

# **PRACTICE GUIDE: DOMESTIC VIOLENCE**

**Addendum to the Judicial Benchbook:  
Considerations for Domestic Violence Case  
Evaluation in Bosnia and Herzegovina**

**Sarajevo, 2016**



**SWEDEN**



**NORWEGIAN EMBASSY**

**Editor**

Nenad Galić

**Proofreading**

Kimberly Storr

**Translation**

Adisa Okerić-Zaid

**Design and layout**

Sanin Pehlivanović

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## PROJECT BACKGROUND AND ACKNOWLEDGEMENTS

In February 2016, under the auspices of the project “Gender and the Judiciary in BiH,” supported by the Embassy of the Kingdom of Norway in Bosnia and Herzegovina as well as by Sweden, the Atlantic Initiative and DCAF began organizing meetings featuring panels of judges, to discuss the judicial handling of domestic violence cases. The aim was to enable judicial officials, with professional and technical support from the Atlantic Initiative and DCAF, to consider how existing legal and institutional frameworks for judges and the judiciary might contribute to improving the judicial response to domestic violence in BiH. From February to May 2016, regular meetings were held in which both individual and collective proposals and initiatives were discussed, with the goal to institutionalize a consistent and efficient judicial approach to cases of domestic violence in Bosnia and Herzegovina.

Among other things, participants discussed the *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in BiH* (hereinafter, the Benchbook), agreeing that it is a useful resource for judges working on domestic violence cases. However, participants also concluded that there is a need to expand on the practice-based resources on domestic violence available to the judiciary. Indeed, they identified that it is necessary to deepen judicial understanding of the complexity of domestic violence cases in order to contribute to more consistency in judicial consideration of domestic violence cases. This new resource for judges, the *Practice Guide: Domestic Violence* (hereinafter, the Guide), was developed in response to that recommendation. It will serve as a supplement to the Benchbook; and together, they comprise a joint resource that judges can use to inform their own considerations of domestic violence cases.

The content of this guide was compiled, discussed, and revised at the aforementioned meetings; its final version was approved and adopted by a consensus of all the judges who participated. It is a pleasure for the Atlantic Initiative and DCAF to acknowledge and give credit to the judges who participated in these panels and who, through their knowledge, leadership, and dedication to this process, contributed to the introduction of this new and significant resource for the BiH judiciary:

**Sabrija Agić**, judge of the Municipal Court in Zenica

**Nisad Ahmetović**, judge of the Municipal Court in Goražde

**Marija Aničić–Zgonjanin**, president of the District Court in Banja Luka

**Edina Arnautović**, judge of the Cantonal Court in Bihać

**Svetozar Bajić**, judge of the Basic Court in Banja Luka

**Enes Behlulović**, president of the Municipal Court in Visoko

**Silva Belegić Perčinlić**, judge of the Municipal Court in Travnik

**Rada Bjeljac**, judge of the Cantonal Court in Sarajevo

**Snežana Bursać**, judge of the Municipal Court in Sanski Most

**Husein Džihanović**, judge of the Municipal Court in Živinice

**Nedeljka Eror**, judge of the Basic Court in Prijedor

**Randžana Hadžibegović–Haračić**, president of the Municipal Court in Bugojno

**Mirsad Hairlahović**, president of the Municipal Court in Cazin  
**Vildana Helić**, judge of the Cantonal Court in Tuzla  
**Ranko Jovanović**, judge of the Basic Court in Trebinje  
**Katica Jozak-Madžar**, president of the Cantonal Court in Novi Travnik  
**Ivica Kalinić**, judge of the Basic Court in Mrkonjić Grad  
**Sead Konjević**, judge of the Municipal Court in Banovići  
**Edib Kučuković**, judge of the Municipal Court in Visoko  
**Branimir Maletić**, judge of the Basic Court in Gradiška  
**Drena Marin**, judge of the Basic Court in Prijedor  
**Svjetlana Milišić Veličkovski**, judge of the Cantonal Court in Sarajevo  
**Duško Miloica**, president of the Basic Court in Prijedor  
**Fikret Mujkić**, judge of the Municipal Court in Lukavac  
**Dino Muslić**, judge of the Municipal Court in Bihać  
**Mirela Omanović**, judge of the Municipal Court in Kakanj  
**Rasema Orman**, judge of the Municipal Court in Kiseljak  
**Ljuljana Pejić**, judge of the Basic Court in Srebrenica  
**Lazarela Porić** judge of the Cantonal Court in Novi Travnik  
**Vahudin Rustemović**, judge of the Municipal Court in Živinice  
**Dragana Simanić**, judge of the District Court in Bijeljina  
**Milorad Sladojević**, judge of the Municipal Court in Bugojno  
**Aida Smajiš**, judge of the Municipal Court in Zenica  
**Slavica Tadić**, president of the Basic Court in Zvornik  
**Muhamed Tulumović**, president of the Municipal Court in Tuzla  
**Selma Voloder Kadrić**, judge of the Municipal Court in Travnik  
**Adisa Zahiragić**, judge of the Cantonal Court in Sarajevo

We would also like to thank **prof. dr Ivanka Marković** (Faculty of Law, Banja Luka) for her support and work with the judges' panels, and for her analysis of court judgments in domestic violence cases in BiH, which was discussed in meetings and included in the Guide in modified form.

Finally, we would like to acknowledge and thank judge **Mel Flanagan** (USA), an expert in domestic violence and sexual violence adjudication, who supported this effort throughout by providing guidance and preparing materials. She not only contributed to the development of the content in the Guide, but improved the overall working process.

## INTRODUCTION

The *Practice Guide: Domestic Violence* is meant to complement the *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in BiH*, and has been prepared for judges as an additional source of information about domestic violence. As such, there is some crossover between the Guide and the Benchbook as far as topics and recommendations; but the Guide also includes chapters that introduce new topics of importance.

The first chapter summarizes the theoretical framework of domestic violence, laying important groundwork for a more comprehensive understanding of the complexity of the phenomenon. The chapter defines domestic violence, explains its causes, briefly discusses how risk factors for domestic violence are often misinterpreted in practice as causes of the violence, and introduces a typology of abusive relationships and its importance in the work of judicial professionals.

The second chapter emphasizes the importance of knowing the context of domestic violence, so that courts can make decisions with a more complete picture of each particular case. Topics such as sexual assault within domestic violence relationships, the exposure of children to domestic violence and the consequences of this exposure, and strangulation as a form of extreme domestic violence are all discussed. Each section contains practical instructions for judges that serve to inform the case law in various stages of criminal proceedings.

The third chapter focuses on victims of domestic violence and on the court's attitude toward victims and their protection. The fourth chapter describes the kinds of reactions that are typical of perpetrators and domestic violence victims in the context of judicial proceedings. The fifth chapter contains guidance for judges in assessing the risk (of lethality or danger) in domestic violence cases, given that judges are institutional actors obliged to provide protection from domestic violence. The sixth chapter outlines the safety issues that should be considered when examining a victim as an injured party. Finally, the seventh chapter offers a list of instructions and guidelines for judges related to their own protection and safety (in view of threats and attacks that have been made against judges when working on domestic violence or family-related cases).

The Guide also includes two annexes. Annex 1 introduces selected international legal standards in the field of domestic violence that pertain to the work of judicial professionals and which are binding in BiH. Annex 2 provides a case law overview in the field of domestic violence and also introduces the specific case law of courts in BiH and of the European Court of Human Rights. Examples of hypothetical court judgments in domestic violence cases are provided, as a tool in valuing aggravating and mitigating circumstances, which have been harmonized with the Benchbook recommendations.

## I DOMESTIC VIOLENCE

Domestic violence is violence that occurs in the private sphere of life. In some instances, domestic violence refers to violence/abuse between family members living together – this is also called family violence (FV); and in other cases, domestic violence only refers to violence/abuse by one intimate partner against the other – this is also called intimate partner violence (IPV).

### Definition of Family

#### The Law on the Protection from Domestic Violence of the Federation of Bosnia and Herzegovina

(“Official Gazette of the Federation of BiH,” 20/13), Article 6 provides a definition of family.

*In terms of this Law, family means:*

- 1) *married and common-law spouses,*
- 2) *live-in relatives; blood relatives and relatives joined by full adoption in direct kinship (linea recta) regardless of the degree of kinship and in the linea colateralis up to the fourth degree of kinship; adoptive parent and adopted child in the case of partial adoption; in-laws up to the second degree of kinship;*
- 3) *guardian and protégé; foster parent and foster child;*
- 4) *formerly married and former common-law spouses and their children (children they have together or children from previous relationships), and their parents, including stepfather and stepmother.*

**The Criminal Code of Republika Srpska** (*Law on Amendments to the Criminal Code of Republika Srpska*, “Official Gazette of Republika Srpska,” no. 67/13), Article 208 (7) (“Domestic Violence or Family Violence”) provides a definition of family.

*(7) For the purpose of this criminal offence, family members or members of household shall be understood to mean spouses or ex-spouses, their children and children of each of them, unwed partners or former unwed partners, their children and children of each of them, in-laws up to the second degree of kinship regardless of the fact that the marriage union has ended, parents of current and former wed or unwed partners, relatives from full adoption in direct line without limitation, and in indirect line up to the fourth degree of kinship, as well as the relatives from partial adoption, persons linked by relation of guardianship, persons who live or lived in the same family household regardless of kinship, and persons who together have a child or have conceived a child, even though they had never lived in the same household.*

## The Power and Control Wheel

While domestic violence has a criminal-legal definition, it also has a sociological definition. Domestic violence is defined as “a systematic pattern of power and control exerted by one person against another, involving a variety of physical and non-physical tactics of abuse and coercion.”<sup>1</sup>

According to the Michigan Judicial Institute:

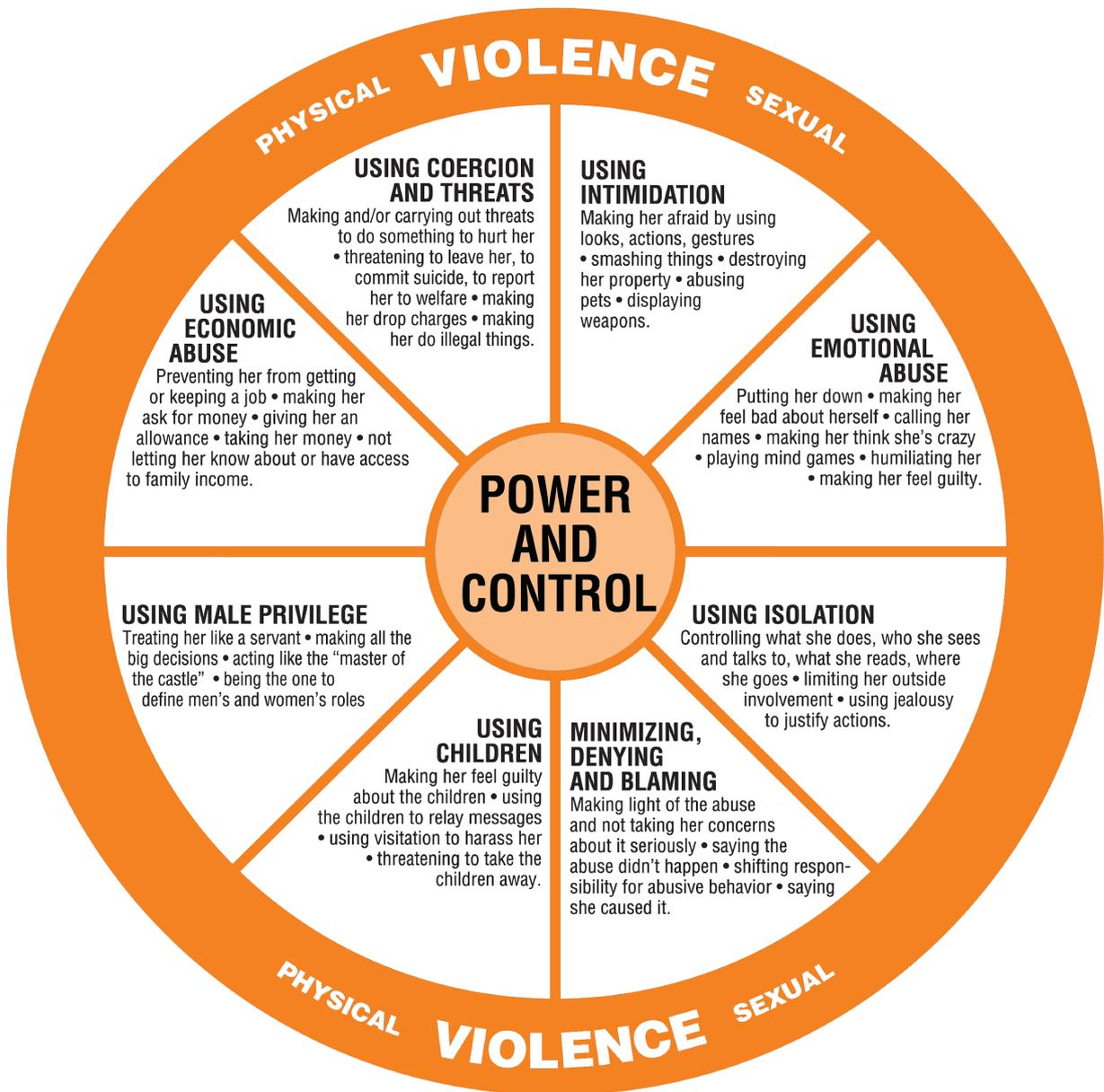
*...domestic violence is more than an occasional incident of angry name-calling, or an isolated, one-time slap or shove between a husband and wife who are frustrated with one another. Moreover, domestic violence is not “out-of-control” behaviour, it is one person’s effort to control another person using a variety of tactics that may involve both criminal and non-criminal acts. Criminal acts may include: hitting, choking, kicking, assaulting with a weapon, shoving, scratching, biting, raping, kidnapping, threatening violence, stalking and destroying property. Non-criminal acts may include: making degrading comments, interrogating children or other family members, threatening or attempting to commit suicide, controlling access to money, and monitoring an intimate partner’s time and activities. These actions may be directed at persons other than the intimate partner (e.g., at children or associates) for the purpose of controlling the partner.*

Source: Michigan Judicial Institute, *Domestic Violence: A Guide to Civil and Criminal Proceedings*, 3. ed., (2013).

The Power and Control Wheel, which was developed in the early 1990s by the Domestic Abuse Intervention Project (DAIP), is used all over the world to illustrate the categories of abuse that most often characterize a **domestic violence or ‘battering’ relationship**.<sup>2</sup>

<sup>1</sup> Flood, M., “He hits, she hits: Assessing debates regarding men’s and women’s experience of domestic violence,” Australian Domestic and Family Violence Clearinghouse seminar, Sydney, (6 December 2012): 2.

<sup>2</sup> Different forms of the Power and Control Wheel are available at: [www.theduluthmodel.org/training/wheels.html](http://www.theduluthmodel.org/training/wheels.html)



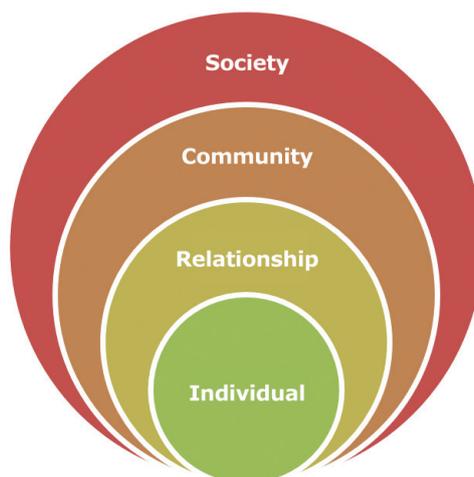
**Figure 1: The Power and Control Wheel**

As demonstrated by the power and control wheel, there are various forms of coercion and abuse that can be systematically used to assert and maintain domination and control over an intimate partner (spouse or dating relationship). Unfortunately, many forms of coercion and abuse are not well recognized by criminal justice system professionals. For example, the following forms of abuse are commonly unrecognized forms of domestic violence:

- Emotional abuse
- Extreme jealousy
- Economic abuse
- Isolation from family and friends
- Threats against the victim or members of her family (or pets)
- Stalking
- Spiritual violence<sup>3</sup>

### What is the Cause of Domestic Violence?

Domestic violence is a learned behaviour – a behaviour that is learned at the individual, family, community, and socio-cultural levels.<sup>4</sup> For example, if gender inequality and the acceptability of male violence and abuse is modeled, taught, or reflected at one or more of these levels, then domestic violence can be learned and perpetuated from one generation to the next. Gender inequality between men and women is a root cause of domestic violence; and therefore the risk of perpetrating domestic violence or being a victim of domestic violence is linked to the extent to which gender inequality is expressed at the individual, relationship, community, and society levels. [See Figure 1.]



**Figure 2: The social-ecological model reflects the levels at which domestic violence is learned<sup>5</sup>**

<sup>3</sup> Imposing or destroying religious or cultural beliefs through denial, condescension, prohibiting one to follow their customs, or forcing one to adopt a system of beliefs.

<sup>4</sup> The social-ecological model of violence prevention was developed to identify and understand the root causes of violence, including domestic and sexual violence and violence against women. See: Dahlberg LL, Krug EG. Violence-a global public health problem in: Krug E, Dahlberg LL, Mercy JA, Zwi AB, Lozano R, eds. World Report on Violence and Health. Geneva, Switzerland: World Health Organization (2002):1–56.

<sup>5</sup> Dahlberg LL, Krug EG. Violence-a global public health problem. In: Krug E, Dahlberg LL, Mercy JA, Zwi AB, Lozano R, eds. World Report on Violence and Health. Geneva, Switzerland: World Health Organization; 2002:1–56

- **Individual Level:** Factors in an individual's biological and socio-personal history can increase the possibility of becoming a victim or perpetrator of violence. For example, attitudes or beliefs that support domestic and family violence, a sense of entitlement, a history of abuse or witnessing abuse, and alcohol and drug abuse. Notably, the single greatest risk factor for being a victim of domestic or sexual violence is being a woman. And, men's attitudes about gender equality and controlling behaviour toward women are major predictors of violence against women.
- **Relationship Level:** Factors within an individual's closest relationships, such as friends, intimate partners, and family members can increase their risk. For example, association with violent peers, or an emotionally unsupportive, physically violent, or strongly patriarchal family environment.
- **Community Level:** Factors at the community level, such as relationships with schools, workplaces, and neighbourhoods can increase an individual's risk. For example, a general tolerance of violence against women, a lack of support from police and judiciary, and weak community sanctions against perpetrators.
- **Societal Level:** Social or cultural norms create an environment that accepts or condones violence and inequality. For example, social, political, and economic inequality based on gender/sex, religion, ethnicity, etc. is widely accepted and even enforced by society.

