happened to them in a manner of their choice. This includes, for example, answers by writing, drawing or illustrating with models, such as anatomical dolls.
- Making use of a child psychologist or social worker to enable the court to better understand the circumstances of the child and her reactions.

The challenge for judges in dealing with inconsistent statements

There may be a number of reasons why judges are faced with considering the issue of inconsistent statements of victims of GBVAWG. The violence can impact the victim's ability to coherently or fully recount her experience. Negative feelings or emotional numbness can complicate

[107] See, e.g., England and Wales, Youth Justice and Criminal Evidence Act 1999, which introduced special measures that were evaluated by Kebbell and others in 2007, as discussed in Olivia Smith and Tina Skinner, "Observing Court Responses to Victims of Rape and Sexual Assault", *Feminist Criminology*, vol. 7, No. 4 (2012).

responsiveness to questioning. In addition to the violence and related feelings, institutional responses can play a role. Victims often have to provide various statements to a number of authorities before getting to trial, which can include statements to the police, reports to the hospital staff, testimony at the pretrial hearing or preliminary inquiry, examination in chief, and testimony on cross-examination. If the victim has been questioned by male police officers, this can affect the victim's ability to recount her experience. Women who do not speak the official language are at a further disadvantage. They might have given their statement in one language that was translated into another language, which may not accurately transcribe what she said or paraphrases her story incorrectly.

A common defence tactic is the attempt to undermine the victim's allegations by reference to a delay in reporting. This involves suggesting that even the slightest deviation over a period of years, on any detail, relevant or not, between any of her statements, indicates unreliability if not dishonesty.

In making their assessment, judges could consider the following guidelines:

- Understand that several factors can have consequences on the coherence and comprehensiveness of the different statements. Such factors include the timing of the incident, being interviewed by a trained individual, whether the victim feels safe and supported at the time the statement is being given. Additional factors include the architecture, dress and formality of the court and the fact that testimony is often given in the presence of the perpetrator, which make many courts an "inhospitable" and intimidating environment for victims, as discussed below.
- Understand that, between the incident and the time the victim is before a judge, it is not uncommon for victims to attempt to manage their lives by choosing not revisit a traumatic event over and over again in their minds. Many victims make efforts to forget or not to think about the violence as a coping strategy.
- Recognize that inconsistencies are to be expected. It is difficult to imagine that anyone could maintain consistency with respect to insignificant details when retelling an incident that occurred months or more likely even years prior. It is sensible to assume that inconsistencies on minor details actually increase credibility. However, experience reveals that such inconsistencies are often cited as a factor in raising concerns about the victim's credibility.
- Respond to defence tactics of using repetition when questioning victims in attempts to raise inconsistencies in victims' statements. Judges must strike a balance between allowing questioning, in line with the right of the accused to a fair trial, and avoiding repetition, in line with the rights of the victim to be treated with dignity and be protected from harassment. Judges can instruct defence counsel to move on from questions already asked and answered about details of the complainant's statements.
- Be aware that lengthy questioning of victims, while premised on demonstrating inconsistencies in the their story, may actually be driven by problematic assumptions about women and gender-based violence. For example, lengthy cross-examination on ambiguities or inconsistencies in a complainant's testimony, as to whether she was wearing a bra or what kind and colour her "panties" were, is informed by problematic beliefs that suggest that women who dress a certain way are more likely to consent to sex or were asking for it.
- In assessing inconsistencies, be cautious about placing too much weight and importance on the contradictions between what a witness says in court and previous statements.
- Consider adopting a culture of believing the victims, unless the contrary is clearly indicated.

Examples of ways to reduce inconsistencies

Some jurisdictions allow for the victim's statement to be recorded and allow that to be entered at trial. In civil law traditions, the victim's statement is recorded before the judge with the defence lawyer present to be able to put questions to her at some point. In common law countries, some countries allow for the recorded statement to be entered during the examination in chief, but the victim is to be available to answer questions from the defence during cross-examination.

Good examples of how judges can deal appropriately with inconsistencies

In Canada, courts have held that "inconsistencies in the evidence of witnesses in relatively minor matters or matters of detail are, of course, normal. They are to be expected." In fact, "the absence of such inconsistencies may be of even greater concern, for it may suggest collusion between witnesses in their evidence or fabrication or excessive rehearsal and regurgitation of a set story."[a] As one court noted, "any witness' mischief should be uprooted, but not simply by defence counsel's narrative or declarations continuously made in the face of the witness over and over again that she was giving contradictory, or to use her phrase, fresh evidence. I mean, that narrative was played over, and over, and over again."[b]

The Supreme Court of Appeal of South Africa stated that the approach to dealing with the contradiction in versions by the same witness is not to determine which version is correct but to be satisfied by the reason for the contradictions, this could be because of the witness failing to recollect events or alternatively due to dishonesty. Not every error by a witness nor every contradiction affects the credibility of a witness and that contradictory versions should be assessed holistically.[c]

The Supreme Court of India held that the "courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation or sexual assaults."[d]

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[a] See Elaine Craig, "The Inhospitable Court", *University of Toronto Law Journal*, vol. 66, No. 2 (2016), citing the case of *R. v. Kench*.

[b] Ibid., citing the case of *R. v. Schmaltz*.

[c] See Mercilene Machisa and others, *Rape Justice In South Africa: A Retrospective Study Of The Investigation, Prosecution And Adjudication Of Reported Rape Cases From 2012* (Pretoria, 2017).

[d] Supreme Court of India, *Sham Sing v The State of Haryana*, Case No. 544/2018, Judgment, 21 August 2018.

2.2 Preventing secondary victimization in the criminal justice system

The courtroom can be a frightening place for many victims of gender-based violence. Criminal courts, procedures and trials can be formal and traditional. Judges have a better chance of reducing the anxiety of the victims if the judge understands how this institutionalized setting and its practices contribute to the inhospitable conditions faced by victims and expose them to secondary victimization.

Table 17 below provides a summary of some of the factors or aspects of the formality of criminal trials that contribute to inhospitable conditions for victims. Some of the factors that contribute to the trauma experienced by victims are most likely unavoidable. Victims must describe to people they do not know well, or at all, the details of the violence. The defence must have an opportunity to ask questions of the complainant. However, some of the rituals of the trial, or aspects of these rituals, are unnecessary. Judges have a duty to consider what steps they can take to minimize the negative impact of those ritualized practices that are considered necessary. The key question is how judges can make the trial more hospitable to complainants without threatening the accused's right to a fair trial.

Table 17. Factors that create inhospitable courtroom environments

Aspects	Details	Considerations for the judiciary:
The formality of civility	• The formality of civility or comparable standards expected of victims and witnesses in court sets the boundaries of acceptable courtroom conduct. • All participants in a trial, including the victims, are expected to perform their role with decorum, orderliness, and politeness. • Even victims who are often subjected to intimate, humiliating and aggressive questioning are expected to use correct language, the appropriate tone and level of emotion, and deference to judges and lawyers. • While judges and lawyers may be disciplined for not treating other judges or lawyers uncivilly, they are not typically disciplined for uncivil conduct towards witnesses. • The victim's credibility is contingent upon her willingness and ability to perform the ritual. Example: "[A]s if engaged in a civil discourse, and without any articulation of outrage or incredulity, to the same question, asked over and over, about how many days following forced anal intercourse it took before she could endure a bowel movement. Ten times she answers this question."	• Appreciate how the degree of self-subjugation necessitated by the demand for civility in the face of humiliation and incivility contributes to secondary victimization of the victim by the criminal justice system. • Understand that the obligatory performance of civility does not level the playing field. • Prevent questioning that is needlessly repetitive or irrelevant. • Control humiliating questioning and focus on relevancy. • Allow for incivility by victims without using this as a factor in assessing thier credibility. • A more coherent and less classist conception of the duty of civility would suggest that those charged with administering the criminal trial process – that is to say lawyers and judges – should behave in this manner towards all trial participants.

Table 17. Factors that create inhospitable courtroom environments *(cont'd)*

The script	• The form of communication accepted in trial proceedings is formal, heavily scripted, and rigid. Judges and lawyers use specialized language. • There are rules regulating who can speak, to whom, and when. • The evidence of witnesses must be obtained through a strict, heavily structured format. • The scripted form of communication used in a trial is explicitly hierarchical. • Lawyers (and judges) ask questions and complainants (and other witnesses) answer them – never the other way around. Example: "[Complainant]: How does that have anything to do with today? [Defence] Well, the rules are I get to ask the questions..." • The format of cross-examination (which includes leading questions, repetition, and insistence on particular answers) allows defence lawyers to exert significant control over a complainant's testimony. • Complainants who deviate from the script risk being perceived as disorderly or disrespectful, and thus untrustworthy.	• Allow for witnesses to seek clarification, express concerns, or contribute to the direction of the exchange. • Be aware of how a complainant's answer may be distorted in efforts, by the defence, to insist upon a desired response. • Embrace a more affable style of interaction with complainants, simply by engaging with them as human beings. • Deviate from and permit others to deviate from their scripted roles. • Before permitting defence counsel to begin cross-examination, ensure a minimum of comfort for the complainant, including that she has been provided with water and tissues and telling her to let the court know if she needs a break.
The physical space and courtroom aesthetic	• The spatial design of a courtroom establishes particular lines of sight, rendering some participants more visible or more audible than others and facilitating certain hierarchical lines of engagement that distinguish between the learned legal profession and the laity. • Judges typically sit behind an elevated bench at the front and centre of the courtroom, assisting in their ability to maintain control over the proceedings.	• Change the aesthetics of the courtroom. • Reconsider the physical design of some courtrooms. For example, reconfigure courtrooms that were designed such that the only way the trier of fact can properly hear and observe witnesses is if they remain standing.

	• In many countries, the courtroom is physically divided by a bar – only those ceremoniously inducted into the profession ("called to the bar") are seated in the front part of the courtroom. Others, including other professionals (such as social workers, medical professionals, courtroom support workers, articling clerks, and paralegals), are only permitted to cross this threshold under specific and invited circumstances. The public is always to remain behind "the bar". • Traditionally, a witness was expected to stand while they provided testimony • thus the label "witness stand". This could involve standing for hours.	• Remove formal symbols, such as gowns and/or wigs for judges and lawyers. • Allow the witness to sit while providing testimony.
The legal process	• In some countries, where cross-examination can go on for days, the complainant is required not to speak to anyone about her testimony or the trial. This requirement ignores the isolating and damaging effect of preventing a woman, who is spending days revisiting a traumatic incident, from obtaining support from a counsellor or other mental healthcare worker. • This is compounded by legal consequences for failing to return to court, such as a bench warrant for her arrest that can be issued in some jurisdictions.	• Re-evaluate whether it is necessary to prohibit complainants from communicating with anyone about their trial experience during an extended period of cross-examination. • Consider ways to allow them this type of assistance without risking distortion of their testimony.
Unprepared victim	• Complainants are often woefully under-prepared for the criminal trial process. • The specialized language used, the roles of particular parties, the courtroom procedures and the trial process more generally will be unfamiliar to many victims. • Many complainants come to court unrepresented, without having completed even basic preparation such as a proper review of one's testimony and without familiarity of the setting.	• Consider measures that better prepare and support victims for and during the criminal process. • Familiarizing complainants with the context may reduce the impact on them arising from their trial performances. • Best practice would be independent, state-funded legal representation for the victim.

Source: Elaine Craig, "The Inhospitable Court", *University of Toronto Law Journal*, vol. 66, No. 2 (2016).

2.3 Ensuring the quality of the victim's evidence

Factors that influence the quality of evidence of victim

The right to remain silent allows the accused to decide not to provide testimony during criminal proceedings. In order to put forward the accused's perspective, the defence counsel often leads the complainant of GBVAWG through the defendant's version of events in a very rigid way, with the criminal procedures allowing for little flexibility. As one academic noted, "in a way the complainant's responses are superfluous to the proceedings as the defence lawyer only wants to put an alternative story to the factfinders to create reasonable doubt".[108] Common defence questioning techniques include presenting certain evidence in certain ways, rather than gathering all the available evidence in a balanced manner, as well as asking closed questions to control what information becomes public.

There has been a lot of research done in the last few decades that leads to a more comprehensive understanding of the factors that influence the quality and quantity of evidence provided by witnesses to a crime.[109] Appreciating this research can help judges take steps to enhance the quality of evidence of victims. One academic noted that one of the "primary predictors of completeness and accuracy of eyewitness evidence is the way the witness is questioned … researchers agree that the 'gold standard' questions are open-ended questions that encourage the witness to freely recall events, for example 'what happened'".[110] Another academic suggested that "as questions become more specific, the witness moves from providing information from memory (a recall task) to making judgments about information provided by the interviewer (a recognition task) and it is this information that can contaminate the witness's memory. If an interviewer's questions imply a particular answer, witnesses are more likely to respond with an answer that meets that expectation".[111] In addition to the memory benefits of using open-ended questions, enabling complainants to give comprehensive responses is also likely to improve their experience of the criminal justice process. Studies suggest that current courtroom questioning practices are unlikely to elicit the most complete and accurate information from complainants; nor are they likely to give the complainant a voice in the courtroom.[112]

Typical criminal proceedings do not allow a victim to tell her story in a way that makes the most sense to her. Her narrative flow is constantly interrupted by counsel's questions. This can lead to complications in the courtroom, not only with the telling of the story, but also with the ways in which the judge comprehends and frames the story to make sense of it.

[108] Nina Westera and others, "Sexual Assault Complainants on the Stand: A Historical Comparison of Courtroom Questioning", *Psychology, Crime and Law* vol. 23, No. 1 (2017), p. 18.

[109] Ibid., p. 16; Gavin E. Oxburgh and others, "The Question of Question Types in Police Interviews: A Review of the Literature from a Psychological and Linguistic Perspective", *International Journal of Speech, Language and the Law* vol. 17, Nr. 1 (2017), p. 46.

[110] Nina Westera and others, "Sexual Assault Complainants on the Stand: A Historical Comparison of Courtroom Questioning", *Psychology, Crime and Law* vol. 23, No. 1 (2017), p. 16.

[111] Debra A. Poole and Lawrence T. White, "Effects of Question Repetition on the Eyewitness Testimony of Children and Adults", *Developmental Psychology*, vol. 27 (2010), p. 975.

[112] Mark R. Kebbell and others, "The Direct and Cross-Examination of Complainants and Defendants in Rape Trials: A Quantitative Analysis of Question Type", *Psychology, Crime and Law*, vol. 9, No. 1 (2003), p. 49; Rachel Zajac & Paula Cannan, "Cross-Examination of Sexual Assault Complainants: A Developmental Comparison", *Psychiatry, Psychology and Law*, vol. 16 (2009) p. 36.

Ways to enhance the victim's ability to tell her story

- Asking open questions and avoiding leading or suggestive questions.
- Controlling inappropriate questioning, which reduces the quality of evidence heard.
- Being aware of the demeanour of the person asking the questions: more authoritative demeanours make vulnerable witnesses less able to recall accurate information and less willing to disclose information.
- Using pre-recorded video evidence. While arguably more compatible with inquisitorial than adversarial approaches to testimony, this is a practice in some adversarial jurisdictions.
- Making trials more about conversations than battles and allowing greater reliance on written evidence gathered.
- Allowing the victim her own lawyer. The duties could range from acting as an intermediary during questioning to providing advocacy and representation throughout the whole legal process, including sentencing and compensation decisions.

Aggressive and improper questioning based on myths and harmful gender stereotypes

Questioning techniques, such as extensive repetition, frequent interruption, closed questions, and demanding precise recollection of peripheral details, are common defence tactics in gender-based violence cases. These are the only crimes in which "the victim becomes the accused and, in reality, it is she who must prove her good reputation, her mental soundness, and her impeccable propriety".[113]

Judges have a responsibility to disallow any unfair, unnecessary, repetitive, aggressive and discriminatory questioning. An understanding of unethical defence tactics is therefore crucial. A key tactic is "whacking" the complainant through humiliating or prolonged questioning that seeks to put the complainant on trial rather than the accused. Specious applications are also used to obtain the complainant's records. Harmful gender stereotypes about women and consent are often invoked and exploited, including assumptions about communication, dress, revenge, marriage, prior sexual history, therapy, lack of resistance and delayed disclosure.

"Whacking" the complainants: a defence tactic

Research has revealed that defence lawyers in Canada have been trained in continuing legal education courses to "whack" the complainants in sexual violence cases. "[W]hack the complainant hard" at the preliminary inquiry.... "Generally, if you destroy the complainant in a prosecution...you destroy the head. You cut off the head of the Crown's case and the case is dead.... [A]nd you've got to attack the complainant with all you've got so that he or she will say [']I'm not coming back in front of 12 good citizens to repeat this bullshit story that I've just told the judge'."

Source: David Tanovich, "'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases", Ottawa Law Review, vol. 45, No. 3 (2015), p. 495.

[113] Freda Adler, *Sisters in Crime: The Rise of the New Female Criminal* (McGraw-Hill, New York, 1975), p. 215.

Table 18. Examples of improper questioning

Victims still commonly face questions focusing on their clothing and behaviour, motivation to lie, their emotionality, delayed reporting and sexual history. These questions can be asked by defence lawyers, prosecutors and judges.	
Defence lawyer	Questioning about the victim's unemployment used to portray her as lazy and draw on class stereotypes to undermine her credibility.
Prosecutor	Objecting to the portrayal of the victim as "undeserving" due to her status as a sex worker but perpetuating this stereotype by stating that the victim's employment "doesn't make her a second-class victim and she should be treated like a normal person".
Judge	Asking the victim "why couldn't you just put your knees together", shifting the blame on her, based on stereotypes around the theme of "she wanted it".

Understanding why judges may fail to intervene to disallow improper questioning

Judges often reportedly fail to intervene when victims are subjected to improper questioning based on myths and harmful gender stereotypes and judges.[114] Understanding why may assist judges in addressing this issue.

Academics who have studied the persistence of myths in GBVAWG cases theorize that: "the criminal justice system often operates within a positivist context, believing that the exclusive source of all certain knowledge is based on natural phenomena, from sensor experience and interpreted through reason and logic. This leads to assumptions that behaviour is 'rational'. This has an impact on judicial duties, from allowing questioning of victim (both by prosecutors and defence); and how judges assess evidence in decision-making as it leads to a strong focus on whether a victim's actions were 'rational' with no recognition that behaviour is often 'irrationall'. Actions were thus compared with hypothetical 'normal' situations based on logic".[115]

Questioning is not viewed as improper if all parties to the criminal trial engage in it. A victim will often be subjected to an assumption of rational behaviour, not only by defence counsel to try to discredit her, but also by the prosecution to support their argument that the victim is credible. If questions regarding whether the victim had a motive to lie, her emotionality and any delayed reporting are considered by the judge as important in assessing the victim's credibility, then the judge will not view questioning based on myth and harmful gender stereotyping as being improper.

Challenges for judges trying to control aggressive cross-examination

Being labelled an activist judge when intervening. Some scholars have studied court cultures at the different levels of courts and believe they influence how courts are run at least as much as formal rules.[a] Those who do not comply with cultural "norms" may be perceived very negatively and are often ostracized by their colleagues, as reputation appears to be highly important among legal personnel. In addition, these cultural norms are considered part of professional conduct. Legal personnel aiming to be successful have an incentive to follow them. One example of court culture is judicial passivity, which is thought to be rife because too much intervention in trials has been grounds for successful appeal, and this reflects badly on the judge.

[114] See, e.g., Louise Ellison, "The Mosaic Art? Cross-examination and the Vulnerable Witness", *Legal Studies*, vol. 21, No. 3 (2001), p. 353.

[115] Olivia Smith and Tina Skinner, "Observing Court Responses to Victims of Rape and Sexual Assault", *Feminist Criminology*, vol. 7, No. 4 (2012).

Concerns of being overturned on appeal. In one case, a court of appeal described the cross-examination of the complainant, which spanned over 550 pages of transcript, as lengthy, repetitive, and often difficult to follow. The defendant appealed his conviction on the basis, in part, that the trial judge intervened in the cross-examination of the complainant in a manner that interfered with defence counsel's ability to cross-examine, or that revealed bias, or that created an apprehension of bias. While the court of appeal rejected these grounds and upheld the convictions, being appealed for trying to control improper questioning is a reality.[b]

[a] Various scholars who have written on court culture are discussed in Olivia Smith and Tina Skinner, "Observing Court Responses to Victims of Rape and Sexual Assault", *Feminist Criminology*, vol. 7, No. 4 (2012).
[b] Court of Appeal for Ontario, *R. v. Finney*, Docket No. C55780, Judgment, 3 December 2014, para. 2.

Strategies for judges to address discriminatory defence tactics

Judges have a role in ensuring that myths and harmful gender stereotypes are not perpetuated by any of the actors in the courtroom, including prosecutors, defence counsel and judges themselves.

A key strategy is building an understand of how and why GBVAWG is different from other offences. This includes appreciating the stereotypes surrounding these cases and the challenges victims face in accessing justice in these cases. Judges need to be aware of the violent impact on victims of requiring them to provide irrelevant, gender-biased information or to refute sexist-stereotype-infused cross-examination.

Another strategy is to prevent and address improper questioning. This can be achieved by balancing women's right to equal protection before the law, as well as their right to privacy, with the defendants' right to a fair trial. The defence has the right to cross-examine witnesses as a fundamental aspect of the right to test the case against the accused, to allow the evidence presented in the courtroom to be tested for inaccuracies or inconsistencies that could render it unreliable. However, the accused's right of cross-examination is not absolute. The right to a fair trial "does not give defence the right to 'whack' the complainant, maligning her behaviour, her dress and her character – all is a sexualized way".[116] Judicial interventions to reduce repetitive and irrelevant cross-examination do not compromise trial fairness. It is important for judges to ask how much the defence needs to know about any complainant and what a woman must reveal about herself in order to access justice, considering how these revelations may subject her to further victimization.

Guidance from the Bangalore Principles

The Bangalore Principles set out a number of guidelines for judges, including that (i) a judge shall not knowingly permit those subject to the judge's influence, direction or control to differentiate between persons concerned in a matter before the judge on any irrelevant ground;[a] and (ii) a judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.[b]

Furthermore, "[t]he judge must address clearly irrelevant comments made by lawyers in court or otherwise in the presence of the judge which are sexist or racist or otherwise offensive or inappropriate. Speech, gestures, or inaction that could reasonably be interpreted as implicit approval of such comments is also prohibited. This does not require that proper advocacy or admissible testimony be curtailed where, for example, matters of gender,

[116] Elizabeth Cormack and Gillian Balfour, *The Power to Criminalize: Violence, Inequality and the Law* (Fernwood Publishing, Halifax, 2004), pp. 112-113.

race or other similar factors are properly before the court as issues in the litigation. This is consistent with the judge's general duty to listen fairly but, when necessary, to assert control over the proceeding and to act with appropriate firmness to maintain an atmosphere of equality, decorum and order in the courtroom. 'Appropriate firmness' will depend on the circumstances. In some instances, a polite correction may be sufficient. However, deliberate or particularly offensive conduct will require more significant action, such as a specific direction from the judge, a private admonition, an admonition on the record or, if the lawyer repeats the misconduct after being warned, so far as the law permits, dealing with the offending lawyer for contempt of court."[c]

[a] Bangalore Principles, Principle 5.4.
[b] Bangalore Principles, Principle 5.5.
[c] UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (2007), para 191.

Judges have the authority to manage their courtrooms. They can ensure that their courtrooms follow a normative framework that is grounded in legal and ethical norms including equality values, lawyers' duty to not discriminate, and to advocate in good faith and not mislead the court. Judges are often given significant deference with respect to trial management and should be able to properly intervene to avoid harassing and improper questioning of victims. Such questioning could fall under rules regarding irrelevant or repetitive evidence. While lawyers have an ethical obligation to cross-examine in good faith, law societies have been reluctant to enter this regulatory sphere and have been criticized when they do discipline the courtroom conduct of lawyers.[117] However, judges and not law societies should be regulating courtroom conduct and judges should be familiar with the applicable national codes of conduct, such as bar council, to see how it covers the issue of improper questioning. When codes of conduct for lawyers are breached, judges should not permit the continuation of such lines of questioning. They need to remind lawyers of applicable ethical standards, which include a duty not to mislead the court. For example, defence lawyers who use harassing and improper questioning to put forward a defence grounded in stereotypes may be considered to be misleading the court.

Good example from courts dealing with unethical defence tactics

Calling out the problem of "whacking" the complainant. The Supreme Court of Canada, in the case *R. v. Mills*, specifically referred to the problem of the whacking of sexual assault complainants by lawyers. The majority observed that "[t]he accused is not permitted to 'whack the complainant' through the use of stereotypes regarding victims of sexual assault."

Court imposed ethical duty on defence counsel. The Supreme Court of Canada interpreted the duty not to mislead the court to include a "good faith" obligation on lawyers, which applies whenever they put a suggestion to a witness in cross-examination, advance defences or make submissions to the trier of fact. The Supreme Court held that "[t]he purpose…must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or imply in a manner that is calculated to mislead is in our view improper and prohibited."

Source: David Tanovich, "'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases", *Ottawa Law Review*, vol. 45, No. 3 (2015).

[117] Yamri Taddese, "Trial Judges Better Suited to Regulating Civility", Law Times, 17 December 2012, available at http://www.lawtimesnews.com/201212172119/headline-news/trial-judges-better-suited-to-regulating-civility-panel.

CONSIDERATIONS REGARDING JUDGES' ENGAGEMENT WITH VICTIMS

1. How does the court's engagement with the victim promote gender equality?
2. How does the court's engagement with the victim support her rights while balancing those of the defendants?
   - Consider the right of the accused to a fair trial, including to examine witnesses.
   - Consider the rights of the victim to be treated with dignity and to be protected from harassment.
   - Ensure a proper balance between these rights, considering the real need for questions and the way they are asked.
3. How can the court avoid engaging with victims based on myths and harmful gender stereotypes?
   - Avoid making inferences from the victim's apparent emotional state and assumptions that are primarily based on beliefs around how an "ideal" victim should feel or would "rationally" behave.
   - Avoid assessing credibility of the victim by making inferences solely on how she reacted based on ideals of how "rational" victims would react.
4. How does the court promote victim-centred approaches and empower victims?
   - Be aware of how court proceedings themselves can reinforce feelings of powerlessness of the victim.
   - Treat victims with dignity.
   - Provide and apply special measures to facilitate the victim's testimony so that she can give voice to her trauma.
5. How does a judge's understanding of trauma impact on fact determination, interpretation of the law, assessment of the evidence, determination of criminal liability and severity of sentence (where there is a conviction)?
   - Victims react differently and express themselves differently.
   - Trauma impacts on the victim's ability to coherently or fully recount her experiences.
   - Victims of trauma can make inconsistent statements for a number of reasons.
6. What steps can a judge take to make the trial more victim-friendly without threatening the rights of the defendant to a fair trial?
   - Prevent cross-examination that is needlessly repetitive, irrelevant and humiliating.
   - Control defence tactics by focusing on the issue of relevancy.
   - Allow for witnesses to seek clarification, express concerns, or contribute to the direction of the exchange.
   - Embrace a more affable style of interaction with complainants.
   - Ensure the complainant is as comfortable as she can be in the circumstances.
   - Change the aesthetics of the courtroom.
   - Remove formal symbols.
   - Allow the witness to sit while providing testimony.
   - Look at ways to allow victims to be supported during the testimony at trial without risking distortion of their testimony.
   - Consider measures that better prepare and support victims for and during the criminal process, for example, legal representation for the victim or adjourning the hearing where victims break down and need time to compose themselves.

7. How can judges enhance the quality of evidence of complainants?
   - Allowing or asking open questions and avoiding leading or suggestive questions.
   - Prohibiting inappropriate questioning as this reduces the quality of evidence heard.
   - Minimizing authoritative demeanours as these can reduce the quality of evidence.

