

EFFECTIVELY INVESTIGATING, PROSECUTING AND ADJUDICATING SEXUAL VIOLENCE CASES: A MANUAL FOR PRACTITIONERS IN GEORGIA

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Council of Europe

Equality Now

UN Women

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Table of Contents

Introduction	2
I. Understanding sexual violence	3
1. Definition of sexual violence under international human rights standards	3
2. Interpreting sexual violence acts in the Criminal Code of Georgia	5
2.1. Excessive formalism as a barrier to access justice	5
2.2. Sexual Violence Crimes in the Legislation of Georgia	6
3. Automatic consideration of lack of consent under the Criminal Code of Georgia	12
4. Comprehensive understanding of non-consensual acts under sexual violence crimes under the Criminal Code of Georgia	13
4.1 Psychological violence and threat of violence that negate the possibility of consent	13
4.2. Coercion and coercive circumstances that negate the possibility of consent	15
5. Communicating lack of consent	18
6. Understanding coercive environments in relation to vulnerable women	19
6.1. General considerations	19
6.2. Minors	20
6.3. Victims of domestic violence	22
6.4. Ethnic minorities	23
6.5. Victims of forced marriage	23
6.6. Women with disabilities	24
6.7. Drug users, homeless or migrant women with uncertain residence status	26
6.8. Women in prostitution	27
6.9. Vulnerabilities connected to sexual orientation and gender identity	28
7. Understanding the impact of sexual violence	29
II. Investigation of sexual violence	31
1. Victim-centred investigations of sexual violence – general considerations	31
2. Reporting sexual violence and starting the investigation	34
3. Information to be collected immediately after starting the investigation	36
3.1. Vulnerability	36
3.2. Medical assistance	36
3.3. Injuries	37
3.4. Incapacitation	37
3.5. Use or threat of use of a weapon	37
3.6. Children as victims or witnesses	38
3.7. Communication barriers	38
3.8. Information on perpetrator(s)	39
4. Categories of evidence	39

4.1. Testimonial evidence	39
4.2. Evidence that may undermine the credibility of the perpetrator or defence witnesses	40
4.3. Evidence of coercion and coercive circumstances and other relevant evidence	40
4.4. Evidence of the impact of sexual violence	41
4.5. Expert examinations relevant to sexual violence cases	42
5. Evidentiary issues: Principles of admissibility, relevance, importance of contextualisation and issues around corroboration	45
6. Overcoming rape misconceptions and stereotypes	55
6.1. General considerations	55
6.2. Avoid drawing adverse inferences as to credibility	56
6.3. Irrelevance of behaviour before, during and after sexual violence	57
6.4. Avoid questions and attitudes based on misconceptions, bias and victim-blaming	58
6.5. Prior sexual behaviour	59
7. Investigating discriminatory motive	60
7.1. Sexual violence as a manifestation of discrimination against women	60
7.2. Discrimination based on sex and intersecting vulnerabilities	61
7.3. Prior history of violence and previous offenders	62
8. Interviewing	62
9. Victim protection and support	70
9.1. Referral to services	70
9.2. Risk assessments and risk management	71
III. Prosecution of sexual violence	75
1. Charging decisions	75
2. Termination of investigations and prosecutions	75
2.1. Victim retracts or withdraws from the criminal justice process	75
2.2. Reasons for withdrawal	75
3.2. Dealing with “false accusations”	78
IV. Trials	79
1. Role of judges in addressing sexual violence	79
2. Survivor-centred court procedures	79
2.1. Prioritising sexual violence cases	79
2.2. Confidentiality in court	79
2.3. Restrictions on cross-examination	80
2.4. Avoiding confrontation	80
2.5. Guarding against stress	81
2.6. Guarding against inappropriate behaviour	81
3. Judgments and sentencing	82
3.1. Examining aggravating and mitigating circumstances	82
3.2. Plea bargains and conditional sentences	86

List of Abbreviations and Acronyms

Istanbul Convention - The Council of Europe Convention on preventing and combating violence against women and domestic violence

ECtHR - European Court of Human Rights

ECHR - European Convention on Human Rights

ICL - International Criminal Law

ICCPR - International Covenant on Civil and Political Rights

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women

GR - General Recommendation

ICC - International Criminal Court

ICTY - International Criminal Tribunal for the Former Yugoslavia

ICTR - International Criminal Tribunal for Rwanda

CPC - Criminal Procedure Code of Georgia

CC - Criminal Code of Georgia

LGBTQI+ - Lesbian, gay, bisexual, transgender, queer and intersex

Introduction

This manual is a rights-based tool offering techniques and methodologies drawn from international human rights law and best practice for the investigation and prosecution of cases of rape and other acts of sexual violence against women in Georgia. It is a living document, guided by a gender perspective, and has been tailored, with local input, to the Georgian context. The manual is aimed at supporting the timely and effective handling of criminal cases to achieve the best possible outcomes and improving access to justice for survivors of sexual violence in a safe and supportive environment.

Sexual violence, similar to other forms of gender-based violence, is a manifestation of historically unequal power relations between women and men, and a form of discrimination against women. Sexual violence is a social mechanism that keeps women in a subordinate position and is a significant barrier to substantive equality. While sexual violence can be committed against persons of any sex, it predominantly affects women and girls and is directed against them because they are women or girls. It is therefore a gender-based crime.¹

This manual predominantly focuses on the investigation, prosecution, and adjudication of the following crimes of sexual violence as set out in the following Articles of the Criminal Code of Georgia:

- Article 137 – Rape
- Article 138 – Another act of a sexual nature
- Article 139 – Coercion into penetration of a sexual nature into the body of a person, or into another act of a sexual nature

The best practices and principles set out in this manual are also relevant to the following Articles of the Criminal Code:

- Article 140 – Penetration of a sexual nature into the body of a person below 16 years of age
- Article 141 – Lewd act

Although this manual focuses on acts of sexual violence committed against adult women over 18 years of age as opposed to minors (who are dealt with according to specific procedures beyond the scope of this manual), many elements are also applicable to specific situations of girl children. The manual focuses on crimes where the perpetrators are male and victims are female, while recognising that sexual violence can be committed against persons of any sex/gender.

The manual is designed for practical application for investigators, prosecutors, and judges in Georgia. These professionals are advised to familiarise themselves with the manual in its entirety and pay specific attention to their respective parts.

¹ Council of Europe Convention on preventing and combating violence against women and domestic violence ('Istanbul Convention'), Preamble.

I. Understanding sexual violence

1. Definition of sexual violence under international human rights standards

This manual defines sexual violence, including rape, in accordance with the Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention) to which Georgia is a party.² Similar standards are developed by the European Court of Human Rights (ECtHR), the Committee on the Elimination of Discrimination against Women (CEDAW Committee), and other international and regional criminal justice and human rights mechanisms.³

Sexual violence, including rape, is a criminal act, which is defined in the Istanbul Convention as follows:

- a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
- b) engaging in other non-consensual acts of a sexual nature with a person;
- c) causing another person to engage in non-consensual acts of a sexual nature with a third person.⁴

Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.⁵

The above-noted definition of sexual violence is legally binding on Georgia⁶ and must therefore be applied in Georgian criminal practice. Perpetrators of any of the above acts must be held accountable for committing sexual violence.⁷

Sexual violence involves singular, multiple, continuous or intermittent acts which, in context, are

² Istanbul Convention, Article 36.

³ Istanbul Convention, Article 36; M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), para. 181; Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 35 on gender-based violence against women, CEDAW/C/GC/35; CEDAW Committee, Karen Tayag Vertido v. Philippines, Merits, Communication No. 18/2008, UN Doc CEDAW/C/46/D/18/2008(2010); R.P.B. v. Philippines, Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011 (2014); International Criminal Court (ICC), ICC Rules of Procedure and Evidence; International Criminal Court (ICC) Elements of the Offences Articles 7((1)(g)-1, 7(2) and 8(2) of the ICC Elements of the Offences; Prosecutor v. Katanga ICC-01/04-01/07, Decision on the Confirmation of Charges 30 September 2008, Para. 440; Prosecutor v. Bemba ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute, 21 March 2016, Paras. 105-106; Inter-American Court Case of Fernandez Ortega et al v Mexico, Judgment of May 15 2011; Interpretation of judgment on preliminary objection, merits, reparations and costs; the International Criminal Tribunal for Rwanda (ICTR), The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Judgement, international Criminal Tribunal for the Former Yugoslavia (ICTY), 2 September 1998; Prosecutor v. Kunarac, Kovac and Vukovic No. IT-96-23& IT-96-23/1-A, ICTY, 12 June 2002; Mechanism to Follow Up on the Implementation of the Convention on the Prevention, Punishment and Eradication of Violence against Women (MESECVI, Second Hemispheric Report on the Implementation of the Belém do Pará Convention (Apr. 2012); and the Declaration on Violence Against Women, Girls and Adolescents and their Sexual and Reproductive Rights. UN Women guidelines also underscore that rape and sexual assault laws should not require evidence of additional force as rape itself is a violent act and that additional violence should be considered an aggravating factor.

⁴ Istanbul Convention, Article 36.1.

⁵ Istanbul Convention, Article 36.2.

⁶ Georgia ratified the Istanbul Convention in 2017 and CEDAW in 1994.

⁷ On the duty to investigate and prosecute acts of gender-based violence: CEDAW General Recommendation 28, CEDAW/GC/28, para. 19; Declaration on the Elimination of Violence Against Women, Article 4(c); Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, A/66/215, Section C, paras. 47-50, 57-63; Due diligence as a tool for the elimination of violence against women, Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2006/61.

perceived by the victim, the perpetrator, and/or their respective communities as sexual in nature.⁸ There is a broad spectrum of acts which can amount to sexual violence.⁹ An act may be sexual in nature regardless of whether it was intended to or did in fact produce sexual gratification of the perpetrator.¹⁰ Sexual violence may instead be intended for a variety of reasons, including to dominate, punish, humiliate, or intimidate.¹¹

Non-consensual acts of a sexual nature encompass an extremely wide range of behaviours, and can include: threatening, humiliating or mocking a person based on their sex, gender, gender identity, and/or sexual orientation; harassing by unwelcome sexual conduct, touching, comments, etc; humiliating, offending, intimidating by making noises or gestures with a sexual overtone; cyber-violence, such as sending sexually explicit messages; exposing a person to naked sexual body parts or acts of a sexual nature; having someone perform bodily functions which are normally conducted in private in view of others, such as measures related to menstruation; inspecting someone's genitals, breasts or hymen without medical or other similar necessity; kissing or licking someone's body or sexual body parts; making the victim masturbate themselves in front of another person; forced nudity, or mutilating or injuring a sexual body part, as with female genital mutilation, among others. This list is non-exhaustive.¹² Not all the above acts amount or should amount to criminal offences. Some acts of lower gravity can be subject to administrative or other sanctions.

With respect to sexual violence - including rape, the Explanatory Report of the Istanbul Convention provides that "prosecution of this offence will require a context-sensitive assessment of the evidence to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed. Such an assessment must recognise the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations. It is equally important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality."¹³

The European Court of Human Rights jurisprudence, which interprets the European Convention on Human Rights (ECHR), is legally binding on Georgia. In *M.C. v. Bulgaria* (2003), the Court was "persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy".¹⁴ The Court noted that the obligations under the Convention "must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim".¹⁵ The Court also noted that consent must be "given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."¹⁶

In *M.C. v. Bulgaria* the ECtHR also noted as follows: "Regardless of the specific wording chosen by the

8 The Hague Principles on Sexual Violence, ('The Hague Principles – Master Document'), p.8.

9 Kim Thuy Seelinger et al., "Investigation and Prosecution of Sexual Violence" (2011) A Working Paper of the Sexual Violence & Accountability Project Human Rights Center University of California, p. 6.

10 The Hague Principles – Master Document, pp. 14-15.

11 The Hague Principles – Master Document p.14; Prosecutor v. Milan Milutinović et al., IT-05-87-T, Judgement, 26 February 2009, para. 199.

12 For a more comprehensive list, see: The Hague Principles – Master Document, pp. 6-8, 40.

13 Explanatory Note to Istanbul Convention, (Explanatory Report) para 192.

14 *M.C. v. Bulgaria*, App. no. 39272/98, (ECHR, 4 December 2003), para 166.

15 *M.C. v. Bulgaria*, App. no. 39272/98, (ECHR, 4 December 2003) para 166.

16 *M.C. v. Bulgaria*, App. no. 39272/98, (ECHR, 4 December 2003), paras. 102-107, 163.

legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms (“coercion”, “violence”, “duress”, “threat”, “ruse”, “surprise” or others) and through a context-sensitive assessment of the evidence”.¹⁷

The CEDAW Committee also affirms that a definition of sexual violence crimes including marital and acquaintance/partner rape should be based on a lack of freely given consent and take the coercive environment into account.¹⁸

The above-noted is also fully in line with the jurisprudence, practice, and principles of international criminal law, which are discussed in more detail throughout this manual. Until amendments are introduced to bring Georgian law into conformity with the Istanbul Convention and the other binding human rights standards outlined above, the sections below provide recommendations for ways in which to interpret the existing legislation of Georgia so as to bring Georgian criminal justice practice into compliance with international standards. The approaches below do not reflect existing practice among investigators, prosecutors, and judges in Georgia, but should be understood as suggestions for advancing the existing practice until such time as the required amendments to the Criminal Code of Georgia are made. While this manual further recognises that legislative reform will greatly help practitioners on the ground to transform their practices for full compliance, applying the broad approach recommended by the ECtHR will help build better cases.

2. Interpreting sexual violence acts in the Criminal Code of Georgia

2.1. Excessive formalism as a barrier to access justice

Prosecutors and judges should move away from narrow interpretation of the provisions of the Criminal Code of Georgia addressing sexual violence crimes, as well as procedural rules applied in their investigation, prosecution, and adjudication. Narrow interpretations, stemming from the practice developed during the Soviet Union, deviate from the experience of most women who are victims of sexual violence.

Restrictive, formalistic interpretations deny the reality of sexual violence victims, since with such interpretations for an act to qualify or be considered a ‘real rape’ means that many of the more ordinary, threatening, intrusive, coercive experiences of unwanted sexual acts are not acknowledged and are normalised as not amounting to sexual violence.

Investigators, prosecutors, and judges have an obligation to ensure access to justice for victims of sexual violence, which is part of their right to an accessible effective remedy for violations. This is stipulated by the Istanbul Convention,¹⁹ the European Convention on Human Rights,²⁰ the International Covenant for Civil and Political Rights²¹ and other standards binding on Georgia. Excessive formalism in interpreting existing laws denies this right, since, under the European Convention on Human Rights, rights need to

¹⁷ M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), para. 161.

¹⁸ CEDAW, General Recommendation No. 35 on gender-based violence against women, CEDAW/C/GC/35, para 33.

¹⁹ Istanbul Convention, Article 49.

²⁰ European Convention on Human Rights, Article 13.

²¹ Article 2(3) International Covenant for Civil and Political Rights.

be “practical and effective and not theoretical and illusory.”²²

Formalism understands the law as static and unchanging. Excessive formalism rigidly follows the letter of the law even if the outcome is unjust or defies common sense.

Excessive formalism can deprive victims of crimes of their right to access justice. That is exactly what narrow, rigid, formalistic interpretations can do, when it comes to sexual violence offences in Georgia. They deprive women who have been victims of sexual violence of their right to access justice.

Prosecutors and judges should move beyond narrow formalistic interpretations of the operative sexual violence legislation that do not capture the wide range of situations in which sexual violence against women takes place. Moreover, they leave rape cases where there is no visible evidence of injury and no corroboration outside the reach of the criminal justice system.

The ECtHR has issued several judgments condemning the laws of different countries for excessive formalism in certain criminal cases as violations of Article 6 of the European Convention on Human Rights, stating that national courts must avoid excessive formalism that would infringe the fairness of the proceedings. The principles flowing from those decisions may also be applied to the right to an effective remedy under Article 13 of the Convention and may put Georgia in violation:

- In *Walchli v. France*, the ECtHR cautioned that the courts must, by applying procedural rules, avoid at the same time an excess of formalism which would undermine the procedural fairness, and excessive flexibility which would result in the removal of procedural conditions established by law.²³
- Applying *Walchi*, in *Evaggelou v. Greece*, the ECtHR said added that the right of access to a court is infringed when its regulations cease to serve the goals of legal certainty and the good administration of justice and constitutes a kind of barrier which prevents the litigant from seeing his dispute settled in court.²⁴
- In *Labergère v. France*, the Court held that the particularly strict application of a procedural rule may sometimes impair the very essence of the right of access to a court.²⁵

Prosecutors and judges need to avoid excessive formalism in the principles of interpretation related to sexual violence offences and apply less rigid interpretation of the provisions of the Criminal Code, which would bring Georgia’s practice in closer compliance with the standards developed by the Istanbul Convention, the ECtHR, the International Covenant for Civil and Political Rights and other instruments Georgia is bound by.

²² *Airey v. Ireland*, App. no. 6289/73, ECHR, 9 October 1979, par. 24; *Mehmet Eren v. Turkey*, App. no 32347/02, ECHR, 14 October 2008.

²³ *Walchli v. France*, App. no. 35787/03, ECHR, 26 July, 2007, para. 29.

²⁴ *Evaggelou v. Greece*, App. no. 44078/07, ECHR, 13 January 2011, para. 23.

²⁵ *Labergère v. France*, App. no. 16846/02, 26 September 2006, Para. 23.

2.2. Sexual Violence Crimes in the Legislation of Georgia

2.2.1. Article 137 – Rape

The crime is defined in the Criminal Code of Georgia as follows:

Rape, that is any form of penetration of a sexual nature of the body of a person with any bodily part or object, committed with violence, under the threat of violence or by abusing form of a helpless condition of a person affected.

This refers to any non-consensual form of vaginal, oral, or anal penetration into the body of the victim by a penis, or any other bodily parts or objects.

This article should be understood as follows -

Penetration of a sexual nature:

- This article only concerns penetrative acts. It does not cover non-penetrative sexual violence;
- Full penetration is not required for the offence to be made out. The depth of penetration is immaterial. Any form of penetration, however slight,²⁶ is sufficient to complete the crime. Penetration of the labia majora, the opening of the anus and lips of the mouth are all sufficient to give rise to rape.²⁷
- Evidence of ejaculation or physical traces of penetration are not required to establish penetration.

Perpetrator and victim:

- A perpetrator can be of any sex/gender;
- A victim can be of any sex/gender;
- Perpetrators are not only persons unknown to the victim. They may include, though are not limited to, a wide range of persons who, in context, hold positions of trust or authority over the victim, among them: spouses or intimate partners; parents, step-parents, foster parents; baby-sitters or child-minders; priests; police officers; guards or other officials in detention or other state facilities; teachers; employers; supervisors; medical professionals; care-givers to the elderly or infirm, or tour-guides. This list is non-exhaustive. Victims in these cases may also fall within the particularly vulnerable categories discussed in more detail in Section 6 of Chapter as well as in Chapter I Section 2.2. on Article 139.

Definition of Violence:

- Proof of violence **does not require evidence of visible physical injuries**. Even if committed with physical force, rape does not necessarily result in physical injury and may not leave any visible traces on the body of a victim.²⁸ The traces might be gone by the time the crime has

²⁶ Rome Statute, Article 7(1)(g)(1); FBI definition, 6 January, 2012 Update; FBI definition, 2013 update, Kunarac et al., IT-96-23 & IT-96-23/1-A, Appeal Judgment, 12 June 2002, para 127; Guidelines for medico-legal care for victims of sexual violence, WHO, 2003, p.8.

²⁷ Gegelia T., Kelenjeridze I., and Jishkariani B., Sex Crimes, World of Lawyers, Tbilisi, 2020, p. 28.

²⁸ Guidelines for medico-legal care for victims of sexual violence, WHO, 2003. P.11; WHO World Report on Violence and Health, 2002, Chapter 6, p.162.

been reported. Absence of physical injuries does not mean that the rape did not happen and should not be a reason to doubt the credibility of the victim.

- Proof of violence does not require evidence of **physical resistance** by the victim.²⁹
- Physical force should be interpreted according to its plain, ordinary meaning. This means that in those cases where physical violence is used, the level of violence **does not need to reach a certain threshold, such as ‘excessive physical force’ or ‘life-threatening physical force’**³⁰ before it is considered criminal, or an element of the crime of rape.
- The violent act is not restricted to only physical force. It also includes psychological or economic violence or coercion (see Section 4 of Chapter I for a detailed analysis of the interpretation of violence and coercion).
- **Threat of violence:** Could also be interpreted as psychological violence, which is used to intimidate the victim.³¹
- May refer to physical violence, but a perpetrator may threaten other forms of harm which are not physical violence, such as a threat to reveal a sexual encounter on social media. He may, for example, threaten economic violence.
- Can be directed towards the victim or any other person or property;³² Does not need to be immediate. A threat directed towards the future is still a constituent element of the crime if it created a coercive environment for the victim.
- Does not need to be explicit, and may be expressed in words or actions or a combination of both.
- Does not require a defendant to fulfil the threat or even to have the ability to do so; but for the victim to believe at that time that he could.
- Therefore, ‘threat of violence’ should not be limited to a threat of immediate violence dangerous to life or health or destruction of property, which effectively limits its application to the small number of situations that pass this burdensome evidential threshold.

Helplessness:

In Georgia, helplessness is interpreted as incapacity. It refers to persons who are not physically capable of giving consent or are unable to comprehend the situation because of their mental state. The common domestic understanding³³ is that a person can be considered helpless if, at the time of the commission of the crime, she was incapacitated by drugs or alcohol,³⁴ unconscious, asleep, suffering from an illness³⁵ or injury, as well as persons affected by age-related incapacity.³⁶

Helplessness can, however, also be the result of force, threat of force or coercion, or by taking advantage

29 Explanatory note para. 191, M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), 166.

30 Amnesty International, ‘Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court’ (2011) (‘Rape and Sexual Violence Amnesty’), p. 18.

31 See Gegelia T., Kelenjeridze I., Jishkariani B., Sex Crimes, 2020, p. 37.

32 The Hague Principles – Master Document, p. 45; ICC Elements of Crimes, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, Element One, Ntaganda Trial Judgment, ICC-01/04-02/06, para 944; Kunarac et al. IT-96-23& IT-96-23/1-A , Appeal Judgment, 12 June 2002, para 130.

33 M. Lekveishvili, N. Todua, G. Mamulashvili, Private Part of Criminal Law (Book One), Fourth Edition, 2011, p. 170-171.

34 International Protocol on Investigation of Sexual Violence in Conflict, p.59; M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), paras. 79, 150, Roadblocks to Justice: How the Law is Failing Survivors of Sexual Violence in Eurasia, Equality Now, 2019, FN 22, p. 17, Prosecutor v. Bemba, ICC-01/05-01/08, 8 June 2008 judgement, para 107.

35 Kunarac et al. Trial Judgment, paras. 451-452; Prosecutor v. Sesay et al., No. SCSL-04-15-T, Trial Judgement, 2 March 2009, para 148.

36 Kunarac et al. Trial Judgment, para 591, 762; Prosecutor v. Sesay et al., No. SCSL-04-15-T, Trial Judgement, 2 March 2009, para 148.

of a coercive environment.³⁷ For example, women who have been victims of systematic domestic violence/abuse may be considered helpless under this Article. For example, an abuser might have beat his victim, and had sexual intercourse with her a few hours after. This act may, following a context-based analysis, be classified as rape, since the victim was subjected to coercive environment because of the physical violence she suffered previously. A context-based analysis may also show the victim was effectively made helpless because of systematic domestic abuse. In other cases, they might be considered as unable to give genuine consent based on coercion and coercive circumstances. Coercion and coercive circumstances will be discussed further in Chapter I Section 4.2.

There should not be an automatic presumption that a person with a mental disability is helpless, except for the situations where a specific form of disability hinders an individual to comprehend the situation and express voluntary consent. Instead, this should be assessed based on the person's individual and surrounding circumstances. Crimes against persons with disabilities are specifically criminalised as aggravated crimes (see Chapter I, section 6). A person with a disability might be considered helpless when she is unable to carry out her daily functions without assistance and she is offered support in exchange for sex or coerced into sex by her care-giver.³⁸

Helplessness can also entail situations where the victim has no opportunity to get away from the abuser or receive help from anyone (e.g. she is in an uninhabited place together with the abuser and the abuser has full control over the situation).

Helplessness and being subjected to coercion and coercive circumstances are interconnected. An individual is in a helpless state if she is deprived of the ability to consent, to react to the situation, or cannot comprehend the nature of the act she is subjected to. In relation to coercive circumstances, the capacity of the victim might not be fully taken away, but she is subjected to coercion, which excludes her ability to give voluntary consent and renders her effectively helpless, e.g. the abuser beats the victim and has sexual intercourse with her a few hours later. This act should likely be classified as rape, since the context indicates that the victim was subjected to a coercive environment because of the physical violence she had suffered previously.

Consequently, helplessness should be widely interpreted and should cover a wide range of situations, in addition to the traditional understanding of helplessness when the victim of incapacitated.

Attempted rape:

When penetration has not been established but lack of consent has, and where the perpetrator's intent (direct or indirect) to penetrate has been proven based on the evidence, the crime should be classified and charged under Article 19-137 (attempted rape) of the Criminal Code. Such a crime should not be classified under Article 138, as discussed below.³⁹

For further discussion of which acts should be covered under Article 137 see Chapter I Section 4.

³⁷ M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003) para. 102, referring to Prosecutor v. Furundzija, IT-95-17/1-T, Trial Judgment, 10 December, 1998.

³⁸ See Todua N., Lekveishvili M., Mamulashvili G., Gvenetadze N. Specific Part of Criminal Law, Book I, 7th addition, 255. This example is given to explaining the meaning of helplessness under Article 139.

³⁹ Commentary of Crimes against Sexual Freedom and Inviolability, group of authors, Union Sapari, 2020, 98.

2.2.2. Article 138 - Another act of a sexual nature

Defined in the Criminal Code as:

Another act of a sexual nature, which does not contain the elements of crime under Article 137 of this Code, committed with violence, under the threat of violence or a helpless condition of a victim.

Should be understood as:

Acts of a sexual nature that fall short of penetration⁴⁰ and are committed with “violence, under threat of violence, or a helpless condition of a victim.”

The difference between this and Article 137 is that Article 138 applies to non-consensual, non-penetrative, physical contact of a sexual nature, while Article 137 applies to penetrative sexual violence.

The remaining elements of this crime should be understood as provided above in relation to Article 137.

Examples of acts which can be classified as offences contrary to Article 138 might include, among others, intrusive body searches carried out by the security forces on a person during detention; acts of a humiliating and sexual nature in prisons (for example, forced nudity), and vaginal or anal examinations carried out by police and not health personnel as a first and not a last resort measure, with the aim of maintaining security in prison.

Physical contact is not necessarily contact on the skin – it can be made through clothing. In addition, the act can be committed not only by physical parts, but also by using objects.⁴¹

2.2.3. Article 139 – Coercion into penetration or into another act of a sexual nature

This offence is **defined in the Criminal Code as:**

Coercion into penetration of a sexual nature into the body of a person, or into another act of a sexual nature, committed under the threat of damaging property, disclosing defamatory information, information representing private life or such information that may substantially affect the right of that person, and/or by abusing a helpless condition of a person affected, or material, official or other kind of dependence.

Applying the broad approach to the prosecution of sexual violence offences recommended by the ECtHR (as discussed in more detail above), the criminal behaviour referred to in Article 139 is fully subsumed within Articles 137 and 138 of the Criminal Code.

Two rape offences based on the same facts:

Georgian legislation currently allows for two different rape crimes, one of which calls for more serious penalties on conviction (Article 137) while the other, Article 139, is called coercion rather than rape and is defined as a light crime committed in circumstances other than with the use of force and threat of immediate force and helplessness. This reinforces the myth that rape always involves physical force. Additionally, by maintaining an alternative rape charge that **does not** demand proof of physical force eschews the idea of affirmative consent is rejected.

A similar two-crime approach in Spanish law (which distinguished between sexual assault, including

⁴⁰ In line with the Istanbul Convention 36.1.b and Explanatory Report to the Istanbul Convention, para. 190.

⁴¹ Gegelia T., Kelenjeridze I., Jishkariani B., *Sex Crimes*, 2020, 59-60.

rape, and sexual abuse, including penetration) has been criticised by GREVIO,⁴² which stated that this approach illustrates an “improper understanding of the use of force and intimidation and the reactions this may trigger in victims of rape” (para. 220).

GREVIO welcomed the Supreme Court of Spain’s clarification, which now serves as guidance to lower courts, that the offence of rape “may apply not only to cases in which physical violence is used, but where other factors clearly indicate that the victim did not consent, such as intimidation (para. 220). GREVIO also indicated its regret that cases involving sexual penetration were being qualified as a different offence (sexual abuse) to rape “where the surrounding circumstances clearly demonstrate intimidation”, and additionally noted that this decision expressly stated the need for a context-sensitive interpretation of the situation a rape victim would find herself in (para. 220).

Despite this resolution, GREVIO noted that Spanish regional courts continued to apply “excessively formalistic interpretations to diminish the criminal liability of the perpetrator” (para. 221). In that light, it welcomed legislative efforts aimed at introducing a new offence to replace the existing provisions, which would send the message that “rape is rape”, and that any sexual act performed on a person without her freely given consent amounts to sexual violence, in accordance with Article 36 of the Istanbul Convention.

The above reasoning is clearly applicable and of relevance to the situation in Georgia. The issue is of particular concern because among other things, Article 139 is also aimed at perpetrators who rape or commit any other non-penetrative act of sexual violence by abusing the victim’s material, official **or other kind of dependence**. As noted above, this can include a wide range of persons who, in context, hold positions of trust or authority over the victim, among them includes but, not limited to: spouses or intimate partners; parents, step-parents, foster parents; baby-sitters or child-minders; priests, police officers; guards or other officials in detention or other state facilities; teachers; employers; supervisors; medical professionals; or care-givers to the elderly or infirm.

The public interest impacts heavily on both charging and sentencing decisions in these types of cases, particularly given the relationship of trust normally connected with dependant relationships.⁴³ By their very nature, these cases, which involve the abuse and exploitation of the most vulnerable, warrant higher sentencing on conviction based on the aggravating circumstances.⁴⁴ They should not be charged as or considered a “less serious” offence within the meaning of Article 139 by mere virtue of the fact that the victim suffered no physical injuries.