## Risk Factors Associated with Domestic Violence

Domestic violence is learned intentional behaviour rather than the consequence of stress, individual pathology, substance abuse, or a 'dysfunctional' relationship. Perpetrators of domestic violence frequently avoid taking responsibility for their behaviour by **blaming** their violence on someone or something else, **denying** it took place at all, or **minimising** their behaviour.

Yet, there are factors that can increase the risk of committing domestic violence. It is important to note that a risk factor is not a cause, but can rather be seen as a factor that either lessens the inhibitions of the perpetrator (e.g. drugs/alcohol) or provides a justification for their abuse (stress, unemployment, loss of temper). The following are a number of factors that have previously been used to explain the occurrence of domestic violence but are now recognized as risk factors for perpetration:

- **Drug and Alcohol Use/Addiction** is associated with increased risk for both domestic violence perpetration and victimization. Drug/alcohol addiction does NOT cause domestic violence – if alcohol and drug use caused violence, then everyone who consumed alcohol or used drugs would become violent. Yet not all perpetrators drink or use drugs, and most people who drink or use drugs do not perpetrate domestic violence (or other kinds of violence). For example, a study of 200 perpetrators found that a substantial proportion of perpetrators did not abuse alcohol or drugs. Even of those who were abusing substances, their use of violence was not limited to times when they were intoxicated. They also found that “**alcohol and drug intoxication may lower inhibitions, but they also make for [good] rationalizations.**”<sup>6</sup> For those perpetrators who do use alcohol and drugs, it may increase

<sup>6</sup> Jacobson, N. & Gottman, J., *When Men Batter Women*, New York: Simon & Schuster (1998).

the frequency and severity of domestic violence.<sup>7</sup> Moreover, for some perpetrators, both substance abuse and domestic violence appear to be linked to an underlying need for power and control related to gender-based distortions and insecurities.<sup>8</sup>

- **Economic Stress and Poverty** is associated with increased risk for both domestic violence perpetration and victimization – but it does not cause domestic violence to occur. While there is a correlation between income levels and domestic violence, there is more to the analysis; for example, a number of studies have linked the profile of lower socio-economic status men, who are not successful in the role of breadwinner, with a motivation to assert dominance through violence, including violence against women, as a means to achieve masculine status.<sup>9</sup> This research suggests that sexual conquest and asserting social and physical control over women may be a source of power and a measure of success for men who feel unsuccessful by traditional markers such as wealth. Moreover, some studies indicate that economically disenfranchised men often associate with one another in male peer support networks that collectively devalue women and regard them as legitimate victims who deserve physical and sexual abuse.<sup>10</sup> Nonetheless, there is also considerable research that shows similar attitudes and behaviours among more privileged men, including within the male student body [among athletes, in fraternities, etc.].<sup>11</sup>
- **Mental illness** is associated with increased risk for domestic violence perpetration and, in particular, victimization. Early studies with domestic violence perpetrators revealed that they often test “normal” despite their need for control and the presence of defensiveness, anger, a lack of empathy for mother or children, and a denial of abuse.<sup>12</sup> Studies examining the relationship between PTSD and domestic violence in male veterans have consistently found veterans with greater PTSD symptomology to have higher levels of anger, hostility, aggressiveness, anger reactivity, and domestic violence perpetration.<sup>13</sup> Notably, this anger, aggression, and violence is not solely directed within the family, suggesting that PTSD does not cause domestic violence but can contribute to aggressive and violent behaviour more generally – and not limited to within the family. Perhaps most notable, mentally ill people are **more likely to be victims** than perpetrators of violent crime<sup>14</sup> and more likely to have experienced intimate partner violence than the general population.<sup>15</sup>

7 Fals-Stewart, W. & Kennedy, C., “Addressing intimate partner violence in substance-abuse treatment,” *Journal of Substance Abuse Treatment* 29, no. 11 (2005): 5-17.

8 Gondolf, E.W., “Alcohol abuse, wife assault, and power needs,” *Social Service Review*, 69, no. 2 (1995): 275-283.

9 Anderson, E., *Streetwise: Race, class, and change in an urban community*. Chicago: University of Chicago Press (1990); Benson, M.L., & Fox, G.L., *When violence hits home: How economics and neighborhood play a role*. Washington, DC: U.S. Department of Justice, National Institute of Justice (2004); Miller, J., *Getting played: African American girls, urban inequality, and gendered violence*. New York: New York University Press (2008); Raghavan, C., Mennerich, A., Sexton, E., & James, S.E., “Community violence and its direct, indirect, and mediating effects on intimate partner violence,” *Violence Against Women*, 12 (2006): 1132-1149. Some studies indicate that economically disenfranchised men often associate with one another in male peer support networks that collectively devalue women and regard them as legitimate victims who deserve physical and sexual abuse (Bourgois, P., *In search of respect: Selling crack in El Barrio*. New York: Cambridge University Press (1999); DeKeseredy, W.S., Alvi, S., Schwartz, M.D., & Tomaszewski, E.A., *Under siege: Poverty and crime in a public housing community*. Lanham, MD: Lexington Books (2003).

10 Bourgois, P., *In search of respect: Selling crack in El Barrio*, New York: Cambridge University Press (1999); DeKeseredy, W.S., Alvi, S., Schwartz, M.D., & Tomaszewski, E.A., *Under siege: Poverty and crime in a public housing community*, Lanham, MD: Lexington Books (2003).

11 Sanday, P.R., *Fraternity gang rape: Sex, brotherhood, and privilege on campus* (2 nd ed.). New York: New York University Press (2007).

12 Evan Stark, *Framing and Reframing Battered Women, in Domestic Violence: The Criminal Justice Response* 287, eds., Eve Buzawa (1993).

13 K. Bell and Orcutt, H., “PTSD and male perpetrated IPV,” *Journal of American Medical Association*, 302, no. 5 (2009).

14 Linda A. Teplin, McClelland, G., Abram, K., and Weiner, D., “Crime Victimization in Adults with Severe Mental Illness,” *Arch Gen Psychiatry*; 62, no. 8 (August 2005): 911–921.

15 K. Trevillion, Oram, S., Feder, G., Howard, L.M., “Experiences of Domestic Violence and Mental Disorders: A Systematic Review and Meta-Analysis,” *PLoS ONE* 7, no. 12 (2012): e51740.

## Typologies of Domestic Violence Relationships

Research has identified several typologies of domestic violence relationships on the basis of the control mechanisms used by the violent partner within the relationship, the motives of the violent partner, and the existence of a pattern of controlling behaviour by the violent partner: <sup>16</sup>

- Intimate Terrorism (also called Domestic Violence Battering)
- Violent Resistance
- Situational Couple Violence

**Box 1: Johnson's control typology of intimate partner violence <sup>17</sup>**

	<b>Intimate Terrorism (Domestic Violence Battering)</b>	<b>Violent Resistance</b>	<b>Situational Couple Violence</b>
<b>Aim</b>	To control a relationship	To escape an "intimate terrorist"	To "win," get attention or get even
<b>Defining characteristics</b>	Repeated violence, or the use of a single violent act as a lasting control mechanism (coercive threat of repetition)	Victim reacts in defence or retaliation to their partner's intimate terrorism	Violence occurs when conflict situations escalate, and usually ends if conflict is resolved
<b>Perpetrator</b>	Only one; dominant role in relationship	Only one; victim of domestic violence	Potentially both parties
<b>Frequency of violence</b>	Often frequent	Very infrequent, often a one-off	Tends to be infrequent or happens in short phases
<b>Severity</b>	Victims often fear for their lives, but violence itself may be largely emotional	May be very violent	Life-threatening behaviour is rare but not unheard of

<sup>16</sup> See: Johnson, M. P., "Patriarchal terrorism and common couple violence: Two forms of violence against women," *Journal of Marriage and the Family*, 57 (1995): 283-294; and Johnson, M. P., & Leone, J. M., "The differential effects of patriarchal terrorism and common couple violence: Findings from the National Violence Against Women survey," Paper presented at the Tenth International Conference on Personal Relationships, Brisbane, Australia (July 2000).

<sup>17</sup> Hines, D.A., and Douglas, E.M., "Intimate terrorism by women towards men: Does it exist?" *Journal of Aggression, Conflict and Peace Research*, 2, no. 3 (July 2010) 36-56; Johnson, M.P., *A Typology of Domestic Violence*. Boston, MA: Northeastern (2008); and Johnson, M.P., "Types of domestic violence: Research evidence, presentations, Crif-Viff, Montreal (March 2013).

Johnson's research identified that in heterosexual relationships, domestic violence battering (or intimate terrorism) is perpetrated almost exclusively by men; violent resistance is found almost exclusively among women; and situational couple violence is used by both men and women.<sup>18</sup> What is unique about these typologies is that they are not limited to the identification of violence alone, but rather seek to identify the nature of the relationship and how the violence is used. In other words, whether the violence is used to control and dominate, to defend oneself, or to 'win a fight'.

For example, Johnson found that an individual can be violent and non-controlling and in a relationship with a partner who is either nonviolent or who is also violent and non-controlling. This is called **situational couple violence** because the purpose of the violence is not to control, but to gain an advantage in a situation or circumstance or to express frustration, anger, and/or exasperation. Second, one can be violent and non-controlling but in a relationship with a violent and controlling partner. If the behaviour of one person includes violence, but is not intended to control the other but rather to defend or protect oneself or another person from the violent and controlling individual, this type of violence is referred to as **violent resistance**. Finally, one can be violent and controlling and in a relationship with a partner who is either nonviolent or violent and non-controlling. This is the pattern called **domestic violence battering** (or intimate terrorism).

*Johnson's typology has several uses for the [judiciary]. First, it can help when distinguishing between the perpetrator and the victim, and also when judging the severity of the crime. For example, when intimate terrorism has taken place, the perpetrator of domestic violence may have committed a relatively minor act while the victim may have committed a very violent act of resistance to escape the controlling behaviour of the perpetrator. In this case, there would be one perpetrator of domestic violence (a more serious act), and another perpetrator of violent resistance (used in necessary defence).<sup>19</sup>*

It is especially important that courts recognize and appropriately evaluate the presence of battering in a domestic violence case, and make an effort to distinguish between violent resistance (which results from self-defence) and domestic violence battering.

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18 Michael P. Johnson, "Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence," *Violence Against Women* 12, no. 11 (November 2006): 1003-1018.

19 Callum Watson, "Preventing and Responding to Sexual and Domestic Violence against Men: A Guidance Note for Security Sector Institutions," Geneva, DCAF (2014): 21. Available at: <http://www.dcaf.ch/Publications/Preventing-and-Responding-to-Sexual-and-Domestic-Violence-against-Men-A-Guidance-Note-for-Security-Sector-Institutions>

## II KNOWING THE DOMESTIC VIOLENCE CONTEXT

### 1. Sexual Abuse as a Form of Domestic Violence

Intimate partner sexual abuse is an assault that is committed by a current or past spouse or partner. It is a common phenomenon, outnumbering stranger and acquaintance sexual assaults.<sup>20</sup>

Women who are sexually assaulted by their partners frequently experience a wide range of other forms of coercion and abuse.<sup>21</sup> This has led to a general understanding that marital rape and sexual assault within an intimate relationship is often an extension of the domestic violence relationship.<sup>22</sup>

#### Victim profile

Research on marital rape indicates that this form of violence is not confined to women from a specific ethnicity, social class, or geographic location.<sup>23</sup> However, women are at particularly high risk of experiencing physical and sexual violence when they attempt to leave an abusive partner, as this represents a challenge to their abusers' control and sense of entitlement.

#### Dynamics of Sexual Assault in the Domestic Abuse Context

- Delayed reporting of sexual assault is common
- Many victims do not physically resist the assault
- Many victims will have an incomplete memory of the assault
- Very few sexual assaults involve the use of a weapon by the perpetrator
- Very few victims of sexual assault sustain any visible physical injury, including to the vagina

#### The Role and Response of the Judiciary

The criminalization of marital rape does not necessarily mean that these laws are actually implemented in practice, mostly due to a lack of public and professional awareness of the problem.

Police, prosecutors, and judges may not ask a domestic violence victim whether she/he was sexually assaulted – and if the victim is not asked, she may not report sexual assault due to shame or uncertainty. Moreover, in cases when the existence of sexual assault is established, competent authorities often hesitate to issue a separate indictment for this criminal offence or even value it as an aggravating circumstance, unless it involved a high degree of violence.

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20 Bennice, J.A., Resick, P.A., "Marital rape. History, Research, and Practice," *Trauma, Violence, & Abuse*. 4, no. 3 (2003): 228-246.

21 Bergen, R.K., "Marital Rape: New Research and Directions," National Resource Center on Domestic Violence, *VAWnet.org* (2006): [https://www.nycourts.gov/ip/womeninthecourts/pdfs/MARITAL%20RAPE\\_1\\_d\\_1.pdf](https://www.nycourts.gov/ip/womeninthecourts/pdfs/MARITAL%20RAPE_1_d_1.pdf)

22 Johnson, I., & Sigler, R., *Forced sexual intercourse in intimate relationships*. Brookfield, VT: Dartmouth/Ashgate (1997).

23 Bergen, Marital Rape: New Research and Directions

Nevertheless, sexual assault in the context of domestic violence constitutes a key factor for lethality.<sup>24</sup> It is therefore of utmost importance for actors in the criminal justice system, the police, prosecutors, and judges, to try to establish the existence of sexual assault in any domestic violence case, and to impose a sanction proportional to the criminal offence perpetrated and to the risk the perpetrator poses to the victim, her family, and the community.

In a large number of cases of sexual assault within the family, the victim is the only witness, and therefore the victim's role is of essential importance to the investigation and prosecution. In order to fully document the incident, investigators should:<sup>25</sup>

- treat the victim with special sensitivity when interviewing her/him, and pay due regard to their privacy;
- calmly approach the victim and recognize the impact of trauma and how this may affect their behaviour (people react differently to trauma, e.g. a lack of emotion or the presence of emotion is not an indicator of the legitimacy of an assault);
- if possible, ask the victim whether she/he wants a psychologist to attend the interview, in order to support the victim;
- ask the victim to describe the sexual assault and specify as many details as possible;
- document all information obtained from the victim (use the victim's exact words and place those words in quotations; do not sanitize or "clean-up" the language used by the victim);
- document the victim's fear and record all reactions of the victim aimed at defending her/himself or escaping;
- ask the victim if they told anyone about the sexual assault, e.g. a close person who could confirm the victim's statement;
- collect medical evidence of the victim's physical injuries;
- document physical evidence;
- take photographs of the victim's visible injuries;
- obtain a statement from the suspect.

*Note: the above instructions primarily apply to cases involving an adult victim.*

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<sup>24</sup> Sharps, P. W., Campbell, J. C., Campbell, D., Gary, F., & Webster, D., "The role of alcohol use in intimate partner femicide," *American Journal of Addictions*, 10, no. 2 (2001): 1–14.

<sup>25</sup> See: International Association of Chiefs of Police (IACP), *Sexual Assault Incident Report Investigative Strategies*, available at: <http://www.theiacp.org/portals/o/pdfs/SexualAssaultGuidelines.pdf> (accessed on 25 April 2016); Wisconsin Office of Justice Assistance, *Wisconsin Prosecutor's Sexual Assault Reference Book*, 2009, available at: [https://www.wcasa.org/file\\_open.php?id=3](https://www.wcasa.org/file_open.php?id=3) (accessed on 25 April 2016); and the National Center on Domestic and Sexual Violence, *Voir Dire and Prosecution Tips for Sexual Assault Cases*, Austin, Texas, available at: <http://www.ncdsv.org/images/SexualAssault-VOIRDIREANDPROSECUTIONTIPS.pdf> (accessed on 25 April 2016).

## Guidance for judges: Taking an active role related to *sexual assault/sexual abuse* cases in different stages of criminal proceedings

### **Indictment Confirmation**

- When confirming an indictment, the court should, within its powers, consider whether the qualification of the offence was applied properly if the indictment includes elements of sexual abuse, i.e. if sexual abuse is described in the indictment. As needed, the court should return the indictment to the prosecutor's office for amendments/corrections; for instance, if an offence is incorrectly qualified as the basic form of domestic violence but the indictment contains a description of the offence or is corroborated by evidence showing that an indictment for a qualified form of the domestic violence offence can be issued.

### **Assessment of Evidence at Trial**

- When presenting evidence or examining the victim as a trial witness, the court should pay special attention to questions about sexual abuse.

### **Sentencing**

- When imposing a sanction, if the statement of facts does not include sexual abuse or if it is not covered by the body of crime, the court should treat the presence of sexual abuse as an aggravating circumstance.

## 2. Children Exposed to Domestic Violence

Contemporary social-scientific research has unequivocally identified that exposure to domestic violence undermines the mental and physical health of children, their social and emotional development, and their interpersonal relationships.<sup>26</sup> Moreover, research further confirms the intergenerational nature of domestic violence – or in other words, how exposure to domestic violence as a child increases your risk of being a perpetrator or victim of domestic violence as an adolescent or adult.<sup>27</sup>

*Growing up in... a home [with domestic violence] can critically jeopardize the developmental progress and personal ability of children, the cumulative effect of which may be carried into adulthood and can contribute significantly to the cycle of adversity and violence.*<sup>28</sup>

26 Hecht-Schafran, L., "Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience," *The Judges Journal*, 53, no. 3 (Summer 2014): 33-37.

27 Igelman, R.S., Ryan, B.E., Gilbert, A.M., Bashant, C., and North, K., "Best practices for serving traumatized children and families," *Juvenile and Family Court Journal*, 59 no. 4 (2008): 35-47.

28 Holt, S., Buckley, H., and Whelan, S., "The Impact of Domestic Violence on Children and Young People: A Review of the Literature," *Child Abuse and Neglect*, 32 (2008): 797, 799 and 802.

### New Knowledge from Neuroscience

“In infancy and young childhood, the human brain is extremely plastic, growing new neurons and making synaptic connections in response to sensory, perceptual, and affective experiences. Developing brains are acutely sensitive to stress and to the internal state of the caregiver upon whom the child depends. In a safe environment where the child has a nurturing relationship with a caregiver, moderate stress produces resilience. But in an unpredictable, tension filled, violent environment where the stress is inescapable, it becomes toxic, unleashing a storm of neurochemicals that result in ‘embedded stress.’