8. When do judges know they need to control defence tactics in their courtroom?
   - Consider whether the defence tactics in cases of truthful complainants cause irreparable harm to the victim and to the administration of justice.
   - Consider whether it will perpetuate disadvantages, such as dissuading other complainants from seeking justice in the criminal justice system.
   - Consider whether it will bring the administration of justice into disrepute.
   - Ask whether the implicit purpose of questioning on certain issues is to suggest that the complainant "is the kind of person to lie" or "the kind of person to consent".
   - Intervene to prevent inappropriate questioning and address defence tactics that cause harm to the victim or the administration of justice.

3. Evidentiary issues

This section focuses on evidentiary rules and the duty of judges to ensure non-discriminatory interpretation and application of those rules. Each jurisdiction has specific rules of admissibility of the different types of evidence (e.g. real, demonstrative, documentary or testimonial). Judges must ensure that all relevant evidence is brought before the court and disallow irrelevant evidence. Guidance is provided to assist judges undertaking a context-driven analysis to understand the why the application of evidentiary rules can make it challenging to get convictions in GBVAWG cases. Relevant factors include: promoting equality and non-discrimination in the application of all evidentiary rules; balancing the rights of both the defendants and victims; and ensuring that myths and harmful gender stereotypes do not influence the court's reasoning for admissibility.

In cases involving gender-based violence there is often insufficient meaningful case building at the investigation stage. Due to the nature of the crime, there are often no other witnesses or little physical evidence, which can result in over-reliance on the victim's statement. At the same time, given that evidentiary practices have developed out of traditional beliefs about women and girls, many judges may view the victim's testimony with – at best – caution and – at worst – suspicion. The present section therefore predominantly covers the judicial role in handling the form of examination of the victim's testimony. While the previous section discussed how to facilitate such testimony and ensure its quality, this section focuses on issues of relevancy. Other evidentiary issues will also be briefly covered, including the use of third-party documents, expert evidence and forensic evidence.

Updated Model Strategies and Practical Measures

Provision 15 urges Member States to:

- Ensure that evidentiary rules are non-discriminatory
- Ensure that all relevant evidence can be brought before the court
- Ensure that the credibility of a complainant in a sexual violence case is understood to be the same as that of a complainant in any other criminal proceeding

- Prohibit the introduction of the complainant's sexual history when it is unrelated to the case
- Ensure that no adverse inference is drawn solely from a delay in reporting
- Ensure perpetrators who are voluntarily under the influence of alcohol, drugs or other substances are not exempt from criminal responsibility
- Consider evidence of prior acts of violence, abuse, stalking and exploitation during court proceedings

3.1 Issues of relevancy

Judges are guided by the basic prerequisites of admissibility of evidence, which differ between jurisdictions but typically include an evaluation of the relevance and materiality of evidence. Evidence is relevant when it has any tendency in reason to make the fact that it is offered to prove or disprove either more or less probable. For example, testimony by an eyewitness to a sexual assault would clearly be relevant, but so would testimony by a witness who saw the defendant go into a room and minutes later the complainant rush out. Evidence is material if it is offered to prove a fact that is at issue in the case. For example, if the defence questions the complainant about whether or not she was wearing a bra on the night of a sexual assault, that evidence may be relevant to prove the fact for which it is offered (i.e. she was not wearing a bra that night), yet the fact that she was or was not wearing a bra is immaterial to any of the issues in a sexual assault case, including the credibility of the complainant or the issue of consent.

In cases involving GBVAWG, a common defence tactic is to focus on irrelevant and immaterial details, relying on myths and harmful gender stereotypes to attack the victim's credibility. It is important to recognize common myths and harmful gender stereotyping in the line of questioning. Judges should recognize whether these questions attempt to cast doubt on the victim's credibility merely by focusing on behaviour that is commonly framed according to narrow gender stereotypes, such as walking along late at night, dressing provocatively, flirting, wearing make-up, going to bars alone, drinking alcohol or leaving a drink unattended.

Table 19. Examples of common scenarios

1. Questions about the complainant's drinking or use of drugs	• Australian studies show that the complainant's drinking in the period preceding the incident is frequently a major component of the defence case, used to impugn the character of the victim and to imply consent.[a] • Research in the United Kingdom found a tendency to attribute responsibility for the ensuing sexual intercourse to the complainant when she had consumed alcohol, based on the belief that alcohol is equated with having a "good time" and that a woman who consumes alcohol is perceived as a "good time girl".[b] • Research in the United Kingdom also found the existence of a double standard in the attribution of responsibility in contested sexual consent scenarios whereby intoxicated defendants tend to be held less responsible for subsequent sexual events than their sober counterparts, while intoxicated complainants tent to be held more responsible.[c]

Table 19. Examples of common scenarios *(cont'd)*

2. Questions about the complainant's underwear, whether she was wearing any, and if so, what type and colour	• One scholar's review of transcripts of sexual assault trials revealed that most complainants were required to testify in detail about her underwear.[d] • In some contexts, a complainant's undergarments will be relevant. However, whether the complainant was wearing underwear and what type of underwear she was wearing appear to be such salient aspects of a sexual assault case that some trial judges continue to include discussion of this in their decisions without any explanation as to relevance. The defendant's undergarments are seldom presented as an independently relevant factor in sexual assault cases.

[a] Alison Young, "The Wasteland of the Law, The Wordless Song of the Rape Victim", *Melbourne University Law Review*, vol. 2, No. 2 (1998), p. 448.
[b] Emily Finch and Vanessa E. Munro, "Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants", *British Journal of Criminology*, vol. 25, No. 1 (2005).
[c] Emily Finch and Vanessa E. Munro, "The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants", *Social and Legal Studies*, vol. 16, No. 4 (2007), p. 592.
[d] Elaine Craig, "The Inhospitable Court", *University of Toronto Law Journal*, vol. 66, No. 2 (2016).

Transcript from a rape trial – use of language by defence to imply consent

Defence: Now you said that after you left the – uh – Kennedy home that you felt dirty. Is that correct?

Victim: I felt dirty before I left the home.

Defence: When you drove home you still had the same panties on.

Victim: Yes sir.

Defence: When you got to your house, you stayed there for several hours without removing those panties.

Victim: I – I'm not quite sure how long I was at my house, but I, but I – the underwear was still on me.

Defence: It was at least a couple of hours, wasn't it?

Victim: I'm not sure.

Defence: And when you went to your mother's house, you kept those same panties on, didn't you?

Victim: Yes.

Defence: And when you went from your mother's house to go pick up Johnny Butler, you still wore the same panties.

Victim: I was pretty terrorized, I – I – I'd never, I just, it's like you're – you're just functioning, and – and to be at the sheriff's office? And I was just, just...

Defence: Even though you – you – felt dirty, you felt awful, and what have you, you kept those same panties on – is that what you said, Miss Bowman?

Victim: I – I couldn't think to, I, I didn't know what to think.

Analysis: It is important to realize that whether the victim left her underwear on after the assault has nothing to do with consent. However, the defence used the cross-examination to imply that how long the victim left her underwear on was relevant to whether she consented. The implication is that, had she not consented, she would have removed her underwear at the first possible opportunity to rid herself of the

source of the "pollution". The use of the word "panties", rather than the more gender-neutral "underwear" is also significant. The word "panties" suggests an item of clothing that is specifically female, personal and intimate – an item of clothing that guards the female genitalia. The defence also insinuates that because she did not remove her "panties" as soon as possible after that assault, her source of "dirtiness" did not come from being raped, but rather from her own shame at having casual sex with a stranger. The defence's control over how long a victim may speak means that the lawyer does most of the talking. The lawyer's domination of linguistic space aids his or her credibility and allows him or her to construct vivid detailed images of what he or she wants the judge/jury to believe. Additionally, the use of leading questions and insistence on particularly answers, a common practice for defence counsel, allows the lawyer to exert significant control over a sexual assault complainant's testimony... there is very little opportunity for her to seek clarification, express concerns or contribute to the direction of the exchange. Furthermore, forced choice questions – those that require a yes or no answer – limit the victim's independent voice. As one scholar points out, the legal processes and courtroom practices used to respond to sexual violence, may in fact "reify the very social dynamics that produce both sexual violence itself and the impact of this gendered harm on its subjects."

Source: Rose M. L. Ubel, "Myths and Misogyny: The Legal Response to Sexual Assault", *Master of Studies in Law Research Papers Repository* (2018).

It is equally important to understand the distorting effect of evidence grounded in myths and harmful gender stereotypes. Evidence that is based on harmful gender stereotypes is mostly irrelevant and often so prejudicial that its exclusion should ideally be mandated under the law. Such "evidence allows stereotype and myth to enter into the equation, sidetrack the search for the truth … [and] invites a result more in accord with stereotype than truth … many a defence lawyer knows the effect of such evidence and thus strives to get it admitted."[118]

Table 20. Understanding the distorting effect of myths and harmful gender stereotypes

Types of evidence and arguments in favour of its admission	Problems with these arguments
1. Evidence that sexual acts were performed by the complainant at some other time to prove that the accused believed the complainant was consenting to the sexual act pertaining to the case.	Irrelevant and prejudicial. Relies on the myth that if a woman says "yes" at one time, she is automatically implying consent to future sexual acts. It also implicitly gives credence to the myths that unchaste women are less worthy of belief and more likely than chaste women to consent to the acts giving rise to the charge.
2. Evidence that the complainant is sexually promiscuous to prove bias or motive to fabricate charges.	Irrelevant and prejudicial. The assumption that women with more sexual experience are more likely to make a false allegation has been refuted by research.
3. Arguing that defendant and the complainant are separated and involved in proceedings for child custody to prove bias or motive to fabricate charges.	Prejudicial. Relies on the discredited belief that women complainants are generally less trustworthy.

[118] Supreme Court of Canada, *R. v. Seaboyer; R. v. Gayme*, File Nos. 20666 and 20835, Judgement, 22 August 1991.

Table 20. Understanding the distorting effect of myths and harmful gender stereotypes (*cont'd*)

4. Evidence that the complainant was wearing a low-cut dress to prove that the accused believed complainant was consenting to the sexual act pertaining to the case.	Irrelevant. This is informed by problematic beliefs that suggest that women who dress a certain way are more likely to consent.
5. Arguing that a victim was flirtatious earlier in the evening to prove that the accused believed complainant was consenting to the sexual act pertaining to the case.	Irrelevant. Whether this complainant was flirting earlier in the evening is not relevant to the issue of whether she consented to the sexual act at issue. Consent to sexual acts must be contemporaneous.
6. Using evidence that the complainant was drunk or took drugs to argue that she is to blame for the violence.	Irrelevant. Whether the complainant was vulnerable does not imply consent.
7. Arguing that when women say "no" to sex they really mean "yes".	Prejudicial. This relies on myth that she wanted sex and that good women are sexually chaste.
8. Using evidence of lack of resistance or delayed reporting to prove consent.	Prejudicial. This relies on the myth that "real" rape victims would fight back and call for the pursuit and capture of the perpetrator at the first opportunity.

Judges should query the relevancy of this line of questioning during the trial and use applicable rules of criminal procedure to stop prejudicial defence questioning. If the line of questioning has been allowed, then judges need to assess whether this evidence is relevant or material and explicitly call out the use of any myths and gender stereotypes. In doing so they should consider the prejudicial nature of this evidence. Even if the evidence has probative value, it may be substantially outweighed by a danger of unfair prejudice, confusing the issue, misleading the trier of fact, or wasting time.

Good examples of a judge addressing relevancy issues during cross-examination

In one case, where the complainant was asked about the style and colour of her underwear and also cross-examined at length about whether she was wearing a bra (she alleged she was raped when she was asleep in bed), the trial judge queried the relevance of her underwear given that the defence was consent: "what does the colour of the complainant's panties have to do with anything... I mean, when your own client testifies it was consensual, I mean, I – I – I'm at odds as to how that would help me believing him it was consensual"[a]

> "I must say that one area that I have been particularly sensitive about as a result of the GLOW programme is that aspect of cross-examination that touches on the past conduct of the [sexual assault] victim as a means of putting her in a bad light. I have noticed that when I ask Counsel where they are heading with those questions and remind them that we are dealing with a specific incident, invariably that line of questioning is abandoned

reluctantly. Previously, I would have allowed such questions as the rules of evidence do not specifically forbid them, but now I invoke my powers to control cross-examination to remind Counsel to stick to the issue at stake."[b]

[a] Elaine Craig, "The Inhospitable Court", *University of Toronto Law Journal*, vol. 66, No. 2 (2016).
[b] Ministry of Foreign Affairs of the Netherlands, *Funding Leadership and Opportunities for Women: FLOW 2012-2015*, p. 39, available at http://www.iawj.org/wp-content/uploads/2017/04/FLOW-Program-Description-organisations.pdf.

Good examples of a judge assessing relevancy issues in the judgment

In one case, a complainant was cross-examined extensively about whether she smoked marijuana on the evening of the attack, whether she flirted with the accused early that night, the precise number of beers she consumed the day and evening before the assault and whether she was wearing a bra. The inference here is that the "kind" of woman who smokes drugs, drinks alcohol, flirts with men and doesn't wear a bra is the "kind" of woman who is not a credible witness, and therefore she was most likely asking for it. The judge considered the evidence irrelevant. In this case, the trial judge convicted the accused, describing in the judgment that the defence counsel's cross-examination as "unnecessarily confrontational and concluded that it was getting out of hand and that most of all [he] had a sense that she was truly being and felt insulted by the process".[a]

The Supreme Court of Canada held that "[C]ross-examination for the purposes of showing consent or impugning credibility which relies upon 'rape myths' will always be more prejudicial than probative. Such evidence can fulfill no legitimate purpose and would therefore be inadmissible to go to consent or credibility."[b]

The Federal Court of Justice of Germany held that asking a woman, who was raped by strangers, questions about her married life with her husband or about her last marital intercourse before the act was unreasonable. It stressed that the replies of the victim to these questions and her behaviour did not raise any doubt about the credibility of the information on the events in question. More generally, the Federal Court of Justice held that trial courts are obliged to consider victims' interests when deciding on the scope and admissibility of evidence, stressing that evidence of the private and intimate life of a witness is permissible only after careful examination of its indispensability. It noted that even in the framework of their primary obligation to ascertain the truth, trial courts must take into consideration the respect of the human dignity of a witness, which ultimately results from the rule of law.[c]

[a] Elaine Craig, "The Inhospitable Court", *University of Toronto Law Journal*, vol. 66, No. 2 (2016).
[b] Supreme Court of Canada, *R. v. Osolin*, File No. 22826, Judgment, 16 December 1993.
[c] Federal Court of Justice of Germany, File No. 1 StR 209/09, Decision, 13 May 2009.

3.2 Issues related to the admissibility of sexual history evidence

In sexual violence cases the focus often shifts onto the victim away from the perpetrator and the actual violent incident. A common defence strategy is to introduce evidence concerning the victim's sexual history. The direct and indirect use of sexual history evidence remains a powerful tool for defence lawyers to undermine the prosecution's case by challenging the credibility of the complainant, who is often the only witness.

International standards prohibit the introduction of the complainant's unrelated sexual history. Some countries introduced an exclusionary rule prohibiting any party from adducing evidence of past sexual activity, except under strict conditions and subject to judicial oversight,[119] while others leave it to the judge to determine relevancy. Despite "rape shield" provisions, which are meant to limit when and how sexual history evidence can be used, sexual history "evidence" remains common, used by defence counsel and allowed by judges.

Allowing for evidence of past sexual history is based on the belief that a woman's sexual history is always a relevant consideration in assessing her credibility and in determining whether or not sex between her and the defendant was consensual. Such evidence is based on common myths and harmful gender stereotypes related to the credibility of certain "kinds" of women.

Table 21. Examples of negative approaches concerning sexual history evidence

1.	Allowing such evidence based on the myth that unchaste women are less worthy of belief (that they are less credible) and unchaste women are more likely than chaste women to consent (that they have consented to the sex).
2.	It is still not uncommon for defence to make, and judges to allow, submissions about the existence of continuous consent simply on the basis that the parties are married or in an intimate partner relationship.
3.	If the victim made previous allegations of prior abuse that did not result in conviction, defence counsel may unfairly use this to imply that the victim tends to lie.
4.	Sexual history evidence has also been used to demonstrate sexual inactivity and this has been determined admissible by judges to allow the defence to argue that the complainant was more likely to have fabricated the allegations.[a] In that case, the defence successfully sought to admit evidence to create a new sexual assault myth: women who were previously chaste are more likely to fabricate complaints.
5.	Another troubling use of sexual history evidence is defence seeking to admit evidence that the complainant has been sexually abused in the past and because of this abuse she has a disordered sexual perception that could lead to misinterpretations, overreactions and false criminal accusations, placing her credibility at issue.[b]
6.	Sexual history evidence is often used to discredit complainants who fail to maintain an appropriate demeanour or who demonstrate anger towards the accused.

[a] Superior Court of Justice of Ontario, *R. v. Antonelli (D.)*, File No. CR10-50000747-0000, Judgment, 28 September 2011.
[b] Karen Busby, "Sex was in the air – Pernicious Myths and other problems with sexual violence prosecutions", in *Locating Law*, Elizabeth Comack ed. (Halifax, Fernwood Publishing, 2014), p. 259.

[119] See Canada, Criminal Code, sect. 276; England and Wales, Youth Justice and Criminal Evidence Act, sect. 41; South Africa, Criminal Procedure Act, sect. 227; Thailand, Criminal Procedure Code, sect. 226/40; Malaysia, Evidence Act, sect. 146A; Philippines, Rape Victim Assistance and Protection Act, sect. 6.

Judges may find the following guidance useful:

- Intervene to prevent the introduction of inadmissible evidence on the victim's prior sexual conduct and consent.
- Hold closed hearings if there are questions about the admissibility of sexual history evidence.
- Avoid the use of myths and harmful gender stereotyping in determining admissibility.
- Stop analysing whether the victim consented due to past sexual history in judgments.
- Provide detailed legal reasoning as to why sexual history evidence is not relevant, connecting this issue with gender inequality or the prejudicial effects of sexual history evidence.

Good examples of responding to sexual history evidence

In a case where the victim was gang-raped, she testified that her assailants had not ejaculated. During cross-examination by the defence, the judge controlled questioning about past sexual history. The defence tried to ask the victim how she knew that the accused did not ejaculate, specifically asking whether she knew what having someone climax inside her felt like. The prosecutor objected to this line of questioning and the judge agreed and did not allow it.[a]

The Supreme Court of Canada found that the prohibition of sexual reputation evidence does not infringe the accused's right to a fair trial. "The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a women's sexual reputation and whether she is a truthful witness."[b] The trickier question appears to be how to balance a complainant's sexual history with relevancy and hence admissibility.

The Supreme Court of the Philippines held that the victim's moral character is immaterial in the prosecution and conviction of an accused for rape, there being "absolutely no nexus between the reputation of a rape victim and the odious deed committed against her".[c]

The Supreme Court of Croatia held that "earlier sex life of the victim, as well as the way she was dressed, have no influence on the question of consent".[d]

[a] Andrew E. Taslitz, Rape and the Culture of the Courtroom (New York: New York University Press, 1999), p. 85.
[b] Supreme Court of Canada, *R. v. Seaboyer; R. v. Gayme*, File Nos. 20666 and 20835, Judgment, 22 August 1991. See also Rose M. L. Ubel, "Myths and Misogyny: The Legal Response to Sexual Assault", *Master of Studies in Law Research Papers Repository* (2018).
[c] Supreme Court of the Philippines, *People vs. Remegio Dela Peña Y Baguio*, G.R. No. 128372, Judgment, 12 March 2001.
[d] Supreme Court of Croatia, I Kž 639/97-5.

3.3 Concerns of prompt complaint requirements or practices

Prompt complaint requirements are procedural or evidentiary rules or practices that refer to the time frame between the incident of violence and when the report is made. An example of this type of rule is a statute of limitations provision for the commencement of proceedings, requiring the victim to report the crime within a set number of days, weeks or months or else prosecution will be barred by law. These types of cases are unlikely to come before a criminal judge. Another example of this type of rule is where an adverse inference can be made as a result of delay on the part of the victim in making a report.

International standards specifically require that no adverse inference is drawn solely from a delay of any length between the alleged commission of a sexual offence and the reporting thereof. Some of the countries that had explicit rules of prompt complaint requirements have taken steps

to explicitly eliminate this rule. Despite precedent setting cases or explicit legal provisions, judges continue to make a reference to the delay in many of their judgments and the issue of delayed complaint continues to be an area of confusion in the law of evidence and is still used to damage a complainant's credibility.

The practice of prompt complaint requirements is not supported by any evidence that delayed reports are less truthful. Statistics indicate that most cases of sexual violence are never reported at all and research indicates that it is not inherently "natural" for the victim to confide in someone or to disclose immediately following the violence.[120]

Examples of negative approaches requiring violence to be reported promptly	
1.	At trial, a delay in disclosing an assault is often perceived as a discrediting factor to the credibility of the victim. There is a common assumption that women tend to lie about rape, and because credibility is the determining factor in most sexual assault trials, a lack of recent complaint often serves as an argument for acquittal.
2.	"Rational" ideals are frequently used by defence counsel to suggest that delayed reporting was suspicious, while immediate reporting is considered as "ideal": Why didn't she call the police straight away? This is based on the mistaken belief that a woman who is sexually assaulted will disclose her violation at the first reasonable opportunity. This idea is premised on a mistaken belief about how "ideal" victims of sexual assault will or should behave, such as calling for the pursuit and capture of the perpetrator and fighting back when her chastity is at stake.[a] This does not recognize that there are many reactions to sexual violence including the victim's wanting to wash after such an assault, disclosing to family or friends first and only reporting to authorities after feeling supported.
3.	In some cases, prosecutors may also rely on this myth when they refer to evidence of a recent complaint to support the complainant's credibility.
4.	Defence arguments may be grounded in victim-blaming, such as the unreasonable assumption that the delayed reporting compromised the physical evidence and that the victim is responsible for this.

[a] Elaine Craig, "The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence", *Queen's Law Journal*, vol. 35, No. 2 (2011), p. 556.

Judges may find the following guidance useful:

- Intervene to prevent cross-examination about the victim's credibility based on the introduction of delayed reporting.
- Avoid the use of myths and harmful gender stereotyping in assessing the lack of physical evidence due to late reporting as fatal to the case.
- Stop analysing whether the victim was not credible due to delayed reporting in judgments.
- Avoid using language in judgments that implies the victim is blamed for delayed reporting.
- Provide detailed legal reasoning as to why no adverse inference should be drawn solely from a delay in reporting.

[120] International Commission of Jurists, *Sexual Violence against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice* (2015).

Examples as to how judges can formulate decisions to debunk myths around delayed reporting

The Constitutional Court of South Africa issued a judgment in June 2018,[a] confirming the absence of time limits in which to institute a criminal prosecution for any sexual offence, regardless of how long ago it was committed or whether the victim was a child or adult. The victims, who had been between 6 and 15 years old at the time of the alleged sexual assault, alleged that it was only after they acquired full appreciation of the criminal act that they instituted civil and criminal action. The Court declared the prescribed time limit as invalid as being irrational and arbitrary as it unjustifiably limits victims' rights to equality and human dignity. The Court further accepted that survivors of sexual assault face similar personal, social and structural disincentives when reporting these offences.

In one Canadian case, where a child was sexually assaulted when she was 5-6 years old, she told no one about the events for 2.5 years. At trial, defence counsel cross-examined the complainant on the long delay in reporting, suggesting that she had fabricated the story. The issue was whether to admit expert evidence attesting to the fact that in diagnosing cases of child sexual abuse, the timing of disclosure, standing alone, signifies nothing but that disclosure depends upon the circumstances of the particular victim. The court held that "[t]he significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons... react to acts of sexual abuse. (...) A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like victims of sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant."[b]

[a] Constitutional Court of South Africa, *Nicole Levenstein and Others v The Estate of the Late Sidney Lewis Frankel and Others*, Case no. CCT 170/17, Judgment, 14 June 2018.
[b] Supreme Court of Canada, *R. v. D.D.*, File No. 27013, Judgment, 5 October 2000.

3.4 Concerns regarding corroboration requirements or practices and the cautionary rule

Corroboration requirements are provisions or practices that prohibit convictions solely on the basis of a victim's testimony and require corroborating evidence such as physical, medical or forensic evidence or the testimony of additional witnesses that supports the victim's testimony. This is linked to the cautionary rule in some jurisdictions, which requires courts to treat the evidence of a victim of sexual violence with special caution and to take special care if grounding a conviction on the basis of such evidence alone. In cases tried by juries, the court in such jurisdictions provides a cautionary instruction to the jury. Traditionally corroboration requirements and cautionary rules, where they existed, only related to sexual violence offences.

International standards require that the credibility of a complainant in a sexual violence case be understood to be the same as that of a complainant in any other criminal proceeding. This is also reflected in the rules of procedure and evidence of international tribunals, which provide that in cases of sexual assault, "no corroboration of the victim's testimony shall be required".[121]

[121] See, e.g., Rules of Procedure and Evidence of the International Residual Mechanism for Criminal Tribunals (MICT/1/Rev.5), rule 118(i).

At the domestic level, a range of jurisdictions continue to maintain the corroboration requirements and cautionary rule.[122] However, many countries have taken steps to remove these requirements, whether by law or judicial precedent, and some have explicitly provided in law that corroboration shall not be required.

In practice, courts often remain reluctant to convict solely on the basis of the victim's testimony.[123] A common practice of defence counsel is to frame the question of how to apply reasonable doubt in a "he said she said" case as weighing in favour of the defendant, irrespective of the assessment of the credibility of the incident based on the victim's testimony.[124]

Examples of negative approaches requiring corroboration	
1.	Applying the myth that the "ideal" rape involves force, resistance, physical injury. This feeds into the belief "real" rape will be easily corroborated or substantiated by physical evidence. This is related to the stereotype that no women would allow herself to be raped if she does not want to be, which leads to the false conclusion that if she does not fight back or does not call for the pursuit and capture of the perpetrator, she must be allowing the sexual encounter to fulfil her own sexual desires.
2.	Wrongly assuming that a lack of medical evidence makes the victim's testimony intrinsically unreliable. The absence of vaginal injury is often used as evidence against women, based on the misguided belief that if she was able to self-lubricate, she must have enjoyed the forced sex act.
3.	Believing that corroboration is the best way to resolve credibility battles about consent in these difficult cases.
4.	Allowing the defence to raise doubt about the victim's story if there is a lack of corroborating evidence. This feeds into the myth that if there is no corroborating evidence, the woman must be fabricating her claims of sexual assault and that women are inherently unreliable and untrustworthy. It also relies on the belief that judges may be inclined to convict on too little evidence, so the warning is intended to remind the court to be sceptical. For example, one court stated that, given the lack of eyewitnesses, the victim's testimony needed to be such that it "left no shadow of doubt as to its accuracy and veracity and the witness's credibility and integrity".[a]

[a] Court of Bosnia and Herzegovina: *Prosecutor v. Oliver Krsmanović*, Case No. S1 1K 006028 11 Krl, First Instance Judgment, 31 August 2015, para. 311; *Prosecutor v. Muhidin Bašić and Mirsad Šijak*, Case No. S1 1 K 007209 12 Kri, First Instance Judgment, 18 January 2013, para. 58; *Prosecutor v. Velibor Bogdanović*, Case No. S1 1 K 003336 10 Kri, First Instance Verdict, 29 August 2011, para. 79.

Judges may find the following guidance useful:

- Intervene to prevent cross-examination about the victim's credibility based on the lack of corroborating evidence.
- Avoid the use of myths and harmful gender stereotyping in assessing the lack of physical evidence.
- There is no need for corroborating evidence when objectively determining credibility issues.

[122] International Commission of Jurists, *Sexual Violence against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice* (2015).
[123] Ibid.
[124] Supreme Court of Canada, *R. v. W. (D.)*, File No. 23478, Judgement, 20 October 1994.