Inconsistent sentences for the same acts

Whereas the sentence range for convictions under Article 137 of the Criminal Code is 6-8 years, and the range for convictions pursuant to Article 138 is 4-6 years, the minimum sentence for a conviction under Article 139 is a financial penalty, while the maximum sentence is five years in prison. This means that a conviction under Article 139 for rape and/or other serious non-penetrative acts of a sexual nature could, in theory, result in a financial penalty for some of the very same acts that could support a felony conviction under Article 137. While each case is unique, there is no justification for this kind of disparity. It violates principles of equality before the law.

⁴² GREVIO Baseline Evaluation Report Spain.

⁴³ Crown Prosecution Service Guidelines, Rape and Sexual Offences - Chapter 7: Key Legislation and Offences.

⁴⁴ See Istanbul Convention, Article 46(a) and 46(b); Articles 137(2)(a),(e); 138(2)(b),(d),(f); 139(3)(e) Criminal Code of Georgia.

Conditional sentences for rape

Article 45 of the Istanbul Convention requires state parties to take the necessary legislative or other measures to ensure that sanctions for sexual violence offences are “effective, proportionate and dissuasive.”

The low sentencing range under Article 139 places rape and other non-penetrative acts of sexual violence in the category of “less serious crimes”, defined in Article 12(2) of the Criminal Code. A person who admits committing a “less serious crime” may receive a conditional sentence. Therefore, Article 139 leaves the possibility open that a perpetrator convicted of rape under this provision could receive a conditional sentence.

A conditional sentence for rape is neither effective, nor proportionate or dissuasive. This lenient sentence implicitly condones this serious crime; diminishes protection for victims; and **promotes a climate of impunity**. Furthermore, a conditional sentence for rape runs contrary to both the letter and spirit of the Istanbul Convention⁴⁵ and CEDAW General Recommendation No. 35 on gender-based violence against women.⁴⁶

Coercive rape and rape with no evidence of physical force should be treated by the courts as equally serious to any other rape – which they are not.

Therefore, to ensure that the classification of the crime properly recognises the gravity of the act committed, the following practice should be applied:

- If the act in question involved non-consensual sexual penetration, the crime should be classified under Article 137 (instead of Article 139);
- If the act involved other non-consensual physical contact of a sexual nature but not penetration, it should be classified under Article 138 (instead of Article 139);
- In the case of sexual coercion that did not result in penetration or other contact of a sexual nature, the act should be classified as an attempt or preparation of Article 137 or 138.

3. Automatic consideration of lack of consent under the Criminal Code of Georgia

As provided in Chapter I Section 1, the Istanbul Convention and other instruments binding on Georgia define rape as an act committed without consent, which is currently not explicitly embedded in the legislation of Georgia. Under the Istanbul Convention, an intentional conduct of “engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object” should be criminalised (Article 36). This article also provides that “consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.” This context-based analysis also represents best practice in international criminal and human rights law.

⁴⁵ Istanbul Convention, Articles 1, 3.

⁴⁶ CEDAW/C/GC/35, paras. 26(a), 29.

International criminal and human rights law holds⁴⁷ that the possibility to give **free, voluntary and genuine consent is negated** when a sexual act is committed through the following means:

- by force, or threat of force or coercion (such as that caused by fear of violence, duress, detention, intimidation, blackmail, psychological oppression or abuse of power and other forms of duress);
- by taking advantage of a coercive environment;
- against a person incapable of giving genuine consent.

When just one of the above criteria is met, this alone is sufficient to establish the non-consensual nature of the sexual act. Proving a lack of consent or demonstrating the non-consent of the victim (i.e. by their words or deeds) is therefore not required in such circumstances.⁴⁸ Once coercion or the inability to give genuine consent has been established, examination of consent is unnecessary.

The lack of possibility for the victim to consent is therefore what underpins the existing provisions of the Criminal Code of Georgia. If any elements of the crimes described above are present, it vitiates consent and it should automatically be considered that the crime was committed without the consent of the victim, even though the wording of the law does not explicitly enunciate lack of consent.

This approach removes the focus away from the acts and conduct of the victim to instead focus on the behaviour of the perpetrator and the surrounding context. It requires a context-based analysis.

Lack of possibility to consent could be demonstrated by violence (physical, psychological, economic, coercion), threat of violence (physical, psychological, economic, coercion) against the victim or a third person,⁴⁹ abusing the helpless state of the victim and rape committed through various other acts, such as:

- threatening to damage property
- threatening to disclose defamatory information
- threatening to disclose information representing private life
- threatening to disclose information that may substantially affect the rights of the victim
- abusing a helpless condition of a victim
- abusing material, official or other type of dependence of a victim (among a wide range of others).

However, the wording of the Georgian legislation is not exhaustive and progressive, non-formalistic

⁴⁷ M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), para. 181; ICC Rules of Procedure and Evidence, Rule 70; ICC Elements of the Offences, Articles 7 (1) (g-1) (2), 8(2) (e) (vi) (-1) ; Katanga ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 440, https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF ; The Administration of Justice on Sexual Violence Crimes, p. 13, <https://rm.coe.int/-web/1680a0a3e3>; Bemba ICC-01/05-01/08-3343, 21 March 2016, para. 105-106: 'The Chamber notes that the victim's lack of consent is not a legal element of the crime of rape under the Statute. The preparatory works of the Statute demonstrate that the drafters chose not to require that the Prosecution prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice. Therefore, where "force", "threat of force or coercion", or "taking advantage of a coercive environment" is proven, the Chamber considers that the Prosecution does not need to prove the victim's lack of consent; Kunarac Appeal Judgement, IT-96-23&IT-96-23/1-A, 12 June 2002, para. 126, <https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>. NB: Nine European common and civil law countries have enacted consent-based rape legislation: Amnesty International: <https://www.amnesty.org/en/latest/news/2019/11/only-nine-european-countries-recognise-sex-without-consent-is-rape-this-must-change/>. See also: Canada Criminal Code, Articles 271, 273.

⁴⁸ Ntaganda Trial Judgment, ICC-01/04-02/06, 8 July 2019, para. 934.

⁴⁹ The Hague Principles – Master Document, p. 45; ICC Elements of Crimes, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6; Ntaganda, ICC-01/04-02/06, Trial Judgment, 8 July 2019, para 944; Kunarac et al. IT-96-23& IT-96-23/1-A, Appeal Judgment, 12 June 2002, para 130.

interpretation of the present criminal code provisions is required to make sure that all forms of sexual violence crimes committed with the lack of consent are punishable in accordance with international practice and the human rights standards that Georgia has undertaken to adhere to. The following section provides for how to apply such an interpretation.

4. Comprehensive understanding of non-consensual acts under sexual violence crimes under the Criminal Code of Georgia

4.1 Psychological violence and threat of violence that negate the possibility of consent

As explained in Chapter I Section 1, violence and threat of violence in Articles 137 and 138 should not be limited to physical violence. Rather, they should be interpreted as covering all forms of physical, psychological and economic violence and abuse. Coercion and threats are forms of psychological violence (as defined by both the Istanbul Convention and international criminal law). The Criminal Code of Georgia defines coercion as *Illegal restriction of a person's freedom to act, i.e. coercing him/her physically or mentally to perform or not to perform an action, performance of or abstaining from performance of which is his/her right, or to make him/her experience an influence against his/her own will (Article 150.1).*

Such an approach will help increase the focus on, and enable success in relation to, prosecution of rape and other acts of sexual violence particularly when reporting is delayed where evidence of physical violence or biological evidence may be unavailable. Such an approach will also prevent perpetrators from evading liability for rape and other sexual acts to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

Based on the laws in force in Georgia, **psychological violence** is defined as:

- Giving offence, blackmailing, humiliation, threats, or any other action that violates a person's honour and dignity (Article 4.b of the Law on the Elimination of Violence Against Women and Domestic Violence, which can be applied to interpret relevant provisions in force under the Criminal Code);
- Regular insult, blackmail (or) humiliation by one family member against another which results in anguish (Article 126¹ of the Criminal Code).

Other examples of psychological violence negating the possibility of consent

Acts of psychological violence, within the scope of coercion include creating or exploiting vulnerabilities in victims to make them dependent on or subordinate to their abuser. These acts can have a devastating effect on victims and should not be excluded as elements through which sexual violence can be committed. Their effect must be assessed in context.

In line with human rights standards, Articles 137 and 138 should be understood broadly as committed through, inter alia, the acts below. This non-exhaustive list illustrates some acts of psychological violence that could negate consent:

- social isolation of the victim from others (friends, family, medical or other support) or confinement;
- a range of threats, which may or may not be of an immediate nature (these can be linked to such things as the victim's children or other family members; their uncertain immigration

- status; housing and financial dependence, among many others);
- threatening gestures and language;
- intimidation (including, for example, through shouting and other aggressive behaviour, such as destroying things);
- harassment, including:
 - street harassment, such as making sexually explicit gestures, statements, or mobbing;
 - cyber-harassment, which can involve using social media platforms, emails, or messaging applications to send such things as threatening, sexually explicit or offensive communications to the victim;
- stalking (including cyber-stalking);
- insulting or belittling the victim (in private or in front of others) by calling them names or ridiculing them;
- cultural/religious humiliation, such as removing a victim's headscarf, or making them disrobe; and
- demanding obedience.⁵⁰

Acts and evidence of coercion such as any of the limited examples above do not need to be contemporaneous to the non-consensual sexual act in question to be relevant to any investigation or prosecution.

Due to previous psychological, economic or physical violence against the victim, the abuser may no longer use physical violence, threats of violence or coercion any other form of violence immediately before committing sexual violence. However, in such a situation, it should still be considered that due to previous violent episodes, the perpetrator has already intimidated the victim and her ability to freely, voluntarily consent. Rape is committed with the use of violence in cases where the perpetrator has already put the victim in a position where her will is suppressed. For example, the abuser took the victim to an uninhabited place where she was sexually abused.⁵¹ As discussed above, in this context this act can also be classified as rape committed by abusing the helplessness of the victim.

4.2. Coercion and coercive circumstances that negate the possibility of consent

Methods of coercion in situations of sexual violence against women are much more than the few listed in Article 139. Any interpretation that would limit the charging prospects for coerced sex to cases involving only those means specifically listed in Article 139 would be excessively formalistic.

Coercive circumstances and behaviours can take various forms and intimidate the victim to such an extent that she is unable to give genuine and willing consent. Perpetrators of sexual violence employ different forms of coercion - surveillance, rules, isolation, manipulation, put-downs, degradation, humiliation, and threats to create or exploit vulnerabilities in victims to make them dependant on – even obedient to - their abuser. Coercion is aimed at gaining and maintaining power and control. In domestic violence cases, it is often part of an oppressive pattern of domination that can chip away at a

⁵⁰ European Institute for Gender Equality (EIGE), Risk Assessment and Management of Intimate Partner Violence in the EU, 2019, pp. 26-27; EIGE, Glossary of Definitions of Rape, Femicide and Intimate Partner Violence, 2017; WHO - Understanding and Addressing Violence Against Women Information Sheet; WHO: Strengthening Health Systems to Respond to Women Subjected to Intimate Partner Violence or Sexual Violence, 2017; Istanbul Convention, Article 33; Explanatory Report, Paras. 179-186; The Issue of Violence Against Women in the European Union, Policy Department for Citizen's Rights and Constitutional Affairs for the FEMM Committee, 2016, pp.16-17.

⁵¹ Commentary of Crimes against Sexual Freedom and Inviolability, group of authors, Union Sapari, 2020, 96-97.

woman's sense of safety and independence.

Coercion is harmful in and of itself. Whether a victim has been subjected to coercion is always a context-based determination.

Coercive circumstances can be created with physical, psychological, economic violence or neglect, or even **when there is no direct evidence of these actions**.

Coercive circumstances can include situations of detention⁵², or where sexual violence is committed in conjunction with other crimes,⁵³ such as battery, aggravated robbery, or human trafficking.

In addition to the behaviours discussed in the previous section, the non-exhaustive list below provides examples of coercive circumstances that could help police, prosecutors and judges recognise behaviours on the part of a perpetrator which, **in context**, might negate consent to sexual contact:

- Making the victim feel like it's too late to say "no" or feel bad or guilty for not having sex;
- Making the victim feel obliged to have sex, such as by referring to "marital obligations" or threatening to end their relationship if she refuses;
- Making promises to the victim that she or another person close to her would be rewarded if the victim has sex with the perpetrator. For example, when due to financial problems, a person may lose housing, or a child of the victim is seriously ill and she is unable to pay for the treatment. If the abuser is aware of these circumstances and in exchange for sexual intercourse offers the person material assistance that is vital to her, this type of offer should be considered as coercion;
- Threatening any kind of abuse if the victim doesn't perform certain sexual acts;
- Isolating the victim from her friends or family;
- Depriving the victim of her basic needs;
- Monitoring the victim's activities and the length of time she spends engaged in them;
- Monitoring the victim's communications;
- Taking control over aspects of the victim's everyday life, such as not allowing her to leave the house, dictating where she can go, who she can see, what she can wear or where she can sleep;
- Depriving the victim of access to support services, such as medical help;
- Repeatedly demeaning the victim, telling her e.g. that she is worthless (in private or public);
- Enforcing rules or activities which humiliate, degrade or dehumanise the victim;
- Forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure of sexual violence to authorities;
- Controlling the finances of the victim, such as only allowing a person a paltry living allowance, or taking her wages, benefits or allowance; not letting her have her own bank account;
- Preventing the victim or a person close to her from being able to attend school, college or university;
- Preventing the victim from working;
- Preventing the victim from having access to transport;
- Threatening that the perpetrator would cause the victim to lose her job or prevent her success in school;
- Threats of withholding benefits from the victim or someone she is close to, such as a

⁵² The Hague Principles – Master Document, p. 47.

⁵³ The Hague Principles – Master Document, p. 47.

- promotion at work or a good grade;
- Threats to have the victim's children taken into care;
- Threats to harm or physically harming a family pet;
- Threats to reveal private information, such as the victim's sexual orientation, HIV status or immigration status, or private photographs publicly, or to family and friends, or on social media;
- Property damage, such as destruction of household goods;
- Threats of reputational damage, such as related to societal stereotypes regarding divorced women or the sex life of an unmarried woman;
- Threats of family dishonour.⁵⁴

Incidents or behaviour such as the examples set out above can be part of a pattern of controlling or coercive behaviour which is well established before a single incident of such behaviour or rape itself has been reported. In many cases the conduct might seem innocent - especially if considered in isolation from other incidents - and the victim may not be aware of, or be ready to acknowledge, abusive behaviour.⁵⁵ However, coercive, controlling behaviours will often intensify and escalate.

A report on sexual violence should not be considered as a single, isolated incident particularly in the context of family or intimate partner relationships, where consideration of the cumulative impact of controlling or coercive behaviour and the pattern of that behaviour within the context of the relationship is crucial, because this can be evidence which would negate consent.⁵⁶

Coercion/coercive circumstances will often take place within an **unequal power relationship** between a perpetrator and their victim.⁵⁷ An unequal power relationship can arise due to a variety of factors. Some illustrative examples include:

- the perpetrator being in a position of authority or power or influence over the victim, including in an institutional setting;
- the victim being dependent on the perpetrator (financially, legally, for resources, personally or through family connections), or in a relationship with the perpetrator that gives rise to a risk of exploitation;⁵⁸
- an awareness that the perpetrator has previously used violence against them, or a third party, including marital, familial, or intimate relationships.⁵⁹
- Sexual violence committed within the framework of a relationship with a musical, political, spiritual or religious leader, idol or other public figure, has particular characteristics linked to the image built around the alleged perpetrator, to whom exceptional virtues and powers are attributed by their following. The leader builds an asymmetric relationship with his followers that encourages admiration, idealisation, and a wish to seek to please or satisfy on their part. This leader generates submission through manipulation, taking advantage of age, social

⁵⁴ See: Roadblocks to Justice: How the Law is Failing Survivors of Sexual Violence in Eurasia, Equality Now, 2019, p.11; Handbook on Legislation for Violence Against Women, UN Women, 2012, p.25; UK Guidelines for Prosecutors, Controlling or Coercive Behaviour in an Intimate or Family Relationship; U.S. Department of Health & Human Services, Sexual Coercion; Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors; Guidelines for medico-legal care of victims of sexual violence, WHO, 2003, p.6.

⁵⁵ Crown Prosecution Service Guidelines, Controlling or Coercive Behaviour in an Intimate or Family Relationship.

⁵⁶ Crown Prosecution Service Guidelines, Controlling or Coercive Behaviour in an Intimate or Family Relationship.

⁵⁷ The Hague Principles – Master Document, p.11.

⁵⁸ The Hague Principles – Master Document, p. 11: for e.g., sex, sexual orientation, gender identity, age, disability, poverty, class, social status, caste, ethnicity, indigeneity, race, religion, illiteracy, or other grounds.

⁵⁹ The Hague Principles – Master Document, p.11.

inequalities, or a vulnerability; or the need on the part of the victim to belong to a certain group. Abusive acts in this context can involve situations of humiliation, generating various feelings such as discomfort, anguish, panic attacks and depression. Such examples of psychological manipulation determine and violate the will of the victim, to the point of preventing her from discerning and identifying the degree of violence to which she is exposed;

- the victim belongs to a vulnerable group that is based on life circumstances⁶⁰ which makes them more vulnerable to a coercive environment.

Unequal power relationships can occur in marital, familial, intimate, societal, or institutional relationships or interactions.⁶¹

As noted above, coercion should be assessed based on a thorough, comprehensive investigation of the context surrounding any incident of sexual violence.⁶² To determine whether there was coercion, the following non-exhaustive illustrative facts could be considered, including:

- the victim's age, maturity and ability to understand what was happening (this does not in any way exclude older individuals as possible victims of coercion);
- the history of the relationship between the victim and alleged perpetrator;
- whether the victim knew or understood the position they were in and what they were being asked to do;
- whether the victim knew or believed that the alleged perpetrator had committed violence against others;
- whether the alleged perpetrator's social or political status made the victim think that she could not refuse;
- whether any force or threats of force were used previously against the victim or a third person (such as a family member or loved one);
- whether an alleged perpetrator was in a position to exert power/ influence over the victim;
- whether the victim was under the influence of alcohol or drugs;
- whether an alleged perpetrator made any promises, such as of a more secure way of life, among other circumstances surrounding the allegation.⁶³

5. Communicating lack of consent

As discussed in Sections 1 and 2 of Chapter I, the determination of lack of possibility to consent should be automatic in certain situations and scenarios rendering it unnecessary to examine if consent was communicated or not.

The ECtHR has repeatedly said that there is no requirement for the victim to clearly say no.⁶⁴

In line with international standards, therefore, lack of consent should not be interpreted in a way that requires the victim to say no – rather, this requires a context-sensitive assessment of the circumstances

⁶⁰ Article 531 of the Criminal Code of Georgia.

⁶¹ Explanatory Report paras. 194, 209; UK Guidelines for Prosecutors, Controlling or Coercive Behaviour in an Intimate or Family Relationship; U.S. Department of Health & Human Services, Sexual coercion.

⁶² International Criminal Law Guidelines on Sexual Violence, section 14 (b)(iv)(i), p. 46.

⁶³ Crown Prosecution Service Guidelines, What is consent?

⁶⁴ E.B. v. Romania, App. no. 49089/10, (ECHR, 19 March 2019), para. 56; M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), paras. 143, 156-158, 166; The Administration of Justice on Sexual Violence Crimes, pp.5,8, 14; ICC R70(a) RPE.

during which it could be ascertained whether there are circumstances which render the victim unable or incapable of being in a position to have possibly consented to the act.⁶⁵ For the interaction to be non-consensual, the victim need not state “no.”

There is no legal requirement to show the victim physically resisted the rape or sexual violence (see Chapter II, Section 6). If the victim said no but did not physically resist, this is evidence of lack of consent. Therefore, stating “no” is sufficient in any situation, including in the absence of a coercive environment.

Expression of consent can be based on either words or behaviour and will be determined by the facts in each case, including some positive indication through behaviour or words that there was willing participation. Nothing less than positive affirmation is required.⁶⁶

Further, the victim’s apparent active participation in the sexual act or any physiological reaction does not necessarily equate to willing participation indicating consent.⁶⁷ More enquiries must be made to establish the circumstances at the time.

Consent must be analysed in a dynamic way: consent must exist at the beginning and during the entire performance of the sexual act(s). On some occasions, a sexual act with a certain content is accepted, but during its performance there is disagreement about some activity, its modality or continuity, or the victim no longer wishes to continue the sexual act. In these cases, the separate sexual activity should be analysed separately to determine whether or not there was consent to the supervening and disputed practice. This should not prejudice the context-specific assessment of the case and the introduction of evidence linking the perpetrator’s abuse of the victim on other occasions of violence.⁶⁸

To determine what ‘no’ meant for the victim, it is important to take into account the entire reality of the sexual violence by considering (these are non-exhaustive examples):⁶⁹

- What the victim said: while there is no requirement for the victim to have expressed her lack of consent by saying ‘no’, if she did then it is important to document this;
- What words the alleged perpetrator used: any words that the alleged perpetrator used could indicate that he heard and understood the way the victim said ‘no’. If, for example, the victim said ‘no’ and the alleged perpetrator responded with ‘come on, I know you want it’, then this indicates that he heard and understood that the victim said ‘no’.

If the victim did not explicitly say ‘no’ or physically resist, it is important to examine in what other ways lack of consent might have been expressed (see Section 6 of Chapter II: Flight, flight or freeze). Some victims report shaking their head throughout the assault; or looking away and focusing on something else. These and other such behaviours could indicate a lack of willingness on the part of the victim and could be useful for a prosecutor to determine the reality of the sexual assault.

Consent can be revoked at any time. Thus, consent is not confirmed if the victim has consented to similar conduct such as if they consented to the sexual activity in question on a previous occasion; if they initially consented but later withdrew that consent, or if the nature of the sexual activity changes

⁶⁵ *M.C. v. Bulgaria*, App. no. 39272/98, (ECHR, 4 December 2003), paras. 143, 156-158, 166.

⁶⁶ *R. v. Goldfinch*, SCC 38, Supreme Court of Canada, Judgement of 28 June, 2019, para. 44.

⁶⁷ *Kunarac et al. IT-96-23-T& IT-96-23/1-T*, Trial Judgement, 22 February 2001, para. 644.

⁶⁸ See “Stop it—NOW”: Charging Considerations in the Prosecution of Rape Following a Revocation of Consent, Aequitas and Jennifer Newman.

⁶⁹ *Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault*, Sergeant Joanne Archambault (Ret.) Kimberly A. Lonsway, PhD February 2006 Updated June 2019, p. 21.

without their consent.

6. Understanding coercive environments in relation to vulnerable women

6.1. General considerations

Women can be subjected to multiple and intersecting forms of discrimination⁷⁰ which have a cumulative negative impact in relation to sexual violence. The intersection of these vulnerabilities can result in different coercive environments in which sexual violence is committed. Some of these environments may include elements of the behaviour described in Chapter II Section 6, but each will be very specific to the victim, her personal circumstances, and the relationship and power dynamics between the victim and the perpetrator.

Victims' experience of sexual violence should not be negated because of their belonging to various groups and the specific circumstances they are in. Rather, their specific vulnerabilities need to be fully considered when classifying and addressing sexual violence against them. This intersectionality and the way in which the discriminations interact with one another underscores the need for context-based sexual violence investigations in each case⁷¹ (See Chapter II Section 1 and 5). The handling of cases involving these particularly vulnerable victims requires authorities to be especially diligent in applying a victim-centred approach.⁷²

The issues provided below are a background analysis of the situation of women with particular vulnerabilities which need to be taken into account for understanding and detecting sexual violence.

6.2. Minors⁷³

Assessment of consent and coercive circumstances in relation to minors (persons under 18) requires

⁷⁰ CEDAW GC 35, para. 12, citing: General recommendation No. 33, par 8 and 9. Other general recommendations relevant to intersectional discrimination are general recommendation No. 15 on women and AIDS, No. 18 on women with disabilities, No. 21 on equality in marriage and family relations, No. 24 on women and health, No. 26 on women migrant workers, No. 27 on older women and protection of their human rights, No. 30 on women in conflict prevention, conflict and post-conflict situations, No. 31 on harmful practices, No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women and No. 34 on the rights of rural women. The Committee has also addressed intersectional discrimination in its views on communications (Jallow v. Bulgaria, 2012; S.V.P. v. Bulgaria, 2012; Kell v. Canada, 2012; A.S. v. Hungary, 2006; R. P. B. v. the Philippines, 2014; M.W. v. Denmark, 2016, among others) and inquiries (in particular, concerning Mexico (2005) and Canada (2015)); Latin America Model Protocol for the investigation of gender-related killings of women (Latin America Model Protocol), p.24, para. 61; Article 53.1(1) CC; The Administration of Justice on Sexual Violence Crimes, p.5.

⁷¹ CEDAW GC 35, para. 12, citing: General recommendation No. 33, par 8 and 9. Other general recommendations relevant to intersectional discrimination are general recommendation No. 15 on women and AIDS, No. 18 on women with disabilities, No. 21 on equality in marriage and family relations, No. 24 on women and health, No. 26 on women migrant workers, No. 27 on older women and protection of their human rights, No. 30 on women in conflict prevention, conflict and post-conflict situations, No. 31 on harmful practices, No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women and No. 34 on the rights of rural women. The Committee has also addressed intersectional discrimination in its views on communications (Jallow v. Bulgaria, 2012; S.V.P. v. Bulgaria, 2012; Kell v. Canada, 2012; A.S. v. Hungary, 2006; R. P. B. v. the Philippines, 2014; M.W. v. Denmark, 2016, among others) and inquiries (in particular, concerning Mexico (2005) and Canada (2015)); Latin America Model Protocol, p.43, paras. 119-120; Article 53.1(1) CC; The Administration of Justice on Sexual Violence Crimes, p.5.

⁷² Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors; E.B. v. Romania, App. no. 49089/10, (ECHR, 19 March 2019), para. 60.

⁷³ Key international standards on preventing and combatting sexual violence against children are provided in the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; European Court of Human

a specific approach as compared to adult victims of sexual violence. Minors are more vulnerable to coercion since they are still developing psychologically and emotionally. They might not have formed sufficient skills to effectively understand and negotiate complex social situations,⁷⁴ which negates consent. Such situations might only rarely involve physical force and threats, or the helplessness of the victim might not be established, though they nevertheless constitute rape. Situations that could be considered as consensual sex in relation to adults might constitute sexual violence in relation to minors, particularly where the perpetrator is an adult engaging in sexual activities with a child who has not reached the legal age for sexual activities or where coercion/coercive circumstances are established, or the adult has a position of trust, authority or influence over the child, including within the family, or due to a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.⁷⁵

In particular, it needs to be considered that younger children are especially vulnerable to coercion, manipulation and grooming by adults or older children. Child victims of abuse are not likely to be able to recognise or name their experience as ‘abuse’ or ‘exploitation’.

Children are particularly vulnerable to coercion through power relationships. They are especially vulnerable to abuse by an adult or older peer in the family or in a setting or relationship where there is a position of trust, dependence, or power.⁷⁶

Under the current law in Georgia, consent given by a person under 16 is immaterial, and a sexual act committed by an adult against a minor constitutes a crime (Article 140 of the Criminal Code). If, as a result of a context-based investigation, it is found that the act was not in fact (in addition to in law) consensual, and not only in situations where there was no physical force or threat of force (see Chapter I, Sections 2.2.), the perpetrator should be charged with rape (Article 137), rather than with consensual sex with the minor.

In assessing coercive circumstances in relation to minors that negate apparent consent, investigators, prosecutors, and judges could consider the following factors provided by the United Kingdom Crown Prosecution Service:⁷⁷

- **Limited financial resources and social network.** A minor’s limited availability of options, resulting from their social/economic and/or emotional vulnerability, makes them particularly susceptible to coercion. Additionally, confinement to the home or a small social circle renders

Rights jurisprudence (such as M.C. v. Bulgaria, no. 39272/98 and Y. v. Slovenia, no. 41 107/10; P.M. v. Bulgaria no. 49669/07; I.G. v. the Republic of Moldova no. 53519/07); UN Convention on the Rights of the Child and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography; General Comment N12, 13 and 14 of the Committee on the Rights of the Child; United Nations Economic and Social Council Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Resolution 2005/20, 2005; Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 2010; Barnahus Quality Standards, Guidance for Multidisciplinary and Interagency Response to Child Victims and Witnesses of Violence, 2017; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict - Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law, Second Edition: March 2017, Chapter 16 and 17. Local standards are provided in the Criminal Code of Georgia Art. 137-141; Juvenile Justice Code; Code on the Rights of the Child and Law on Violence against Women and Domestic Violence.

74 Changes in Adolescents’ Risk Factors Following Peer Sexual Coercion: Evidence for a Feedback Loop, Cambridge University Press, (2012).

75 The Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, also known as “The Lanzarote Convention”, Article 18.

76 UNICEF Preventing and Responding to Child Sexual Abuse and Exploitation: Evidence review, p. 26.

77 Crown Prosecution Service Guidelines, CPS Guidelines on Prosecuting Cases of Child Sexual Abuse and Toolkit for addressing consent.

the minor unable to escape manipulation and will result in the sexual violence being less likely to be noticed.

- **Seemingly consensual situations.** Minors may engage in seemingly “consensual” relationships and sex for attention, accommodation, gifts or items, or the promise of love and affection. Minors might initially refuse to identify as a “victim” of sexual violence, believing that they were in a genuine, loving, and non-abusive relationship with their perpetrator, not recognising the coercive circumstances of their situation. Considering this and given the local social and cultural environment in Georgia, promising marriage in return for sex could also be seen as a seemingly consensual relation, which in fact could be coercive and negate genuine consent.
- **Vulnerability factors.** Minors may be particularly at risk of coercion and sexual violence when they experience any of the following:
 - lacking friends from the same age group;
 - low self-esteem or self-confidence;
 - learning or developmental disabilities;
 - unsure about their sexual orientation or unable to disclose sexual orientation to their families;
 - living in a chaotic or dysfunctional household (including parental substance use, domestic violence, parental mental health issues, parental criminality), homeless, or living in temporary or unstable housing situations;
 - history of abuse (including familial child sexual abuse, risk of forced marriage, risk of ‘honour’ based violence, physical and emotional abuse and neglect);
 - exposure to gang association either through relatives, peers or intimate relationships (in cases of gang associated child sexual exploitation only);
 - having friends at school or elsewhere who are sexually exploited or otherwise victims of sexual violence.