Children persistently exposed to domestic violence live in an ongoing ‘alarm’ state, with powerful stress hormones, particularly cortisol. This alarm state has many negative consequences for brain development. Neuroscience shows us that for children, chronic exposure to domestic violence also results in physical changes to the brain, impairment of brain function, and consequences for physical and mental health over the lifespan. Toxic stress changes the architecture of the child’s brain.

Neuroscience shows us that exposure to domestic violence harms children’s brains at the neuronal level, with lifetime consequences. What if instead of saying that children exposed to domestic violence are ‘at risk,’ we said children exposed to domestic violence are ‘at risk of brain damage’? Neuroscience helps judges assess ‘grave risk’ for children in the domestic violence context.”

***“The most beneficial action a court can take for a child exposed to domestic violence is to end the exposure [to domestic violence] and support the protective parent.”***

Source: LynnHecht-Schafran, “Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience,” *The Judges Journal*, 53, no. 3 (Summer 2014): 33-37

### Child Traumatic Stress Reactions

“Child abuse and neglect have been shown to adversely affect the growth of the brain, nervous, and endocrine systems and to impair many aspects of psychosocial development, including the acquisition of social skills, emotional regulation, and respect for societal institutions.”<sup>29</sup> The following table lists some of the most common traumatic stress reactions seen in children of various ages.

<sup>29</sup> National Child Traumatic Stress Network, Justice System Consortium, *Helping Traumatized Children: tips for Judges*. Los Angeles, CA & Durham, NC: National Center for Child Traumatic Stress (2009).

**Box 2: Child Traumatic Stress Reactions (by age group) <sup>30</sup>**

Age Group	Common Traumatic Stress Reactions
<b>Young children (Birth–5y)</b>	<ul style="list-style-type: none"> <li>• Withdrawal and passivity</li> <li>• Exaggerated startle response</li> <li>• Aggressive outbursts</li> <li>• Sleep difficulties (including night terrors)</li> <li>• Separation anxiety</li> <li>• Fear of new situations</li> <li>• Difficulty assessing threats and finding protection (especially in cases where a parent or caretaker was an aggressor)</li> <li>• Regression to previous behaviours (e.g., baby talk, bed-wetting, crying)</li> </ul>
<b>School-age children (6–12y)</b>	<ul style="list-style-type: none"> <li>• Abrupt and unpredictable shifts between withdrawn and aggressive behaviours</li> <li>• Social isolation and withdrawal (may be an attempt to avoid further trauma or reminders of past trauma)</li> <li>• Sleep disturbances that interfere with daytime concentration and attention</li> <li>• Preoccupation with the traumatic experience(s)</li> <li>• Intense, specific fears related to the traumatic event(s)</li> </ul>
<b>Adolescents (13–18y)</b>	<ul style="list-style-type: none"> <li>• Increased risk taking (substance abuse, truancy, risky sexual behaviours)</li> <li>• Heightened sensitivity to perceived threats (may respond to seemingly neutral stimuli with aggression or hostility)</li> <li>• Social isolation (belief that they are unique and alone in their pain)</li> <li>• Withdrawal and emotional numbing</li> <li>• Low self-esteem (may manifest as a sense of helplessness or hopelessness)</li> </ul>

**The Role and Response of the Judiciary**

When judges hear cases of domestic violence involving children who are exposed to domestic violence – be it directly, by witnessing the violence or being a victim of violence, or indirectly, by hearing the violence or seeing the consequences of violence – a judge’s decision can impact the child’s mental and physical wellbeing and behaviour. While judges cannot be experts in neuroscience, they have a duty to stay abreast of current information and research, particularly research that points so clearly to the short- and long-term harm that exposure to domestic

<sup>30</sup> Ibid.

violence has on children. Judges who are empowered with medical science will be better able to recognize domestic violence contexts that require a clear intervention in order to protect children and stop the intergenerational cycle of domestic violence.

### Guidance for judges: Enabling the Social Work Centre to take an active role in cases involving children's exposure to domestic violence

In a domestic violence case where children are exposed (directly or indirectly) to domestic violence, it is important for the court to engage the Social Work Centre (the Centre) as a custody authority, and to send court decisions in such cases to the Centre, so that the Centre can follow the situation further and take activities within its scope to protect the interests of children and juveniles. The court must consistently take actions to contribute to the protection of children during and after the proceedings.

## 3. Strangulation: Extreme Domestic Violence

Strangulation is defined as the obstruction of blood vessels and/or airflow in the neck resulting in asphyxia. Strangulation constitutes one of the most lethal forms of violence and poses significant threat of physical injuries and even death.<sup>31</sup>

### Strangulation alongside other forms of Domestic Violence

Strangulation can be understood as an ultimate form of domination and control, where the perpetrator literally controls the victim's next breath. A perpetrator's use of strangulation may foreshadow escalating violence or the risk of homicide.<sup>32</sup> Strangulation is recognized as one of the most lethal forms of domestic violence.

### Consequences

Strangulation can lead to lack of consciousness within 5-10 seconds and death within 4-5 minutes.<sup>33</sup> Moreover, **strangulation is one of the best predictors for the subsequent homicide of victims** of domestic violence.<sup>34</sup>

Although only half of victims have external evidence of injury, strangulation has a major impact on the victims' health. Its consequences may include:<sup>35</sup>

31 Strack, G. and Gwinn, C., *On the Edge of homicide: Strangulation as a prelude*, *Criminal Justice* 26, no. 3 (2011): 3-4.

32 Turkel A., "And then he choked me: Understanding, investigating and prosecuting strangulation cases," *The Voice*, 11, no. 1 (2008): [http://www.ndaa.org/pdf/the\\_voice\\_vol\\_2\\_no\\_1\\_08.pdf](http://www.ndaa.org/pdf/the_voice_vol_2_no_1_08.pdf)

33 Strack, G.B., McClane, G.E., & Hawley, D., "A review of 300 attempted strangulation cases," *Journal of Emergency Medicine*, 21, no. 3 (2001).

34 Research shows that the risk of a lethal outcome is 7 times higher for victims of domestic violence who previously experienced strangulation as compared to those who did not. See: Glass et al., "Non-fatal strangulation is an important risk factor for homicide of women," *The Journal of Emergency Medicine*, 35, no. 3 (2008): 329-335: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2573025/>

35 Funk, M. & Schuppel, J., "Strangulation injuries," *Wisconsin Medical Journal*, 102, no. 3 (2003): 41-45

- Physical injuries such as unconsciousness, fractured trachea/larynx, internal bleeding, artery damage, dizziness, nausea, sore throat, voice changes, throat and lung injuries, and swelling of the neck;
- Neurological injuries such as facial or eyelid droop (palsies), paralysis of one side of the body (hemiplegia), loss of sensation (feeling), loss of memory and paralysis;
- Delayed fatality, where death can occur days or even weeks after the attack due to a tear in one of the neck arteries; respiratory complications such as pneumonia; acute respiratory distress syndrome (ARDS); and the risk of blood clots travelling to the brain (embolization); and
- Psychological injuries such as PTSD, depression, suicidal ideation, memory problems, nightmares, anxiety, severe stress reaction, amnesia, and psychosis.

### Signs and symptoms of strangulation<sup>36</sup>

Tiny red spots (petechiae) on the face and neck or under the eyelids and around the eyes	Cognitive changes including amnesia or memory loss, confusion, restlessness, or agitation
Difficulty in swallowing or a 'thick' feeling in the throat (swelling of the tongue)	Breathing changes, difficulty breathing, shortness of breath
Raspy or hoarse voice	Neck or throat pain
Cough	Bruising or swelling inside the lips
Loss of consciousness or near loss of consciousness	Conjunctival haemorrhage (eyes are red with blood)
Victim thought they would die	Tinnitus (ringing in the ears)
Reported loss of control of bowel or bladder at the time of the assault	Scratch marks or bruising in the jaw line, clavicles, and around the neck
Redness, abrasions, bruising on chin from lowering chin to protect neck	Impressions on the skin that may indicate use of a ligature or object
Nausea and vomiting	

<sup>36</sup> Douglas H., Fitzgerald R., "Strangulation, Domestic Violence and Legal Response," *Sydney Law Review*. 36, no. 2 (2014). Based on McLean M., "The Identification, Care and Advocacy of Strangulation Victims: Information for Front Line Workers and Crisis Advocates (2009, rev. 2012).

## The Role and Response of the Judiciary

In spite of the high risk of subsequent fatal harm associated with strangulation, “attempted strangulation is often misunderstood or misidentified by police and prosecutorial authorities as something far less serious.”<sup>37</sup> It is partly because when recounting an incident, many victims minimize being strangled, and, as a result, investigators tend not to fully investigate these incidents. The effects of strangulation may also be minimized or missed by other professionals, such as doctors and social workers, because of a lack of awareness of the signs and symptoms.

In order to properly assess not only the legal standards necessary for charging but also to understand the lethality of the assault, it is essential for investigators to:

- Record the victim’s exact words (i.e., “he choked me”);
- Get a description of the mechanism for the injury;
- Document the amount of pressure used;
- Ask about the perceived duration of the strangulation;
- Ask what the perpetrator was doing immediately prior to the strangulation;
- Ask what words the perpetrator used;
- Ask the victim if they lost consciousness and, if so, for how long;
- Document any pain or problems with swallowing, sore throat, or hoarseness;
- Look for the tiny red spots (petechiae) characteristic of many cases of strangulation due to ruptured capillaries, sometimes found only under the eyelids (conjunctivae);
- Document any external injuries such as redness or scratches;
- Check for scratches to hands and elbow area and bite marks to perpetrator’s arms or chest;
- Document any nausea or vomiting;
- Document any muscle injuries;
- Check if the victim is dizzy or having trouble focusing or paying attention;
- Ask what, in general, the victim did to defend him/herself;
- Look for any witness.<sup>38</sup>

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<sup>37</sup> According to Turkel, as cited in Douglas, H. and Fitzgerald, R., “Strangulation, domestic violence and the legal response,” *Sydney Law Review*, 36, no. 2 (2014): 235.

<sup>38</sup> Adapted from: Turkel, A., “Understanding, Investigating and Prosecuting Strangulation Cases,” *The Prosecutor*, 41, no. 6 (2007): 20-23.

## Guidance for judges: Taking an active role related to *strangulation* cases in different stages of criminal proceedings

### ***Indictment Confirmation***

- When confirming an indictment, the court should, within its powers, consider whether the qualification of the offence was applied properly if the indictment includes elements of strangulation, i.e. if strangulation is described in the indictment. As needed, the court should return the indictment to the prosecutor's office for amendments/corrections; for instance, if an offence is incorrectly qualified in the indictment as the basic form of domestic violence, and the indictment contains a description of the offence or is corroborated by evidence showing that an indictment for a qualified form of the domestic violence offence can be issued.

### ***Assessment of Evidence at Trial***

- When presenting evidence or examining the victim as a trial witness, the court should pay special attention to questions about strangulation.

### ***Sentencing***

- When imposing a sanction, if the statement of facts does not include strangulation or if it is not covered by the body of crime, the court should treat the presence of strangulation as an aggravating circumstance.

### III DOMESTIC VIOLENCE IN THE COURTROOM: UNDERSTANDING THE VICTIM AND DOMESTIC VIOLENCE ISSUES

Source: American Judges Association & American Judges Foundation, *Domestic Violence in the Courtroom: Knowing the Issues...Understanding the Victim*, (2012).

#### How Can Judges Help?

What can a judge do to help stop domestic violence, promote victim safety and support, and hold offenders accountable?

**FIRST:** The judge must take time to listen carefully. Your demeanour demonstrates to the victim that you are concerned about his or her circumstances and the underlying events. Judges should understand that the victim may not choose to participate in the proceedings for a variety of reasons, including intimidation and fear.

**SECOND:** Remember that the initial step toward stopping the abuse is being able to identify it as abuse. Denial, rationalisation, and minimisation are coping methods used by the abused person and often those closest to the victim. These same methods are often used by the individual who perpetrates the violence.

**THIRD:** The victim must be informed of his or her options. The court should take a proactive approach and ensure that victims are informed of their options and have access to safety planning.

**FOURTH:** What transpires in the courtroom may be unfamiliar and confusing to a lay person. While a victim may understand the legal issues intellectually, he or she may be overwhelmed with the enormity and complexity of the information. Comprehension of the available options often becomes difficult. A judge must take time to explain the proceedings and provide an opportunity for the victim to safely give input if the victim chooses to give input.

**FIFTH:** A victim may seek to comply with the judge. As a result, the victim may appear very complacent in the courtroom, even when he or she does not agree with what is taking place. A judge needs to take the time to ask for specific details. A victim may tend to accept responsibility for things that are not his or her fault out of fear of further abuse. Remember, this is often a strategy of survival.

**SIXTH:** The courtroom atmosphere is often inherently intimidating to the victim. Judges should be aware of methods to minimize additional intimidation factors. Court cases generally focus on a particular incident, but the victim may have been exposed to years of intimidation and coercive control. A judge can use his or her authority to the fullest extent of the law and enforce every relevant law in the case. Judges can also create a courtroom ambiance that promotes «zero tolerance» of domestic violence. For example, a judge can instruct bailiffs not to permit the litigants, family members, or friends to interact in an intimidating manner in the courtroom. A defendant may sometimes behave in an

inappropriate manner or make intimidating comments about the victim. Allowing this to happen sends a message of defiance to both the court and victim, and makes it appear that the defendant is immune to the court's authority.

### Do Not Blame the Victim

A victim of domestic violence may act in ways that seem incomprehensible or confusing to people not aware of the dynamics and strategies of abuse. The victim may deny the abuse in a desperate attempt for self-preservation. The abuser's control of a victim may affect the simplest decisions a victim may need to make. **Domestic violence is a crime by the perpetrator, not the victim.** A perpetrator must take full responsibility for his or her violent behaviour. Abuse often escalates in frequency and severity over time. It rarely goes away without community response and intervention.

Many people believe that the victim of violence must somehow have invited it, encouraged it, or even found some kind of satisfaction from it. No victim likes to be abused.

### No One is Immune, Everyone Suffers

It is devastating for children to be exposed to abuse, or to see the aftermath – an injured parent, a destroyed home. Learning disabilities and behavioural problems that may be present are likely to intensify as they get older. In households where women are abused by their partners, there is often a high incidence of child abuse by the abusive parent. It is also becoming increasingly apparent that, unfortunately, the legacy of abuse does not stop when children leave the home. Children develop behaviour based on what they have experienced growing up; and children from violent homes are at high risk for becoming adult victims or abusers themselves.

Another component of the strategy of the perpetrator of domestic violence is to focus on family and friends. The abuser may harm or threaten harm to others close to the victim in an effort to hurt or control the victim. An abuser may harm pets, personal belongings, and the family home. Frequently, a batterer isolates the victim from the family socially, emotionally, and geographically. The victim is frequently forbidden to have access to friends and family, and may be denied the opportunity to go to school or to work outside the home. There is little or no access to or control over finances. After a long period of isolation, the victim may be scared or confused.

### Recognizing the Violence

A victim of domestic violence often has confused thoughts and feelings. Denial, rationalization, and minimization are methods of coping day-to-day with the reality and severity of their abuse. The first step toward ending a violent relationship is to identify it as such. For many victims, identifying oneself as a victim of battering is an extremely difficult step.

There is a growing understating of the gendered dimensions of domestic violence, namely that battered women's use of force may result in women being misidentified as the perpetrator. When in court, **battered heterosexual women accused of using physical violence against their intimate male partners often over-report their use of violence**. In contrast, their abusive male partners typically deny any wrong doing. The following distinctions in behaviour are important to note:

- men are more likely than women to underreport violence perpetration
- women are more likely than men to over-report violence perpetration
- men who batter typically minimize, deny, and justify their violence and abuse

### Lethality Assessment and Victim Protection

Research has found that there are certain factors that are important in assessing the lethality potential in a particular situation. However, predicting lethality is difficult, as all serious battering relationships can be unpredictable and have the potential to quickly escalate. Nonetheless, the reported presence of **some of these factors can be used to assist judges in making judgments about the level of protection necessary** at any particular moment:

- Severity of violence is escalating
- Intoxication and drug abuse
- Threats to harm the children
- Forced or threatened sex acts
- Suicide threats or attempts
- Access to weapons
- Psychiatric impairment of the victim or abuser
- Proximity of victim and abuser
- Need or control of contact around children
- Previous criminal history
- Defiance of Court Orders and judicial system

### Why Doesn't the Victim Simply Leave and Why Does She/He Refuse to Testify?<sup>39</sup>

There are numerous reasons why victims do not leave their abuser:

- **Fear:** Abusers often threaten suicide. A victim's fear for her/his life or lives of loved ones is a sufficient reason for the victim to stay in the abusive relationship.
- **Economy:** The victim often has no access or has limited access to financial resources; and is financially dependent on the abuser.
- **Isolation:** The victim is often isolated from family and friends and the isolation makes her/him feel helpless and unable to leave the abusive relationship.

<sup>39</sup> Content prepared by Judge (Ret.) Mel Flanagan, Fulbright scholar in BiH for 2016.

- **Shame:** Victims often blame themselves for violence; they are ashamed to admit to family and friends that they are in an abusive relationship with the person they chose for a partner.
- **Love:** The relationship did not start with violence and the violence is not constant. Periods of relative peace and expressions of love and regret by the abuser give the victim hope that the violence will stop and that the abuser will change.
- **Low self-confidence:** Victims often feel that they deserve or cause violence; which is intensified by the abuser's behaviour.

Apart from the foregoing, there are additional reasons why victims go back to abusers and refuse to testify in court proceedings:

- Friends and/or family members pressure the victim to go back to the abuser;
- Children miss their parent and they blame the victim for breaking up the family;
- The victim was threatened with violence unless she/he drops charges;
- The victim has no confidence that the judicial system will protect her/him.

One should keep in mind that domestic violence victims constantly evaluate their own safety and risks of future danger for themselves and their loved ones. A victim may make an informed and rational decision not to testify or to give up a request for the imposition of a protective measure; if the victim does so, it does not mean that they lack credibility or that the domestic violence never took place. A victim's unwillingness to cooperate with the judiciary is understandable and logical, especially when abusers remain unsanctioned for previous domestic violence incidents.

## IV A JUDICIAL GUIDE: KNOWING REACTIONS OF ABUSERS AND DOMESTIC VIOLENCE VICTIMS

Source: Wisconsin Office of State Courts, *A Judicial Guide to Domestic Abuse Issues. Working with Batterers and Victims of Domestic Abuse: an Overview*, (Dec 2012).