- Understand that medical evidence is not required to corroborate a victim's account. A medical report that may show that penetration occurred but does not prove or disprove rape.
- Do not dismiss victims' testimony as not credible unless the contrary is clearly indicated.
- Follow the United Nations Inter-agency statement regarding prohibiting the practice of introducing evidence of virginity testing,[125] as research show this has no scientific merit or clinical indication – the appearance of a hymen is not a reliable indication of intercourse and there is no known examination that can prove a history of vaginal intercourse. Furthermore, the practice is a violation of the victim's human rights.
- Do not treat the evidence of a victim of sexual violence with special caution or instruct the jury that special care should be taken in convicting a defendant on the basis of such evidence alone.
- Stop analysing whether the victim could have fought back.

Examples as to how judges can formulate decisions to debunk myths around corroboration

The Bangladesh High Court held that "the testimony of a victim of sexual assault is vital, and unless there are compelling reasons which necessitate corroboration of her statement, the court should find no difficulty in convicting an accused on her testimony alone if it inspires confidence and is found to be reliable." To do so, the Court noted, would be to treat victims of sexual violence equally with other victims and witnesses of violent crimes, for whom decisions of credibility are made on a case-by-case basis and not subject to general rules.[a]

The Court of Appeal of Kenya observed that "there is neither scientific proof nor research findings that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences."[b]

A court in India held that the "absence of external injuries does not tantamount [sic] to consent, nor does it discredit the version of [the victim]." The court upheld the "well-settled principle of law that conviction can be sustained on the sole testimony of the [victim] if it inspires confidence."[c]

The Supreme Court of California (United States of America) similarly reasoned that the "instruction now performs no just function, since criminal charges involving sexual conduct are no more easily made or harder to defend against than many other classes of charges, and those who make such accusations should be deemed no more suspect in credibility than any other class of complainants."[d]

One study noted that "[C]ourts should be careful not to draw the wrong inferences, based on outdated assumptions or myths that have no scientific basis, such as... the absence of medical evidence to corroborate the abuse points to a false complaint having been made."[e]

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[a] International Commission of Jurists, *Sexual Violence against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice* (2015), p. 14.

[b] Ibid.

[c] Delhi v Pankaj Chaudhary and Others (2018).

[d] International Commission of Jurists, *Sexual Violence against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice* (2015).

[e] Raulinga, "Expert testimony in cases of child sexual abuse: Does it assist judicial officers to arrive at the truth?", *Child Abuse Research South Africa*, vol. 3, No. 25 (2002), p. 31.

[125] WHO, OHCHR and UN Women, "Eliminating virginity testing: an interagency statement" (WHO/RHR/18.15).

3.5 Evidence of the defendant's character and other crimes, wrongs or acts

Countries deal differently with evidence of the defendant's bad character or misconduct, sometimes called similar fact evidence, tendency evidence or propensity evidence. Some jurisdictions have a general rule excluding propensity evidence, with some maintaining a strict exclusionary approach. Other countries have abolished this rule thereby allowing admission of such evidence. This gives the trial judge the power to exclude the evidence where it would be "unjust" or have an adverse effect on the fairness of the proceedings.

The function served by the traditional rule to exclude propensity evidence, is the view that its probative value is generally outweighed by its prejudicial risk. It is a common law rule that arose from the mistrust of juries to evaluate all the relevant material. Some judges in countries where these rules have been relaxed argue that today juries are better educated. For those countries that allow such evidence, greater weight is placed on the need for law enforcement and less on the defendant's rights.[126] Psychological theories of character and behaviour and criminological research on recidivism suggest that propensity evidence may have far more probative value than previously appreciated by the law, and not just where the other misconduct and the charged offence share a common signature, and that it has more probative value than juries are likely to attribute to it.[127] All of this implies that while relaxing or abolishing the exclusionary rule is prejudicial to the defendant, it may not be unfairly prejudicial.

Judges who are allowed to consider propensity evidence may find the following guidance useful:

- Propensity evidence should be considered where it has sufficiently high probative value to outweigh its prejudicial risk.
- Evaluate the degree of probative value and the prejudicial effect of this evidence.
- Strike a balance between the risk that the fact-finder may be unduly influenced by the propensity evidence, may give it too much weight, and may be too ready to convict, on the one hand, and the likelihood that the accused would escape criminal responsibility on the other hand.
- Consider guidance from psychologists and evidence from research on recidivism.

Example of a judge applying the propensity rule – Australian case law

The defendant was charged with 18 sexual offences committed against the complainant over an 11-year period. At the trial of first instance, the prosecutor was allowed to adduce as tendency evidence several uncharged sexual acts and evidence of a witness in order to establish that the defendant had a sexual interest in the complainant and a willingness to act upon it. The defendant was convicted. He appealed and his convictions were quashed and a new trial ordered. However, the High Court held that the trial judge had been correct to conclude that the complainant's evidence on the previously uncharged sexual acts was admissible as tendency evidence. All of the charged and uncharged acts were alleged to have been committed against the one complainant, and none of them was far separated in point of time or far different in nature and gravity from the others. These characteristics meant that there was no need for the evidence to have any "special feature" to render it admissible. The complainant's evidence had very high probative value because it showed that the defendant was sexually attracted to the complainant and that he acted upon that attraction by engaging in sexual acts with her, making him more likely to seek to continue to give effect to the attraction by engaging in further sexual acts with the complainant as the opportunity presented. Nor was the complainant's evidence productive of unfair prejudice to the defendant, so that there was no real risk of the jury using that evidence in such an unfair way as to justify its exclusion.

Source: High Court of Australia, *The Queen v. Dennic Bauer (A Pseudonym)*, Case No. M1/2018, Order, 12 September 2018.

[126] David Hamer, "Probative But Still Prejudicial? Rethinking exclusion of propensity evidence in sexual offence cases", paper presented at the Jury Research and Practice Conference, Parliament House, New South Wales, 17 December 2007.
[127] Ibid.

3.6 Issues relating to third-party records

In some countries seeking to restrict the use of irrelevant evidence of the victim's sexual history in sexual violence cases, defence counsel increasingly requested disclosure of personal records.[128] This tactic consists in seeking access to every imaginable personal record including counselling, therapy and psychiatric records, records from abortion and birth control clinics, child welfare agencies, adoption agencies, schools, drug and alcohol rehabilitation centres, medical doctors, military records, criminal injuries compensation boards, prisons, social welfare agencies, victim/witness assistance programmes, immigration offices, sexual assault crisis centres and personal diaries.[129] These records are almost exclusively used in sexual violence cases.

Some countries have provisions that subject application for production and disclosure of third-party records to a high level of scrutiny to minimize possible abuse by defence counsel. Usually the first stage is to require defence to make a written application to the trial judge that must specify how the record is "likely to be relevant" to an issue at trial and how production of the record is "necessary in the interests of justice". If the judge is satisfied that the records are likely to be relevant, the records are reviewed by the judge to decide whether the documents or edited portions are to be disclosed to the defence.

Table 22. Case showing how judges take different approaches in the same situation

This case involved gratuitous violence and humiliation, much of it admitted by the accused, but the defence ignored the facts and engaged in aggressive tactics to humiliate and embarrass the victim and exploited stereotypes about sexual assault complainants and mental disability. The court examined whether the accused had the right to cross-examine the complainant on a single entry in her psychiatric records, which indicated that, one day during therapy, the complainant expressed concern "that her attitude and behaviour may have influenced the man to some extent," and that she was "having second thoughts about the entire case".

Positive approaches	Negative approaches
The trial judge refused to permit cross-examination on the entry in her psychiatric records as irrelevant and the defence was prohibited from using the complainant's medical records in the manner proposed. At the Supreme Court level, the dissenting opinion stated that the "complainant's reflections on how the situation might have been avoided, even assuming they are correct, can have no probative value as to whether or not there was consent to the assault or mistaken belief in consent.... It is well-known that victims of sexual assault in particular often feel responsible for not having done enough to prevent the attack."	Supreme Court was split five-four on the third-party records issue, with the majority ordering a new trial because of the trial judge's refusal to permit cross-examination on the entry in her psychiatric records. This allowed harmful gender stereotypes to influence decision-making.

Source: Supreme Court of Canada, *R. v. Osolin*, File No. 22826, Judgment, 16 December 1993.

Judges may find the following checklist useful in determining applications for third-party records:

- Consider the purpose for defence counsel's use of third-party records. Open access to a complainant's records has been requested on the basis of being paramount to a defendant's right

[128] Karen Busby, "Third Party Records Cases Since *R. v. O'Connor*", *Manitoba Law Journal*, vol. 27, No. 3 (2000), p. 355.

[129] Lise Gotell, "Colonization through Disclosure: Confidential Records, Sexual Assault Complainants and Canadian Law", *Social & Legal Studies*, vol. 10, No. 3 (2001), p. 319; Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1-278.9 of the *Criminal Code*", *Canadian Journal of Women and the Law*, vol. 20, No. 1 (2008), pp. 124-25.

to a fair trial. However, researchers found that defence counsel were blunt in acknowledging that they would bring applications for private records "for evidence that the primary witness is not credible or for inconsistencies in her account or for material that embarrasses or humiliates her enough to convince her not to proceed."[130]

- Consider how records applications would impact women who have been subject to extensive record keeping in contexts characterized by multiple inequalities such as prisons, psychiatric hospitals and the child welfare system. For example, where disclosure of counselling records fails to protect confidential doctor/patient communications, this can perpetuate the disadvantage felt by victims of sexual assault, often women. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong."[131]
- Strike a proper balance between the victim's equality and privacy rights and the defendant's right to a fair trial, which requires a thorough inquiry into the need for the documents.
- Consider the actual relevancy of the documents and be aware that requests for therapeutic records are becoming virtually automatic in some countries.
- Consider the probative value in light of the nature of the records in question. Counselling or therapeutic records can be highly subjective documents which attempt merely to record an individual's emotions and psychological state.
- Check the accuracy by the subject of the records.

Particular challenges arise in relation to defence applications for disclosure of the victim's digital material, such as her personal computer or phones. This may amount to "fishing" or "trawling" expeditions by defence to gather as much material as possible to discredit the victim. The call history and texts, messages and social media posts of victims are often used for victim-blaming and fuelling harmful gender stereotyping. In such applications, and in reviewing the material before allowing disclosure to the defence, the judge can be guided by the above checklist, including issues of relevancy and the need to balance the rights of the defendant and the victim. In addition, the following considerations are important:

- Ensure disclosure of digital material does not condone myths or stereotypes.
- Consider the prejudicial impact on the victim of disclosing material that is often hugely intrusive and emotionally damaging and likely to erode the victim's trust in the criminal justice system.
- Be aware that the information on computers and phones can be manipulated. Judges should only release copies of material on a disc or transcript and ensure the maintenance of a chain of custody of the physical electronic device.

3.7 Use of expert evidence

Expert evidence can assist judges in providing context for a better understanding of the dynamics of gender-based violence and the myths and harmful gender stereotypes around these cases. Experts from outside of the criminal justice system can help to garner a better understanding on these and related issues, including the mental health, behaviour and demeanour of victims of GBVAWG. However, judges must be careful when determining applications to call expert evidence for the purposes of that the complainant's evidence may not be reliable because of her psychiatric history of depression and anxiety.

[130] David M. Tanovich, "Criminalizing Sex at the Margins", *Criminal Reports*, vol 74, No. 6 (2010), pp. 86-95.
[131] Supreme Court of Canada, *M(A) v. Ryan*, File No. 24612, Judgement, 6 February 1997.

Depending on the jurisdiction, expert witnesses may include medical professionals, law enforcement experts, victim advocates, psychologists, psychiatrists, clinical social workers and other counsellors. Expert witnesses can provide testimony on different types of information:

- On victim behaviour that is described by the defence as "unusual", such as failing to fight or resist, experiencing freezing or flopping, having a lack of injury, delayed reporting, minimizing the violence, showing flat affect, not being able to remember, providing inconsistent statements, blaming oneself for the violence.
- On common victim reactions and general criteria for post-traumatic stress disorder.
- On whether the victim's behaviour or symptoms are consistent with a diagnosis of post-traumatic stress disorder.
- How acceptance of myths about rape and intimate partner combine with the erroneous belief that bad things happen to bad people, and how these adversely impact on perceptions of the victim's credibility.
- How the application or misapplication of the law further victimizes the victims of GBVAWG.
- Common challenges experienced by the courts, such as recanting victims in intimate partner violence cases.

Case study on the use of expert evidence

In one case, the complainant in the matter was a child of 15 years of age raped by her youth pastor. A clinical psychologist (or social worker) was called to court to speak about the trauma suffered by the complainant because of the rape, and assist the court in questions around delayed disclosure of the rape. Of the psychologist's evidence, the Magistrate stated in her judgment: "[h]er evidence was very long but the reason why it is important to refer to all of it, is because I think that it relates to the issue why the complainant did not disclose timeously to the members of her family what had happened to her."

The court ultimately relied heavily on the input by the psychologist; not only was clarity around the issue of non-disclosure arrived at but the Magistrate also came to understand the effects of post-traumatic stress disorder and how this could have been a factor in the complainant's behaviour.

Source: Mercilene Machisa and others, *Rape Justice In South Africa: A Retrospective Study Of The Investigation, Prosecution And Adjudication Of Reported Rape Cases From 2012* (Pretoria, 2017), p. 102.

Judges may find the following guidance useful:

- Where allowed by the national legal framework, consider involving appropriate experts. This could include anthropologists, psychologists, social workers, victim service providers, or GBVAWG crisis counsellors.
- In cases involving girl victims, consider also involving a child psychologist, where allowed by national law.
- Determine issues of admissibility, in accordance with national laws.

3.8 Issues related to forensic evidence

There are several challenges related to forensic evidence. First, there is a tendency of over-reliance on forensic evidence, based on the assumption that there is a single "truth" to be uncovered and that empirical or "scientific" evidence is the most legitimate method of finding it. Second, the absence of forensic/medical evidence is often misinterpreted.

There are numerous reasons why there may be no medical/forensic evidence. This includes delayed reporting, which often means that either no examination is done or, if it is done, there is no evidence of injuries or other traces. The victim may also refuse to undergo a forensic examination, and there can be many reasons for this. For example, in one case a young girl refused to undergo an examination because the doctor wore gloves that looked like a condom which was used by the perpetrator. In other cases, forensic examinations have not been done in a timely manner or in a gender-sensitive or age-appropriate manner.

Lack of certainty is another challenge. There is a spectrum of physical findings produced by violence. Some physical findings are quite specific for violence, while other findings are nons-pecific. The type of physical findings or evidence produced vary with the type of violence, objects or body parts used, age of the victim, amount of force applied, use of lubricants, number of episodes of abuse and time elapsed before the physical exam.[132] Rape is not a medical condition; it is a legal definition. The health practitioner cannot make any comment on whether the activity was consensual or otherwise.[133] Medical reports should not conclude whether rape has occurred, but rather describe the examination. Judges need to know how to interpret the forensic report.

Care needs to be taken to ensure that the interpretation of forensic evidence is not influence by myths and harmful gender stereotypes. First, placing sole or primary reliance on forensic evidence is based on the incorrect presumption that women will fight back when faced with any form of violence and as a result there will be evidence of physical force or a struggle. Second, forensic evidence that shows that the victim was previously sexually active can undermine her credibility and be used to argue that the violence did not occur.

In the Philippines, the Supreme Court ruled that a medical examination and certificate are merely corroborative evidence and are not indispensable to a prosecution of rape.

Source: Supreme Court of the Philippines, *People vs. Arivan*, G.R. 176065, Judgment, 22 April 2008.

Judges may find the following guidance useful:

- Be sensitive to the many reasons why the victim has not undergone a medical/forensic examination.
- Be aware that lack of physical injuries does not mean that no violence has occurred.
- Remember that forensic evidence should not be indispensable to conviction.

[132] Jan Bays and David Chadwick, "Medical Diagnosis of the Sexually Abused Child", *Child Abuse & Neglect*, vol. 17 (1993) p. 103.

[133] UNODC and WHO, Toolkit on Strengthening the Medico-Legal Response to Sexual Violence.

CONSIDERATIONS REGARDING THE APPLICATION OF EVIDENTIARY RULES:

1. How can the judge ensure non-discriminatory application of evidentiary rules?
   - What are the existing evidentiary rules?
   - Examine the prejudicial effects of evidentiary rules and the ways in which this type of evidence reinforces gender inequalities.
   - Review the domestic criminal legislation regarding rape shield laws; any prompt complaint requirements or specific provisions regarding drawing an adverse inference; corroboration requirement; cautionary rules.
   - Interpret evidentiary rules in a way that is compliant with international standards.
2. How can the judge avoid aggressive irrelevant cross-examination?
   - Control improper questioning by defence regarding delayed reporting, balancing the rights of the defendant and the victim.
3. How can the judge avoid admitting evidence that is based on myths and harmful gender stereotypes?
   - Ask whether the defence is trying to introduce kinds of behaviour (such as walking alone at night or dressing provocatively) or information about the victim (such as her work, dress, motherhood or marital status, disability, attitude and demeanour or abuse history) to discredit the victim based on harmful stereotypes.
   - Consider whether the evidence is being used to support the twin myths regarding credibility (unchaste women are less worthy of belief) and consent (unchaste women are more likely than chaste women to consent).
4. Is the probative value of the evidence substantially outweighed by a danger of unfair prejudice, confusing the issue, misleading the trier of fact, or wasting time?
   - Consider the accused's right to a fair trial and the victim's right to privacy and dignity.
   - Determine whether the evidence will assist in a just determination of the case.
   - Remove discriminatory beliefs and biases from the fact-finding process.
   - Consider the implications of allowing prejudicial evidence on the reporting of GBVAWG offences in other cases.
5. Consider how to formulate the court's decision on admissibility of evidence to ensure debunking of these myths.
   - Consider referring to the history of rules requiring corroboration of the victim's account and noting why such rules perform no just function.
   - There is no need for credibility to be resolved only with physical corroborating evidence.
   - Be careful when applying the principle of *in dubio pro reo* in "he said she said" cases of GBVAWG that are surrounded by myths and gender stereotypes.

4. Incorporating a gender perspective into judicial decision-making

Incorporating a gender perspective in judicial decision-making requires judges to assess the facts in accordance with a careful understanding of the law, free from any gender biases and harmful gender stereotyping. This not only applies to the decision itself but also to the process by which the decision is made. This section covers issues around fact determination; interpreting the applicable law based on human rights standards in decision-making; legal reasoning and crafting judicial decisions.

4.1 Factual assessments/fact determinations

People, including "fact finders", such as judges and juries, tend to think in terms of stories that they are familiar with. Judges and juries often operate on the belief that the exclusive source of all certain knowledge is based on natural phenomena, from sensory experience and interpreted through reason and logic. This leads to assumptions that behaviour is "rational".

Judges and juries often apply stories they are familiar with to witness testimony in determining who to believe. It has been described this way: "[the fact-finder] converts evidence into familiar stories, filling gaps in the evidence where needed to craft a coherent tale. Whom [they] believe turns on the consistency of each witness's testimony with the plausible stories that [the fact finders] create based upon their pre-existing stock. These stock stories come from experience and culture, tales learned from the Bible, children's tales, television, radio, books, magazines and movies. Stories create our world of meaning; they are the lens through which we view all events in life. Many of these stories tend to channel the political and economic power that society most values to men and to privilege male perceptions of reality".[134] Research has found these patriarchal stories evident in trial transcripts, including stories about similarities and differences between the sexes in terms of motivations and needs, strengths and weaknesses; and stories presenting women as hypersexual or liars.

This has an impact on how judges assess evidence in decision-making and, in those countries with jury systems, how they instruct juries. Applying a gender perspective in the assessment of the facts is essential to ensure that analysing and weighing the evidence is not influenced by myths and stereotypes. As one scholar noted, "myths have more to do with fiction and generalizations than with reality and therefore are not compatible with factual assessments and judicial decision-making".[135]

Assessing the credibility of the victim

Myths continue to inform credibility assessments of the victim, from whether she behaved "rationally" at the time of the violence to how she comports herself during the criminal trial. Judges often look at what they believe is rational and "good choices" by complainants to inform assessments of credibility.[136] They ask questions which are based on a construction of the "ideal victim" at the time of the violence incident: did she make "good choices"? Was she drunk or otherwise leading a risky lifestyle? There is no recognition that behaviour is often "irrational". Actions were thus compared with hypothetical "normal" situations based on logic. Often the "rational" norm by which actions were measured is a myth or harmful gender stereotype. Aspects that are routinely portrayed as important in assessing a victim's credibility include whether the victim had a motive to lie; their emotional display; and any delay in reporting.

Examples of judicial reasoning crossing the line into myths and stereotypes

- In assessing the complainant's credibility, a trial judge found it necessary to point out "that the complainant did not present herself .... In a bonnet and crinolines".[a]
- A judge considered that the complainant had a motive to fabricate her allegations because she was facing the loss of her marital home and the obligation to pay an equalization settlement to the accused.[b]

[134] Andrew E. Taslitz, *Rape and the Culture of the Courtroom* (New York, New York University Press, 1999), p. 99.

[135] Claire L'Heureux-Dubé, "Beyond the Myths: Equality, Impartiality, and Justice", *Journal of Social Distress and the Homeless*, vol. 10, No. 1 (2010), p. 89.

[136] Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law", *Osgoode Hall Law Journal*, vol. 40 (2002).

- A judge relied upon the complainant's failure to try to escape the alleged assault or call for help and on the absence of physical injuries to the complainant.[c]
- A trial judge, speaking about a child's behaviour of not avoiding her stepfather between the ages of 11 and 16 years of age, during which time he sexually abused her over 50 times, stressed that "[a]s a matter of logic and common sense, one would expect that a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change of behaviour such as avoiding the perpetrator".[d]

[a] See Supreme Court of Canada, *R. v. Ewanchuk*, File No. 26493, Judgment, 25 February 1999, para. 88.
[b] Supreme Court of Canada, *R. v. J.A.*, File No. 33684, Judgment, 27 May 2011.
[c] Ibid.
[d] See Court of Appeal of Alberta, R. v. A.R.D., File No. 1603-0074-A, Judgment, 19 July 2017, para. 4.

Judges also assess the complainant's attributes, decisions and comportment that occurs when she is on the stand and during the criminal justice process more broadly: does she appear in court unkempt and disorganized? Is she too emotional? Is she responsive? Are her responses rational?[137] There is a belief that a "good" witness, that is, a credible witness, must answer all questions in calm manner and not rage against the unnecessary humiliation of a defence lawyer who takes his or her role of interrogation beyond justifiable limits.

Example where the judge's instruction to a jury relies on myths and stereotypes

"This is a case that essentially is going to depend on whether you believe what a witness is telling you … it is sometimes the case, not always, but sometimes, you can be assisted in evaluating what a witness is telling you by the manner in which they give it." This case illustrates the directions judges told the jury to use emotionality in their assessment of facts. This relies on the myth that women are "more emotional" than men, implying that unless they become hysterical nothing must have happened.

Source: Olivia Smith and Tina Skinner, "Observing court responses to victims of rape and sexual assault", *Feminist Criminology*, vol. 7, No. 4 (2012).

[137] Elaine Craig, "The Inhospitable Court", *University of Toronto Law Journal*, vol. 66, No. 2 (2016).

Table 23. Examples of assessing the credibility of witnesses

Myths	Negative interpretations	Good examples of debunking myths
Myth: an ideal victim would tell immediately.	Why did she not tell someone?	"Why did she not tell someone … that is a valid question … on the other hand you may think … when abuse takes place it is often hard to tell somebody … that is a comment I make."[a]
Myth: an ideal victim would resist and if she does not, women mean "yes" even when they say "no".	A court said "[i]nstances of women behaviour are not unknown (sic) that a feeble no may mean a yes".[b] The alleged victim told the court she stopped resisting out of fear she could suffer more harm.	Judges should recognize that there are powerful reasons why victims react differently when experiencing violence and that the failure of the victim to try to escape does not negate the existence of the violence.
Myth: a victim's credibility can be established by whether or not there was a "rational" motive to make false allegations.	Prosecution: You didn't need any extra money? Victim: No Prosecution: You didn't need to make a false allegation of rape. Defence asked several questions about the victim's finance (question about relevancy?)[c]	Judges should explain that the assumption that the victim had a "rational" incentive to lie, such as getting compensation, is unfounded and cannot be used to suggest her evidence cannot be trusted.
Myth: emotional reactions can be rationally assessed, and victims will "naturally" respond in similar ways.	"In relation to her later experience … [victim] was upset and agitated … does that sound like the sort of thing that [victim] might have made up, was she capable of making up".[d]	Judges should be aware that myths are not solely used by the defence to undermine victims but also by the prosecution to support victim credibility.

[a] Olivia Smith and Tina Skinner, "Observing court responses to victims of rape and sexual assault", *Feminist Criminology*, vol. 7, No. 4 (2012).
[b] Jumha Sen, "'A feeble no may mean yes': Indian court overturns rape conviction", 27 September 2017, available at https://jgu.edu.in/article/feeble-no-may-mean-yes-indian-court-overturns-rape-conviction.
[c] Olivia Smith and Tina Skinner, "Observing court responses to victims of rape and sexual assault", *Feminist Criminology*, vol. 7, No. 4 (2012).
[d] Ibid.

Focusing on the defendant's conduct and the violent incident

In cases involving GBVAWG, the focus in assessing the facts often shifts away from the violent incident and the conduct of the perpetrator to the conduct of the victim. The result is to downplay the defendant's conduct and responsibility while shifting the blame towards the victim. Judges should be aware that there are several common myths that have a negative impact when determining the facts and assessing the evidence around the violent incident itself and the conduct of the perpetrator.

Most perpetrators are known to their victims and most sexual assaults happen in a familiar place. This reality is obscured by a set of myths and misconceptions, including that gender-based violence is an anomalous event and the erroneous belief that it is not a common occurrence; the belief that the perpetrators are perverted, ugly, seedy or insane, a stranger, or what is seen as "the other"; the belief that most perpetrators are part of "the other", such as an ethnic or religious minority; as well as the assumption that "normal" men do not assault women. This intersects with the myth that GBVAWG is an anomalous and therefore uncommon event, implying that there must be a misunderstanding as to whether the violence occurred.

A related common misconception is that violence may result from miscommunicated romantic signals. A widely held belief is that a woman's "no" really means "yes" and that it is difficult for men to decipher what women really want. This wrongly implies that the perpetrator may be guilty of incompetent message-decoding, rather than gender-based violence, didn't mean to do it and is thus not guilty or entitled to lower punishment. Similarly, one survey revealed that 44 per cent of men and 32 per cent of females believed that rape results from men not being able to control their need for sex,[138] which wrongly implies that they are not fully responsible for their actions because it is not within their control.

Example of negative approaches in assessing the conduct of the defendant

"The sum of the evidence indicates that [the accused]'s advances to the complainant were far less criminal than hormonal. In a less litigious age going too far in the boyfriend's car was better dealt with on site—a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee."

Source: Supreme Court of Canada, *R. v. Ewanchuk*, File No. 26493, Judgment, 25 February 1999, para. 93.

Table 24. Example of challenges for judges in assessing "rational" behaviour

Consider the following quotes from court cases dealing with sexual violence.	
Defence: "Why didn't she call the police straight away?"	The victim's failure to act logically is held against her and treated as suspicious.
Defence: "He knew that the car was traceable to him … why would he be so stupid as to go on and rape the woman that he had been seen with only moments before?"	The perpetrator's failure to act logically is held in his favour.
Judge: "Why did she not tell someone … that is a valid question … on the other hand you may think … when abuse takes place it is often hard to tell somebody … that is a comment I make."	The importance of questioning assumptions and preconceived notions about rational behaviour is stressed.

Source: Olivia Smith and Tina Skinner, "Observing court responses to victims of rape and sexual assault", *Feminist Criminology*, vol. 7, No. 4 (2012).

[138] Natalie Taylor, "Juror Attitudes and Biases in Sexual Assault Cases", *Trends & Issues in Crime and Criminal Justice*, vol. 344, No. 1 (2007), p. 3.

Good practice – England and Wales judicial guidelines about directions to jury

In order to improve fact-finding in England and Wales, in sexual violence cases, the Judicial Studies Board has developed guidelines for judges about directions to jury. These directions include what have been called "myth-busters," which were designed to try and highlight some of the realities of rape in a balanced and informative way to help jurors look beyond the common stereotypes.