When both parties are minors, for examining whether the act was consensual, the following could be relevant:

- The relative ages of both parties;
- The existence of and nature of any relationship;
- The sexual and emotional maturity of both parties and any emotional or physical effects as a result of the conduct.⁷⁸

Cases of experimentation, in general, among minors close in age and development, should not be regarded as criminal offences in the absence of coercion, exploitation or abuse of trust.⁷⁹

6.3. Victims of domestic violence

Victims of domestic violence are very often subjected to sexual violence. However, women in abusive relationships may not recognise or be ready to acknowledge that they have been subjected to sexual

⁷⁸ Crown Prosecution Service Guidelines, CPS Legal Guidance on Rape and Sexual Offences - Chapter 12: Sexual Offences and Youths.

⁷⁹ Crown Prosecution Service Guidelines, CPS Legal Guidance on Rape and Sexual Offences - Chapter 12: Sexual Offences and Youths.

violence.⁸⁰ This might happen as a result of various circumstances, including:

- Some women might view any kind of sexual intercourse (consensual or non-consensual) as their “marital duty”, not recognising the abuse is a crime;
- They may be convinced that no one will believe them, or that they provoked the abuse;
- They may feel shame or fear bringing disgrace on their family by reporting the incident;
- They may only turn to the authorities when the pattern of violence becomes unbearable or rises to extreme levels.

Commonly, victims who do report domestic violence will disclose only physical assault and will withhold or deny information about sexual violence.⁸¹ However, sexual violence, whether in a familial or other intimate relationship, often happens within a pattern of controlling or coercive behaviour. This can include physical, psychological and economic violence, sexual harassment, stalking or other kinds of abuse by intimate partners or persons in an intimate relationship.⁸² The perpetrators may be highly manipulative.⁸³

Victims may wish to return to or remain in their abusive relationship for a wide variety of reasons, some of which may be linked to their coercive environment. They may be afraid of the perpetrator and not want to aggravate the situation. They may have no other home. They may be financially dependent on the perpetrator or under family pressures.⁸⁴ This makes it especially important to understand and examine the wider context of the relationship.⁸⁵

Most victims of domestic violence experience a “cycle of abuse”, typically characterised by a build-up of tension over a period of time, punctuated by an assault or violent episode, followed by a period of reconciliation. As the violence may not be constant, victims may want to believe their abuser’s assurance that it would not happen again; they may even feel responsible for the abuse. Victims may love their abusive partner and want to return to them, not want to get them into trouble, or want to stay in the relationship to remain close to their children, or because they feel needed, particularly where the constant abuse has eroded their confidence and feeling of self-worth.

In context, what may initially be seen as the victim’s consent to sexual contact may actually be the victim’s way of coping with or adapting to her coercive environment and avoiding other harmful consequences.⁸⁶ This does not negate the fact, however, that abuses have been committed, and therefore any sexual violence committed in the above circumstances should be classified and recognised as a serious crime which requires prosecution, together with other forms of domestic violence.

6.4. Ethnic minorities

Intersecting forms of discrimination against women from ethnic minorities must be taken into account to understand sexual violence against them. In some cases, sexual violence might be committed with

⁸⁰ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors, Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p.18.

⁸¹ Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p.18.

⁸² Explanatory Report, Articles 42, 181; National Research on Domestic Violence in Georgia, pp, 12-13;

⁸³ Crown Prosecution Service Guidelines, Controlling or Coercive Behaviour in an Intimate or Family Relationship.

⁸⁴ Preventing and Combatting Domestic Violence Against Women, A learning resource for training law enforcement and justice officers, January 2016, p.51;

⁸⁵ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors; The Administration of Justice on Sexual Violence Crimes, pp.5, 17.

⁸⁶ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

the motive of intersectional discrimination (See Chapter II Section 7), and in other cases, discriminatory environment might make ethnic minorities more vulnerable to abuse.

This includes language barriers that hinder access to information and diminish or preclude access to services provided by the government and non-governmental organisations.⁸⁷ The language limitations of such women may also be exploited by their abusers.⁸⁸ They may live in isolated villages, far from police services and with limited access to public transport.

Conservative culture, strict social norms and families rooted in patriarchal traditions might be particularly manifest among women in ethnic minority communities, preventing them from reporting the abuse. Virginity is highly valued, which also contributes to the stigma around sexual violence being strong.

In addition, dependence on spouses (financial and otherwise), child marriages, lack of access to quality education and employment and lack of integration with the dominant ethnic community present various barriers to uncovering sexual abuse. Reporting sexual violence, including marital rape, might lead to the woman being shunned by her family and community or subjected to so-called honour-based crimes. These specific circumstances should influence any evaluation of consent.

Based on the above, violence against ethnic minority women may only come to light when victims suffer injuries, which then cannot be ignored by the authorities. A risk assessment, and measures to be taken to ensure the victim's safety, security and confidentiality of the information is therefore of the utmost importance.

6.5. Victims of forced marriage

Forced marriage, including bride kidnapping, already constitutes a situation where consent is negated.

Bride kidnapping is a harmful practice and a form of forced marriage, which involves abducting a girl or a woman for the purpose of marriage. This act of force creates a coercive environment which is often characterised by physical and psychological violence, overcoming the will of the victim. In these cases, sexual violence is very often used as a tool to prevent the victim from leaving, making her agree to marriage and stopping her from reporting to the police, since sexual intercourse is viewed to decrease her "value", dishonour her and make her unsuitable for marriage.

Forced marriages, including bride kidnapping, automatically create coercive circumstances that negate consent for sexual intercourse and further evidence should not be required to establish the lack of consent. Therefore, sex as a consequence of bride kidnapping can be classified as rape committed by physical or psychological violence, based on the circumstances of the crime.

6.6. Women with disabilities

Persons with disabilities are much more likely to be subjected to sexual violence than persons without disabilities.⁸⁹ Some women may be specifically targeted because they suffer from some form of disability.⁹⁰ Perpetrators might choose to target women with disabilities because they believe that

⁸⁷ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

⁸⁸ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

⁸⁹ The Prosecutors' Resource on Sexual Violence Cases Involving Victims With Intellectual Disabilities, AEQUITAS, 2019, pp. 1-2.

⁹⁰ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

they can get away without punishment more easily, since the victims could face additional barriers to reporting and proving that they suffered the crime.

An abuser of a woman with disabilities can often be her caregiver.⁹¹ The abuser may use the specific disabilities of their victims to coerce and control them, including: neglect; violence and other bullying; the removal or control of communication aids and the refusal to assist in communicating; the denial of personal mobility and accessibility; the refusal to assist with daily activities such as bathing, menstrual and/or sanitation management, dressing and eating; the withholding of food or water; bullying, verbal abuse and ridicule on the grounds of disability; and the general exercise of control, for example by restricting face-to-face or virtual access to family, friends or others.⁹² Such restrictions and control create a coercive environment and sexual violence in such circumstances can be classified as committed with psychological violence, economic violence, abusing the helplessness of the victim, or all of the above.

Even though rape is about power and control, not about desirability, evidence provided by a woman with physical, mental, or intellectual disabilities may be considered unreliable based on discriminatory or stereotyped ideas. Examples of these may include such things as an assumption that her condition prevents her from providing an accurate account of the circumstances of the case or that a woman with disabilities would not be sexually desirable so could not have been targeted for rape. There also is a common assumption that women with disabilities are hypersexual and that they “provoke” sexual intercourse. These prejudices may be reinforced by the fact that sometimes victims with disabilities cannot consistently or comprehensively report the events of an incident or may refer to substantially different details that are not related to the incident in question. Mental and/or intellectual disabilities can give rise to the discriminatory impression that victims do not understand what violence is.

Determining competency and capacity to consent in relation to victims with intellectual disabilities

The Prosecutors’ Resource on Sexual Violence Cases Involving Victims with Intellectual Disabilities⁹³ by AEQUITAS provides very helpful guidance on examining some of the most problematic issues in the criminal justice processes when it comes to sexual violence against women with intellectual disabilities.

AEQUITAS suggests that in the criminal justice processes, there are two separate issues to assess in relation to sexual violence against women with intellectual disabilities:

1. Whether intellectual disability has affected the victim’s competency to testify in Court;
2. Whether intellectual disability affected the victim’s ability to consent to sexual activity.

A victim with an intellectual disability may have the capacity to testify in Court, but lack capacity to consent to sexual activity, and vice versa.

“Competency” refers to the victim’s ability to distinguish truth from falsehood, to understand the duty to tell the truth, and to communicate in a manner that can be understood. All adults are generally presumed to be competent to testify; however, when the victim has an intellectual disability, it may be necessary to conduct a forensic examination to determine competency. Such an examination should not be conducted automatically in every case where a person has intellectual disability, but only when there are substantial grounds to assume that the disability can affect a person’s competency. Establishing

⁹¹ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

⁹² General comment No.3 (2016) on women and girls with disabilities, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/3; Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

⁹³ The Prosecutors’ Resource on Sexual Violence Cases Involving Victims with Intellectual Disabilities, AEQUITAS.

competency should, neither formally or informally, be understood as examining credibility of the victim by forensic examination - which is prohibited by the legislation in force.

To assess “capacity to consent”, as opposed to “competency”, the following issues should be considered:

1. The victim’s understanding of a sexual act – the sexual nature of the contact;
2. The victim’s understanding of the unique circumstances surrounding the sexual act.

To analyse whether the victim understands the sexual nature of the contact, examining the following issues might be helpful:⁹⁴

- What does the victim know about sexual activity in general?
- What does the victim know about the specific type of sexual activity at issue?
- Has the victim received sex education?
- Are there support people (e.g., family, friends, advocates, providers) with whom the victim can discuss issues of sexuality?

To analyse whether the victim understands and is capable of consenting to or refusing the sexual act, the following issues should be looked at:⁹⁵

- Is the victim able to understand the facts and choices they have in these circumstances?
- Does the victim understand they can say “no” to the sexual act?
- Is the victim able to weigh the consequences of their choice and to understand how it might affect them?
- Is the victim capable of recognising or reporting unwanted sexual advances or abuse?

It might also be helpful for an investigator/prosecutor to examine whether the victim is able to effectively communicate their decision to consent or to refuse to engage in the sexual activity. In connection to this, it should also be determined whether the victim is familiar with the possible risks or consequences of the sexual activity. To examine this, the following should be looked at:

- Does the victim understand safe sex practices, including those to avoid pregnancy or sexually-transmitted infections?
- Does the victim understand the consequences of potential pregnancy and childbearing?⁹⁶

To examine the context in which the sexual activity occurred, the following should be considered:

- Are there indications of coercion?
- Was there undue pressure or an imbalance of power (e.g., was the perpetrator a family member, care provider, staff member, or someone the victim felt must be obeyed)?⁹⁷

AEQUITAS further notes that while victims with intellectual disabilities may be particularly vulnerable to sexual exploitation, many people with intellectual disabilities have the capacity to consent to sexual activity under non-exploitive conditions. People with intellectual disabilities, who are capable of making informed decisions, are as entitled to enjoy non-exploitive intimate relationships as people without disabilities, even where protective parents, family members, and others might find it difficult to accept that the person with the disability was acting freely. If it is determined that a woman was acting freely,

⁹⁴ The Prosecutors’ Resource on Sexual Violence Cases Involving Victims with Intellectual Disabilities, AEQUITAS, p.3

⁹⁵ The Prosecutors’ Resource on Sexual Violence Cases Involving Victims with Intellectual Disabilities, AEQUITAS, p.3.

⁹⁶ The Prosecutors’ Resource on Sexual Violence Cases Involving Victims with Intellectual Disabilities, AEQUITAS.

⁹⁷ The Prosecutors’ Resource on Sexual Violence Cases Involving Victims with Intellectual Disabilities, AEQUITAS.

instead of initiating criminal proceedings, a social worker or other advocate may consider referring the family for appropriate services to support their family member with an intellectual disability.⁹⁸

Similarly, the courts in England and Wales have examined the following factors to determine whether a person with intellectual disabilities has the capacity to consent. These include examining whether the person has sufficient knowledge and understanding of: the nature and character of the act of sexual intercourse, the reasonably foreseeable consequences of sexual intercourse, the capacity to choose whether or not to engage in it, the capacity to decide whether to give or withhold consent to sexual intercourse and, where relevant, to communicate their choice.⁹⁹ Further, a person must have a basic understanding of the mechanics and consequences of the physical act, including that vaginal intercourse may lead to pregnancy and/or significant ill-health and that those risks can be reduced by precautions such as a condom.¹⁰⁰

Women admitted to psychiatric hospitals (public or private) under the guardianship and responsibility of the State are particularly exposed to situations of abuse due to their reduced ability to report or others' disbelief of their word. According to the Inter-American Commission on Human Rights (IACHR), the characteristics of sexual violence in health institutions require special procedures for the complaint, investigation, and judicial process, considering the specific circumstances the victims might face and the power imbalance in relations between doctor-patient.¹⁰¹

6.7. Drug users, homeless or migrant women with uncertain residence status

Women made vulnerable by specific circumstances, including women drug users and migrant women with uncertain residence status, may be exploited by an abuser since women fear that they may be "outed" to authorities and punished for their drug use or illegal residence.¹⁰²

In addition, women drug users may be reliant on their abuser for drugs; women who are homeless may depend on their abuser for shelter. Migrant women or asylum seekers may be socially or linguistically isolated or find themselves unable to leave an abusive situation because of their lack of knowledge of, or access to available services.¹⁰³ Some may have been victims of abuse in their own countries, increasing their vulnerability.¹⁰⁴

6.8. Women in prostitution

Women in prostitution are particularly vulnerable to many forms of sexual violence. Because of their engagement in prostitution, women are stigmatised, perceived as immoral, untrustworthy, and undeserving of protection. Often, women in prostitution are not considered as victims of sexual violence, since they are perceived as perpetually consenting to sex. Prostitution can also be the basis of discriminatory motive of the perpetrator in committing sexual violence (See Chapter I Section 6.8.).

⁹⁸ The Prosecutors' Resource on Sexual Violence Cases Involving Victims with Intellectual Disabilities, AEQUITAS

⁹⁹ See e.g. *D CC v LS* [2006] EWHC 1544 (Fam), para. 12.

¹⁰⁰ See e.g. *A Local Authority v. H*, EWHC 49 (COP), Case No: COP11895254, Approved Judgment, 27 January 2012, para. 23.

¹⁰¹ "Access to justice for women victims of sexual violence: education and health, IACHR (2011)" <http://www.oas.org/es/cidh/mujeres/docs/pdf/VIOLENCIASEXUALEducSalud.pdf>.

¹⁰² Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

¹⁰³ Explanatory Report, para. 53; Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

¹⁰⁴ Explanatory Report, para. 53; Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

Women in prostitution generally have a fear or distrust of the government and police because they are afraid of being arrested or deported, or because they have had adverse experience with law enforcement.¹⁰⁵ For example, Georgian legislation penalises women for prostitution (Administrative Penalties Code of Georgia, Article 172³), rather than recognising them as victims of human rights violations by those who use and exploit them in prostitution. Reporting sexual violence crimes to the authorities could put women in prostitution at risk of administrative or criminal sanctions for prostitution or acts related to prostitution.¹⁰⁶ This contributes to a climate of impunity for perpetrators, who will target women in prostitution, believing that they will go unpunished, as the women in prostitution may be unlikely to report the abuse for the reasons given, or if reported, will likely not be believed.

Additionally, a woman in prostitution may be subject to numerous intersecting vulnerabilities, e.g. she may also be a victim of domestic violence; a migrant; homeless; a member of an ethnic minority; HIV positive; or a drug user. Many times, extreme poverty forces women into prostitution. As a result, their individual experiences of coercive circumstances will differ vastly, as well as their responses to sexual violence.

The abuser can be a person in authority, extorting sex from his victim in return for not revealing her status or for some other reason. The abuser can also be a police officer, who might sexually exploit women in return for not penalising them, which creates an additional barrier to reporting sexual violence.¹⁰⁷

It is common for there to be trauma-bonding between the prostituted woman and her pimp, which can make it difficult for her to establish relationships with those who try to help her. As a coping or survival skill, prostituted women may even develop loyalties and positive feelings toward their pimp or try to protect them from the authorities. Sometimes they feel that it is their fault that they are in this situation.¹⁰⁸

This does not however imply that they have not been subjected to violence and that perpetrators should not be brought to justice.

6.9. Vulnerabilities connected to sexual orientation and gender identity

Individuals might be specifically targeted for sexual violence because of their actual or perceived sexual orientation and gender identity. Because of widespread discrimination, sexual violence can be used against these persons to punish them for their “immoral” behaviour and for going against “national values”, which promote heterosexuality and a traditional understanding of family. Individuals made vulnerable based on their sexual orientation and gender identity can also be prevented from defending their constitutionally guaranteed rights, such as freedom of assembly and freedom of expression.

Transgender women are particularly vulnerable to sexual violence – and prevalence of this abuse is high.¹⁰⁹ Prostitution is often one of their few options to earn a living and due to entrenched discrimination

¹⁰⁵ Gender-based violence against sex workers and barriers to accessing justice: International Standards and experience in Georgia, p. 26; Victims of prostitution and trafficking: a Rape Crisis Center Response.

¹⁰⁶ Gender-based violence against sex workers and barriers to accessing justice: International Standards and experience in Georgia, pp.6, 16-17, 26.

¹⁰⁷ It also needs to be noted that an evaluation must be conducted to determine if the SV victim is a victim of human trafficking.

¹⁰⁸ Victims of Prostitution and Trafficking: a Rape Crisis Centre Response, p. 19.

¹⁰⁹ World Health Organization, United Nations Population Fund, Joint United Nations Programme on HIV/AIDS, Global Network of Sex Work Projects, The World Bank. Implementing comprehensive HIV/STI programmes with sex workers: practical approaches from collaborative interventions. Geneva: World Health Organization; 2013.

and stigma, transgender women find it particularly difficult to access support. This also makes it easier for perpetrators to exploit their situation to commit sexual violence.

Individuals deprived of their liberty also face risks of sexual violence and acts of violence and discrimination at the hands of security personnel, on the basis of sexual orientation and gender identity.¹¹⁰

Additionally, in some places, lesbian and bisexual women might be subjected to sexual violence as a hate crime, with the purpose of “correcting” the sexual orientation of the victim.¹¹¹ Such practice serves to “reform” victims by “correcting” their sexual orientation in accordance with established gender roles. It is used as a method of punishment against lesbian and bisexual women and gender nonconforming individuals, demonstrating the link between homophobia and sexism.¹¹² Lesbian, bisexual and transgender people may also be subjected to forced marriage and sexual violence in the context of such a “marriage.”¹¹³

Some additional barriers to lesbian, bisexual, transgender, intersex, and queer women reporting sexual violence include:

- Fear of homophobia/biphobia/transphobia and additional victimisation by service providers;
- Fear that law enforcement will not take sexual violence seriously, particularly when both victim and perpetrator are of the same sex;
- Fear of coming out and loss of home, family, or shelter as a result, or being subjected to physical violence as a result;¹¹⁴
- Fear that law enforcement and service providers will violate confidentiality and disclose information about their sexual orientation to third parties;
- Fear of losing support from the LGBTQI+ community, some of whose members consider such problems as sexual violence should not be disclosed since they contribute to strengthening negative perceptions against the LGBTQI+ community. As LGBTQI+ persons often lack support from family and friends, their community support is often essential for them;
- Internalised homophobia making the victims believe that homosexuality is a pathology, that

¹¹⁰ Violence against LGBTI persons, IACHR, 2015, para. 148.

¹¹¹ Violence against LGBTI persons, IACHR, 2015, para. 170.

¹¹² In the case of ‘corrective’ or ‘punitive’ rape, women, and occasionally men, are singled out and brutally raped because they happen to be, or are perceived to be, lesbian or gay. Part of a wider pattern of sexual violence, attacks of this kind commonly combine a fundamental lack of respect for women, often amounting to misogyny, with deeply-entrenched homophobia” - T. Navi Pillay, The shocking reality of homophobic rape, The Asian Age 20 June 2011. <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11229&LangID=E> . A/HRC/4/34/Add.1, paras. 633. Both the Committee on the Elimination of Discrimination against Women and the Special Rapporteur on violence against women have addressed so-called “curative” or “corrective” rape, perpetrated by men who claim their intent is to “cure” women of their lesbianism - Concluding Observations of CEDAW on South Africa CEDAW/C/ZAF/CO/4, para. 39; report of the Special Rapporteur on her mission to Kyrgyzstan A/HRC/14/22/Add.2, para. 38. Concluding Observations of CEDAW Committee on South Africa, CEDAW/C/ZAF/CO/4, paras. 39-40. Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity; A/HRC/19/41’.

¹¹³ See A/HRC/19/41, paras. 66-67; A/HRC/16/44, paras. 23-24; E/CN.4/2002/106, para. 90-92; E/CN.4/2002/83, paras. 57 and 101-102; and A/61/122/Add.1, paras. 57, 73, 84 and 151. The study conducted by WISG in 2012 found that 26% (N=39) of the persons interviewed were either forced to marry or experienced pressure because of not being married. In 2014 this number rose to 34%.

¹¹⁴ The study conducted by WIST in 2010 found that 72.2% of those interviewed said negative attitudes from society prevented them from coming out “Research of Sexual and Self-destructive Behaviour in LB Group”, WIST. 2010, Tbilisi.

they have deserved violence and have no choice but to tolerate it.¹¹⁵

7. Understanding the impact of sexual violence

Rape and other acts of sexual violence are life-changing for victims and their families. Fully taking into account the impact and harm of sexual violence is essential to ensuring justice for survivors and preventing future abuse.

Injuries from rape and other acts of sexual violence may be less visible than those caused by other kinds of violence, yet a victim may still suffer long-term physical and psychological complications.¹¹⁶ Psychological harm suffered by victims of sexual violence may often be more pervasive and permanent in their effect than any physical harm.¹¹⁷ Many victims of sexual violence experience rape trauma syndrome, which is defined as the stress pattern of a person who has experienced sexual violence.¹¹⁸ Others, particularly those who have experienced sexual violence where a weapon was used in the commission of the offence or extreme violence, may experience post-traumatic stress disorder.¹¹⁹

Trauma is a subjective experience. This means that the scope of the trauma of sexual violence to the victim is very difficult to measure. It may be years before victims feel able to speak about the crimes.¹²⁰ Many will never be able to state that they have been victims.¹²¹ Some victims may take years to recover; and some may never recover.

A victim may become pregnant, become infected with a sexually transmitted disease, or become unable to bear children as a consequence of a rape. Potential psychological side effects of sexual violence include different types of anxieties, substance abuse and depression, each with a broad category of symptoms: sleeplessness, fear, feelings of guilt and shame, loss of self-esteem, loss of sexual desire, and a sense of defilement are just a few. Deaths following sexual violence may be because of suicide, HIV infection, or as a result of a murder in the name of "honour".

The impact on women of sexual violence based on compounded discrimination can be particularly profound. These attacks target women not only because they are women but also because of circumstances they are in or the communities they belong to (see Chapter I Section 6 and Chapter II Section 3.7). The nature of the crimes may cause long term trauma. These crimes will impact the community by sending a message of fear to other women. Failing to deal with these crimes will effectively reinforce discriminatory stereotypes and social biases as well as creating an environment of impunity which enables further violence.

115 Balsam, K. F., & Szymanski, D. M. (2005). Relationship quality and domestic violence in women's same-sex relationships: The role of minority stress. *Psychology of Women Quarterly*, 29, 258- 269.

116 R. v. McCraw, 3 SCR 72, Supreme Court of Canada, Judgment of 26 September, 1991.

117 R. v. McCraw, 3 SCR 72, Supreme Court of Canada, Judgment of 26 September, 1991; WHO World Report on Violence and Health, 2002, Chapter 6, p.149.

118 Guidelines for medico-legal care of sexual violence victims, WHO, pp. 14-15.

119 Guidelines for medico-legal care of sexual violence victims, WHO, pp. 15-16.

120 Rape Cases Hard to Bring in Georgia, Institute for War and Peace Reporting (IWPR).

121 Rape Cases Hard to Bring in Georgia, Institute for War and Peace Reporting (IWPR).

II. Investigation of sexual violence

1. Victim-centred investigations of sexual violence – general considerations

Context-based approach

States have an obligation to effectively investigate and prosecute rape and other acts of sexual violence¹²² from a gendered perspective.¹²³ Having a gendered perspective requires an understanding of differences in “status, power, roles, and needs between males and females, and the impact of gender on people’s opportunities and interactions.”¹²⁴

A gendered perspective will help those working in the criminal justice system to better understand where the same and/or differentiated treatment can lead to discrimination against women. It will help police, prosecutors and judges to contribute to a criminal justice system that guarantees women’s access to justice.

A gendered perspective will help police, prosecutors and judges to recognise the stereotypes and stereotypical thinking that should be avoided in all aspects of their work, from their factual analysis, credibility assessments, in interpreting and applying the law, in the language they use, and their courtroom strategies, to name a few. Effective investigations will also necessitate police and prosecutors taking all reasonable steps to collect and secure evidence concerning the incident in a timely manner to ensure a swift and comprehensive analysis of the case.¹²⁵ This includes establishing the relevant facts, interviewing all available witnesses and where necessary, with the consent of the victim, conducting forensic or other examinations without unreasonable delay.¹²⁶ Giving low priority to these cases contributes to a sense of impunity among perpetrators that has helped perpetuate high levels of acceptance of such violence.¹²⁷ Therefore, to be effective, such investigations and prosecutions should be **prompt, thorough, unbiased and impartial**.

Context-based investigations are victim-centred. A context-based investigation is one which takes into account the local dynamics concerning gender norms in terms of culture and religion and the social norms that impact upon how sexual violence is treated. This is key to understanding why sexual violence is committed, by whom and the broad range of impacts it has on survivors. This requires not only gathering evidence in relation to the violation itself but the context in which it was committed.¹²⁸

Criminal justice mechanisms need to address sexual violence “in the context of the prevailing inequality

¹²² M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), para. 166; Istanbul Convention, Articles 5 (2), 40, 49; Explanatory Report, paras. 255-256.

¹²³ Istanbul Convention, Article 6.

¹²⁴ Policy Paper on Sexual and Gender-based Crimes, Office of the Prosecutor, International Criminal Court, June 2014, p.3.

¹²⁵ Istanbul Convention, Article 49 (1); Explanatory Report, paras. 255-256. See also Latin American Model Protocol, p.28 para. 81.

¹²⁶ Volodina v. Russia (2019), 41261/17, 9 July 2019, para. 92; See also. Opuz v. Turkey, App. no. 33401/02, (ECHR, 09 June 2009), para. 145; Maslova v. Russia, N839/02 24 January 2008, para. 91; Istanbul Convention, Article 49(1); Explanatory Report, paras. 255, 256, 280.

¹²⁷ Explanatory Report, Article 49, para. 255.

¹²⁸ International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law’ (2nd ed UK Foreign & Commonwealth Office 2017) (‘International Protocol’), Volume 2, pp. 14, 17; Draft Murad Code, principle 1.1.

between women and men, existing stereotypes, gender roles and discrimination against women¹²⁹ A gendered perspective in investigations would ensure that relevant questions will be asked, the victim's rights and dignity will be protected throughout the proceedings, and she will not be subjected to re-traumatisation. Gender-based stereotypes and preconceived notions about women and their roles must not influence any aspects of the criminal proceedings. This means that criminal justice actors and support services for victims should operate in a way that reflects an understanding of the gendered impact of sexual violence on women in society.¹³⁰ It requires a context-sensitive investigation and assessment of the evidence¹³¹, taking into consideration the victim's specific needs,¹³² wishes and risks, and responding to their diverse abilities, challenges and vulnerabilities based on who they are and the context they are in.

The investigation of sexual violence needs to be guided by the following **basic principles**, which underpin all stages of criminal processes and are further explained in the relevant procedural sections of this manual:

DO NO HARM

DO NO HARM is a survivor-centred ethical principle broadly used in domestic and international human rights and criminal investigations. It has been widely accepted as being core to the investigation of crimes of sexual violence.

Survivors of sexual violence, harmed by their perpetrators, can be further harmed by their families and communities. They may be shunned, subjected to retribution, and/or isolated and stigmatised,¹³³ be forced to leave their homes, lose custody of their children, be divorced or rendered destitute.

Survivors can be further harmed by the criminal justice process.¹³⁴ They may encounter disbelief on the part of criminal justice actors, who may minimise or deny their complaint. They may be subjected to unresponsive, insensitive, inadequate, and poorly prepared interventions by police, prosecutors, and judges. This not only traumatises and stigmatises victims, but it presents a barrier to their ability to access justice.¹³⁵ Based on considerations of safety and dignity of survivors, DO NO HARM is the principle requiring criminal justice actors to be aware of the possible negative aspects that criminal justice processes have on victims and their families, witnesses and the broader community and to put in place measures that prevent or minimise that impact (these are set out in Chapter II, Sections 9 and 10).¹³⁶

Putting in place measures that prevent or minimise negative impacts involves being aware of the security, privacy, health and other similar concerns of victims and witnesses. DO NO HARM engages police, prosecutors and judges. It underpins all stages of the criminal justice process. It requires action before, during and after any engagement with a victim or witness and throughout the criminal justice process. DO NO HARM paves the way towards safely and ethically giving survivors the opportunity to speak out, while identifying available support mechanisms for them.¹³⁷

¹²⁹ Istanbul Convention, Article 18; Explanatory Report, para. 43.

¹³⁰ Istanbul Convention, Article 18; Explanatory Report, para. 116.

¹³¹ Explanatory Report, paras. 191-192.

¹³² Equality Now, Learning from Cases of Girls' Rights, 2018.

¹³³ World Report on Violence and Health, WHO, 2002, Chapter 6, p.149.

¹³⁴ Latin America Model Protocol, p.24, para. 61.