### Domestic Abuse: Some Common Themes

As with all other types of crime, perpetrators are the ones who determine when, where, and how domestic abuse/sexual assault against their partners occur. As a result, there are usually no witnesses to these crimes, and the physical injuries are frequently delivered in a manner that make them unnoticeable through casual observation. Therefore, it is important to look at the following behavioural cues when considering whether domestic abuse exists between the parties.

#### An abusive partner may:

- Minimize, deny, or blame others for his or her behaviour, or apologize for it;
- Be well-behaved, “professional,” or articulate, or alternatively, cry or otherwise appear remorseful;
- Focus on his or her community or professional stature, or alternatively, that of the victim (e.g., “She’s a doctor, I’m an engineer, do you really think either of us would tolerate that?”);
- Use disrespectful or gender-based language;
- Attempt to use charm or friendly persuasion to “disarm” the judge;
- Try to control various particulars of the proceedings;
- Focus on his or her “rights” and not the safety of the victim;
- Deflect responsibility to others, including the victim;
- Direct eye contact or body language toward the victim rather than the court; and
- Speak for the victim.

#### A partner at risk for domestic abuse/sexual assault (the injured party) may:

- Mistrust third-party professionals, including the judge and prosecutor, the psychologist providing support to the victim, court staff, and others providing domestic violence support services;
- Speak either aggressively, ironically, or without affect;
- Minimize or deny the abuse, justify it, take responsibility for it, or deny fear;
- Have an inability to articulate his/her point or have difficulty focusing;
- Raise his or her voice, shake, or demonstrate other evidence of fear, or alternatively, appear stoic or disinterested;

- Agree with the abusive partner that “nothing really happened, it was all a mistake” or otherwise demonstrate ambivalence about the outcome of the case;
- Shut down or withdraw over time during the proceedings.

*Note: This list is not exhaustive. Just as no two individuals will respond precisely the same way in a given situation, batterers and victims are likely as well to vary in their response. This list is intended for guidance purposes only.*

## V BENCH GUIDE: RISK ASSESSMENT IN DOMESTIC VIOLENCE CASES

Source: Minnesota Supreme Court, Gender Fairness Implementation Committee (Committee for Equality and Justice), *Domestic Violence Risk Assessment Bench Guide*, (2009).

The **presence of these factors can indicate elevated risk** of serious injury or lethality. The absence of these factors is not, however, evidence of the absence of risk of lethality.

1. Does alleged perpetrator have access to a **firearm**, or is there a firearm in the home?
2. Has the alleged perpetrator ever used or threatened to use a **weapon** against the victim?
3. Has alleged perpetrator ever attempted to **strangle** or choke the victim?
4. Has alleged perpetrator ever **threatened to or tried to kill** the victim?
5. Has the physical **violence increased in frequency or severity** over the past year?
6. Has alleged perpetrator **forced** the victim to have **sex**?
7. Does alleged perpetrator try to **control** most or all of victim's **daily activities**?
8. Is alleged perpetrator constantly or violently **jealous**?
9. Has alleged perpetrator ever **threatened or tried to commit suicide**?
10. Does the **victim believe** that the alleged **perpetrator will re-assault** or attempt to kill the victim? *Note: A "No" answer does not indicate a low level of risk, but a "Yes" answer is very significant.*
11. Are there any pending or prior Orders for Protection, criminal, or civil cases involving alleged perpetrator?

### How to Use the Domestic Violence Risk Assessment Bench Guide

- **Obtain information regarding these factors through all appropriate and available sources**
  - Potential sources include: the police, witness protection staff, prosecutors, defence attorneys, court administrators, representatives of the Social Work Centre, evaluators in custody cases, parties in proceedings, and lawyers.
- **Communicate to practitioners that you expect that *complete and timely* information on these factors will be provided to the court**
  - This ensures that risk information is both sought for and provided to the court at each stage of the process and that risk assessment processes are institutionalized.
  - Review report forms and practices of others in the legal system to ensure that the risk assessment is as comprehensive as possible.

- **Expect consistent and coordinated responses to domestic violence**
  - Communities in which practitioners enforce court orders, work in concert to hold alleged perpetrators accountable, and provide support to victims are the most successful in preventing serious injuries and domestic homicides.
- **Do not elicit safety or risk information from victims in open court**
  - Safety concerns can affect the victim's ability to provide accurate information in open court.
  - Soliciting information from victims in a private setting (by someone other than the judge) improves the accuracy of information and also serves as an opportunity to provide information and resources to the victim.
- **Provide victims information on risk assessment factors and the option of consulting with confidential advocates**
  - Information and access to advocates improves victim safety and the quality of victims' risk assessments and, as a result, the court's own risk assessments.
- **Note that this list of risk factors is not comprehensive**
  - The listed factors are the ones *most commonly* present when the risk of serious harm or death exists.
  - Additional factors exist which assist in prediction of re-assault.
  - Victims may face and fear other risks such as homelessness, poverty, criminal charges, loss of children, or family support.
- **Remember that the level and type of risk can change over time**
  - The most dangerous time period is in the days and months after the alleged perpetrator discovers that the victim:
    - might attempt to separate from the alleged perpetrator or terminate the relationship;
    - has disclosed or is attempting to disclose the abuse to others, especially in the legal system.

## VI A JUDICIAL GUIDE: SECURITY ISSUES AT INJUNCTION HEARINGS

Source: Wisconsin Office of State Courts, *A Judicial Guide to Domestic Abuse Issues. Safety issues at injunction hearings*, (Dec 2012).

Because domestic and sexual abuse thrives on silence, petitioners/victims are often abused verbally and physically before and/or after attending injunction hearings, for breaking their silence. Victims of domestic and sexual abuse are usually frightened, intimidated, and threatened when encountering the respondent at an injunction hearing. To minimize violence toward victims, these ideas can help increase petitioner safety and monitor the respondent's behaviour before, during, and after the injunction hearing.

### **Safety before the hearing:**

- Consider a specialized entrance for petitioners that respondents cannot access
- Provide security checkpoints for all parties, including weapons screening
- Consider a security escort for petitioners, to and from the courtroom; if not possible in all cases, provide in the cases of highest threat as identified by petitioners and/or advocates
- Have court security present before hearing to interrupt any contact between petitioners and respondents; remind all parties that contact is a violation of the law
- Parties should be kept separated before hearing, preferably in different locations
- Notify security as to expectations of behaviour and when to make an arrest for violation of a temporary restraining order, and make sure all parties are aware
- Allow petitioners to have someone accompany them for support
- Provide information to petitioners and/or advocates at the time of issuance of temporary restraining orders as to what security measures are possible and how to obtain them

### **Safety during the hearing:**

- Provide seating arrangements that keep petitioners and respondents separated in the courtroom; for example, having court security between parties during the hearing
- Seat petitioners and respondents such that respondents cannot make eye contact with petitioners, to minimize their ability to stare at or intimidate petitioners
- Take control of courtroom behaviour – bring a stop to tactics such as asking irrelevant questions on cross, interrupting petitioners during testimony, accusing petitioners of irrelevant behaviours, begging petitioners to return to respondents or their child(ren), asking if petitioners still love respondents, and revealing petitioners' private information
- Do not allow respondents to ask for petitioners' address or allow petitioners to provide it

- Educate petitioners to look at the judge or court commissioner while testifying
- Impress upon the parties that there are legal penalties for violating temporary restraining orders or injunctions, whether those violations happen within the court or outside of the courtroom.

***Safety after the hearing:***

- Stagger departures, with victim leaving first; and escort victim to vehicle in high-risk cases
- Have respondent, their family, and friends wait at least 15 minutes after hearing
- Monitor respondents; and inform respondents when they can leave

## VII PERSONAL SECURITY GUIDE FOR JUDGES (AND OTHER EMPLOYEES OF JUDICIAL INSTITUTIONS)<sup>40</sup>

This chapter includes advice, i.e. guidelines, for judges, who need a safe environment to administer justice without fear of threats or violence. The purpose of this section is to help you recognize, avoid, and respond to dangerous situations at the court and in the community (which are not exclusively related to adjudication in domestic violence or violence-related cases).

### To avoid problems/danger

#### A. Be careful at the court:

- Do not take your safety for granted. You are responsible for your safety and the safety of others who depend on you.
- Be aware of your surroundings.
- Pay attention to people near you, where they are, and what they are doing.
- Trust your instincts – if you feel that something is wrong, it probably is.
- Be aware of potential problems, especially in the courtroom.

### When a problem is foreseeable

#### A. In the courtroom or at the court:

- Keep in mind whom you should call for help and how, save the telephone number of the support department/person at the court, and if you have a panic button, use it wisely.
- Learn when to evacuate yourself, staff, and others; and make a plan including where to go and how to arrive there safely.
- If someone is yelling at you, keep calm and use a low, non-confrontational tone in response.
- In case you are attacked, use items around you to defend yourself, such as a book, vase, water bottle, coffee cup, etc.
- If you are the target, withdraw to a safe place.
- When the security/court police arrive, get out of their way.

#### B. When the problem occurs anywhere (including at the court):

- Remain calm; if you are not calm, regain your composure as quickly as possible and decide where you can look for help and find safety.
- Breathe; you will not be able to focus, function, or think without breathing.

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<sup>40</sup> Content prepared by Judge (Ret.) Mel Flanagan, Fulbright scholar in BiH for 2016.

- If you are attacked, do not turn your back.
- Run to the nearest safe place if you can.
- Create noise; for example, calling for help.
- Use your physical abilities, such as your voice, fists, elbows, and legs, but also anything nearby, such as keys, a bag, an umbrella, etc.
- Be ready to react in order to survive.

*Note: This list is not exhaustive, and is intended for guidance purposes only.*

## ANNEX 1: INTERNATIONAL LEGAL STANDARDS IN THE FIELD OF DOMESTIC VIOLENCE

Annex 1 includes relevant international legal standards pertaining to obligations of competent national authorities, including judicial institutions, with regard to violence against women and domestic violence. However, the following international legal standards and recommendations, applicable to BiH, do not constitute an exhaustive list of binding international legal instruments for BiH in the field of domestic violence.

### 1. Council of Europe Convention on preventing and combating violence against women and domestic violence (The Istanbul Convention) (CETS 210; 2011)

*BiH ratified the Istanbul Convention on 7 November 2013; the Convention came into force on 1 August 2014 (“Official Gazette of Bosnia and Herzegovina – International Treaties,” no. 19/2013)*

#### ***State obligations and due diligence (Article 5)***

1. Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions, and other actors acting on behalf of the State act in conformity with this obligation.
2. Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish, and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.

***Protection and support (Article 18)***

1. Parties shall take the necessary legislative or other measures to protect all victims from any further acts of violence.
2. Parties shall take the necessary legislative or other measures, in accordance with internal law, to ensure that there are appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of this Convention, including by referring to general and specialist support services [...].
3. Parties shall ensure that **measures taken pursuant to this chapter shall:**
  - be based on a gendered understanding of violence against women and domestic violence and shall focus on the human rights and safety of the victim;
  - be based on an integrated approach which takes into account the relationship between victims, perpetrators, children, and their wider social environment;
  - aim at avoiding secondary victimization;
  - aim at the empowerment and economic independence of women victims of violence;
  - allow, where appropriate, for a range of protection and support services to be located on the same premises;
  - address the specific needs of vulnerable persons, including child victims, and be made available to them.
4. The provision of services shall not depend on the victim's willingness to press charges or testify against any perpetrator.

***Sanctions and measures (Article 45)***

1. Parties shall take the necessary legislative or other measures to ensure that the **offences established in accordance with this Convention are punishable by effective, proportionate, and dissuasive sanctions, taking into account their seriousness.** These sanctions shall include, where appropriate, sentences involving the deprivation of liberty [...].

***Aggravating circumstances (Article 46)***

Parties shall take the necessary legislative or other measures to ensure that the following circumstances, insofar as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sentence in relation to the offences established in accordance with this Convention:

- 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.

***Investigation, court proceedings [...] (Article 49)***

1. Parties shall take the necessary legislative or other measures to ensure that **investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings.**

2. Parties shall take the necessary legislative or other measures, **in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences** established in accordance with this Convention.

***Risk assessment and risk management (Article 51)***

1. Parties shall take the necessary legislative or other measures to ensure that **an assessment of the lethality risk, the seriousness of the situation, and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk** and if necessary to provide co-ordinated safety and support.
2. Parties shall take the necessary legislative or other measures to ensure that the assessment referred to in paragraph 1 duly takes into account, at all stages of the investigation and application of protective measures, **the fact that perpetrators of acts of violence covered by the scope of this Convention possess or have access to firearms.**

***Restraining or protection orders (Article 53)***

1. Parties shall take the necessary legislative or other measures to ensure that appropriate restraining or protection orders are available to victims of all forms of violence covered by the scope of this Convention.
2. Parties shall take the necessary legislative or other measures to ensure that the restraining or protection orders referred to in paragraph 1 are:
  - available for immediate protection and without undue financial or administrative burdens placed on the victim;
  - issued for a specified period or until modified or discharged;
  - where necessary, issued on an *ex parte* basis, which has immediate effect;
  - available irrespective of, or in addition to, other legal proceedings;
  - allowed to be introduced in subsequent legal proceedings.
3. Parties shall take the necessary legislative or other measures to ensure that **breaches of restraining or protection orders issued pursuant to paragraph 1 shall be subject to effective, proportionate, and dissuasive criminal or other legal sanctions.**

***Measures of protection (Article 56)***

1. Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:
  - a. providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation, and repeat victimisation;
  - b. ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively;
  - c. informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case;
  - d. **enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;**
  - e. providing victims with appropriate support services so that their rights and interests are duly presented and taken into account;
  - f. ensuring that measures may be adopted to protect the privacy and the image of the victim;
  - g. **ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible;**
  - h. providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence;
  - i. **enabling victims to testify, according to the rules provided by internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.**
2. **A child victim and child witness** of violence against women and domestic violence shall be afforded, where appropriate, **special protection measures, taking into account the best interests of the child.**

## 2. United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/1979)

BiH ratified CEDAW in 1995; the Convention is part of Annex 1 to the Constitution of Bosnia and Herzegovina.

### A) General Recommendation No. 19, on violence against women, Committee on the Elimination of Discrimination against Women (1992)

The Committee on the Elimination of Discrimination against Women, a body responsible for monitoring the implementation of CEDAW and the binding interpretation of its provisions, adopted Recommendation 19 on violence against women, which includes the following:

6. The Convention in article 1 defines discrimination against women. **The definition of discrimination includes gender-based violence**, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty...

7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of the Convention. These rights and freedoms include:

- a) The right to life;
- b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; [...]
- c) The right to equal protection under the law;
- d) The right to equality in the family;
- e) The right to the highest standard attainable of physical and mental health...

#### ***Specific recommendation:***

(t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:

- (i) **Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family [...]**

## B) Concluding observations, Committee on the Elimination of Discrimination against Women, on the combined fourth and fifth periodic reports of Bosnia and Herzegovina (CEDAW/C/BIH/CO/4-5), 25 July 2013

Concluding observations of the CEDAW Committee for BiH were issued in 2013 during the process of defending the combined fourth and fifth periodic reports of Bosnia and Herzegovina before the Committee, regarding the implementation of the Convention on the Elimination of All Forms of Discrimination against Women. The comments and recommendations of the CEDAW Committee regarding domestic violence that are relevant for judicial authorities in BiH are:

21. [...] The Committee is also concerned about the inconsistent application of the laws regulating domestic violence by the courts of both entities, which undermines women's trust in the judicial system despite the comprehensive legislative framework in place; the underreporting of domestic violence; **the limited number of protective measures issued; and the lenient sentencing policy, including a large percentage of suspended sentences.**

22. **The Committee recommends that the State party:**

(b) Encourage women to report incidents of domestic violence by de-stigmatizing victims and raising awareness about the criminal nature of such acts, and intensify its efforts to ensure that all reported cases of domestic and sexual violence against women and girls are effectively investigated and that **perpetrators are prosecuted and sentenced commensurate with the gravity of the crime; [...]**

(d) Provide **mandatory training for judges, lawyers and law enforcement officers on the uniform application of the existing legal framework, including on the definition of domestic violence and on gender stereotypes.**

## ANNEX 2: DOMESTIC VIOLENCE CASE LAW

Annex 2 presents: 1) an overview of case law in Bosnia and Herzegovina related to criminal cases of domestic violence; 2) an overview of case law and standards of the European Court of Human rights related to domestic violence; and 3) examples of hypothetical domestic violence judgments with reference to aggravating and mitigating factors.

### 1. Domestic Violence Case Law in Bosnia and Herzegovina<sup>41</sup>

*The following material contains excerpts from BiH case law relevant to criminal cases of domestic violence – specifically, examples of court assessments of aggravating and mitigating factors in domestic violence cases; qualification of domestic violence offences, accompanied by factual descriptions of crimes that give rise to the qualification; and court applications of individual general criminal law institutes (concurrency and necessary defence – self-defence).*

*Examples of case law presented in this section are quoted directly from dispositions and explanations of court judgments in Bosnia and Herzegovina in cases of or related to domestic violence, and are followed by comments about the court's treatment of each case.*

#### A) Assessment of mitigating and aggravating factors in domestic violence cases

##### Example 1

*From the explanation of the judgment:*

“[...] **for a long period of time**, the defendant has jeopardized the serenity and bodily integrity of his wife, the injured party P. S., **by verbally and physically attacking her** [...] in the period from 2011 until [...] 2013; [...] in 2013, in the apartment [...] where he lives with the injured party and two minor children, **he hit** the injured party P.S. **on her head multiple times with his fist**, after which he **pushed** her on to the furniture, causing bodily harm [...].”

*Sentencing:*

“In assessing the psychological attitude of the defendant toward the offence committed, the Court [...] found that the defendant committed this offence [...] **with direct intent**. In deciding on the type and gravity of the sentence to be pronounced to the defendant [...] the Court assessed as a **mitigating factor for the defendant** his confession, remorse, decent behaviour before the Court, financial and family standing, the fact that he had not been previously convicted, **while the court found no aggravating factors** [...].”

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<sup>41</sup> Analysis material has been prepared by professor Ivanka Marković (Faculty of Law, University of Banja Luka).