Source: Judicial Studies Board, *Crown court bench book: Directing the jury* (London, 2010).

4.2 Interpreting the applicable law – understanding the essential criminal elements

Written laws and judge-made laws (in countries that follow precedent) ought to be interpreted and applied by judges in such a way as to:

- Promote, rather than harm, the values of gender equality, autonomy and security of the person
- Discount myths and stereotypes about women and gender-based violence
- Be guided by international law and national laws which domesticate international obligations

While all forms of GBVAWG are human rights violations, this does not necessarily mean that they have been established as criminal offences in the domestic law of every State. Moreover, the scope, definition or elements of the relevant criminal offences vary between jurisdictions. It is beyond the scope of this handbook to review how the various forms of GBVAWG have been or should be criminalized in line with international standards, but additional resources are included in the annex for more information.

Judges are bound by applicable domestic law. However, examples from international and national case law show that it is inappropriate to do so based on preconceived notions of what constitutes elements of the legal definitions of GBVAWG crimes. When courts use myths and stereotypes they disconnect the law from contemporary knowledge. Some of the common concerns are discussed below but this should not be considered exhaustive.

Sexual violence offences

Many common rape myths lead to narrow interpretations of what counts as sexual offences and elements of the crime, irrespective how the crime has been defined. Some definitions of sexual offences require an element of force, whether this is framed as "against the will" or "by force or threat of force". A tendency among many judges is to interpret such terminology from the belief that "real rape" is perpetratored by a stranger involving force and causing physical injuries. This is based on myth that a women will always struggle to defend her honour. If these factors are not present, then there is often confusion as to whether this really was sexual violence.

Table 25. Examples from case law

Negative approaches	Positive approaches
Failure to take into account coercion that occurred a few hours before rape. A defendant slapped the victim (his former girlfriend) in the face, insulted her and forced her to get in his car. Then he drove her to his apartment and two hours later performed sexual intercourse with her. He was not physically violent at that time and did not threaten her. However, she did try to push him away and she told him that she did not want the intercourse. The Court acquitted him from the accusation of rape because the resistance of the victim was not "*permanent*" and she did not "*persist in her resistance*" and did not scream. Although the defendant was violent earlier that night, the Court concluded that this cannot be connected to later sexual intercourse due to the "*time gap*".[a]	**Threat, force and resistance regarding the crime of rape.** A threat is typically understood as every activity that hints of an immediate attack to the victim's or another person's life or body. However, it is sufficient for rape that the threat is manifested by some type of conclusive action, which exists when the defendant is using an environment of fear and violence that he created earlier. For example, where it was proved that a defendant was making death threats to a victim for almost two years before the rape occurred, at the time of the act, the Supreme Court of Croatia accepted that the victim was too scared to show him any resistance.[b] The Supreme Court pointed out that physical force is not the only way to break a victim's resistance and that psychological pressure is just as effective.[c] The Supreme Court stipulated that, although the victim did not show any resistance, "the resistance could be expected, if one takes into account other circumstances and that is sufficient evidence for the use of force".[d]
Requiring resistance from a 16-year-old girl when she was incapacitated by drugs. The victim was allegedly picked up outside of her school, plied with cocaine, gang raped for hours and then impaled on a wooden spike. The defendants washed and redressed the victim before leaving her at a rehab clinic. The van that dropped her off was traced back to defendant and used condoms, drugs, sex toys and ammunition were found. A three male judge panel acquitted the defendants, finding that the victim died of an overdose. They allowed the introduction of her past sexual history, and that there was no evidence of physical resistance.[e]	**The proof of resistance is irrelevant**. The Supreme Court of Croatia rejected a defendant's claim that the victim did not demonstrate any resistance: "she had no real chance to show any resistance and...the fact that she didn't demonstrate resistance is not relevant";[f] "if the victim didn't resist, court has to decide whether that is because resistance could put her in a worse position...if that is the case, pure verbal resistance prior to the event is sufficient";[g] "courts must evaluate the fact that sometimes resistance could expose the victim to even greater danger".[h]
	Defendant of rape who did not perform sexual acts. The defendant was accused as a perpetrator of rape because he forced the victim by beatings and knife threats to undress and have sex with another defendant (who meanwhile just sat and watched TV). After they were finished, he gave her a bottle and ordered her to masturbate in front of them. After that, he threw her out on the street naked. During the whole event, he did not directly participate in any of the acts of a sexual nature. However, the court found him guilty as a perpetrator of rape because he provided an essential contribution to the commission of crime.[i]

[a] County Court of Zagreb, Case No. K 229/08. See Ivana Radačić, "Rape Myths and Gender Stereotypes in Croatian Rape Laws and Judicial Practice", *Feminist Legal Studies*, vol. 22, No. 1 (2014), pp. 67-87.
[b] Supreme Court of Croatia, I Kž 259/14-4.
[c] Supreme Court of Croatia, I Kž 571/13-4.

Table 25. Examples from case law (*cont'd*)

[d] See e.g. following decisions of the Supreme Court of Croatia: I Kž 328/1999-3; I Kž 901/09-6; I Kž 502/16-4; I Kž 528/13-4; I Kž 286/14-4; I Kž 462/08-4; I Kž 375/1994-3; I Kž-349/1999-3; I Kž 571/13-4; I Kž 1070/06-3; I Kž 200/1992-3; I Kž 168/02-3.

[e] Case from Argentina decided November 2018 and discussed at the expert meeting in Vienna, 26-28 November 2018. See also *The Mirror*, "Drug rape and murder of 16 year old girl sparks widespread femicide protest in Argentina", 20 October 2016.

[f] Supreme Court of Croatia I Kž 1048/93-3.

[g] Supreme Court of Croatia I Kž 565/94-3.

[h] Supreme Court of Croatia I Kž 632/93-4.

[i] Supreme Court of Croatia, I Kž 920/07-6.

Table 26. "Wolf Pack" gang rape case in Spain

This case illustrates that judges listening to the same facts can arrive at different conclusions.

Negative approach	Positive approach
Requiring resistance in a situation of gang rape. A majority of the court upheld sexual abuse convictions for five men who attacked an 18-year-old woman but acquitted them of gang rape on the grounds that they did not use force. The court of first instance had held that the woman had not been raped since she had adopted "an attitude of submission and subjugation".	Two of the five judges dissented, finding that the defendants had committed gang rape. They described the attack as "an act of intimidation and coercion created by all of them, laying a trap for the victim given the near zero possibility she had of escaping". They also said the attack constituted rape not only due to the acts inflicted upon the victim, but also because she was left half naked on the ground while one of the men in the group took the memory cards out of the victim's phone.

Source: Independent, "'Wolf pack' sex attackers did not gang rape teenager, Spanish appeals court rules", 5 December 2018.

The updated Model Strategies and Practical Measures and the Committee on the Elimination of Discrimination against Women call for sexual violence offences to be based on lack of consent. This element provides the potential for a contextual analysis of the power relations within which sexual interactions unfold.

Consent may be defined in the criminal legislation or in case law and often uses the following: free agreement; free and voluntary agreement; or consent freely and voluntarily given. The criminal legislation may also prescribe some circumstances where consent is defined not to exist or, under certain circumstances, consent is deemed to be vitiated or the complainant is to be regarded as not consenting. This often includes lack of capacity to consent, including where the victim is asleep, unconscious or affected by drugs; the actual use of force, threatened use of force which need not involve physical violence or physical harm; unlawful detention; mistaken identity and mistakes to the nature of the act, including mistakes generated by fraud or deceit; and any position of authority or power, intimidation or coercive conduct.

In interpreting the elements of sexual violence offences, judges should look for agreement rather than relying upon acquiescence. Problems remain as to the ambiguity of the legal concepts and definitions of consent; determining the conditions or circumstances that are seen to negate consent; and the way in which a defendant's "honest belief" in consent is dealt with. Myths in these kinds of cases include the myth that women who have previous sexual experience are more likely to have consented. There are also difficulties of recognizing non-consensual sex between intimate partners.

Example of consent being conditional: the practice of "stealthing"

"Stealthing" is described as the act of non-consensual condom removal during sexual intercourse.

In Switzerland, the Criminal Court of Lausanne held the defendant guilty of rape after he removed a condom without permission during what had, up to that point, been consensual sex, and sentenced him to 12-month suspended sentence. On appeal, the Cantonal Court of Vaud found that while the sentence handed down was appropriate, the offence itself should be downgraded to "defilement".[a]

In Canada, the Supreme Court found a man who had tampered with a condom by poking holes in it without his partner's knowledge was guilty of aggravated sexual assault, and sentenced him to 18 months' imprisonment.[b]

[a] Corker Binning, "Stealthing, Consent and the Law: Are perpetrators protected?", 29 June 2017.
[b] Supreme Court of Canada, *R. v. Hutchinson*, File No. 35176, Judgment, 7 March 2014.

Intimate partner violence offences

Several countries do not have specific criminal offences for domestic violence, but rather use general criminal code provisions, such as physical assault, threats, defamation, and sexual offences, to cover violence that takes place in intimate partner relationships. The challenge for judges is that these offences generally focus on the latest single incident rather than encompassing the multiple incidents involved in the typical pattern of coercion and control.

Examples of judicial reasoning raising concern

The accused had broken into his estranged wife's house, found a gun and threatened her with it before putting it away, after it had accidently been fired. He had intercourse with her and argued that he had an honest but mistaken belief that she was consenting. Despite finding that the accused intended to scare his wife with the gun, the judge determined that in the accused's mind, this was not a factor in the sexual assault. He found that the accused's wife had led him to believe, by her words and conduct; she was consenting to the sexual intercourse.[a]

A trial judge found that an ex-husband who violently abducted his estranged wife and had sexual intercourse with her in the back of his van in a deserted gravel pit had a mistaken belief that she was consenting.[b]

A trial judge, in acquitting the accused husband, held that as between husbands and wives an implied doctrine of consent to sexual touching exists and that even proof that the wife said no and the husband knew she said no was not sufficient. "I am of the view that where a viable marital relationship exists, then it is not enough for the Crown to simply prove that the sexual conduct took place without the stated consent of the other party in order to secure a conviction for sexual assault by one marital partner against the other."[c]

In Mexico, a young lawyer, Grettel Rodriguez Almeida, was stabbed several times with a kitchen knife by her boyfriend, German Alyn Ortega Hernandez, and was rushed to hospital by her parents who heard her screams. The doctor sutured her wounds without anaesthesia to save her life. Her boyfriend confessed to attacking her. At his trial for attempted murder, the court found him guilty of aggravated assault, noting that since he was a cook and knew how to use a knife, if he had wanted to kill her he would have. After spending less than 1 year and 9 months in prison he was released. The boyfriend started harassing her via

Twitter and texts. Grettel appealed the decision to the Supreme Judicial Court which, after review, ordered the reinstatement of attempted murder charges.[d]

[a] Nova Scotia Provincial Court, *R. v. C.M.M.* See Elaine Craig, "Ten Years After *Ewanchuk* The Art of Seduction is Alive And Well: An Examination of The Mistaken Belief in Consent Defence", *Canadian Criminal Law Review*, vol. 13, No. 3 (2009).

[b] See Lucinda Vandervort, "Honest Beliefs, Credible Lies, and Culpable Awareness: Rethoric, Inequality, and Mens Rea in Sexual Assault", *Osgoode Hall Law Journal*, vol. 42, No. 4 (2004), p. 629, discussing the case of *R. v. MacFie*.

[c] Supreme Court of Canada, *R. v. R.V.*, File No. 33684, Judgment, 27 May 2011.

[d] OHCHR, "A case of domestic violence in Mexico: Grettel's quest for justice", 8 January 2013.

4.3 The judicial decision – gender-sensitive decision-making and crafting judicial decisions

Legal reasoning and decision-making

Judicial reasoning and fact determination in gender-based violence cases should be based on an understanding of gender equality. Such an approach contributes to protecting victims from the operation of myths and harmful gender stereotypes and assists in achieving substantive equality for women in their access to justice. Judges can play a leading role in moving judicial reasoning towards a more egalitarian approach to fact determination.[139]

The risk of harmful stereotyping arises when a trier of fact moves from proven fact to an inference about consent or credibility by way of a generalization. In fact, the underlying generalization may be misleading, discriminatory, and one that should be eliminated from the fact determination process before inferences are drawn. In this regard, judges should be aware that in cases involving GBVAWG there appear to be extreme interpretations of the standard and burden of proof.

Standard of proof. A high standard of proof is required to protect innocent defendants, which is typically "beyond reasonable doubt" or a comparable standard, depending on the jurisdiction. However, this only requires the absence of "reasonable" doubt, not absolute certainty or the absence of any doubt at all. By contrast, in cases involving gender-based violence, the applicable standard is often presented as having no doubt at all, and therefore almost impossible. Judges and juries thus need to remember and reiterate that beyond reasonable doubt requires the absence of "reasonable" doubt, not any doubt at all.

One study found that defence lawyers frequently ask courts or juries not to convict unless they are sure of the truth or 100 per cent certain, with no challenges from the prosecutor or the judge. As defence counsel has been known to say: "If you think there is any possibility, not probably lying or must be lying, but do you think there is ANY possibility … it's not saying to her that she's lying, it's just saying I'm not sure"[140] The way in which the standard of proof is defined can impact conviction rates. For example, a United States study explored the effect of varying "beyond reasonable doubt" definitions on mock murder trials and found that stronger definitions led to significantly fewer convictions when evidence was "weak".[141] This could affect GBVAWG trials in that evidence is often considered "weak" because such trials are frequently one person's word against another.

[139] Emma Cunliffe, "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?", *Supreme Court Law Review*, vol. 57 (2012).

[140] Olivia Smith and Tina Skinner, "Observing court responses to victims of rape and sexual assault", *Feminist Criminology*, vol. 7, No. 4 (2012).

[141] Irwin A. Horowitz and Laird C. Kirkpatrick, "A concept in search of a definition: The effects of reasonable doubt instructions on certainty of guilt standards and jury verdicts", *Law and Human Behaviour*, vol. 20, No. 6, pp. 655-670.

Burden of proof. It is often argued that due to the burden of proof being on the prosecution, doubt about the defendant is irrelevant and *any* doubt about the victim should result in acquittal. Ironically, this is particularly an issue in countries where the legislation has shifted part of the burden of proof to the defendant, such as the English 2003 Sexual Offences Act, which includes evidential presumptions about consent that defendants need to rebut. In general, there is a tendency to focus on the victim, putting their actions and evidence on trial rather than the defendant, and this may be encouraged by defence counsel arguing that the victim as the central witness in the case should be scrutinized. However, it is important to remember that the focus should be on assessing the credibility of the alleged act.

Research from England and Wales

A study on jury instructions concerning reasonable doubt found that while the 2003 Sexual Offences Act made the defendant accountable for proving consent, this was not mentioned in any of the judicial decisions studied, even where the victim feared violence because the defendant had a knife, and that the burden remained wholly on the prosecution in all trials. The defence therefore only needed to create doubt in the victim's story rather than belief in the defendant's evidence. The study raised two concerning issues:

i) Misapplication of the law on mistaken belief in consent. One example showed the closing arguments of the defence to a jury, stating that the law does not require the defence to provide an explanation as not being challenged by the judge.

ii) Shift of the focus on the victim, with judges reinforcing this tendency. For example, judicial summaries included directions such as "The burden of proving [the charges] rests on the prosecution throughout; it is not for [defendant] to prove his innocence".

Source: Olivia Smith and Tina Skinner, "Observing court responses to victims of rape and sexual assault", *Feminist Criminology*, vol. 7, No. 4 (2012).

Table 27. Considerations for judges when dealing with particularly challenging cases

Dealing with victim absent prosecutions	• In many cases of intimate partner violence, the victim is reluctant to cooperate and does not show up at the trial, recants or becomes hostile. (See part one regarding the complex reasons many women stay with their abusers). • This has led in some jurisdictions to evidence-based prosecutions or victimless prosecutions. • Judges are presented a variety of evidence with no or limited participation of the victim. Evidence can include emergency recorded calls and transcripts, child witness statements, neighbour witness statements, medical records, paramedic log sheets, prior police reports, restraining orders, videotaped/audio taped interview with the victim, and body camera videos. • The evidence is often complemented by an expert witness who can provide the judge with information as to the dynamics of domestic violence and help explain the reasons for reluctance. • Admitting out of court statements can be challenging depending on the rules in the judge's jurisdiction.

Table 27. Considerations for judges when dealing with particularly challenging cases *(cont'd)*

Challenges with non-lethal strangulation cases	• Non-lethal strangulation often causes no visible injury but impairs memory, which may compromise the accuracy and credibility of the victim's account. • This can result in many perpetrators being charged with or entering pleas to lesser offences.
Psychological intimate partner violence	• Cases involving psychological violence are challenging due to evidentiary issues, myths and harmful gender stereotypes, women's perceived lack of credibility and a tendency to view such violence as less serious than physical violence. • Psychological violence is intentional conduct that seriously impairs a person's psychological integrity through coercion or threats. • Some jurisdictions have introduced the criminal offence of "controlling and coercive behaviour in an intimate or family relationship". This typically requires the judge to find that the defendant's behaviour is repeated or continuous and has a serious effect on the victim. • Coercive control often involves micro-regulation of daily activities that are commonly associated with women's traditional roles as homemakers, mothers and sexual partners, or behaviours that may erroneously be associated with signs of love rather than abuse (e.g. jealousy and possessive behaviours). • Victims who have to give evidence in court may experience traumatic flashbacks, panic attacks or episodes of disassociation, and may come across as confused, disoriented or have an inability to maintain eye contact. The defence may argue that this compromises the victim's credibility. • Judges should consider calling in an expert witness who is trained to recognize controlling behaviour and trauma. • Judges should give appropriate weight to the victim's testimony, and her description of the serious impacts on her resulting from the violence.
Rape by deception	• Several countries criminalize sexual intercourse with a person having obtained that person's consent by use of fraud, concealment or artifice. This has been referred to as rape by deception or, in some countries, such as India, rape relating to false marriage promises. • Are courts required to determine when a consensual relationship has gone bad (right to sexual autonomy) or when sex is obtained through dishonesty? • Sex by deception is sex without consent, because consent obtained by deception, as courts have long and repeatedly held outside of rape law, is no consent at all. Deception always vitiates autonomy, including sexual autonomy.

	• Some courts have come to different conclusions regarding whether false promise of marriage vitiates consent. One held: "the failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact."[a] However, this case then goes on to describe the girl as promiscuous and places the blame squarely on her for having sex outside of marriage. • Judges need to consider the intention of the defendant.
The use of alcohol by victim and by accused	• In the context of intoxication it appears to be all too easy for the defendant to argue that the complainant had simply forgotten that she consented in advance. • The courts often use reasoning influenced by constructions of the ideal victim, relying on the belief that a woman who consumes alcohol is perceived as a "good time girl" and attributing to her responsibility for the ensuing sexual intercourse. • There is a double standard at play in the attribution of responsibility in contested sexual consent scenarios whereby intoxicated defendants tend to be held less responsible for subsequent sexual events than their sober counterparts while intoxicated complainants tent to be held more responsible.[b] • Judges need to consider that when a woman is drunk, she lacks the capacity to communicate a voluntary decision to consent. Such a lack of capacity would be obvious to all who see her, except the wilfully blind. There can be no honest mistake in this scenario.
Having sex with a sleeping woman	• Women in relationships are particularly vulnerable to being sexually assaulted while sleeping or otherwise incapacitated. • The hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent.[c] • If the complainant is unconscious during the sexual activity, she has no real way of knowing what happened, and whether her partner exceeded the bounds of her consent. How can the consent be revoked or the lack of compliance proved? The complainant cannot testify as to what happened while she was unconscious.
Interpreting consent in existing intimate partner relationships	• Sex can be complex and courts often do not want to "wade into the morass of ongoing sexual relationships".[d] • It is important to focus on the act itself – either there is or there is no consent to the sexual act. • This is to be determined based on direct and/or indirect evidence of the complainant's state of mind at the time of the alleged assault. • There is no implied consent. The characterization of consent is in the affirmative rather than the negative, stipulating that consent means indicating "yes" rather than not indicating "no".

Table 27. Considerations for judges when dealing with particularly challenging cases *(cont'd)*

Elopement versus kidnapping and illegal confinement	• In some cases, where a woman marries without the consent of her parents, the parents may initiate legal action against the man for abduction and illegal confinement or similar offences. Judges must be careful because they may be exposing the woman to risk of "honour"-based violence. • Judges should ensure that the testimony of the alleged victim is taken in privacy and without influence of her family.
Statutory rape case involving consensual sex between adolescents	• While there is variance between (and within) countries as to the legal age of sexual consent — and and this may also vary according to the sex of the child, and the sex act(s) involved — international standards provide that sexual activities are considered as violence when committed against a child by another child, if the child offender is significantly older than the child victim or uses power, threat or other means of pressure.[e] It should also be noted that the Committee on the Rights of the Child affirms that "sexual activities between children are not considered as sexual abuse if the children are older than the age limit defined by the State party for consensual sexual activities".[f] • When dealing with a cases of consensual sex between adolescents who are close in age, and where one or both children is below the legal age of sexual consent, the court should make full use of available options for diversion and non-custodial measures in line with relevant international standards, taking also into account the need for sexual education and information, and access to contraception. In such cases, children should be treated in a manner that promotes their well-being. Further guidance on the protection of the rights of children in justice settings is provided in the United Nations Model Strategies and Practical Measures to Eliminate Violence Against Children in the Field of Crime Prevention and Criminal Justice; and the Handbook for Professionals and Policy Makers on Justice in Matters Involving Child Victims and Witnesses of Crime.

[a] Rajasthan High Court, *Vishal Goyal vs State Of Rajasthan*, Petition No. 2232/2018, Judgment, 8 October 2018.
[b] Emily Finch and Vanessa E. Munro, "The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants", *Social and Legal Studies*, vol. 16, No. 4 (2007), p. 592.
[c] Supreme Court of Canada, *R. v. Easau*, File No. 25409, Judgment, para. 73.
[d] Elaine Craig, "Ten Years After *Ewanchuk* The Art of Seduction is Alive And Well: An Examination of The Mistaken Belief in Consent Defence", *Canadian Criminal Law Review*, vol. 13, No. 3 (2009).
[e] See Committee on the Rights of the Child, General Comment No. 13 (2011) on the right of the child to freedom from all forms of violence (CRC/C/GC/13), p. 10.
[f] Ibid.

Crafting gender-sensitive judicial decisions

Gender-sensitive judicial decisions are those framed in terms of women's equality, security interests and affirming women's autonomy and dignity. The judge should approach judicial decision-making by

analysing how to protect and or at least balance all these interests.[142] Some courts have developed the practice of citing feminist literature in cases involving GBVAWG. It is important that judges clearly provide legal reasoning as to how the laws have been interpreted, discussing how the international standards and norms as well as the myths, stereotypes and discredited assumptions are addressed.

Criminal laws cannot be applied in abstract. Judges need to set the context in their judicial decisions. This could include the history of biases reflected in laws and procedures and any concerns raised by advocates that might have led to legal reform. It could also include an analysis of the current realities of women, illustrated through statistics and research, as well as an emphasis on the need to interpret the laws in light of all these contextual factors and on the interests the law is seeking to protect.

Table 28. Elements of gender-responsive decisions

"Care must be taken to avoid the false assumptions or 'myths' that may mislead us … One of these is the stereotypical notion that women who resist or say no may in fact be consenting."[a]

"stereotypical assumptions lie at the heart of what went wrong in this case.… On appeal, the idea surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions … no longer … find a place in [this country's] law." [b]

"[E]liciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper."[c]

[*E*]*quality concerns* must … inform the contextual circumstances.… [A]n appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence.… The accused is not permitted to 'whack the complainant' through the use of stereotypes regarding victims of sexual assault.[c]

[a] Supreme Court of Canada, *R. v. Esau*, File No. 25409, Judgment, 10 July 1997.
[b] Supreme Court of Canada, *R. v. Ewanchuk*, File No. 26493, Judgment, 25 February 1999, para. 103.
[c] Supreme Court of Canada, *R. v. Osolin*, File No. 22826, Judgment, 16 December 1993.
[d] Supreme Court of Canada, *R. v. Mills*, File No. 26358, Judgment, 25 November 1999.

Gender-sensitive approach to a case of gender-related killing of women and girls

In Mexico, a landmark decision was issued in the case of Mariana Lima. She lived most of her short life married to a police officer in a state of fear, facing verbal insults and threats from her husband, escalating to physical violence until he murdered her. Days before her death, she decided to leave him and went to stay with her mother's home. She went back to the home to collect her things and she never returned. He phoned her mother to say Mariana had committed suicide. He used his position as a police officer to conceal evidence, provide false statements, directed the investigation towards suicide rather than homicide. After much lobbying by activists, the Supreme Court of Justice of Mexico took up the case. One and a half years later the Supreme Court issued a historic order in favour of the plaintiff, the mother. The order analysed the proceedings undertaken by each public servant involved in the case and revealed how the absence of a gender-sensitive approach had led to human rights violations of both Marianna Lima and her

[142] Jennifer Koshan, "Marriage and Advance Consent to Sex: A Feminist Judgment in R v JA", *Oñati Socio-legal Series*, vol. 6, No. 6 (2016).

mother. The court also issued legal protection for the mother. Eventually the husband was arrested, and the case set a precedent with standards for GRKWG investigations. The decision of the Supreme Court applied a gender-sensitive approach, in particular:

- The court identified the situation of power between the parties and found a power imbalance.
- The court challenged the facts and evidence, rejecting any gender stereotyping or prejudice in order to make visible the power imbalance.
- Based on the identified power imbalance, the court determined how gender-neutral law is applied differently to women in situations of power imbalance and whether the applicable law and procedures are biased against these women, pointing out the irregularities and obstructions to justice.
- Based on this analysis of the differential impact of the law, the court applied human rights standards, avoiding reliance on stereotypes.

Case studies on gender-sensitive judicial decisions

Marital rape

The following steps could be considered by judges:

Review the history and context of legal reform around marital rape. In many countries, marital rape has not been criminalized and in still some countries around the world men are still immune from criminal consequences for raping their wives. Historically, women were seen to have given up their entitlement to resist sexual relations with their husbands upon marriage. According to the implied consent theory, "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract".[a] Wives were seen as the property of their husbands, conferring an entitlement on the latter to sexually violate their wives with impunity.

Review the persistent myths around marital rape. Courts remain influenced by previous sexual behaviour to consider the likelihood that the victim consented to the incident subjected to criminal charges before them. Other frequent considerations include the alleged propensity of women to lie about rape to gain an advantage in divorce, matrimonial property or child custody proceedings and the importance placed on maintaining marital privacy and harmony. This feeds into the myth that that women are more likely to fabricate marital rape allegations in the event of a custody dispute. Another stereotype that feeds into unfair judicial decisions on marital rape include the mistaken believe that women are sexually passive and men are sexually aggressive.

Review applicable international law and the rights of the victim. The prohibition of discrimination based on sex or gender and the right to substantive equality before the law and freedom from gender-based violence are addressed in several international and regional conventions, standards and norms. Spouses have equal rights to be free from violence and free from the prejudicial ways that their complaints of such violence have been treated by legal actors historically. The complainant has the right to say no to sexual intercourse and to have that right respected.

Review the elements of the crime of rape. The element of consent does not include implied consent and should not be based on the past sexual relationships of husband and wife.

Advance consent to sexual activities that will occur while the wife is asleep or unconscious should not be considered valid without certain legal safeguards being put into place.