¹³⁵ Latin America Model Protocol, p.24, para. 61.

¹³⁶ International Protocol, p.85; Explanatory Report, para. 255; The Administration of Justice on Sexual Violence Crimes, p. 30.

¹³⁷ International Protocol, p.85.

Informed consent and sharing of information

Informed consent is an ethical principle grounded in respect for personal autonomy and the right of sexual violence survivors to make their own choices.¹³⁸ It ensures victims of sexual violence maintain full control over their experiences and are informed, willing participants in the criminal justice process.¹³⁹ Informed consent applies throughout the handling of a case. It requires that the victim understands what could happen to the information they share at every stage of the criminal proceedings and the consequent risks to their safety and security.¹⁴⁰ This means that police, prosecutors and judges will need to proactively and carefully explain what will happen in those different stages, be clear about how the victim's information will be used at each stage and ask the victim if they agree. This principle will be important to build the victim's trust.¹⁴¹

At all stages of the proceedings, investigators, prosecutors, and judges are required to **proactively and clearly** inform victims about their rights, the progress of the case and support them in making the best decisions they can.¹⁴² This sharing of information¹⁴³ should not be done in a formulaic way, but should be done systematically, without delay and should not depend on whether or not a victim has officially been granted victim status.¹⁴⁴

It is particularly important to inform the victim (1) when she is allowed to ask for protective measures and what the procedure is; and (2) what guarantees are available to protect her from re-traumatisation. The role of the Victim and Witness Coordinator is particularly important in all stages of the proceedings, who should ensure systematic communication of the information and facilitate access to investigator and prosecutor (The role of the Victim and Witness Coordinator will be discussed in more detail at Chapter II Section 9.2).

Confidentiality

Confidentiality is not just an ethical obligation – it is a legal imperative¹⁴⁵ and an operational necessity. Privacy and security measures are often critical to building trust with victims and witnesses and a key step in getting them to disclose information.

Confidentiality¹⁴⁶ requires investigators, prosecutors, and judges to protect information they gather about victims throughout all stages of the criminal justice process.¹⁴⁷

In all contact with victims, including during court proceedings, victims should be informed what

¹³⁸ Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p. 15.

¹³⁹ International Protocol, pp.89-90; Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p. 15.

¹⁴⁰ International Protocol, pp.89-91, 146.

¹⁴¹ Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p. 16.

¹⁴² 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 (' Directive 2012/29/EU'), Preamble Para. 26, Articles 4-6; Istanbul Convention, Article 56 (1); Explanatory Report, paras. 285-286; Law on the Elimination of Domestic Violence Article 171; Report of the Special Rapporteur on violence against women; its causes and consequences on her mission to Georgia, 2017, para. 93; Criminal Procedure Code of Georgia, Article 57 (Rights of the Victim); United Nations Office on Drugs and Crime - Handbook on effective prosecution responses to violence against women and girls (2014), p.44; International Protocol, p.88.

¹⁴³ Directive 2012/29/EU, Articles 4, 6.

¹⁴⁴ Under the Georgian legislation, victim status can be granted through the criminal procedure (Criminal Procedure Code Article 56), as well as through issuing of restraining or protection orders or by the victim identification group tasked with determining a victim status (Law on Violence against Women and Domestic Violence, Article 161).

¹⁴⁵ Article 7 of Criminal Procedure Code of Georgia; Istanbul Convention, Articles 1, 18, 56 (1)(a) and (f).

¹⁴⁶ Article 7 of Criminal Procedure Code of Georgia; Istanbul Convention, Articles 1, 18, 56 (1)(a) and (f).

¹⁴⁷ See Article 7(2) of the Criminal Procedure Code of Georgia.

personal information will be kept confidential, how its confidentiality will be preserved,¹⁴⁸ and who will have access to it and at what point. They should be told that court judgments will be publicly available (upon request for information deemed public), but that the victim's, perpetrator's, and witnesses' names and personal details will be redacted. The police, prosecutor or judge need to know what information protection measures are in place for victims, witnesses and their testimony and fully and clearly explain to them the parameters and limitations of such measures.¹⁴⁹

The victim or witnesses should always be prioritised over the information.¹⁵⁰ This requires practitioners to unfailingly respect the right of victims and other witnesses to make his or her own choices, to be fully informed as to the risks and benefits of participation, and to consent – or not - to every aspect of documentation. It also involves being constantly aware of the assistance, services and protection needs of those involved in the documentation, both at the point of the documentation itself and following it.¹⁵¹

2. Reporting sexual violence and starting the investigation

Under Georgian law, the investigation and prosecution of sexual violence is conducted *ex officio*.¹⁵² This means the state has the obligation to investigate and prosecute, rather than placing the burden on the survivor, and does not require a survivor's complaint to open the case.

Pursuant to Articles 100-101 of the CPC of Georgia, investigators and prosecutors are required to initiate investigations upon receiving information about the possible commission of an offence from any source, including (but not limited to):

- a report of the survivor or of any other person (acting with or without the consent of the survivor); information can also be provided by a minor, or a person with disabilities;
- information published in the media, including social media;
- information revealed through the investigation of any other crime.

This applies in all cases of reports of alleged acts of sexual violence. Corroboration of initial evidence is not required to start an investigation.

The report about the crime can be made orally, in writing or in any other form (Art.101.2 of the CPC of Georgia). Investigation can also start on the basis of an anonymous report (Art. 101.3 of the CPC of Georgia).

Because of the serious nature of sexual violence, investigation should start promptly after receiving information about the alleged crime. So-called "pre-investigation" (pre-investigative measures aimed to determine whether or not to start the investigation) has no basis in the law and such practice should be discontinued.

¹⁴⁸ See, for example, Article 182 Criminal Procedure Code.

¹⁴⁹ International Protocol, p.95.

¹⁵⁰ See, for example, International Protocol, Volume 2, p.180.

¹⁵¹ International Protocol, Volume 2, p. 282.

¹⁵² In compliance with the Istanbul Convention Article 55 (1), based on which Parties shall ensure that investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 of this Convention shall not be wholly dependant upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint.

Human rights best practice suggests the victim should be given a written acknowledgement of receipt of their complaint by the police.¹⁵³ This is also required by the Criminal Procedure Code of Georgia (Art. 101.2¹) - a person reporting the crime should receive acknowledgement of receipt of the report.

Victims might not want to participate in the criminal proceedings because of the sex of the investigator¹⁵⁴. Therefore, assigning an investigator that is of the same sex as the victim should be prioritised.¹⁵⁵

Investigators and prosecutors should understand that in the following cases, the evidence may also support charges of sexual violence:

- **domestic violence** is reported (See Chapter I Section 6.1);
- **pregnancy of an adolescent girl** is reported;
- **forced marriage, including bride kidnapping**, is reported (See Chapter I Section 6.3.);
- physical or psychological violence against a woman in a vulnerable category is reported, including a woman with **disability, in prostitution**, or other women who are particularly vulnerable to discrimination based on other grounds, including sexual orientation and gender identity (See Chapter I, Section 6).

Delayed reporting should not be the basis for a refusal to record the crime, initiate an investigation or to question the credibility of the survivor at any stage in the criminal justice process.¹⁵⁶ Some illustrative and non-exhaustive reasons for delayed reporting can be as follows (See Chapter II Section 6):

- The psychological and other types of impact of sexual violence (See Chapter I Section 7);
- In the case of **women or girls with disabilities**, underappreciation of the negative impact of sexual violence; lack of special care and support (medical, technical, or otherwise) to enable reporting and their participation in all aspects of the criminal justice process;¹⁵⁷ lack of specially trained support persons to accompany them throughout criminal justice processes and safeguard their best interests;
- In the case of **women in prostitution**, the legislative framework that penalises women for engaging in prostitution; inappropriate or degrading treatment by police; fear of disclosure of personal data; lack of trust in the police; discriminatory view that women in prostitution always consent to sex;
- In relation to **sexual orientation and gender identity** – confidentiality concerns and the fear of disclosure of sensitive information that could expose them to physical harm;
- In the case of forced marriage, including **bride kidnapping** - a girl/woman might be able to report only if/when she is free from her abuser; a girl/woman might decide not to report because of social stigma in relation to having experienced bride kidnapping;
- In the case of sexual violence committed in the **context of domestic violence** – familial, material, emotional or other kind of dependence on the abuser.

Reports of historical incidents of sexual violence should be treated with the same investigative standards and priority as more recent complaints.

Every incident of sexual violence that becomes known to the authorities (through reports or other

¹⁵³ Directive 2012/29/EU, Preamble para. 24.

¹⁵⁴ Commentary of Crimes against Sexual Freedom and Inviolability, group of authors, Edited by B. Pataria and T. Dekanosidze, 2020, 96-97.

¹⁵⁵ Lika Jalagania, Social Justice Centre.

¹⁵⁶ Directive 2012/29/EU, para. 25.

¹⁵⁷ Domestic Abuse Guidelines for Prosecutors; See Article 117, Criminal Procedure Code of Georgia– Interviewing/examining persons with disabilities and seriously ill persons.

sources) needs to be diligently and thoroughly documented, including for statistical purposes and the investigation should promptly start into each of those incidents. The evidence should not be prejudged as not worthy of documentation at the start of the investigation. Failing to properly document reported facts and failure to start the investigation perpetuates a climate of impunity for sexual violence and gives rise to inaccurate statistics about crimes.

As discussed throughout this manual, witnesses may be unwilling to report complaints of sexual violence for many reasons, not the least of which is the impunity for perpetrators based on the consistently rigid and excessively formalistic interpretations of the laws around cases of sexual violence. It is therefore critically important in these situations for investigators and prosecutors to work together to create a safe and supportive environment where victims feel secure in coming forward to report crimes.¹⁵⁸ Establishing confidence and trust that the Georgian criminal justice system will respond to situations of violence against women in a timely, effective and secure manner can be achieved by implementing the policies and practices set out in this Manual. For example, prosecutors and investigators should be prepared to deal with a victim's protective measures and provide targeted professional counselling, health or other support needs as soon as possible and establish pathways so that these referrals can be made. In another example, prosecutors may look to use alternative, less traumatising ways for the victim to deliver their evidence in court, discussed at Chapter IV Section 2.

3. Information to be collected immediately after starting the investigation

Information collected immediately after receiving a report of sexual violence will directly impact the efficient and timely handling of the investigation as well as the safety and well-being of the victim and her family.¹⁵⁹ While this information will be further developed during the course of the investigation, recording it at the earliest opportunity will inform key aspects of investigative planning, risk assessment and providing the victim and her family with appropriate support services, and may provide the first evidence of aggravating circumstances.

3.1. Vulnerability

Information needs to be obtained and recorded which might reflect the vulnerability of the survivor based on any of the categories listed in Article 53¹ of the Criminal Code. Vulnerabilities might be intersecting and will affect any risk assessment and related protective measures for the victim; they will be relevant to identify the most appropriate support measures for the victim (including measures to enable her to fully participate in the investigative and trial process); and they will be relevant as aggravating factors to the incident in question.¹⁶⁰

When investigating discrimination, knowing this information as early as possible will help with investigative planning.

¹⁵⁸ International Protocol, Volume 2, p. 130.

¹⁵⁹ Istanbul Convention Articles 19, 26, 46.

¹⁶⁰ Istanbul Convention Article 46(c); Explanatory Report, paras. 87, 238; see also: Criminal Code of Georgia, Articles 137(3)(d), 138(2)(d), 139(3)(d), 140(2)(a); Preventing and Combatting Domestic Violence Against Women, A learning resource for training law enforcement and justice officers, January 2016, p.25.

3.2. Medical assistance

Immediately after reporting, it needs to be established if the victim requires medical assistance. If so, the victim should be helped to obtain it.¹⁶¹ Necessary medical care should always take precedence over a forensic medical examination.¹⁶²

While evidence relevant to the criminal case could also be obtained in the course of providing medical treatment to the victim, it should be made clear to the victim that **she does not have to consent to a forensic examination at any time, including** to receive medical care. Police should also explain that pregnancy testing, as well as testing for sexually transmitted diseases and HIV, can also be provided to the victim at local medical facilities.¹⁶³

3.3. Injuries

It is important for any injuries to be documented shortly after they were inflicted, because documentary evidence of any injuries with photographs and notation in written reports is directly relevant to proof of the charge. This information is also directly relevant to the immediate safety of the victim and her family and should be incorporated into any risk assessment to ensure the most appropriate, effective protective measures.

Evidence of injuries that require urgent medical attention, as well as of **the nature, force and intensity and duration of any violence** may also be relevant to show that the offence was committed with “extreme cruelty”, or extremely high levels of violence, both of which are aggravating circumstances.¹⁶⁴ Therefore, such evidence may also impact on charging decisions and on classifying the crime based on its gravity (see Chapter III Section 1).

It should be emphasised that many forms of gender-based violence, including rape, do not cause physical injuries, but nonetheless may adversely affect women’s emotional and psychological health.¹⁶⁵ Therefore, the need for evidence of physical injuries should not be overly relied on.

3.4. Incapacitation

Investigators should be alert to signs of drug or alcohol-facilitated sexual violence.¹⁶⁶ Signs of drugs or intoxication need to be investigated on receiving a report on sexual violence. Emergency services must be called if the victim needs resuscitation. Recording incapacitation (whether voluntarily or as a result of action by the perpetrator) will help further with assessing the ability of the victim to have consented to the sexual contact.¹⁶⁷

¹⁶¹ Istanbul Convention, Article 25; Student Manual Department of Justice National Hate Crimes Training Curriculum, p.50; Guidelines for medico-legal care for victims of sexual violence, WHO, 2003, p.32.

¹⁶² Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p. 17; Guidelines for medico-legal care for victims of sexual violence, WHO, 2003, p.32.

¹⁶³ Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p. 17.

¹⁶⁴ Criminal Code of Georgia Articles 137(4)(a) and 138(4)(b); Istanbul Convention Article 46(f); Explanatory Report, para. 241.

¹⁶⁵ Women’s Access to Justice for Gender-based Violence, A Practitioner’s Guide, p.167.

¹⁶⁶ Guidelines for medico-legal care for victims of sexual violence, WHO, 2003, p.8.

¹⁶⁷ International Protocol, p.59; M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), paras. 79, 150; Roadblocks to Justice: How the Law is Failing Survivors of Sexual Violence in Eurasia, Equality Now, 2019, FN 22; Training Manual for Judges and Prosecutors on Ensuring Women’s Access to Justice, Country Chapter for Georgia, December 2016, p.26.

Some offenders may have administered drugs to victims surreptitiously or by force, or to discredit victims who may decide to report to authorities. Other victims may have taken drugs voluntarily. Irrespective of the circumstances, the sooner blood and urine specimens are taken the higher the likelihood of successfully detecting any substances not knowingly taken.¹⁶⁸

3.5. Use or threat of use of a weapon

If a weapon was used in the commission of the offence, it should be located and removed from the premises and recorded as evidence. Use or threat of use of a weapon is directly relevant to the immediate safety of the victim and her family, as well as the safety of the public at large; to any risk assessment and the terms of any related protective measures; as well as for determining charges and aggravating circumstances (See Chapter II Section 10 and Chapter IV Section 3.1). If the alleged perpetrator belongs to the police or a security force, it should be assumed that he has a weapon and the search should be conducted with more scrutiny.

3.6. Children as victims or witnesses

If the victim is underage or the offence was committed in the presence of children, it will directly impact on how the case will be handled. In such a case, the criminal justice processes should be conducted by special procedures provided under the legislation of Georgia, with criminal justice professionals who have specialised in working with juveniles. Victims would need to be protected by special measures applicable to minors and considering their best interests, e.g. a restraining order might be sought separating the child from abusive family members (See Chapter II, Section 10).

Depending on their age, the child may be considered a witness in court.¹⁶⁹

The fact that an incident of sexual violence was committed in front of children may be relevant to a context-sensitive assessment to determine whether the victim was able to give free, genuine, and specific consent to the acts in question, as she may not have been able to refuse the sexual contact out of fear for the safety of her children. In addition, this will help to determine whether there were any aggravating circumstances - such as committing an offence in the presence of a minor ¹⁷⁰ (See Chapter IV, Section 3.1.)

3.7. Communication barriers

The early identification of specific support needs is critical.¹⁷¹ If the victim does not understand an official language, an interpreter will need to be assigned from the very initial stages of the investigation to make sure that information is adequately understood and shared, that she is fully advised of her rights and to ensure that she is able to access the most appropriate support services.

Family members or persons from the victim's community group should not be allowed to act as interpreters and support persons, as this could place the victim at risk by disclosing their interaction

¹⁶⁸ Guidelines for medico-legal care for victims of sexual violence, WHO, 2003, p.8.

¹⁶⁹ Istanbul Convention, Article 26.

¹⁷⁰ Istanbul Convention Article 46(d); Criminal Code of Georgia, Article 531(2).

¹⁷¹ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

with the criminal justice sector¹⁷² and may additionally expose them to community pressure to withdraw their statement.

Moreover, it is important for police, prosecutors, and judges to recognise that a victim's lack of understanding of the local language may impact their ability to have given consent to the sexual contact.

In the case of persons with disabilities, necessary adjustments should be made, and alternative communication methods should be applied where necessary. This for example could require involvement of a sign language interpreter for persons with hearing impairments, or asking and responding to the questions in writing in relation to persons with speech or hearing impairments. If a person has injuries threatening to her health or life, she can be interviewed with the permission of or, where necessary, in the presence of a medical doctor.¹⁷³ A psychologist or family member should be invited to identify special needs and help establish and maintain communication. It needs to be ensured that the support person is not the one who might be involved in the crime or one who would unduly influence the victim.

3.8. Information on perpetrator(s)

The number of perpetrators will have immediate implications for the investigation and potentially require additional police resources to be assigned to the case. It may also be relevant to show that the offence was committed with "extreme cruelty"; or extremely high levels of violence. Committing a crime as a group will also constitute an aggravating crime. The victim should always be asked about any relationship with the perpetrator. If the perpetrator is a family member, relative or intimate partner the crime may be classified as sexual violence committed as part of a domestic crime. Evidence of the nature of the relationship between the victim and the perpetrator and their living arrangements can also be highly relevant to establishing whether coercive circumstances existed which would negate the victim's consent.

A person in a position of trust or authority over the victim has a duty of care to their victim. This may be a teacher, baby-sitter, caregiver to someone who is elderly or infirm, an employer, supervisor, prison warden, mentor, or medical professional (among others). The violation of trust which is normally connected with such a relationship may give rise to specific emotional harm for the victim, which is considered an additional aggravating circumstance.¹⁷⁴

4. Categories of evidence

An investigation into acts of sexual violence can be built on different types of evidence. Some are discussed below.

4.1. Testimonial evidence

Core testimonial evidence can be gathered from interviews of the victim (See Chapter II Section 8 on

¹⁷² Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

¹⁷³ Criminal Procedure Code of Georgia, Article 177.

¹⁷⁴ Istanbul Convention Articles 46(a), (h); Articles 531(2), 137(2)(a)(b), 138(2)(b)(g), 139(2) CC; Explanatory Report, para. 243.

victim interviewing techniques); persons(s) who reported the incident; persons who saw the incident, heard it or heard about it; witnesses who had contact with the victim in the period leading up to the crime; witnesses who spoke with the victim after the crime; witnesses whose evidence may reveal coerced patterns of behaviour; neighbours; colleagues; teachers; staff of specialist support organisations; patrol officers who were part of the first response; emergency medical personnel, and doctors, midwives, nurses and other health care professionals who may have treated the victim.

Evidence of the victim's distress after the incident may also be available from any of these witnesses and serve as corroboration.

Assumption of credibility of the victim

The absence of documentary, forensic, physical, medical, or digital evidence does not mean that justice for victims of sexual violence is not possible. In cases of rape and other acts of sexual violence (See Chapter II Section 5 and 6 on no need for corroboration and stereotypes), the victim's own evidence can establish that an act of sexual violence took place; the nature of the attack; the identification of the alleged perpetrator; the circumstances surrounding the act and the existence of coercive circumstances.¹⁷⁵ This has been the case in international courts and tribunals, which rely heavily on testimonial evidence (see Chapter II Section 5).

4.2. Evidence that may undermine the credibility of the perpetrator or defence witnesses

Police and prosecutors should be alert for evidence which does not directly prove what happened but may support or undermine the credibility of the defendant or defence witnesses. Any motive to lie can be examined, such as divorce or custody proceedings, revenge, or career prospects. Many sex offenders are recidivists. If someone has sexually assaulted once he is likely to have assaulted previously, with the victim or with other women. The sex offenders' register should be checked, among other records, to identify persons who have been convicted for sexual violence and were deprived of certain rights (such as the right to work in an educational or out-of-school institution, the right to operate a means of transport, including public transport, the right to transport passengers, etc) in relation to having committed these crimes.¹⁷⁶ Deprivation of the rights should be checked in the databases of the Ministry of Internal Affairs, which maintains a register of persons convicted of sex crimes. Potential additional victims should also be searched for.

4.3. Evidence of coercion and coercive circumstances and other relevant evidence

There are several additional types of evidence, which may be relevant to the investigation and useful to corroborate the evidence of the victim and any witnesses and establish physical or **psychological violence, threats and other forms of coercion or coercive circumstances**. Below are some examples:

- Records and recordings of telephone calls including to 112, police/medical services or victim hotlines to report an incident;
- Letters, copies of emails, texts and other messages and evidence of abusive or threatening

¹⁷⁵ International Protocol, p.148.

¹⁷⁶ Law of Georgia on Combating Crimes against Sexual Freedom and Inviolability, Article 3.

communications over social media platforms;

- Crime scene trace and other material evidence. In cases of spousal or intimate partner abuse, this may include evidence of damage to property or furniture overturned. Photos of the crime scene are therefore relevant, as well as evidence of prior acts of intimate partner violence;
- Photographs of any immediate/visible injuries such as defensive injuries to forearms; bruising reflecting upper arm grabs; scalp bruising; clumps of hair missing etc. It may be relevant to look for signs of strangulation or choking of the victim. This technique is increasingly used in sexual violence. Such signs may not be immediately obvious (and include such things as dilation of pupils) and require medical assistance to be properly checked. It should also be noted that bruising may not be immediately visible on arrival at the scene of the incident and only become evident some days later. Therefore, the survivor should be informed about the necessity to document any new traces of violence if they appear after the first medical examination and the procedure for it;
- Footage from body worn cameras (generally available in cases of emergency responses);
- CCTV footage - which could, for example, have captured the crime itself. It could serve as corroborating evidence, establishing (for example) the routes travelled by the perpetrator and the victim;
- Any location evidence connected to mobile devices – mobile devices are highly useful in establishing whether the perpetrator was at/near the crime scene at the relevant time;
- Evidence of previous threats made to children or other family members;
- The criminal record of the alleged perpetrator;
- Evidence of isolation – such as lack of contact between family and friends; of the victim withdrawing from social activities; or the alleged perpetrator accompanying the victim to medical appointments;
- Witness statements from family or friends which might provide evidence about the effect and impact on the victim of her isolation from them;
- Any diary kept by the victim;
- Bank records (which may show financial control). Where the perpetrator has a care responsibility, evidence of any care plan might be useful as it could detail what funds should be used for.¹⁷⁷

4.4. Evidence of the impact of sexual violence

While physical force may not have been used during the act of sexual violence, there are various consequences of sexual violence which need to be taken into consideration by police and prosecutors when evaluating its impact on the survivor and their family. Police and prosecutors must gather evidence of the impact of the crime on the victim(s) and their families (see Chapter II Section 4.5.2). Among the more common consequences are those pertaining to reproductive, mental health and social well-being.¹⁷⁸

Some examples include:¹⁷⁹

¹⁷⁷ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors: Controlling or Coercive Behaviour in an Intimate or Family Relationship.

¹⁷⁸ World Report on Violence and Health, WHO, chapter 6, Sexual Violence, p. 16.

¹⁷⁹ Effects of Sexual Violence, Rape, Abuse & Incest National Network.

- Post-traumatic stress disorder (PTSD)
- Flashbacks
- Mental health and behavioural problems, including depression, dissociation, self-harm, panic attacks;
- Suicide
- Substance abuse

The victim impact evidence may be particularly important at trial and sentencing. The following types of evidence provide examples of proof of the impact of sexual violence:¹⁸⁰

- Victim interviews can be used to describe who the victim is now and how this is different from who the victim was before the assault;
- A description of how the victim changed after the sexual assault can also include information provided by friends, family members, and co-workers. This type of information is particularly important for victims who may not be able to verbally articulate these changes for themselves, either as a result of incapacitation or trauma, or because of a disability limiting their cognitive ability or communication, or because they are deceased;
- Statements from 'outcry witnesses' (people who the victim told about the sexual assault, either in the immediate aftermath or later);
- Expert witnesses, such as a psychologist.

The information provided by the victim can be corroborated with the descriptions provided by friends, family members, teachers, and others. This would also support overcoming credibility challenges based on any lack of physical resistance. A re-establishing by the victim of her social life or her ability to work, or any outward appearances of her apparent recovery should in no way be taken to mean that the victim does not bear any trauma resulting from the sexual violence and such assumptions should not be made.

4.5. Expert examinations relevant to sexual violence cases

Relevant forensic information about sexual violence can be much broader than just biological (for example semen, saliva or blood-stains) or medical evidence, and can overlap with physical, documentary and even digital information (e.g. fingerprints; clothing; gloves; towels; used condoms; hairs; soil; tyre-marks; tape; ropes/ligatures; photographs (even if the crime scene is not fresh); mobile or other phone records – including calls to a hotline or other emergency services, etc.).

Careful collection and analysis of forensic evidence can corroborate aspects of the victim's account – even long after the incident in question.

While medical, forensic, psychological, or psychiatric examination can be important evidence in a case, if the expert examination does not find evidence of physical injuries, evidence of penetration, biological material of the perpetrator, or it does not find that the victim suffered trauma, no adverse inferences should be drawn from this. This should not be used as the basis to conclude that sexual violence did not happen.

¹⁸⁰ Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault, Sergeant Joanne Archambault (Ret.) Kimberly A. Lonsway, PhD February 2006 Updated June 2019, p. 22.

4.5.1. Forensic, biological, and other examinations

Forensic examination includes a range of medical examinations of the victim and perpetrator to document physical injuries, recover biological material, examine clothing and the crime scene. Only forensically qualified and trained professionals should carry out such exams. For recovery of biological material, forensic examinations must be undertaken within a very short time frame after the alleged incident(s). Dependent on conditions including temperature etc., after a certain period there is generally no trace of sperm or liquid to justify a forensic examination.

Forensic examinations, including gynaecological examinations, should not be considered mandatory, but ordered only where necessary¹⁸¹ and with the victim's informed consent (See Chapter II Section 1)¹⁸². Prosecutors should evaluate the relevance of an expert examination based on an analysis carried out on a case-by-case basis, taking into account the time that has elapsed since the sexual violence is alleged to have occurred.¹⁸³

Informed consent requires that the investigator explains the reasons for the forensic examination and all parts of the examination in advance, in clear, easy-to-understand language.¹⁸⁴ Victims should be informed when and where touching will occur and should be given ample opportunity to ask questions.¹⁸⁵ Treating a victim of sexual assault with respect and compassion throughout the examination will aid her recovery.¹⁸⁶ The victim should be asked whether she wants a third person to be present during the examination due to religious, psychological or any other reasons.

Wherever possible, a victim should be given the opportunity to choose the sex of the forensic expert who examines her to protect her from any potential secondary victimisation or trauma. Where it is not possible to provide a female forensic expert, the investigator should proactively inform the victim of her right to choose a support person to accompany her during the examination. It is important to allow the survivor to have a support person during the examination regardless of the sex of a forensic expert, due to religious, psychological or any other personal reason.

For persons with some form of mental or intellectual disability, it is important to have a close person (it could be an officially assigned supported decision maker) with her during the examination at all times to help her feel safe in these unfamiliar circumstances or to enable her to communicate with others. It needs to be ensured that the support person is not the one who might be involved in the crime or one who would unduly influence her.

If not much time has passed after the incident of sexual violence and there is a threat that evidence might get lost or damaged, the investigator should ensure that the victim is encouraged not to bathe, eat or drink prior to the examination, and told that her clothes may be held as evidence.¹⁸⁷ Should the victim decline an examination, the investigator should provide information as to how and where she could obtain an exam later. The victim should be sensitively advised, however, that forensic evidence

¹⁸¹ Directive 2012/29/EU Article 20(d); The Administration of Justice on Sexual Violence Crimes, p. 32.

¹⁸² Guidelines for medico-legal care for victims of sexual violence, WHO, 2003, p.30.

¹⁸³ Inter American Court of Human Rights Case of Espinoza González v. Peru, Judgment, preliminary objections, merits, reparations and costs, judgment of 11/20/14, para. 257.

¹⁸⁴ Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p.17; Guidelines for medico-legal care for victims of sexual violence, WHO, 200, p.30.

¹⁸⁵ Guidelines for medico-legal care for victims of sexual violence, WHO, 200, p.30.

¹⁸⁶ Guidelines for medico-legal care for victims of sexual violence, WHO, 200, p.30.

¹⁸⁷ Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p.17.

and the possibility to document the injuries may be lost with a delayed exam.¹⁸⁸ The investigator might also want to apply to the victim coordinator, who should be able to explain to the victim, applying a victim-centred approach, why it is important to undergo the examination at that time (See Chapter II Section 10).

The victim's refusal to submit to a forensic examination is not a basis for terminating an investigation. Furthermore, women who choose not to undergo a forensic examination should not be considered less credible. Rather, the evidence relevant to the case should be collected through other investigative measures detailed in this manual.

Avoidance of drawing adverse inference from hymen condition

Genital injuries in women and girls are most likely to be seen in the posterior fourchette, the labia minora, the hymen and/or the fossa navicularis.¹⁸⁹ However, the state of her hymen cannot establish whether a woman has been raped, has had sexual intercourse or is sexually active.¹⁹⁰ The hymen may not break or incur noticeable damage as a result of sexual intercourse or forced sexual penetration.¹⁹¹ On the other hand, the hymen can be broken for reasons outside sexual intercourse or sexual violence¹⁹², such as exercise or other physical activity, such as horse-riding or using tampons.¹⁹³

There is no factual, scientific, or medical basis for utilising hymen size, morphology, or integrity to determine whether a woman has experienced vaginal penetration, and whether this can accurately determine her "virginity".¹⁹⁴ Virginity tests have been described by the World Health Organisation as 'degrading, discriminatory and unscientific'.¹⁹⁵

The state of a hymen, therefore, should only ever be used to show injury to prove sexual violence and corroborate blunt force trauma and never to draw evidence of the victim's prior sexual history (which has no relevance to the crime) and undermine the gravity of the abuses the victim suffered.