### Comments

1. The court does not assess the established degree of criminal responsibility as an aggravating factor.
2. *Persistence* in the criminal offence manifested in the long-term repetition of violence indicates a higher degree of danger or harm to the protected good. It is not assessed as an aggravating factor.
3. *Exposure* of children to domestic violence and *effects* of violence on children are not taken by the court as aggravating factors in the assessment of all the circumstances under which the crime was committed.
4. The court does not explain what constitutes *decent behaviour by the defendant before the court*. The court should explain in any case what decent behaviour constitutes and should not take decent behaviour as such as a mitigating factor.
5. *Remorse* should not be assessed as a mitigating factor having in mind that this specific case is not a one-off offence; domestic violence has been going on for a period of time.
6. The court fails to explain what constitutes *financial and family standing*, assessed here as a mitigating factor. The defendant has committed a criminal offence against family as a protected good; family standing should not be taken as a mitigating factor.

### Example 2

*From the disposition of the judgment:*

“[...] Since December 2011, the defendant constantly jeopardized the serenity and bodily integrity of his common-law wife, the injured party M. D., by **threatening** the injured party **almost on a daily basis** that he would take their son T. away (born in 2011) and that he would **kill** her; in 2012 [...] he **pushed** her in the bathroom and she fell backward on to the floor, hitting the tiles; in [...] 2013 [...] after a brief quarrel, he **punched** the injured party on her right cheekbone, then **pulled a knife** and **threatened to kill her**; in 2013 [...] after a brief quarrel, he **pushed the injured party against a wall** and started **choking** her, **threatening to kill her** [...].”

*From the explanation of the judgment:*

“For the decision [on the guilt of the defendant], the Court had plenty of evidence available, primarily the confession of the defendant at the main hearing that he did commit the criminal offence, as well as other material evidence presented that objectively proves the truthfulness of the confession and all the charges from the indictment. [...] In deciding on the sentence, the Court assessed all the factors that impact the type and gravity of the sentence, and the Court found that **the mitigating factors** for the defendant are **the personal circumstances, financial standing, circumstances of the crime** as well as **confession** and **remorse** for the committed crime, while an aggravating factor...was **the conviction on suspended sentence** in the defendant’s criminal record.”

### Comments

1. The court fails to assess long-term and continuous violence against the injured party as an aggravating factor.
2. The court fails to take as an aggravating factor the fact that the defendant threatened to kill the injured party a number of times, which indicates a persistence in committing domestic violence and a high risk of death.
3. The court fails to assess as an aggravating factor in the circumstances under which the crime had been committed the fact that the defendant choked the injured party and threatened to kill her; which is a particularly life-threatening way to commit the crime and borders on homicide, i.e. attempted homicide.
4. The court fails to recognize as an aggravating factor the fact that the defendant pulled a knife against the injured party; thus resorting to the use of a weapon/dangerous object suitable to inflict grave bodily injury.
5. The court finds that remorse of the defendant is a mitigating factor although the defendant continuously and for a long period of time kept committing the crime; it is not a one-off offence of domestic violence where remorse of the defendant could constitute sincere remorse.
6. The court fails to explain what constitutes *personal circumstances and financial standing*, assessed here as mitigating factor.

### Example 3

*From the disposition of the judgment:*

“[The defendant] has **for a long period of time, continuously** jeopardized the serenity and bodily integrity of the injured party through **psychological and physical battering** on a number of occasions, and [...] in 2013 in his family house [...] he **hit her on her head with an open palm**, saying ‘you should keep quiet and not say a word,’ after which he forced the injured party to get into his motor vehicle [...] **together with him and their two minor children**, they drove to M. and **while he was driving the above vehicle** in the direction of M. he **repeatedly hit her on the head** [...] and in the hallway of the family house of S. D., while **the injured party was holding their minor daughter M. in her arms, he repeatedly hit her on the head** [...].”

*From the explanation of the judgment:*

“The court assessed the psychological attitude of the defendant toward the crime and concluded that he committed this crime with intentional culpability and, specifically, with **direct intent**. Deciding on the type and gravity of the sentence, [...] assessed as **mitigating factors** that the defendant fully confessed to the crime, **behaved decently and sincerely** before the court, **that he is a family man, a father of two, he behaved decently after he committed the criminal offence**; and the court found his **previous conviction an aggravating factor**.”

### Comment

1. *Inter alia*, the defendant committed the offence in the presence of children. *Although this is a qualifying circumstance of the offence according to the RS CC, the criminal proceedings in this case were lead for the basic form of the domestic violence offence.* The court fails to take the presence of children at the time of the offence as an aggravating factor and does not consider any effects of violence upon the children.
2. The degree of guilt is not taken into account as an aggravating factor.
3. The court takes as a mitigating factor that the defendant is *a family man and a father of two*, although the offence was committed in the presence of his children and against family as a protected good. The circumstance that the defendant is a family man should not be assessed as mitigating in the context of domestic violence crimes.
4. The court does not explain what constitutes *decent behaviour of the defendant before the court*. The court should explain what decent behaviour constitutes and should not take decent behaviour as such as a mitigating factor.
5. The court should clarify whether the defendant in this case has *previously been convicted for domestic violence*, in order to take a separate assessment of this factor.

### Example 4

*From the disposition of the judgment:*

“[b]y violence and reckless behaviour, he **endangered the bodily integrity of a minor person**, member of his family, which was **followed by a grievous bodily harm.**”

*From the explanation of the judgment:*

“Upon deciding on the sentence within the plea agreement [...] assessed as **mitigating factors** for the defendant are the facts that he is a young man, **a family man, the father of a minor child, unemployed, in poor financial standing**, and there has been no other proceeding led against him for a criminal offence. The court found **no aggravating factors, as...he has no previous convictions.**”

### Comments

1. The court fails to assess the fact that two qualifying requirements are met (an offence against a minor and grievous bodily harm), which indicate a higher degree of threat or harm to a protected good and a higher degree of unlawfulness, as an aggravating factor.
2. The court finds it a mitigating factor that the defendant is *a family man* and *a father of a minor child*, although the offence was committed against a minor child and against family as a protected good.
3. The court finds it a mitigating factor in itself that the defendant is *unemployed* and in *poor financial standing*, without any explanation of the link between these personal circumstances and the offence he is accused of. The question is, what is the significance of these facts in relation to the criminal law sentencing?

### Example 5

*From the disposition of the judgment:*

“[The defendant is found guilty] for acts of violence committed on April 24, 2012 [...] in the family house of his father [...] where he lives with his common-law wife M.J. and three minor children, against the injured party and his father I.H. when he came home intoxicated and, after a brief quarrel with his wife, physically attacked her by grabbing her neck with one hand and with the other fist repeatedly hitting her on the head and then all over her body; the other injured party I.H., when he heard children crying, came into the house with the intention of protecting the injured party, but was physically attacked by the defendant who hit him with a closed fist on the head, knocked him down on the couch and grabbed his neck with both hands; they jostled and the injured party I.H. escaped the house and the injured party M.J. called the police, who detained him [...] He committed **two criminal offences of “domestic violence”** from Article 222(2) CC FBiH.”

*From the explanation of the judgment:*

“Once the court indisputably established that the defendant did commit the criminal offences and, in assessing his attitude toward the offences, found that they have been committed **with direct intent** [...] The court found that **mitigating** factors for the defendant are the fact that he has no previous convictions, that he confessed to the crime, that he is **unemployed**, behaved **decently** during the proceedings, is **a family man and father of three**, and the court found **not a single aggravating factor for the defendant.**”

**Comments**

1. The degree of guilt was not taken as an aggravating factor.
2. The court fails to take as an aggravating factor the fact that the defendant committed two domestic violence offences, i.e. violence against several family members, which constitutes a high degree of threat or harm to a protected good and higher degree of unlawfulness.
3. The court does not explain what constitutes *decent behaviour of the defendant before the court*. The court should explain what decent behaviour constitutes and should not take decent behaviour as such as a mitigating factor.
4. The court takes as a mitigating factor that the defendant is *a family man and a father of three*, although the offence was committed against family as a protected good. The circumstance that the defendant is a family man should not be assessed as mitigating in the context of domestic violence crimes.

**Example 6**

*From the disposition of the judgment:*

“In the time after March 13, 2006 [*the day when the Judgment convicting him of the same criminal offence from Article 208(1) of RS CC became final*] until July 13, 2008, he jeopardized the psychological and physical integrity and serenity of his wife, the injured party M.D., both under pending divorce proceedings, by calling her on the phone, insulting her, calling her ‘a whore, a slut’ and by calling her friend K.S. on the phone to insult and threaten her; on July 13, 2008 he appeared under the window of the apartment to which the injured party had moved with a minor daughter, **and threw stones at the window, demanding they open the door, while the minor daughter J. was [alone] inside the apartment**, and...called her mother, who drove there together with her mother and father [...].”

*From the explanation of the judgment:*

“In assessing culpability, the court finds that the defendant committed the crimes **with direct intent**, i.e. that in the time of the criminal offence he was aware of its legal elements and he wanted to commit such an offence, which is clear if we take into account **the judgment that found him guilty for the same criminal offence** for which he is re-tried here, **as well as persistence in the crime, having in mind the time period of continuous violence**.

In deciding on the criminal law sentence [...] the fact that he is **a father of two minor children** is taken as **a mitigating factor**. **An aggravating factor** was the fact that he is **a special recidivist**, i.e. has been convicted previously for the same offence, which means that **the previous suspended sentence did not prevent the defendant from repeatedly committing criminal offences**. **The way in which the crime was committed was also taken as an aggravating factor** [...], taking into account the statements of the injured party...it is clear that **the defendant intensively and continuously committed violence against his, now former, wife**. When you add to this the fact that **the number of his criminal offences of domestic violence is growing**, the

court finds the defendant guilty and sentences him to prison, as the court deems that only such a sentence is adequate here [...].”

### Comments

1. A good example of assessing aggravating factors in a specific case.
2. The court unduly finds a mitigating factor in the fact that the defendant is *a father of two minor children*. In this specific case, a minor child was present when violent behaviour occurred and called her mother to come to the apartment out of fear.

### Example 7

*From the disposition of the judgment:*

“[The defendant is found guilty] for actions taken on March 9, 2012, around 06.30 in the family house he lives in with his mother, the injured party K.Đ., and an eight-year old son F. P., when he jeopardized the serenity and bodily integrity of the injured parties with **violence and reckless behaviour** as he told his mother ‘suck my dick’ for no reason, **grabbed her by her chest and repeatedly kneed her in the head** causing her to fall, and then **threw a small kitchen knife at her, threw his mobile phone at her and hit her belly, and...ejected the injured party and the son F.**, who was present during the violence, from the house [...].”

*From the explanation of the judgment:*

“The court assessed all mitigating and aggravating factors. In determining the sentence for the defendant, the court found that **an aggravating factor** is his **previous conviction for the same** but also other criminal offences, **persistence** in committing the criminal offence, **degree of guilt, growing social danger of his criminal offences**, as they are increasing in number and are thus intensifying the threat to the fundamental social unit – the family. The court **specifically found an aggravating factor in the fact that violence against a family member was committed in the presence of a minor child**. In addition, **the defendant showed no remorse or regret of any kind for the actions he committed, saying that things he is accused of are not true, which indicates a highly uncritical perception of one’s actions; the court found no mitigating factors for the defendant**. Having in mind the above circumstances, the court sentenced the defendant to 6 (six) months in prison. The court deems that such a prison sentence will influence the defendant not to commit offences in the future and will have a positive effect on others in terms of their respect for the legal system and refraining from criminal offences, by which objectives of special and general prevention shall be met.”

### Comment

1. A good example of assessing aggravating factors in a specific case.

## B) Qualification of Offences

### Example 1

*From the disposition of the judgment:*

“On March 17, 2012 [the defendant] [...] around 08.30 am, driving his vehicle, blocked the road to stop the vehicle driven by his wife M.B., from whom he was undergoing a divorce; when his wife approached the passenger door of his car, he opened the window and **took his gun** [...], **pointed it at the injured party saying** “bitch, **I will kill you;**” the injured party moved away from his vehicle, got into her car and drove to the family house in K., where she used to live in marriage, when around 09.30 the defendant met her at the first floor of the house, **grabbed her hair**, dragged her to the living room where he **hit her head and shoulders repeatedly with his hands**, due to which she temporarily lost consciousness, and workers employed in her company found her at the house [...] and took her to General Hospital [...]. By which [...] he committed a criminal offence of “domestic violence” from article 208(1) RS CC.”

#### *Comment*

Wrong qualification of the offence – use of weapons is a qualifying circumstance and serves as grounds for a graver form of the offence.

### Example 2

*From the disposition of the judgment:*

“On Dec 16, 2013 [the defendant] [...] in the living room of the family house [...] intoxicated, first attacked his wife, the injured party S.D., verbally and then pushed her into the bedroom, knocked her on to the bed and hit her multiple times...and kicked her on the head and body, telling her she is a whore, cursing her dead mother, and using other insulting words, while the injured party screamed and called for help, **and all that time the minor sons of the injured party were present in the house, ages four and seven, and watched what was occurring;** [the defendant] was prevented from further physical attack on the injured party by the neighbour M.N., who heard the screams and calls for help, got into the house of the injured party, grabbed the defendant from the back, and pushed him out into the yard. [...] By which he committed a criminal offence of “domestic violence” from Art. 208(1) RS CC.”

### Comments

Wrong qualification of the offence – the commission of an offence in the presence of a person under 18 years of age is a qualifying circumstance and serves as grounds for a graver form of the offence, according to RS CC.

*Note:* the criminal act occurred after the amendments to the RS CC entered into force and therefore provisions of Art 208(3) RS CC should have been applied to this case.

### Example 3

*From the disposition of the judgment:*

“[The defendant is found guilty] for actions taken on March 9, 2012, around 06.30 in the family house he lives in with his mother, the injured party K.Đ. and an eight year old son F.P., when he jeopardized the serenity and bodily integrity of the injured parties with violence and reckless behaviour as he told his mother ‘suck my dick’ for no reason, grabbed her by the chest and kneed her in the head, due to which she fell, and then **threw a small kitchen knife at the injured party**, threw his mobile phone at her and hit her belly, **and...ejected the injured party and the son F.P.**, who was present during the violence, from the house [...] by which he committed a criminal offence of domestic violence from Article 222(2) CC FBiH.”

### Comments

1. Wrong qualification of the offence – it should have been qualified as an offence from Art. 222 (3) CC FBiH (use of dangerous tools or other suitable means to seriously harm a body or impair health).
2. The question is whether the offence could have been qualified also as an offence from Art. 222 (4) CC FBiH because it was committed against a child – the son was thrown out of the house.

### Example 4

*From the disposition of the judgment:*

“In the period from August to December 2012, due to previously disturbed relations of common-law spouses, [the defendant] **sent threats via mobile phone to his common-law wife M.J.**, with whom he previously lived in common-law union, and to her daughter S.M., **saying that he will kill them**; on August 25, 2012 [...] in front of the family house they lived in together [...] **he banged on the door to the house with his feet**, and at one point he took something like **a hammer** from his car **that he used to bang on the door, trying to get in**, breaking the glass on the door, and all the time **expressing threats that he will kill them**; after this incident he **kept sending messages from his mobile phone [...] with threatening and disturbing content** to the mobile phone number of his former common-law wife M.J. [...] and to the mobile phone of her

daughter S.M. [...] with content such as ‘I like it so much when Ž. drunkard whore is scared to answer her phone cause she knows that the gun has been bought and the axe is coming to chop the door into small pieces’; ‘Ok, if you’re not coming, I will come there, but I will not leave this town before I kill you, S., and the policeman’; ‘[...] I ordered everything to be burned in the house and around it, so you know what’s coming’; ‘You are about to see, I am coming to break you, I will kick you until you breathe out your soul, you fucking whore’; [...] and a number of other similar contents [...] by which he committed a crime – **endangering safety from Article 169 (2) in conjunction with paragraph 1** of the Criminal Code of Republika Srpska.”

*From the explanation of the judgment:*

“The District Prosecutor’s Office [...], in the indictment [...] charged P.R. with the criminal offence of domestic violence from Article 208(1) in conjunction with paragraph 6 of the same Article of the RS Criminal Code. At the main hearing, the District Prosecutor changed the indictment in terms of the qualification of the offence and accused the defendant of endangering safety from Article 169(2) in conjunction with paragraph 1 of the Criminal Code of Republika Srpska.”

#### **Comment**

Wrong application of the Criminal Code. The act in this case constitutes psychological and partly physical violence committed by a member of the family or family union against a member of the family or family union, which is the specificity of this criminal offence of “domestic violence” that separates it from other, similar criminal offences and because of which, Art. 208 RS CC should be applied.

#### **Example 5**

*From the disposition of the judgment:*

“On April 2, 2012, once he found out that his minor sister K.M. was avoiding going to school again, revolted by his sister’s behaviour, he took her into the barn at their family farm [...] and, using a wooden stick [...] started beating the minor M. and as she tried to escape him in the barn, to overpower her resistance, he took horse reins and tied both her feet, and continued beating her on her legs, arms, back, and other body parts, until he broke the stick and stopped beating her; she then seized the moment, untied herself, and in fear of the defendant’s behaviour, started running out of the barn, and trying to escape as quickly as possible, jumped over the wooden steps in front of the barn, stumbled, and fell to the ground – the consequence of which was a grievous bodily harm, the fracture of the left humerus [...]. Thus, with violence and reckless behaviour, he endangered the bodily integrity of **a minor person** as a member of his family that **led to a grievous bodily harm**. By that he committed a criminal offence of “domestic violence” **from Article 208(3)** in conjunction with (1) of RS CC.”

**Comment**

Good example of the qualification of domestic violence. A grave form of the offence committed against a minor and causing grievous bodily harm.

**C) Application of concurrence****Example**

*From the disposition of the judgment:*

“On June 27, 2012 after 22.00, in his family house, [the defendant] started insulting his wife U.J., telling her ‘You f-ing whore, I will abuse you every two hours’ and then his wife left the house and he went to bed; after some time when she came back to the house and went to lie down with their son in another room, he got up, locked the door and hid the key, and demanded his wife J. ‘Get in the room!’ which J. refused to do and so he grabbed her hand and pulled her into the other room; J. started crying and begging him to leave her alone, to do her no harm, and he started insulting her again and threatening her, took off all her clothes and looked for any object with which he could cause her harm, and then **started abusing her sexually, making her take different poses so that he could get sexual satisfaction against J.’s will**, lasting until late into the night, i.e. until 03,00 when he went to sleep and J. remained in the room crying because she experienced strong pain in her back, stomach, and head that made her seek medical help the next morning [...] and she was referred to General Hospital [...] where they diagnosed an injury of a hematoma on her back as light bodily harm [...] by which he committed domestic violence [...].”