Rape by deception

In one case,[b] the High Court of Delhi raised concern about two observations made by the judge of first instance, namely "(i) The girls in such cases are mostly in the age group of 19-24 years, thus mature enough to understand the consequences of their acts and not so snub to get carried away with any representations of the boy. They voluntarily elope with their lovers to explore the greener pastures of bodily pleasure and on return to their homes, they conveniently fabricate the story of kidnap and rape in order to escape scolds and harsh treatment from the parents. (ii) The girls are morally and socially bound not to indulge in sexual intercourse before a proper marriage and if they do so, it would be to their peril and they cannot be heard to cry later on that it was rape". The High Court called these observations sweeping generalizations, not based on any evidence, and noted that the task of a judge is to analyse the facts and evidence appearing before them in an impartial and objective manner. It noted that, "in the case of gender issues, a Judge is supposed to be sensitive regarding key points, which inter-alia, would be as under:

(i) Though women and girls comprise more than half the population, they remain disadvantaged in many areas of life.

(ii) Stereotypes and assumptions about women's lives can unfairly impede them and may frequently undermine equality.

(iii) Care must be taken to ensure that our experiences and aspirations as women or of other women, are not taken as representative of the experiences of all women.

(iv) Factors such as ethnicity, social class, disability status and age affect women's experience and the types of disadvantage to which they may be subject.

(v) Women may have particular difficulties participating in the Justice system, for example, because of child care issues.

(vi) Women's experiences as victims, witnesses and offenders are in many respects different to those of men.

For this, Judges have to learn the language of equality and impartiality. The process of learning the language of equality may be slow, but a Judge has to encourage himself to learn the same. Otherwise, there will be no equality and therefore no justice."

In the words of Chief Justice Hilario G. Davide, Jr. in the foreword to the book 'Gender Sensitivity in the Court System' by Marcia Ruth Gabriela, it was noted: *It is disconcerting when the courts that are expected to be the paradigms of equality, themselves display gender insensitivity or gender bias. The effect is the same when the insensitive act is made not by a Judge or a court employee but by a lawyer appearing in the Court but who, nevertheless, receives no chastisement for the insensitivity. Often the offensive acts are unconsciously committed, but there are times when gender slurs are deliberately made. Culture may be the culprit in both instances.*

(emphasis supplied).

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[a] Sir Matthew Hale, *History of the Pleas of the Crown* (1736).

[b] High Court of Delhi, *Suo Motu Cognizance In Re: Order dated October 07, 2013 in SC No.34/2013*, File No. W.P. (C) 8066/2013, Decision, 19 December 2013.

CONSIDERATIONS FOR INCORPORATING A GENDER PERSPECTIVE INTO JUDICIAL DECISION-MAKING

Fact determination and interpretation of evidence

1. What was the context in which the facts took place?
   - Look at the dynamics of the form of violence: intimate partner violence; sexual violence; stalking; "honour"-based violence.
   - Identify situations of power between the parties. Is there a power imbalance?
   - Avoid shifting from a focus on the actions and state of mind of the accused to an interrogation of the victim's state of mind and what she did and did not do during the incident.
   - In assessing the credibility of victim, judges need to understand the context of gender-based violence, the effects of trauma on victims and the power dynamics that characterize such violence.

2. Does the behaviour that judges expect by the victim or defendant conform to myths or harmful gender stereotypes?
   - In assessing the facts, identify and expressly reject any myth or harmful gender stereotyping.
   - Make the power imbalance visible.

3. Can the judge assess the gaps in the evidence needed for a comprehensive fact assessment?
   - If the evidence is insufficient, in some jurisdictions, the judge has the power to order the prosecutor to produce further evidence.

Applicable law

4. Do the legal provisions reflect any myths or stereotypes about gender-based violence?
   - Do not apply existing legal provisions that discriminate against women. These may include provisions that allow, tolerate or condone forms of gender-based violence against women, including forced marriages; laws that exempt perpetrators from rape charges if they marry the survivor; laws that criminalize being lesbian, bisexual or transgender, engaging in sex work or adultery. Where necessary, rely on relevant legal provisions (e.g. constitutional and international law on non-discrimination) to justify non-application of discriminatory legal provisions.
   - If relevant laws have been reformed, appreciate the history and context of the reformed laws.
   - Do not allow extreme interpretations of procedural rules without challenging this in the courtroom.

5. In applying and interpreting the law, is it necessary to challenge the gender neutrality of the law?
   - Consider whether the law is biased against women.
   - Determine the differentiated impact of the law on women and men.

6. What is the relevant international law that can be applied?
   - Be aware of international law obligations to make informed and human-rights compliant decisions.
   - International law calls on States to ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual or psychological integrity, are criminalized and introduced, without delay, or strengthened

legal sanctions commensurate with the gravity of the offence, as well as civil remedies.[143]

- International law further calls on States to characterize sexual assault, including rape as a crime against women's right to personal security and integrity; criminalize marital and acquaintance/date rape; be based on lack of freely given consent and take into account coercive circumstances. Any time limitation, where they exist, should prioritize the interests of the victims and give consideration to circumstances hindering their capacity to report the violence suffered to competent services/ authorities.[144]

7. Look at case law (national as well as comparative from other countries, if possible) that promotes substantive gender equality, without condoning myths and harmful gender stereotypes.

Judicial reasoning

8. Apply an interpretation of the law that promotes substantive equality and is not based on myths or harmful gender stereotypes.
   - Reasonable doubt does not mean the absence of any doubt, and the presumption of innocence does not mean that doubt about the defendant should be ignored.
   - Identify and avoid judicial reasoning that is based on myths or harmful gender stereotypes.
   - Focus on proven facts rather than inferences by way of a generalization.
   - Before inferences are drawn, the question should be whether the underlying generalization is misleading, discriminatory, and one that should be eliminated from the fact determination process.
9. Crafting the judgment
   - Avoid language in judgments that uses or relies on myths or harmful gender stereotypes.
   - Use inclusive language.

5. The role of judges in sentencing

International standards and norms call for the recognition of the serious nature of GBVAWG for sentences that are commensurate with that seriousness.

Updated Model Strategies and Practical Measures

Provision 17 recognizes the serious nature of violence against women and the need for commensurate crime prevention and criminal justice response. It urges Member States:

(a) To review, evaluate and update sentencing policies and procedures in order to ensure that they:

(i) Hold offenders accountable for their acts related to violence against women;

(ii) Denounce and deter violence against women;

(iii) Stop violent behaviour;

(iv) Promote victim and community safety including by separating the offender from the victim, as well as from society where necessary;

[143] Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 (CEDAW/C/GC/35), para. 29.

[144] Ibid., para. 33.

(v) Take into account the impact on victims and their family members of sentences imposed on perpetrators;

(vi) Provide sanctions that ensure that the perpetrators of violence against women are sentenced in a manner commensurate with the severity of the offence;

(vii) Provide reparations for harms caused as a result of the violence; and

(viii) Promote the rehabilitation of the perpetrator, including a sense of responsibility in offenders and, where appropriate, reintegration of the perpetrator into the community.

(b) To ensure that their national laws take into account specific circumstances as aggravating factors for sentencing purposes, include for example, repeated violent acts, abuse of a position of trust or authority, perpetration of violence against a spouse or a person in a close relationship with the perpetrator, perpetration of violence against a person under 18 years of age.

(c) To ensure the right of a victim of violence to be notified of the offender's release from detention or imprisonment.

(d) To take into account, in the sentencing process, the severity of the physical and psychological harm and the impact of victimization, including through victim impact statements.

(e) To make available to the courts, through legislation, a full range of sentencing dispositions to protect the victim, other affected persons and society from further violence, and to rehabilitate the perpetrator, as appropriate.

(f) To develop and evaluate treatment and reintegration/rehabilitation programmes for perpetrators of different types of violence against women that prioritize the safety of the victims.

(g) To ensure that judicial and correctional authorities, as appropriate, monitor perpetrators' compliance with any treatment ordered.

5.1 Sentencing considerations

In determining the appropriate sentencing for cases involving GBVAWG, it is important for judges to determine the appropriate offence category, consider aggravating and mitigating factors, as well as to assess the dangerousness of the offender and the need for any additional orders. Formulating clear reasons is another crucial aspect of appropriate sentences.

Determine the offence category. Sentencing often starts with the categories of harm and culpability the offence falls into and the prescribed range of sentences. This includes considering the harm to the victim (e.g. severity of the psychological or physical harm, additional degradation, vulnerability of the victim) and the culpability of the offender (e.g. previous violence against the victim, abuse of trust, recording of the offence, offence motivated by the gender of the victim). Research shows that sentences imposed in GBVAWG cases vary greatly among countries, are inconsistent and often informed by discriminatory attitudes held by judges regarding victims of gender-based violence.[145] Studies have raised concern that sentences in cases involving GBVAWG are lower than other violence crimes. For example, a study in South Africa found that many of the sentences for rape deviated from minimum sentences prescribed and several them appeared to be quite inappropriate, such as giving correctional supervision and suspended sentences to men for rape.[146]

Consider aggravating factors. According to international standards, aggravating factors include repeated violent acts, abuse of a position of trust or authority, perpetration of violence against a spouse or a person in a close relationship with the perpetrator, and perpetration of violence against a person under

[145] UN Women, *Handbook for Legislation on Violence against Women* (2012), p. 49.

[146] Mercilene Machisa and others, *Rape Justice In South Africa: A Retrospective Study Of The Investigation, Prosecution And Adjudication Of Reported Rape Cases From 2012* (Pretoria, 2017).

18 years of age. A worrying trend in some countries is that violent crimes committed by strangers are considered more reprehensible than violence crimes committed by persons known to the victim,[147] which means that the fact that the crime was committed against a former or current spouse or partner is often considered as a mitigating factor. In cases where repeated incidents of intimate partner violence are common and, when the same penalty is applied for each assault, the deterrent effect is questionable. In the United States and some countries in Europe, more severe penalties for repeated incidents have proven to be effective.[148] Sanctions should be increased for repeated incidents of intimate partner violence regardless of the level of injury.

Consider mitigating factors. Judges need to avoid allowing for mitigating factors based on culture, religion or male privilege. While judges can consider mitigating factors in considering sentencing options, they should be careful to avoid perpetuating existing gender biases when considering factors such as absence of previous convictions or good character. Particular caution may be warranted in the following types of cases:

- Cases of a "first" offender of GBVAWG, who may receive their first criminal conviction, while it may not be the first incident of violence against the victim.
- Cases where the offender's previous good character has been used to facilitate the offence, which should rather be considered as an aggravating factor.
- Cases involving traditional apologies, pardons from victim's families or the subsequent marriage of the victim of sexual assault to the perpetrator, none of which warrants mitigation.
- Cases involving particular "types" of women, such as sex workers or non-virgins or involving so-called "honour" crimes, which do not justify lesser penalties.

Good practice from South Africa

In response to a situation where the Supreme Court was deviating from the mandatory minimum sentences for rape, the legislature passed a provision that provides: "when imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstance justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

(ii) An apparent lack of physical injury to the complainant;

(iii) An accused person's cultural or religious beliefs about rape; or

(iv) Any relationship between the accused person and the complainant prior to the offence being committed."

Source: South Africa, Criminal Law (Sentencing) Amendment Act, 2007.

Review the dangerousness of the offender. The legal framework in many countries enables the court to declare the defendant a dangerous offender, either on the court's own motion or on application by the prosecutor or any person interested in the criminal proceedings, typically after conviction for a sexual offence, but before sentence. In doing so, the court generally considers whether the defendant: (i) has more than one conviction for a sexual offence; or (ii) has been convicted of a sexual offence which was accompanied by violence or threats of violence; or (iii) has been convicted of a sexual offence against a child. This determination will require a hearing and allow the defendant to be heard.

[147] Amnesty International, *Submission to the Group of experts on action against violence against women and domestic violence (GREVIO) on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence in Finland* (2018).

[148] UNODC, *Handbook on effective prosecution responses to violence against women and girls* (2014).

Determine whether to make additional orders. In many jurisdictions, the court may issue orders for rehabilitation or intervention treatment programmes, as part of the sentence. Such programmes typically aim to prevent reoffending by perpetrators of sexual or domestic violence, by teaching non-violent behaviour in interpersonal relationships and other techniques to change violent behavioural patterns. Such programmes can be offered by prisons, probation offices or community organizations. Such orders recognize that simply removing a perpetrator from a situation does not address the real issue of re-victimization, either against the same victim or someone else. These types of orders as part of sentences focus on the changing of the behaviour of the perpetrator through rehabilitation which seeks to prevent him from repeating his violent behaviour.

In making these orders, judges should consider the following:

- The order should be part of a conviction that would be entered into the criminal record, rather than an alternative to a sentence.
- These programmes ought to require court supervision and court sanction if offenders do not satisfactorily complete the programme.
- Programmes should work within a gendered structural analysis of GBVAWG as opposed to a simplistic or individualized anger management paradigm and should be accredited with an organization that supports victim feedback as to whether the violence continues. Anger management classes do not provide safety for the victim because they do not address the underlying issues of power and control that are the root causes of gender-based violence.[149] In addition, they feed into the discredited belief that intimate partner violence is uncontrolled anger, thereby minimizing the patterns of coercion and control.
- Victim safety should be the priority in any such programme. This means consulting victims at the time the assessment is done, when the options for rehabilitation are being considered, as well as in connection with ongoing risk assessments, and informing the victims of all post-trial decisions.
- Service providers for victims have emphasized that such programmes should be considered and delivered only as part of an integrated response to GBVAWG. Where limited funding is available, services for victims should be prioritized over programmes for perpetrators.

Minimum standards for any intervention programme	
Characteristics of gender-sensitive rehabilitation treatment programmes include:	
•	Adequate funding
•	Trained staff to ensure timely monitoring and immediate enforcement
•	Accredited with an organization that supports victim feedback as to whether the violence continues
•	Committed to working within a gendered structural analysis of violence against women as opposed to a simplistic or individualized anger management paradigm
•	Commitment not to engage in any relationship counselling or mediation
•	Undertaking an appropriate suitability assessment of perpetrators prior to acceptance in the programme
•	Ongoing risk assessment with the safety of victim the priority

Source: UN Women, *Handbook for National Action Plans on Violence against Women* (2012).

[149] Praxis International, *St. Paul Blueprint for Safety* (2010).

Determine appropriate sentences and formulate clear reasons. Appropriate sentences should be effective, proportionate and dissuasive. Studies have shown that judges should consider more intrusive dispositions (incarceration, work release, electronic monitoring and conditioned probation) rather than less intrusive sentences, such as fines or suspended sentences without probation, in cases involving GBVAWG.[150]

Particular concerns arise in cases of intimate partner violence. On the one hand, it has been noted that the imposition of a fine as a sentence does not reflect the gravity of such an offence, is not a sufficient form of punishment to change the behaviour of the perpetrator and can have the potential effect of burdening the victim.[151] If payment of a fine is ordered, due account shall be taken of the ability of the perpetrator to assume his financial obligations towards the victim and children. When fines are imposed they should be combined with treatment and supervision of the perpetrator through probation. On the other hand, the range of sentencing options for crimes involving intimate partner violence may be seen as too restrictive in countries where a conviction equals imprisonment. This can have consequences for the victim who relies on the perpetrator economically and socially. A study from Southeast Asia found that a reason for reluctance in reporting and participating in the criminal cases involving intimate partner violence is the concern that the perpetrator will receive a sentence of imprisonment as well as a tendency to "down-criminalize" the offence by enforcement agencies.[152]

The need to monitor sentence execution to ensure protection of victims

The European Court of Human Rights (ECHR), in the case of Branko Tomašić and Others v Croatia (2009), dealt with the situation where the applicants were the relatives of a mother and her baby whose husband/father had killed both them and himself one month after being released from prison, where he had been held for making death threats against them. He was originally ordered to undergo compulsory psychiatric treatment while in prison and after his release, as necessary, but the appeals court ordered that his treatment be stopped on his release. The ECHR held that there had been a violation by the State because of the authorities' lack of appropriate steps to prevent the deaths of the child and his mother. The court found, in part, that the court's judgment ordering compulsory psychiatric treatment had not provided sufficient details on how the treatment was to be administered and that the perpetrator had not been examined immediately before his release from prison in order to assess whether he had posed a risk of carrying out his death threats once free.

Examples of negative approaches in sentencing for different forms of GBVAWG

The majority of the Supreme Court of Appeal of South Africa reviewed an appellant's sentence of life imprisonment, who had been convicted of rape. The victim had sat in a bar with the appellant, whom she did not know, while she waited for her friend. When the victim tried to leave, the appellant forced her into a hotel room and raped her. When left alone, the victim jumped out of the second floor window to try to escape but landed where the appellant was drinking with friends. He forced her to return to the room, raped her multiple times over the course of the night and hid her clothes so she could not run away. The majority of the Supreme Court took the view that when the trial court imposed the compulsory minimum sentence of life imprisonment, it had not taken into account

[150] UNODC, *Handbook on Effective Prosecution Response to Violence against Women and Girls* (2014).
[151] Eileen Skinnider, *Towards Gender-Responsive Criminal Justice: Good Practices from Southeast Asia in responding to violence against women* (Thailand Institute of Justice, 2018).
[152] Ibid., p. 96.

compelling circumstances, including the appellant's relative youth (he was 29 at the time of the offence), the fact that it was his first offence and that he was employed at the time. The minimum sentence was quashed and he was sentenced to 16 years' imprisonment instead. Only one judge dissented, stating that this was the kind of rape case that legislators had in mind when introducing the minimum sentence.[a]

In one case where the judge convicted the defendant of sexual assault, he found as mitigating factors that the complainant provoked the assault because she was, outside a bar, "made up", and dressed in a tube top with no bra on and high heels. The judge found that "sex was in the air" and that the defendant was a "clumsy don juan".[b] The defendant and the complainant, a much younger and smaller aboriginal woman, had known each other for about 20 minutes before the assault occurred. She had rebuffed his sexual advances; picked up a stick to use in self-defence; and asked him during the assault if he was going to kill her. She had bruises on her backside and legs as well as cuts from running through the forest half-dressed following the assault. Yet even after making these findings and rejecting the defences of consent and mistaken belief in consent, the judge was obviously of the view that the complainant bore some responsibility for what had happened.

In one case involving intimate partner violence and non-lethal strangulation, a judge sentenced the offender to 14 days' house arrest for assault. The judge downplayed the strangulation, deciding it only happened for a brief period and the women was not injured; treated the perpetrator, who was a police officer, as the victim, citing the case's slow movement through the legal system (not mentioning how this may impact the actual victim); categorized domestic violence as a private matter by saying the attack happened at the home and that the offender was not a danger to the public; and demonstrated a lack of understanding of trauma for the victim.[c]

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[a] Supreme Court of Appeal of South Africa, *MK Nkomo v The State*, Case No. 979/2013, Judgment, 26 November 2014.
[b] Manitoba Court of Queen's Bench, *R. v. Rhodes*, Transcript of Proceedings, 18 February 2011.
[c] Supreme Court of Newfoundland and Labrador, *R. v. Lockhart*. Case discussed at the expert meeting in Vienna on 26-28 November 2018. See also CBC, "Courts failing to fight male violence against women", 8 April 2017.

Sentencing guidelines

One practice that responds to the low punishment rates for GBVAWG is for the judiciary to follow sentencing guidelines that call for thorough, standardized, consistent sentencing of perpetrators, to ensure that other efforts to protect victims are not significantly undermined. In order to improve consistency of sentencing with the gravity of the crime committed, some countries have introduced sentencing guidelines. For example, in the United Kingdom, sentencing guidelines on sexual offences were issued in 2013 and have been regularly updated since then. (Sentencing Council, *Sexual Offences Definitive Guideline*, https://www.sentencingcouncil.org.uk/publications/item/sexual-offences-definitive-guideline).

5.2 Reparations considerations: placing the victim and her needs at the centre of the process

An aspect of sentencing that is often not fully utilized is the possibility of requiring the perpetrator to make reparations, including compensation and restitution to the victim. However, an increasing number of countries are enacting legislation that allows for such awards in criminal cases. Where this is not yet the case, judges can be creative and consider encouraging civil suits in which their findings can be used to determine reparations.

Reparations cover two aspects: procedural and substantive.[153] Procedurally, the process by which arguable claims of wrongdoing are heard and decided by the judiciary need to be victim-centred, available, accessible and adaptable to the specific needs and priorities of different women and girls. Substantively, remedies consist of the outcomes of the proceedings and, more broadly, the measures of redress granted to victims. This includes reflecting upon effective ways to compensate victims for harms suffered.

There are many forms of reparations. In addition to restitution and compensation, they may include public acknowledgement of the facts and acceptance of responsibility, prosecution of perpetrators, restoration of the dignity of the victim through various efforts, as well as guarantees of non-repetition. Reparations are not mutually exclusive and should ensure that remedies are holistic. The notion of reparation may also include elements of restorative justice. However, this needs to address the pre-existing inequalities, injustices, prejudices and biases or other societal perceptions and the practices that enabled GBVAWG to occur (see below section 6.3 on restorative justice).

In making an order for reparations, including restitution and compensation, judges could consider the following guidelines:

- Reparations should be proportionate to the damage caused by the violence.
- Compensation should never be a substitute for other penalties, such as imprisonment or community service.
- Restitution and financial compensation for harms done to the victim should be prioritized ahead of fines and penalties and should not preclude the victim from pursuing civil or other remedies.
- The calculation of the harm to the victim and the costs incurred as a result of the violence should be defined as expansively as possible and aim to be transformative, meaning that it redresses inequalities that made her vulnerable to violence, rather than simply returning the victim to the position in which she was prior to the violence.

Considerations when assessing physical and psychological harm or damage
• The loss of reputation or dignity, pain and suffering and emotional distress, loss of enjoyment of life
• The lost opportunities including employment, pension, education and social benefits, including loss of earning potential
• Damages that take full account of the victim's unremunerated domestic and caring activities
• Damages that take full account of the situation of the girl victim, including costs of social and educational recovery/reintegration
• Expenses for legal, medical, psychological and social services
• Actual costs of seeking justice and other services as a result of or related to the experiences of violence, including transportation

Source: UN Women, UNFPA, WHO, UNDP and UNODC, *Essential Services Package for Women and Girls Subjected to Violence: Core Elements and Quality Guidelines* (2015), Module 3 Justice and Policing.

[153] Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (A/HRC/14/22), paras. 12-85.

5.3 Sentencing hearing practices

Conducting sentencing hearings can ensure that all relevant information is before the court, which contributes to consistent and commensurate sentencing.

Sentencing hearing checklist. It is useful for the judiciary to have checklists for the types of relevant information that should be considered for a sentencing hearing. There are some common considerations in GBVAWG cases that could be contained in sentencing checklists, such as the inappropriateness of considering fines, since they may negatively impact victims, as well as the issues of restitution, reparations and compensation.

Elements for a sentencing hearing checklist

•	Victim impact statements
•	Risk assessment of offender dangerousness at the time of sentencing
•	Information on the nature and gravity of offence
•	History of abuse, both towards the victim and others
•	Previous efforts at rehabilitation
•	Defendant's character
•	Current rehabilitation needs
•	Any aggravating factors

Source: UN Women, UNFPA, WHO, UNDP and UNODC, *Essential Services Package for Women and Girls Subjected to Violence: Core Elements and Quality Guidelines* (2015), Module 3 Justice and Policing.

Enable the participation of victims at sentencing hearings. Providing the opportunity for victims to tell the court about the physical and psychological harm and victimization on them and their family allows the court to take the severity of the harm and the impact of victimization into account for the purposes of sentencing.[154] The victim's participation could be ensured through a broad range of methods that suit the individual needs of the victim, such as a written or oral victim impact statement provided by the victim or a victim impact report prepared by experts, such as social workers.

Victim impact statements. As one court noted, a victim impact statement "can form an integral part of the last phase of the trial. It is essential for the court in arriving at a decision that is fair to the offender, victim and the public at large. It serves a greater purpose than contributing only to the quantum of punishment. It generally gives the sentencing court a balanced view of all aspects, in order to impose an appropriate sentence. It accommodates the victim more effectively, thus giving her or him a voice and the only opportunity to participate in the last phase of the trial. Moreover, the [victim impact statement] gives the victim the opportunity to say in her or his own voice how the crime has affected him or her. This is particularly so where no expert evidence is led by the State to indicate the impact of the crime on the victim."[155]

[154] Updated Model Strategies and Practical Measures, provision 17.
[155] Supreme Court of Appeal of South Africa, *Mhlongo v The State*, Case No. 140/2016, Judgement, 3 October 2016, para. 22.

Example of a court highlighting victim-centredness of sentencing hearings

In a judgment on a murder and rape case, a Supreme Court stressed that

"[a]n enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognized and sought to be addressed through a number of declarations, the most important of which is the United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasize that a crime is more than the breaking of the law or offending against the State – it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values, namely human dignity. It enables us, as well, to vindicate our collective sense of humanity and humanness. The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice the court will have an opportunity to truly recognize the wrong done to the individual victim.

"... By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality, rather than harshness. Furthermore, courts generally do not have the necessary experience to generalize or draw conclusions about the effects and consequences of a rape for a rape victim. As Muller & Van der Merwe put it:

> 'It is extremely difficult for any individual, even a highly trained person such as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of sexual violence may have experienced. Each individual brings with himself or herself a different background, a different support system and, therefore, a different manner of coping with the trauma flowing from the abuse.'"

Source: Supreme Court of Appeal of South Africa, *State v Matyityi*, Case No. 695/09, Judgment, 30 September 2010, paras. 16 and 17.

6. Other considerations for judges

6.1 Harmonizing criminal court proceedings with other legal matters

International standards urge States to ensure that their laws, procedures and practices complement and are consistent with the criminal justice systems, response to GBVAWG and that civil law decisions

reached in marital dissolutions, child custody decisions and other family law proceedings for cases involving domestic violence or child abuse adequately safeguard victims and prioritize the best interests of children.[156]

While this handbook focuses on the judicial involvement in criminal cases, it is important to recognize that judicial proceedings should treat GBVAWG as a holistic legal problem, as criminal, civil and family law problems are inter-related. Criminal judges should be aware that women and girls subjected to violence, who might have sought justice through the criminal justice process or who have triggered the criminal justice system involvement by seeking help from the police to stop the violence, may also be involved in other legal proceedings. Other legal proceedings could include applications for protection orders, personal injuries claims or family court filings for divorce, child custody and support. Women who report violence in the home may also have to deal with child protection or welfare systems or trigger the involvement of immigration agencies if their immigration status is attached to their husband's.

Women who are involved in different domains of legal proceedings face a number of difficulties. A key challenge is each system's differing objectives, procedures and timing.[157] If family courts are not aware of existing criminal protection orders or conditions of pre-release, their orders regarding child custody and access may be incompatible to the criminal court decisions and may not take into account the level of risk to the women. Other challenges specifically affect girls, who may be involved in both the criminal and child protection systems, and include concerns over not allowing children to act as witnesses or that their evidence is not given due weight in light of their age and level of maturity. Women who are foreign nationals face challenges participating in the criminal justice system when their residence permits are derived from their spouse.

The different legal domains may have different definitions and understandings of GBVAWG. For example, the criminal justice system in many countries interprets intimate partner violence in terms of actions, emphasizing the physical, whereas the family and child protection systems consider patterns of behaviours and the implication of those patterns. This makes the consistent interpretation of information and coordinated action across legal systems a challenge.[158]

Divergences in criminal and other legal proceedings concerning GBVAWG lead to secondary victimization and ineffective justice responses. Families may be required to attend multiple hearings on different days, in potentially different court locations. The victim is required to tell her story to different courts multiple times. Victims are often confused about the different processes and different protection measures of each court system, may worry about what should be said in family court which may impact the criminal process. Each court is likely to only have a partial view of what has occurred. This results in court decisions that may not appreciate the full situation as well as inconsistent orders being made from the different courts. There is often no case management system within these different justice systems.

Judges may find the following guidance useful:

- In the initial assessment of a criminal case, determine if there are any other legal actions and screen for safety.
- Initiate direct communications with the other judge(s) involved in the concurrent and related proceedings. The purpose of such communications is more efficient coordination

[156] Updated Model Strategies and Practical Measures, provision 14(d).

[157] Canada, Department of Justice, *Making the Links in Family Violence Cases: Collaboration among family, child protection and criminal justice systems, Report of the Federal-Provincial-Territorial Ad hoc Working Group on Family Violence* (2013).