4.5.2. Psychological assessment

Ordering a psychological examination at the outset of a sexual violence investigation may help criminal justice actors develop plans and mechanisms to ensure that the victim's participation in the criminal justice process is not re-traumatising. It may help determine whether she needs specialised support. Such assessment should also be done in the initial stage of the investigation through the involvement of the Victim and Witness Coordinator. It may also provide victim impact evidence that the sexual contact in question caused serious psychological harm to the victim and should be considered an aggravating circumstance on sentencing.

The victim should be able to choose the sex of the Victim/Witness Coordinator (see Chapter II Section 8). If a Victim/Witness Coordinator is assigned to the case, they may conduct an initial psychological

¹⁸⁸ Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p.18.

¹⁸⁹ Guidelines for medico-legal care for victims of sexual violence, p. 12.

¹⁹⁰ Through evidence, change is possible, Physicians for Human Rights.

¹⁹¹ Guidelines for medico-legal care for victims of sexual violence, p. 78, Through evidence, change is possible, Physicians for Human Rights, p. 1.

¹⁹² Through evidence, change is possible, Physicians for Human Rights.

¹⁹³ Does a woman always bleed when she has sex for the first time? NHS.

¹⁹⁴ Through evidence, change is possible, Physicians for Human Rights, p. 1.

¹⁹⁵ World Health Organisation (2014) Healthcare for Women Subjected to Intimate Partner Violence and Sexual Violence, A Clinical Handbook, Geneva: WHO; International Protocol, p. 46.; CEDAW/C/GC/35, para. 29 (c) (ii).

assessment of the victim in a semi-structured interview – about the incident and its impact. They must then inform the investigator or prosecutor if, in their view, the victim needs psychological support.

4.5.3. Psychiatric assessment

It is not permitted to conduct an expert examination to prove the reliability of a victim/witness.¹⁹⁶ Therefore, experts should not be instructed to express opinions as to whether a victim or other witnesses can give consistent testimony. It is for the judge alone to assess the weight and credibility of the evidence based on the case at hand.¹⁹⁷ The purpose of a psychiatric assessment is to assess the impact of sexual violence on the victim, plan support services or inform investigative and interviewing strategies (by specially trained persons if required) to ensure a victim-centred approach alone. Psychiatric assessments should never be applied to determine whether the victim is saying the truth.

A psychiatric assessment of persons with disabilities should not be used to assess credibility. Disability should not be automatically assumed to suggest a person is helpless, incapable, or unable to understand, remember or convey the details of a sexual violence crime. Whether a person with disabilities is able to contribute evidence to the case should not be decided by psychiatric examination only, rather assessed in the context of evidence offered.

Article 50(2) of the Criminal Procedure Code of Georgia states that a person who, due to a physical or mental disability, is unable to properly comprehend, remember and recollect circumstances essential to the case, or give information or testimony, may not be interviewed or interrogated as a witness.

The above provision should not be interpreted as allowing for the evidence of victims with mental disabilities to be evaluated by a psychiatrist for its credibility and relevance and should not prevent the disabled person from participating in the criminal justice process and from accessing justice. No matter how consistent or credible the evidence of a disabled victim might be, a psychiatric determination that a disabled victim is unable to properly comprehend, remember and recollect circumstances essential to the case, and to give information or testimony, currently precludes the court from accepting it as evidence and relying on it – therefore, such assessments should not be the sole basis for refusing to press charges and the court should not automatically refuse assessing and relying on the evidence of a person with disability.

In light of this, a victim-centred approach in these situations would be for psychiatrists to assess how the victim can contribute to the criminal justice process and for police, prosecutors and judges to use that specialised guidance to develop a methodology for interviewing persons with disabilities, so that their disability would not automatically exclude the victim from the criminal process and deny her justice.

An investigator/prosecutor should not use any “informal” pressure to force the victim to undergo a psychiatric or any other assessment. The right to refuse such an assessment must be explained very clearly to the victim. The victim and her lawyer should also be informed that the lawyer can accompany the victim during the psychiatric examination.

¹⁹⁶ Article 51(3) Criminal Procedure Code of Georgia.

¹⁹⁷ CC of Georgia, 51(3).

5. Evidentiary issues: Principles of admissibility, relevance, importance of contextualisation and issues around corroboration

Principles of admissibility at international criminal law

Principles of admissibility determine whether particular items of evidence may be received by the court in support of a particular fact in issue.¹⁹⁸ Rules of procedure and evidence at the international courts grant judges great discretion to rule on the admissibility of evidence.¹⁹⁹ The idea is that evidence should be weighed **at trial**, rather than automatically excluded.²⁰⁰

Principles of admissibility in the ad hoc tribunals

The judges at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda had the discretion to admit 'any relevant evidence which it deems to have probative value,' and to exclude evidence 'if its probative value is substantially outweighed by the need to ensure a fair trial.'²⁰¹

Principles of admissibility in the International Criminal Court (ICC)

In practice, the ICC works on a presumption in favour of admission,²⁰² which includes admissibility of hearsay. Their rules on evidence are found in Article 69 of the Rome Statute, **but the test for the admission of evidence is set out in jurisprudence.**

Set out in *Lubanga*: a cumulative 3-step test for the admission of evidence, to be applied on a case-by-case basis.

- (I) is the evidence *prima facie* (on its face) relevant?
- (II) is the evidence of *prima facie* probative value?
- (III) does the probative value outweigh its potentially prejudicial effect?²⁰³

The ICC Rules of Procedure and Evidence prescribes only two exclusionary rules. Evidence obtained by means of a violation of the Rome Statute or internationally recognised human rights is excluded if: "the violation casts substantial doubt on the reliability of the evidence or the admission of evidence would be antithetical to and would seriously damage the integrity of the proceedings."²⁰⁴ ICC Trial Chambers typically consider the relevance and probative value as part of the 'holistic assessment' of all evidence submitted at trial and defer determination of admissibility of individual items of proof until deliberation.²⁰⁵ The factors taken into consideration for these assessments are identified and discussed

¹⁹⁸ Admissibility, Oxford Dictionary of Law (5th Ed OUP 2006), p. 13.

¹⁹⁹ Stahn, Critical Introduction to International Criminal Law, p. 343.

²⁰⁰ Stahn, Critical Introduction to International Criminal Law, p. 343.

²⁰¹ See e.g., International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, 13 May 2015 (as amended), ('ICTY Rules of Procedure and Evidence'), rule 89(D); International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence 13 May 2015 (as amended) ('ICTR Rules of Procedure and Evidence'), rule 89(C); Special Tribunal for Lebanon, Rules of Procedure and Evidence, 18 December 2020 (as corrected) ('STL Rules of Procedure and Evidence'), rules 149(c), (d); Special Court for Sierra Leone, Rules of Procedure and Evidence ('SCSL Rules of Procedure and Evidence'), rule 89(c); Cryer, An Introduction to International Criminal Law, p. 433.

²⁰² Cryer, An Introduction to International Criminal Law, p. 434.

²⁰³ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1399, Decision on the Admissibility of Four Documents, 13 June 2008, paras 25–32.

²⁰⁴ Rome Statute, Article 69(7).

²⁰⁵ Cryer, An Introduction to International Criminal Law, p. 434.

below.

Evidence of the prior or subsequent sexual conduct of a victim or witness shall NOT be admitted by the court.²⁰⁶

Factors to be considered in determining admissibility

Relevance

Relevance is about the relationship between the evidence and the matter being investigated or prosecuted. For judges, relevance denotes pertinence to an allegation or issue at trial.²⁰⁷ The principle of relevance should guide investigators, prosecutors, and judges through all phases of the criminal justice process. It will ensure that all available evidence is collected, presented, and considered in the most efficient, effective, and appropriate way.

Identifying and collecting evidence is the main object of an investigation. Relevance is extremely broad during the investigation stage. At this stage, investigators should consider relevance to include **all** evidence that could prove or disprove a material fact being investigated. This will require a comprehensive, context-based investigation. Relevance is much broader during the investigations phase of a case than at any other.

Once someone has been charged, relevance will always be determined by the framework of the allegations. At this stage, relevant evidence may be considered as anything that would support or disprove a material issue in a case; in other words, evidence is relevant if it would make a fact at issue more or less likely. Material issues are those found in the criminal charges.

Relevance is a threshold requirement that must be met even before the court considers the value of the evidence proving or disproving a fact in issue.²⁰⁸ Relevance is not a solitary concept and is **always** relative to the fact(s) in issue. Evidence, therefore, especially if indirect, must be contextualised to determine its relevance.

Probative value

The concept of relevance contains an implicit requirement of probative value. Probative value is the degree to which the evidence makes an assertion more or less probable; **in other words, it is the degree to which a piece of evidence can “prove or disprove a point in issue.”**²⁰⁹

For example, a photo with a timestamp of someone at a place where a crime has taken place, and a video of the person committing the crime both support the fact that a crime may have been committed by the person.

Evidence which is both relevant and probative must also enjoy some component of reliability.²¹⁰

Reliability

Reliability depends on circumstances such as the origin, content, corroboration, truthfulness,

²⁰⁶ ICC Rules of Procedure and Evidence, rule 71.

²⁰⁷ Cryer, *An Introduction to International Criminal Law*, p. 433; Stahn, *Critical Introduction to International Criminal Law*, p. 343.

²⁰⁸ See 'Evidence Law: The Rule of Relevance and Admissibility of Character Evidence'.

²⁰⁹ Cryer, *An Introduction to International Criminal Law*, pp. 433-434; Stahn, *Critical Introduction to International Criminal Law*, p. 343.

²¹⁰ *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, paras 15–16, 19. See further Cryer, *An Introduction to International Criminal Law*, p. 465.

voluntariness, or trustworthiness of the evidence.²¹¹ Reliability is therefore not only about the evidence itself, but it is also dependent on the way it has been obtained. For example, if obtained in violation of a serious human right, such as torture, the reliability of a confession or other testimonial evidence would be seriously impacted.²¹²

Consequently, the two parameters determining probative value are reliability of the evidence and the amount it can influence the determination of a matter at hand.²¹³

Reliability is a broad concept. Accordingly, it embraces credibility (the extent to which the source of the evidence can be trusted) as well as other issues, including observational accuracy and authenticity.

It is important to note that a piece of evidence can be credible even if it is inconsistent. For example, witness testimonies with inconsistencies or discrepancies have been accepted by international courts because the evidence, when taken as a whole, was considered to be reliable and credible (e.g., in light of corroborative evidence of other witnesses on certain issues).²¹⁴

Indirect evidence – hearsay

Hearsay evidence

Hearsay evidence is evidence of a statement made out of court and **offered in court to prove the truth of the matter asserted in the statement**.²¹⁵ Hearsay can be first hand, such as when a witness gives an account of information provided to him by another person; second hand (double hearsay); or more remote, such as when an account of information has passed between two or more persons before being conveyed to the witness who appears in court.²¹⁶

Georgian criminal practice distinguishes between direct and indirect evidence. Indirect evidence is interpreted as referring to “indirect testimony”;²¹⁷ (first or second-hand hearsay) while all other evidence, including circumstantial evidence, is considered “direct evidence”. Both may be **relevant** to a material fact at issue.

Testimony can often contain both direct and indirect evidence. For example, a child may tell her mother that she was raped by an individual who now stands charged with the crime. The mother’s account of the child’s statement may be considered “indirect testimony” and is clearly relevant and probative to determining the material facts at issue. Furthermore, if the child has already given evidence that she was raped and testified that she reported it to her mother, the mother’s “indirect testimony” is relevant as corroborative evidence. The mother’s evidence may also be relevant as evidence of the child’s emotional state of distress. Finally, the child’s statement to her mother may be found to have been made at a time when she was so emotionally overpowered by the crime that any possibility that it was fabricated can be disregarded. **This illustrates the importance of contextualising evidence to determine its relevance.** At the same time, the mother’s testimony may contain what is considered “direct evidence”

²¹¹ Cryer, *An Introduction to International Criminal Law*, p. 434; Prosecutor v. Aleksovski, Case No. IT-95-14/1, Decision on Prosecution’s Appeal on Admission of Evidence, 16 February 1999 (‘Aleksovski Decision on Prosecutor’s Appeal on Admissibility of Evidence’), para. 15.

²¹² Stahn, *Critical Introduction to International Criminal Law*, p. 345.

²¹³ Prosecutor v. Germain Katanga & Matthew Ngudjolo Chui, Case No. ICC-01/04-01/07 Decision on the Prosecutor’s Bar Table Motions, 17 December 2010 (‘Katanga and Chui, Decision on the Prosecutor’s Bar Table Motions’) para. 20.

²¹⁴ Prosecutor v. Popović et al., Case No. IT-05-08-T, Judgment, 10 June 2010 (‘Popović et al., Trial Judgment’), para. 506.

²¹⁵ ICTY Manual on Developed Practices, pp. 106-107; Crown Prosecution Service, Code for Crown Prosecutors.

²¹⁶ UNICRI, ICTY Manual on Developed Practices, p. 107.

²¹⁷ Criminal Procedure Code of Georgia, Article 76.

in Georgian practice, such as her personal observations of physical injuries, emotional state of the child or any changes in her behaviour around the time of the alleged crime. These observations are also clearly relevant to the facts at issue.

Strict interpretation of the hearsay admissibility rules can present real barriers to the admissibility of otherwise important evidence. In practice, however, common law adversarial systems and international jurisprudence on hearsay evidence has evolved such that the range of exceptions have practically nullified the exclusionary rule.²¹⁸ Some illustrations follow.

Hearsay evidence in international practice

The importance of hearsay evidence is reflected in international practice. **The idea is that the evidence, including hearsay, should be weighed at trial rather than precluded per se.**²¹⁹

It was settled practice **at the *ad hoc* tribunals that hearsay evidence was admissible, as long as it was relevant and probative to the case.** Those Chambers had the discretion to admit, and did admit and rely on, hearsay evidence.²²⁰ The ICC Appeals Chamber has similarly held that there is no procedural bar to the introduction or reliance on hearsay evidence in the Court's legal framework. **The fact that evidence is hearsay does not necessarily deprive it of probative value.**²²¹ **As with any kind of indirect evidence, while the weight or probative value afforded to it may be lower, this ultimately "depend[s] upon the infinitely variable circumstances which surround hearsay evidence".**²²²

Canada's principled approach to hearsay

The Supreme Court of Canada considered the hearsay exclusionary rule in its decision in the 2006 case of *R v. Khelawon*.²²³ The appeal in this case turned on the admissibility of hearsay statements under a principled case-by-case exception to the hearsay rule based on necessity and reliability.²²⁴ There, on behalf of a unanimous Court, Charron J. wrote:

"When it is necessary to resort to hearsay evidence, a hearsay statement may be admitted if, because of the way in which it came about, its contents are

²¹⁸ See, e.g. Alvin Goldman, 'Legal Evidence' in Martin Golding & William Edmundson (eds) Blackwell Philosophy Guide to the Philosophy of Law and Legal Theory (Blackwell Publishing Ltd 2005), p. 174.

²¹⁹ Stahn, Critical Introduction to International Criminal Law, p. 343.

²²⁰ Rome Statute, articles 69 (3), (4); ICTY Rules of Procedure and Evidence, rule 89(c); ICTR, Rules of Procedure and Evidence, rule 89(c); SCSL Rules of Procedure and Evidence, rule 89 (c); STL, Rules of Procedure and Evidence, rule 149(c); Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rev.8, 3 August 2011 ('ECCC Internal Rules'), rule 87 (1). See also, Prosecutor v. Aleksovski, Case No. IT-95-14/1, Decision on Prosecution's Appeal on Admission of Evidence, 16 February 1999 ('Aleksovski Decision on Prosecutor's Appeal on Admissibility of Evidence'), para. 15; Prosecutor v. Galić, Case No. IT-98-29-AR73.2, Decision on interlocutory appeal concerning Rule 92bis (C), 7 June 2002, para. 27; Prosecutor v. Gotovina et al., Case No. IT-06-90-T, Judgment, 15 April 2011 ('Gotovina et al. Trial Judgment'), para. 43; Prosecutor v. Popović et al., Case No. IT-05-88-A, Judgment, 30 January 2015 ('Popović et al. Appeal Judgment'), para. 1307; Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, 1 June 2001 ('Akayesu Appeal Judgment'), paras 286; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, ('Kajelijeli Judgment and Sentence'), para. 45; Prosecutor v. Brima et al., Case No. SCSL-04-16-PT, Decision on Joint Defence Motion to Exclude All Evidence from Witness TFI-277 pursuant to Rule 89(C) and/or Rule 95; 24 May 2005 ('Brima et al. Decision on Joint Defence Motion') paras. 12-13; Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Judgment, 20 June 2007, para. 100; ECCC Internal Rules, rule 87(1); Co-Prosecutors v. Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010, para. 43.

²²¹ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, 08 July 2019, para. 67.

²²² Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, 08 July 2019, para. 67; Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

²²³ R. v. Khelawon, 2006 SCC 57 (CanLII), [2006] 2 SCR 787, Superior Court of Justice of Canada, 14 December 2006, ('R. v. Khelawon'), para. 2.

²²⁴ R. v. Khelawon, para. 1

trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth.”²²⁵

Necessity and reliability are determined on a *voir dire*.²²⁶ Necessity and reliability should not be considered in isolation and one criterion may impact another.²²⁷

The Court also emphasised that attention to the requirements of reliability and necessity within the particular context should prevail over formalised rules or categories of exclusion and admission.²²⁸ Accordingly, a contextual approach to the admissibility enquiry should be applied in every instance except where the hearsay statement was made by the accused or a party.²²⁹

Within the traditional hearsay exceptions there are also considerations of reliability. Testimony from a prior proceeding may be reliable if the witness was under oath at the time the statements were made, and an opposing party had adequate opportunity for cross-examination. Alternatively, *res gestae* statements (such as those referred to above in the example of the child rape victim, who made certain statements about the incident to her mother) may be reliable as impulsive utterances, as the declaration against interest exception appeals to common sense in that “people do not readily make statements that admit facts contrary to their interests unless those statements are true.”²³⁰

Importance of contextualisation

This Manual has repeatedly referred to the importance of contextualisation and context-based investigations in dealing with cases of rape and other forms of sexual violence against women. In line with this, the jurisprudence of the European Court of Human Rights offers important guidance for Georgian investigators, prosecutors and judges, particularly in cases involving two conflicting versions of the events and little “direct” evidence.²³¹ In such cases, the Court has stressed that the authorities need “to explore the available possibilities for establishing all the surrounding circumstances” and “assess sufficiently the credibility of the conflicting statements made.”²³² In the absence of “direct” proof of rape, “the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances.”²³³

More particularly, the European Court has held that “the presence of two irreconcilable versions of the facts **obviously called for a context-sensitive assessment** of the credibility of the statements made and for verification of all the surrounding circumstances. That could have been done by questioning people known to the applicant and the alleged perpetrator, such as friends, neighbours and others who could shed light on the trustworthiness of their statements, or by seeking an opinion from a specialist psychologist. In this context, the authorities could also verify whether any reasons existed for the victim to make false accusations against the alleged perpetrator”²³⁴). (See Chapter II Section 4 on Categories of evidence)

Issues around corroboration

²²⁵ R. v. Khelawon, para. 2.

²²⁶ R. v. Khelawon, para. 47.

²²⁷ R. v. Khelawon, para. 46.

²²⁸ Cuncliffe and Boyle, Hearsay, p. 2.1.4.

²²⁹ Cuncliffe and Boyle, Hearsay, p. 2.1.4.

²³⁰ Cuncliffe and Boyle, Hearsay, p.2.1.9-2.1.0.

²³¹ M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), para. 176.

²³² M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), para. 178.

²³³ M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), 181.

²³⁴ E.B. v. Romania, App. no. 49089/10, (ECHR, 19 March 2019), para. 58; I.G. v. Moldova, App. no. 15966/04, (ECHR, 13 November, 2012), para. 43.

As noted earlier in this Manual (Chapter II Section 5), there should be no absolute requirement for the account of a victim of sexual violence to be otherwise corroborated for her evidence to be considered credible, reliable and sufficient as a basis for a conviction.

The CPC of Georgia states that a judgment of conviction shall be based only on a body of consistent, clear, and convincing evidence, which proves the culpability of a person beyond reasonable doubt.²³⁵ It also states that a judgment of conviction cannot be based solely on indirect evidence.²³⁶

This article is **consistently** interpreted as requiring two **pieces** of evidence on which to prefer an indictment or base a conviction, with the testimony of an individual witness considered to be one “piece.” **That is a formalistic, limiting interpretation of the word body/sum/totality/unity as the article does not specify that two pieces of evidence are required.**

This approach has governed even where a single witness may speak to many separate facts or ‘pieces’ of evidence in their testimony; it somehow fails to acknowledge **the totality** of evidence in any trial as being comprised separate pieces of evidence, or the fact that evidence such as a statement or testimony can be internally consistent as well, especially after cross-examination.

The test for sufficiency of evidence is not a numerical one.

Sometimes the statement of the victim is the only evidence the prosecution has – particularly with sexual violence cases.

Sexual violence is a gender-based crime, overwhelmingly committed against women and girls. These assaults typically happen in locations and situations where the perpetrator is in a position of authority over the victim and has isolated her in order to perpetrate the crime. This was explicitly recognised by the Supreme Court of Georgia, which, overturning the judgment of acquittal of the Court of Appeal in an attempted rape case, stated that “the crime in question, by its nature and character, is usually not public and is not distinguished by a large number of eyewitnesses.”²³⁷

This strict requirement of “two pieces,” however, means that **even if** the evidence of women and girls who have been a victim of sexual violence is credible and reliable, unless corroborated by another “piece” of evidence, it can never on its own form the basis for conviction.

This is just another example of how a formalistic interpretation **prevents access to justice** for women who have been victims of rape and other forms of sexual violence in Georgia. **In these cases the “two pieces” threshold avoids a determination on the merits** because uncorroborated complaints of women who have been victims tend to not go to court. This may be considered discriminatory, and a violation of the right to an effective remedy under Article 13 of the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

Corroboration is always helpful, but strictly requiring it in sexual violence cases reinforces the common myth that assumes that if a woman were really raped, she would have corroborative evidence of the assault, and that her failure to produce corroboration means that she was not really raped. The reality of rape victims’ experiences is different. Corroboration in a rape case usually refers to physical injuries from the assault, torn clothing, or other evidence of a physical struggle. In most cases, those are not available.

Corroboration does not automatically establish credibility.

²³⁵ Criminal Procedure Code of Georgia, Article 13(2).

²³⁶ Criminal Procedure Code, note to Article 13; Criminal Procedure Code, Article 76.

²³⁷ Supreme Court of Georgia, Judgment of 19 November 2015, case N253 A.P.-15, para. 3.

In international criminal law, corroboration of testimonies, even by many witnesses, does not automatically establish the credibility, reliability or weight of those testimonies. Corroboration is not a guarantee of reliability of a piece of evidence. There is no reason for the strict “two pieces” requirement. Corroboration is an element that a reasonable trier of fact **may** consider in assessing the evidence. The question of whether to consider corroboration or not forms part of its discretion.²³⁸ The fact that a witness gives an account that varies from other witnesses – even from a number of other witnesses - or isn’t necessarily favourable to the prosecution case doesn’t necessarily affect their credibility.

The ECtHR’s position regarding corroboration

The ECtHR does not find it necessary to have more than one piece of evidence to bring charges and deliver a judgment of conviction in a criminal case. The ECtHR stated that to bring charges and deliver a judgment of conviction, “where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker”.²³⁹

International criminal law regarding corroboration

It is a long-settled principle of international criminal law that judges may rely on the evidence of a single credible witness to enter a conviction without the need for corroboration.²⁴⁰ This is done on a case by case assessment.

This principle may also serve as precedent for Georgian courts and criminal justice practitioners. For example, in the *Kordić and Čerkez* Appeal Judgment, the Trial Chamber held that it may enter a conviction on the “**basis of a single witness, although such evidence must be assessed with the appropriate caution**, and care must be taken to guard against the exercise of an underlying motive on the part of the witness”.²⁴¹

This principle has been codified in the ICC Rules of Procedure and Evidence, where Rule 63(4) states that: “Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, **in particular, crimes of sexual violence**.”²⁴²

National jurisprudence of certain countries on corroboration in sexual violence cases

Laws and practices **strictly** requiring corroboration in cases of sexual violence against women have been abandoned in many parts of the world because of their discriminatory effect. Jurisprudence in that regard can also serve as legal precedent for criminal courts in Georgia.

²³⁸ Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu, IT-03-66-A, Judgment of: 27 September 2007, Para. 203.

²³⁹ Khan v. the United Kingdom, App. no. 35394/97, ECHR, 12 May 2000, Para. 35-37; Allen v. the United Kingdom, App. no. 25424/09, ECHR, 12 July 2003, Para. 43; Bykov v. Russia, App. no. 4378/02, ECHR, 10 March 2009, Para. 90; Haxhia v. Albania, App. no. 29861/03, ECHR, 8 October 2013, Para 129.

²⁴⁰ See e.g., Prosecutor v Ntaganda, Case No. ICC-01/04-02/06-2359, Trial Judgment, 8 July 2019, paras 75 - 76; Prosecutor v Haradinaj, Case No. IT-04-84-A, Appeal Judgment, 19 July 2010, paras 145, 219; Prosecutor v Tadic, Case No. IT-94-1-A, Appeal Judgment, 15 July 1999, para. 65; Prosecutor v Bagilishema, Case No. ICTR-95-1A-A, Appeal Judgment, 3 July 2002, para. 79; Prosecutor v Dragomir Milosevic, Case No. IT-98-29/1-A, Appeal Judgment, 12 November 2009, para. 215; Prosecutor v Kupreskic, Case No. IT-95-16-A, Appeal Judgment, 23 October 2001, para. 220; Prosecutor v Lukic & Lukic, Case No. IT-98-32/1-A, Appeal Judgment, 4 December 2012, para. 375.

²⁴¹ Prosecutor v Kordić & Čerkez, Case No. IT-95-14/2-A, Appeal Judgment, 17 December 2004, para. 274.

²⁴² International Criminal Court, Rules of Procedure and Evidence (ICC-PIOS-LT-03-004/19_Eng), rule 63(4); Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute), article 66(3): It is relevant to note that article 66(3) of the Rome Statute (to which Rule 63(4) refers) related to the standard of proof required in order to convict an accused, i.e., beyond a reasonable doubt.

For example, as early as 1992, the Supreme Court of Canada commented on the “false assumptions” underpinning such rules in the landmark case of *R v Seaboyer*,²⁴³ which is partially extracted below:

“The common law has always viewed victims of sexual assault with suspicion and distrust. As a result, unique evidentiary rules were developed. The complainant in a sexual assault trial was treated unlike any other. In the case of sexual offences, the common law “enshrined” prevailing mythology and stereotype by formulating rules that made it extremely difficult for the complainant to establish her credibility and fend off inquiry and speculation regarding her “morality” or “character”... **The preoccupation of the law with the credibility of the complainant in such cases and the blatant stereotyping of such complainants as untrustworthy are difficult to comprehend. As we have seen, sexual assault is the most under-reported of all violent crimes. Even after a report, the police and prosecutors filter out a significant number of the complaints based upon their congruence with rape myth and stereotype. Logically it would seem that the likelihood of false complaints is, in this context, much reduced compared to that for most crimes. Indeed, there is no evidence to support the contrary.**”²⁴⁴

In Canada, victim corroboration is **not** a “pre-requisite” to a conviction for sexual violence.

In fact, the Canadian Criminal Code states that in sexual assault cases: **no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.**

This is also echoed in Section 32 of the England and Wales [Criminal Justice and Public Order Act 1994](#) (Abolition of corroboration rules), which states that:

“Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is (a) an alleged accomplice of the accused, or (b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed, is hereby abrogated.”

In line with this, the October 2020 Interim Guidance for Rape and Sexual Offences for Crown prosecutors in England states: “It is essential that prosecutors do not introduce a requirement for corroboration in their review process or identify the ‘one versus one’ feature of the case as a negative in their assessment of the evidence. One person’s word can be sufficient to provide a realistic prospect of conviction.”²⁴⁵

Georgia’s international human rights obligations

Sexual violence is a gender-based crime, overwhelmingly committed against women and girls in Georgia. **The overarching consequence of this interpretation of the CPC, strictly requiring two ‘pieces’ of evidence on which to base a conviction, is that acts of rape and other forms of sexual violence against women and girls in Georgia, which are often based only on conflicting accounts from the victim and perpetrator, are not investigated or prosecuted.**

This interpretation has a discriminatory effect and may constitute a violation of Georgia’s international human rights obligations.

According to the UN Human Rights Council, states should “...take appropriate legislative and policy

²⁴³ *R v Seaboyer* [1991] 2 SCR 577.

²⁴⁴ Madame Justice L’Heureux-Dubé in *R v Seaboyer* (n 7).