**Comment**

**In a case of sexual domestic violence in the form of forced sexual intercourse, concurrence of the crime of rape and crime of domestic violence should be applied**, as these are criminal offences against different legal goods. In this specific case, the defendant forced his wife to have sexual intercourse, manifesting his domination, which is one of the characteristics of domestic violence. However, having in mind the fact that by this act he also committed a crime of rape, which is a criminal offence against sexual integrity, the court should have applied concurrence of the criminal offence of domestic violence and criminal offence of rape as these are offences protecting different legal goods and **the application of only the offence of domestic violence cannot encompass the overall criminal scope of this event**. The criminal offence of rape protects the sexual integrity (of a family member), while the criminal offence of domestic violence protects a peaceful and serene life within the family. Sexual violence, manifested in forced sexual intercourse with a family member, is not covered by the incrimination of domestic violence, as the content of the criminal action covered by domestic violence does not include the criminal offence of rape.

## D) Application of the “Necessary Defence (self-defence)”

### Example

*From the disposition of the judgment:*

“[...]are found guilty because] on [...] 2013 [...] after the **suspect S.D.**, under the influence of alcohol...had repeatedly attacked suspect S.F., both verbally and physically, for a long period of time, and following a short verbal quarrel, he physically attacked his wife S.F. and punched her on the head with the right fist and then hit her three times with a piece of wood [...]inflicting light bodily injury – a scratch on the left lower leg, **and at that moment, the suspect S.F. stabbed him in the chest** with a knife [...], inflicting serious bodily injury on the left side of the thorax [...] Therefore, defendant S.F. used violence and violated the bodily integrity of a member of her family, inflicting him serious bodily injury, and the defendant S.D. used violence and with presumptuous behaviour violated the serenity and bodily integrity of a member of his family; thereby, the defendant S.F. perpetrated the criminal offence of domestic violence or family violence defined in Article 208(3) in conjunction with paragraph 1 of the Criminal Code of Republika Srpska, and the defendant S.D. perpetrated the criminal offence of domestic violence or family violence defined in Article 208(1) of CC RS.”

### *Comment*

There is an issue of wrongful application of the Law in this specific case, because the court should have examined the possibility to apply the institution of **necessary defence (self-defence)** or **exceeding the limits of necessary defence**. In this case, as can be seen from the statement of facts, the person who defended herself from an attack was sentenced for a more severe form of domestic violence, while the person who perpetrated violence for a long period of time was sentenced for the basic form of the criminal offence of domestic violence. The statement of facts shows that the existence of necessary defence is possible, which excludes the illegality of the criminal offence of defendant S.F. or excludes the possibility of exceeded limits of necessary defence, which again excludes sanctioning or allows more lenient sanctioning of the defendant S.F., who stabbed the defendant on the chest while he was illegally attacking her. The court should have taken adequate actions in order to examine whether this was the only way for S.F. to defend herself from the simultaneous illegal attack, and if it was, to establish the existence of the necessary defence institution. Furthermore, the court should have examined at least the existence of exceeded limits of the necessary defence, if it believes that the defence was more intense than the attack and that it was not necessary to ward off the attack (which is valued in the context of all circumstances in the specific case).

## 2. Domestic Violence Case Law & Standards of the European Court of Human Rights

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*This section introduces selections from case law of the European Court of Human Rights involving domestic violence cases with established violations of human rights. The following judgments of the European Court of Human Rights are presented in this chapter:<sup>42</sup>*

- A. **Kontrova v Slovakia** (Application No 7510/04); 31 May 2007
- B. **Bevacqua and S. v Bulgaria** (Application No 71127/01); 12 June 2008
- C. **Branko Tomašić and others v Croatia** (Application No 46598/06); 15 January 2009
- D. **Opuz v Turkey** (Application No 33401/02); 09 June 2009
- E. **E.S. and others v Slovakia** (Application No 8227/04); 15 September 2009
- F. **A. v Croatia** (Application No 55164/08); 14 October 2010
- G. **Hajduova v Slovakia** (Application No 2660/03); 13 November 2010
- H. **Kalucza v Hungary** (Application No 57693/10); 24 April 2012
- I. **Valiuliene v Lithuania** (Application No 33234/07); 26 March 2013

### A) **Kontrova v Slovakia**<sup>43</sup>

#### ***The factual background:***

On 2 November 2002 the applicant filed a criminal complaint against her husband. She accused him of having assaulted and beaten her and submitted a medical report to support her allegations. The applicant also stated that there was a long history of physical and psychological abuse by her husband.

Accompanied by her husband, and with the direct advice of a police officer, the applicant sought to withdraw the criminal complaint. On 27 December 2002, the applicant called the Police Department to report that her husband had a shotgun and was threatening to kill himself and the children. The policemen took the applicant to her parents' home. In the following days, the applicant visited the police station twice and enquired about her case and the status of her criminal complaint. On 31 December 2002, the applicant's husband shot their two children and himself dead. Eventually, national courts found that the tragedy was directly caused by the failure of police officers to act efficiently, and disciplinary (not criminal) sanctions were imposed against responsible police officers. All the appellant's attempts before national courts to obtain a fair compensation for non-pecuniary damages were unsuccessful.

<sup>42</sup> © Council of Europe / European Court of Human Rights. Legal summaries of the specified judgments were used to present the judgments. Legal summaries were accessed through HUDOC database, available at: <http://hudoc.echr.coe.int/>.

<sup>43</sup> © ECHR – CEDH. Content summarized from: “Information Note on the Court’s case law No. 97”, May 2007, available at: [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"002-2693\"\]}](http://hudoc.echr.coe.int/eng#{\) (accessed on 5 July 2016).

**Application:**

The applicant stated that the state failed to protect the lives of her two children; and that she was unable to file a claim for non-pecuniary damages.

**Established violation of the European Convention for the Protection of Human Rights:**

The Court found violations of Article 2 (the right to life) and Article 13 (the right to an effective legal remedy).

**Reasoning:**

The Court found that the police failed to comply with national legislation (police procedures) and the obligation to protect life and health. Also, national courts established the accountability of competent police officers for failing to provide this protection, and the Government of Slovakia itself confessed before the European Court of Human Rights that national authorities had failed to take efficient measures to protect the lives of the killed children, thus establishing the violation of the right to life. Also, the Court found that the applicant had to be provided with the option to file a non-pecuniary damage claim due to death of her children, and that this type of legal remedy remained unavailable to the applicant, establishing the violation of the right to an effective legal remedy.

**B) Bevacqua and S. v Bulgaria<sup>44</sup>****The factual background:**

The applicant (Bevacqua) – claiming to be abused on a regular basis by her husband – abandoned her husband and filed for divorce and applied for interim custody of their three-year-old son (S., the second applicant), whom she took with her to her parents' apartment. Following repeated attacks in the presence of her son, the applicant went to a shelter with her son; a police officer allegedly warned her that she may be prosecuted for abduction and she abandoned the shelter. A social protection body granted shared child custody to the parents; according to the applicant, her husband at the time did not respect it, and continued his threats and violence. The court did not treat her custody claims as a priority (repeatedly postponing hearings and requesting new evidence); the applicant was eventually granted custody once the court made a decision on divorce, one year later. After that, the applicant experienced another physical attack by her then ex-husband; she complained to the prosecution authorities, which refused to institute criminal proceedings, noting that it was open to the first applicant to bring private prosecution proceedings, as the alleged injuries fell into the category of light bodily injuries.

**Application:**

The applicants complained that competent authorities of Bulgaria had failed to ensure respect for their private and family life in a difficult situation involving domestic violence suffered at the hands of the husband/father, and that the custody proceedings over S. were excessively long.

<sup>44</sup> © ECHR – CEDH. Content summarized and adapted from: Case of Bevacqua and S v Bulgaria, Application No 71127/01; 12 June 2008, available at: [http://hudoc.echr.coe.int/eng#{"fulltext":\["bevacqua and s v bulgaria"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-86875"\]}](http://hudoc.echr.coe.int/eng#{) (accessed on 6 July 2016).

***Established violation of the European Convention for the Protection of Human Rights:***

The Court found a violation of Article 8 (the right to respect for private and family life).

***Reasoning:***

The Court found that *Article 8 of the Convention also includes positive obligations of the state to protect one's personal and physical integrity in the sphere of the relations of individuals between themselves.* The Court noted, in this respect, that the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection has been emphasized in a number of international instruments and constitutes an established legal standard. Examining the facts of the case, the Court found that national courts did not pay due diligence to the imposition of an interim custody measure (the procedure was not resolved in 8 months), which would have been understandable given that the applicant was exposed to violence, which was supported by medical evidence and witness statements; what is more, the court did not consider possible grave consequences which the excessive length of proceedings may have for the three-year-old child who witnessed violent incidents, which required additional urgency regarding case resolution. Failure of the competent court to adopt a custody measure without delay in a situation that negatively affected the applicant and the wellbeing of the second applicant, and failure to take sufficient measures due to the husband's abusive behaviour during that period, were qualified as a violation of the positive obligation of the state to ensure respect for private and family life, as specified in Article 8 of the Convention. As regards the failure of the prosecutor's office to file an official criminal report for a qualified offence of light bodily injury that the applicant also complained about, the Court found that such practice is within the discretion of the state; although the court clearly emphasized that treating violence as a private issue cannot be viewed as compatible with the obligation of competent authorities to protect the applicant's life.

**C) Branko Tomašić and others v Croatia<sup>45</sup>*****The factual background:***

The applicants are relatives to M.T. and her juvenile child V.T., who were killed by M.M., the child's father. M.T. and M.M. lived together in the home of M.T.'s parents until June 2005, when M.M. moved out of the house after a series of disputes with the members of the household. In January 2006, M.T. lodged a criminal complaint against M.M due to alleged death threats. During a criminal proceeding, psychiatric experts showed that it was probable that M.M. would repeat similar actions in the future and emphasized the need for psychiatric treatment of M.M. On 15 March 2006, M.M. was sentenced to five months in prison due to repeated threats that he would kill himself, M.T., and their child with a bomb, and the court imposed mandatory psychiatric treatment during his prison term and following his release, in accordance with a subsequent assessment. On 26 April, the second-instance court reduced the security measure to the duration of the prison sentence. M.M. served his sentence and was released on 3 July 2006. On 15 August 2006 he shot M.T., V.T., and himself.

<sup>45</sup> © ECHR – CEDH. Content summarized and adapted from: "Information Note on the Court's case law No. 115", January 2009, available at: [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"002-1695\"\]}](http://hudoc.echr.coe.int/eng#{\) (accessed on 5 July 2016).

**Application:**

The applicants complained that Croatia failed to take all sufficient positive measures to protect the lives of M.T and V.T., in accordance with its obligations from Article 2, and that it failed to conduct an efficient investigation regarding the liability of national authorities for their death.

**Established violation of the European Convention for the Protection of Human Rights:**

The Court found a violation of Article 2 (the right to life).

**Reasoning:**

The findings of national courts and conclusions of psychiatric experts showed beyond a doubt that competent national authorities were informed about the seriousness of the death threats made against M.T. and V.T. The Court found several deficiencies in the actions of competent authorities. First, they had failed to order and carry out a search of M.M.'s premises and vehicle in the course of the first set of criminal proceedings, although he repeatedly threatened having a bomb. Second, although psychiatric experts – for the purposes of criminal proceedings – stressed the importance of continued psychiatric treatment of M.M., the state failed to demonstrate that such treatment was properly administered. Namely, the documents submitted show that the treatment of M.M. in prison consisted of conversational sessions with the prison staff, none of whom was a psychiatrist. Concerning the enforcement of a measure of compulsory psychiatric treatment, the court decision did not include any details about the method of enforcement/administering of the psychiatric treatment, whereas the relevant legislation left it completely to the discretion of the prison authorities to decide how to administer the treatment, and they failed to efficiently implement an individual treatment program stipulated by the law. Finally, there was also no assessment of his condition immediately prior to his release from prison with a view to assessing the risk that, once at large, he might carry out his previous threats against the lives of M.T. and V.T. In view of the above, the Court considers that *national authorities failed to take all necessary and reasonable measures to protect the lives of M.T. and V.T.* (threatened by a person who was previously sentenced for death threats).

**D) Opuz v Turkey<sup>46</sup>****The factual background:**

The applicant's mother was shot and killed by the applicant's husband in 2002, while she was helping the applicant move to another city and escape her marriage and home. In the years prior to the incident, the husband subjected the applicant and her mother to a series of violent assaults and some of them resulted in injuries that physicians described in their reports as sufficient to cause a lethal outcome. These incidents included multiple beating, hitting the applicant's mother with a car and seriously injuring her, and stabbing the applicant seven times. Competent authorities were informed about all incidents and of the women's fear for their own lives. Although criminal proceedings were instigated against the applicant's husband for various criminal

<sup>46</sup> © ECHR – CEDH. Content summarized and adapted from: “Information Note on the Court’s case law No. 120”, June 2009, available at: [http://hudoc.echr.coe.int/eng#{"itemid":\["002-1449"\]}](http://hudoc.echr.coe.int/eng#{) (accessed on 5 July 2016).

offences, including death threats, physical assaults, and attempted homicide, they were suspended after the women dropped the charges, allegedly after being exposed to pressure and new threats by the husband. Still, in view of the seriousness of the injuries, proceedings related to the assault with a car and the stabbing continued, and the applicant's husband was sentenced in both cases. For the first offence, the abuser was sentenced to three months in prison, which was later transformed into a fine; and for the second offence, a fine was imposed (around EUR 400), to be paid in instalments. Over the next several years, the applicant and her mother addressed the police and prosecutor's office on several occasions due to the husband's threats and abuse, requesting his arrest and detention. The abuser was arrested and questioned on some occasions, but he was never detained. Violence culminated with a fatal shot at the applicant's mother; the husband stated that he did it for the sake of his honour. He was found guilty of homicide in 2008 and sentenced to life in prison. Nevertheless, he was released while waiting for a decision of the appellate court, and he renewed his threats against the applicant who again requested protection from competent authorities. Seven months later – when the applicant's application was considered by the European Court of Human Rights – the Court requested urgent information about actions taken by Turkish authorities to protect the applicant. The Turkish authorities then took concrete measures of protection, and the police authorities restricted access of the applicant's ex-husband to the applicant.

### ***Application:***

The applicant stated that the competent authorities of Turkey failed to protect the life of her mother, and that they were negligent about the long-standing violence, death threats, and injuries she was exposed to, thus violating their obligations specified in Articles 2 (the right to life), 3 (the prohibition of torture and inhuman or degrading treatment), 6 (the right to a fair trial within a reasonable time), 13 (the right to an effective legal remedy), and 14 (the prohibition of discrimination).

### ***Established violations of the European Convention for the Protection of Human Rights:***

The Court found violations of Article 2 (the right to life), with regard to the murder of the applicant's mother, as national authorities were informed about the history of violence and were repeatedly informed about abusive behaviour of the applicant's husband; Article 3 (the prohibition of torture and inhuman or degrading treatment), due to failure of competent authorities to protect the applicant from the abusive behaviour of her husband/ex-husband; and Article 14 (the prohibition of discrimination) in conjunction with Articles 2 and 3, based on the fact that violence endured by the applicant and her mother was gender-based and therefore constituted a form of discrimination against women, especially in view of the general passivity of the court system in Turkey in cases of violence against women and the impunity enjoyed by perpetrators of violence that mostly affects women as victims.

### ***Reasoning:***

#### *Article 2:*

The Court reiterates that when a state is accused of having violated its positive obligation to protect the right to life in the context of its duty to take preventive operational measures to

protect an individual, it must be established that competent authorities knew or should have known at the time about the existence of actual and direct risk for an individual's life from the criminal acts of another individual and that they failed to take measures within the scope of their powers that could have reasonably prevented the risk.

*Predictability of risk:* There was an escalating violence against the applicant and her mother, with a continuing threat to their health and safety. It was obvious that the perpetrator had a record of domestic violence and there was therefore a significant risk of further violence. The situations were well known to the authorities and the mother had submitted a petition to the Public Prosecutor's Office two weeks before the homicide, stating that her life was in immediate danger and requesting the police to take action. The possibility of a fatal attack was therefore reasonably predictable.

*Did the authorities take adequate measures:* The first question was about validity of the decision of the authorities not to instigate criminal proceedings once the applicant and her mother dropped the charges. Examining the comparative legal practice, the Court concluded that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints. In this case, despite repeated violence and use of lethal weapon, the local authorities repeatedly decided to discontinue the criminal proceedings against the husband. Instead, they seem to have given exclusive weight to the need to refrain from interfering with what they perceived to be a "family matter." Moreover, there is no indication that the authorities considered the motives behind the withdrawal of the complaints by the applicant and her mother, although they had been informed about the death threats. As regards the state's argument that the existing statutory regulation at the time prohibited prosecution in this case, it was incompatible with the state's positive obligations to intervene and provide protection in domestic violence cases. Furthermore, *the Court underlined that in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity.* Finally, the Court found that national courts could have imposed protective measures in the form of a restraining order, or prohibition of contact and harassment, in accordance with the existing Law on Family Protection, which was not done. The Court concludes that the national authorities cannot be considered to have displayed due diligence and they therefore failed in their positive obligation to protect the right to life.

*The effectiveness of the investigation:* The criminal proceedings related to the death of the applicant's mother lasted more than six years, which cannot be described as a prompt response by the authorities in investigating an intentional killing where the perpetrator had already confessed to the crime.

#### *Article 3:*

The Court found that the response of competent authorities to the husband's violence was obviously insufficient, in view of the seriousness of his offences. The judicial decisions in this case had no noticeable preventive or deterrent effect, and they even showed tolerance for violence (the husband was sentenced to a short imprisonment, which was later transferred to a fine, and was also issued a small fine for stabbing a woman as many as seven times). The Court notes with grave concern that the violence suffered by the applicant had not come to an

end and that the authorities had continued to display inaction. Despite the applicant's petition requesting the prosecuting authorities take measures for her protection, nothing was done until after the Court requested the Government provide information about the measures that had been taken by their authorities. The State authorities failed to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband.

*Article 14:*

In accordance with relevant rules and principles of international law that have been accepted by a large number of states, failure of the state, albeit unintentional, to protect women from domestic violence constitutes a violation of their right to equal protection before the law. Reports of international organizations, which were never challenged by the state, show that women are more affected by domestic violence in Turkey, that it is tolerated by the authorities in practice, and that existing legal remedies do not function effectively. Police officers fail to investigate complaints, but often take on the role of mediator between the victim and perpetrator of domestic violence. Delays in the imposition of protective measures are frequent, deterring sanctions are not imposed on perpetrators of domestic violence, and mitigating circumstances (e.g. custom, tradition, honour) prevail in lenient sentencing.