[158] Linda C. Neilson, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, family, child protection) A Family Law, Domestic Violence Perspective* (Department of Justice Canada, 2013).

and not discussing the merits of the proceedings. Judicial communication needs to be conducted in a manner that affords procedural fairness to all parties.

- Consider holding a joint management/resolution conference with the other court involved to manage both processes effectively. Common issues to discuss could include consistent approaches to safety and risk assessment, as well as coordination of the processes. It could provide the opportunity for all involved: judges, parties and lawyers to discuss solutions that could work within the context of both the criminal and family law systems. Any discussions need to safeguard the rights of the defendant and the victim.
- Propose other models, such as coordinated court models or specialized integrated family violence courts that deal with civil and criminal matters.

6.2 Dealing with women victims as defendants

International standards and norms urge States to enable courts to take into account, during the prosecution and sentencing, claims of self-defence by women who have been victims of violence, particularly in cases of battered woman syndrome.[159] Given the complex nature of GBVAWG, particularly intimate partner violence, female victims may find themselves in the criminal justice system as the person charged with or convicted of assault or murder as a result of hitting back in retaliation or in self-defence. These victims can suffer unwarranted consequences, including jail time and possible loss of custody of their children. This also has broader consequences, as victims who are arrested and charged after a domestic violence incident are far less likely to report violence again and more likely to remain in a dangerous situation.

Women who report violence to the police may also trigger a criminal investigation into their own behaviour, particularly in jurisdictions where it is a crime to engage in prostitution, adultery or other offences of "immoral conduct". Where these are criminal offences and rape is not clearly defined in the criminal code, victims of rape may be detained and imprisoned, for example on charges of "adultery" or "fornication", leading to their further victimization. Under such laws, women and girls are also imprisoned for running away from home, often trying to escape forced and child marriages or intimate partner violence.[160]

While a full discussion of how to deal with women victims as defendants is beyond the scope of this handbook, two useful approaches are highlighted: (1) understanding the situation of battered woman syndrome; and (2) determining the predominant aggressor when there appears to have been mutual violence.

Battered woman syndrome

"Battered woman syndrome" has been described as a psychological condition involving a pattern of behaviour that develops in victims of intimate partner violence as a result of a serious, long-term abuse. Victims become so depressed, defeated and passive that they believe they are incapable of leaving the abuser. The related theory of "learned helplessness" was originally developed in the 1970s and adopted by Lenore Walker to explain why women find it difficult to leave a violent relationship.

Studies of battered women have found rates of post-traumatic stress disorder ranging from 31 to 84 per cent.[161] Based on evidence and advocacy, battered woman syndrome has been recognized by

[159] Updated Model Strategies and Practical Measures, provision 15(k).
[160] UNODC, *Handbook on Women and Imprisonment* (2014), p. 123.
[161] United States of America, Department of Justice and Department of Health and Human Services, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report responding to Section 40507 of the Violence against Women Act* (1996).

some courts and in some countries' legislation. The updated Model Strategies and Practical Measures stipulate that battered woman syndrome is suffered by women who, because of repeated violent acts by an intimate partner, may suffer depression and be 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.

Judges may consider that battered woman syndrome is an indication of the defendant's state of mind in assessing the defence of self-defence (e.g. the syndrome meant that she was acting as she had a reasonable fear of imminent danger) or may consider it a mitigating circumstance. However, there has been some controversy about courts using the term battered woman syndrome, as it can be imprecise, misleading and stigmatizing, and because the knowledge pertaining to battering and its effects does not rest on a singular construct, as the term implies.

Criticism of the term battered woman syndrome

The New Zealand Law Commission in reviewing this issue preferred to avoid using the term battered woman syndrome and instead called it "expert evidence on domestic violence":

New Zealand courts currently admit expert evidence on what is referred to as battered woman syndrome in relation to a number of defences. Such expert evidence covers a broad range of issues concerning the psychological, social and economic aspects of domestic violence. In their view this evidence should continue to be admissible. However, they would prefer to avoid using the term battered woman syndrome and instead call it "expert evidence on domestic violence". Under the proposed Evidence Code, expert evidence is admissible where it is relevant and substantially helpful. While relevant expert evidence about domestic violence will vary from case to case, depending on the facts, expert evidence that is likely to be relevant and substantially helpful may include the following:

- *Evidence concerning the behaviour of battered women – for example, a tendency to keep the violence a secret and to remain in relationships, even when they are severely battered. This sort of evidence is likely to be counter-intuitive and could be used to support credibility where there is no independent evidence of battering or of the severity of the battering.*
- *Research on the patterns of violence in battering relationships, the social and economic factors that affect battered women, the psychological effects of battering and separation violence. This may help to explain why the woman remained in the relationship or thought she had no alternative to using lethal force.*
- *Evidence concerning the battered defendants' appraisal of the danger they are in. Intimate partners generally learn to read the subtle nuances of each other's behaviour more clearly than outsiders, and battered spouses (like prisoners of war or hostages) have a great incentive to learn to read their abusers' behaviour accurately.*

To ensure the relevance of the expert evidence, a factual foundation linking the expert evidence to the circumstances of the particular case would need to be established. Thus, there would have to be evidence before the fact-finder from which it could conclude that the alleged abuser had battered the defendant. There would also have to be evidence before the fact-finder from which it could conclude that the particular social, economic and psychological factors that were the subject of expert evidence were relevant to the particular defendant. For example, expert evidence on the economic factors that typically affect battered women would not be relevant if the defendant was financially independent. Those qualified to give such expert evidence would differ, according to the nature of the evidence. Under the Evidence Code, evidence that does not concern psychological matters could be given by someone with expertise in the social issues surrounding domestic violence, rather than a psychologist or psychiatrist.

Source: New Zealand Law Commission, *Battered defendants: victims of domestic violence who offend: a discussion paper* (2000), available at http://www.nzlii.org/nz/other/nzlc/pp/PP41/PP41-2_.html.

Dealing with self-defence and battered woman syndrome in court

Judges have navigated legal barriers to sentence women who are defendants but victims at the same time. In Uganda, many judges have applied criminal service (non-custodial sentences) even in cases where women are charged with murder as long as there is proof that they were victims of violence. In a case of a daughter charged with the murder of her father, where the father raped her from childhood until adulthood, sired children with her and infected her with HIV, the judge sentenced her to remain in custody until the rising of the court.[a] In a case where a husband took a teenage girl as a wife, continuously beat her, infected her with HIV, and committed adultery with her sister, the judge stated that such a woman needed rehabilitation as opposed to a custodial sentence. She sentenced her to serve approximately 210 hours of community service. (The wife had been charged for murdering her husband.)[b]

The Supreme Court of Canada accepted battered woman syndrome as a defence. The court recognized the following as central elements of domestic violence in a criminal law context: the imbalance of power "wherein the maltreated person perceives himself or herself to be subjugated or dominated by the other"; the dependency and lowered self-esteem of the less powerful person; the periodic, intermittent nature of the associated abuse; the clear power differential between battered women and batterers that combine with the intermittent nature of physical and psychological abuse to produce cumulative consequences.[c]

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[a] High Court of Uganda at Masaka, *Uganda v NA*. See Commonwealth Secretariat, *Judicial Bench Book on VAW in Commonwealth East Africa* (2017), p. 194ff.

[b] High Court of Uganda at Kampala, *Uganda v Lydia Draru Alias Atim*. See Commonwealth Secretariat, *Judicial Bench Book on VAW in Commonwealth East Africa* (2017), p. 170ff.

[c] Supreme Court of Canada, *R. v. Lavallée,* File No. 21022, Judgment, 3 May 1990.

Victim resistance violence and the predominant aggressor analysis

Women targeted repeatedly by intimate partner violence can and do become violent as a result. This is referred to as the phenomenon of "victim resistance violence". There can be cases where, although the woman resisted the continuation of the violent relationship with her own violence, the male partner exercised dominance, control and determined the timing of the onset of the pattern of violence in the relationship. In addition, some perpetrators are highly manipulative and learn how to set up their partners to engage in violent action. The judge needs to consider patterns and effects over time rather than focusing exclusively on the last incident to avoid erroneous conclusions about responsibility.

Different situations may trigger women to use violence without being the primary aggressor. They may respond to a perception of imminent threat of physical violence or to respond to psychological harm. They may also use violence that is associated with the inability to withstand the growing tension in the relationship and a desire to "just get it over with" (see the cycle of violence discussed in part one). Violence may also be used to resist the dominant aggressor or to attempt to escape the relationship.

In cases where the defendant has been a victim of gender-based violence, judges need to ensure that they have all relevant information, including the social context in which the defendant experienced the gender-based violence. In cases of dual arrest, judges should require the prosecutor to provide evidence showing which party is the predominant aggressor. It is important to assess all the evidence to fully understand each person's use of violence within the context of their relationship. The following questions can help determine which party was the predominate aggressor and who was the victim or whether the violence by the defendant in this case was coercive or resistance violence:

- Look beyond the current incident and get information about the complainant's and the defendant's entire relationship.
- What has been the pattern of abuse and violence throughout the relationship?

- Is the defendant the one who holds the balance of power in the relationship? For example, who is in control of the finances? Who has dominated the relationship?
- Who controls decision-making, such as choice of friends, decisions about clothing and appearances, decisions about types and frequency of sex?
- Who initiated the violence at the outset?
- Is there evidence of coercion and control in the relationship?
- Was the violence committed out of fear, anger, controlled?

Judges may find the following guidance useful:

- Appreciate that a review of the evidence in intimate partner violence cases that is limited to a singular or the most recent incident can make acts of resistance violence appear to be mutual violence or even coercive violence.
- Thoroughly assess violence in its social context and in the context of the pattern of power and control over the course of relationship, to be able to identify forms of resistance violence.
- Use the dominant aggressor analysis to determine if the violence was resistance violence.
- Determine if the resistance violence was used in self-defence.
- Resistance violence which includes initiating violence will often fall outside the legal definition of self-defence. In these cases, consider the defendant's situation as a mitigating factor during sentencing.

6.3 Issues around restorative justice

Restorative justice is an approach to justice that focuses on addressing the harm caused by crime while holding the offender responsible for his actions, by providing an opportunity for the parties directly affected by the crime, including victims, offenders and the community, to identify and address their needs in the aftermath of the crime. There are different models of restorative justice programmes that the judiciary may be involved in. Court-based programmes can take place at various stages in the criminal justice process, either before entering a guilty plea, after a guilty plea but before sentencing or at sentencing. These models include sentencing circles, victim-offender mediation and victim-offender reconciliation programmes.

Dangers of restorative justice in cases of GBVAWG. Studies that show that these practices can create circumstances where the victims are likely to be re-victimized, intimidated and abused by the perpetrator. International and regional standards prohibit mandatory mediation or conciliation in cases of GBVAWG.[162] Some jurisdictions, particularly in Latin American countries, have gone even further and prohibited mediation or conciliation in all cases of violence against women or domestic violence.[163]

Judges should be aware of the dynamics of GBVAWG, particularly the history of power and control in intimate partner violence situations, where the victim is not only in an unequal position of power but has been traumatized, including psychologically. Mediation should never be considered if there is a big gap in power between the victim and the perpetrator. The main concern is for the safety of the victim, particularly in a situation of power imbalance. This unequal

[162] See, e.g., Commission on the Status of Women, Agreed conclusions on the elimination and prevention of all forms of violence against women and girls (E/2013/27, chapter I.A(g)); Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), article 48.

[163] Second Follow-Up Report on the Recommendations of the Committee of Experts of the Follow-up Mechanism to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (2014), available at http://www.oas.org/en/mesecvi/docs/MESECVI-SegundoInformeSeguimiento-EN.pdf.

situation puts pressure of the victim who may fear worse if she does not go along with the abuser's suggestion to mediation. Another concern is that restorative justice may be seen as a "soft" option, which continues the historical trivialization of intimate partner violence by the criminal justice system.

Benefits of restorative justice in cases of GBVAWG. Studies suggest that victim participation in restorative justice may be beneficial for victims' psychological well-being, by reducing symptoms of stress and post-traumatic stress disorder.[164] Research into different forms of restorative justice, mainly victim-offender mediation and conferencing, reveals high satisfaction rates of both victims and offenders. Most evaluations indicate a decrease in recidivism, especially in more severe cases, and in no types of cases have higher numbers of recidivism been found.[165]

Judges should be extremely cautious in referring cases to restorative justice. Judges should only refer cases involving GBVAWG where the restorative justice programmes are strictly regulated and only allowed when certain safeguards and criteria are in place to ensure dignity, justice and protection for victims of GBVAWG. As outlined above, restorative justice measures should never be mandatory. They should only be allowed when a previous evaluation by a specialized team ensures the free and informed consent by the affected victim and that there are no indicators of further risks for the victim or their family members. The procedures should not constitute an obstacle to women's access to formal justice but empower the women victims and be provided by professionals specifically trained to understand and adequately intervene in cases of GBVAWG, ensuring an intervention with no stereotyping or re-victimization of women.[166] Moreover, it is important to ensure that the possibility of criminal conviction and sentence remains if the restorative justice process fails.

Table 29. Minimum criteria for referring a case to restorative justice

Only allow restorative justice were procedures are in place to guarantee no force, pressure or intimation has been used. Minimum requirements include:
• The process must offer the same or greater measures of protection of the victim's safety as does the criminal justice process.
• The perpetrator has accepted responsibility.
• The justice service provider (e.g. the judge) approves.
• The mediators are trained and qualified.
• A validated risk assessment has determined that the woman is not at high risk.
• The victim is fully informed of the process and she approves of the mediation.
• The victim consents to participate.

Source: UN Women, UNFPA, WHO, UNDP and UNODC, *Essential Services Package for Women and Girls Subjected to Violence: Core Elements and Quality Guidelines* (2015), Module 3 Justice and Policing.

[164] Jo-Anne Wemmers, "Judging Victims: Restorative choices for victims of sexual violence", *Victims of Crime Research Digest*, No. 10 (2017).

[165] Katinka Lünnemann et al, *Restorative Justice in Cases of Domestic Violence: Best practice examples between increasing mutual understanding and awareness of special protection needs* (European Commission, 2015).

[166] Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 (CEDAW/C/GC/35), para. 32 (b).

Restorative justice practices that provide safeguards for the victim

RESTORE,[a] a pilot programme that ran from 2003 to 2007 in Arizona, United States, is perhaps one of the best-known restorative justice programmes explicitly targeting victims of sexual violence. Taking a victim-centred approach to restorative justice, RESTORE offered victims the opportunity to participate in a dialogue with the offenders who attacked them as an alternative to criminal prosecution. This was not a one-off intervention: cases were carefully screened and victims were supported prior to, during and after the dialogues to ensure their safety and well-being. An evaluation of the RESTORE programme found that victims showed a decrease in post-traumatic stress disorder from intake (82 per cent) to post-conference (66 per cent). Victims who participated in the programme not only experienced a reduction in stress, but also felt empowered. All of the victims who participated in the RESTORE programme strongly agreed with the statement that "taking back their power" was a major reason to select RESTORE over other justice options.

In Austria, the prosecutor or the judge can refer a case to victim-offender mediation if, in their assessment, punishment is not necessary to prevent reoffending. All VOM cases are referred to "Neustart", a non-profit organization that provides probation and mediation services nationwide. Victim-offender mediation for intimate partner violence cases begin with separate interviews with the offender and victim to assess the suitability of VOM to the case. At this stage, the trained mediators use a risk assessment tool, which includes factors, such as whether the offender possessed a firearm, whether there has been a history of violence or whether there is a risk of another violent incident. If VOM is considered appropriate, one of two methods is applied. In the first method, called "working in teams of two", two mediators are present during the whole process, including initial separate interviews. When this method is used, VOM is not held immediately after the separate interviews. In the second method, called "mixed double", separate meetings with the victim and offender typically take place at the same time in different rooms. Immediately following the separate meetings, both the victim and offender and the two mediators get together for the VOM. As a safeguard to prevent secondary victimization, victim-offender mediation cannot take place if the offender blames the victim, downplays or denies his wrongdoing, and/or if there is a serious power imbalance, a history of violence, or a lack of emotional stability of the victim.

In New Zealand, the Ministry of Justice published restorative justice standards for sexual offending cases in 2013.[b] These new standards recognize that previous guidance on restorative justice processes did not specify how to safely manage referrals and needed to be integrated with additional safeguards and processes for sexual offending cases. Aimed at service providers that are contracted by the Ministry and approved to work with such cases, the standards clarify that the process should be driven by the victim/survivor and respect their right to hold the offender accountable, while at the same time maximizing the chances for healing and minimizing the chances for harm. Some of the requirements concerning service design, specifications and processes include:

- Specialist sexual violence knowledge, skills and processes
- The re-establishment of victim/survivor choice and control
- The need for specialist professional supervision
- Informed consent guides the process
- The offender must be able to take a high degree of responsibility for the harm they have caused
- Specialist assessment, screening and planning with the victim/survivor and access to therapy and specialist support

[a] Jo-Anne Wemmers, "Judging Victims: Restorative choices for victims of sexual violence", *Victims of Crime Research Digest*, No. 10 (2017).

[b] Available at https://www.justice.govt.nz/assets/Documents/Publications/Restorative-justice-standards-for-sexual-offending-cases.pdf.

For further information on international and regional standards, see:

United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters

Committee on the Elimination of Discrimination against Women, General Recommendation 33 on women's access to justice (para. 58 (c)) and General Recommendation 35 on gender-based violence against women (para. 32 (b))

Commission on the Status of Women, Agreed conclusions on the elimination and prevention of all forms of violence against women and girls (chapter I.A(g))

Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (article 48)

Council of Europe, Committee of Ministers of the Recommendation CM/Rec (2018)8 concerning restorative justice in criminal matters

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

Second Follow-Up Report on the Recommendations of the Committee of Experts of the Follow-up Mechanism to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (chapter 1.2)

Part 3

Part three:

Effective institutional practices to address gender-based violence against women and girls: examples of good practices by the judiciary

Summary

Part three frames the discussion of effective judicial institutional approaches to GBVAWG with good practice examples from various countries. It is not meant to be a thorough assessment of what the judiciary should do, but rather provides general guidance concerning the following:

- How the court environment can become more gender-responsive and victim-friendly
- Approaches that can improve court administration capacity
- How the judiciary can improve justice service delivery to be more victim-centred
- How to deal with specific challenges for victims living in remote and rural areas
- How to ensure effective gender mainstreaming within the judicial system
- Effective ways to promote female judges at all levels of the judiciary
- Ethical rules and professional codes of conduct to improve the institutional response to GBVAWG

1. Gender- and victim-responsive courts

A few countries have responded to concerns raised by victims who have had negative experiences with the judiciary. The main measures taken include establishing specialized courts on GBVAWG, designating specialized judges and dedicated court times in the regular courts and introducing special measures in regular courts to respond to the needs of victims.

Such specialization measures have been evaluated and found to be effective in many instances, as they provide a stronger possibility that the judiciary will be specialized and gender-sensitive regarding GBVAWG, that more efficient case management systems are in place and that the courtroom environment is more hospitable to victims.[167] Effectiveness of these measures is aided by adequate funding,

[167] UN Women, *Handbook for National Action Plans on Violence against Women* (2012).

proper human resources and capacity-building measures, as well as the provision of tools, such as guidelines, protocols, and bench books.

1.1 Creating specialized courts

Common elements identified in a review of specialized courts on GBVAWG include the following:

- Infrastructure that ensures courts are adequately equipped to reduce victims' contact with the defendant and ensure their safety (e.g. separate waiting rooms and entrances, private rooms to conduct interviews)
- Infrastructure to ensure facilitation of victims' testimony
- Special units within the court administrative staff for coordinating support for victims throughout the trial
- Presiding judges who have specialized knowledge of GBVAWG
- Court personnel (judges and court staff) who are systematically trained
- Gender-sensitive guidelines or protocols focusing on ensuring the protection of the rights and safety of victims
- Targeted tools (e.g. model bench books) which provide relevant case law within a social context analysis of GBVAWG
- A team of multidisciplinary officers attached to the court, such as prosecutors, court staff, psychologists and victim support persons
- Legal assistance for victims
- Female interpreters

Table 30. Benefits and challenges of specialized courts for GBVAWG cases

Benefits	Challenges
Assigned specialized judges, prosecutors and court personnel usually receive specialized training and gain experience in dealing with GBVAWG cases, potentially making them more likely to act with sensitivity and reject harmful gender stereotypes.	These courts are usually established in urban areas where the case load is high enough to justify the costs and specialization.
Experienced judges, prosecutors and court personnel are able to concentrate on similar cases and become more knowledgeable about the relevant laws and procedures regarding GBVAWG, such as criminal element of consent, patterns of coercion, gender-related killing of women and girls, motivation, third-party disclosure applications, use of experts, etc.	Specialized courts are not available to all victims and this may limit gender-responsiveness to only one part of the judiciary.
Legal and judicial expertise in dealing with the unique characteristics of GBVAWG and the intricacies of the law through specialization can be developed. This can contribute to increased convictions and enhanced procedural justice.	These courts may not be sustainable, particularly in cases where courts are funded through development aid, which may not be available in the long term.
Continuity of court personnel and greater administrative efficiency and processing of cases can be ensured.	
Court resources are freed up and proceedings become faster and more efficient.	
Coordination with support services is enhanced.	

Victims have better legal support in specialized courts to help guide and support them through the trial process. This is important because once they are in court, victims, are often on their own unless they have their own lawyer.	
The needs of victims are better addressed by ensuring easily accessible psychosocial support to avoid retraumatization; infrastructure such as creating separate waiting space for victims and defendants and using video-linked equipment to avoid or reduce contact with the defendant.	
Information-sharing and advocacy are usually improved, which may raise victims' participation and satisfaction.	

Sexual Offences Courts – looking at the South African example

South Africa has developed a blueprint that sets out the essential requirements for Sexual Offences Courts and covers personnel, equipment and location requirements. The South African Department of Justice and Constitutional Development has published a detailed report on the establishment of sexual offence courts.[a] These courts were designed to tackle low rates of convictions for sexual offences and to mitigate the hardships encountered by complainants in the ordinary courts. They have been successful in both respects. A recent study looked at how to improve the functioning of the Sexual Offence Courts, such as how to improve case-flow management and the knowledge and skills of justice sector officials in the courts.[b]

Findings include:

- Simply streamlining case-flow systems will not guarantee improved conviction rates. Other capacity and knowledge-building exercises must be employed to enhance service provision and survivor outcomes.
- Traditional indicators of success in the criminal justice system in the form of conviction rates and finalization rates do not give a true reflection of the work involved in sexual offences cases; more information is needed of victim satisfaction with overall outcome.
- Bottlenecks in the justice system still occur for various reasons, including lack of buy-in from other stakeholders, lack of dedicated budget, human resource challenges, and restricted space capacity in courts.
- Additional training is needed to deal with vulnerable groups such as LGBTI, children, people with disabilities, and older persons.
- Training needs to be more practical (e.g. increase the use of case law and examples).
- Inter-sectoral collaboration needs to be enhanced.
- There were some challenges in improving case-flow management through practice guidelines, including due to multiple postponement requests, incomplete investigations, unavailability of legal counsel on trial dates, limited human capacity to deal with large numbers of backlog cases.

Recommendations include:

- Improve the turnaround time of finalized sexual offence cases from reporting to sentencing by enhancing case-flow management.

- Improve specialized services for victims by increasing specialized staff, and the urgent establishment of a Sexual Offence Ombudsperson to provide oversight across all departments.
- Address human resource challenges and enhance specialization of staff through training.
- Improve the emotional and mental well-being of specialized staff.

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[a] South Africa, Department of Justice and Constitutional Development, *Report on the Re- Establishment of Sexual Offences Courts* (2013), available at http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report- aug2013.pdf.

[b] Aisling Heath et al., *Improving Case Outcomes for Sexual Offences Cases Project: Pilot Study on Sexual Offences Courts* (Cape Town, Gender Health and Justice Research Unit, 2018).

Unified domestic violence courts – some common elements

Unified Family Courts or Integrated Domestic Violence Courts have jurisdiction over both criminal and family law matters in cases of intimate partner violence. These courts address the unique nature of such violence which involves not only criminal behaviour but also complex social relationships and often requires different legal actions (e.g. protection orders, divorce and child custody proceedings, and compensation applications). Having one judge deal with all matters is efficient and can speed up proceedings as well as free up other courts dealing with the same parties but different legal aspects. It also increases victim safety and offender accountability.

- **Specialized staff**: specially trained judges, court staff and non-court professionals (e.g. victim advocates, social workers and/or counsellors) who understand the emotional and material needs of victims.
- **Assigned single permanent judge** for specific cases: this helps to ensure consistency and quick disposal of the case.
- **Safety**: the court setting is able to provide a sense of safety to the victim, for example by providing private spaces and CCTV for testimony.
- **Enhanced legal assistance and psychosocial support** to the victim: victims have immediate access to legal counsel, victim advocacy services, counselling, safety planning services, information and other services to assist them throughout the court process and after the trial has ended.
- **Immediacy**: rapid case management so that the defendant can be brought to trial in the shortest possible period of time.
- **Intensive monitoring**: the court establishes a network with law enforcement agency and other courtroom officers in order to conduct rigorous monitoring of defendants and victims.
- **Effective communication**: network or linkages between the court, law enforcement agency and other courtroom officers.
- **By streamlining and centralizing court processes**, such integrated courts eliminate contradictory orders, improve victim safety and reduce the need for the victim to testify repeatedly.

1.2 Designating judges and court times

Where specialized courts are not feasible due to costs, location (e.g. in rural areas) or any other reason, some countries have created specialized dockets as a less costly way to prioritize cases of GBVAWG. Specialized dockets dedicate a time frame and a judge or judges to handle these kinds of cases. Cases can be put directly on the specialized docket rather than the often more congested regular docket.

Certain elements can be established within the regular court administration to obtain some of the same benefits, such as efficient court services, better support services for victims, increased victim participation and satisfaction and more efficient information-sharing. These elements include the following:[168]

- *Designating trained and experienced judges.* Judges should be identified based on legal knowledge, skills and commitment to respond to GBVAWG, as well as possess certain attitudes and personal and psychological skills to deal with these crimes. They should be sensitive, compassionate and empathetic. Designated judges need to undertake regular training so that their decisions on the specialized docket are reliable and consistent.
- *Designated court times.* Appreciating that waiting in overcrowded courtrooms increases secondary victimization, and that designated court times can reduce the uncertainty of delays for the victim. Often there are clear procedural guidelines for court staff for these designated court times in order to promote consistent and reliable service. The courtrooms chosen should have sufficient space for separate and secure waiting rooms.
- *Case management issues.* Prioritizing GBVAWG cases in the docket or having a specialized docket can reduce long delays that can increase secondary victimization. Expedited measures (fast-tracking) can improve the general efficiency in case management and reduce the uncertainty of delays for the victim.

Special fast-track courts in India

India has established a number of fast-track courts with special judges and prosecutors assigned to deal with sexual violence cases. The fast-track courts appoint a trained support person to meet the victim during a pretrial visit to the courthouse, who provides an explanation of the court process before the trial. The assigned judge may meet her during the pretrial visit. Fast-track courts have separate waiting rooms for victims, family and support persons. There are CCTV links where the victim can testify in a separate room with the defendant being able to see her via video link. Every question is routed through the judge who has a direct link to the support person who asks questions of the victim. Her answers are heard directly by the defendant and his lawyer in the courtroom. Advantages of the fast-track courts include the following:

- Measures allow for the building of a rapport with the victim so the victim does not feel alone. Victims are less anxious about participating at trial and this improves the quality of their evidence.
- Focus on the victim's well-being. The court can make arrangements for transportation to and from the court and provide food.
- Lawyers for the victims are available and there is often a civil society organization linked to these courts. For example, in Delhi, the Delhi Committee of Women Lawyers works with the victims and provide them with a Date Booklet, which contains all the information about their case.

[168] UNODC, "Blueprint for Action: An Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women", in UNODC, *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women* (2014), available at https://www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf.

- Fixing of trial dates based as per the availability of the victim helps to avoid time gaps between trial hearings.
- Courts can also make interim compensation orders.
- Courts carefully regulate the production of electronic evidence, balancing the rights of the defendants and victims.
- Courts sensitize the investigating officer and other stakeholders.