²⁴⁵ Crown Prosecution Service Guidelines, Rape and Sexual Offences - Chapter 2: Applying the Code for Crown Prosecutors to Rape and Serious Sexual Offences

steps to ensure the prompt and adequate investigation, prosecution and accountability of perpetrators, including by strengthening the capacity of the criminal justice system,²⁴⁶ and specifically to "...repeal discriminatory provisions that require corroboration of testimony in sexual violence cases."²⁴⁷

The CEDAW Committee, which **gives authoritative interpretations of the obligations under** the CEDAW Convention, in its General Recommendation (GR) 33 recommended that states parties ensure that women's equality before the law is given effect by "...taking steps to abolish any existing laws, procedures, regulations, jurisprudence, customs **and practices that directly or indirectly discriminate against women especially in their access to justice, and to abolish discriminatory barriers to access to justice,**" including: "**Corroboration rules** that discriminate against women as witnesses, **complainants** and defendants by requiring them to discharge a higher burden of proof than men in order to establish an offence or to seek a remedy."²⁴⁸

Furthermore, in GR 35, the CEDAW Committee set out a number of measures for states to undertake in order to "...eradicate prejudices, stereotypes and practices which are the root causes of gender-based violence against women," among them a requirement that judicial bodies should: "...strictly apply all criminal law provisions punishing such violence, ensuring that all legal procedures in cases involving allegations of gender-based violence against women are impartial, fair and unaffected by gender stereotypes **or the discriminatory interpretation of legal provisions,** including international law", noting that the standard of proof required to substantiate the occurrence of gender-based violence can affect women's rights to equality before the law.²⁴⁹

The state's international obligation to ensure that legal procedures are unaffected by the discriminatory interpretation of legal provisions provides for abolishing any existing practices that directly or indirectly discriminate against women. This includes ending the practice of requiring strict corroboration of victim evidence in cases of rape and other forms of sexual violence against women. While assessing sufficiency of evidence, prosecutors and judges should take measures which enable access to justice for women who have been victims of rape and other forms of sexual violence by, at a minimum, issuing practice directions or policies ending any strict requirement for corroboration in cases of sexual violence against women.

Disadvantages of purely technical requirements

The existing technical practice requiring corroboration is primarily concerned with the number of sources of evidence and not their quality.

While the investigation and prosecution of cases of rape and other forms of sexual violence against women should ideally not be wholly dependent on the evidence of the victim,²⁵⁰ there should not be a strict requirement for the victim's account to be corroborated by other evidence for her testimony to be considered capable of satisfying the burden of proof in these cases. There is no reason why one unimpeachable source of evidence cannot, in the circumstances of these cases, be considered sufficient.

²⁴⁶ Human Rights Council Res. 23/25, A/HRC/RES/23/25, 2013, para. 7 (emphasis added).

²⁴⁷ Human Rights Council Res. 23/25, A/HRC/RES/23/25, 2013, para. 8 (emphasis added). See also: UN Women Handbook for Legislation on Violence Against Women, 2012, pp. 41-42; CEDAW General Recommendation No. 33, para. 25(a)(iii).

²⁴⁸ CEDAW/C/GC/33, 25 July 2015, para. 25(a)(iii).

²⁴⁹ CEDAW/C/GC/35, 14 July 2017, para. 33.

²⁵⁰ Istanbul Convention, Article 55; Explanatory Report, para. 280; Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors, Gender Equality in Georgia: Barriers and Recommendations, 2018, Vol. 1, p.58..

Conclusion

Ending the arbitrary strict corroboration requirement in cases of rape and other forms of sexual violence against women does not put the complainants on a better footing than those in other types of criminal cases; it simply means that there is no general cautionary rule which risks systematically discriminating against certain groups of victims and that their evidence is "...assessed rationally and objectively in the context of all the evidence at trial, and with regard to the burden of proof".²⁵¹

6. Overcoming rape misconceptions and stereotypes

6.1. General considerations

Survivor-centred practices and procedures require the dignity and autonomy of the victim to be at the forefront of the investigation and prosecution. This requires a context-sensitive assessment of the evidence, and a recognition of the wide range of behavioural responses to sexual violence and rape which victims exhibit. Crucially, in compliance with the jurisprudence of the European Court of Human Rights²⁵² and other international standards, investigations and prosecutions should not be influenced by gender stereotypes and myths about male and female sexuality. No aspects of case handling or assessment of the evidence should be affected by any personal views about rape or other acts of sexual violence,²⁵³ gender or other bias or stereotyping against women generally and women in any of the vulnerable groups identified in Chapter I Section 6.

States' obligations under Articles 5 of CEDAW and 12.1 of the Istanbul Convention include combating prejudices and social and cultural patterns of behaviour predicated on gender-based stereotypes. In cases of violence against women "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."²⁵⁴

*"Stereotyping affects women's right to a fair and just trial and...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."*²⁵⁵

For example, it is a myth that a woman lies about rape because she wants revenge against a man, especially if she has already had consensual sexual relations with him, or that having had sexual relations before makes her less traumatised by rape. This is stereotypical thinking. It is also false to assume that complaining about rape is easy for a woman and she can abuse her right to complain by making false allegations. The idea that if a woman has had sex outside marriage, she always consents to sex is another rape myth.

²⁵¹ R. v. Solomon, 2020 ONSC 2640 (CanLII), Superior Court of Justice, of Canada.

²⁵² The Grand Chamber of the European Court of Human Rights in Konstantin Markin v. Russia (No. 30078/06), §142-3 recognised the importance of identifying and dismissing gender-based stereotypes.

²⁵³ Preventing and Combating Domestic Violence against Women, A learning resource for training law enforcement and justice officers, January 2016, p.43.

²⁵⁴ CEDAW General Recommendation 35, para. 26.c.

²⁵⁵ Karen Tayag Vertido v. The Philippines, CEDAW/C/46/D/18/2008, 22 September 2010, Para. 8.4.

Credibility assessments should not be focused on victim behaviour. Focusing on victim behaviour overlooks the sexual violence and ignores the behaviour of the perpetrators.

Rather than focusing on the individual victim, the context-based investigation called for by the Istanbul Convention and other international criminal and human rights standards requires criminal justice actors pay attention to the perpetrator himself, along with the social, political, cultural, and economic contexts in which he commits these acts of sexual aggression towards women. The following sub-sections delineate practical instructions for overcoming some of the most common demonstrations of bias and stereotyping in sexual violence procedures that could ultimately otherwise result in the impunity of perpetrators.

6.2. Avoid drawing adverse inferences as to credibility

Women still struggle to prove that there is no alternative explanation for what happened, to prove they are “genuine victims” of rape. There is no “normal” behaviour for rape victims and no “ideal” victims. It is a myth to think so.

No adverse inference as to the credibility of the victim/witness should be made based on bias or stereotypes, or ideas of how a victim ‘should’ have behaved. The credibility of a victim/witness should be considered solely based on the evidence and not because of the behaviour of the victim.²⁵⁶ Credible evidence needs to be accepted at face value, no matter who the complainant might be.

Delayed reporting should not be the basis for any adverse inferences or assumptions as to the credibility of victims.²⁵⁷ There is no ‘reasonable’ reporting time. Victims may delay reporting due to fear of retaliation, humiliation or stigmatisation or other circumstance.²⁵⁸ (Chapter III Section 2). Additional barriers to reporting by vulnerable women, resulting from intersectional discrimination, should also be recognised (Chapter II Section 7.2.).

Equally, women who remain with their abuser and/or who have no marks of physical violence should not be considered less credible. How a victim may have been dressed at the time of the incident, may be dressed in court or what her prior sexual behaviour might have been also have no bearing on her credibility.

Special care needs to be taken to properly recognise the experiences of women from vulnerable groups. Stereotypes and negative perceptions related to the vulnerability of these women should not guide the views of criminal justice actors in relation to their credibility. Common misperceptions in relation to sexual orientation and gender identity of a person, around women in prostitution, women with disabilities and other vulnerable groups are detailed in Chapter I, Section 6.²⁵⁹

In addition, police, prosecutors, and judges should not **mistake manifestations of trauma** as evidence of a lack of credibility.²⁶⁰ Recollection of a traumatic event may not always follow a logical, chronological, narrative structure. What might appear to be an inconsistency can actually be a typical, predictable and normal way of responding to and coping with a traumatic event. Traumatized individuals cannot always accurately and fully recall what happened to them. They may experience gaps of memory, or block out parts of a memory, or simply be too affected by the experience to offer full disclosure about what

²⁵⁶ Directive 2012/29/EU, para. 25.

²⁵⁷ Directive 2012/29/EU, para. 25.

²⁵⁸ Article 13(1) Criminal Procedure Code (evidence shall have no pre-determined force).

²⁵⁹ Article 13(1) Criminal Procedure Code (evidence shall have no pre-determined force).

²⁶⁰ IICI Investigator’s Manual, Investigating Sexual and Gender Based Violence, Niamh Hayes, Chapter 21; Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p.17.

happened. It does not necessarily make a victim less credible.²⁶¹ Questions should be framed to focus on the core elements of the crime. The timeline can come later while the victim recovers.²⁶²

There is also no automatic or necessary correlation between trauma and lack of credibility. Traumatized individuals can be both credible and reliable. In fact, traumatized victims and witnesses may sometimes remember the main aspects of the trauma with heightened accuracy and detail. It is important to pay specific attention to these details, as investigators and prosecutors may be able to identify evidence that can corroborate the victim's account.²⁶³

The sections that follow are also closely related to the assessment of the victim's credibility.

6.3. Irrelevance of behaviour before, during and after sexual violence

It is a myth to think that a woman who is categorically unwilling to have sexual intercourse is going to vigorously verbally or physically resist, and that this resistance should be able to be proven. There is no legal requirement nor should there be any expectation for victims of rape or other acts of sexual violence to physically resist or fight back to demonstrate lack of consent.²⁶⁴ Passivity (a victim having frozen, or finding herself unable to call for help) should not be considered a sign of voluntary participation.²⁶⁵ Similarly, the victim's apparent active participation in the sexual act or any physiological reaction does not necessarily indicate consent and requires a thorough analysis of the surrounding circumstances.²⁶⁶

Victims of rape and other acts of sexual violence exhibit a wide range of behavioural responses during and after the violence, and also in the re-telling of their experiences. Police, prosecutors, and judges should therefore not base their assessment of the victim's credibility and reliability on their own assumptions of typical behaviour in such situations.²⁶⁷

Some documented examples of the different behavioural responses that victims exhibit during and after experiencing sexual violence in order to protect themselves from additional harm and survive the situation, include:²⁶⁸

- **Fight:** physically fighting, pushing, struggling, and fighting verbally e.g. saying 'no'.
- **Flight:** putting distance between the victim and danger, including running, hiding, or backing away.
- **Freeze:** becoming tense, still and silent. This is a common reaction to rape and sexual violence. Freezing is not giving consent; it is an instinctive survival response. Animals often freeze to avoid fights and potential further harm, or 'play dead' and so avoid being seen and eaten by

²⁶¹ Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p.17;

²⁶² Trauma-Informed Victim Interviewing, Human Trafficking Task Force e-guide.

²⁶³ The Impact of Trauma on Adult Sexual Assault Victims, Canada Department of Justice.

²⁶⁴ Istanbul Convention, Article 36; Explanatory Report, para. 191; The World's Shame: The Global Rape Epidemic, Equality Now, 2017, p.13; E.B. v. Romania, App. no. 49089/10, (ECHR, 19 March 2019), para. 56; M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), paras. 143, 156-158, 166; ICC R70(a) RPE.

²⁶⁵ E.B. v. Romania, App. no. 49089/10, (ECHR, 19 March 2019), para. 56; ICC R70(a) RPE; Grevio Baseline Evaluation Report Sweden, 2019: <https://rm.coe.int/grevio-inf-2018-15-eng-final/168091e686>, p.45, para. 181; Guidelines for medico-legal care for victims of sexual violence, WHO, 2003, p.11.

²⁶⁶ Kunarac et al. Trial Judgement, para. 644.

²⁶⁷ Istanbul Convention, Article 36; Explanatory Report, para.192; Case Closed: Rape and Human Rights in the Nordic Countries: <https://amnesty.dk/media/1557/case-closed.pdf>, p.50; The Administration of Justice on Sexual Violence Crimes, pp.14, 29-30; Karen Tayag Vertido v. The Philippines, CEDAW/C/46/D/18/2008, 22 September 2010, Para. 8.5; CEDAW General recommendation No. 35 CEDAW/C/GC/35, Para. 26(c).

²⁶⁸ Fight or Flight Response, Rape Crisis England and Wales.

predators.

- **Flop:** like freezing, except the muscles become loose and the body goes floppy. This is an automatic reaction that can reduce the physical pain of what is happening to the victim. The victim's mind can also shut down to protect itself.
- **Friend:** calling for a 'friend' or bystander for help, for example by shouting or screaming, and/or 'befriending' the person who is dangerous, for example by placating, negotiating, bribing, or pleading with them. This does not mean the victim is giving her attacker consent, it is an instinctive survival mechanism.

Women and girls might not physically resist (fight) or flee because of reasons associated with their unique, coercive environment. For example, they may have been wholly overpowered by the physical strength of their abuser; they may have been abducted for marriage and felt there was no point in resisting; or they may have been detained in an isolated location; they may submit based on a genuine fear rooted in the perpetrator's previous violent behaviour; they may be afraid of escalating the situation, reprisals, or believe that actively resisting might provoke even more violent, abusive behaviour; they may be groomed; they may just be terrified.

In particular the CEDAW Committee criticised the following stereotypes and misconceptions: "The judgment reveals that the judge came to the conclusion that the author had a contradictory attitude by reacting both with resistance at one time and submission at another time, and saw this as being a problem. The Committee notes that the Court did not apply the principle that "the failure of the victim to try and escape does not negate the existence of rape" and instead expected a certain behaviour from the author, who was perceived by the court as being not "a timid woman who could easily be cowed". It is clear from the judgment that the assessment of the credibility of the author's version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and "ideal victim" or what the judge considered to be the rational and ideal response of a woman in a rape situation."²⁶⁹

6.4. Avoid questions and attitudes based on misconceptions, bias and victim-blaming

Criminal justice actors should take special care to be polite, respectful and patient when communicating with victims of sexual violence.²⁷⁰ They should never patronise, intimidate or express judgment, disbelief or scepticism in their questions or manner of speaking.²⁷¹ Equally, investigators must not appear shocked or embarrassed by the language a victim uses to describe a particular act, as this will convey to victims that the investigator is uncomfortable.²⁷² They should avoid victim-blaming and intimidating, discriminatory or sexist language, in compliance with the jurisprudence of the European Court of Human Rights. The tacit presumption of the victim's responsibility for what happened to her should be avoided, either because of her dress, living, sexual behaviour, relationship, or kinship with the alleged

²⁶⁹ Karen Tayag Vertido v. The Philippines, CEDAW/C/46/D/18/2008, 22 September 2010. Para. 8.5; General recommendation No. 35, CEDAW/C/GC/35, Para. 26(c); GREVIO Third Party Intervention in Kurt v Austria, paras 10-11.

²⁷⁰ Student Manual Department of Justice National Hate Crimes Training Curriculum: p.50.

²⁷¹ 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), page 65; Preventing and Combating Domestic Violence against Women, A learning resource for training law enforcement and justice officers, January 2016, p.43; Student Manual Department of Justice National Hate Crimes Training Curriculum: p.50.

²⁷² Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault, Sergeant Joanne Archambault (Ret.) and Kimberly A. Lonsway, PhD February 2006 Updated November 2020, p. 92.

perpetrator.²⁷³

Police, prosecutors, and judges should always avoid irrelevant, gender-insensitive questions, such as: **“Did you enjoy it?”** and **“Did you have an orgasm?”** Such questions are not only gender-insensitive and humiliating to the victim, but they are also irrelevant since physiological reactions do not indicate consent.

Such questions also constitute victim-blaming. They are biased and rooted in gender stereotypes that reveal the person who poses them is not impartial. They are linked to unfair assumptions that women can exploit the criminal justice system for what might have been consensual sex they later regret, and that women have a responsibility to be dressed modestly to avoid provoking unwanted sexual contact.

Asking the question: **“How were you dressed?”** reflects a misunderstanding of rape. Rape is not about biological urges but about power and control over women. What a woman is wearing at the time the offence takes place is no justification for sexual contact without consent. The only circumstance in which questions related to the victim’s clothing can actually be relevant is for the purpose of securing those items for forensic examination, the opportunity for which is time limited.

Asking **“Why were you out late at night?”** and drawing adverse judgments from it also constitutes victim-blaming. Instead, the investigation should dismantle the commonly held victim-blaming beliefs that make women responsible for their own safety and for the violence they suffer.²⁷⁴

6.5. Prior sexual behaviour

As consent for each sexual act must be agreed to independently, questions about a victim’s prior sexual conduct are not relevant to any investigation of rape or other acts of sexual violence. They do not provide information regarding consent at the time the crime was committed and are therefore of no use to proving or disproving the charges.²⁷⁵ The Istanbul Convention provides that “evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary”²⁷⁶.

Questions about sexual history used to undermine the credibility of the victims are rooted in gender bias and stereotyping. They reflect an unfounded assumption that a rape victim is less likely to have been raped because she consented to past sexual contact. Victims of sexual violence who are women in prostitution can be particularly vulnerable to this type of inappropriate attack. This is a good illustration of the contrast between notions of ‘ideal’ victims who might be considered blameless and ‘bad’ victims who are somehow, if not entirely, seen to be at fault and less deserving of justice. ‘Bad’ victims are those whose credibility tends to be under the greatest scrutiny as they fall far outside notions of the ideal victims. Women in prostitution are sometimes considered ‘un-rapeable’, since their work revolves around being sexually accessible. Similarly, women drug users might be perceived as having expressed “general permission” for sexual activity; drug use might be seen as an indication of promiscuity.

Examination of private correspondence (email, text messages) of the victim with the perpetrator or with other individuals should only be done to the extent that is necessary for proving the charges, and the process of gathering evidence should not be abused to collect information about the personal life and

²⁷³ Access to justice for women victims of violence in the Americas, IACHR (2007).

²⁷⁴ The Victim Blaming, Canadian Resource Centre for Victims of Crime, 2009.

²⁷⁵ Resolution adopted by the General Assembly on 21 December 2010, ‘Strengthening crime prevention and criminal justice responses to violence against women’, A/RES/65/228, para 15; Handbook for Legislation on Violence against Women, UN Women, 2012; Istanbul Convention, Article 54; Explanatory Report, Para. 277.

²⁷⁶ Istanbul Convention, Art. 54.

sexual history of the survivor which has no bearing on establishing the facts of the case. It should also not be used to challenge her credibility, for example, investigating any interaction she might have had with a psychologist and drawing adverse inferences based on myths and stereotypes.

Presenting information on sexual history as if it were evidence in the crime under investigation reinforces damaging stereotypes of victims of sexual violence, such as being promiscuous and, by extension, immoral. This is humiliating, and risks re-traumatising the victim²⁷⁷ and blaming her for the violence inflicted upon her. It is not her so-called immorality or otherwise that is being investigated and it is not probative as to whether the alleged perpetrator committed the crime.

Therefore information about virginity should not be used or permitted unless relevant and necessary to illustrate some aspect of the social, psychological or other physical impact of the alleged crime.²⁷⁸ In such a case, the evidence, since it constitutes evidence on sexual history, should only be presented to the court where it is relevant to a specific issue at trial and if it is of significant probative value and in a way that does not lead to secondary victimisation.²⁷⁹

7. Investigating discriminatory motive

7.1. Sexual violence as a manifestation of discrimination against women

Sexual violence is a form of gender-based violence which is inherently a discriminatory crime based on gender. Sexual violence is targeted against women because they are women, it disproportionately affects women and is a part of the general context of structural inequality, subordination, and violence against women.²⁸⁰ Therefore, investigation of discrimination based on sex and gender should be an essential part of handling the cases of sexual violence.

It is not a requirement to establish a discriminatory motive as the sole basis of the crime. Almost no crime is committed solely for one reason. There may be more than one motive.²⁸¹ It is sufficient that a discriminatory motive is a contributing factor for the commission of the crime.²⁸²

A discriminatory motive may be established through evidence in the period leading up to, during, or after, the incident in question.²⁸³ It may be obvious from evidence of the perpetrator's biased language, statements, or communication with the victim, within his social circle or in public. It may be found in his social media activity.

Discrimination may be apparent through evidence of the perpetrator's treatment of and attitude

²⁷⁷ Istanbul Convention, Article 54; Explanatory Report, para. 277; Roadblocks to Justice: How the Law is Failing Survivors of Sexual Violence in Eurasia, Equality Now, 2019, p.22.

²⁷⁸ Istanbul Convention, Article 54; Explanatory Report, para. 278; Roadblocks to Justice: How the Law is Failing Survivors of Sexual Violence in Eurasia, Equality Now, 2019, pp.18-19; IP2, p.62. See also: Resolution adopted by the General Assembly on 21 December 2010, "Strengthening crime prevention and criminal justice responses to violence against women", A/RES/65/228, para 15; The Administration of Justice in Sexual Violence Crimes, pp.29-30.

²⁷⁹ Istanbul Convention, Article 54; Explanatory Report, para. 278; IP2, p.62.

²⁸⁰ CEDAW/C/GC/35, para. 21; Convention on the Elimination of Discrimination against Women, Article 1; Istanbul Convention, Preamble, Article 3(a); Latin American Model Protocol, Introduction, p.3.

²⁸¹ Prosecuting Hate Crimes - A Practical Guide, International Association of Prosecutors – OSCE/ODIHR, 2014 ('Prosecuting Hate Crimes'), p. 63.

²⁸² Student Manual Depart of Justice National Hate Crimes Training Curriculum, pp.16-17.

²⁸³ Prosecuting Hate Crimes, p.60.

towards other individuals in similar situations to the victim. The perpetrator may also be affiliated with xenophobic, racist, or homophobic groups, obtaining the evidence of which can support charges of discriminatory motive.²⁸⁴

Investigators and prosecutors should pay special attention to the circumstances surrounding the commission of the offence, as the discriminatory motive may be revealed by examining the specific manner or method in which the perpetrator committed the crime. For example, the crime may have been accompanied by demeaning insults, such as those based on a person's ethnicity, sexual orientation, or engagement in prostitution. The time and place of the incident may also be relevant as evidence of a discriminatory motive.

Identifying discriminatory motives must be done considering the general context of gender-based violence and discrimination against women. Discriminatory motives can be manifested when the perpetrator acted:

- with the perception of a woman as a subordinate object who must obey a dominating and prevailing man;
- with a sense of entitlement to or superiority over a woman;
- with an assumption of ownership of a woman;
- with a desire to control a woman's behaviour;
- with any other reasons related to sex or gender.

Clear examples of discriminatory motives of sexual violence can be established when a crime is committed by way of forced marriage or bride kidnapping – where perception of a woman as a subordinate object is obvious– as well as in the context of ongoing domestic violence, where unequal power dynamics are at play.

Motive of gender-based discrimination or gender-based hate crime can also be identified when the abuser belongs to a group that advocates discrimination against women; or when he has committed similar types of gender-based violence before; or when he targets women human rights defenders or feminist activists because of their work; or when the offence is committed on a date marking women's rights – such as 8 March or 25 November. Gender-based discriminatory/hate motives might also be relevant in cases where no other motive can be detected.²⁸⁵

7.2. Discrimination based on sex and intersecting vulnerabilities

Women may be targeted for sexual crimes based on other intersecting (and therefore compounded) forms of discrimination. Intersecting forms of discrimination underscore the need for an individualised, context-based approach in all aspects of the criminal justice process. Evidence about these forms of discrimination is relevant to things such as the victim's (and her family's) privacy, safety and security; her ability to participate in the criminal justice process; and her support needs. Such evidence is relevant to show coercion, and can be used when sentencing as potential aggravating factors.

Article 46.c of the Istanbul Convention suggests that an "offence [...] committed against a person made vulnerable by particular circumstances" should be an aggravating circumstance. In addition,

²⁸⁴ Prosecuting Hate Crimes, pp.60-61.

²⁸⁵ Gender-based Hate Crimes, OSCE ODIHR Hate Crime Reporting.

the Georgian Criminal Code provides that committing a crime with a discriminatory motive is an aggravating circumstance. The grounds for discrimination include: race, skin colour, language, sex, sexual orientation, gender, gender identity, age, religion, political or other views, disability, citizenship, national, ethnic or social affiliation, origin, property or birth status, place of residence or other signs of discrimination (Article 53¹.1 of the Criminal Code). The list is open-ended. Examples of intersecting forms of vulnerability can also be the situation of child/early marriage, social and economic disadvantage, being denied education, or shunned by the community.

It is not essential to determine whether the victim is actually a member of a targeted group when identifying bias indicators. Anyone can be the victim of discrimination, whether or not they are a member of a vulnerable community.²⁸⁶ The issue of concern is the offender's motive based on his perception of who the victim is.²⁸⁷

The victim may have been engaged in activities promoting the perpetrator's targeted group,²⁸⁸ or a member of an advocacy group supporting the targeted group, or have been in the company of, married to or been the intimate partner of a member of the targeted group.²⁸⁹

Even if the perpetrator was mistaken in his belief that the victim was a member of a protected group, the offence is still one committed with discriminatory motive as long as the offender was motivated by bias.²⁹⁰

If the perpetrator targeted the victim based on her intersecting vulnerabilities, or if such vulnerabilities made it easier for the perpetrator to commit the crime, or if he had the belief that these vulnerabilities could be the basis for him to escape punishment – such motives need to be investigated as discriminatory motives.

Investigators and prosecutors should proactively look for evidence confirming the above motives and present them to the court as an aggravating factor – discrimination - in compliance with Article 53.1¹ of the Criminal Code,²⁹¹ so that judges can take it into account when sentencing. This requirement aligns with international and human rights best practice and principles for police and prosecutors to ensure effective, timely, victim-centred, comprehensive investigations. If this evidence of motive²⁹² is shown to meet the appropriate standard, it will give judges the opportunity to rely on Article 53¹ of the Criminal Code.

7.3. Prior history of violence and previous offenders

Domestic violence often takes place as part of a pattern of repeated abusive behaviour. This may include acts of sexual violence. In that context, complaints made to the police are unlikely to reflect a

²⁸⁶ Prosecuting Hate Crimes, p.48.

²⁸⁷ Student Manual Depart of Justice National Hate Crimes Training Curriculum, p.18.

²⁸⁸ Student Manual Depart of Justice National Hate Crimes Training Curriculum, pp.16-17.

²⁸⁹ Student Manual Depart of Justice National Hate Crimes Training Curriculum, pp.16-17.

²⁹⁰ Student Manual Depart of Justice National Hate Crimes Training Curriculum, p. 17.

²⁹¹ Article 53.11 of the Criminal Code of Georgia defines grounds of discrimination: race, skin colour, language, sex, sexual orientation, gender, gender identity, age, religion, political or other views, disability, citizenship, national, ethnic or social affiliation, origin, property or birth status, place of residence or other signs of discrimination.

²⁹² In *Identoba and others v Georgia* the ECtHR found that it is essential for the relevant domestic authorities to conduct the investigation in specific context, taking all reasonable steps with the aim of unmasking the role of possible discriminatory motives (p. 77, 73235/12, 12/05/2015).

first offence.

In all cases of sexual violence, investigators and prosecutors should be proactive in their inquiries into the alleged perpetrator's previous behaviour. This should include criminal record checks (including whether the alleged perpetrator had been previously convicted of sexual violence or other violent offences); whether the alleged perpetrator has been previously in conflict with the law and ascertain whether there have been previous callouts to the crime scene or reports registered against the alleged perpetrator (with police or social or legal support services), including those where no further action was taken, including ascertaining reasons why a case did not proceed. Witnesses/victims might also provide information about previous violent acts that were never reported to the police.

As part of their ongoing obligation to protect the victim and conduct risk assessments, investigators should also query any previous breaches of restraining orders²⁹³ in both the internal information databases of the police as well as their interviews with victims and witnesses.

8. Interviewing

Victim interviews are the most important part of sexual violence criminal procedures. Below is guidance on how to conduct interviews in compliance with ethical and human rights considerations.

Avoiding repeated interviews

Victims of rape and other acts of sexual violence can be re-traumatised by re-living their experiences in repeated interviews throughout the criminal justice process. It needs to be taken into account that victims of crime in Georgia might have to go through several interviews:

- Interview by a Victim/Witness Coordinator (if she is involved in the case) to prepare a psychological assessment and determine the victim's primary needs;
- Interview by the investigator;
- Interviews with a medical professional during the course of any medical, gynaecological, psychological or psychiatric case-related examinations;
- Testifying before a magistrate judge if a victim is unable to be present during the trial;²⁹⁴
- Should a victim refuse to be interviewed, she may be compelled by the prosecution to give evidence before a magistrate judge;
- Testifying at trial;
- Testifying before the appellate court if the perpetrator is wanted by the police or appeals the first instance hearing.

International human rights law requires states to ensure that during criminal investigations the number of victim interviews should be kept to a minimum and only carried out where strictly necessary for the purpose of investigation.²⁹⁵ Against all this, it is important to recall that trust is built over time. The victim may not feel comfortable revealing everything at first. It may take more than one interview before she does.²⁹⁶

²⁹³ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

²⁹⁴ See: Article 114 Criminal Procedure Code.

²⁹⁵ Directive 2012/29/EU, Article 20(b); The Administration of Justice in Sexual Violence Crimes, pp.36; Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, pp.14, 16.

²⁹⁶ Trauma-Informed Victim Interviewing.

A victim-centred approach to minimising the number of interviews requires the investigator and the Victim/Witness Coordinator to work together in conducting joint, comprehensive interviews of the victim in the most supportive environment possible. Completion of a well-planned, comprehensive, victim-centred interview, carried out according to an established framework, should mean that the victim need only be re-contacted in the event police require further clarifications on aspects of information provided during the first interview.

Additionally, police, prosecutors and judges can consider practice directives leading to a well-prepared, comprehensive interview based on accepted methodology, which may produce a single written, audio or video recorded statement which could be put to the victim in court; adopted by her as accurate and rendered as evidence.²⁹⁷ This would potentially reduce the duration of the examination in chief to questions clarifying the recorded evidence, yet allow counsel for the defendant the opportunity to cross-examine on the evidence in its entirety. Having the previously recorded interview authenticated by the witness in court would be in line with the principle of orality and would avoid the stress of lengthy court testimony. Victim interviews during the trial are further elaborated in Chapter IV Section 2.

Interviewing Methodology: PEACE

A properly prepared interview has the potential to empower victims; lead to a more developed investigation and enable charging decisions which fully respect the scope of the criminality. Well-conducted interviews ultimately lead to better founded judgments.²⁹⁸ Police, prosecutors and investigating magistrates may gain valuable evidence with minimal trauma to the victim by conducting a thorough, context-based interview built around an established methodology.