Therefore, domestic violence mostly affects women, while general and discriminating judicial passivity in Turkey created a favourable environment for violence, fostering impunity. Therefore, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the state, the overall unresponsiveness of the judicial system and the impunity enjoyed by perpetrators, as found in this case, indicated that there was insufficient commitment to take appropriate action to address domestic violence.

### **E) E.S. and others v Slovakia<sup>47</sup>**

***The factual background:***

In March 2001, the first applicant left her husband and filed for divorce. In April, the first applicant filed a criminal complaint against her husband on the ground that he had ill-treated both her and the children (the second, third, and fourth applicants) and had sexually abused one of their daughters. In May 2001, she requested an interim measure ordering her husband to move out of the municipal apartment that they held under joint tenancy. The court dismissed the first applicant's request as it considered that it lacked the power to restrict her husband's right to use the property. As a consequence, the applicants had to move away from their home, and two children had to move to a new school. The higher court upheld the first-instance decision noting that an interim measure could have been issued if the first applicant had instead requested that her husband be ordered to "abstain from inappropriate behaviour" and that the court could decide on joint property issues only after a final decision had been delivered in divorce proceedings. Following the decision on divorce and loss of custody, the

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<sup>47</sup> © ECHR – CEDH. Content summarized and adapted from: "Information Note on the Court's case law No. 122", August-September 2009, available at: [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"002-1324\"\]}](http://hudoc.echr.coe.int/eng#{\) (accessed on 5 July 2016).

husband was convicted of domestic violence and sexual abuse in June 2003. He was sentenced to four years' imprisonment. The applicants complained to the Constitutional Court and the Court found that there was no violation of the first applicant's human rights, but that lower-instance courts had failed to take necessary measures to protect the children; it dismissed their request for compensation for non-pecuniary damage. In July 2003, following amendments to the legislation, the first applicant obtained an interim court measure ordering her former husband not enter the common apartment.

### ***Application:***

Relying on Articles 3 and 8 of the Convention, the applicant complained that the authorities failed to adequately protect her and her children from domestic violence.

### ***Established violations of the European Convention for the Protection of Human Rights:***

The Court found violations of Article 3 (the prohibition of inhuman or degrading treatment) and Article 8 (the right to respect for private and family life).

### ***Reasoning:***

The Court already found that the alternate measure (the interim measure ordering her husband to abstain from inappropriate behaviour) proposed by the national courts would not have afforded the applicant adequate protection (because it repeats the general legal obligation of every citizen), and therefore it could not be deemed an efficient legal remedy. The applicant was unable to terminate the tenancy until the decision on divorce became final in May 2002, one year after filing a complaint against her husband. In view of the seriousness of the allegations, the applicants needed urgent and immediate protection, not after one or two years. Therefore, during this period no effective remedy was open to the first applicant by which she could secure protection against the acts of her former husband. As regards the children, the Court did not accept that the establishment of a violation of rights alone – without awarding compensation – was an appropriate satisfaction in view of the damage suffered. Finally, the respondent state failed to discharge the positive obligation to protect the applicants from degrading treatment.

## **F) A. v Croatia<sup>48</sup>**

### ***The factual background:***

Between November 2003 and June 2006, the applicant's husband – who had been suffering from mental disorders (anxiety, PTSD) with a tendency toward violence – repeatedly subjected the applicant to psychological and physical violence, including death threats, punching and kicking her head and body. The violence was often witnessed by their daughter, who was herself also the victim of her father's violence on several occasions. The marriage ended in divorce in 2006. In the period from 2004 to 2009, different and numerous criminal and

<sup>48</sup> © ECHR – CEDH. Content summarized and adapted from: "Information Note on the Court's case law No. 134", October 2010, available at: [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"002-778\"\]}](http://hudoc.echr.coe.int/eng#{\) (accessed on 7 July 2016).

misdemeanour proceedings were instigated against the abusive husband, and several protective measures were imposed. Still, only some of those measures were implemented (e.g. an eight-month prison sentence imposed in October 2006 was never implemented and the convict was never subject to psychiatric treatment; and he never served a prison sentence due to his failure to pay a fine resulting from another court judgment). The applicant's petition from October 2007 requesting the imposition of an additional protective measure prohibiting harassment and stalking – after the abuser had allegedly stalked her, thus violating the previously-imposed restraining order – was dismissed because an immediate risk to life was not proved. Finally, the former husband was arrested and sentenced to prison in October 2009, on charges of making death threats against a judge (and her daughter) who had adjudicated one of the previous criminal domestic violence proceedings against him.

***Application:***

The applicant complained about the failure of the authorities to adequately protect her from domestic violence by her ex-husband, in view of the fact that they had been informed about physical and psychological attacks and death threats.

***Established violations of the European Convention for the Protection of Human Rights:***

The court found a violation of Article 8 (the right to respect for private and family life) of the Convention.

***Reasoning:***

Firstly, in a case like this, which includes a series of violent acts by one person against the same victim, the applicant would have been protected more efficiently had the authorities treated the situation as a single case, instead of resorting to a range of separate procedures. Secondly, although numerous measures were imposed – including temporary detention, a fine, an order for psycho-social treatment, and even a prison sentence – they were never implemented, which prevented the achievement of the deterrent effect on the perpetrator. The compulsory psycho-social treatment was not even imposed as a result of domestic violence proceedings, but in a criminal proceeding unrelated to the domestic violence charge (a later proceeding due to death threats against the judge.) Finally, the national authorities failed to implement measures aimed, on the one hand, at addressing the psychiatric condition that appears to have been at the root of the perpetrator's violent behaviour, and on the other hand, at providing the applicant with protection against further violence; thus leaving the applicant, for a prolonged period, in a position in which they failed to satisfy their positive obligations to ensure her right to respect for her private life. Thereby, the authorities failed to fulfil their positive obligations to protect the applicant from abusive behaviour.

## G) Hajduova v Slovakia<sup>49</sup>

### ***The factual background:***

Criminal proceedings were instigated against A., the applicant's former husband, due to physical and psychological attacks and death threats against the applicant. In the course of the criminal proceedings, experts established that A. suffered from a serious personality disorder. The court ordered compulsory treatment as an inpatient in a psychiatric hospital. However, he was admitted to a local hospital, which did not carry out the treatment A. required, nor did the court order it to carry out such a treatment. After his release from hospital after one week, A. verbally threatened the applicant and her lawyer, who filed criminal complaints against him. When A. visited the applicant's lawyer in her office and threatened her, he was arrested by the police and the prosecutor's office instigated another criminal proceeding. The applicant's subsequent complaint to the Constitutional Court – where she claimed that the court had failed to ensure that her husband be placed in a hospital for the purpose of psychiatric treatment immediately after his conviction and that her rights were violated – was dismissed.

### ***Application:***

The applicant stated that national authorities failed to fulfil their legal obligations to order and ensure that her former husband be placed in a hospital for the purpose of psychiatric treatment immediately after his conviction for domestic violence.

### ***Established violation of the European Convention for the Protection of Human Rights:***

The Court found a violation of Article 8 (the right to respect for private and family life).

### ***Reasoning:***

The Court found that although the former husband's threats did not actually materialize into concrete acts of physical violence, they were enough to affect the applicant's psychological integrity and wellbeing to give rise to an assessment as to compliance by the State with its positive obligations under Article 8 of the Convention. A. was convicted for his abusive behaviour against the applicant, but during his transfer to the hospital, the competent court failed to follow its legal obligation to order the hospital to detain the convict and provide him appropriate psychiatric treatment. Therefore, the inactivity of national authorities enabled the convict/former husband to continue his threats against the applicant and her lawyer. Only when the applicant and her lawyer filed criminal complaints did the police react. Also, the Court concluded that domestic authorities had sufficient indications of potential future violence and threats against the applicant, and accordingly they should have exercised a greater degree of vigilance. In light of the foregoing, the lack of sufficient measures taken by the authorities in reaction to A.'s abusive behaviour, notably the court's failure to order his detention for psychiatric treatment following his conviction, amounted to a breach of the state's positive obligations under Article 8 of the Convention.

<sup>49</sup> © ECHR – CEDH. Content summarized and adapted from: “Press Release: issued by the Registrar of the Court”, no. 913, 30.11.2010, available at: [http://hudoc.echr.coe.int/eng-press#{"fulltext":\["2660/03"\],"item id":\["003-3353850-3754528"\]}](http://hudoc.echr.coe.int/eng-press#{) (accessed on 7 July 2016).

## H) Kaluczka v Hungary<sup>50</sup>

### ***The factual background:***

The applicant shared an apartment with an abusive former partner against her will, while awaiting the resolution of numerous litigations regarding ownership of the apartment. Their relationship ended in 2007, but they continued living together against the applicant's will. Since then, the applicant has filed criminal complaints for rape, assault, and harassment against her former partner. He was acquitted on four occasions, the applicant dropped charges five times, the accused was found guilty of physical attack two times and was imposed fines, and three times the applicant was found guilty of an attack and inappropriate behaviour during court proceedings. During those proceedings, the applicant filed petitions requesting the imposition of restraining orders against her former partner, but the court dismissed them after establishing that both parties were responsible for "their bad relationship." Also, three civil proceedings regarding the apartment and its ownership were conducted and then suspended. In the period from 2005 to 2010, 13 medical reports were registered involving injuries on the applicant's head, face, chest, and neck, where healing/treatment lasted ten days.

### ***Application:***

The applicant complained that national authorities failed to protect her from constant physical and psychological domestic violence, and that they failed to take all sufficient measures in that regard.

### ***Established violation of the European Convention for the Protection of Human Rights:***

The Court found a violation of Article 8 (the right to respect for private and family life).

### ***Reasoning:***

The present application pertains to the sphere of private life, and the Court considers that the State authorities had a positive obligation to protect the applicant from the violent behaviour of her former common-law husband. The Court finds it striking that the authorities needed more than one-and-a-half years to decide on the applicant's first request for a restraining order, although the rationale of such a measure is to provide immediate or at least prompt protection for victims of violence. As to the dismissal of the applicant's requests for a restraining order, the Court takes the view that the domestic courts failed to give sufficient reasons for their decisions, except for mentioning that both parties had participated in the incident (in this regard, the Court found that such actions constituted an example of poor practice, because if this measure could not be imposed in the event of mutual assault, it seriously undermines the possibility to protect the person/victim acting in legitimate self-defence; and that there is also a possibility to issue restraining orders against both parties). In light of the fact that proceedings involving disputes about the apartment have been suspended since 2007 and 2008, the Court finds that the domestic courts failed to comply with their positive obligation to decide the

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<sup>50</sup> © ECHR – CEDH. Content summarized and adapted from: "Press Release: issued by the Registrar of the Court", ECHR 181 (2012), 24. 04. 2012, available at: [http://hudoc.echr.coe.int/eng-press#{"fulltext":\["57693/10"\],"itemid":\["003-3926023-4539531"\]}](http://hudoc.echr.coe.int/eng-press#{) (accessed on 7 July 2016).

cases within a reasonable time. Finally, the Court found that, although the applicant filed criminal complaints because of the attacks, repeatedly filed requests for restraining orders, and instigated civil proceedings to get her partner to move out from the apartment, the Hungarian authorities failed to take sufficient measures to effectively protect the applicant, in accordance with their obligations based on Article 8 of the Convention.

### **I) Valiuliene v Lithuania<sup>51</sup>**

#### ***The factual background:***

In February 2001, the applicant lodged an application with the district court to bring a private prosecution against her partner for beating her on multiple occasions. In January 2002, the court forwarded the applicant's complaint to the public prosecutor, ordering him to start his own pre-trial criminal investigation, and her partner was soon indicted of the infliction of bodily injuries. The procedure was suspended several times because the defendant did not show up at hearings or due to lack of evidence; it was then discontinued and a higher-level prosecutor later reopened it on the grounds that the criminal investigation had not been [sufficiently] thorough. In June 2005, the prosecutor in charge decided to discontinue the pre-trial investigation on the grounds that the law had changed in 2003 and a prosecution in respect of minor bodily harm should have been brought by the victim in a private capacity (while retaining the right of the public prosecutor to initiate prosecution in the public interest). The district court upheld this decision in September 2005, noting that a prosecutor had a right, but not an obligation, to initiate/continue a pre-trial investigation. There was no information in the case file to indicate that the case was of public interest or that the victim could not protect her own rights by means of a private prosecution. After that, the applicant lodged a private criminal complaint, which was dismissed in February 2007 without examination, because the statutory limitation period for prosecution had been exceeded.

#### ***Application:***

The applicant complained that the domestic authorities failed to investigate her allegations about repeated domestic violence, in order to establish her partner's liability, and she also complained about the excessive length of criminal proceedings following her initial complaint.

#### ***Established violation of the European Convention for the Protection of Human Rights:***

The Court found a violation of Article 3 (the prohibition of torture and inhuman or degrading treatment).

#### ***Reasoning:***

The Court found that the applicant filed a criminal complaint against her partner before the competent court as early as February 2001, that she provided a description of incidents, and

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<sup>51</sup> © ECHR – CEDH. Content summarized and adapted from: “Press Release: issued by the Registrar of the Court”, ECHR o89 (2012), 26. 03. 2013, available at: [http://hudoc.echr.coe.int/eng-press#{"fulltext":\["33234/07"\],"item id":\["003-4306515-5150989"\]}](http://hudoc.echr.coe.int/eng-press#{) (accessed on 8 July 2016).

named several witnesses, thus creating grounded suspicion regarding the perpetration of domestic violence. From this moment, the authorities were obliged to act on the complaint. However, they repeatedly suspended the investigation, as the case was transferred to the public prosecutor. The fact that the higher prosecutor abolished the decision to discontinue the investigation – because it was not sufficiently thorough – indicates the existence of omissions on the side of state authorities. Although the national legislation (CPC) was amended in May 2003, the prosecutor decided to return the case to the applicant for private prosecution as much as two years after the legislative reform, i.e. in June 2005. The decision was confirmed by the court despite the applicant's complaint that her former partner would enjoy immunity from criminal liability, because the statutory limitation period for prosecution was about to expire. Also, the court underlined that even after the legal reform it was still possible for public prosecutors to investigate minor bodily injuries if such investigation was in the public interest. As a result of the prosecutor's decision, facts in the case were never established by the competent court. In light of the foregoing, *one of the functions of criminal prosecution, which is an effective protection from violation of physical integrity (and from degrading treatment as well), was not achieved in the applicant's case, which resulted in a violation of Article 3 of the Convention.*

### 3. ample Judgments: Assessing Aggravating and Mitigating Factors in a Domestic Violence Case

*This section includes hypothetical court judgments in domestic violence cases, and focuses on assessing aggravating and mitigating factors. Assessment of these factors in hypothetical judgments is in accordance with the recommendations provided in the Judicial Benchmark: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina. Three sample judgments are provided below. Each includes a description of the hypothetical case scenario involving domestic violence, followed by the valuation of aggravating and mitigating circumstances in the court judgment.*

#### Hypothetical Domestic Violence Case 1

Husband A and Wife A have been married for 23 years. The police were called to their home. Wife A had a slightly red and swollen area on her left cheek bone, and Husband A had scratch marks, some with blood, on his forearms and the top of his hands. Wife A reported that Husband A was mad that she visited a friend in the city and that she was wearing something nice. Wife A reported that, during an argument, Husband A grabbed her around the neck and throat and began to squeeze. To make him stop, she says she tried to claw at his hands and arms. When she did this, she says he slapped her hard across the left side of her face. Wife A claims that her husband has been abusing her for years and that he always dictates where she can go, who she can see, and what she can wear. Wife A has one small scratch on the left side of her neck.

*Additional information in the Case File:*

- Witness statement from adult daughter, who lives with her husband in another city, reporting that her mother, Wife A, is an alcoholic and does not take good care of her dad. She says Wife A drinks and does not do house work or prepare meals and that she sometimes screams at Husband A. The daughter reports to police that she does not think her dad would strangle or choke her mom. The daughter, who was not present during this incident, denies seeing the father be violent or abusive. However, she does admit that the father sometimes forbids the mother to go certain places or wear certain clothes.
- Report from the local Social Work Centre indicating that Wife A has contacted them on two occasions – once by telephone and once in-person – claiming to live with constant psychological abuse and the threat of physical violence.
- Police statement from Husband A in which he denies choking his wife and says that she attacked him, forcing him to slap her in self-defence. He says she is an alcoholic and doesn't do anything in the home. He works and makes the money and still has to do all the shopping because she is often too drunk.

The prosecutor issued an indictment for the offence of domestic violence, which has been confirmed.

**Sample Judgment:**

The Court in... acting upon the Prosecutor’s indictment, confirmed on ... for the purpose of a criminal offence – Domestic violence – from Article ... of the Criminal Code ... held after the main oral hearing and issued a decision on ... and publicly released the following

**J U D G M E N T**

The accused ...

has been found GUILTY

Because ...

By which the accused has committed the crime – Domestic violence – from Article ... for which offence the punishment of ... has been determined.

... IS SENTENCED ...

***Reasoning***

*(exclusively relating to the domain of assessment of aggravating and mitigating circumstances<sup>52</sup>)*

... the Court chose the type and extent of the sentence and punishment meted for the accused for an offence for which he was found guilty, within the limits of statutory penalties, bearing in mind the purpose of criminal law sanctions and taking into account all the circumstances affecting the sentence being lower or higher (mitigating and aggravating circumstances).

The Court found on the part of the accused more aggravating circumstances that reveal the broader context of violent behaviour of the accused toward the injured party.