Source: Information provided at the expert meeting in Vienna on 26-28 November 2018. See also TNN Times of India, "1,800 fast-track courts on anvil to speed up justice", 23 August 2014, available at http://timesofindia.indiatimes.com/india/1800-fast-track-courts-on-anvil-to-speed-up-justice/articleshow/40725609.cms.

1.3 Providing victim-responsive and safe courtroom environments

Studies show that infrastructure can improve the safety of victims as well as make the courtroom environment more hospitable.[169] Several measures could be adopted to minimize the negative impact that participating at a criminal trial has on victims and allow courts to better manage risk within the court setting.

One strategy is to adjust the court infrastructure and provide the necessary equipment. Courtrooms should have adequate space between parties, multiple exists and security on duty. Courtroom infrastructure should ensure at least two entrances and exits on opposite sides of the building so that victims may safely enter or leave the building. Courthouses should have separate waiting rooms and safe and easily accessible restrooms for the victim, which should not be the same as those used by the relatives of the defendant. Clear signage and documents in all relevant languages should be available so victims know where they have to be. Equipment to ensure safe environments include metal detectors and facilities for private videotaping or closed-circuit television testimony.

Another important strategy is to provide for protocols and human resources required to ensure that courtrooms are victim-responsive and safe. Security guards should be available as the public enters the court house. Escorts for the victims and witnesses should be provided as they enter and leave the building to safeguard the victim's rights to safety and privacy, including when protecting the identity of the victim from the media and the public. Guidelines for all court staff should be in place to ensure an immediate and adequate response to violence or threats of violence in court. Court staff should also ensure increased communication with the victim throughout the process and coordination of risk assessment and support.

Table 31. Measures to support the victim's participation in criminal proceedings

Many countries have introduced various measures to promote victim-friendly courtrooms. Courts have the ability to protect the safety, physical and psychological well-being, dignity and privacy of witnesses and should have regard to all relevant factors including age, gender, health and the nature of the crime. Often, the court can on its own motion or on application by the prosecutor make a wide range of orders in this regard.
• Permitting the victim to testify in a manner that allows her to avoid seeing the defendant (using screens or CCTV)
• Limiting the frequency, manner and length of questioning
• Allowing a video-recorded interview as evidence in chief

[169] Elaine Mossman and others, *Responding to sexual violence: A review of literature on good practices* (Wellington, New Zealand Ministry of Women's Affairs, 2009).

- Giving evidence via an intermediary
- Permitting a support person such as family member or friend to attend trial with the victim
- Removing of formal legal dress by judge and lawyers
- Emptying the public gallery (closed hearings or in-camera hearings)
- Allowing for in-camera proceedings
- Protecting the identity of the victim from the media and the public, for example through banning publication, removing any identifying information such as names and addresses from the public records of the court, using a pseudonym for the victim

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

2. Improving judicial capacity: training and capacity development

Studies have shown how training and capacity development can change practice. For example, the International Association of Women Judges found that training for judges on instruments that protect women's human rights has resulted in the citation of those human rights documents in judicial opinions among trainees.[170]

2.1 Good practices in training of judges and court staff

Building the capacity of all judges to apply the national laws in an appropriate and gender-sensitive manner and using specialized expertise in parallel have been recognized as a good practice towards ensuring a gender-responsive criminal justice system.[171] These practices respond to the long history of inadequate response to GBVAWG cases by criminal courts. To counter harmful gender stereotyping that often inhibits women and girls from participating in the criminal justice system, a judiciary who appreciates the dynamics of gender-based violence and understands the victim's multiple needs can contribute to developing a victim-centred criminal justice system that holds perpetrators accountable for the violence. All training materials should be reviewed to ensure that they challenge the attitudes and behaviours within criminal justice agencies that foster GBVAWG and does not contribute to the perpetuation of gender-based myths and stereotypes.

Features of effective training

- Specific, regular and relevant training mandated by law.
- Training is integrated institutionally, supported by protocols and guidelines.
- Multidisciplinary training among criminal justice providers. This kind of training can contribute to building trust among the different criminal justice agencies and can enhance coordination.
- Training in close cooperation with women's rights organizations and civil society. This kind of training can contribute to building trust between the community and the criminal justice system.
- Evaluation mechanism to measure the impact of training.

[170] As cited in Cheryl Thomas and others, *Working with the Justice Sector to End Violence against Women and Girls* (The Advocates for Human Rights and UN Women, 2011).

[171] Updated Model Strategies and Practical Measures; Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 (CEDAW/C/GC/35).

- Specialized training for specialized units and general training for all criminal justice providers.
- Training covering a broad range of topics on GBVAWG.
- Gender issues are mainstreamed into all other relevant training areas and training includes in-depth modules on gender-related issues.
- Training drawing on the expertise and specialist knowledge of academic researchers, medical practitioners, probation and parole officers and victim support agencies.

Source: UNODC, "Blueprint for Action: An Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women", in UNODC, *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women* (2014), available at https://www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf.

The issue of mandated training for judges is controversial in some jurisdictions. Some argue that to require judges to undertake a specific training course would infringe judicial independence. In some jurisdictions, however, lawyers who apply for a judicial appointment are required to show that they have taken such training. However, others take the view that training and capacity-building programmes are most effective when they are mandated in law and provided regularly and systematically.[172]

Mandatory training in the Philippines

The Magna Carta of Women, section 9, provides that all government personnel involved in the protection and defence of women against gender-based violence shall undergo mandatory training on human rights and gender sensitivity pursuant to the Act. The Family Court judges received mandatory training at the Philippine Judicial Academy (PHILJA) in handling cases involving women and children, specifically the handling of battered women and abused children as well as trafficked women and children.

Source: Eileen Skinnider, *Towards Gender-Responsive Criminal Justice: Good Practices from Southeast Asia in Responding to Violence against Women* (Thailand Institute of Justice, 2018).

Training approaches should make full use of interactive methodologies and information and communication technologies. The development of online courses is cost effective and allows for broader dissemination. Judges who participate in interactive training may put questions to facilitators, share problems among co-participants and obtain guidance from trainers.

Judicial training networks provide another important entry point for training on GBVAWG. The UNODC Global Judicial Integrity Network or the European Judicial Training Network are useful platforms and promoters for the training and exchange of knowledge of the judiciary. The Global Judicial Integrity Network has developed a judicial ethics training package and an e-learning course and facilitating peer-to-peer support and learning opportunities. The European Judicial Training Network has developed training standards and curricula, coordinates judicial training exchanges and programmes, disseminates training expertise and promotes cooperation between European Union judicial training institutions.

[172] Thomas Harrison, "While mandatory judicial education does not breach independence, some requirements of Bill C-337 may have implications for independence and the rule of law", Policy Options, 22 May 2017. See also UNODC, *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women* (2014), p. 53.

Training provided by the Judiciary in Argentina

The Judiciary of Cordoba, Argentina, created the Office of Family Violence Coordination to work within the scope of the Superior Court of Justice. As part of its mandate, the Office organizes a training scheme required by the judiciary. The training aims to increase the understanding of the impact of gender stereotypes, as well as the role of judicial operators in discrediting stereotypes and recognizing the different barriers faced by women to access justice. Workshops provide concepts and tools for the judiciary to generate a process of sensitization that allow operators to review their previous knowledge and incorporate notions that help them to rethink their intervention from a practical perspective. Trainees work on avoiding acts that constitute so-called "institutional victimization" or secondary victimization. The Office also trains police, prosecutors and other justice providers, conducts research and issues publications, such as working protocols, operational manuals, syntheses of relevant jurisprudence and a compilation of international, national, provincial and judicial regulations.

Source: Information received from a reply to the questionnaire distributed through the International Association of Women Judges, the Commonwealth Magistrates' and Judges' Association and the Global Judicial Integrity Network, September 2018.

The Jurisprudence of Equality Program (JEP) of the International Association of Women Judges (IAWJ)

All JEP training shares the following features:

- Judge-centred and judicially-owned at both the international and national level: IAWJ works with and through its chapters to provide training that is responsive to local needs and whose content is guided and shaped by in-country judges. IAWJ trains judges to become trainers themselves so they can pass this skill onto colleagues, since judges are best equipped to communicate and collaborate with their peers.
- Reliance on participatory learning methods: Judges are used to a high degree of professional autonomy, and consequently bring to training sessions their specific and often unique knowledge and experience. JEP training draws on this expertise through the use of case studies, role plays, small group work and other participatory techniques.
- Encourage the application of international law in domestic courts to the extent permitted by national law: During JEP training, judges explore the meanings of international law texts, such as the CEDAW, in the context of their national laws.
- Practical and non-abstract: Through stakeholder consultations and outreach to women's groups, medical practitioners, police and prosecutors, JEP training works to address concrete problems identified by national chapters.

2.2 Developing tools for capacity-building

Many national courts have developed tools for judges and court staff to assist them in applying the law in a gender-responsive manner and to promote consistency among all judges who are assigned these cases. Tools include bench books, handbooks, protocols and guidelines. These typically cover an overview of the country's legal system, the laws and procedures in the country applicable to the GBVAWG, as well as a review of the jurisprudence on cases of gender-based violence. They also summarize international standards and norms and set out the country's context, the particular needs of victims of violence and barriers to access justice. These tools are typically focused on gender equality and ensuring women's access to justice and provide a framework and guidance for the main tasks of the judges and court staff.

Selected resources

The UN Women Virtual Knowledge Centre (http://www.endvawnow.org) provides lists and links to tools, including for judges and court staff, such as the following:

- The St. Paul Blueprint for Safety, published by Praxis International in 2010, provides a comprehensive plan for the judiciary, law enforcement, and service providers on how to respond to domestic violence in any country.
- The Training Manual on Combating Violence against Women, edited by Appelt and others in 2000, provides information on myths and realities of violence against women, training objectives, methods, and teaching aids, and specific modules for judicial professionals (among others) including handouts.
- The publication "Pretrial Innovations for Domestic Violence Offenders and Victims: Lessons from the Judicial Oversight Initiative", published by the United States Department of Justice in 2007, contains specific guidance for restructuring courts to promote victim safety and offender accountability in domestic violence cases.
- The Domestic Violence Risk Assessment Bench Guide is a research-based guide used by judges in Minnesota, United States, and provides guidance on using risk assessments in courts at all stages and instructions for implementing the assessments.

3. Efficient justice service delivery: good practices in case and courtroom management

It is important for the judiciary to take control and responsibility of the court case and limit questionable tactics of defence lawyers and prosecutors that can delay the case and contribute to the re-victimization of women and girls subjected to violence. Court and case management includes expedited procedures for cases involving GBVAWG, limiting adjournments, providing the victim with timely legal assistance and support, as well as addressing court management challenges in rural and remote areas.

Updated Model Strategies and Practical Measures

Provision 18 urges Member States to:

- Provide an accessible and sensitive court mechanism and ensure fair and timely processing of cases
- Provide victims with court support and interpretation services
- Provide victims with access to qualified personnel who can provide victim advocacy and support services, such as independent support persons

3.1 Timely and expedited proceedings

Delays and cancellation of the criminal case, particularly at the start of trial, have been identified as being traumatic for victims and increasing secondary victimization.[173] The judiciary has taken different approaches to improving case management for GBVAWG cases: (i) prioritizing cases of GBVAWG on court rolls, (ii) establishing specialized dockets for GBVAWG cases; (iii) designing court procedures to move cases through the system quickly (fast-tracking) and (iv) developing protocols.

[173] Sara Payne, *Redefining Justice: Addressing the Individual Needs of Victims and Witnesses* (London, Home Office, 2009).

Table 32. Domestic Violence Protocol in Washtenaw County (United States)

The county district court judges adopted a protocol, agreeing on six principles for domestic violence cases:	
• Dedicated dockets 1 day per week	• Use of a designated probation unit
• Priority processing of cases	• Automatic appointment of defence counsel
• Compulsory bond conditions	• Early subpoenaing of witnesses
The designated domestic violence judges also developed formal, standardized, written protocols for conducting arraignments, which included obtaining defendants' criminal histories and other background information to use in making bond decisions and using a common conditional bond-release form. This process built consensus and commitment to consistent judicial practices across the county's four district courts.	

Source: United States of America, Department of Justice, *Pretrial Innovations for Domestic Violence Offenders and Victims: Lessons from the Judicial Oversight Initiative* (2007)

Research shows that the practicalities of a trial are stressful for victims, especially in relation to delays while waiting to give evidence. One study in England found that all trials studied were delayed, from 1 hour to over 1 day, with an average of 75 per cent of delays occurring while the victim waited to give evidence.[174] Delays occurred for multiple reasons, such as problems with special measures, loss of jurors and child care needs of both the victim and defendant. The most common cause, though, was the overrunning of other cases that judges dealt with each morning before the trial. The study raised the concern that judges did not do enough to challenge the inevitability of continual delays that were considered a routine aspect of trial.

Setting court trial lists can be an effective practice to address these concerns and expedite proceedings. This involves establishing a trial readiness certification before the trial judge sets trial dates. This allows the judges to manage their own court roll. Trials involving GBVAWG should be scheduled to start in the afternoon so that the victim is not summoned on the first day of trial. This addresses the common practice of defendants who tend to wait and see if the victim shows up before deciding whether to enter a guilty plea on the first day of trial.

3.2 Court governance and administration issues

Some countries have focused on changing the internal organization of the courts to provide better services to victims of GBVAWG. At the policy level, court practice directives concerning management of cases involving GBVAWG or directives on criminal justice norms and standards have been issued, including by the Chief Justice. Practical measures include regular meetings with relevant stakeholders or specialized offices in the court administration on GBVAWG. There also needs to be internal accountability to monitor the extent to which gender-responsive services are being provided. Relevant measures could include requiring judges to regularly account for court hours, finalized matters, part-heard cases and outstanding judgments, as well as establishing key performance indicators for judicial accountability.

[174] Olivia Smith and Tina Skinner, "Observing court responses to victims of rape and sexual assault", *Feminist Criminology*, vol. 7, No. 4 (2012).

Office on Domestic Violence of the Supreme Court of Argentina

The Office on Domestic Violence has developed standardized criteria for case registration and ensured timely access to justice for victims of domestic violence. Relevant elements include the following:

- A team of lawyers, medical professionals, psychologists, social workers, and administrative staff are available around the clock to help survivors report violence and to perform risk assessments, obtain immediate protective remedies, and provide expert opinions and a medical report to judges and prosecutors.
- An agreement between the Court and the City of Buenos Aires to make available hospital services and shelters, if necessary.
- The Office works with mobile squads belonging to the Ministry of Justice and Human Rights programme Victims against Violence. These squads, with a simple call from the victim, can take the person to the Office's headquarters to initiate proceedings.
- The Office has improved efficiency, as evidenced by the courts making a decision on injunctions on the same day, or the following day at the latest.

According to judges, significant progress has been made, because there are no more delays in determining whether there are bodily injuries (before, if injuries were not very serious, they had healed by the time checks were made), and victims are now informed about the eventual existence of civil actions, simultaneously with criminal proceedings. The Office on Domestic Violence admitted 8500 cases in the first 17 months of its existence. Only 40 per cent of these cases were admitted during court hours, emphasizing the importance of night and weekend hours. A monitoring process is already in place to analyse the performance of the relevant sectors and to obtain statistical records to support policies on domestic violence. The Supreme Court of Argentina is ensuring the sustainability of the Office on Domestic Violence by including it in its budget.

Source: Avon Global Center for Gender and Justice at Cornell Law School, "Gender Justice in the Argentine Context: Justice Highton de Nolasco Shares her Views", undated.

At the level of individual courts, practical administrative changes can be implemented to enhance women's access to justice. This may include additional shifts for judges in the afternoon and weekend or the extension of hours of the court registry for the reception of complaints. Another possible measure is issuing the citation to victims by instant messaging (e.g. WhatsApp Business). The creation of special forms to receive complaints, which could also be uploaded to a digital platform, could facilitate faster and easier access by all authorized officials.

3.3 Court programmes that support victims' rights

International standards provide that victims should be supported in the criminal justice process, including through access to legal aid and quality interpretation.

Table 33. International standards

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems	
Principle 4	Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime.
Guideline 7	(a) Appropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization; (b) Child victims receive legal assistance as required, in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime; (c) Victims receive legal advice on any aspect of their involvement in the criminal justice process, including the possibility of taking civil action or making a claim for compensation in separate legal proceedings, whichever is consistent with the relevant national legislation; (d) Victims are promptly informed by the police and other frontline responders (i.e., health, social and child welfare providers) of their right to information and their entitlement to legal aid, assistance and protection and of how to access such rights; (e) The views and concerns of victims are presented and considered at appropriate stages of the criminal justice process where their personal interests are affected or where the interests of justice so require
Guideline 9	Implementation on the right of women to access legal aid... (c) Providing legal aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimization and other such services, which may include the translation of legal documents where requested or required.
Updated Model Strategies and Practical Measures	
Provision 18	Provide victims with court support and interpretation services.
Provision 18	Provide victims with access to qualified personnel who can provide victim advocacy and support services, such as independent support persons.

Not all countries provide the victim legal standing in criminal courts and the right to have counsel represent them during the criminal proceedings, which is generally seen in inquisitorial legal traditions as opposed to common law legal traditions. However, research highlights that it is important for victims to have their own legal representative in all countries, irrespective of the legal tradition.[175] The judiciary has a role in ensuring access to counsel, and, where needed, access to legal aid, for victims. Court programmes should emphasize that legal aid to victims should be provided in close cooperation of justice agencies and other professionals including victim support workers to maximize the effectiveness of the legal aid system and that services should be provided in a manner that prevents repeat victimization and secondary victimization.

[175] Joanna Lovett Liz Kelly, *Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries* (2009).

Advantages of courts ensuring that the victim has her own lawyer

The benefits of the victim having her own lawyer, depending on the jurisdiction, include the following:

- Protecting victims from harassing, humiliating and improper defence tactics, including the introduction of evidence that lacks probative value
- Familiarizing victims with the court process
- Preparing victims for hearings and trial
- Liaising with the prosecutor in order to provide victims with updates on the case
- Assisting in the preparation of victim impact statements
- Explaining the developments in the case or at trial to the victim
- Monitoring any use of myths or stereotypes

In some common law countries, where victims do not have standing at trial, the victim has been given the right to her own legal representation during certain applications, such as applications for disclosure of third-party records or *voir dire* regarding admissibility of past sexual history information. In countries that are looking to expand this right to victims, questions are raised about the relationship between the prosecution and the lawyer of the victim and about the consequences of an objection by the lawyer of the victim. Scholars have provided some ideas as to what this may mean in practice,[a] for example, the lawyer of the victim could provide input into the prosecution's trial strategy, but the prosecutor would remain in control. They could also object to the defence line of questioning without the prosecution's permission, but not be involved in any decision-making discussions about the objection other than to briefly explain why the questions were inappropriate. These objections could only be about matters of law, for example, that questions were more prejudicial than probative, and so would not change the prosecution's responses to legitimate defence arguments. In this way, the lawyer of the victim could act as an "evidentiary watchdog," much like the judge and prosecution barrister are meant to be but are not.

[a] Olivia Smith and Tina Skinner, "Observing court responses to victims of rape and sexual assault", *Feminist Criminology*, vol. 7, No. 4 (2012).

Court-assigned interpreters

Interpreters should be trained on effective and gender-sensitive interpretation in criminal justice proceedings involving gender-based violence. Cases can be lost through poor and inaccurate interpretation. Women who speak a different language may be more vulnerable to violence and face particular challenges in reporting gender violence and continuing to cooperate with the criminal justice system. Many interpreters are known to their community which can cause reluctance to participate in the criminal proceedings.

It is recommended that courts ensure the following:

- Interpreters work to an interpreting code of conduct.
- Staff brief and de-brief interpreters prior to and following appointment.
- Opportunities are provided for interpreters to fully explain their role and their duty of confidentiality.
- Be aware throughout an interpreting session of any difficulties or distress experienced by the victim.
- Terminate the session if a victim indicates that the interpreter is not suitable.
- Avoid leaving victims and interpreters alone together at any time before, during or after the session.

Source: Glasgow Violence Against Women Partnership, "Good practice guidance on interpreting for women who have experienced gender based violence", undated.

Independent Domestic Violence Advisors in England and Wales

Independent Domestic Violence Advisors (IDVA) are trained support workers who provide assistance and advice to victims of domestic violence. They work closely with criminal justice and statutory partners and may be based in many different settings. The key ingredients of effective IDVA services are independence, a focus on victims' safety and the ability to coordinate a range of services across agencies on behalf of victims. Successful IDVA work depends on the local availability of other necessary support services (e.g., outreach, long-term support, specialist sexual violence services).

Results and impact: The first 100 IDVAs were trained in 2005-2006 and by 2009, there were over 700 in England and Wales. An evaluation of IDVAs in seven sites in England and Wales found that "abuse stopped completely in two thirds of cases where there was intensive support from an IDVA service including multiple interventions" but also highlighted that IDVA current capacity is "estimated to be less than half of the 1,200-1,500 IDVAs needed for national coverage".

Source: Amanda Robinson, *Independent Domestic Violence Advisors: a process evaluation* (Cardiff University, 2009).

3.4 Issues regarding justice delivery in rural and remote areas

For many victims of GBVAWG living in rural and remote areas, justice is far away. They face additional challenges due to isolation; lack of transportation; close ties with the community, which affects privacy;and lack of accessible justice institutions. Countries that have vast regions of sparsely populated remote and rural areas have used a variety of strategies to ensure access to criminal courts.

Several strategies can be adopted to enhance women's access to justice in such areas. One option is staffing with a judge and a court clerk on a regular or rotating basis. Another important measure is to provide the means for victims to participate in court hearings (transportation, hotels, food, and child care). Authorizing the use of telephone, fax, and internet technology can allow victims to participate during the process, such as preliminary interviews or hearings, or interim judicial release (bail) hearings. Some countries have also established mobile courts which travel to rural and remote areas on a regular basis.

The hub and spoke model for specialist family violence divisions in courts

Australian scholars have identified certain approaches that address the issue of isolation and limited services to maximize women's access to justice services. One of them is the *hub and spoke* service model wherein a central hub, either generalist or specialist services, located in a regional centre, can provide services to rural and remote populations.[a] The central point service, the hub, can provide outreach where the justice service providers go to the service user, with justice providers often travelling long distances to visit people in their homes. Hubs can also be in-reach services where service users travel into the hub to access the services. Another scholar noted that in-reach services are more appropriate to larger towns and regional centres in densely populated and less remote areas, while outreach services are more accessible to dispersed and remote populations.[b] He argued that hub and spoke models that are attached to local, community-owned infrastructures increase the credibility and relevance of specialist services, which improves their use for local women. The hub and spoke model has the potential to strengthen coordination among justice providers as well as non-justice service providers. It has been recommended that the major regional courts have specialist Family Violence divisions and that they also commit to effectively delivering those dedicated services to their rural satellite courts. One of the most important features of specialist family violence courts/divisions is the presence of

funded applicant and respondent workers. They significantly reduced the amount of court hearing time involved and women applicants felt more equipped in understanding the court process and were linked into referrals.

Source: Bridget Harris and Amanda George, *Submission to the Royal Commission into Family Violence* (New South Wales and Victoria, Centre for Rural Regional Law and Justice, 2015).

[a] Monica Campo and Sarah Tayton, *Domestic and Family Violence in Regional, Rural and Remote Communities: An Overview of Key Issues* (Australian Institute of Family Studies, 2015).

[b] Sarah Wendt and others, *Seeking help for domestic violence: Exploring rural women's coping experiences: State of the Knowledge Paper* (Australia's National Research Organisation for Women's Safety, 2015).

Judges and courts who are assigned to rural and remote areas should consider the following guidelines:

- Liaise with local court staff to investigate the available resources and provide information to community legal service providers/probation and parole officers/community-based charitable organizations/support agencies about accessing support (telephone counselling services offered by agencies) and about changes to the law that impact on advice to victims.
- Ensure that information available on court websites provides accurate information about court proceedings and available resources (information videos that set out who is at court/roles/support services).
- Use offsite remote witness facilities such as police stations, legal aid offices or community services offices located in the community to address the concerns of women's safety before, during and after the hearing, as well as ensure that women are more comfortable giving evidence. This can be particularly beneficial for women living in rural and remote areas where courts are very small and there is high visibility in the community.
- Appreciate that the cost of the new technology required for such facilities is much lower than remodelling or building new courthouses, but would require courts to have compatible technology and provide staff at the offsite facility during the hearings.[176]
- Rearrange existing court spaces to include a "protected persons space". These spaces can keep parties separated in courts that are not deemed "specialist".

Design and operational guidelines for remote participation in court proceedings

The Gateway to Justice project in Australia studied the existing remote participation facilities, developed and piloted "enhanced" processes and environments for remote witnesses and measured the impact of any change on both witnesses and jurors in order to develop a set of guidelines on how to use remote witness facilities more effectively in court processes. Groups who may use the remote facilities can include: vulnerable witnesses, such as victims of sexual and domestic violence, women who live substantial distances from the court and experts who may be based in urban areas or overseas. The study found that the existing facilities were often substandard (e.g. cramped, uncomfortable, not conducive to providing an appropriate environment for the remote participant); the video technologies were often inadequate (e.g. restricted vision, poor sound quality, limited eye contact); and the court processes were inadequate (e.g. inadequate preparation of witnesses and insufficient orientation for the remote interaction).

[176] Emma Rowden and others, *Gateways to Justice: design and operational guidelines for remote participation in court proceedings* (University of Western Sydney, 2013).

The Guidelines include making remote witness rooms more comfortable, with access to natural light and visual relief; improving eye contact between the remote participant and the person with whom they are speaking in the court; providing different views of the court for vulnerable and expert witnesses; and providing a second channel for display technologies. It also provides suggestions for adapting court processes to improve outcomes and get better value out of the investment.

Source: Emma Rowden and others, *Gateways to Justice: design and operational guidelines for remote participation in court proceedings* (University of Western Sydney, 2013).

Developing partnerships between the court, police and victim services

An initiative operating out of Warrnambool Court in Australia emerged after the closure of the local legal aid office. A community-based, independent feminist organization, Emma House Domestic Violence Services (EHDVS) employs a part-time in-house lawyer who is a family violence law specialist, with funding from legal aid. They negotiated a protocol between the court, police and EHDVS, whereby a fax is sent to EHDVS the day before the family violence court list is heard. This enables the service provider to make contact with women to determine whether they need assistance in court. Warrnambool Court has a streamlined approach, which entails that on court days registrars do not call for matters until they are advised that EHDVS is ready to proceed. Women who have cases on days on which the lawyer cannot attend are prepared beforehand by the lawyer and will have an EHDVS support worker attend court with them. Having an in-house lawyer gives women in the region unfettered access to a family violence specialist, who only sees applicant women.

Source: Amanda George and Bridget Harris, *Landscapes of violence: Women surviving family violence in regional and rural Victoria* (Deakin University, 2014).

4. Promoting gender equality within the judicial system

All judges, both women and men judges, have a role to play in addressing gender discrimination in courts. They have an obligation to ensure that the court offers equal access and equal protection to women and men.

The Bangalore Principles

The Commentary on the Bangalore Principles of Judicial Conduct provides that the obligation to offer equal access to justice to men and women "applies to a judge's own relationships with parties, lawyers and court staff, as well as the relationship of court staff and lawyers with others. Overt instances of gender bias by judges towards lawyers may not today occur frequently in court, although speech, gestures or other conduct may sometimes be perceived as sexual harassment; for example, using terms of condescension in addressing female lawyers ('sweetie', 'honey', 'little girl', 'little sister') or commenting on such a lawyer's physical appearance or dress in a way that would not be ventured in relation to a male counterpart. Patronizing conduct by a judge (*'this pleading must have been prepared by a woman'*) affects the effectiveness of women as lawyers by sometimes diminishing self-esteem or decreasing the level of confidence in their skills. Insensitive treatment of female litigants (*'that stupid woman'*) may also directly affect their legal rights both in actuality and appearance. Sexual harassment of court staff, advocates, litigants or colleagues will often be illegal as well as unethical."