Good interviewing methodology	Lack of consistent methodology
shows professionalism	risks a loss of trust
increases the interviewer’s credibility	risks losing credibility for the investigation process
avoids re-traumatisation	risks losing critical evidence
enables the interviewer to get the fullest account possible of what happened and helps to ensure the information collected is usable	means interviewers may fail to note and consequently fail to address an interviewee’s safety and security concerns
helps to calm or reassure the interviewee	means a prosecutor or judge may act on the basis of a report that contains incorrect or incomplete information.
fosters trust	risks losing trust

The PEACE²⁹⁹ methodology is a framework for police investigative interviewing based on best practice which was developed in England at the beginning of the 1990s and is now internationally accepted as an effective interview model which can be used with a wide range of interviewees in all types of interview situations, including victims of sexual violence.

The model is broken up into five stages from which it gets its acronym:

²⁹⁷ Directive 2012/29/EU, Preamble, para. 53.

²⁹⁸ International Protocol, p.161.

²⁹⁹ International Protocol, p.163

Planning and preparation; Engage and explain; Account; Closure, and Evaluation.³⁰⁰

Planning and preparation

A successful interview needs to be planned and structured under PEACE methodology. A first step in doing that will be for investigators and prosecutors to identify their interview objective.

Effective interview planning requires time to become familiar with the victim's background information. This is where the context-based investigation begins, as the victim's background information will include details about her personal and family situation and home environment, among a broad range of other information.

Individual characteristics should be considered when planning and preparing an interview.³⁰¹ For example, before interviewing a person with a mental or intellectual disability, the investigator may need to talk to her supported decision-maker, teacher and/or a psychologist. It is very important to identify appropriate communication techniques and frame the questions in a way which the interviewee is able to understand. It needs to be ensured that the support person is not one who might be involved in the crime or one who would unduly influence the victim. The investigator should also inquire about any personal circumstances which may prevent a person from speaking out and providing a detailed statement.

Inconsistencies in evidence and omissions in interviewing can be the result of misunderstandings between interviewee and interviewer. The way an individual recalls events and expresses certain feelings, observations, acts, and specific words can be culturally specific. In some cases, particular words to describe acts may not even exist.

Investigators and prosecutors should assess the state of the investigation and whether conducting the interview will contribute significantly to the investigation's progress. In cases where the victim has given previous statements, this will include collecting, reviewing and critically analysing those statements, any related statements by other witnesses, and documentary and other evidence which could help to better understand the case. Taking these steps will help to frame the questions in a manner appropriate to the age and background of the interviewee.

As part of the eventual interview, interviewers should allow the victim to review previous statements to refresh her memory. The victim may wish to correct, change, or adopt previously recorded information. In this way it may be possible to limit the risk of re-traumatisation to the victim by only asking additional, clarifying questions. This will help get the fullest, most coherent account of the crimes.

Note that if the victim has spoken with anyone about the incident in question, this may provide additional potential witnesses for the case.

The following checklist to finalise the preparations might be applied by police and prosecutors:

- looking at what has been reported;
- the nature of the alleged crimes;
- considering the range of potential charges;
- examining the key elements of those offences and what is needed to satisfy those elements.³⁰²

³⁰⁰ Mary Schollum, Investigative interviewing: New Zealand Police, September 2005.

³⁰¹ Investigative interviewing, College of Policing.

³⁰² International Protocol, p.125.

Police and prosecutors must accept that their information may not be complete and they should identify any gaps in the evidence which could be filled by this witness. Has there been a context-based investigation? Has the possibility of coercive circumstances been sufficiently explored? Have aggravating circumstances been investigated? Have checks been made into whether the violence has been systematic?

Interview location and environment

Victims and witnesses may be too ashamed or embarrassed to recount personal matters in a public forum. A victim-centred approach would be, wherever possible, to provide private interview spaces.³⁰³ That may involve interviews taking place in non-police premises.³⁰⁴

Efforts to make the interview location comfortable and non-threatening could have an enormous, positive impact on the interview process. It should be considered how a witness might perceive the location and environment. Is it an environment where she is and feels safe (not only during the interview, but on arriving and leaving)?³⁰⁵ While the victim is always interviewed in isolation from the perpetrator, are there other people at the interview location who could recognise her? Can they see or hear the conversation? The timing/ease of access/distance of this location for the interviewee and the cost of transport should also be considered.³⁰⁶

Parent/guardian/support person presence during the interview

Victims can choose to have a Victim/Witness Coordinator present with them during interviews.³⁰⁷ Alternatively, they may have a legal representative or a support person of their choice present.³⁰⁸

Investigators should proactively inform the victim of her right to have a support person³⁰⁹ present during the interview. Investigators should ensure the support person is someone the victim trusts.³¹⁰ While the support person should preferably not be a member of the family, a witness or potential witness, the presence of a guardian or care-giver may be required for persons who are ill, elderly, or with certain disabilities. The support person should equally have no part in the interview, and only be present during the ENGAGE and EXPLAIN phase described below.

Confidentiality of information/safety and security issues

It is important to protect the privacy of the victim (or witness). It is therefore relevant/necessary to explain the parameters and limits of confidentiality before any information is on the record.³¹¹ Witnesses may be extremely unwilling to speak out about what happened to them because of fear, shame, or stigma (among other things).

Inconsistencies in testimony can also arise if witnesses are afraid of retaliation by attackers if their identity and/or sexual identity, and the fact that they have disclosed having experienced or witnessed rape or other acts of sexual violence, becomes known. They may offer only partial accounts; attempt to

³⁰³ Directive 2012/29/EU, Article 23.2 (a).

³⁰⁴ Investigative interviewing, College of Policing.

³⁰⁵ Istanbul Convention, Article 50; Explanatory Report, para. 258; IP2, p.165; Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, pp.14, 16; Student Manual Department of Justice National Hate Crimes Training Curriculum, p.54.

³⁰⁶ International Protocol, p.165.

³⁰⁷ See on victim and witness coordinators: <http://pog.gov.ge/interesting-info/coordinator-of-the-witness-and-victim>

³⁰⁸ Directive 2012/29/EU, Article 20(c).

³⁰⁹ Support person is not similar to supporter listed in article 3 section 4 of Criminal Procedure Code of Georgia

³¹⁰ Preventing and Combating Domestic Violence against Women, A learning resource for training law enforcement and justice officers, January 2016, p.43.

³¹¹ International Protocol, p.96.

misdirect the investigation; and omit mentioning the presence of other victims, witnesses or attackers.

The interviewer should know and explain to the witness the security/protective measures available to them. The information given to the victim about confidentiality should include, but not be limited to, the following issues:

- How the anonymity of the victims' statements will be ensured;
- Options for meeting in a secure location where the meeting won't draw attention (away from their home, community or police station, for example);
- Possibility for a partial or complete closure of court sessions;
- What steps will be taken if, during the interview, the victim discloses a threat of violence or violent acts of revenge by the perpetrator.

Engage and explain

The interviewer should create an environment that encourages the interviewees to speak. This includes paying attention to the seating arrangements. The layout of the room could prove intimidating to victims and mirror the unequal power relationship within which the sexual violence took place. The layout of the room should be open, egalitarian and unthreatening, to give the interviewee power and show them respect.

The interviewers should introduce themselves and it should be explained who each one is, why each one is there (setting out the objective of the interview and the topics for discussion), and why listening to what the interviewee has to say is important. If interview preparation has been done, it should be possible at this point to explain the nature of the questions.³¹²

The interviewee should be advised to tell the truth, and make sure that she understands what it means to tell the truth. The interviewee should be invited to say if she does not understand any of the questions; to ask clarification questions or to correct anything that is wrong. The interviewees should feel they have control of the meeting and understand that they can end the interview at any moment.

Interviewers should be good listeners, indicating this in their posture and body language so that the victim feels someone is paying attention to her and understands what she has to say. This will make her feel more comfortable in providing information. Interviewers should be aware of their facial expressions and avoid expressions which could be construed as disbelief or judgment.

Account

The interviewer should listen attentively.

Characteristics of an attentive listener

Builds rapport

Is able to recognise changes in behaviour (such as fear, discomfort, embarrassment or reluctance), which will signal that an adjustment in the process is necessary - to stop, change the subject or take a break

Identifies and remembers details better

Shows interest and refines listening skills by paraphrasing/repeating/summarising the information received.

³¹² Student Manual Department of Justice National Hate Crimes Training Curriculum, p. 50

Questions about sexual violence are very intimate and may be difficult for victims to discuss. They may create feelings of embarrassment or shame. Victims may blame themselves for what happened to them (particularly those who experienced a freeze response during the incident). Investigators and prosecutors should be aware that this myth could be exploited by the defence during a criminal trial. Because of this, it is important to be particularly careful to explore the context during the interview.³¹³

The interviewer should make sure the language used is clear. Short, simple, open-ended, probing questions should be used. These tend to be either the “who/what/where/when/and how do you know” questions or “TED” questions, which means inviting the interviewee to Tell, Explain or Describe something.

In the event the victim is fearful, reluctant, or traumatised, a conversational approach might be used rather than a rapid series of questions to obtain preliminary information.³¹⁴

Some examples might be: “What are you able to tell me about your experience?”; “Where would you like to begin?” This will encourage a victim to describe the incident under investigation in her own words.³¹⁵

Asking questions that elicit sensory details (such as: “Do you recall hearing anything?”) may provide information that will help interviewers later corroborate the victim’s account.³¹⁶

Leading questions should not be used. Leading questions are those which tend to suggest or assume the answer.

Forced choice questions should be avoided, which may result in the interviewee guessing an answer.³¹⁷ Similarly, questions which tend to result in only a yes/no answer should be avoided. These limit the response choices of the interviewee and can be considered leading. Open-ended questions will elicit more information from victims.

Using exact words from the legal definition of rape and other acts of sexual nature should be avoided, as a person may have a different understanding of what “violence” or “coercion” are. Similarly, phrases such as “mutual consent”/ “consensual” should be avoided – a person may believe that as she did not demonstrate the lack of consent “well enough” the act was consensual.

Investigators should record the exact terminology the victim uses to describe a particular act in their statement. (Investigators should never sanitise the victim’s statement or replace it with law enforcement terminology. For example, if the victim states that “he made me give him head,” the investigator should document these exact words in the report and not change the phrase to something else (such as “fellatio,” “oral sex,” or “oral copulation”). To ensure there is no lack of clarity in the information recorded during the interview, investigators may clarify what victims mean when they use a particular term or phrase. Using the same example, when the victim states that “he made me give him head,” the investigator could ask the victim to describe exactly what she means by that phrase. ³¹⁸

If the victim appears to be uncomfortable with sexual language and details, it is sometimes helpful for investigators to reassure the victim that they have heard these things before and to remind them how

313 The Impact of Trauma on Adult Sexual Assault Victims, Canada Department of Justice.

314 Trauma-Informed Victim Interviewing.

315 The Impact of Trauma on Adult Sexual Assault Victims.

316 The Impact of Trauma on Adult Sexual Assault Victims.

317 Investigative interviewing, College of Policing.

318 Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault, Sergeant Joanne Archambault (Ret.) and Kimberly A. Lonsway, PhD February 2006 Updated November 2020, p. 92

important it is to have the fullest account possible of what happened to them.

Interrupting the interviewee should be avoided.³¹⁹

If a victim/witness says something inconsistent with something she has said earlier or something different from an established fact or that needs clarification, the interviewer should not confront the victim. For this, interviewers can use specific closed questions such as: “What words did he use?” or “Where did this happen?”³²⁰

Victims and other witnesses may be confused about facts—dates, times, locations—or have trouble remembering many of these details. Their memory may be affected by the trauma of the incident in question. They may not be able to recall things in a linear way. The interviewer should consider this in framing the questions, such as by asking: “What else happened?” instead of: “What happened next?”³²¹

Basis for knowledge

Investigators should take care to establish the basis for knowledge of every statement of fact made by the interviewee.³²² They may be a survivor of the alleged crime; they may have seen it or heard about it. If they heard about it, it should be established from whom, and how. If they heard about it, is the incident something everyone knew? Was everybody talking about it? Was it reported in the media or social media?

Investigating coercive circumstances

Some indicators that a victim may be under coercion or subjected to coercive behaviour may be reflected in the list below (which is illustrative, and non-exhaustive) and may be an area to explore during interviews with indirect witnesses:

- Stopping or changing the way in which she socialises;
- Deterioration in her physical or mental health;
- A change in the routine at home including those associated with mealtimes or household chores;
- Changes in attendance at school (her or her family);
- Putting in place measures at home to safeguard herself or her children; and
- Changes to work patterns, employment status or routes to work.³²³

Central to a context-based investigation of coercion and coercive circumstances is the nature of the relationship between the victim and perpetrator. This will include asking a victim about past violence, which will also inform the risk assessment. To establish whether there has been systematic violence, investigators might ask:

- How did you meet?
- How did you communicate?
- Has this ever happened before?
- Do you have any concerns for your children or fears about their safety?

³¹⁹ Investigative interviewing, College of Policing.

³²⁰ Investigative interviewing, College of Policing.

³²¹ Trauma-Informed Victim Interviewing.

³²² Code of Criminal Procedure of Georgia, Articles 75(1), 76(2).

³²³ Crown Prosecution Service Guidelines, Controlling or Coercive Behaviour in an Intimate or Family Relationship.

- Can you describe how X treats you as a person?
- What is the worst thing X has ever done to you?
- Talk about how much freedom you have in your everyday life?
- Who decides how you spend your money?
- Do you have any concerns, fears or anxieties?
- Have you ever had to get medical help because of anything that happened at home?
- Have there been any incidents seen by someone outside the family?
- What happens when he wants to have sex and you do not?

This list is only meant to provide limited examples and is non-exhaustive.

Closure and evaluation

Concluding a victim/witness statement seldom marks the end of an investigation. It is often only the beginning. Interviewers should not end the interview abruptly,³²⁴ rather choose a safe ending point. They should ask the interviewee if there is anything she wants to add, clarify, or whether she has any questions. Interviewers should acknowledge that the interview may bring up memories and feelings, and that this is completely normal. They should make sure the victim is not left in an emotional state and that she has someone to call or go to after the interview. Both sides should agree how to get in contact with one another again, including alternative means of contact. Interviewers should ensure that the victim is aware that she can provide more information as she recalls it. Closure is a good time for the interviewers to re-confirm informed consent. Victims need to understand they are allowed to change their mind about participation in the criminal justice process.

The information obtained in context of the investigation should be evaluated with the prosecutor. This informs the next steps to be taken.

9. Victim protection and support

9.1. Referral to services

To aid recovery from sexual violence, victims are entitled to all victim support and protection services provided under the Law of Georgia on Violence against Women and/or Domestic Violence, Protection and Support of Victims of Violence (LGVAVDV). These include (see Article 17 of the LGVAVDV):

- Placement in a shelter/crisis centre and provision of services available therein;
- Free legal advice, free primary and emergency medical care and free psychological assistance upon placement in the shelter/crisis centre;
- Temporary residence permit to stay in Georgia, if the victim is an alien or a stateless person;
- Legal assistance at the public expense as provided by the Law of Georgia on Legal Assistance.

The investigator should proactively inform the victim about the above services when the victim files a report with the police about sexual violence and the investigation has begun. Victim status should be granted in a timely manner. Issuing a restraining order, which is a measure to ensure a victim's safety

³²⁴ Investigative interviewing, College of Policing.

(see Chapter II Section 10) will also enable the survivor to benefit from State-funded services.

Under the Istanbul Convention, “victim” is defined as any natural person who is subjected to violence³²⁵. The Convention envisages the services to be provided to all victims³²⁶ and does not require the granting of formal victim status for a person to be able to receive specialist support services. Therefore, to ensure compliance with the Convention and considering that currently state services are provided only to victims granted specific victim status, the investigator should refer the victim to those available services provided by NGOs that do not require a designated victim status. It should be noted, however, that the capacity of NGOs can be extremely limited.

The European Parliament’s Directive establishing minimum standards on the rights, support and protection of victims of crime obliges member states to ensure that in accordance with their needs, victims have access to support services before, during and for an appropriate time after any criminal proceedings.³²⁷ Referrals should not be dependent on a victim’s participation in the criminal justice process.³²⁸

Best practice requires that when any criminal justice actors engage with victims of rape and other acts of sexual violence, they learn what social, legal, medical and other services are available for the victim in order to ensure they provide the most suitable referral options outlined above. Wherever possible, criminal justice actors should establish pathways to social and other support networks to facilitate victim access.³²⁹

The police, prosecutors or Victim/Witness Coordinators should record what, if any, services a victim of sexual violence was referred to. Clear records should be maintained of what psycho-social or other services the victim has accessed, to ensure those services are the most appropriate for their needs.

9.2. Risk assessments and risk management

Police, prosecutors, and judges share a responsibility for the protection of victims of sexual violence through all stages of the investigation and judicial process.³³⁰ This is done through a thorough risk assessment. A risk assessment involves identifying all potential threats which could cause harm (physical, emotional harm, property, or other damage) to victims, assessing the likelihood they will come to pass and then taking mitigating measures which could reduce the impact or likelihood of harm.

A risk assessment is one of the first³³¹ and most important steps authorities should take in the investigation of sexual violence. It should be reviewed and updated throughout the criminal justice process.³³² A risk assessment should be individualised, and done on a case-by-case basis,³³³ and deal with multiple levels

³²⁵ Istanbul Convention, Article 3 (e).

³²⁶ Istanbul Convention, Article 22 (2).

³²⁷ Directive 2012/29/EU, Article 8 (1).

³²⁸ See e.g., Istanbul Convention, Article 18(4).

³²⁹ Directive 2012/29/EU, Article 8.2; par. 38, 40; Istanbul Convention, Article 56 (1)(c); International Protocol, pp.94, 164; Explanatory Report, paras. 138-142, 255; Best Practice Guide for Law Enforcement Investigations into Sexual Violence, p.10; Student Manual Department of Justice National Hate Crimes Training Curriculum: pp. 50-51, 54.

³³⁰ Istanbul Convention, Article 56; Explanatory Report, para. 260.

³³¹ Directive 2012/29/EU, Article 22.1.

³³² Istanbul Convention Article 51; Explanatory Report, Para. 260; International Protocol, p.92; Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

³³³ Directive 2012/29/EU, para. 22; Risk assessment and risk management by police.

and different types of risks.³³⁴ This will include a consideration of the victim's intersecting vulnerabilities linked to her personal characteristics as well as her relationship to the perpetrator.³³⁵ These may have different weight, depending on the context of the individual situation.

Victims of sexual violence may be particularly concerned about confidentiality.³³⁶ Therefore, dangers stemming from potential breaches of confidentiality need to form part of the risk assessment and guide the entire investigation process.

A risk assessment should be conducted based on the risk assessment tool developed for victims of domestic violence and other forms of violence against women together with the additional guidance provided by this manual. This assessment should form a part of the criminal case materials for ease of reference.

The risk assessment and risk-management must be conducted in a timely manner as established by the ECtHR and CEDAW.³³⁷ Assessing that the risk exists and is sufficiently serious is entirely the responsibility of the authorities and not the victim.

The following three steps of risk assessment need to be followed:

Step One: Identify the specific threats (e.g. threat to life, health, property, reputation, etc.). Consider who or what is threatened, and who or what has made the threat or presents a threat.³³⁸

This will include evidence-based factors such as the use of weapons in the commission of the offence; the presence of weapons at the incident location or threats to use weapons.³³⁹

A victim-centred approach to risk assessment would also include psychological and socio-economic factors such as:

- the possibility of re-traumatisation, intimidation or revenge;
- the risk of being stigmatised by the victim's family and/or community;
- risks to health including sexually transmitted infections or pregnancy;
- the risk of the victim (and, if she is a mother, her children) being made homeless, being evicted from the home she shares with her partner or family.³⁴⁰

Certain victims, such as victims who are drug users or in prostitution, may require special protective measures to ensure their safety.

Step Two: Assess how likely it is that the threat(s) identified in Step One will become a reality or recur, their impact on the victim and her family, the outcome of the case and the public interest.³⁴¹ Analysis conducted at this stage of the assessment needs to be as comprehensive as possible, to effectively deal with all types of risks and take into account the particular circumstances of the case at hand.³⁴² The

³³⁴ Risk assessment and risk management by police.

³³⁵ Directive 2012/29/EU, para. 22.3.

³³⁶ Student Manual Depart of Justice National Hate Crimes Training Curriculum, pp. 50, 54.

³³⁷ For example, in *O.G. v Russia* CEDAW found that having considered the applicant's request for measures under witness (victims) protection scheme for three weeks the authorities violated their obligation to protect her from recurrence of violence. Similarly, in its jurisprudence on *Moldova* the ECtHR criticized the authorities for not conducting risk-assessment and risk-management promptly.

³³⁸ International Protocol, p.93.

³³⁹ Risk assessment and risk management by police; Explanatory Report, para. 263.

³⁴⁰ Directive 2012/29/EU, para. 22.

³⁴¹ International Protocol, p.93; Risk assessment and risk management by police.

³⁴² Risk assessment and risk management by police.

assessment should also take into account the victim's own assessment.³⁴³

Perpetrators of sexual violence may target vulnerable persons who they perceive to be less likely to be able to access justice in which case they can get away without punishment. Any risk assessment should take into account the specific needs of these special categories of victims, which can include such things as lack of social support; isolation; ethnic background; age or immigration status (among others).³⁴⁴

It is likely for victims of domestic sexual violence to be subjected to repeated assaults.³⁴⁵ Evidence of coercive or controlling behaviour and escalating violence will therefore factor into the risk assessment.³⁴⁶

Step Three: Mitigate or manage the risk by identifying what measures can be put in place to reduce or counter those risks³⁴⁷ and implement those measures. This may require a coordinated safety plan involving different agencies and organisations, including the police, prosecutors, and judges, particularly to ensure the safety and security of high risk and vulnerable victims.³⁴⁸

Protection measures

Under the LGVAWDV, restraining and protection orders are measures to protect all victims of domestic violence and violence against women, including sexual violence.³⁴⁹ Restraining orders are issued by the police, while protection orders are issued by the Court upon the application of the victim, the victim's family members or those providing her with services.³⁵⁰

Protection measures provided under restraining and protection orders include prohibiting the perpetrator from approaching or contacting the victim by any means (phone calls, messages); removing the alleged perpetrator from the premises; removing the perpetrator from the home even if it is his property; separating him from the victim; or restricting him from possessing or using weapons. The Criminal Procedure Code also prescribes various protective measures for victims of sexual violence in ongoing criminal investigations.³⁵¹

Issuing a restraining order is mandatory for sexual violence crimes committed contrary to Articles 137 and 138 of the Criminal Code of Georgia.³⁵² However, it is not envisaged as a mandatory measure under Article 139 or Article 140. To ensure the protection of victims of all forms of sexual violence an investigator/prosecutor should consider issuing restraining orders immediately after the sexual violence is reported based on the risk assessment detailed in the previous section. The terms of a restraining order should be individualised based on the risk assessment and circumstances of the victim.

Upon receiving a report of sexual violence and issuing a restraining order, an investigator in charge of the case should inform the victim about the process of obtaining a protection order. The investigator should refer the victim to legal support services that will assist her to apply to the court to issue a protection order.

In extremely serious cases of sexual violence, where the victim's or her family members' safety cannot be

³⁴³ Risk assessment and risk management by police.

³⁴⁴ Istanbul Convention Article 46 (c); Explanatory Report, paras. 87, 238; Risk assessment and risk management by police.

³⁴⁵ Explanatory Report, Para. 260.

³⁴⁶ Explanatory Report, para. 260, Risk assessment and risk management by police.

³⁴⁷ Explanatory Report, para. 261; International Protocol, p.93.

³⁴⁸ Explanatory Report, paras. 64, 261. See Articles 67-68 Criminal Procedure Code of Georgia.

³⁴⁹ Articles 10, 11; of the Law on Violence against Women and Domestic Violence.

³⁵⁰ Article 10 and 11 of the Law on Violence against Women and Domestic Violence.

³⁵¹ Articles 49, 57, 198, 199 Criminal Procedure Code of Georgia.

³⁵² Article 10.11 of the Law on violence against women and domestic violence.

ensured by restraining and protection orders only, victim protection measures provided by the Criminal Procedure Code may also need to be applied. These include: changing ID information; changing the victim's appearance, relocation within the country or outside of the country, etc.³⁵³ The seriousness of the case where such measures might be applied should also be assessed by the risk assessment procedure outlined in the previous section. Priority, however, should be given to issuing restraining orders as these can be made easily to offer immediate protection. The assessment of protection measures should be ongoing and regularly updated.

Victim liaison and victim/witness coordinators

Investigators, who are the victim's entry point to the criminal justice process, should be very carefully assigned considering their qualifications and experience using gender-sensitive approaches towards victims of sexual violence. This is not only crucial to the victim's ability to work towards healing and recovery, but it will affect the overall investigation and any court proceedings that may result.³⁵⁴

If there are both male and female investigators available as first responders for sexual violence cases or part of the eventual investigations team, victims should be offered a choice as to who they would prefer to have as a point of contact and conduct the victim interview.³⁵⁵ Victims may bond with the investigator in the case. The victim's main point of contact in the case is expected to be the investigator who conducted her interview.

A Victim/Witness Coordinator from the Ministry of the Interior or General Prosecutor's Office should automatically be assigned to all cases where charges are laid under Articles 137, 138, 139 or 140 of the Criminal Code. In this case, the Victim/Witness Coordinator may become the victim's main liaison.

Victim/Witness Coordinators are only involved in the case with the victim's consent. If the victim does not wish to have any other person involved in the case, the victim's main point of contact will be the investigator and prosecutor.

The Victim/Witness Coordinator's role includes sharing information with the victim about the criminal proceedings; providing emotional support to victims; identifying and assessing their safety and security/medical/legal/psycho-social support needs and enabling referrals to those services; and guarding against re-victimisation during the course of proceedings.

³⁵³ Chapter IX and Article 68 of the Criminal Procedure Code of Georgia.

³⁵⁴ Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p. 13.

³⁵⁵ Directive 2012/29/EU, Article 23.2 (d); Explanatory Report, para. 258; International Protocol, p.166; Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p. 16.

III. Prosecution of sexual violence

1. Charging decisions

While starting an investigation into the crime is the obligation of an investigator/prosecutor (See Chapter II Section 2),³⁵⁶ the prosecutor enjoys discretion on whether or not to bring charges.³⁵⁷ Below are guidelines to prosecutors on how to exercise this discretion based on evidentiary and public interest tests³⁵⁸ in line with international human rights standards.

Public interest test

Sexual violence against women is a serious violation of human rights, irrespective of the situation in which it was committed. For all forms of sexual violence, where the case is otherwise made out on the evidence, it should be considered that the public interest test is almost always met. Therefore, when the evidentiary test is met, the prosecutor should on the whole be bringing charges. This also applies to cases where the victim has retracted her statement, reconciled with the perpetrator or when the perpetrator states that he admits and regrets his actions (See Chapter III Section 2). Moreover, financial compensation provided by the perpetrator to the victim should not affect the decision to prosecute based on public interest.³⁵⁹

2. Termination of investigations and prosecutions

2.1. Victim retracts or withdraws from the criminal justice process

Victims are obliged under the law to give evidence (pursuant to the provisions of Article 371 of the Criminal Code) and refusing to do so may lead to criminal liability. A victim, however, has the right to avoid giving testimony which discloses the commission of an offence on their part, or by their close relative and will thereby be relieved of liability for failing to testify.³⁶⁰

Retraction or withdrawal of her statement by the victim is not a basis to terminate the investigation.³⁶¹ The onus is on investigators and prosecutors to build a robust case by collecting evidence in addition to that of the victim which will work towards ensuring that the case can continue if the victim withdraws the complaint or is otherwise unavailable to testify.³⁶² Investigators and prosecutors are required to make sure all the evidence has been gathered and consider other, alternative sources of evidence.³⁶³

2.2. Reasons for withdrawal

Victims might withdraw their statements for many reasons, including fear of the perpetrator, pressure

³⁵⁶ Criminal Procedure Code of Georgia, Article 100.

³⁵⁷ Criminal Procedure Code of Georgia, Article 16.

³⁵⁸ Order of the Minister of Justice N181, on guiding principles of criminal policy, 08.10.2020.

³⁵⁹ Gegelia T., Kelenjeridze I., Jishkariani I., *Sexual Offences*, 2020, p. 163.

³⁶⁰ Criminal Code of Georgia Article 371, Criminal Procedure Code of Georgia 113 (2).

³⁶¹ Istanbul Convention, Article 55; Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

³⁶² Istanbul Convention, Article 55; *Opuz v. Turkey*, App. no. 33401/02, (ECHR, 09 June 2009), para. 145; Explanatory Report, para. 280; Domestic Abuse Guidelines for Prosecutors.

³⁶³ Istanbul Convention, Article 55; Explanatory Report, para. 280; Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

from their own family, shame, protracted procedures, and lack of trust in the criminal justice system.³⁶⁴

It is important to properly investigate cases where a victim elects to withdraw from the criminal justice process.³⁶⁵ The investigation may reveal credible risks to the victim and her family. It may give rise to additional criminal charges and may require special measures to ensure the victims and her family's protection. Before initiating this investigation, the risk assessment should also be updated.

Some possible reasons for withdrawing a complaint are set out in the list below. This is not an exhaustive list:

- fear of being further harmed and fear for her own and her family's safety;
- fear of confronting the perpetrator;
- threats, intimidation or other forms of pressure from the perpetrator, his family or associates;
- pressure from other family members of the victim, other members of the community or community 'elders', including being pressured to reconcile, resolve 'differences' between parties through mediation, or other community-based measures;
- fear of being publicly shamed, disowned or outcast from the community;
- a wish to be reconciled with the perpetrator (if not already reconciled), or a wish to return to the family, if estranged;
- the victim is no longer in a relationship with the perpetrator or does not want to re-live the incident;
- a fear that her children will be removed and placed into care;
- a fear of the impact on children, or other dependants, or financial repercussions (such as withholding of certain child maintenance, tax allowances or financial support through benefits) if the perpetrator were to receive a custodial sentence;
- continuing with a prosecution may cause the victim to feel she is responsible for the perpetrator receiving a criminal record and the impact on his job and their family finances, etc.;
- the perpetrator may agree to drop other proceedings, such as custody applications for children, if the complainant withdraws the complaint;
- mental exhaustion/re-traumatisation due to the length and conduct of the proceedings;
- the victim's fear that she may not be believed and fear that the criminal justice system is biased towards the offender;
- fear that in high profile cases covered by the media, she has been portrayed unjustly and there is bias of the media and as a result of public and law enforcement, against her and her reputation;
- feelings of isolation or vulnerability, and fear she may not be believed as a result of those vulnerabilities;
- fear that showing support for a prosecution may place her at further risk of harm;
- fear of immigration status being made known to law enforcement authorities, or fear that a complaint may reveal the perpetrator's immigration status which may not be secure;
- fear of being 'outed' about their sexual orientation, or gender identity if not already known;
- fear of HIV status or other very sensitive personal information being revealed if not already known;
- where victims are in prostitution, fear that her complaint will not be taken seriously or that as a consequence of reporting she will be fined for engaging in prostitution;

³⁶⁴ Jessica Lenahan (González) and others v. United States, Report no. 80/11 (IACHR, 21 July, 2011), paragraph 134, Opuz v. Turkey, App. no. 33401/02, (ECHR, 09 June 2009), para. 136.