Firstly, the evidentiary hearing established that domestic violence, among other things, has been committed by the accused by strangling the injured. This was confirmed by expert witness testimony about marks on the neck and left cheekbone of the injured party, as well as the testimony of the injured witness... The fact that strangulation was present as part of the enforcement of the act of domestic violence, according to the Court’s opinion means that there has been an escalation of violent and dominant behaviour on the part of the accused. This was a serious physical assault by the accused, which not only violated the physical integrity of the injured party, but brought about a high risk of injury and the possibility of negative consequences for the victim’s health, including death. A medical fact well known to the Court is that death

<sup>52</sup> The reasoning does not address the evaluation of evidence in full, nor disputed material-legal or procedural-legal issues that make up a standard part of a court ruling (that part is considered as solved). An example of a court judgment or reasoning of the judgment regarding the crime of “domestic violence” only touches upon assessment of potential aggravating and mitigating circumstances, which are identified in the case scenario as such based on information present in the concrete scenario of the case. Any evaluation of evidence is specifically presented in connection to the qualification of certain circumstances as aggravating or mitigating.

can occur even several days after attack, due to blood clots in the brain that occur as a result of the loss of oxygen supply to the brain. The seriousness of this attack is confirmed by the fact that the injured party did not remain passive during the attack by the accused by strangulation, but was acting in self-defence and resorted to scratching the accused on his arms and hands, causing abrasions on the hands of the accused, which was confirmed by the expert medical report on the accused. In accordance with the above, and given that strangulation is one of the deadliest forms of violence, the Court valued the fact of the existence of strangulation as a particularly aggravating circumstance.

The Court approached with special care the evaluation of the testimony of the injured witness (Wife A) and of an adult daughter who lives with her husband in another city, which confirmed that Husband A has a practice of conduct by which he prohibits Wife A visits to specific places, see certain people, or wear certain clothes. These witness statements correspond in all claims, except in terms of the frequency of such behaviour of the accused – with the injured party arguing that the defendant has behaved like this consistently for years, while the daughter claims that he behaves this way only sometimes. Taking into account the fact that the daughter does not live with her parents (the accused and the injured party), and that she does not visit them regularly because of the distance, the Court gave a stronger significance in this regard to the testimony of the injured witness, which was valued as logical, honest, and trustworthy. In such actions of the accused, the Court found evidence of controlling behaviour, considering that the accused has been continuously determining how the injured party behaves and appears in public. By such conduct, the defendant has controlled the behaviour and the outcome of the behaviour of the injured party, with the sole objective of maintaining his own domination over the injured party, who in that way was in a position of subordination in relation to the accused. Also, witness statements reveal that this behaviour comes not in isolated acts, but as a pattern which occurs in continuity. Therefore, it opens the possibility for the Court to derive the conclusion that the case of domestic violence that is the subject of proceedings can be seen as part of a wider pattern of abuse of the accused against the injured. Accordingly, the Court valued control or dominance of the accused over the injured party as an aggravating circumstance.

As regards the above circumstance, the Court approached the assessment of the facts that led to the assault of the accused against the injured. The Court accepted the testimony of the injured witness concerning the verbal discussion that preceded the physical assault by the accused against the injured party as a credible and honest description of the events, which sheds light on the background activity of the accused regarding the criminal activity with which he is being charged. The injured party argued that the accused “was furious because she visited a friend in town and she was wearing something nice.” This statement, when linked to the previously explained pattern of dominant behaviour of the accused, was taken by the Court as an indication of the defendant’s control over the injured party.

Finally, the Court took into account the fact that the injured party on two previous occasions addressed the local Centre for Social Work (CSW) for assistance regarding violence – once by phone and once in person. A CSW report, which was included in the evidence, revealed that the victim had previously claimed to be “experiencing constant psychological abuse and fear of physical violence.” These data suggest that the victim was actively seeking protection from violence by the institutions of the system that are required to provide the same, in this case the

CSW. The Court is familiar with the dynamics of gender-based violence that occurs in the family, and with the fear and stigma faced by victims of domestic violence while seeking help from the institutions that are required to provide them protection from violence. On this occasion, the Court finds that the CSW failed to take further intervention and notify the police and prosecutors about the injured party following two calls by the injured party – which is the legal obligation of the CSW – which is a subject of particular concern to the Court with regard to the actions undertaken by responsible local institutions in preventing domestic violence and fulfilling their legal obligations. Regardless, the Court viewed the injured party's calls to CSW as an indication of the existence of continuity in committing domestic violence by the accused against the injured party, and valued it as an aggravating circumstance.

The Court did not find mitigating circumstances on the side of the accused (Husband A). The Court finds that throughout the criminal proceedings the defendant behaved in an exemplary manner before the court and with respect to the parties concerned and aggrieved. Even so, the court did not regard the defendant's "exemplary" or "proper" behaviour as a mitigating factor when deciding on the extent of criminal sanction, given that this kind of behaviour is expected of all defendants and other persons who appear before the court during the course of criminal proceedings; or that it is a general standard expected of the parties relating to the court, and not evidence of good character on the part of the accused.

Also, the Court is required to clarify the treatment of the fact that the accused is the only provider of income in the family (i.e. that the accused is the so-called primary breadwinner). The defence has repeatedly emphasized during the proceedings that the accused, being the only employee, is responsible for the livelihood of the family consisting of the accused and the injured, and that the Court should take that into account when making its decision. The defence argued that a prison sentence or a fine to the accused will also produce a negative effect on the wellbeing of the injured, since Husband A is economically supporting Wife A. The argument of the defence that is based on the hypothesis that the (economic) benefit of Wife A will be threatened by punishment of the accused is of little use to the Court since it touches upon an assumed future situation that has not happened. Also, this kind of stance of the defence ignores the fact that the accused is in a specific type of superiority over the injured, since the injured party is economically dependent on him. To that end, an argument could be derived that the breadwinner role played by the accused in the family can be a stimulating influence on him to continue with the commission of domestic violence – which would also erode the benefit to the injured party. Finally, according to the law, the Court must take into account the economic status of the accused only when determining fines – which is not an imposed sanction of the Court in this case. In connection with the above, the fact that the accused is responsible for the family's livelihood was not assessed by the Court as a mitigating circumstance.

In conclusion, the Court found that the aggravating circumstances – in accordance with the foregoing – prevail in this case, and that the exposed aggravating circumstances are the reason why the Court found for the defendant a sentence...

### **Hypothetical Domestic Violence Case 2**

Husband B and Wife B have been married for 10 years. They have two small children together, ages 5 and 7. On 15 October, the police were called to the home by the neighbour after the

seven-year-old was seen outside without a coat and shoes, crying. When the police arrived, Husband B was very calm and Wife B was shouting and crying. Both children were in the room with them, also crying. There were no visible injuries on either Husband B or Wife B, but Wife B claims that Husband B grabbed her by the upper arms and shook her after she disagreed with him about a financial matter. Husband B reports that he may have gently grabbed his wife by her upper arms, but says he did not shake her.

*Additional information in the Case File:*

- Police ask both Husband B and Wife B whether the children were present during their fight; they both say that the children were in the house, but in the other room. Neither parent is aware that the seven-year-old was outside with no coat or shoes, crying, during their fight.
- Police speak with the seven-year-old child, who tells them that sometimes ‘Daddy cleans his gun when he is angry and that scares mommy.’
- Police note that Husband B is a rising political figure in the community and he is generally held in high esteem.
- A witness statement from the neighbour, an elderly widower, indicates that she has heard shouting from the house at least once a month. She says Husband B is very polite and very nice, and Wife B is always at home and does not leave very often. She does not see visitors to the home except the family of Husband B.

The prosecutor issued an indictment for the offence of domestic violence, which has been confirmed...

***Sample Judgment:***

The Court in... acting upon the Prosecutor’s indictment, confirmed on ... for the purpose of a criminal offence – Domestic violence – from Article ... of the Criminal Code ... held after the main oral hearing and issued a decision on ... and publicly released the following

**J U D G M E N T**

The accused ...

has been found GUILTY

Because ...

By which the accused has committed the crime – Domestic violence – from Article ... for which offence the punishment of... has been determined.

... IS SENTENCED ...

## *Reasoning*

*(exclusively relating to the domain of assessment of aggravating and mitigating circumstances<sup>53</sup>)*

... the Court chose the type and extent of the sentence and punishment meted for the accused for an offence for which he was found guilty, within the limits of statutory penalties, bearing in mind the purpose of criminal law sanctions and taking into account all the circumstances affecting the sentence being lower or higher (mitigating and aggravating circumstances).

The Court valued the lack of previous criminal record of the accused as a mitigating circumstance. The Court finds that throughout the criminal proceedings the defendant behaved in an exemplary manner before the court and with respect to the parties concerned and aggrieved. Even so, the court did not regard the defendant's "exemplary" or "proper" behaviour as a mitigating factor when deciding on the extent of criminal sanction, given that this kind of behaviour is expected of all defendants and other persons who appear before the court during the course of criminal proceedings; or that it is a general standard expected of the parties relating to the court, and not evidence of good character on the part of the accused, as the defence repeatedly argued.

In addition, the Court feels obliged to clarify the treatment of the following circumstances, considering that the defence emphasized that the same should be considered by the Court during the trial. The defence noted that the accused is a politician whose political career is on the rise and that he is "particularly respected in his community." The defence argued that by way of his political service, and the respect afforded to him by the public, he deserved special consideration by the Court for good behaviour. The Court did not appreciate the stated circumstance as a mitigating factor because those performing public duties or who enjoy respect from the community as a result of their public position are not entitled to special treatment by the Court. In fact, all individuals are equal before the law; including individuals who have otherwise provided public service to their community. Indeed, the Court did not find the political career and service of the accused, nor his appreciation by the community, as evidence of a broader 'positive character' of the accused, as the defence presented it in order to describe the defendant's character. As such, the Court could not give preponderance, i.e. greater importance, to the assertion that the accused is well respected in the community over the behaviour he exhibited in his private life; most notably, the acts of violence and abuse he committed within the family.

With regard to aggravating circumstances, the Court found that during the evidentiary proceedings the existence of actions that show a pattern of violence and abuse by the accused (Husband B) toward the victim (Wife B) was established. In addition to acts of violence, which constitute the body of the crime of domestic violence, the Court found evidence of isolating the victim from family and friends based on statements of the witnesses – the neighbour and the

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<sup>53</sup> The reasoning does not address the evaluation of evidence in full, nor disputed material-legal or procedural-legal issues that make up a standard part of a court ruling. An example of a court judgment or reasoning of the judgment regarding the crime of "domestic violence" only touches upon assessment of potential aggravating and mitigating circumstances, which are identified in the case scenario as such (information present in the concrete scenario of the domestic violence case).

victim – which the Court rated as truthful, clear, logical, and mutually non-contradictory. These witness statements indicate that the victim (the wife of the accused) neither leaves the home on her own nor receives guests other than the family of the accused. The defendant's effort to isolate the victim serve to decrease her access to outside support and thereby increase her dependency and subordination to the accused. Thus, the Court identified the presence of efforts to isolate the victim to be an aggravating circumstance.

In addition, the Court valued as truthful the statement of the seven-year-old child, given to the police, which was confirmed by the testimony of the officer and the victim. The police noted that the seven-year-old, without prompting, told the police that “in moments of anger” the accused cleans his gun and scares the victim. The Court finds this statement to be evidence of threats of violence and ongoing abuse toward the victim. Further, the Court finds that threats with weapons, including showing or cleaning a handgun, is evidence of the defendant's effort to create a sense of constant jeopardy and fear in the victim and thus establish power and control over the victim. Moreover, the Court specifically took into account the findings of international research that identifies even the threat of use of guns in the context of domestic violence is a factor in determining the risk of a lethal outcome. Therefore, the Court has an obligation to take this factor into account and thus found the defendant's behaviour, of cleaning a weapon in the presence of the victim and the children during a state of anger, to be an aggravating circumstance.

Finally, the Court specifically valued as an aggravating circumstance the undisputed fact that domestic violence has been committed in the presence of two child witnesses, who may not have directly witnessed the abuse, but clearly heard the violence and subsequently saw the consequences of the violence. The Court cannot ignore medical science that has proven that children's exposure to domestic violence has negative effects on their mental development and outcomes related to their educational and social functioning. The Court finds evidence of a child witness to domestic violence based on statements from the police who found a seven-year-old child outside, crying, without shoes or a coat, during the episode of violence and abuse. In connection with this aggravating circumstance, the Court specifically finds that children who witness domestic violence enjoy special protection by the legal system in Bosnia and Herzegovina; [*for example the Law on Protection from Domestic Violence of Republika Srpska states that children are considered to be direct victims of domestic violence even if they only witnessed domestic violence*].

In conclusion, the Court found that the aggravating circumstances – in accordance with the foregoing – prevail in this case, and that the exposed aggravating circumstances are the reason why the Court determined for the defendant a sentence...

### **Hypothetical Domestic Violence Case 3**

Son D lives with his Father D and Mother D. Son D is 47-years-old and has been diagnosed with Post Traumatic Stress Syndrome from the war. He has a slight disability and walks with a limp. He does not work but receives a small amount of money due to his disability. Father D and Mother D are in their late 70s. Father D is retired. Mother D has a heart condition and is generally in poor health.

Son D was recently arrested by the police after returning to his parents' home drunk, shouting at them, knocking his mother onto the floor and breaking dishes. The police observed signs of a fight in the home and noted that Mother D could not walk as a result of injury from the fall. They offered medical attention to her but she declined. Father D and Mother D were both very concerned about Son D being arrested – and pleaded for police not to take him. Son D claims he does not remember anything.

*Additional information in the Case File:*

- Police note that neither Father D nor Mother D wants Son D prosecuted for domestic violence. They are asking for treatment for his mental illness and alcohol addiction. Father D admits that Son D goes drinking regularly and will often come home in a state of anger and distress.
- Father D individually told the police that he is worried Son D will really hurt Mother D at some point – and that she is inclined to protect him at all costs.
- Father D and Mother D admit that they have no family or friends who can help. They are alone in BiH and have limited resources. All their family has moved to other nearby countries.

The prosecutor issued an indictment for the offence of domestic violence, which has been confirmed...

**Sample Judgment:**

The Court in... acting upon the Prosecutor's indictment, confirmed on ... for the purpose of a criminal offence – Domestic violence – from Article ... of the Criminal Code ... held after the main oral hearing and issued a decision on ... and publicly released the following

**J U D G M E N T**

The accused ...

has been found GUILTY

Because ...

By which the accused has committed the crime – Domestic violence – from Article ... for which offence the punishment of... has been determined.

... IS SENTENCED ...

## *Reasoning*

*(exclusively relating to the domain of assessment of aggravating and mitigating circumstances<sup>54</sup>)*

... the Court chose the type and extent of the sentence and punishment meted for the accused for an offence for which he was found guilty, within the limits of statutory penalties, bearing in mind the purpose of criminal law sanctions and taking into account all the circumstances affecting the sentence being lower or higher (mitigating and aggravating circumstances).

The Court valued the lack of previous criminal record of the accused as a mitigating circumstance.

On the other hand, the Court found aggravating factors that were taken into account when deciding on the choice of the type and severity of the sentence. The Court considered the fact that the injured party (Mother D) falls under the category of particularly vulnerable victims of violence, given that she is an elderly person in her late seventies and has a heart condition that leaves her in generally poor health. Also, it was found that the injured party cannot walk as a result of acts of domestic violence by the accused. In addition, Mother D and Father D have a limited income, and in their statements say that they do not have family or friends who can provide assistance. Finally, as being specifically indicative, the Court valued the statement of father D attached to the police report – which was entered into evidence – saying that Father D fears further violence by the accused toward the injured party, and believes Mother D is trying to protect the accused at all costs. Because of all this, the Court is of the opinion that the injured party is in a difficult position to seek protection from the violence to which she is exposed, and that the accused took advantage of this situation to exert violence, and that it is reasonable to regard the injured as a particularly vulnerable person. Accordingly, the Court appreciated the vulnerability of the injured party as an aggravating circumstance.

In addition, the Court took into account the fact that the accused was drunk at the time of the domestic violence perpetration (confirmed by the police report), which was self-induced. This was subsequently confirmed by expert examination of the accused party's state, which showed that the accused intentionally brought himself into a state of alcohol intoxication, thus removing any inhibitions of the accused in perpetrating the domestic violence; and that it was not due to the loss of control of the accused during the commission of violence as was represented by the defence counsel, but about a self-induced mental incapacity of the accused. The testimony of the accused that he did not remember the perpetration of violence was considered by the Court in conjunction with the established self-induced mental incapacity of the accused, as a consequence of his alcohol intoxication. Further, the testimony of a witness – Father D – shows that the accused regularly drinks, and that he returns home in “a state of anger and anxiety.” The Court had no reason to question the credibility of this statement. Also, expert testimony revealed that the accused did not behave violently in public places or in other circumstances outside of his home – which led to the conclusion that the accused is able to

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<sup>54</sup> The reasoning does not address the evaluation of evidence in full, nor disputed material-legal or procedural-legal issues that make up a standard part of a court ruling (that part is considered as solved). An example of a court judgment or reasoning of the judgment regarding the crime of “domestic violence” only touches upon assessment of potential aggravating and mitigating circumstances, which are identified in the case scenario as such based on information present in the concrete scenario of the case. Any evaluation of evidence is specifically presented in connection to the qualification of certain circumstances as aggravating or mitigating.

control his aggression on other occasions, i.e. outside the family home, taking into account his diagnosed post-traumatic stress disorder. The Court accepted such expert opinion. In accordance with the foregoing, the Court valued the defendant's commission of domestic violence under the influence of alcohol as an aggravating circumstance.

Finally, it is of importance for the integrity of the reasoning part of the Judgment, for the Court in this section to shed light on the treatment of the statements of Mother D (the injured party) and Father D given during the proceedings, in which they ask the Court not to punish the defendant, which was repeated during the presentation of closing arguments at the trial by the defence counsel as particularly important in terms of the Court making a fair decision. The Court approached with particular care the assessment of the testimony of Mother D and Father D, as the defendant's parents who live in the same household with him. The Court notes that the evidence (the police report) shows that the parents of the accused expressed the same kind of pleas to the police, asking the police not to arrest the accused in response to the report of violence. To that end, the Court believes that such requests represent candid statements of will from Mother D and Father D, and that the Court was not presented with any evidence indicating that Father D and Mother D were forced to act in this way. Despite this, the Court is obliged to note that it is a matter of general principle that the penalty for the offence is determined in accordance with the gravity of the offence and the general rules on sentencing, without considering the desire and/or attitudes of injured persons and relatives of the accused. On the other hand, it would not be justified for the injured party to feel responsible for the imposed [... *criminal sanction/measure*...] in the event that the Court was guided by the attitudes of the injured party when making the decision. The Court recalls that the burden of law enforcement, determining criminal liability, and accordingly sanctioning those responsible is the responsibility of the institutions, rather than individuals who are affected by criminal offences. Accordingly, the Court did not take into account the views of the injured party and Father D regarding impunity of the accused when deciding on the type and extent of the sentence.

In conclusion, the Court found that the aggravating circumstances – in accordance with the foregoing – prevail in this case, and that the exposed aggravating circumstances are the reason why the Court determined for the defendant a sentence...