Source: UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (2007), para. 185.

4.1 Policies incorporating a gender perspective into the workings of criminal courts

Judges have a duty to ensure that court staff conform to prescribed standards. The first contact that a member of the public has with the judicial system is often with court staff. One way to guide the conduct of the judge and court staff alike is for the judiciary to design policies that incorporate a gender perspective into the workings of criminal courts. Such polices could set guidelines for the conduct of court personnel, such as refraining from gender-insensitive language, as well as behaviour which could be regarded as abusive, offensive, menacing, overly familiar, or otherwise inappropriate by reference to any prohibited ground.

Action plan to mainstream gender in the judiciary in the Philippines

Following a study on access to justice for women which found, in part, negative attitudes towards female victims, trivialization of sexual and domestic violence; gender-insensitive court procedures, and use of gender stereotypes,[a] the Supreme Court developed an action plan to mainstream gender in the judiciary system. The plan included:

- Gender sensitivity training for judges and other judiciary personnel
- Incorporating gender issues into the curriculum at law schools
- Establishing committees intended to further the goal of a gender-responsive judiciary
- Compulsory allocation of a certain percentage of the judiciary budget for gender programmes

Source: Asian Development Bank, *Philippines: Governance in Justice Sector Reform Program* (2017).
[a] UNDP, *Promoting Gender Sensitivity in the Philippine Court System in the Philippines* (2003).

Gender Equality Protocol for Judicial Officers in Trinidad and Tobago

The Gender Equality Protocol for Judicial Officers assists the judiciary in adjudicating cases with greater gender sensitivity. The Protocol aims to:

- Equip the Judicial Officer to render decisions that are the product of a fair, transparent, and unbiased process;
- Increase the awareness of Judicial Officers in Trinidad and Tobago of the State's international responsibilities towards the promotion of gender equality;
- Assist Judicial Officers in recognizing and eliminating individual biases which foster gender discrimination and provide signposts or markers for use by Judicial Officers to assist in identifying and treating with those issues which trigger individual gender biases; and
- Provide the Judicial Officer with the tools to identify, treat with and provide redress for power imbalances which hinder equality of treatment before the courts, structural inequalities in society and equal access by the litigant to the remedies and redresses available from the court.

Source: Judicial Education Institute of Trinidad and Tobago, *Justice Through a Gender Lens: Gender Equality Protocol for Judicial Officers* (2018), p. 13.

4.2 Establishing gender offices or gender equality units within the judiciary

Gender Offices within the courts can ensure that the judiciary itself is ready and able as an institution to ensure equality and equal access to justice. These offices design and establish policies that incorporate gender perspectives into the working of the court. This is a practice in several Latin American countries, where these offices conduct awareness and training to judicial officers on gender perspectives, create protocols on access to justice with a gender perspective and collect statistics on judicial composition, performance and cases.

Office for Women in the Supreme Court of Argentina

The Supreme Court of Argentina created the Office for Women within the Court's institutional structure in 2009. A key objective for the creation of the Office for Women was incorporating a gender perspective in the judiciary to achieve gender equity, both for users of the justice system and for those who work in it. The main areas of work of the Office are:

1. Assessments and surveys to identify behaviours, decisions, and procedures that perpetuate gender inequality and prevent or hinder women's access to justice
2. Awareness-raising and training activities on issues related to women's rights
3. Preparation of project proposals to mainstream gender and improve working relations in the judiciary
4. Communication and dissemination of laws and policies, including on violence against women
5. Monitoring of judicial activity though an analysis of jurisprudence to identify needs and gaps and ensure adherence to normative requirements

Source: Alba Ruibal, "Women's Rights at the Argentine Supreme Court: Innovative Non-Jurisdictional Offices for Women and a Conservative Jurisprudence on Reproductive Rights", paper presented at the American Political Science Association Annual Meeting, Seattle, United States, 1-3 September 2011. See also https://www.csjn.gov.ar/om/institucional.do.

4.3 Studying the issue – gender bias task forces in the courts

Some courts have set up gender bias task forces to study the interaction between gender and the court systems, including the role gender plays in the appointment process, within all aspects of courtroom interactions and between and among judges and lawyers. The primary purposes of a Task Force are to document the existence of gender bias in the court system, specify its different manifestations and consequences, propose reforms and recommend mechanisms to implement, monitor and institutionalize those reforms. Depending on its resources, the Task Force can employ various methods of data collection to investigate the courts' treatment of women and men in relevant substantive law areas and to examine how gender affects the dynamics of courtroom interaction and the differential treatment of women and men in courtrooms.

Manual on operating a gender bias task force in the courts

The Foundation for Women Judges, a non-governmental organization created in 1980 in the United States, published a manual on operating a task force on gender bias in the courts. This manual provides a comprehensive overview of the process and contains information on specific tasks as well as different models. It covers such issues as:

- Laying the groundwork in the establishment of a task force on gender bias
- The start-up phase
- Data collection methods
- The task force in progress
- Disseminating the findings and recommendations
- Implementing reforms
- Implementing and monitoring

Source: Lynn Hecht Schafran and Norma J. Wikler, *Operating a Task Force on Gender Bias in the Courts: A Manual for Action* (The Foundation for Women Judges, undated).

Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System

The Committee's Final Report cites a comparative study of the first nine gender bias task force reports in the United States, noting: "Although the severity of the problems documented varies in certain instances from state to state, there is an overall uniformity. In the words of the New York Task Force on Women in the Courts, 'Gender bias against women litigants, lawyers and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment and equal opportunity'. Since that comparative study, over 30 subsequently published reports have found similar problems and have made similar recommendations".

Source: Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, *Final Report* (2013), p. 354, available at http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf.

Studies of vulnerable groups of women and their experiences of courts in Australia

In 2014, the Council of Chief Justices endorsed the formation of a new advisory body: the Judicial Council on Cultural Diversity (JCCD). The Council aims to assist Australian courts, judicial officers and administrators to positively respond to the changing needs of Australian society and ensure that all Australians have equal access to justice. The following year, the Judicial Council conducted studies which were aimed at strengthening the capacity of Australian courts to provide access to justice for women facing cultural and linguistic challenges. They focused on Aboriginal and Torres Strait Islander women and migrant and refugee women as these groups were more likely to enter the legal system at a point of extreme vulnerability, often as a result of family violence or family breakdown. The studies are to lead to development of a national framework for the courts consisting of best practice guidelines, resources and protocols as well as advice on training packages for judicial officers and court administrators on gender, culture and family violence.

Source: Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts Report* (2016), available at https://jccd.org.au/wp-content/uploads/2016/04/JCCD_Consultation_Report_-_Aboriginal_and_Torres_Strait_Islander_Women.pdf.

4.4 Removing barriers for female judges

A 2011 report by UN Women provided statistics on female judges worldwide, noting that women are significantly underrepresented as they account for only 27 per cent of judges worldwide.[177] Furthermore, even in countries that have a higher representation of women in the judiciary, the numbers of women decrease at higher levels. There are few women in the highest courts, including supreme courts, and rarely are the presidents women. Men continue to hold a disproportionate share of judicial appointments compared with their share of the general population.

The fact that the judge is a woman does not guarantee gender equality, gender sensitivity or understanding on the complexity of GBVAWG. However, there are several reasons why a gender balance and a gender equitable work environment in the judiciary is beneficial and important:[178]

- Fairness.
- Diversity has a strong potential to improve quality.
- Women can bring a different voice and a different perspective to the bench.
- For the judiciary to be perceived as legitimate, it is important that victims appearing before the court feel that judges are a fair representation of society.
- Ensuring a more balanced approach to enforcing the law.
- Enhancing gender diversity in the justice system can reduce barriers for women's access to justice, such as stigma associated with reporting gender-based violence.

Table 34. International standards

Committee on the Elimination of Discrimination against Women General Recommendation No. 33 on women's access to justice

- Calls on State Parties to: confront and remove barriers to women's participation as professionals within all levels of judicial system; take steps, including temporary special measures, to ensure that women are equally represented in the judiciary; and gather and analyse data, which should include but need not be limited to the number of men and women in judicial institutions at all levels.

Updated Model Strategies and Practical Measures

- Provision 16(k) urges States to ensure gender equitable representation in the judiciary particularly at the decision-making and managerial levels.
- Provision 16(l) urges States to provide victims of violence, where possible, with the right to speak to a female officer.

There are several strategies to ensure that women can be retained and progress in their careers as judges ensuring equal opportunity with men. One of them is redefining "merit" in the judicial appointment process to reflect skills, knowledge and behaviour necessary to perform the job rather than traditional criteria based on predominately male experiences. In order to ensure retention and promotion of women in the judiciary, effective measures could include mentoring schemes and women judges' networks.

Improved workplace policies and structures are another important step to take into account both men and women judges' needs. This could include flexible work strategies, maternity/paternity leave and the provision of child care. However, some scholars also add words of caution to a number of these

[177] UN Women, *In Pursuit of Justice: Progress of the World's Women 2011-2012* (2011).

[178] OECD, *OECD Toolkit for Mainstreaming and Implementing Gender Equality: Implementing the 2015 OECD Recommendation on Gender Equality in Public Life*, available at https://www.oecd.org/gender/governance/toolkit/toolkit-for-mainstreaming-and-implementing-gender-equality.pdf.

strategies that unless they are implemented with an understanding of the systemic discrimination enmeshed within the legal culture and society, these strategies could maintain discriminatory practices against women.[179] Structural change is also needed to avoid gender pay gaps and sexual division of labour or pigeonholing of female judges into what is seen as "women's areas of law", such as family law. As in other sectors, there is a need for policies on sexual harassment in the workplace.

Redefining "merit" in the judicial appointment process

The Supreme Court of Canada has one of the most gender-balanced high courts in the world. This has been achieved by a three-agency approach involving the Government, the Commissioner for Federal Judicial Affairs (FJA) and the judicial profession itself. The Government, in partnership with the FJA, has actively sought to attract and appoint women to judicial roles. This work has been supported by the efforts of the judicial profession to accommodate women and remove barriers that make it difficult for them to excel as compared to their male colleagues, so that they may more easily join the front ranks of practice from which judges are typically drawn. However, the fundamental change that has engendered women's progress has been a different approach to the selection criteria or "merit" principle. The "merit" principle is broken down into Professional Competencies (it is clearly stated that a lack of court room experience is not a barrier to appointment) and Personal Characteristics. These include: an ability to listen, an awareness of racial and gender issues, tact, humility, reliability, tolerance and consideration of others.

Source: Commission on Women and the Criminal Justice System, *Engendering Justice – from Policy to Practice* (London, Fawcett Society, 2009), p. 98.

Specific strategies for recruiting judges

Systematic recruitment by judicial nominating committees and expanding the pool of applicants at the start of the judicial nomination process is key to effectively increasing diversity in the judiciary. Research from the Brennan Center for Justice at New York University Law School regarding judicial appointments provided the basis for their recommendations: nominating committees must acknowledge implicit bias; increase strategic recruitment; be clear about the role of diversity in the nominating process in the law; keep the application and interviewing process transparent; train commissioners to be effective recruiters and nominators; and appoint a diversity compliance officer or ombudsperson.

Source: Ciara Torres-Spelliscy and others, *Improving Judicial Diversity* (Brennan Center for Justice at New York University School of Law, 2010).

Associations of women judges

Women judges can be isolated and reduce opportunity to network due to career responsibilities. This can hinder career advancement. Networking among female judges could assist in countering these challenges. For example, the International Association of Women Judges is a non-profit, non-governmental organization that brings together judges from all levels of the judiciary worldwide, creating a network of influential leaders united by their commitment to equal justice and the rule of law.

[179] Nicole Buonocore Porter, "Re-Defining Superwomen: An Essay on Overcoming the Maternal Wall in the Legal Workplace", *Duke Journal of Gender Law & Policy*, vol. 13 (2006); Patricia L. Easteal and others, "Flexible work practices and private law firm culture: A complex quagmire for Australian Women lawyers", *QUT Law Review*, vol. 15, No. 1 (2015).

5. Secondary or vicarious trauma among the judiciary

Judges and other court staff who work on issues of GBVAWG may be at risk of suffering from secondary or vicarious trauma. The repeated or extreme exposure to details of the traumatic events that affect victims of GBVAWG can cause compassion fatigue, burnout, stress and trauma. The repeated exposure to detailed accounts, pictures and videos of gender-based violence is something experienced by judges and can be a daily occurrence for judges assigned to specialized courts. Trial judges can be quite isolated as they make rulings and decisions individually without the ability to discuss ongoing cases.

The symptoms of vicarious trauma can interfere with the judicial decision-making process. They are similar to post-traumatic stress disorder and include the following:[180]

- Hypervigilance
- Hopelessness
- Inability to embrace complexity
- Inability to listen, avoidance
- Anger and cynicism
- Sleeplessness
- Fear
- Chronic exhaustion
- Physical aliments
- Minimizing
- Guilt

Table 35. Strategies for building resilience

Awareness: it is important for judges and court staff to be aware of the above symptoms, either in oneself or in one's colleagues. The judiciary could consider providing training not only on how to identity the stressors, symptoms and techniques but also to destigmatize vicarious trauma and emphasis it is not a sign of weakness but a common human reaction to being exposed to so much trauma	**Balance**: It is important to emphasize the need for self-care for judges and court staff. This includes getting enough sleep, exercise, eating healthy, yoga and meditation and cognitive behaviour mindfulness.	**Connection**: It is important for judges and court staff to debrief with each other to avoid typical isolation, and have a safe space to discuss the situation with colleagues who understand. Always consider if a counsellor or therapist may be needed.

[180] Anne Chambers, *Judges and Compassion Fatigue: What is it and what to do about it* (Missouri Lawyer's Assistance Program, 2017).

UNODC Facilitator's Manual on Strategies for the Development of Cognitive Skills and Stress Management

In this manual, the facilitators are provided with a variety of exercises for cognitive stimulation and stress management in a simple and orderly manner, so as to make the educational process more dynamic. It covers various relaxation techniques, including autogenic relaxation, creative potentiation techniques, mandalas, conscious body movements, breathing, conscious breathing techniques and cognitive simulation.

Source: UNODC, *Facilitator's Manual: Strategies for the Development of Cognitive Skills and Stress Management* (2017).

6. Accountability and standards of conduct

While judicial independence forms an important guarantee, it also has the potential to act as a shield behind which to conceal possible unethical behaviour. Research shows a persistent and widespread problem in the courts with conduct that covers sextortion, sexual harassment, sex discrimination, gender bias, gender stereotyping and other inappropriate sexual conduct.[181] This may affect how judges interact with others, as well as public confidence in the courts. This includes: presiding over a courtroom and ensuring that all parties to the proceedings (e.g. prosecutors, defence counsel, defendant, victims and witnesses) are treated with respect by the judge and all others in court; in hiring, supervising and working with court staff; in fulfilling administrative duties, making work assignments, providing professional opportunities and interacting with other judges; and in their private social conduct.

International standards

The Bangalore Principles of Judicial Conduct contain the set of values that should determine judicial behaviour. These values, which are reflected in most codes of conduct, are independence, impartiality, integrity, propriety, equality, competence and diligence. Grounds for removal based on a judge's conduct will normally be based on these principles.

As a general rule, judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions. This should only occur after the conduct of a fair procedure. Judges cannot be removed or punished for errors made in good faith or for disagreeing with a particular interpretation of the law. Furthermore, judges enjoy personal immunity from civil suits for monetary damages arising from their rulings. States have a duty to establish clear grounds for removal and appropriate procedures to this end. The determination as to whether the particular behaviour or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing.

There are various approaches to address the issue of accountability of the judiciary to ensure judicial integrity.[182] First, it is important to develop standards of conduct to regulate judicial behaviour, such as ethical rules or professional codes of conduct. These codes generally cover an articulation of broad principles essential to maintaining public confidence in the integrity of the judiciary. They also provide guidance on how to apply these principles to rules of conduct that guide judges in confronting particular situations, including through associated commentary, definitions or advisory opinions.

[181] UNODC, *Issue Paper: Gender-Related Judicial Integrity Issues* (unpublished).
[182] Ibid.

Second, there is a need for accountability mechanisms that provide procedures for investigation and correcting inappropriate behaviour. Judicial education and training programmes also include a discussion of judicial standards of conduct.

A formal code of conduct provides many benefits. It sets standards of personal and professional conduct while on and off duty, providing clear guidance so that there is no ambiguity about what inappropriate conduct is. It also provides an opportunity to prohibit all forms of discrimination on the basis of sex and gender. This can help clarifying that judges have a duty to refrain from and prevent harassment and other gender-related misconduct and provide practical guidance on this issue. Codes of conduct have proven highly valuable in cases where legislation is lacking, for example on the issue of sexual harassment in the workplace. Although codes of conducts are not legally binding, they can have a significant influence on employers and improve workplace policies and procedures.

Examples of codes of conduct

In the United States, a Federal Judiciary Workplace Conduct Working Group reviewed the Code of Conduct for the United State Judges and its recommendations were taken up by the Judicial Conference committees, including to expressly prohibit harassment and abusive, prejudiced, biased, or otherwise inappropriate workplace behaviour. The revised Code of Conduct (effective 12 March 2019) includes a passage specifying that the "judge should not engage in behaviour that is harassing, abusive, prejudiced, or biased" and a commentary specifying that this includes "harassment that constitutes discrimination on impermissible grounds", with reference to relevant Rules for Judicial-Conduct and Judicial-Disability Proceedings providing that misconduct includes:[a]

- Engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault
- Treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner
- Creating a hostile work environment for judicial employees
- Intentional discrimination on the basis of race, colour, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability

In the Philippines, a justice of the Supreme Court noted that the law on sexual harassment requires that the courts set up a Committee on Decorum and Investigation (CODI).[b] Employees can file complaints involving sexual harassment within the CODI. The appellate courts also each have their own CODI and in the trial courts, there are also CODIs, usually under the executive judge. The Supreme Court issued a circular identifying the members of the CODI. The Committees on gender-responsiveness has prepared posters in each court on how to file a complaint with the CODI.

[a] United States Courts, *Code of Conduct for U.S. Judges (effective March 12, 2019)*, available at https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

[b] Supreme Court of the Philippines, *New Code of Conduct for the Philippine Judiciary (Annotated)* (2007).

The judiciary should consider the following elements of an effective accountability mechanism:

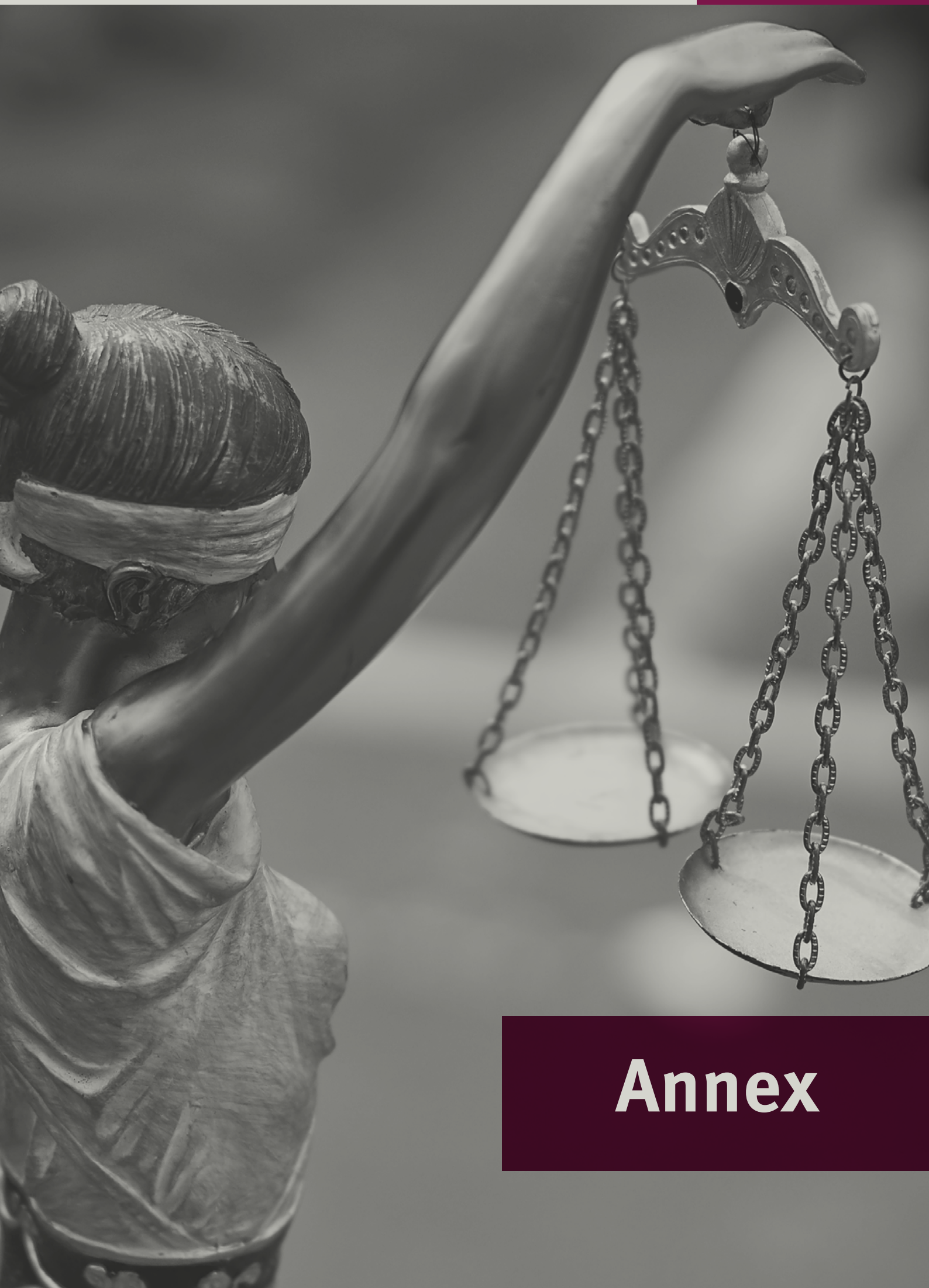
- Senior judicial leadership commitment
- Wide dissemination of the code of conduct that is clearly written and easy to access
- Clear reporting and complaint mechanisms, such as having an identifiable independent person of high stature assigned to receive reports of misconduct and providing for different avenues in which to make a complaint

- Measures to ensure protection against retaliation, including issues of confidentiality
- Prompt and impartial inquiry process
- Prompt disciplinary action
- Regularly monitoring the process to ensure effectiveness

Example of a judge held accountable for using harmful gender stereotypes

The Canadian Judicial Council recommended that Federal Court Justice Robin Camp be removed from office for serious misconduct that included asking the 19-year-old complainant in a rape case "why couldn't [she] just keep [her] knees together" and other questions reflecting myths and harmful gender stereotyping. The Council found: "the Judge's conduct, viewed in its totality and in light of all of its consequences, was so manifestly and profoundly destructive of the concept of impartiality, integrity and independence of the judicial role that public confidence is sufficiently undermined to render the Judge incapable of executing the judicial office". Furthermore the Council stated: "In our view, the statements made by Justice Camp during the trial and in his decision, the values implicit in those statements and the way in which he conducted himself are so antithetical to the contemporary values of our judicial system with respect to the manner in which complainants in sexual assault cases should be treated that, in our view, confidence in the system cannot be maintained unless the system disassociates itself from the image which the Judge, by his statements and approach, represents in the mind of a reasonable member of the public. In this case, that can only be accomplished by his removal from the system which, if he were not removed, he would continue to represent".

Source: Canadian Judicial Council, *Canadian Judicial Council Inquiry into the Conduct of the Honorable Robin Camp: Report to the Minister of Justice* (2017).



Annex

Annex:

Additional resources

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5. Commonwealth, *Strengthening Jurisprudence of Equality: Violence against Women* (2014).
6. Commonwealth Secretariat and UN Women, *Judicial Resource Book on Violence against Women for Asia: Combating Violence against Women and Girls for Cambodia, India, Pakistan and Thailand* (2018).
7. Commonwealth Secretariat, *Judicial Bench Book on Violence Against Women in Commonwealth East Africa* (2017).
8. Council of Europe, *Preventing and Combating Domestic Violence Against Women – A learning resource for training law-enforcement and justice officers* (2016).
9. Council of Europe, *Improving the Effectiveness of Law Enforcement and Justice Officers in combating Violence Against Women and Domestic Violence – Training of Trainers Manual* (2016).
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11. Council of Europe Gender Equality Commission, Compilation of good practices to reduce existing obstacles and facilitate women's access to justice (2015).
12. Eileen Skinnider, *Towards Gender Responsive Criminal Justice: Good practices from Southeast Asia in responding to violence against women* (Thailand Institute of Justice, 2018).

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14. Emily Christie and others, *An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence Cases in the Pacific Island Region* (International Center for Advocates Against Discrimination, 2016).
15. European Union Agency for Fundamental Rights, *Violence against Women: an EU-wide survey* (2014).
16. European Union and Council of Europe, *Training Manual for Judges and Prosecutors on Ensuring to Justice, prepared under the project Improving Women's Access to Justice in the Eastern Partnership Countries* (2017).
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19. Inter-American Development Bank, *Violencia Contra la Mujer y Justicia Penal* (2014).
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21. International Commission of Jurists, *Sexual and Gender Based Violence, Fair Trial Rights and the Rights of Victims, Challenges in Using Law and Justice Systems Faced by Women Human Rights Defenders* (2015).
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25. Judicial Education Institute of Trinidad and Tobago, Justice Through a Gender Lens: Gender Equality Protocol for Judicial Officers (2018).
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33. UNODC, *Facilitator's Manual: Strategies for the Development of Cognitive Skills and Stress Management* (2017).

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List of selected international instruments

1. Convention on the Rights of the Child, GA res. 44/25.
2. Convention on the Elimination of All Forms of Discrimination Against Women, A/Res/34/180.
3. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/Res/40/34/annex.
4. Declaration on the Elimination of Violence against Women, A/Res/48/104.
5. Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC res. 2005/20, annex.
6. International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations Treaty Series, vol. 999.
7. International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, United Nations *Treaty Series*, vol. 993.
8. Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, A/Res/69/194.
9. Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, New York, 25 May 2000, United Nations *Treaty Series*, vol. 2171.
10. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, United Nations *Treaty Series*, vol. 2237.
11. Universal Declaration of Human Rights, General Assembly resolution 217 A (III).
12. Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/Res/65/228, annex.

List of selected regional instruments

1. African Charter on Human and Peoples' Rights (adopted 27 June 1981, OAU Doc. CAB/LEG/67/3rev.5).
2. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted by the 2nd x. Ordinary Session of the Assembly of the African Union, Maputo, CAB/LEG/66.6, 13 Sept 2000).

3. African Charter on the Rights and Welfare of the Child (OAU Doc. CAB/LEG/24.9/49, 1990).
4. Convention for the Protection of Human Rights and Fundamental Freedoms (Council of European, European Treaty Series, No. 5).
5. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (CETS No. 210).
6. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).
7. Council of Europe Convention on Action Against Trafficking in Human Beings (CETS No. 197).
8. European Convention on the Compensation of Victims of Violent Crime (Council of Europe, European Treaty Series, No.116).
9. American Declaration of the Rights and Duties of Man (Adopted by the Ninth International Conference of American States, Bogota, Columbia, 1948).
10. American Convention on Human Rights (Pact of San Jose, Costa Rica, 22 November 1969).
11. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention, Adopted in Belém do Pará, Brazil, on 9 June 1994 at the twenty-fourth session of the General Assembly).
12. Inter-America Convention on International Traffic in Minors (adopted at Mexico on 18 March 1994 at the Fifth Inter-American Specialized Conference on Private International Law).
13. South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (adopted 5 January 2002).
14. Declaration on Elimination of Violence against Women in the ASEAN Region (signed at the 37th Meeting of ASEAN Foreign Ministers in Jakarta on 13 June 2004).

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