³⁶⁵ Istanbul Convention, Articles 18, 26, 50, 56; Explanatory Report, para. 59; Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors; The Administration of Justice on Sexual Violence Crimes, p. 19.

- lack of engagement or communication from criminal justice agencies, or a fear of not knowing what will happen if she does support a prosecution; or
- concerns that the criminal justice agencies are not aware of the issues she faces or may not be sensitive to her specific situation.³⁶⁶

Withdrawal can also be related to other factors linked to the situation of violence, for example the dynamics of the “cycle of violence” that a couple goes through. The cycle of violence has three phases that vary both in duration and intensity for the same couple and between different couples. These are: accumulation of tension; explosion and acute phase of blows; and ‘lover’s’ calm.”³⁶⁷

A 2016 Council of Europe Manual on Preventing and Combating Domestic Violence Against Women³⁶⁸ published a helpful checklist of questions (initially developed by Women Against Violence Europe - WAVE) which can assist police, prosecutors, and investigators in discovering reasons why a victim refuses to testify or to find out whether a victim has been coerced or intimidated into withdrawing her complaint:

- Why do you feel reluctant (or refuse to) testify?
- When did you become reluctant (or decide to refuse) to testify?
- Were you living with the defendant when the incident happened?
- Are you now living with the defendant?
- (If not) Does the defendant know where you are staying?
- Are you financially dependent on the defendant?
- Do you and the defendant have children together?
- Have you discussed the case with the defendant?
- Has the defendant made any promise to do something for you if you do not testify?
- Is that promise to do something the reason you do not wish to proceed/or testify?
- Has the defendant or anyone else threatened you, your children or your family and told you not to testify?
- Is there some other reason you are afraid of the defendant?
- Are you aware that this court/the civil court can issue an order telling the defendant to stay away from you and have no contact with you and your family?
- Are you aware that if the case is prosecuted, that the defendant can be required to get counselling, pay for your damages, and stay away from you and your family?
- (If injuries are visible) How did you receive the injuries (allude to police reports, medical reports, photos, injuries still visible in court, etc.)?
- Have you talked about your desire not to testify with the local women’s shelter/counselling centre/a victim’s services?
- If not, would you be willing to talk to them?³⁶⁹

It also needs to be examined whether the victim has previously retracted a complaint or failed to give evidence in proceedings. If so, reasons need to be examined, and the nature of the previous allegation should be investigated.³⁷⁰

Victims who are reluctant or refuse to participate in investigative or court processes should be referred to support programmes and provided with information on personal safety.³⁷¹ Victims should also be

³⁶⁶ See, for example, *Opuz v. Turkey*, App. no. 33401/02, (ECHR, 09 June 2009), para. 143; Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

³⁶⁷ Walker, Leonore, *The Battered Women*, Harper Colophon Books, New York, 1979. Translation: Lic. María Cristina Vila de Cerillo).

³⁶⁸ Available at: <https://rm.coe.int/16805970c1> p. 74.

³⁶⁹ Preventing and Combating Domestic Violence Against Women; a learning resource for training law enforcement and justice officers, January 2016, p.74.

³⁷⁰ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

³⁷¹ Directive 2012/29/EU, Preamble, para. 40.

sensitively made aware of the importance of using criminal justice mechanisms to combat sexual violence and the support measures available throughout the criminal processes to minimise any possible harm.

Victims also need to be informed that they can report the incident or other incidents (in case of repeated violence) in the future.

In sexual violence cases, similar to the practice in relation to domestic violence cases, where the victim withdraws from the criminal justice process and there is insufficient other evidence on which to proceed otherwise (despite efforts to obtain such evidence), the prosecutors should not terminate the investigation immediately. The prosecutor should delay termination by 3-4 months, checking in repeatedly with the victim to see whether the violence has recurred or whether the victim has changed her mind about participation in the criminal justice processes. If so, the case should be resumed with the potential for new, additional charges.

Such practice could prove an important step in building the trust of victims in the criminal justice system and its ability to protect them.

3.2. Dealing with “false accusations”

It is a myth that women commonly falsely report rape. The prevalence of this myth makes it particularly difficult for victims to report incidents of sexual violence, as they fear not being believed by criminal justice actors.³⁷² Only a tiny percentage of reported rapes are actually false.³⁷³

That a sexual violence crime cannot be proved does not mean that the accusation was false. Similarly, the fact that the victim changed her version of events does not mean that her accusation is false. If there is the very rare occasion when it seems a false accusation may have been made, the prosecutor should lean towards not starting a counter-prosecution against the complainant on the basis that it would be contrary to public interest, since such prosecution might have a chilling effect in relation to other victims, making them reluctant to come forward and report incidences of abuse. It would also enhance impunity for the crime. In the exceptional cases where prosecutions need to be initiated, the potential impact of such prosecutions should be fully taken into account and measures (such as refraining from publicity of such prosecutions) need to be taken to ensure that the prosecution does not discourage survivors from coming forward. At the same time, prosecutors should properly examine the reasons behind the victim’s retracting or changing her report, since many times this can be the result of pressure, shame, or disbelief in the criminal justice system (Chapter III, Section 2).

Perpetrators of sexual violence are likely to deny the facts rather than acknowledge their abusive behaviour. They may file a complaint alleging a false accusation to avoid facing charges. It is important to note that recantation, inaccuracies or inconsistencies in the victim’s statements or lack of corroborating evidence do not necessarily equate to a false report.

With a context-based investigative approach, investigators will have gathered evidence about the nature of the relationship between the victim and the alleged perpetrator as well as about the context within which the sexual violence took place. In their comprehensive investigation, investigators would have recorded evidence that could inform any investigation into a false accusation.³⁷⁴

³⁷² The Impact of Trauma on Sexual Assault Victims.

³⁷³ Guidelines for medico-legal care for victims of sexual violence, WHO, 2003, p.11.

³⁷⁴ Crown Prosecution Service Guidelines, Domestic Abuse Guidelines for Prosecutors.

IV. Trials

1. Role of judges in addressing sexual violence

Judges have a particularly important role in addressing rape and other acts of sexual violence and promoting substantive equality for women. Their authority sends a message to the community about the state's commitment to ending systemic inequalities and violence against women and ensuring their access to justice.

Judges have the power to establish procedures in court which can provide a safe, supportive environment which encourages women to actively participate in the criminal justice process. Such procedures will guard against stress, secondary victimisation, and re-traumatisation of victims of crime in compliance with international human rights standards. Judges should also create the necessary conditions to allow vulnerable witnesses to testify fully and safely³⁷⁵ (see Chapter IV Section 2). Judges should not be influenced by personal assumptions, gender-based myths or stereotypes (see Chapter II Section 6).

A well-reasoned judgment where the gravity of the crime is properly appreciated not only ensures justice to survivors, but also sends a message to the community that sexual violence is a grave violation of women's rights, which must not be tolerated.

2. Survivor-centred court procedures

2.1. Prioritising sexual violence cases

Delays in investigations and trials of sexual violence contribute to additional trauma to the victims and can hinder their healing; they diminish women's faith in the justice system and effectively promote a climate of impunity for perpetrators. The longer a case goes on the more likely it is for a victim to withdraw and be less likely therefore to get justice.

Based on the gravity of the abuse and its impact on the victims, sexual violence cases should be prioritised, where possible, throughout the investigation and trial stages. The allegation of sexual violence itself should, where possible and because of its seriousness, suggest priority in trial planning and administration, irrespective of the condition of the defendant.³⁷⁶

The prioritisation of the examination of the case also depends on the level of preparedness of the parties (both the prosecutor and the defence) to engage in trial.

Reports of historical incidents of sexual violence should be treated with the same investigative standards and priority as more recent complaints.³⁷⁷

³⁷⁵ *Y. v. Slovenia*, App. no. 41107/10, (ECHR, 28 May 2015), para. 108.

³⁷⁶ E.g. the defendant being a minor or in detention would prioritise the trial, while otherwise there would be no priority.

³⁷⁷ Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p. 14.

2.2. Confidentiality in court

Confidentiality in sexual violence cases must be strictly observed. Under Article 182(3)(d) of the Criminal Procedure Code, judges may exercise power, on a motion of either of the parties or on their own initiative, to partially or fully close a court session to protect the interests of victims in sexual violence cases. As a result, almost all sexual violence cases are examined in closed hearings. In parallel to closing the hearings, it is important to provide for independent monitoring of these sessions to ensure effective steps are being taken to protect the rights of the victim. For this purpose, judges could allow, with the informed consent of the victim, representatives of the Ombudsperson's office or independent observers to attend sexual violence hearings.

The lawyer of the victim and any other support person should always be allowed in a closed hearing.

2.3. Restrictions on cross-examination

Cross examination should not be used as a means of intimidating or humiliating witnesses.³⁷⁸ Judges are able to take measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence.³⁷⁹

These measures may include directing counsel to submit cross-examination questions for judicial review in advance, and in this way ensure a balance between the rights of the defendant and the protection of the victim and her right to privacy. This can also avoid inappropriately aggressive, accusatory, protracted, and repetitive cross-examinations, which can exacerbate the stress and trauma of testifying and sometimes cause a victim to withdraw from the proceedings or be a factor in her decision to engage with the criminal justice system at all.

2.4. Avoiding confrontation

Criminal justice actors have an obligation to ensure the protection of victims at all stages of investigation and the judicial proceedings.³⁸⁰

Confrontation with the perpetrator is re-traumatising for victims of sexual violence.³⁸¹ Victims have a right to avoid contact with the defendant.³⁸² Judges can avoid face to face confrontation in the courtroom and limit the prospects of re-traumatisation for the victim by providing a number of protective measures. These may include:

- Separate waiting areas,³⁸³
- Allowing the victim to testify without being in the courtroom or away from the presence of the defendant.³⁸⁴ Under Article 243(3), the prosecutor should request, and the judge grant the request of a victim to be examined remotely. This can be through CCTV systems, where available.³⁸⁵ Alternatively, the sightlines of both parties could be restricted, with the victim

378 *Y. v. Slovenia*, App. no. 41107/10, (ECHR, 28 August 2015), para. 108.

379 Directive 2012/29/EU, Article 23.2(c).

380 Istanbul Convention, Article 56.

381 The Administration of Justice on Sexual Violence Crimes, p.7.

382 Directive 2012/29/EU, Article 19.

383 Directive 2012/29/EU, Article 19; The Administration of Justice on Sexual Violence Crimes, p.27.

384 Directive 2012/29/EU, Article 23.3 (b).

385 Directive 2012/29/EU, Article 23.3(a).

testifying behind screens in the courtroom;³⁸⁶

The Criminal Procedure Code provides for the right of an unrepresented defendant to cross-examine the prosecution witnesses. This forces a victim into direct confrontation with the defendant, against her wishes and potential well-being.³⁸⁷ In addition to the suggestions outlined above, aid counsels could be made available to unrepresented defendants, which would obviate the unnecessary trauma of direct confrontation.³⁸⁸

2.5. Guarding against stress

International human rights standards call for judges applying measures in court to guard against stress, secondary victimisation, and re-traumatisation of victims of crime, for example, by:

- Barring the media from the courtroom or closing all or parts of the proceedings to the public;³⁸⁹
- Removing unnecessary persons from the courtroom while the victim is testifying.³⁹⁰ The victim can be invited to indicate who she does not wish present;
- Allowing the victim to take frequent breaks or pause her testimony if needed;³⁹¹
- Altering the courtroom settings to make them less formal;³⁹² and
- Ensuring that a lawyer of the victim and a dedicated Victim/Witness Coordinator is present in court with the victim to deal with her psychological or emotional needs. A Victim/Witness Coordinator should accompany a victim at her request during her testimony in court and remain in her immediate proximity as a support person to guard against stress and inform the court of her needs.

2.6. Guarding against inappropriate behaviour

Judicial impartiality requires that judges should not only avoid using degrading language that reflects gender stereotypes, but guard against use of any such degrading, threatening, insulting language by counsel for the defendant(s), the defendant himself, a prosecutor, or members of the public in the courtroom³⁹³ by actively intervening.

Judges should respond to aggressive/inappropriate/irrelevant questions, coercion, threats, insults or intimidation against the victim or any members of her family by having the perpetrators (which may include but not be limited to the defendant and/or their lawyer) expelled from the courtroom; ordering a

³⁸⁶ Directive 2012/29/EU, Article 23.3(a); Istanbul Convention, Article 56(1)(l); Explanatory Report, para. 292; The Administration of Justice on Sexual Violence Crimes, pp.9, 32.

³⁸⁷ Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice, 2017, p. 40.

³⁸⁸ 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), p.77; The Administration of Justice on Sexual Violence Crimes, pp. 9, 32, 35.

³⁸⁹ Directive 2012/29/EU, Article 23.3(b); The Administration of Justice on Sexual Violence Crimes, p.27.

³⁹⁰ Istanbul Convention, Article 56; Explanatory Report, para. 291; 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), p.77.

³⁹¹ Istanbul Convention, Article 56; Explanatory Report, para. 292; 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), p.77; The Administration of Justice on Sexual Violence Crimes, p.27.

³⁹² The Administration of Justice on Sexual Violence Crimes, p.27.

³⁹³ Explanatory Report, paras. 83, 88; The Administration of Justice on Sexual Violence Crimes, p. 27; Latin American Model Protocol, p. 27, para. 76.

fine against them; directing the prosecutor to investigate or, if the person's action is aimed at disrupting the process or expressing explicit and/or gross disrespect to the court, party or participant, issuing an order to arrest.

3. Judgments and sentencing

Judgments of the court have to be reasoned and substantiated (based on the evidence).³⁹⁴ Therefore, judgments in sexual violence cases should reflect individualised assessments of the evidence and the context in which the crime occurred;³⁹⁵ they should guard against perceptions of judicial bias and arbitrariness, show transparency, and contribute to establishing appropriate sentences for cases of violence against women that reflect the full gravity of the crimes.³⁹⁶ Those sanctions should be “effective, proportionate and dissuasive.”^{397 398}

3.1. Examining aggravating and mitigating circumstances

Sentences for sexual violence crimes in Georgia should consider circumstances which mitigate or aggravate liability³⁹⁹ and the weight those different circumstances merit in the particular case at hand.

a) Aggravating circumstances

Judges are required to consider aggravating circumstances in the determination of any penalty⁴⁰⁰ and reference them in judgments with an explanation as to how these factors influenced their findings.⁴⁰¹ Omitting aggravating factors results in judgments that do not accurately reflect the severity of the crime.

Sentences in sexual violence cases should reflect the seriousness and extent of the offence and take into account any previous incidences of violence; any aggravating factors; and the impact of the offence on the victim and any children⁴⁰² (see Chapter I Section 7). A context-based, comprehensive investigation

³⁹⁴ Criminal Procedure Code of Georgia, Articles 19(1), 259(3), 273. See Article 6 ECHR: Based on the jurisprudence of the European Court of Human Rights (“ECtHR”), this provision includes an obligation on the judges to give sufficient reasons for their decisions. This demonstrates to the parties that their case has been truly heard and facilitates an effective right to make use of any existing right of appeal. ECtHR, Guide on Article 6 of the Convention – Right to a fair trial (civil limb), updated on 30 April 2017, p. 56, citing ECHR, H. v. Belgium, Application No. 8950/80, Judgement, 30 November 1987, para. 53; ECtHR, Hirvisaari v. Finland, Application No. 49684/99, Judgement, 27 September 2001, para. 30. 30 ECtHR, Hadjianastassiou v. Greece, Application No. 12945/87, Judgement, 16 December 1992, para.33. See also: The United Nations Human Rights Committee (“HRC”) (the treaty body overseeing the proper implementation of the ICCPR) notes that the right to have one's conviction reviewed “can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and at least in the court of first appeal where domestic law provides for several instances of appeal...” Human Rights Committee (HRC), ICCPR General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 49, citing HRC, Van Hulst v. Netherlands, Communications No. 903/1999, U.N. Doc. CCPR/C/82/D/903/1999, 2004, para. 6.4; HRC, Morrison v. Jamaica, Communication No. 663/1995, U.N. Doc. CCPR/C/D/663/1995, 25 November 1998, para. 8.5.

³⁹⁵ Criminal Procedure Code of Georgia, Article 273(2).

³⁹⁶ Trial International: Punishing Conflict-Related Sexual Violence, p.55. See also: Criminal Procedure Code of Georgia, Article 259(4).

³⁹⁷ Istanbul Convention., Article 45.

³⁹⁸ Good practice provides for survivor notification by the prison or probation service on the release from prison of a perpetrator who has served a significant sentence, for example a sentence of 12 months. See for example: “After a trial Keeping victims informed”, independent charity Victim Support.

³⁹⁹ Criminal Procedure Code of Georgia, Article 273(2).

⁴⁰⁰ Criminal Procedure Code of Georgia, Article 273(2); The Administration of Justice on Sexual Violence Crimes, p. 41.

⁴⁰¹ Criminal Procedure Code of Georgia, Article 273(2) The Administration of Justice on Sexual Violence Crimes, p. 10; Trial International: Punishing Conflict-Related Sexual Violence, p.7.

⁴⁰² Preventing and Combatting Domestic Violence Against Women, A learning resource for training law enforcement and justice officers, January 2016, p.67.

should ensure that this evidence, where available, is part of the case file (see Chapter IV Section 3.1.).

The following aggravating circumstances, set out under Article 46 of the Istanbul Convention and incorporated in the Criminal Code of Georgia, need to be looked at when examining sexual violence, to make sure that the crime is treated based on its gravity:

- a) the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority;
- b) the offence, or related offences, were committed repeatedly;
- c) the offence was committed against a person made vulnerable by particular circumstances;
- d) the offence was committed against or in the presence of a child;
- e) the offence was committed by two or more people acting together;
- f) the offence was preceded or accompanied by extreme levels of violence;
- g) the offence was committed with the use or threat of a weapon;
- h) the offence resulted in severe physical or psychological harm for the victim;
- i) the perpetrator had previously been convicted of offences of a similar nature.

These aggravating circumstances should be considered in combination/conjunction with the Georgian legislation in force, discussed below. Articles dealing with sexual violence in the Criminal Code of Georgia also include additional aggravating circumstances discussed below.⁴⁰³

The aggravating factors which may be taken into account on sentencing for rape and other sexual violence crimes are incorporated in Articles 53(1), 137-141 of the Criminal Code and have been discussed at different points throughout this manual (see Chapter II Section 3). These are also reflected in the provisions of the Istanbul Convention, which not only guides their interpretation but sometimes expands the scope of their application.

It is particularly important for the judge to take into account any **discriminatory motive** and **prior history of abuse** as aggravating factors (see Chapter II Section 7).

Any evidence of aggravating factors should be obtained and presented to the court by the prosecutor, which the judge must consider and give due assessment.

The aggravating circumstances in the examples below, should be understood as follows -

Article 53.1(2) – Commission of a crime by one family member against another

A family member, in accordance with Georgian legislation (Article 11¹ of the Criminal Code) and Article 46(a) of the Istanbul Convention should be understood as: a former or current marital partner or former or current non-marital partner as recognised by internal law, by a member of the family, or any person cohabiting with the victim.⁴⁰⁴

Articles 137(3)(e) and 138(2)(f) – committed against a person under the care, guardianship or surveillance of the offender

⁴⁰³ Criminal Code of Georgia, Articles 137-139.

⁴⁰⁴ Istanbul Convention Article 46(a); Explanatory Report, Article 236.

This factor should be understood by reference to the parallel aggravating circumstance set out in Article 46(a) of the Istanbul Convention: the offence being committed by a person having abused her or his authority.⁴⁰⁵ “Person in authority” refers to anyone who is in a position of superiority or power over the victim, including for example a teacher or employer. The common element of these cases is the position of trust which is normally connected with such a relationship and the specific coercive environment and emotional harm which may emerge from the misuse of this trust when committing an offence within such a relationship⁴⁰⁶ (See Chapter I Section 3).

Articles 137(2)(b) and 138(2)(g) - serious damage to the health of a person affected, or other serious consequence

“Serious damage to the health” should refer not only to physical, but also psychological harm. The prosecutor should present to the court a medical, psychological, or psychiatric assessment of the victim to ensure that the scope of that harm is properly taken into account when sentencing a convicted perpetrator.

Articles 137(3)(a) and 138(2)(a) – committed repeatedly

To prove that the offence was committed repeatedly, a prosecutor should present to the court any evidence of patterns of sexual violence, including previous complaints against the perpetrator and prior restraining orders, as well as records of previous convictions (against the victim or in other cases).

Articles 53.1(2), 137(4)(a) and 138(3)(a) – committed with extreme cruelty

This article can refer to a range of physically and psychologically abusive behaviours not necessarily sexual in nature. There is a parallel in Article 46(f) of the Istanbul Convention: The offence being preceded or accompanied by extreme levels of violence.⁴⁰⁷ This refers to acts of physical violence that are particularly high in intensity and present a serious risk to the life of the victim,⁴⁰⁸ and likely includes offences committed with “extreme cruelty” (see Chapter II Section 3.3.).

Articles 137(4)(b) and 138(3)(b) – caused the death of the person affected

The critical issue here is to establish whether there has been a causal link. A victim may have been killed as a result of force used during or on the same occasion of the sexual violence, but may equally have died as a result of being infected by HIV during the rape, or committed suicide following the rape, or have been killed as an act of retribution (or in a so-called honour killing or as punishment) for having reported the rape.⁴⁰⁹

Articles 137(4)(c, d) and 138(3)(c) – knowingly against a minor

This is based on the idea that the victim lacks the maturity, knowledge or understanding to make an informed choice about sexual contact. In this case, consent is irrelevant. The prosecution must show that the perpetrator was aware the victim was underage (in case of 138 – that the victim was below 14). Under Article 137.d, the prosecutor does not need to show that the perpetrator was aware the victim was underage if the perpetrator abused trust, authority, or influence.

⁴⁰⁵ Istanbul Convention Article 46(a).

⁴⁰⁶ Explanatory Report, para. 236.

⁴⁰⁷ Istanbul Convention Article 46(f).

⁴⁰⁸ Explanatory Report, para. 241.

⁴⁰⁹ Guidelines for medico-legal care for victims of sexual violence, WHO, 2003, p.12; WHO World Report on Violence and Health, 2002, Chapter 6, p. 149.

Article 46(c) Istanbul Convention - The offence being committed in situations where the victim has been made vulnerable by particular circumstances.

The Istanbul Convention subsumes and expands upon the named vulnerable victims identified in Articles 137(3)(d), 138(2)(d), 139(3)(d), 140(2)(a) of the Criminal Code and also incorporates the discriminatory grounds listed in Article 53.1(1) and includes: pregnant women and women with young children, persons with disabilities (including those with mental or cognitive impairments), persons living in rural or remote areas, substance abusers, prostituted people, persons of national or ethnic minority background, migrants – including undocumented migrants and refugees, gay men, lesbian women, bi-sexual and transgender persons as well as HIV-positive persons, homeless persons, children and the elderly.⁴¹⁰

b) Examining mitigating circumstances

General mitigating circumstances, provided by the Georgian Criminal Code and applicable for all crimes, should not be used in sexual violence or any other cases of violence against women. They are contrary to international human rights standards and would have a damaging effect in signalling that sexual violence and violence against women could be justified in some circumstances, which can prove to be discriminatory against women. The general circumstances under Article 53.3 of the Criminal Code should be examined with care and the following should not be considered as mitigating factors:

- Motive of the crime – if it is jealousy, revenge, punishment, preserving public morals, ‘honour’, motives related to culture, religion, and traditions ⁴¹¹;
- Character – the defendant is characterised as a good person. Being characterised as such might make it easier for a person to commit or cover up the crime,⁴¹²
- Prior history of positive behaviour and being a “first” offender – in cases of gender-based violence (particularly domestic violence), the first reported incident is seldom the first incident;⁴¹³
- Defendant’s wish to compensate the harm;
- Defendant’s reconciliation with the victim, apology or offering to marry/marriage.⁴¹⁴

Remorse, as a mitigating circumstance, should not be applied. Any other mitigating circumstances should be carefully examined, and priority should be given to punishing the perpetrator based on the gravity of the crime.

Provocation, which is rooted in arguments relating to jealousy, infidelity, nagging or revenge should not be applied as a mitigating factor. Its application has been highly criticised as sexist and supporting gender stereotypes. Reliance on provocation institutionalises violence against women, and gives credence to the idea that some women deserve to be abused or raped. Allowing provocation to be available in any form, including and especially as the basis not to press charges, puts the burden back

⁴¹⁰ Istanbul Convention Article 46(c); Explanatory Report, paras. 87, 238; Criminal Code of Georgia, Articles 137(3)(d), 138(2)(d), 139(3)(d), 140(2)(a); Preventing and Combatting Domestic Violence Against Women, A learning resource for training law enforcement and justice officers, January 2016, p.25.

⁴¹¹ On honour, culture and traditions not being a justification see the Istanbul Convention Article 42.

⁴¹² Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls, UNODC, p. 119.

⁴¹³ Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls, UNODC, p. 119.

⁴¹⁴ Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls, UNODC, p. 119.

on women to demonstrate why their behaviour should be blameless.

c) Implications of reconciliation of the victim and the perpetrator

Reconciliation of the defendant with the victim, as noted above, should never be considered as a mitigating circumstance in sexual violence cases. Reconciliation, mediation and seeking out-of-court resolution for sexual violence crimes is against human rights standards.⁴¹⁵

Judges should be aware of and guard against a typical situation in sexual violence cases whereby lawyers and family members/close relatives of the defendant play the role of mediators, who, with various promises, including marriage and financial offers, facilitate the “reconciliation” of the victim and the defendant. These efforts are particularly successful in domestic violence cases, where the victims can exercise their right not to testify against a close relative. Defence attorneys might also advise the victims to use that right. Lawyers may also sometimes produce a notarised document stating that the victim has no allegations against the defendant, which then serves as grounds for amendment of a restraining order with a lighter one or the imposition of a lighter sentence for example.

The judge should never tolerate these practices, as they discriminate against women and effectively promote continued gender-based violence against women. Reconciliation is not grounds for terminating a prosecution/release from criminal liability/grounds for acquittal. It should never be considered as a mitigating circumstance.

Furthermore, the wholly inappropriate behaviour of pursuing a reconciliation/settlement may support a charge of coercion contrary to Article 150 of the Criminal Code or Exertion of influence on a victim, contrary to Article 372.⁴¹⁶ Prosecutors and judges should take affirmative steps to investigate this behaviour as such.

The scope and seriousness of the impact of rape and other acts of sexual violence on the victims, their families and their communities is such that reconciliation, financial compensation and the victim’s expressed preferences with respect to punishment are not appropriate reasons to drop charges or reduce sentences in these cases. Judges should never be involved in encouraging or offering to facilitate a victim’s reconciliation with the perpetrator.

3.2. Plea bargains and conditional sentences

In the case of plea bargains, the defendant pleads guilty and agrees with the prosecutor to a sentence, to mitigation or partial removal of charges (Article 209 of the Criminal Code). Plea bargains in sexual violence cases can result in sentences so low that they effectively contravene the objectives of justice.⁴¹⁷ If not properly handled, plea bargains can leave survivors feeling worthless and betrayed. Sentences should always be of a level that show the gravity of the crime and ensure there is no effective impunity for sexual violence.

The Criminal Code allows for conditional sentences (Article 63 of the Criminal Code) through plea

⁴¹⁵ OAS, Follow-up Mechanism of the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women, Second Hemispheric Report.

⁴¹⁶ Criminal Code of Georgia, Article 372.

⁴¹⁷ Trial International: Punishing Conflict-Related Sexual Violence, p.56.

bargains for convictions including rape and other acts of sexual violence envisaged in Articles 137, 138 and 139 of the Criminal Code. Similarly, the Criminal Code allows for sentences lower than those provided in the law (Article 55 of the Criminal Code) through plea bargains. The implementation of these provisions should not result in disproportionately low sentences for sexual violence crimes, considering that the Istanbul Convention⁴¹⁸ and the recommendations of the Committee for the Elimination of Violence Against Women⁴¹⁹ require sanctions for crimes of sexual violence to be effective, proportionate, and dissuasive, commensurate with the real gravity of the crimes.⁴²⁰

Therefore, plea bargains should not be concluded by the prosecutor and confirmed by the court if the imposed penalty downgrades the seriousness of the crime. The facts of the case and the public interest in showing that crimes of sexual violence will be dealt with seriously should be the determinants of any decision on plea bargains. This is particularly relevant where serious crimes are inappropriately charged under Article 139 as opposed to Article 137 or 138 (See Chapter III Section 1).

It should also be considered, however, that plea bargains, where they do not result in disproportionate sanctions, can sometimes save the victim from stressful procedures by avoiding the need for her having to testify in court. In deciding whether to accept a plea bargain, prosecutors should ensure that the victim's assessment about any negative consequences of the plea bargain and detrimental impact on her are taken into account to make sure that the crime is not being downgraded as a result of the plea bargain

The role of prosecutors and judges is also important in the process of establishing the terms of any plea agreement. This will include guarding against proposals and terms motivated by stereotypical views⁴²¹ as well as ensuring the continued safety and security of the victim and her family.

418 Istanbul Convention, Article 45; CEDAW C/CG/35, Article 29.

419 CEDAW C/CG/35, Article 29,

420 Istanbul Convention, also: Article 45; CEDAW C/CG/35, Article 29.

421 Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice, Country Chapter for Georgia, December 2016, p.18.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.



UN JOINT PROGRAMME FOR GENDER EQUALITY

